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INSIDE

Vacation, travel & bad days
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The Alaska BAR RAG

SEPTEMBER-OCTOBER, 1992 — *Dignitas, semper dignitas* — VOLUME 16, NO. 5

Alaskans achieve national recognition

The comforts of First Class

"For this I used my upgrade?"

Willard elected to ABA Board

Donna Morris Willard, a lawyer in sole practice in Anchorage, Alaska, became a member of the American Bar Association Board of Governors Aug. 12.

Willard represents the Thirteenth District on the 33-member board. The district is composed of the states of Alaska, Washington, Montana and Oregon. The board meets periodically during the year to oversee management and administration of the 370,000-member ABA, among the largest voluntary professional associations in the world.

Willard has been active in the ABA since 1971, when she joined the Young Lawyers Division. She has been a member of the House of Delegates, the policy-making body of the ABA, since 1986, and previously in 1980-84. She heads the Alaska delegation to the House and has chaired and served on House committees.

Since 1991, Willard has served on the Alaska Supreme Court Special

Continued on page 3

Greenstein re-elected

Marla N. Greenstein, executive director of the Alaska Commission on Judicial Conduct, was re-elected to the American Judicature Society's Board of Directors at the Society's Annual Meeting in San Francisco in August.

Greenstein received her law degree from Loyola University of Chicago. She is the past senior staff attorney of the Alaska Judicial Council and a past senior staff attorney for the American Judicature Society. She has also formerly been a member of the Alaska Supreme Court Mediation Task Force and a past member of the Board of Anchorage Conflict Resolution Center.

Founded in 1913, the American Judicature Society is a national organization working to improve the nation's justice system. Its mission includes enhancing judicial selection methods, promoting the highest standards of judicial conduct and ethics while protecting the independence of the judiciary, improving judicial administration, and increasing the public's understanding and appreciation of the role of courts in society.

ALSC wins two awards

The national Legal Services Corporation has recognized the tremendous work being done in Alaska to deliver free legal assistanceto our rural and remote locations.

The Alaska Pro Bono Program, a joint state volunteer legal assistance project sponsored by the Alaska Bar Association and Alaska Legal Services Corporation, has been awarded the 1992 PAI/Pro Bono Award for Rural Programs.

This first annual award is being presented by the Legal Services Corporation to the Alaska Pro Bono Program in recognition of its work in delivering free legal assistance to low-income Alaskans.

Over 960 volunteer attorneys (60 percent of the available membership of Alaska's Bar Association) along with 250 volunteer non-attorney professionals including doctors and court reporters, donate thousands of hours of their time and provide assistance to more than 1,200 eligible people each year.

In addition to projects for the elderly, numerous advice-only and do-it-yourself clinics, Pro Bono Program volunteers routinely accept cases ranging from deathbed wills to the most difficult contested family law matters. It is not uncommon for a volunteer attorney located in Anchorage to agree to assist a person, for whom English is second

Continued on page 3

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President's Column

By Barbara J. Blasco

As we are reminded nearly every day, most Americans have such a jaded view of the legal profession that all one needs to do is but mention that he or she is a lawyer in order to find themselves the subject of immediate lawyer-bashing.

Lawyer Jokes are usually reasonably amusing (although they are becoming increasingly predictable) and, like most people, I chuckle and often tell a few, myself. I enjoy the humor and I personally believe that laughing at yourself is a very healthy exercise.

But more importantly, I appreciate the perspective this experience gives me: It provides important insight into the public's view of the legal profession and helps us come to grips with both the need to improve the delivery of legal services and steps by which this can be accomplished.

One recurring theme in lawyer-bashing is distrust of the way in which lawyers police themselves and a sense that lawyer discipline systems are calculated to protect lawyers at the expense of clients and the public. The organized bar is keenly aware of this aspect of the profession's image problem and the need to improve that image if our credibility is to be maintained.

In 1989, the American Bar Association established the Commission on Evaluation of Disciplinary Enforcement for the purpose of *studying professional disciplinary* systems and formulating recommendations for their improvement.

In its report issued in May 1991, the Commission found that the "public views lawyer discipline as too slow, too soft, and too self-regulated." And, although it reported that most states discipline serious misconduct effectively, that was not enough: The profession and the judiciary were challenged to face the problems identified and make the necessary reforms.

I am pleased to report that the Alaska Bar Association has made significant progress in evaluating its disciplinary system and instituting changes to better serve clients and lawyers and enhance the image of the profession in Alaska,

In March 1990, the Board of Governors, faced with an open caseload of 168 grievances and the resulting complaints of undue delay from clients and lawyers alike, worked with bar counsel to make needed changes to improve the efficiency of the process, including the so-called "10 day intake letter" and the "six month" policy,

The "10 day intake letter" works this way: When it has been determined that a grievance meets minimum requirements, bar counsel sends a letter to the lawyer named in the grievance, along with a copy of the grievance. The letter advises the lawyer that the grievance has been filed and that the lawyer has 10 days in which to voluntarily submit written information to assist bar counsel in determining whether the grievance should be accepted for investigation. Upon expiration of this period, the file is reviewed and a decision is made as to whether sufficient allegations are present to open an investigation. Meritless complaints are thus promptly eliminated at the intake stage.

When a grievance is accepted for investigation, the lawyer is notified by letter that he or she must respond to the allegations within 20 days of the date of service of the bar's letter. The lawyer is also advised of the "six month" policy under which bar counsel must make a determination on whether to dismiss a grievance or seek discipline within six months of the filing of the grievance. Investigations must be undertaken and a decision on action must be made within a reasonable period.

The "10 day intake letter" and the "six month" policy are serving their purpose: Pending grievances have been brought down to a ten year low of 100.

In addition to these steps, in August 1992, the Board of Governors recommended to the Alaska Supreme Court the adoption of comprehensive amendments to the existing confidentiality requirements in the discipline process.

The Board's work on this project began in June 1991 and was finalized in June 1992 following study of the ABA Commission's recommendations for increasing public confidence in the disciplinary process, development or proposed rule changes by the Statute, Bylaws and Rules Committee, publication of the proposed amendments in the Bar Rag, and comment by the bar membership. The ABA Commission concluded that

> "secrecy in discipline proceedings continues to be the greatest single source of public distrust of lawyer disciplinary systems. Because it engenders such distrust, secrecy does great harm to the reputation of the profession. The public's expectation of government and especially of judicial proceedings is that they will be open to the public, on the public record, and that the public and media will be able to freely comment on the proceedings. The public does not accept the profession's claims that lawyers' reputations are so fragile that they must be shielded from false complaints by special secret proceedings. The irony that lawyers are protected by secret proceedings while earning their livelihoods in an open system of justice is not lost on the public. On the contrary it is a source of great antipathy toward the profession."

The proposed changes to the Alaska Bar Rules would provide for public access to disciplinary matters (with the exception of work product or matters covered by a protective order) at the point when bar counsel decides to open a disciplinary investigation after intake review (the 10 day intake letter process). Under the current rules, disciplinary proceedings are not open to public review until a petition for formal hearing is filed. The proposed amendments would apply prospectively to grievances filed after the effective date of the rule changes.

Under the proposal, complaints eliminated at the intake stage would remain confidential. This will protect the interests of the innocent lawyer in being victimized by a groundless complaint. On the other hand, grievances which contain sufficient allegations to warrant investigation would be open for public review, thereby increasing public confidence in the process. As stated by the ABA Commission, "[a]n open disciplinary system demonstrates its fairness to the public. Secret records and secret proceedings create public suspicion regardless of how fair the system actually is."

Another significant rule change in the Board's proposal is the elimination of the "gag rule" which prevents complainants and persons contacted during a disciplinary investigation from communicating publicly about a grievance.

While "gag rules" may protect lawyers from false charges, they also have been the subject of criticism in that with delay and secrecy in disciplinary proceedings, a lawyer who is under investigation can continue to practice for long periods with no means by which people can find out whether the lawyer is even under investigation. The concern is the perception that bar associations are so protective of the privacy of their members that they have lost sight of the legitimate need of the public to be informed.

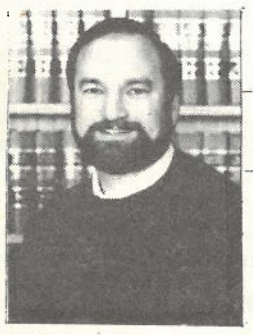
The Board's proposal balances the public's need to be informed with the lawyers' privacy interests. In place of the "gag rule" would be a mechanism for obtaining a protective order from an Area Hearing Division or a Hearing Committee when necessary to protect attorney-client confidences or to protect against an unwarranted invasion of privacy. The goal, once again, is to reduce the resentment and suspicion inherent in a secret process, and promote confidence and respect in the legal profession.

The Board of Governors is proud of the improvements that have been made in the disciplinary process over the past two and a half years, and is excited about these proposed rule changes that we believe would further increase public confidence in the disciplinary system in Alaska. While we will certainly not put an end to lawyer-bashing (it is way too much fun), we can take steps to make changes which, like these, respond to justified criticisms and will begin to improve the public's perception of the legal profession. And perhaps one of these days lawyer jokes will just go out of style .

•

On another subject, CONGRATULATIONS are in order for the Alaska Pro Bono Program and

Continued on page 3



Editor's Column

By Ralph Beistline

Life is full of amazing peculiarities. Seldom does a day pass that I don't notice something unusual or out of the ordinary. Today it's my luck on airplanes.

No matter where I sit in an airplane — coach, first class, or baggage — the person in front of me always lays the seat back in my lap. I mean as far back as it will go. I have studied the back of enough heads on airplanes to be qualified as an expert witness in craniology. In fact, that's the reason I quit reading newspapers on planes. Every time I would open a full-size newspaper, the seat in front of me would come crashing back, crushing the paper before me. The consistency of this occurrence was almost eerie. That's another one of *The Bar Rag's* many virtues — it can be read in cramped quarters.

Unfortunately, giving up newspapers did not lift the curse. Today, as I write this article, I am in an airplane. There are 12 seats in the first class section (I used an upgrade). There are 7 passengers. Eleven of the seats are upright. I am seated in 4F. I am not reading a newspaper. Can you guess what seat is laying nearly horizontal? (*See* page 1, Bud Root cartoon, for answer.)

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).

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The *Alaska Bar Rag* is published in January, March, May, July, September, and November. Copyright 1992. All rights reserved.

Letters

Volunteers wanted

I am interested in meeting lawyers who have an interest in law and public health.

Last week we had the second meeting of the Cancer Coalition, a group brought together by Health and Social Services to come up with a plan for directing resources to reduce mortality and morbidity due to cancer. There were several issues that came up regarding public health policy, the law, and how we could most effectively get existing laws enforced. There is wide representation of skills and interests on this coalition, but no lawyers.

I am not asking for lawyers to sit on the Cancer Coalition because the legal concerns for that committee are only a small part of their plan. However, there are many other areas where law and public health interface, for example, HIV and AIDS reporting, civil commitments for alcoholism or dementia, HIV education in penal systems.

There are undoubtedly many areas where cooperation could produce better public health policy. Are there any lawyers out there who are interested in sitting down with myself, Dr. John Middaugh, and other public health professionals to talk about law and public health? If anyone is interested, please call Dr. Mary Ellen Gordian at DHHS 343-6718.

Mary Ellen Gordian MD MPH
Medical Officer
Municipality of Anchorage

IOLTA comment

Thank you for your letter, luncheon invitation and report on the IOLTA program. We have been a participant in this program from the beginning.

As you may recall, however, I am not a fan of how the Alaska Bar Foundation spends the money generated from our IOLTA accounts. I believe a significant portion of it should be contributed to Alaska Legal Services, which is in crisis at this point. The money that the Bar Foundation spends largely serves urban Alaska which is in less need, in my opinion, than the outlying areas. ALSC has in the past directly served those clients living in the villages who are under-represented and have access to far less services than those living in urban areas. As ALSC's ability to reach those clients is further reduced, I believe that the Bar Foundation should increase its efforts in their behalf. I don't think the programs you are currently funding do much in this regard. I hope that you will consider this view in future years.

Fred Torrisi
Attorney

Oversight Department

In the July-August edition of the Bar Rag, the 1992 convention photos were taken by Steve Van Goor.

**

In the same issue, the thought-provoking article on the evolving habits of Southeastern's bears was written by Dan Branch (who also reports more bear observations in this issue).

• President's

Continued from page 2

Juneau lawyer Jamie Fisher. The Legal Services Corporation has awarded the Alaska Pro Bono Program the 1992 PAI/Pro Bono Award for Rural Programs in recognition of its work in delivering free legal assistance to low-income Alaskans.

Jamie Fisher has been awarded the 1992 PAI/Pro Bono Rural Attorney Award for the hundreds of hours he has given to ALSC as a volunteer in the Juneau office. Seth Eames, Coordinator of the Alaska Program, and Jamie are to receive their awards at the LSC Provider Conference in Minneapolis on September 25. Good job Seth and Jamie!

And, of course, let's not forget the more than 960 Alaska lawyers and 250 non-lawyer professionals who generously donate their time and talents to providing legal services to low-income persons across this state.

• National award

Continued from page 1

language, and who lives in a remote village located hundreds of miles from Anchorage and accessible only by plane.

The Legal Services Corporation also recognized James E. Fisher, an attorney in Juneau. He will receive the 1992 PAI/Pro Bono Rural Attorney Award for the hundreds or hours he has given to Alaska Legal Services Corporation as a volunteer in their Juneau office. As a Pro Bono volunteer, Fisher, a member of the first Alaska Legislature, assists Alaska Legal Services Corporation with fundraising, monitoring pending legislation, general case work, and overseeing publicity for local free legal clinics.

Seth Eames, Coordinator of the Alaska Pro Bono Program, and Fisher will each receive their Awards at the Legal Services Corporation Provider Conference in Minneapolis, MN, on September 25th.

• Willard election

Continued from page 1

Committee on Contempt. She is chair of the Anchorage Port Commission and the Alaska State Officers Compensation Commission, and past chair of the Anchorage Transportation Commission. She served on the board of directors of Alaska Legal Services Corporation and is a member of both the Anchorage Advisory Council of the American Arbitration Association and the Alaska Commercial Arbitration Panel.

Willard has been in private practice since 1970, when she graduated fourth in her law school class at the University of Oregon. She was born in Calgary, Alberta, Canada, and received her bachelor of arts degree from the University of British Columbia. She is admitted to practice in U.S. Customs and Tax courts, as well as federal and state supreme and trial courts.

Willard is married to Douglas Jones, a retired Anchorage police officer.

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7. You want to put on the clothes you wore home from the party and there aren't any.
8. You turn on the news and they're showing emergency routes out of the city.
9. Your twin sister forgets your birthday.
10. You wake up to discover your water bed broke and then realize that you don't own a water bed.
11. Your horn goes off accidently and remains stuck as you follow a group of Hells Angels on the freeway.
12. Your wife wakes up feeling amorous and you have a headache.
13. You mailed all your bills only to realize that payday is *next* Friday.

PUBLIC NOTICE APPOINTMENT TO CHAPTER 7 PANEL OF TRUSTEES

The Office of the United States Trustee is now accepting applications for consideration for appointment to the chapter 7 panel of trustees to administer Chapter 7 bankruptcy cases filed in the United States Bankruptcy Court for the District of Alaska, Juneau, Ketchikan and Anchorage Divisions. The minimum qualifications for appointment are found in Title 28 of the Code of Federal Regulations, Part 58.

To be eligible for appointment, applicants must possess strong administrative, financial and interpersonal skills, as well as a working knowledge of the Bankruptcy Code. Fiduciary experience is preferred. A successful applicant would be required to undergo an FBI background check and must qualify to be bonded. Trustees receive compensation and expenses on cases in which they serve pursuant to 11 USC sections 326 and 330.

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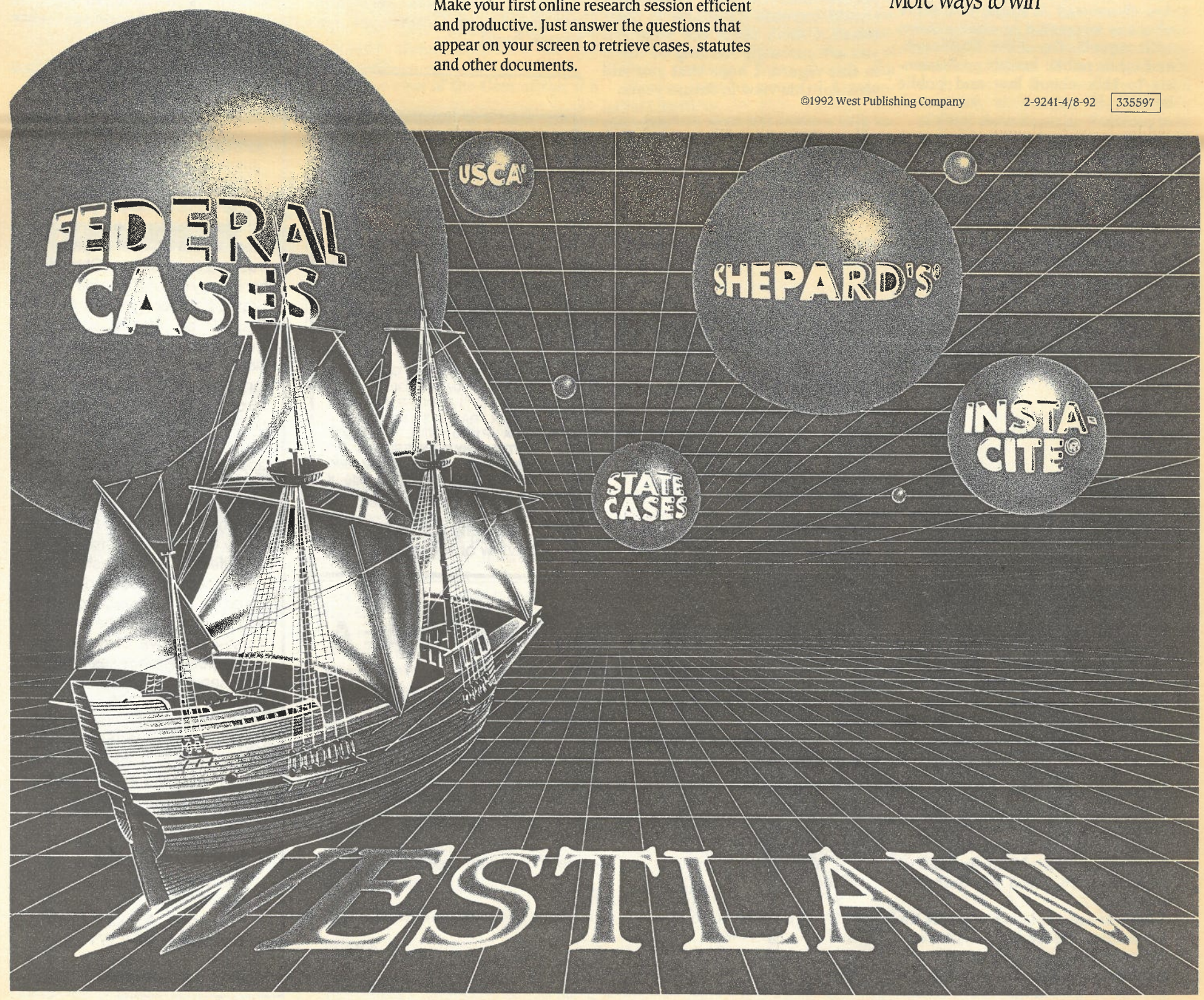

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Disabilities act is 'civil rights' of '90s

BY ANN STOLOFF BROWN

The Americans with Disabilities Act has been called the civil rights act for disabled people. Most provisions of the Act, which are likely to involve litigation, are now in effect. Both private and government lawyers should be familiar with the legislation.

Although the ADA has five titles, the three most likely to affect lawyers deal with public accommodations, public services, and employment. Those portions of the Act which are considered to be less likely to cause litigation involve State and Local government, including transportation, telecommunications, and some miscellaneous provisions.

The Act defines a disability as an impairment that substantially limits one or more major life functions such as breathing, walking, or seeing. The Act protects those with a history of disability or those who are regarded as having a current disability. Those who would constitute a threat to the health and safety of others in the work-place, or to the public in general, or who are current drug users, or who have sexual fetishes, compulsions or disorders, are not protected.

The public services by private businesses portion of the Act prohibits discrimination of the disabled in public services, programs, and activities, including both State and Local governments.

The Act requires that the disabled find public transportation accessible. No public entity may exclude disabled persons from participating in or benefiting from programs and services. If an otherwise qualified person with a disability finds that a public program is inaccessible, that is discrimination.

Specifically, public transportation, including inter-city and commuter rails must be fully accessible to those persons suffering from physical disabilities. While disabled individuals must have accessibility to public programs, services, and transportation, every person with a physical disability does not need to have the same exact accessibility to public programs, services and transportation in the same exact way as those without disabilities. The goal of the Act is to provide those with disabilities the opportunity to enjoy public programs, services and transportation equal to the way those services are enjoyed by others.

Public accommodations by private businesses of the disabled is now mandated by Federal law. Those who own, lease or operate a public accommodation fall within the Act's jurisdiction. Discrimination is defined as any interference with the full and equal enjoyment of public accommodations by the disabled.

In order to avoid the prohibitions of the Act, public accommodations must be made accessible to the disabled. This can be done in one of three ways, such as removing obstacles including architectural and communication barriers, modifying policies, practices or procedures, or providing auxiliary aides and services. Again, the best modifications are not necessary, only reasonable ones are required.

Finally, the third area in which litigation will be likely to occur is in the employment arena. Title I prohibits discrimination of the disabled in all aspects of employment including during the application and hiring process, on the job, at the work-place, and in termination proceedings. The employment prohibitions apply to both public and private employers except the federal government and certain small businesses.

Employers must make reasonable attempts to accommodate an otherwise qualified person with a disability by modifying the work-place or job. Employers, however, do not need to make accommodations or modifications which cause undue business hardship.

In the future, case law and regulations will provide definitions of terms in the ADA which are currently somewhat vague. The standards of reasonableness, and the definition of an otherwise qualified individual, will all be defined in the future. For now, the standard is reasonableness and this is how the ADA should be analyzed by both public and government attorneys.

ADA: Five titles govern businesses

BY JOHN PARRY

As of July 26, 1992, most provisions of the Americans with Disabilities Act (ADA) likely to effect the legal profession will be law of the land. Thus, both private and public lawyers should become familiar with this historic legislation.

The ADA has five titles dealing with (1) employment, (2) state and local government including transportation, (3) public accommodations in private businesses, (4) telecommunications, and (5) miscellaneous provisions. For most lawyers, the important provisions are found in titles I-III.

"Disability" means an impairment that substantially limits one or more major life activities such as breathing, walking or working. Persons who either have a disability history or are regarded as having a disability also are protected. Persons who, by their behaviors, constitute a direct threat to other people, or who use drugs, or have compulsions or sexual disorders are not protected.

Title I: Employment

Title I prohibits disability discrimination in all aspects of employment including application and hiring processes, on-the-job issues, the workplace, and termination.

Title I applies broadly to all public and private employers except the federal government, which is covered elsewhere, and certain small businesses.

Law firms and other employers may use reasonable job qualifications. However, they must also make reasonable efforts to accommodate a person's disability by modifying the workplace or supplying auxiliary aids or services.

Title II: Public Services

Title II prohibits disability discrimination in public services, programs and activities, including state and local governments, and mandates accessible public transportation.

No public entity may exclude qualified persons with disabilities from participating in or benefiting from it's programs/services. Program inaccessibility is discrimination. Public transportation, including intercity and commuter rail, must be fully accessible to persons with disabilities.

Every person with a disability need not be able to use all programs and services in the same way as everyone else. Nor does the law require that the best possible solutions be used to overcome program accessibility obstacles. Clients with disabilities, however, should be able to enjoy program benefits equal to the benefits enjoyed by other clients.

Title III: Public Accommodations

Title III prohibits disability discrimination in commercial facilities and places of public accommodation, including law firms and entities that educate, license or certify lawyers. Discrimination encompasses any interference with the full and equal enjoyment of a public accommodation. Prohibitions apply to anyone who owns, leases or operates a public accommodation.

Nondiscrimination requires that public accommodations be made accessible. This can be done by taking reasonable steps (1) to provide auxiliary aids and services, (2) modify policies, practices or procedures, or (3) remove obstacles including architectural and communication barriers.

Conclusion

The ADA is an historic federal civil rights statute which gives persons with disabilities a similar level of protection as women, African-Americans, and other minority groups. The key to understanding the ADA, both in terms of rights and obligations, is reasonableness. The ADA is no different for lawyers and law firms in this regard, than for the rest of society.

John Parry is Director of the American Bar Association's Commission on Mental and Physical Disability Law and Editor-in-Chief of the Mental and Physical Disability Law Reporter, from which this article is derived. A manual containing those articles plus other materials on the ADA will be published this summer. For more information on the manual or the Reporter, write to ABA Commission on Mental and Physical Disability Law, 1800 M St., N.W., Washington D.C. 20036 or call (202) 331-2240.

JurisPrudence

By Daniel Patrick O'Tierney

If you are a small businessperson or your business often faces small unpaid debts, small claims court may offer you some relief. Small claims procedure is designed to be a quicker, simpler and less expensive process for pursuing a claim. You generally do not need a lawyer.

To begin with, any eligible claim involving less than $5,000 (exclusive of collection costs and interest) must be heard as a small claim, unless an important or unusual point of law is involved. However, small claims court only handles certain simplified types of cases and the amount of recovery is limited to $5,000.

Small claims courts are actually a part of Alaska's District Courts which have jurisdiction over civil cases involving $5,000 or less. By statute, small claims specifically exclude matters involving title to real property, injunctive relief, liens and claims against the government, among other things.

There are several attractive features of small claims procedure to consider before electing to proceed in small claims court. On the one hand, it costs less to advance your claim. For example, the filing fee for a small claim is currently $25, as opposed to $60 in District Court. Further, the process is designed to be used without a lawyer, although you can be represented by one if you wish. For instance, the formal rules of evidence do not apply at trial of a small claim. Essentially, the disputants need only tell their story, with or without witnesses. The court provides the written forms for the parties to fill in the blanks in order to initiate, as well as defend, a small claim.

On the other hand, unlike formal civil procedure in District Court, trial by jury is not available for a small claim; a judge or magistrate will decide your case. Also, a small claims complaint cannot be served upon a defendant who is outside of Alaska, except for a nonresident landlord in landlord-tenant cases. In other words, if a defendant has left the jurisdiction, any claim must be filed against him in District Court where out of state service by certified mail (or process server) is allowed.

In general, small claims procedures are much less complex than the formal civil rules which otherwise apply in District Court. In fact, there are approximately one quarter the number of court rules governing small claims procedure, as opposed to formal civil procedure in District Court.

All of the above adds up to a much shorter ordeal for all involved. It has been estimated that a small claims case could be at trial within four to twelve weeks after the defendant answers the complaint. Under District Court procedure, it is more likely to take six to ten months after the defendant files an answer for the matter to reach trial.

For anyone considering a small claims action, or for anyone named as a defendant in one, a few general caveats are in order. First, remember that a claimant must always ask for satisfaction of the claim before filing a lawsuit. In some cases, such as alleged issuance of bad checks, the law requires a written demand for payment before filing suit.

Second, at the time of her written answer to the small claims complaint, a defendant has the right to choose that formal rules of civil procedure apply to the action, instead of small claim procedure. If that occurs, the parties are involved in a District Court case and both plaintiff and defendant should consult with an attorney. Since small claims rules would no longer apply at that point, the court does not provide forms or other assistance.

Third, even if the small claims court decides a monetary claim in your favor, the debtor may not voluntarily pay the judgment against her. As in any type of case, the creditor will then be forced to undergo the headache and expense involved in the process of trying to execute on the debtor's assets (if she has any) to satisfy his judgment.

Last, but not least, the Alaska Court system has prepared an excellent Small Claims Handbook which you may want to pick up from the downtown courthouse for future reference, in any event. It contains all you need to know about small claims court, including step-by-step instructions for filing, or defending, a claim. As a matter of fact, a copy of the Handbook must be served by the claimant upon any one named as a defendant in a small claims case.

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

Moore selected Chief Justice

Supreme Court Justice Daniel A. Moore, Jr. will become Chief Justice of the Alaska Supreme Court on Oct. 1.

Justice Moore was elected by a vote of the Supreme Court Sept. 3.

Under the Alaska Constitution, the term of the Chief Justice is three years. A Justice may serve more than one term, but not consecutively. In addition to judicial duties, the Chief Justice is the administrative head of all Alaska state courts.

Justice Moore was appointed to the Court in 1983 by Gov. William Sheffield. He served on the District Court as a magistrate from 1961-62 and was appointed by Gov. Jay S. Hammond to serve on the superior court in Anchorage from 1981-83. From 1962 until 1981, Moore practiced law in Anchorage and was a senior partner with the law firm of Delaney, Wiles, Moore, Hayes and Reitman, Inc.

Justice Moore received his B.B.A. degree from the University of Notre Dame in 1955 and his law degree from the University of Denver in 1961. He first worked in Alaska in the summer of 1954 and then returned in 1955 and was employed by the Western Electric Co on the White Alice and Dew Line defense projects. From 1957-59 he was on active duty in the U.S. Marine Corps. He returned to Alaska in 1964 after completing law school.

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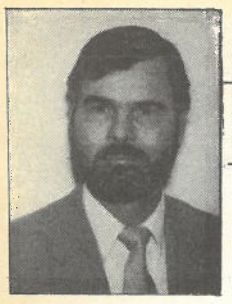

BANKRUPTCY BRIEFS

By Thomas Yerbich

Rule 4003(b), Federal Rules of Bankruptcy Procedure requires objections to a debtor's claim of exemption be filed within 30 days after the § 341 First Meeting of Creditors is concluded. In April, the U.S. Supreme Court held that failure to object within that 30-day window barred an objection to a claim of exemption, even where there was no colorable basis in either fact or law for the exemption claim. [*Taylor v. Freeland & Kronz*, ___ US ___, 112 SCt 1644, 118 LEd2d 280 (1992)] In *Taylor*, the debtor had no basis for claiming more than a small portion as exempt but nevertheless claimed the entire property as exempt. In the absence of a timely objection the otherwise non-exempt property became exempt. The court did, however, leave open as not properly before the court at that time whether an untimely objection to an exemption not claimed in good faith could be made under § 1O5(a). [*See e.g. Ragsdale v. Genesco*, 674 F2d 277 (CA4 1982)]

Taylor eliminated the "colorable basis" rule that some lower courts had engrafted as an exception to application of Rule 4003(b). Under that theory, a failure to object was not fatal if the claim of exemption had no "colorable basis in fact or law." Thus, e.g., if a debtor claims the proceeds of a malpractice claim as exempt and no timely objection is made, the proceeds of that lawsuit become exempt under *Taylor* even though there may be no "colorable basis" for the exemption claim.

A more important case with respect to exemption claims is *In re Hyman* ___ F2d ___ (1992 WL 136505) (CA9 1992), decided two months after *Taylor,* affirming the decision of the BAP [reported at 123 BR 342]. *Hyman* held that although the time for objecting to a claim of exemption may expire 30 days after the conclusion of the § 341 meeting under Rule 4003(b), an objection to the value of the property claimed as exempt (where the exemption is limited in value) is not time-barred by Rule 4003(b). Since most state and Federal exemptions are limited in value, this case, as a practical matter, probably has a more significant impact than *Taylor.*

In *Hyman*, the debtor claimed the California homestead exemption, scheduling the residence at a value of $415,000. After expiration of the Rule 4003(b) time without making an objection to the exemption claim, the trustee, asserting the value was $650,000, attempted to sell the residence. Debtors sought a declaration that the residence was exempt property no longer part of the estate or, alternatively, all post-petition appreciation accrued for the benefit of debtors. The Ninth Circuit held in favor of the trustee on both issues.

There are three main points addressed in the *Hyman* decision that should be borne in mind. First, Rule 4003(b) does not apply to a determination of the value of property claimed as exempt. Second, lapse of the 30-day objection period provided in Rule 4003(b) does not *ipso facto* result in exempt property revesting in the debtor. Before exempt property revests in the debtor, the trustee must take affirmative steps to abandon it. Third, an exemption based on value does not come into play until the trustee attempts to sell the property. Accordingly, on exempt property, the value on the date petition is filed is irrelevant; the critical issue is the value when sold. Property claimed as exempt remains part of the estate until abandoned and the exemption is applied at the time of sale. Thus, post-petition economic appreciation in excess of the exemption limitation accrues to the estate; conversely, the estate also initially suffers the effect of any post-petition economic depreciation or erosion caused by the application by the mortgagee of § 506(c).

At first blush it may seem difficult to reconcile *Hyman* with *Taylor*. The difference, though subtle, is nonetheless present and of paramount importance. In Taylor, the debtor, legally entitled to exempt but a portion of a discrimination lawsuit, scheduled it as having an "undetermined" value and claimed the entire "undetermined" value as exempt. In *Hyman*, the debtor scheduled the property with a value of $415,000, subject to consensual liens totalling $367,611 and claimed the $45,000 California homestead exemption. The ironic distinction is: the debtor in *Taylor* "played fast and loose with the rules," improperly scheduling exempt property and *won*; while in *Hyman*, the debtor "played by the rules," properly scheduling the exemption and *lost*! For trustees and creditors, *Taylor* requires paying greater attention to the detail of exemption claims in Schedule C, making sure to file a timely objection to exemptions if warranted.

Hyman creates problems for debtors in two instances: (1) where the equity in the property is substantially less than the exemption limitation and (2) where the equity in the property is more than the exemption amount. What does a debtor do in these cases?

As practical matter the first scenario only becomes a problem where there are other assets requiring administration in the bankruptcy estate. In a "no-asset" case, the trustee is probably going to return to his office at the conclusion of the § 341 meeting, prepare and file a "no-asset/no-distribution" report and the scheduled property will be abandoned as a matter of course within a short time. If, on the other hand, there are estate assets requiring administration (*e.g,* recreational real property), estate administration could literally drag on for years leaving the exempt property suspended in a state of "legal limbo." To eliminate this problem, it is suggested that debtors' counsel file a motion to compel the trustee to abandon the property claimed as exempt (do not forget the $60 filing fee or you will hear from Wayne or his minions), noticing the matrix. When the 20-day notice period has run, file an LBF 15 with a proposed Order of Abandonment and the matter will be concluded.

The second scenario usually always presents a problem because the excess equity is itself an asset requiring administration. [Also, it should be noted that in determining "excess equity" subject to administration, *Hyman* expressly rejected deducting hypothetical "costs of sale."] The situation is further clouded by the fact the property is also invariably encumbered. Thus, there are three separate, incompatible and not infrequently hostile parties with an interest in the property: mortgagee, debtor and trustee. The mortgagee wants to continue to receive payments, the trustee must liquidate the estate's interest and, as the *Hyman* court noted in footnote 11, the debtor has use of the property rent free pending disposition.

What is the solution? That depends to a significant degree on the debtor's desires and intentions with respect to retention of the property as well as his or her financial wherewithal.

If retention of the property is desired, the debtor may purchase the "excess equity" from the estate on such terms and conditions as the debtor and trustee may negotiate, subject to approval by the court after appropriate notice to the creditors. On several occasions the author has been able to negotiate a time pay-off secured by a security interest in the property. Of course, when an equity buy-out occurs, the debtor must still deal with any mortgagee. If unable to negotiate a deal, the debtor may also wait until the trustee has found a buyer and simply over-bid. This approach has the dual-pronged drawback of being a "crap-shoot" and will generally require a cash-out of the excess equity.

The problem can also involve a disagreement over the value, particularly where the property is "close-to-the-wire" and is appreciating. In those cases a delay by the trustee in making a decision can be detrimental to a debtor who may wish to retain the property. In such cases, the remedy for the debtor if the debtor believes delay is inimical or detrimental, is to petition the bankruptcy court to set a date by which the trustee will sell the property or it will be deemed abandoned. [*See In re Pauline*, 119 BR 727 (BAP9 1990)]

The final tension between the mortgagee, debtor and trustee arises when it is agreed "excess equity" exists, debtor does not wish to retain the property, but the market is "soft." The mortgagee is unlikely to obtain relief from stay because of the existence of a substantial equity, debtor may for a variety of reasons want to "cash-out" the exemption and get on with life (make the "fresh start," perhaps out of state), and the trustee has a fiduciary obligation to maximize recovery for the estate. Moreover, no procedure exists to compel the trustee to either expedite sale to the detriment of the estate or to buy debtor's equity.

Among the parties, tension can become exacerbated if the property is leased. Who receives the benefit of rental payments? Does the estate ultimately get to retain the rent because one property is part of the estate and the proceeds from estate property are also property of the estate? On the other hand, the debtor has a legally cognizant interest (the exemption) in the property and should not the fruits of that interest inure to the benefit of the debtor?

The author suggests that the rental proceeds should be allocated as follows: to first "reimburse" the estate for any equity erosion resulting from the application of § 506(c) with the balance, if any, divided between the debtor and estate *pro rata* in proportion to their respective interests in the equity.

This formula balances the interests of the parties. In the event "adequate protection" payments are made to a mortgagee, thus avoiding 506(c), to the extent that the "equity" is increased by those payments, it should likewise be allocated *pro rata* between the estate and the debtor in proportion to their respective interests in the equity at the commencement of the case.

The other "block-buster" decision related to exemptions or exclusions from the estate this spring was *Patterson v. Shumate* [___ US ___ 112 SCt 2242, 118 LEd2d (1992)] unanimously holding that the phrase "applicable nonbankruptcy law" 541(c)(2) includes federal as well as state law, resolving the conflict among the circuits. Among those cases falling was the Ninth Circuit decision *In re Daniel* [771 F2d 1352 CA9 1985)] Thus, ERISA-qualified pension plans are excluded from the estate under § 541(c)(2). Under *Patterson*, all that is required is the restriction on alienation be enforceable under either state or federal law. This removes the "settlor trust" and "control" dichotomy that had arisen in the Ninth Circuit under *Daniel* and its progeny. *Patterson* makes clear that state or (common law) principles of spendthrift trusts, while nor necessarily irrelevant, are not controlling where a federal statute, such as ERISA, creates the spendthrift trust.

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Standards of Review

A useful compilation from recent Alaska Supreme Court slip opinons, by Joe Sonneman, Esq. $14.95 ppd. Five Star Publishing, 324 Willoughby, Juneau, AK 99801

TANANA VALLEY BAR

Maybe we should call them the Tastelessly Venal Bar Association...

Al Schon reported on an article he had read in the Wall Street Journal about attorneys who billed 59 hours of work a day. Al suggested a resolution urging TVBA attorneys to bill no more than 36 hours per day. Chris Zimmerman noted that the motto of a now-defunct law firm (or was it a lawyer?) from Fairbanks: "it isn't the number of hours you bill in a day, its the number of hours you bill in an hour." It was suggested we find out the attorney's name and schedule a CLE, but this suggestion was withdrawn when we found out the attorney was in jail and transportation would therefore present logistical problems.

*

R. Dryden Burke gave a foreign relations report that Saddam Hussein would be gone within 9 days because R. Dryden has so decreed on 2/2/92 at a TVBA meeting. When asked whether he really thought it would be so, R. Dryden said it was likely, but he didn't think it would. Dan Winfree indicated that he wants a "Likely but I don't think so" standard when he goes to trial. R. Dryden was asked for a Foreign Relations opinion about why we ran out of beer at the Christmas Party. He said the Russians did it.

*

A Juneau Bar Association report was given. It seems they should henceforth be referred to as the VBBA, or Very Boring Bar Association....the Anchorage Bar does not accept our designation of them as the MFBA (Mud Flats Bar Association). The comments to this report cannot be provided in these minutes since I don't know how to spell PFBBBBBBBB.

--Aly Closuit,
Secretary & Dog Lady
July 17, 24, 1992.

...Or the Terribly Verbose Bar Association

Ralph Beistline presented the following CLE fact situation (a true story):

A couple is traveling through Denali National Park when they stop their car to photograph a grizzly bear. After husband gets out of the car, wife does also, as does the family poodle. The family poodle attacks the grizzly bear. The grizzly bear eats family poodle. Who is liable to whom and why?

A large prominent law firm offered to lose any litigation for $500,000. A smaller prominent law firm offered to lose any litigation for $65,000.

Dave Call offered a one-hour free lecture on the proper wine to serve with French poodle, complete with samples.

Ken Covell offered to defend grizzly bear on any charges of poodlecide, noting how nice it would be to have a client to whom being call a wild animals was not an insult.

The borough attorney offered grizzly bear a job enforcing its leash law.

The Attorney General's office, not to be outdone, offered grizzly bear a job collecting child support.

At this point Ron Smith declared enough of this BS and PS ended the meeting.

--Richard D. Wright
Aug. 28, 1992

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a professional corporation, is pleased to announce the opening of our Anchorage office in the Peterson Tower Building, 510 "L" Street, Suite 601, and that

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TIP OF THE MONTH

A Guide to Survival in the Practice of Law

PAPER TRAILS OF PROTECTION:

✓ The latest ploy in legal malpractice actions is an allegation borrowed from the medical malpractice arena: lack of informed consent. When a client claims you didn't provide him with adequate information to make an informed decision, or that you didn't divulge material facts he needed, you'll be one of the contestants in the old swearing match if you didn't document your file.

✓ Put all important advice to your client in writing, and keep file memos, handwritten notes and telephone messages that will thoroughly document the history of your client's case. Don't rely upon your memory, practice defensive documentation. Your recollection and an empty file folder won't hold up to scrutiny very well when a claim is made against you.

IN THE SUPREME COURT OF THE STATE OF ALASKA

In the Disability Matter Involving:	)	Supreme Court No. S-2851
H. JOHN DeNAULT, III	)	ORDER
Respondent.	)	

ABA File No. 1991B005
Before: Rabinowitz, Chief Justice, Burke, Matthews, Compton and Moore, Justices.

An order was issued on February 14, 1992, directing the Alaska Bar Association to file a supplemental response to the petition for transfer of attorney H. John DeNault, III to active status. The recommendation of the Board of Governors dated June 3, 1992, was filed on June 10, 1992. Accordingly,

IT IS ORDERED:

The recommendation of the Board of Governors of the Alaska Bar Association is ADOPTED and H. John DeNault, III is reinstated to the active practice of law in the State of Alaska effective June 29, 1992.

Entered by direction of the court at Anchorage, Alaska on June 29, 1992.

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/s/Jan Hansen

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Estate Planning Corner

By Steven O'Hara

Taxes: "Enjoy" Them While They're Low

For this writer there is no question that taxes, including income taxes, will be going up. The question is how soon.

The wealth transfer taxes appear particularly vulnerable to increases. Gift, estate and generation-skipping transfer taxes may never be lower.

Currently up to $600,000 of an individual's transfers may be made free of gift and estate tax (I.R.C. Sec. 2010 and 2505). With planning, a married couple may transfer $1.2 million free of gift and estate tax.

Up to $1 million of an individual's transfers may be made free of generation-skipping transfer tax (I.R.C. Sec. 2631). Double that amount for married couples who plan.

In the gift tax area, a donor may make additional gifts of up to $10,000 to an unlimited number of donees each calendar year, free of any gift tax or reporting requirement (I.R.C. Sec. 2503(b) and 6019). The donor's spouse may also do the same. Properly planned, these gifts can also avoid generation-skipping transfer tax (I.R.C. Sec. 2642(c)).

Direct transfers to educational organizations and health care providers for the benefit of a designated beneficiary also escape the gift and generation-skipping transfer tax systems (I.R.C. Sec. 2503(e), 2611(b)(1) and 6019).

In general, transfers between spouses are free of any tax or reporting requirement (I.R.C. Sec. 1041, 2056, 2523, 2651(c)(1) and 6019). This rule generally does not apply if the transferee spouse is an alien (I.R.C. Sec. 1041(d), 2056(d) and 2523(i)).

The top marginal transfer tax rate is, in general, 55 percent, compared to 77 percent as recently as 1976 (I.R.C. Sec. 2001(c), 2502 and 2641).

As the end of 1992 approaches, it is prudent for clients to consider making substantial gifts now so as to capture the transfer tax benefits currently available. They should beware, however, of the possible retroactive effect of legislation that eliminates tax benefits (O'Hara, *Estate Planning Corner*, Alaska Bar Rag, May-June 1990; Cf. Schmedel, *Tax Report*, The Wall Street Journal, August 12, 1992, at 1, col. 5. (discussing the 9th Circuit's recent holding that Congress' retroactive repeal of a tax deduction violates due process)).

For example, the $600,000 exemption equivalent from gift and estate tax could be reduced at any time. As another example, the $10,000 annual gift tax exclusion could be limited to three donees per year, as has been proposed in recent years.

In many instances, a client's wealth includes a substantial nest egg in an IRA or other retirement plan. Depending on the client's circumstances, it may be prudent for the client to consider terminating the plan, paying the resulting income tax and using the balance to fund substantial gifts.

Such an idea often sounds ludicrous to clients, until they learn that their retirement plans could ultimately disappear to the various taxing authorities.

For example, suppose a wealthy client dies, leaving her substantial IRA to a grandchild who resides in a state that has its own income tax. Under such circumstances, the IRA would be subject to income tax at both the federal and state levels, and the IRA could be subject to a 55 percent estate tax, a 15 percent excess accumulation tax, and an additional 55 percent generation-skipping transfer tax (I.R.C. Sec. 61, 2039, 4980A(d) and 2611(c)).

For this writer, these various taxes will not be going away. They will be going only up.

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Book review

"Lawyers say the darndest things

By Ralph R. Beistline

Steve Kluger worked for roughly seven years as a typist in several Los Angeles law firms. He was, however, a writer by profession. As a result, he took careful notes and accumulated, unbeknownst to his employers, a book full of lawyer quotes that he found revealing. These were published in the 1990 book, *Lawyers Say the Darndest Things,* by Ivy Books of New York. Included below is a sampling of his quotes:

1. It was determined by the tire company's investigators that the airline accident was caused by witchcraft.

2. Please state at what speed you were traveling in the vicinity of the question.

3. Plaintiff weighs 125 pounds with a driver's license.

4. Have you ever suffered a loss of smell in either ear?

5. It appears that we will have a difficult time obtaining a defense verdict if this case is tried before a live jury.

6. That case is totally distinguishable from the instant case as there, the trial court, after 9 days, determined that only 5 days would be permitted to give the plaintiff 2 days to present his case, for a total of 11 days, allowing the defendant 3 days, as opposed to the 2 days of plaintiff. The court was quite clear on this point.

7. The deponent stated, "I was sitting behind the bush and I saw something move, so I raised my rifle and shot the plaintiff because I thought he was a turkey."

8. Plaintiff admits he was inebriated at the time of the incident, but claims he would have made the same unsafe lane change even if he had been sober.

9. The plaintiff further contends that he has discomfort and that he cannot sit down and stand up at the same time.

10. If the whereabouts of the subject document are unknown, please state where it can be located.

11. We requested that the trial in this matter be held in early fall. The judge concurred and set a trial date of April 6th.

12. If any injury or damage was suffered by the plaintiff, the same was proximately caused the plaintiff in failing to use the subject toilet seat in a reasonably foreseeable manner.

13. If any injury or damage was suffered by the plaintiff, the same was proximately caused and contributed to by the plaintiff in failing to use the subject spaghetti in a reasonably foreseeable manner.

14. If any injury or damage was suffered by the plaintiff, the same was proximately caused and contributed to by plaintiff in failing to use the subject heart valve in a reasonably foreseeable manner.

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Movie Mouthpiece

By Ed Reason

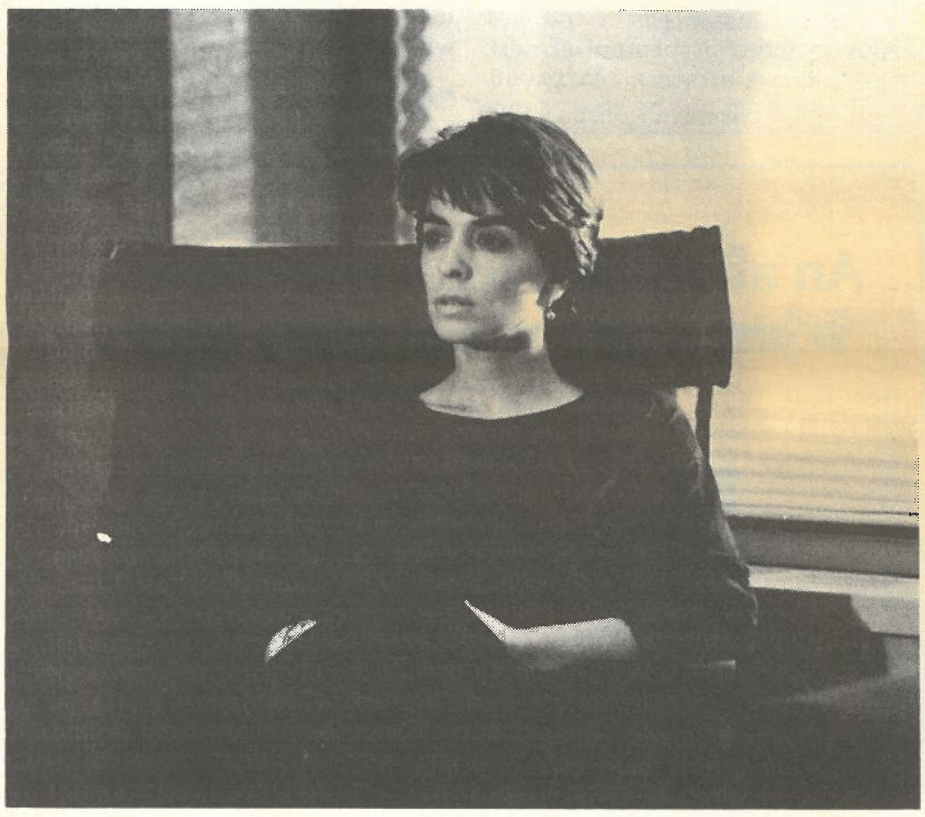
Sometimes all of us are unduly prejudiced either for or against a film because of the reviews.

The reviews of *Whispers in the Dark* have not all been favorable. The ones from New York rudely suggested that the film shouted, not whispered. Remember this about New York film critics — they never forgive a film that picks on so-called New York intellectualism, just as people from Iowa tire of late talk show jokes of Iowans.

Dr. Ann Hecker (Annabella Sciorra) is a New York psychiatrist who is haunted by a recurring sexual dream after hearing a woman patient describe her own lover.

At some point in time she unknowingly meets the same man, becomes his lover also, and in the process tells one of her New York friends: "He's not the intellectual type. He's a man's man. He flies planes for a living".

Deborah Unger stars as New York City art gallery owner Eve Abergray who relates her fantasies to her psychiatrist.



Annabella Sciorra stars as Dr. Ann Hecker, a New York City psychiatrist who finds herself caught in the shocking aftermath of a patient's murder in "Whispers in the Dark."

The plane he flies incidentally is a corporate jet, so we as Alaskans could have a field day as to whether the accomplished pilot was an intellectual or not. But no matter — the heroine of this film has, in a NYC setting, voiced what is not supposed to be a desire to an intelligent woman — love with a man who is not an intellectual. Whispers in the Dark was bound to die a slow, agonizing death in the Hudson Valley.

For the rest of America, Paramount is touting the film as an erotic mystery-thriller. This seems to be the genre that draws all of the post college, life-starter-outers to the theatre. Anyway, Sciorra is a human being as well as a trained psychiatrist. She becomes aroused by fantasies involving bondage and decides to explore some of her own unresolved issues with the help of fellow colleague Dr. Leo Green (Alan Alda). Actor James Sheridan, who plays the pilot love interest (Doug McDowell) in this film is known to most of us for his careful portrayal of a corporate attorney turned nice-guy litigator in the acclaimed NBC series "Shannon's Deal".

Once Dr. Hecker (Sciorra) and pilot McDowell commence their passionate love affair, and she learns that her woman patient's lover and McDowell are one and the same, she suddenly becomes confronted with her patient's nude, dead body. McDowell becomes a murder suspect. Naturally I won't disclose how it all ends, but there are several interesting film techniques that I enjoyed — which if watched for by you — might cause you to rate Whispers in the Dark more favorably than New Yorkers have:

(1) Opening credits — generally this is covered by written contract, and anyone who is anyone in filmmaking wants his name on a single card (a few seconds by itself) before the story unravels. Lesser-knowns have to put up with crawl credits, which come after the film has ended and most people are leaving the theatre. what do you see in the hazed background of the theatre. What do you see in the hazed background of the screen as the opening credits are rolling? I know this is a minor psychiatry ink blot inquiry, but I'll chance it. Is that a gentle man rubbing a consenting woman's bare breasts? It becomes important because when pilot McDowell makes love to good Dr. Hecker, he is gentle, so much so that she tells him: "You may be the gentlest man I've ever met." Yet her woman patient described sensual bondage scenes that were far from gentle and this woman was found dead, nude, and hanging by her neck. That's real, everlasting bondage.

Which is lover McDowell — gentle or kinky? Can a sane man be both?

(2) This film was both written and directed by Christopher Crowe. Crowe is a screenwriter of some talent, but this is his first effort at a directory feature film. He's damn good. He doesn't fool around with unnecessary crazy shots to impress you and he uses almost exclusively close (top of head to bottom of head) and medium (top of head to belly button) with few fadeouts and almost no dissolves.

You watch a close-up of one of Dr. Hecker's more troubled patients, a former convict, who really likes to torture women (played excellently by John Leguizamo), but who is aware of his sickness and is using therapy and original art painting to alter his ways. Then, without perceptible change, you watch a medium shot of Dr. Hecker responding to his inquiry of what she thinks about one of his paintings. Too much of this cross-cutting can become boring, but Crowe and cinematographer Michael Chapman know when enough is enough and their efforts move this film along at a very comfortable, very interesting pace.

(3) The interior design is definitely NYC. People live in small apartments where books are prized possessions. Central Park is used daily by thousands and is a treat in a city of 11 million souls. Professionals tend to marry late in life and both man and woman generally keep their own apartments, even after teaming up, because people in a large city do need their space and besides, because of NYC rent controls, good apartments are a steal if acquired at the right time.

(4) The relationship between a psychotherapist and a patient can indeed become voyeuristic, but when both love the same man, a special bond of trust is broken and their lives are on a collision course. Patient Eve finds out that her doctor is sharing her man. Deborah Unger, an Australian actress not well known in this country, does a chilling portrayal of a woman wronged by her female psychiatrist.

First she steals some tapes and files of other patients (malpractice perhaps?) Then she confronts the doctor in a large public building in front of several people entering and exiting. She tells everyone in view that the doctor is sleeping with her guy (only more graphically) and she plays the role of a wronged patient and wronged woman all in one long, beautiful sequence.

There is more, of course, but that's enough, I trust, to encourage you to view Whispers in the Dark.

DIAL 800-478-7878

FOR CLE & BAR INFO

The Alaska Bar Association now has an 800 information number thanks to the Alaska Bar Foundation. The outgoing tape message on this number gives you the Bar office hours, address, phone, fax, upcoming CLEs, and other program information — such as the Bar Exam and MPRE dates and locations.

If there is other information that you think would be helpful to have on this tape, please call Barbara Armstrong, CLE Director, at the Bar office at 272-7469.

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Cold War Fall Out

On vacation, bears are better company

BY DAN BRANCH

They were a grim bunch, these 10 overweight Germans peering through cigarette smoke and a heavy rain at Fish Creek.

Their guidebooks promised bears. They found only dying dog salmon. Seeing our family's Plymouth Wagon pull up next to them at the Hyder bear-watching platform didn't improve their mood.

Moving into the parking space thoughtfully provided by the Hyder Community Association, we ignored a man decked out in a cheap camouflage poncho and German football club hat as he gestured wildly at us with a closed fist. There were no bears yet. They would come later, after the weak daylight faded to dusk. We had food and our preschooler was asleep. Unless the Germans turned ugly we could wait out the bears.

Watching the multicolored dog salmon fight for spawning space in the creek below, I thought about how much this whole Labor Day weekend tour of Northwest British Columbia had been impacted by the newly unified Germany.

We had left Ketchikan for Prince Rupert on the *M/V Aurora* late on the previous Thursday night. Setting up camp on the floor of the forward observation lounge, we sacked out in sleeping bags after the purser turned off his cabin lights. Hard accented voices of RV drivers exchanging ALCAN horror stories mixed with engine noise as we drifted toward sleep.

Just before nodding off I thought I heard the nasal tone of spoken German. Looking for lederhosen, I saw only Midwestern stretch pants. The Aurora pulled into Rupert at six the next morning.

A contingent of the Kansas Good Neighbor Sam Club blocked our exit off the Aurora's car deck. Lack of sleep and the close quarters made it tough for the drivers to find their recreational vehicles. We decided to stop for English breakfast at the Prince Rupert Hotel to give the good neighbors a chance to chalk up some miles before hitting the Yellowhead Highway. The Prince Rupert served the standard fried North American fare. I did find German graffiti scribbled on the wall of the restaurants men's room.

German filled the air at the Prince Rupert museum when we entered that establishment. Over by the bentwood boxes someone asked me, in heavily accented English, for directions to the water closet. I innocently sent him to the courthouse across the street where a gauntlet of teenagers waiting to plead out to minor-consuming-alcohol lined the front steps. Purple hair should have been nothing new for the German visitor and I doubt that he could fully appreciate the nuances of the Canadian slang insults hurled at him by the defendants. For some reason he seemed very upset about the whole deal. Susan explained the problem to me while we headed for the car.

Heading East out of Prince Rupert we followed the Yellowhead Highway as it ran upstream along the Skeena River. Our old Plymouth ate up the kilometers between us our destination for the day—Mt. Layton Hot Springs and Water Slide Park. In no time we passed the song bird totem poles on the edge of Terrace. Five clicks later we were at the Skeena River Mall where K-mart waited for our fat American dollars. Heavy lobbying for the water slides by the car seat contingent overruled a suggestion to make the mall our first stop.

Two other Ketchikan families were already in the pool when we arrived at Mt. Layton Hot Springs. The place is better known to Revilla Island preschoolers as the home of the turtle slides. I planned to spend the two hours allotted us at Mt. Layton floating in the therapeutic pool but a friend shamed me into mounting the steps to the "watercannon." Too soon I was hurtling through the water filled tube of blue fiberglass at a 45-degree angle. Suffering an adverse reaction to the watercannon "g" forces, I retreated to the therapeutic pool to soak.

Six German nationals joined me in the hot waters of the pool. They were pleasant enough folks with good haircuts and ruddy faces. It was almost a cosmopolitan experience.

That night we enjoyed a great dinner at the local Mexican restaurant. I wasn't surprised to learn about their special on German beer. I even accepted the waiter's offer of Black Forest cake for dessert. The pattern was well established now.

We left Terrace the next day for a campground on the Eastern edge of Smithers. At noon we stopped at Ksan, an art school and museum on a reserve near Hazelton. The gift shop was closed when we arrived. I took the opportunity to study the double-finned killer whale someone had carved on the door. That's when a group of German tourists approached. Their tour guide translated a sign on the gift shop door that told visitors the shop would reopen at 1 p.m. "It's after one now," the guide must have said in German, "But that is what is so wonderful about life in British Columbia."

The tourists took some quick snaps of friends posing next to totem poles and then flooded the small gift shop when it reopened. They were snapping up soapberry spoons and silk screen prints when I left.

There were more Germans in Smithers. The disenchanted folks were leaving the Rhine River for a simpler life in northern B.C. A near parity of the Deutsche Mark and Canadian dollar allowed them to live like kings in Canada.

Seeking comfort in the junk food bins at the Smithers Safeway store, I found insight in a bag of Gummi bears. We were witnessing the end of North American dominance in the world. Southeast Alaska is already a service center for Norwegian cruise ship lines. It won't be long before we live only to serve the European Economic Community.

These thoughts and a building low-pressure system darkened our trip from Smithers to the international twin cities of Stewart B.C. and Hyder, Alaska. A punishing rain was falling when we checked into our Stewart motel. After cooking up some ravioli in the provided kitchenette we crossed the open border and drove to the bear stand at Fish Creek.

Last year we found the creek relatively people free. Brown bear sows let us watch them teach their cubs how to fish. It was like the Discovery Channel with authentic odors. This year the decaying salmon were there but a huge influx of tourists had chased the bears away. The bruins that tried their luck in the creek would dart out of the brush, snatch a dog salmon, and return to their hiding place.

I didn't know about the changed dynamics until we pulled the Plymouth up to the bear watching stand. It didn't take long to figure out that Germans had replaced Alaska wildlife in Hyder. Our presence agitated the invading species.

We watched in silence for bears until our daughter woke up. She had to go to the bathroom and her rain gear was in back part of the car. As quietly as possible I exited the car and walked to the rear door.

The German leader called out to me in his best pidgin German. I knew he wanted me to move the car but rather than comply I exercised the prerogative of the exploited. Smiling through a shrug I told him that I didn't understand. It felt good.

OPPORTUNITY FOR
APPOINTMENT AS NINTH CIRCUIT BANKRUPTCY JUDGE

The U.S. Court of Appeals for the Ninth Circuit is seeking additional applications from highly qualified candidates for the position of Bankruptcy Judge in the Central District of California. The position is located in Los Angels and becomes available upon completion of the appointment process.

The basic jurisdiction of a Bankruptcy Judge is specified in Title 28, United States Code, and explained in Title 11, United States Code, as well as in 98 Stat. 344 P.L. 98-353, Title I, Section 120. The term of appointment to this office is 14 years. The current annual salary is $119,140, including a 3.5 percent cost-of-living adjustment.

The Court of Appeals uses an open-selection process which is confidential and competitive. Persons shall be considered without regard to race, color, sex, religion, or national origin. Qualifications for appointment include: (1) admission to practice before the highest court of at least one state or the District of Columbia; (2) membership in good standing of every other bar of which they are a member; and (3) a minimum of 5 years actual practice of law (with some substitutions authorized). A complete statement of qualifications is provided with the application materials for this position.

Application forms can be obtained by writing to the Office of the Circuit Executive at P.O. Box 193846, San Francisco, CA 94119-3846, **Attn: Bankruptcy Judge Application.** The application form is also available on computer disk (WordPerfect 5.1 format). However, if you elect this option, it will be necessary for you to send a blank 5 1/4" (1.2mb/360k) or 3 1/2" (720k/1.44mb) disk along with your request for an application. Application forms can also be obtained from the Clerk of the Ninth Circuit Court of Appeals, the Clerks of the U.S. District and Bankruptcy Courts for the Central District of California, and all federal District and Bankruptcy Clerks' offices in the Ninth Circuit. **NOTE: Applications made in formats other than that of the Ninth Circuit will not be accepted.**

NOTE: Those individuals who have applied for the position of Bankruptcy Judge in this district within the last three (3) months need not submit a new application. He/she should simply send a letter to the Office of the Circuit Executive requesting that his/her prior application be considered for this latest recruitment; at this time they should also provide updated information, as necessary and appropriate, for consideration by the Merit Screening Committee.

Any letters of reference (optional) and supporting documents *must accompany* the completed application. All applications (including any supporting documents) must be submitted by potential nominees personally and received at the Circuit Executive's Office *no later than 5:00 P.M. PDT on Friday, October 2, 1992.*

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August 1992

Note: The U.S. Bankruptcy Court, District of Alaska, has a limited number of Information and Application Materials for this position. Should you desire a copy please contact the Deputy Clerk in the front office.

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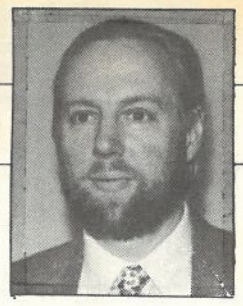

GETTING TOGETHER

By Drew Peterson

Framing your communication

Why is it that when we ask a straightforward question people cannot simply answer it? Why do they have to be so evasive? Surely the world would be a better place if people would only say what they mean.

On the other hand, why is it that some people have to be so blunt? Don't they know that they are being rude? They just seem to forget the niceties of communication. Life is too short to deal with each other in a hostile and non-respectful manner.

Does the above debate sound familiar? And which side would you place yourself on?

In the last issue of *The Bar Rag* I discussed the field of cultural linguistics and the observations of Deborah Tannen, Ph.D., in her book *That's Not What I Meant - How Conversational Style Makes or Breaks Relationships* (Ballantine Books, 1986), about cultural differences in how we communicate with each other. In addition to such differences in *how* we communicate with each other, Tannen's book also discusses cultural differences in *what* we communicate to others. We don't always say what we mean in so many words. Linguists refer to the way people mean what they don't exactly say as "indirectness."

Many people, especially Americans, tend to associate indirectness with dishonesty and directness with honesty. In most normal communications, however, such a view of indirectness as dishonest is not fair or realistic. Indirectness is a form of metamessage, and it is basic to all communications. Metamessages are conveyed not by the actual words said but by intonation, pitch, body language, and the like.

There are three payoffs that are provided by indirectness in our communications: it can provide rapport with the other party, it can be used for self defense, and finally there is the simple esthetic pleasure of communicating cryptically. Indirect communications can be very effective in some circumstances. There are many ways of saying one thing and meaning another. Irony, sarcasm, and figures of speech are such devices, and they are wonderful when they work.

Manipulating and Being Manipulated

One of the common results of the different in cultural styles concerning directness is the feeling of being manipulated. People who expect directness on certain subjects feel manipulated when that subject is approached indirectly. And yet those who are not accustomed to directness are not so much unwilling as unable to use it. It just does not feel right or natural to them to be more direct. The result can be that each feels manipulated by the other.

The danger of a term like "manipulation" is that it blames others for the way we feel in response to them. One of the most important things that we can do to avoid miscommunication is to simply bear in mind that misunderstandings are natural and normal. They are not a sign that something is wrong with an individual or with the relationship.

Framing and Reframing

Everything that we utter is set into a "frame" of some sort, through non-verbal metamessages. For example a frame could be serious, joking, teasing, angry, polite, rude, or ironic. But the use of such frames is another pattern of communications that varies by culture.

When all is going well in communications, frames do their work unnoticed and unnamed. Since framing is mostly non-verbal, it is easier to identify a frame in person than in writing, or even over the phone. The panic caused by the original performance of Orson Welles's *The War of the Worlds* occurred because of the unintended lack of proper framing. Framing is also responsible for the effect of many jokes, whose punch lines depend upon the sudden switching of frames at the end. The patient sits uncomfortably on the doctor's examining table. "Tell me Doc" he says, "how many billable hours do I have left?"

Frames have great power, which can be both good and bad. Most of us feel a strong impulse to stay with the prevailing frame. Once recognized, however, there are two ways to manage conversational frames without being controlled by them. These are by metacommunicating and by reframing.

Metacommunicating means simply to put a name to the frame. By naming the frame ("you sound angry," or "why are you teasing me?") it automatically changes, while at the same time it is given substance by being the subject of the new frame. This can be very effective in resolving communication problems caused by framing.

Equally powerful but more subtle is the process of reframing. Frames are not static but are dynamic, and are constantly evolving during our conversations.

By being consciously aware of frames we can often turn them in a different direction. This can be either good or bad, depending upon the reframe used. Positive reframing, consciously used, can be a very effective method of improving communications. For example, family mediators are trained to reframe discussions of "alimony" into terms of "becoming independent" or of "custody" into terms of "co-parenting." It is one of their most effective techniques.

Power versus Solidarity

The terms power and solidarity capture the way we juggle the simultaneous and contrary human needs of involvement and independence in the real world, especially the business world. Indirectness makes it possible to control others without appearing to, and thus power can masquerade as solidarity. This is an area that is full of cultural pitfalls. Simple things such as the use of first names, endearing (or patronizing) names, forms of formal address, and the like, can create great problems in the workplace, and at home as well. Many of the concerns related to sexual office politics come from miscommunicating in this area.

Men versus Women

In interviews Deborah Tannen has described how after writing *That's Not What I Meant,* 90 percent of the questions which she was asked related to the minor portion of the book describing cultural linguistic differences between men and women. That in turn led her to write her most recent and best selling book, *You Just Don't Understand - Men and Women in Conversation.* (Ballantine Books, 1990)

The latter book is fascinating and enjoyable reading. Let me only note here that the premise of Tannen's earlier book about men and women is that many of the differences between them are essentially cultural differences, just as are the differences between, say, Swedes and Italians.

Women's culture generally places a greater emphasis on involvement in relationships, while men's culture emphasizes independence.

Thus, women are often more attuned to the metamessage side of communication while men may have a better grasp of the direct messages. Men tend to be more direct and women more indirect in their dealings with others. This is evidenced by the stereotypes of the strong, silent man and the loving, nurturing woman.

To make things worse, our most intimate allies can become our most intimate critics as well. This can lead to what Gregory Bateson calls "complementary schismogenesis": a process by which two people exhibit more and more extreme forms of the behaviors that trigger in the other increasing manifestation of an incongruent behavior, in an ever-worsening spiral. Any of us who have ever had marital difficulties or a love affair gone sour will recognize the pattern. And it happens in all of our dealings with others, not just in love relationships. Most of us can probably also recognize it in our dealings with certain attorneys.

What To Do About It

The first step in dealing with communication problems is to simply be aware of the fact that difficulties can be the result of different cultural styles. It is particularly important to be aware of your own style of communicating. After listening and getting a sense of your own communication style there are ways that you can adjust it. For example by simply being aware of the spirals of aggression of complementary schismogenesis, you can resist the impulse to contribute to the spiral yourself and try a different tact.

Being aware of the frames in which our conversations take place can help us to change them for the better. We can do that directly by metacommunicating, that is by simply naming the frame ("I feel like we are having a yelling match - can we calm it down?"). An even more powerful way to change the frame is to do so subtly without naming the it, i.e. by reframing.

The Bigger Picture

The processes of conversational style that play themselves out in private conversations are also at the heart of public and international relations. Just as spouses blame each other for miscommunications, individuals in a cross-cultural context tend to blame the other group. Thus for example the "establishment" blames the newcomers for their failure to behave as expected by the predominant culture.

Looking to an even broader context, differences in communication styles are responsible for many of the problems in the arena of international relations. In this age of hydrogen bombs, improving the ways in which we communicate with each other is a critical necessity. Understanding the concepts of cultural linguistics as presented by Deborah Tannen can be a good beginning point towards such improved communications.

IN MEMORIUM

KURT M. LEDOUX
BORN: 11-16-50,
MINNEAPOLIS, MN
DECEASED: 08-29-92,
ANCHORAGE, AK

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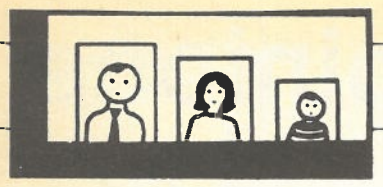

People

Alaska Bar Association President **Barbara Blasco**, former Juneau Borough & City Attorney, is now the head of the Governmental Affairs Section for the A.G.'s office.....**Lynn Allingham** is the editor for the Alaska *Journal of Law*.....**David Bundy** and Cabot Christianson have formed Bundle & Christianson.....**Paul Cossman** is self-employed as of June.

John "Jay" Frank, formerly with Hughes, Thorsness, is now with Clough & Associates.....**James Farr** is no longer the Kotzebue Magistrate, but is now a Hearing Examiner for the State handling Medicaid appeals in Anchorage.....**Mac Gibson** has relocated from South Carolina to Fairbanks.....**Martha Mills** and **Peter Galbraith** have relocated from Idaho to Anchorage.

Alexis Gabay has moved to Dallas, TX.....**Gordon Goodman** has joined the firm of Robinson, Beiswinger & Erhardt in Soldotna.....**Bart Garber,** formerly with the Native American Rights Fund, has opened his own law office in Anchorage.....**Mary Geddes** is now with the Federal Public Defender.

James Hill has joined the firm of Wade & DeYoung.....**Kevin Kinney**, formerly with Jermain, Dunnagan & Owens, is now with FDIC in Anchorage.....**Karen Kirby** is now with Advocacy Services of Alaska.....**Ardith Lynch**, formerly with the Child Support Enforcement Division, is now the Borough Attorney for the Fairbanks North Star Borough.

Ivan Lawner has left the firm of Herzfeld & Rubin in New York and has opened his own law office in White Plains NY.....**Renee Manes** has relocated to California....**John McConnaughy** is now with the firm of Fortier & Mikko....**Jan Samuel Ostrovsky** is now with Perkins Coie in Anchorage....**John Marston Richard** is now with the Municipal Prosecutor's Office in Anchorage....**Holly Roberson** is now with the Law Offices of Tim Lynch.

Chuck Ray has opened his own law office in Anchorage.....**Kathleen Strasbaugh** has relocated from Juneau to West Virginia.....**Janalee Strandberg** has relocated from Anchorage to Vancouver, B.C.....**Michael Stancampiano** has moved from Fairbanks to Colorado.

Sharon Young has been named as State Recorder for the State of Alaska, Department of Natural Resources, and will administer and direct the statewide land records system and the UCC central file system. She formerly served as house counsel for financial institutions in Colorado and Alaska, and most recently was an Associate with Groh, Eggers & Price.....**Dillon & Findley** has opened an office in Anchorage and Ray Richard Brown is now an associate with the firm.....**Sandra Wicks** has relocated from Juneau to Anchorage.....**C.J. Seidlitz** has moved from Anchorage to Great Falls, MT.

Leroy K. Latta, Jr. has transferred from the Anchorage District Attorney's office to the Attorney General's office, Environmental Litigation Section....**Linda O'Bannon and George Gary McLain** were married in Anchorage April 24, 1992.

Reporting she's "having a great time," **Jeanne Dickey**, formerly with BP Exploration in Anchorage and Houston, is now Assistant Dean for Student Affairs at the University of Utah College of Law.

Jim Cannon and Ardith Lynch are the parents of a new baby girl, born in September.

Hickel appoints Dam

Governor Walter J. Hickel has appointed William E. Dam of Anchorage to a three-year term as a public member on the Alaska Bar Association board of directors, which is made up on nine attorneys elected by the Bar Association and three non-attorneys. A retired military communications specialist, Dam has owned and operated small businesses in Anchorage, including Dam Construction Co. and Government Hill Texaco Service Center. He is also a commercial pilot and registered guide.

—Office of the Governor

Historians seek material

The Historians Committee of the Alaska Bar Association is collecting historical material relating to the Alaska Bar. If you have old photos, manuscripts, books, etc. which reflect Alaska's legal history and the lawyers and judges who were a part of it, the committee is seeking to collect and preserve these materials. Please contact Committee Chair Leroy Barker at 277-6693 or Deborah O'Regan at the Bar office at 272-7469.

Proposed change to Rule 81

The Board of governors is proposing the following change to the Association Bylaws. Please send any comments to Deborah O'Regan at the Bar office.

Article III. Section 4. **REQUIRED FEE FOR OTHER ATTORNEYS.** The required fee for other attorneys under Civil Rule 81 (a)(2) is $100.

Alaska Legal Research

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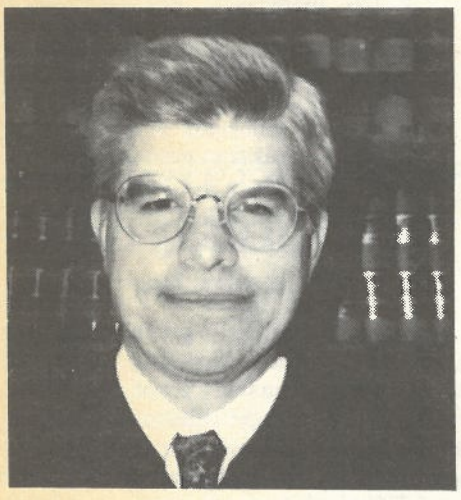
Carpenter with 20 years experience does drywall, plumbing, electrical, renovation work, wishes to exchange carpentry for paternity representation. Ernst 349-4866.

District Court judges sworn



Sigurd Murphy

Stephanie Rhoades

Sigurd Murphy and Stephanie Rhoades, appointed to the state district court bench by Gov. Walter Hickel in June, were sworn in during September.

Both will serve in the Third Judicial District. Murphy, 46, has practiced law in Alaska for 20 years. Rhoades, 33, received her law degree in 1986 and most recently was an assistant district attorney in Anchorate in the DA's sexual assault unit.

Prime Space For Law Office

Modern office space for rent located directly across from Court House. Perfect location with 2115 square ft. with separate conference room available. Will build out to suit tenant. Contact Dawn at 276-5727 for details.

Get Help From The Substance Abuse Committee

If you are concerned about your own use of alcohol or drugs, or by a fellow attorney, call one of the members on the Substance Abuse Committee. This is a referral and information committee. All inquiries will be confidential.

John Abbott
John Reese
Nancy Shaw
Mike Lindeman
Brant McGee
Cliff Groh, Sr.

Lawyer Reprimanded for Secretly Taping Phone Calls

Attorney Ronald D. Flansburg received a public reprimand from the Disciplinary Board for surreptitiously taping telephone calls. On eight occasions Flansburg recorded conversations with witnesses and parties to a pending lawsuit, each time without notice and consent. This violated Alaska Ethics Opinion 78-1, which adopted ABA Opinion 337; violation of an Alaska Ethics Opinion is grounds for discipline under Bar Rule 15(a). Although laypersons may be allowed by federal and state law to make unconsented recordings, the same act by a lawyer violates DR 1-102(A)(4), which prohibits conduct involving deceit, dishonesty, fraud and misrepresentation.

Attorney A received a private reprimand for neglect under DR 6-101(A)(3). After becoming ill, the attorney transferred responsibility for the client's matter to an associate. However, Attorney A failed to make a written report of this arrangement to the client, who claimed that he had not been notified of the illness or the new attorney. The client wrote several times for a status report but Attorney A failed to respond. Attorney A also committed neglect by failing to adequately supervise the associate, who missed a deadline for opposing a motion to dismiss with the result that the case was dismissed.

Board adopts three ethics opinions

92-3

Clarification of Ethics Opinion 86-4 Regarding Attorney's Duty When Dispute Arises Concerning the Rights of Third Parties to Client Funds in the Possession of Attorney.

A number of questions have arisen regarding the scope of Opinion 86-4, and the circumstances under which an attorney may be held responsible for failing to honor a claim by a third party against client funds in the possession of the attorney.

It is the opinion of the Committee that: (1) In order to trigger an obligation on the part of the attorney to pay a creditor's claim, in contravention of a client's instructions, the creditor's claim must be a valid assignment on its face or statutory lien which has been brought to the attorney's attention.[1] (2) If a client instructs an attorney to ignore or disregard a valid assignment or statutory lien, the attorney should advise the client that absent an explanation (e.g., a written release, or some other form of written waiver by the lienor or assignee) the attorney will withhold the disputed funds, and, absent some amicable resolution, the funds will be deposited into court where the dispute can be decided by the judge.

A. A third party claims must be honored?

This is another way of asking the question when is the attorney obligated to deliver to the client funds "which the client is entitled to receive." See DR9-102(b)(4) (emphasis added). The Committee believes that when a client executes a valid assignment from settlement proceeds, or there exists a perfected statutory lien against settlement proceeds, it creates a presumption that the client is not "entitled" to those funds. *Bonanza Motors, Inc. v. Webb*, 657 P.2d 1102 (Id. App. 1983); *Herzog v. Riace*, 594 A.2d 1106 (Me. 1991).

There may be other claims unrelated to the subject matter of the representation; for instance child support, alimony, restitution for criminal conduct and so on. "However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party." see Comment to Model Rule 1.15.[2] A client is capable of and responsible for payment of his or her own obligations. Unless the claim in question has been reduced to a valid assignment or perfected lien, a creditor has no more special "entitlement" to those funds than does the client. The creditor in that situation has other remedies, such as prejudgment attachment. *See* Alaska R. Civ. P. 89. However, where a settlement includes or references *specific* allocation for a lien claimed by a third party, the amount designated for satisfaction of the lien must be utilized for that purpose. *In re Burns,* 679 P.2d 510 (Az. 1984).

B. When does a dispute arise over the client's entitlement to his or her funds, and how should those disputes be resolved?

In the view of the Committee, if a client instructs an attorney to disregard the terms of a valid assignment or statutory lien, the attorney should promptly inform the client that the attorney is obligated to withhold and segregate those funds in question. Unless the client and the creditor are able to amicably resolve their differences, or unless the client provides the attorney with some verification that the lienor or assignee have waived their interest in those funds, the attorney will be required to deposit the funds into court for disposition by the judge. Given the fact that both sides will incur expense and delay in the event this step is taken, it would be appropriate to encourage the client and the creditor to resolve their differences promptly and amicably.

C. The attorney should be careful not to induce reliance on the part of the third party creditor.

Any number of questions may arise regarding a client's "entitlement" to funds being held by the attorney. The Committee believes that care should be taken to dispel any confusion which might arise regarding the attorney's obligations under these circumstances.

If, for instance, an attorney receives a letter from a medical provider to the effect that he or she is owed money for services provided to the client relating to the subject matter in question, that does not, in the Committee's view, create a presumption that the client is not entitled to receive the funds in question at his or her request. However, the Committee believes that the attorney in that instance should respond to the letter and convey to the medical provider the fact that this is a matter between the client and the medical provider. The medical provider should be on notice that the attorney will not be assuming the responsibility for payment of the client's bills relating to the subject matter in question; that is the client's responsibility.

The Committee believes it is inappropriate for the attorney to remain silent after having received notice of such a potential claim. While the attorney may believe that his or her silence in the face of receiving such notice is or may be interpreted as a constructive denial of the creditor's position, it is just as likely that the third party creditor may view that silence as implicit or tacit acceptance of the third party claim.

The situation is ripe for confusion, and the Committee believes the attorney should take the affirmative step of responding to these claims by shifting the burden back where it belongs, namely on the third party creditor and the client.

In conclusion, the Committee believes that an attorney is not ethically obligated to arbitrate claims between creditors and his or her client. With respect to third party creditors who have not received an assignment from the client, or who have not perfected a statutory lien, and assuming the attorney has followed the recommendations outlined in Section C above and informed the creditor that the claim should be taken up directly with the client, the attorney should be free to follow the client's instructions with respect to return of client property. Even though the attorney may be aware of a potential problem in this regard, the Committee does not believe this vitiates the client's "entitlement" to return of his or her property, pursuant to DR 9-102(B)(4).

If a client instructs an attorney to disregard the terms of a valid assignment or statutory lien, the attorney should promptly take the appropriate steps to segregate those funds in question, and to inform the client that, absent a resolution which is satisfactory to all parties concerned, the attorney will be obliged to deposit the funds into court for disposition by the judge.

Approved by the Alaska Bar Association Ethics Committee on April 2, 1992.

Adopted by the Board of Governors on June 1, 1992.

[1] However, practitioners should be aware that under some tax lien statutes, the statutory filing requirements provide the element of notice. See 26 U.S.C. s 6321.

[2] The Model Rules of Professional Conduct have been approved by the Alaska Board of Governors and are currently pending before the Alaska Supreme Court.

92-4

Acceptance of Subrogation Case on a Contingent Fee Basis Where Client is Able to Pay on an Hourly Basis

Question Presented

Is it ethical under the Code of Professional Responsibility for a lawyer to accept a subrogation case on a contingent fee basis from a subrogated insurer who desires such an arrangement but is capable of paying on an hourly basis?

Conclusion

A lawyer may ethically accept a subrogation case on a contingent fee basis from a client who desires such an arrangement even though the client is able to pay on an hourly basis, provided that the client has been fully informed of all relevant fee arrangement alternatives and the proposed contingent fee arrangement is reasonable and not excessive.

Statement of Facts Presented

On larger property damage losses, particularly fires, the owner of the property is usually reimbursed by insurance for the loss. The paying insurer then becomes subrogated to the rights of the insured either by virtue of the insurance policy provisions or by common law. Subrogated insurers on large losses typically bring an action against a third party to recover part or all of their payment where they believe the third party was responsible for causing or contributing to the loss.

Most subrogated insurers have adequate financial resources to pay a lawyer on an hourly basis. Some of these subrogation cases are handled on an hourly basis by counsel who normally do defense work for such insurers. Other subrogation cases are handled on a modified contingent fee basis with the insurer paying a reduced hourly rate plus an additional contingent fee if there is a recovery.

In the past few years, however, the practice has arisen of large insurers refusing to pay any hourly fee for subrogation work but instead insisting on a pure contingent fee arrangement. Some insurers have engaged in lawyer shopping based on who will agree to the lowest fee, including lead counsel from outside Alaska. It is alleged that such counsel from outside Alaska routinely violate the requirements of Civil Rule 81(a)(3). Further, it is contended that because subrogated insurers on a contingent fee basis have no investment in the litigation other than costs, they are more likely to take a case to trial rather than settle it.

Discussion

Ethical Consideration 2-20 of the Code of Professional Responsibility states in pertinent part:

> Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with any client who, after being fully informed of all relevant factors, desires that arrangement.

Disciplinary Rule 2-106 of the Code separately requires that any fee arrangement must be reasonable and not excessive.

The Model Rules of Professional Conduct[1] similarly permit the use of contingent fee arrangements in all types of cases except for criminal and domestic relations matters. *See* Model Rules 1.5(c) and (d). Significantly, the cautionary language of EC 2-20 quoted above has been omitted from the Model rules.

Although the contingent fee has gained acceptance largely as a means of providing legal services to those who otherwise could not afford them, courts have not restricted contingent fee arrangements solely to indigent clients. *See DeGraff v. McKesson & Robbins, Inc.*, 31 N.Y.2d 862, 292 N.E.2d 310, 315, 340 N.Y.S.2d 171, 177 (1972) (Breitel, J., dissenting). Apart from the need to provide legal services to those who cannot afford them, there is also an impor-

Continued on page 16

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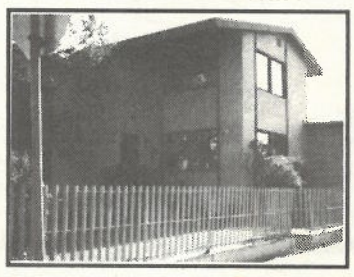

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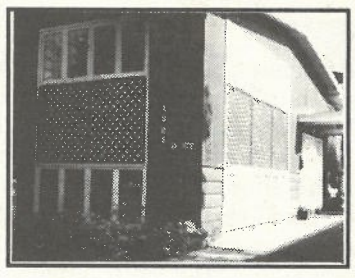

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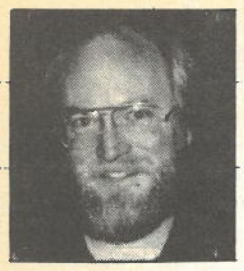

Torts

By Michael Schneider

Negligent Infliction of Emotional Distress in Alaska: The history

The seminal case allowing recovery for emotional injury unaccompanied by impact or physical injury was *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968). The Supreme Court of California adopted guidelines in evaluating NIED claims as follows:

> " 1. Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it.
>
> 2. Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurence.
>
> 3. Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship."

Id. at 920.

It is against this precedential backdrop that our supreme court first considered a claim for NIED in the case of *Tommy's Elbow Room, Inc. v. Kavorkian,* 727 P.2d 1038, 1043 (Alaska 1986). Fred Brantingham drove by the scene of an accident on his way home. When he arrived home and found that his daughter was not there, he realized that she must have been the person involved in the accident. He immediately returned to the scene and "perceived and suffered shock from observing his child's injury." *Id. at 1043.*

Our supreme court recognized this bystander's right to recover damages for negligent infliction of emotional distress caused by injury to another, concluding that it was *reasonably foreseeable* that a parent would appear at the scene and suffer emotional harm. *Id.*

Kavorkian was followed in 1987 by *Croft v. Wicker*, 737 P.2d 789 (Alaska 1987). In Kavorkian, the Court adopted guidelines set forth in *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968) for determining whether the risk of harm to the plaintiff was reasonably foreseeable, thus creating a duty of care. *See Kavorkian* at 1040-43. The court in *Kavorkian* recognized that one of the *Dillon* requirements, that the claimant suffer emotional impact from a contemporaneous observance of the accident, was not met by the plaintiff, but that this requirement should be viewed as a "guideline" and liberally interpretad. *Id.* The court in *Croft* came to an identical conclusion in holding that it was reasonably foreseeable that Wicker's act of sexual abuse toward the Crofts' daughter would cause them emotional harm upon discovery of the acts and whether or not the acts were actually witnessed by the Crofts. *See Croft* at 790-92.

Croft was followed by *Mattingly v. Sheldon Jackson* college, 743 P.2d 356 (Alaska 1987). Mattingly's son was working in a trench, cleaning a drain pipe on the Sheldon Jackson college campus. The trench collapsed seriously injuring him. Mattingly was in Ketchikan at the time. The Sheldon Jackson college campus was located in Sitka, 150 miles away. Mattingly asserted a claim for negligent infliction of emotional distress. The trial court dismissed the claim. On appeal, the supreme court determined that Mattingly had no claim for NIED, and that he was sufficiently removed in both time and distance from the accident that he had an pportunity to "steel himself" against the emotional impact of first observing his son's injury in the hospital upon his arrival in Sitka. *Id.* 364-66.

The cause of action for NIED was next visited by the Supreme Court in *Hancock v. Northcutt*, 808 P.2d 251 (Alaska 1991). The trial court instructed the jury that if the Hancocks were negligent in performing duties under a construction contract and thus caused the Northcutts' emotional distress, damages for emotional distress could be awarded. *Id.* at 257. The supreme court acknowledged the general rule that damages may not be awarded against a tort feasor for emotional distress unaccompanied by physical injury. The court went on to observe:

> "In [*Mattingly, Croft*, and *Kavorkian*) we recognized an exception to the general rule where the plaintiff is shocked by observing tha physically injured victim 'more or less contemporaneously with the plaintiff's learning of the nature of the victim's injuries.' *Mattingly*, 743 P.2d at 365-366. This exception has no application in the present case."

Id. at 257.

The supreme court found that breach of a house construction contract was not likely to result in serious emotional disturbance and thus denied the cause of action. Again, the court's focus was on the foreseeability of the harm. As a matter of law, the court simply concluded that such harm was not foreseeable when the distress grew out of breach of a contract of this nature. *Id.* at 258.

II. The Problem.

While Mr. Brantingham was not present at the accident that claimed his daughter's life, he returned to the scene while emergency personnel were in the process of removing her lifeless body from the wreckage. *See Kavorkian* at 1040. Our supreme court elected to recognize his claim for NIED. Mr. Mattingly was not at the scene of the cave in that injured his son, nor did he ever arrive at the scene itself. Instead, his first observation of his son and his son's injuries took place at the hospital in Sitka, following a trip by air from Ketchikan to Sitka of over 150 miles. *See Mattingly* at 365-66. Having abandaned the Dillon requirement that the plaintiff's emotional damage flow from "the sensory and contemporaneous observance of the accident," where is "the line" to be drawn?

The California supreme court has elected to interpret the *Dillon* factors as strict requirements instead of guidelines. In *Thing v. La Chusa*, 771 P.2d 814 (Cal. 1989), the California supreme court upheld summary judgment dismissing an NIEO claim of a mother who, after learning that her son had been struck by a car, rushed to the scene to observe him, bloodied and unconscious, lying in the streat. The California supreme court denied recovery under these facts, concluding that a plaintiff could recover for NIED if, and only if, the plaintiff:

> (1) is closely related to the injury victim; (2) is present at the scene of the injury producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress—a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances.

Id. at 829-30, footnotes omitted.

Aware of this constraint by the very court that authored the *Dillon* decision, defense counsel and insurance carriers routinely refuse to acknowledge the viability of a claim for NIED where the claimants appear at the hospital or at some location other than the scene of the accident itself. Arguments that the case law of Alaska focusas more strongly on foreseeability have generally met with the rejoinder that a "bright line" test like the one set forth in *Thing* would be adopted by our supreme court and require, at a minimum, that the plaintiff arrive at the scene of the accident; showing up at the hospital won't get it.

III. The Answer: *Beck v. State of Alaska.*

July 31, 1992, our supreme court issued Opinion No. 3871 in a case styled *Ida Marie (Pavao) Beck, Individually and as Personal Representative of the Estate of Jerrie Beck, Appellant, v. State of Alaska, Dept. of Transportation and Public Facilities, Appellee.* Jerrie Beck was killed when the car she was driving left the roadway along a stretch of state-maintained highway near Petersburg, Alaska. *Id.*, Opinion pp. 1 and 2. The decedent's mother was at her home in Petersburg, about six miles from the accident scene, when she learned of the accident. She drove to the scene and observed rescue workers in the area, but was unable to approach the vehicle that contained her injured daughter. She then drove to the hospital. Within minutes of her arrival at the hospital, her daughter was brought in on a gurney and Beck first observed her injuries. *Id.*, Opinion pp. 5 & 6. Conceding that the facts of Beck were intermediate between *Kavorkian and Mattingly* (*Id.*, Opinion at 5), the supreme court reversed the trial court's dismissal of Beck's NIED claim made upon the state's motion for summary judgment:

> "one who is thrust, either voluntarily ar involuntarily, into such dramatic events and who makes a sudden sensory observation of the traumatic injuries of a close relative in the immediate aftermath of the event which produced them is no less entitled to assert a claim for his or her emotional injuries than one who actually witnessed the event. By contrast, one who learns of the injury or death of a loved one, or who observes the pain and suffering or the injuries only after a considerable period of time has elapsed since the accident, suffers a harm which, while foreseeable, policy and reason dictate the law should not regard as compensable.
>
> Because Beck's emotional shock resulted from her observation of her daughter's traumatic injuries during the continuous flow of events in the immediate aftermath of the accident, and because it cannot be said that she had time to "steel herself" as did the plaintiff in *Mattingly*, we conclude that her injury was foreseeable."

Id., Opinion p.8.

IV. Practical Considerations.

Unless the potential plaintiff has had plenty of time (as in *Mattingly*) to "steel" themselves against the shock of observing a seriously injured loved one, their emotional trauma is likely to be found by the court to be foreseeable and thus compensable. This can be extremely important where inadequate insurance coverage exists for the underlying injury because, unlike loss-of-consortium claims that are generally held to be derivative in nature, claims for NIED trigger separate "per-injury" limits. *See* for example *Wolfe v. State Farm Ins. Co.*, 540 A.2d 871 (N.J. Super. A.D. 1988). Negligently inflicted emotional distress is a separate bodily injury. Not only does the claim address previously unrecoverable damages suffered by family members, it provides the only method of squeezing more money out of a policy that may otherwise appear to be exhausted.

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Ethics opinions: Fees & mass disasters

Continued from page 14

tant economic reason to support the use of contingent fees. In many instances a contingent fee arrangement provides a client with an efficient way to share or spread the risk of nonrecovery. If a client, fully advised of alternative fee arrangements, prefers to have the lawyer share the risk of nonrecovery in return for a potentially higher fee, there is no logical reason why such an arrangement should be limited to indigent clients. *See generally* Note, The Contingent Fee: Disciplinary Rules, Ethical Considerations, or Free Competition?, 1979 Utah L. Rev. 547, 550; Comment, Are Contingent Fees Ethical Where Client Is Able to Pay a Retainer?, 20 Ohio St. L.J. 329 (1959).

In Alaska Ethics Opinion No. 74-3, the Committee addressed substantially the same question of whether it was unethical for an attorney to insist on a contingent fee in a personal injury case where the client had the ability to pay on an hourly basis. The Committee found that such a practice was not unethical as long as the fee charged was not excessive and the lawyer fully explained to the client all possible fee arrangements so that the client could make an informed decision uninfluenced by the lawyer's personal preference.

The Committee hereby reaffirms the views expressed in Ethics Opinion No. 74-3 and specifically applies them to the facts presented here. A subrogation claim arising out of a personal injury or property damage is typical of the kinds of tort claims that traditionally have been pursued on a contingent fee basis. Even though a subrogated insurer may be financially capable of paying a lawyer on an hourly basis, there is no ethical reason why the insurer should not be permitted to choose payment on a contingent fee basis regardless of the lawyer's preferred form of payment. If the lawyer does not wish to perform the work on a contingent fee basis, he or she is free to decline the work.

Regarding the alleged violations of Civil Rule 81 by counsel outside Alaska, such complaints are beyond this Committee's authority and should be referred to the court or to the bar disciplinary process. Furthermore, the concern regarding the impact of contingent fees on an insurer's willingness to settle subrogation claims does not raise an ethical issue. It is not the purpose of the ethics rules to balance the economic forces between parties in litigation.

Given the sophistication and financial resources of most insurers, the negotiation of a fee arrangement in subrogation cases would appear to involve two equally knowledgeable parties. Nonetheless, before entering into a contingent fee arrangement with any client, a lawyer should ensure that the client is fully informed of alternative fee arrangements and that any proposed contingent fee is reasonable and not excessive.

Approved by the Alaska Bar Association Ethics Committee on April 2, 1992.

Adopted by the Board of Governors on June 1, 1992.

[1] A version of the Model Rules of Professional Conduct has been approved by the Board of Governors of the Alaska Bar Association and is under consideration for adoption by the Alaska Supreme Court.

ETHICS OPINION NO. 92-5
Solicitation of Clients

The Board of Governors has requested the committee's guidance regarding the Bar's duty to the public following mass disasters. This opinion will set forth ethical considerations involved in the solicitation of clients. These ethical rules are binding upon lawyers in Alaska. The ethical rules apply to any lawyer soliciting any client for pecuniary gain and are not limited to mass disaster situations.[1]

DR 2-103 and DR 2-104 of the Code of Professional Responsibility deal with solicitation of clients. DR 2-101 deals with media advertisement. The Model Code predates recent United States Supreme Court decisions involving legal solicitation.[2] The American Bar Association Model Rules of Professional Conduct recognize the evolution of the law of lawyer advertisement. Model Rule 7.3(a) correctly states the constitutional limitations on solicitation of clients. The ethical limits on solicitation must be determined by reference to the present canons together with applicable case law.

Summary of the Opinion

1. A lawyer may not, either personally or through third persons, engage in person to person or telephonic solicitation of persons who have been involved or who have had family members involved in mass disaster.

2. A lawyer may advertise in the public press or through the electronic media. The advertisement may not misrepresent or mislead the public. It must state at the beginning and end of the message that it is an advertisement.

3. A lawyer may make direct mailings either to the general public or to individuals known to be in need of legal services subject to the same rules on misrepresentation. The mailing must contain the words "Advertising material" on the outer envelope.

4. A lawyer may not continue to directly solicit business after the prospective client makes known a desire not to receive such solicitation. The solicitation may not involve coercion, duress or harassment.

Discussion

DR 2-103(A) provides "A Lawyer shall not, except as authorized in DR 2-101(B), recommend employment as a private practitioner, or himself, his partner, or associate to a layperson who has not sought his advice regarding employment of a lawyer." DR 2-103 (B) prohibits the payment of compensation to individuals or organizations not listed within DR 2-103(D) for referral of work or recommendation resulting in employment. If a lawyer gives unsolicited advice to a layperson recommending that the layperson obtain counsel, that lawyer may not thereafter accept employment from that person except in the limited circumstances set out in the rule. Thus, the present canons prohibit a lawyer from recommending herself or her law firm to an unrepresented layperson who has not sought such advice. The rules would allow the lawyer to advise the individual that he needs to seek counsel. When such unsolicited advice is given, the lawyer cannot thereafter accept employment.

Present DR 2-101 prohibits "public communications" containing false, fraudulent, misleading, deceptive, self-laudatory or unfair statements or claims. DR 2-101(B) limits or purports to limit the information which may be disseminated. DR 2-101(B) also requires advertisement to be made in a "dignified manner."

The disciplinary rules are amplified by decisions of the United States Supreme Court. There are three cases which are germane to the situation before the committee. In *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 454 (1978), the Court upheld a blanket prohibition against any form of in-person solicitation of legal business for pecuniary gain. The State's interest in preventing "those aspects of solicitation that induce fraud, undue influence, intimidation, overreaching and other forms of vexatious conduct" overrides the lawyer's interest in communication. *See Annotated Model Rules of Professional Conduct*, American Bar Association (Second Edition) 1992, p. 522. The Supreme Court noted that since in-person solicitation for pecuniary gain is basically impossible to regulate, a prophylactic ban is constitutional.[3] Thus, the committee believes that the ban on in-person solicitation arising out of DR 2-103 and DR 2-104 is proper and may be enforced. The considerations which influenced the Court in Ohralik are no less important in Alaska. "Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decision making..." 436 US at 457.

This prophylactic ban is limited to in person and telephonic solicitations. It does not apply to printed advertisements. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). There, the Supreme Court also evaluated constitutional limitations on the content of printed solicitations. The State may always regulate false or misleading statements. Other restrictions may be made only "in the service of a substantial governmental interest and only through means that directly advance that interest." *Id.* For instance, the State's desire that attorneys maintain their dignity in communications with the public is not an interest substantial enough to justify abridgement of the First Amendment right. *Id.*

The Supreme Court upheld the state finding of misleading solicitation in one important instance. Zauderer had advertised the availability of a contingent fee arrangement, without informing the public that an unsuccessful litigant would be liable for costs and fees. The Court noted that the advertisement informed the public, "if there is no recovery, no legal fees are owed by our clients." *Id.* The Court upheld the state's discipline because the reasonable implication made by unsophisticated laypersons would be that if the cause was unsuccessful, they would owe nothing. *Id.*

Shapiro v. Kentucky Bar Ass'n, 486 US 466 (1988) held that a State Bar Association may not preclude a lawyer from sending mail advertisements to individuals who are known to require specific legal services. The Court rejected the claim that *Shapiro* was *Ohralik* "in writing." "In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference." 486 US at 475. The letter sent by Shapiro posed much less risk of overreaching or undue influence than in-person solicitation because of the absence of "the coercive force of the personal presence of a trained advocate" or the "pressure on the potential client for an immediate yes-or-no answer." *Id.* The recipient of a letter is free to ignore the mailing, discard the mailing or if he chooses read it. The personalized mailing is, of course, subject to the same limitation on misrepresentation as any other public communication.

Proposed Model Rule of Professional Conduct 7.3(a) correctly limits a lawyer from in-person and telephone solicitation for pecuniary gain.

The United States Supreme Court Cases do not regulate the extent to which a lawyer may continue to solicit clients after being informed that the client does not wish to be the recipient of further solicitation or the solicitation involves coercion, duress or harassment, Model Rule 7.3(b) would prohibit those practices. The committee believes that such limitations would be implicit under the current canons as applied by the United States Supreme Court because an attorney's First Amendment right to free speech does not include a right of coercion, duress or harassment.

Model Rule 7.3(c) requires that "Every written or recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter and with whom the lawyer has no family or prior professional relationship, shall include the words "Advertising Material" on the outside envelope and at the beginning and ending of any recorded communication." *Shapiro* neither condemns nor condones this limitation. In the view of the committee, there is much less opportunity for misrepresentation or misleading solicitations if such communications are clearly labeled as advertisement. Therefore, in the view of the committee, this restriction is reasonably related to the express goal of preventing misleading solicitation.

Approved by the Alaska Bar Association Ethics Committee on April 2, 1992.

Adopted by the Board of Governors on June 1, 1992.

[1] The committee recognizes the work of Bruce B. Weyhrauch, Esq. and the bench and bar of Juneau who have studied and prepared a mass disaster plan for the First Judicial District.

[2] The Bar Association has proposed the adoption of the Model Rules of Professional Conduct but the Alaska Supreme Court has yet to act upon that recommendation. More than two-thirds of the States have adopted the Model Rules. Given the evolution of the law of Lawyer advertising in the United States Supreme Court, the existing canons are both incomplete and confusing.

[3] The Constitutional ability to ban solicitation is limited to situations where the lawyer is motivated by pecuniary gain. The Supreme Court has specifically ruled that in cases where there is no motivation for pecuniary gain (public interest litigation), the Bar may not regulate solicitation of prospective clients because of the lawyers right to free association. *In re Primus*, 436 U.S. 423 (1978).