The Alaska BAR RAG

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Inside:

Alaska first in trusts

BY RICHARD W. HOMPESCH II

After hearing about the estate planning benefits of the Alaska Trust Act a lot of Alaskans asked, "What happens when other states pass it?" The best response I heard to that was from Jonathan Blattmachr. He would ask, "Who was the first person to fly solo across the Atlantic?" In a state that has more pilots per capita than any other, everybody had heard of Lucky Lindy. Then Jonathan would ask, "Who was the *second* person to fly solo across the Atlantic?" Not one person has told me yet.

Although a lot of us expected Delaware to pass copy-cat legislation, we thought that Delaware would not be able to pass anything very quickly. We wanted Alaska to have a head start and for a year or so to be the only state that allowed self-settled spendthrift trusts. We were wrong. In a little over three months Delaware swiftly passed legislation that took Alaska three months and one year to pass.

Delaware is serious about its trust business. In a recent article from Associated Press reporter Todd Spangler that appeared in the Anchorage Daily News on July 29th entitled "*Delaware again 1st in trusts,*" Delaware state deputy bank commissioner Robert Glen was quoted as saying, "It (Alaska) was going to be the jurisdiction of choice. But Delaware has a long history of preeminence in the area of trusts."

In my view, to use Jonathan's analogy, shortly after takeoff the Delaware trust act had engine problems and crashed and burned at the end of the runway. Rumor has it that Delaware will try and repair its trust act. This article will review why Alaska has little to fear from Delaware's current trust legislation.

The very narrow estate tax issue is whether a self-settled spendthrift trust can be structured so that its assets are excluded from the settlor's estate. Under IRC §2036(a)(1) the gross estate includes the value of all property transferred to trust to the extent that a taxpayer "retained for [her] life ... the possession or enjoyment of, or the right to income from, the property." Under IRC §2038 the property in a trust will be included in the settlor's estate if she can terminate the trust by "relegating [her]

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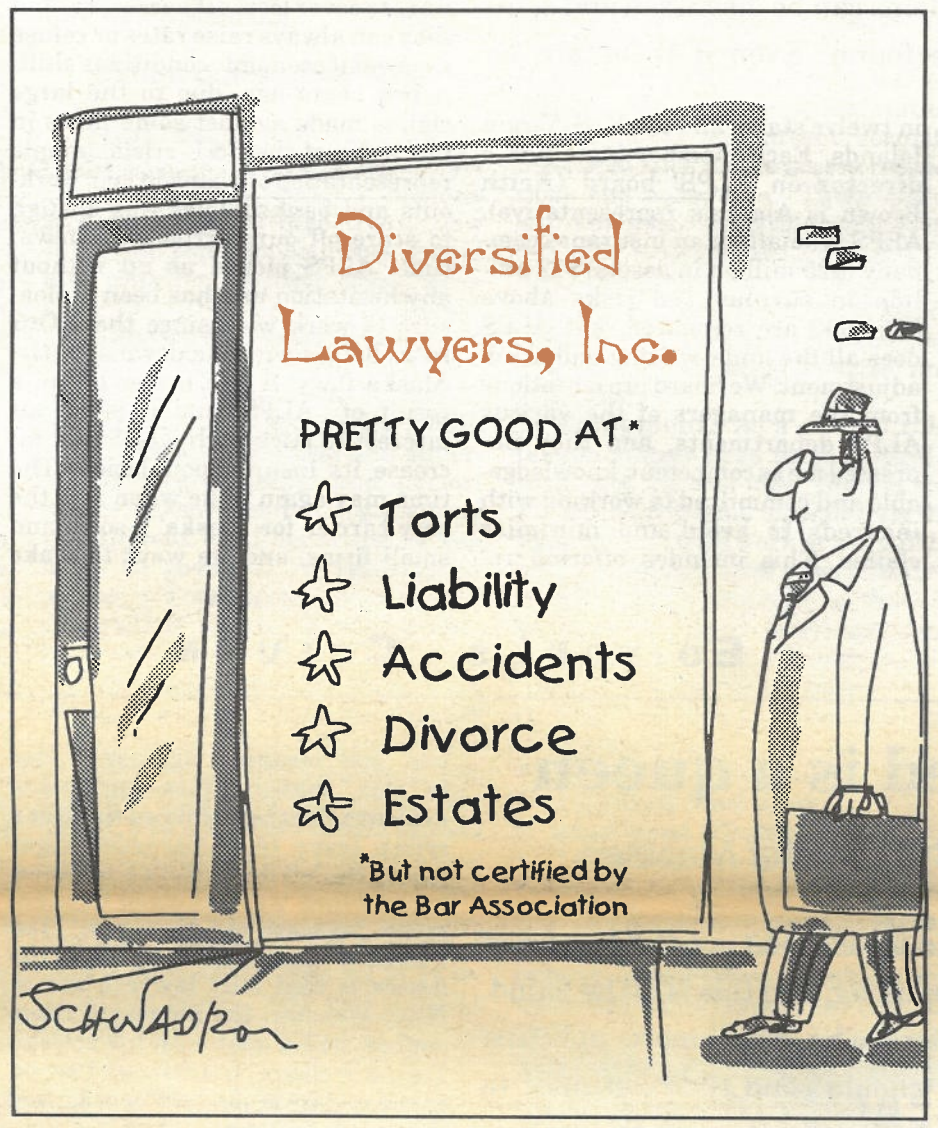

Alaska Rule of Professional Conduct 7.4

Disclaimers in lawyers' advertising?

BY ROB STONE, RAY BROWN, AND BARBARA SCHUHMANN

INTRODUCTION

Published in the last issue of the *Bar Rag* was the Board of Governors' proposed amendment to ARPC 7.4 (Communication of Fields of Practice and Certification). Surprisingly, the Bar Association did not receive any comments regarding the proposed amendment, but due to the significant changes proposed by this amendment, the board decided to re-publish the proposed rule along with a commentary by members of the board to address the pros and cons of adopting the rule. The Board of Governors *encourages* your comments.

The proposed amendment makes two significant changes. First, it creates a certification system in Alaska

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New immigration laws increase demands for legal assistance

BY BARBARA HOOD

Recent changes in federal immigration and welfare laws have meant overwhelming demands for legal assistance to the local Immigration and Refugee Services program of Catholic Social Services. According to program director Robin Bronen, the agency now receives over 300 requests for assistance each month from people who are anxious and confused about the effects new laws will have on themselves and their families. As the three-person staff for the only legal services agency in Alaska dedicated exclusively to the needs of immigrants and refugees, Bronen and her colleagues Nancy Karterman and Maria Teresa Amaya are feeling the pressure.

"The needs of the immigrant community in Alaska are great," says Bronen, who has engaged in extensive legislative, administrative and legal advocacy in recent months to address the impact of the changes. Achieving citizenship has become critically important to many immigrants. Recent changes in the welfare laws will require the termination of benefits to elderly and disabled immigrants who are not citizens—even those who have lived and worked in the U.S. legally for decades.

To address this problem, Bronen and her staff have been presenting workshops on the naturalization process to individuals and community organizations across the state. In Anchorage, Bronen presents workshops regularly at the Fairview Recreation Center. In Fairbanks, she recently met with over fifty elderly Koreans through the cooperation of the Korean Presbyterian Church. In Kodiak, a workshop at St. Mary's Church was filled to overflowing with over 140 people from England, Russia, Costa Rica, El Salvador, Guatemala, Honduras, Burma, the Dominican Republic, the Philippines, Korea, American Samoa, Western Samoa, and Mexico.

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"The Kodiak workshop was scheduled to end at 10:00 PM," Bronen said, "but we were at the church until well after midnight."

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President's Column

Summer meetings

☐ David H. Bundy

One of the functions of your Bar President is to attend various meetings of national and regional bar organizations, during which, it is hoped, mutual problems can be discussed and solutions can be found. Even if there are no obvious solutions, it is comforting to know that most bar associations share the same concerns.

In July, Will Schendel, Deborah O'Regan and I attended an ALPS meeting in Missoula. Most of you probably know that ALPS (Attorneys Liability Protection Society) is a "captive" insurance company which was established in 1987 to provide professional liability insurance to lawyers in smaller states, such as Alaska, in which the commercial market was then showing little interest.

Currently ALPS covers attorneys in twelve states and the U. S. Virgin Islands. Each member state has a director on ALPS' board (Keith Brown is Alaska's representative). ALPS is small for an insurance company ($25 million in assets, $12 million in surplus), so risks above $250,000 are reinsured, but ALPS does all the underwriting and claim adjustment. We heard presentations from the managers of the various ALPS departments, and they impressed me as competent, knowledgeable and committed to working with insureds to avoid and minimize claims. This includes offering resources to deal with potential liabilities before they develop into claims, and reviewing office procedures to reduce the risk of claims in the first place. In my experience, these services are well worthwhile.

ALPS is not the lowest-cost carrier all the time, and there may be a temptation to go for the savings if they are offered by another insurer. Larger and more diverse insurers can offer coverage for lower premiums if they want to attract legal insurance business; they have other lines to cover losses if necessary, and they can always raise rates or refuse renewal if economic conditions shift. A few years ago, due to the large claims made against some firms in the wake of the S&L crisis, simple representation of a bank in loan workouts and bankruptcies was enough to scare off our carrier at renewal time. ALPS picked us up without any hesitation and has been a pleasure to work with since then. Our rates have even gone down slightly! Alaska lawyers are better off as a result of ALPS, and it is in our interest to stick with ALPS and increase its insured population. The time may again come when it is the only carrier for Alaska' s solos and small firms, and we want to make sure it is here in that eventuality.

The National Conference of Bar Presidents met in San Francisco in conjunction with the Annual Meeting of the American Bar Association. The NCBP is large and diverse, as its members include mandatory bar associations of all sizes, as well as voluntary bar organizations, many much larger than Alaska's. But Will and I did get to meet with the representatives of mandatory bars from smaller states ("smaller" means less than 12,000 members). They wrestle with the same issues that we confront, including the future of the state bar convention, the ability of the organized bar to take stands on public issues under *Keller*, general apathy among members, resistence to dues and dues increases, the public perception of lawyer incompetence and dishonesty, access to justice for lower- and middle-income persons, and fair administration of the bar examination for applicants who request accommodations under the ADA. There isn't an issue we are facing that hasn't come up in several other locations at one time or another.

I had not attended an ABA

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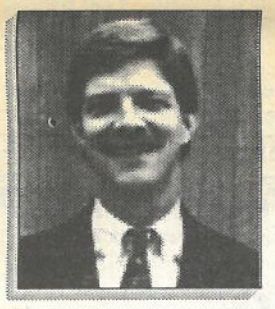
Editor's Column

What we need is a queen with a mace

☐ Peter Maassen



The Editor cleaned out the bottom of the mailbag, and this is all he found. Readers who want more uplifting commentary should send their resumes to the Bar's executive director, who will parse them for grammar and syntax before consigning them to the shredder.

Dear Editor:

Having had the chance to monitor some Canadian litigation lately, I was taken by the jazzy introduction to a Canadian form summons: "Elizabeth the Second, by the Grace of God, of the United Kingdom, Canada and Her other Realms and Territories, Queen, Head of the Commonwealth, Defender of the Faith, To the Defendants. . ." Makes you want to hop to it and obey, doesn't it? Our pathetic little counterparts not only are completely in the passive voice ("you are hereby summoned"), they do not even identify who is doing the summoning. Is it the Clerk, who signs the summons? Is it the lawyer who requested it? Is it a nameless judge?

To my mind, the mental image of an aloof and all-powerful sovereign wielding a jewel-encrusted mace is a strong incentive to get your answer filed on time. Using the power of your editor's pen, can you ram through an official Summoner for Alaska?

— Craving Authority

Dear C.A.:

The only time I've ever successfully rammed something through with my editor's pen was that time I got a peanut stuck in my ear, which explains the curious little rattle you hear whenever I drive over a speed bump. As for the substance of your suggestion, I'm afraid I have to discard all the obvious candidates. Governor Knowles is neither aloof nor all-powerful, as the legislature has proven conclusively. Besides, putting the Governor's name on the summons would prompt another legislative revision of the Civil Rules (can't those people just leave us alone?). Spider Man is all-powerful but not aloof (just ask M.J.). Binky the polar bear used to be both all-powerful and aloof, but now he's dead.

Unless the Civil Rules Committee can come up with a better idea, I therefore suggest that we petition Her Royal Highness Elizabeth the Second for permission to use her name. We are right next door, after all, and she (or is it She?) might already think we're part of Canada anyway. Putting our petition on "Commonwealth North" stationery should cinch it.

Dear Editor:

Like most lawyers I know, I use the word "conclusory" at least once a day, usually more. My computer's spell-checker doesn't like it, however, and after some searching I've been unable to find it in any dictionary. I'm beginning to conclude (is that a word?) that I may have made it up. Please tell me I'm not alone.

— Confused

Dear Confused:

You may be alone, but not with regard to "conclusory." Everybody uses it, and nobody can find it in a reputable dictionary. The word's Latinized Saxon derivation is obvious: "con" meaning "against," added to "clus," meaning those odd bits of evidence Sherlock Holmes finds at a crime scene (e.g. discarded cigar bands, the left imprint of a size twelve boot), which when cobbled together mean "against the evidence." The reason it doesn't show up in dictionaries is that only lawyers use it. Noah Webster, the pioneer lexicographer, had a spat with his brother Daniel Webster, the famous lawyer, in the middle of the "con" words, and the rest is history.

Dear Editor:

A number of courts have published opinions in verse, *e.g. In re Love*, 61 B.R. 558 (S.D.Fla. 1986), *Fisher v. Lowe*, 333 N.W.2d 67 (Mich.App. 1983), *Mackensworth v. American Trading Transportation Co.*, 367 F.Supp. 373 (E.D.Pa. 1973), *Wheat v. Fraker*, 130 S.E.2d 251 (Ga.App. 1963). Alaska's courts have not yet done so, despite Justice Matthews' proven ability in that field. What are they waiting for? Can't they see that the masses are longing for a little cultural leavening in the mastic whitebread of the law?

— Yearning for Better Things

Dear Yearning:

Who can say the court hasn't complied already? Go to the open mike at Cyrano's at 11:30 on a Saturday night, read *Caterpillar Tractor Co. v. Beck* in a boozy monotone, and see if it doesn't beat out all the free-verse competition. On the other hand, take a look at *In re Rome*, 542 P.2d 676 (Kansas 1975), in which the Supreme Court of Kansas sternly chastizes a trial judge for having made light of the defendant in a prostitution case in a 12-stanza memorandum and order containing such memorable lines as:

From her ancient profession she'd been busted, And to society's rules she must be adjusted.

Instead of merely revoking Judge Rome's poetic license (which was definitely called for), the high court found that he had violated the canons of judicial ethics by holding the defendant up to public ridicule.

(To find Rome and other reported cases noteworthy for their humor, their purple prose, or their oddball factual premises, take a look at *Blackie the Talking Cat and Other Favorite Judicial Opinions*, published in 1996 by West Publishing Company. Alaska's own literary Judge James von der Heydt is listed as a contributor, presumably of the hoary favorite *McGinley v. Cleary*, 2 Alaska Reports 269 (D.Alaska 1904).)

The Alaska Bar Rag

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Bar Letters

Fan Mail!

Rather than complete the survey on the *Bar Rag* (survey forms always seem a little limiting), I thought I would give you my thoughts on the publication.

For reasons I cannot now discern, I am a member of three bars, including the bars in Oregon and California. There is little comparison between the *Bar Rag* and the official publications of either the California or Oregon bars. Without question, the *Bar Rag* is the most readable, informative, and enjoyable of the three publications.

To be sure, the Oregon and California (especially) bar magazines are slicker than the *Bar Rag*. The editors of those magazines, though, seem to have lost touch with the notion that a bar magazine should be everything that the *Bar Rag* is and they are not - reports on developments in the law, current information on CLE's, ongoing columns about specific areas of practice, reports of disciplinary proceedings, and general good humor.

Don't "slick up" the *Bar Rag*. You've got a great thing going right now - a bar magazine that I actually *read*.

Will Aitchison

Tumbleson Fixed

This past legislative session, I successfully added language to Senate Bill 104 (The Omnibus Insurance Bill) to clarify that current Alaska law provides for "stacking" of uninsured and underinsured motorist coverage.

In 1990 I authored the original legislation which amended the uninsured and underinsured auto insurance law AS 28.20.445 to allow for greater coverage through "stacking" of policies to provide excess coverage. However, in 1995 the U.S. District Court decision in *Colonial Insurance Company of Columbia v. Tumbleson* misinterpreted the legislative intent of my legislation, thereby putting the stacking of coverages in question. The *Tumbleson* case is currently on appeal.

This solution to the court's mistaken decision in *Tumbleson* will ensure that "stacking continues to benefit injured insured by affording them equitable compensation through this excess policy coverage.

As you can imagine there was strong opposition from many in the insurance industry to continue "stacking". Additionally since this was an "omnibus" bill there was generally considerable reluctance among legislators to approve any amendments to Senate Bill 104.

Very few amendments were adopted making this fix of the *Tumbleson* problem even more significant.

I would like to thank the Academy of Trial Lawyers for their assistance and support in passing this important revision. Additionally, I would especially like to thank Mike Schneider, the attorney who originally brought this idea to me, for his tireless effort in seeking a solution to this problem.

Sen. Dave Donley

Sokappa settles into new job

Ed. note: When we last heard from Mark Sokappa a few months ago, he was serving in a government position in law in Micronesia. He sends these comments on his relocation after completing his assignment in Chuuk, Micronesia.

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The political situation and economic situation in Chuuk is very unstable. Most people only see Saipan, Guam, or Palau. So they don't know how bad a place like Chuuk is right now. Chuuk's future is very uncertain.

My wife is from Taiwan. So she stayed in Taiwan during the time I was in Chuuk. The Chuuk lifestyle was just too hard for her. It is hard without electricity and running water. It can also be dangerous for women. The women are expected to dress in clothes similar to 17th Century Puritanical New England. They don't execute the women they suspect of witchcraft, but most of the people still have strong beliefs in magic and attribute magical powers to some of the older women in the community.

After my contract ended I came to Taiwan to join my wife. My son spent some of the time with me in Chuuk so he would have the experience. I sent in our home address in Taiwan for Bar purposes because it is the best way to contact me at the moment. I am still settling into jobs. I expect to start work with a local law firm in Kaohsiung next week. The firm is Chen & Chern, 12th Flr-2., 47 Chung Hwa 4th Road, Kaohsiung, Taiwan. Fax +886-7-3322445 and Telephone +886-7-3355228. I'll let the Alaska Bar know when this will be permanent, but please feel free to publish it now.

I will be a partner with the firm. I am still doing American immigration law for local people here, but the work with the firm will also entail all aspects of foreign investment in Taiwan, investment out of Taiwan, and trading and shipping. I hope anyone from Alaska coming to Taiwan will feel free to contact me.

I planned to write a detailed article for publication on the legal, political, and economic situation in the Federated States of Micronesia; but this note has gone on for so long, feel free to publish it in the Bar Rag.

Mark Sokappa

President's Column

Continued from page 2

annual meeting before, and as there were only ten Alaska lawyers registered, I assume that this is true for most of you as well. To say it is mind-boggling is an understatement. There are thousands of lawyers in attendance and they seem to take over the city. Each substantive law section is based at a different hotel, and each puts on several days of CLE programs, conducted three or four at the same time and in competition with other sections' CLEs across the street. I attended several business law sessions and found them well worthwhile. At the same time the ABA House of Delegates is deliberating issues of great importance (such as physician-assisted suicide and the wisdom of needle-exchange programs). The ABA is a voluntary organization and is not subject to *Keller*, so it is free to debate and pronounce upon all manner of questions in the name of the hundreds of thousands of lawyers in this country who do not attend the convention and who may not know or care about what is going on. Every convention registrant and guest gets a badge. For the rank and file, the badge simply states one's name and home town. The more exalted attendees, such as officers, delegates and speakers, attach additional ribbons, placards and tags to their badges so that their status may be recognized. Saluting was not mandatory, but the civilian equivalent, holding elevator doors, was definitely in order.

The convention is amazingly organized: all the CLE programs began and ended on schedule, the speakers and their written materials were well-prepared, and the coffee, juice and danish pastry were available in abundance. The ABA staff deserves to be congratulated for pulling off such an immense undertaking so efficiently. I'm glad I went, and I encourage everyone to try it, at least once; the CLE programs justify the trip. If the ABA politics don't interest you, you can skip that part.

According to delegate Keith Brown, the proposed 9th Circuit split was on the convention agenda for discussion. Our delegation was asked if Alaska lawyers had a view on this topic. The Board has not taken a position but it will be discussed at the September meeting (which will be history by the time this is published) and may come up again. Is there any feeling that the Board should be officially for or against the split? It seems to me that the pro-split camp is motivated by the belief that Alaska's views (at least the pro-development side) are not appreciated by current court, but moving the court to Seattle and adding new judges would make a difference. Is this a valid perception? Who would sit on the new court and why would their judicial philosophies be different? Wouldn't the new circuit's judges be transferred from the existing court? Considering that most Alaska lawyers do not practice frequently in federal court or handle appeals to the 9th Circuit, does the Bar need to be heard on the wisdom of the split?

The Board has embarked on the tasks outlined in my last column. such as lawyer certification, and possible disclosure of uninsured status, which may or may not find favor with the membership. We really want some constituent reaction. What we do does affect your professional lives. We take this seriously and look forward to an ongoing dialogue.

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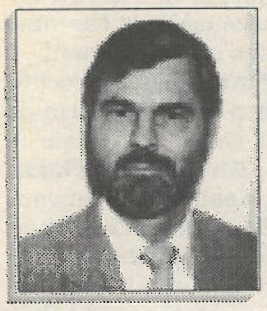
NOTICE

The Bar Rag welcomes articles from its readers

Consumer & residential leases

☐ Thomas Yerbich



In consumer chapter 7 cases the debtor frequently will be the lessee under an unexpired residential (apartment or house) and/or a vehicle lease at the time the petition is filed. Because such leases rarely, if ever, benefit the estate, the trustee generally will not assume a residential or consumer lease. Section 365(d)(1) of the Code provides that such leases are deemed rejected if not assumed by the trustee within 60 days after the petition is filed. What is the effect of this deemed rejection on the leases and the parties?

Rejection constitutes a breach of the lease as of the day immediately preceding the date the petition was filed, making any claim of the lessor against the estate arising out of the rejected lease an unsecured prepetition claim [§§ 365(g); 545(3), (4); I*n re LCO Enterprises*, 12 F3d 938 (CA9 1993)]. A claim arising out of the termination of a lease is determined by reference to state law as well as the terms of lease [*In re McSheridan*, 184 BR 96 (BAP9 1995); *In re Audra-John Corp.*, 140 BR 752 (Bank.D.Minn. 1992)], including rent accruing prepetition but prior to rejection and surrender of the property [*In re Maupin*, 165 BR 864 (Bank.MD.Tenn. 1994)]. A claim arising out of the termination of a real property lease is "capped" [§ 502(b)(6)]. Thus, the obligation of the trustee (estate) to the lessor is fairly well defined. But what about the rights and obligations or duties as between the lessor and the debtor? The Code is silent on this point. For leases of nonresidential real property the Code specifically requires the trustee to surrender the property to the lessor [§ 365(d)(4)]. Thus, rejection of nonresidential real property leases also terminates the right to possession [*In re Elm Inn, Inc.*, 942 F2d 630 (CA9 1991); *Sea Harvest Corp. v. Riviera Land Co.*, 868 F2d 1077 (CA9 1989)]. There is no similar provision in the Code with respect to residential or personal property leases. Thus, we are faced with the problem of attempting to ascertain Congressional intent. Clearly the "plain meaning" rule does not apply — silence hardly expresses a plain meaning!

First, is there really a problem? Experience has indicated that in most cases the parties simply go along their respective merry ways ignoring the fact a bankruptcy has occurred. However, a problem may arise when either (1) the debtor is otherwise in default (*e.g.*, not making the lease payments) or (2) the lessor refuses to accept payment and desires to end the relationship. What are the lessor's remedies in the first case and what rights, if any, does the debtor have in the second?

Lessor's may, of course, proceed with an FED or replevin action in state court (after obtaining relief from stay if it has not already been terminated). A secondary problem concerns the lessor's claim to delinquent rents or other monetary damages: can any part of these be recovered from the debtor? The short answer is no. A lessor has a claim against the estate, but since any obligation of the debtor arose prior to the petition, it is discharged. The lessor would not have an administrative expense claim against the estate for the continued use or occupancy of the leased property simply because that use or occupancy was by the debtor and not by or for the benefit of the estate [§ 503(b)]. Thus, while the lessor may terminate the possessory interest and the lease, the lessor may not recover any monetary damages from the debtor.

A debtor wanting to continue the lease but faced with a recalcitrant lessor faces a more perplexing threshold issue: does rejection of the lease and its statutorily-defined breach *ipso facto* terminate the lease? Neither the Code nor controlling authority answer this question and existing case law is inconsistent. As noted above, rejection of a lease constitutes a prepetition "breach," but, does that equate to "termination" or give the lessor a right to terminate the lease in the absence of some other breach of (default) the lease? For the reasons set forth below, the author suggests that rejection by the trustee in a chapter 7 of a lease of residential real property or personalty does not terminate the lease. This analysis is based primarily upon two rules of statutory construction: (1) consistency with the purpose of the Code [*see In re Mann Farms*, 917 F2d 1210 (CA9 1990)]; and (2) issues of property rights are generally determined by reference to state law [*Nobelman v. American Savings Bank*, 508 US 324 (1993); *Butner v. United States*, 440 US 48 (1979)].

The purpose of § 365(g) is to "treat rejection claims as prepetition claims" [HR Rep.No. 595, 95th Cong., 1st Sess. 349 (1977); S.Rep. No. 989, 95th Cong., 2d Sess. 60 (1978)]. Significantly, § 365(g)(1) speaks only in terms of "breach." It does not invalidate the contract, or treat the contract as if it did not exist.

Congress knew how to authorize the termination of executory contracts and leases in § 365. "Termination" is used in § 365(h), (i), and (n) as one option available respectively to the purchaser of an interest in a timeshare project, the vendee of real property, or the licensee from the debtor of a right to intellectual property if the trustee has rejected the executory contract. Accordingly, the trustee may reject any of these contracts, but termination does not occur except at the other party's option. The option to terminate a timeshare lease, § 365(h)(1), or a license, § 365(n)(1)(A), arises where the trustee's rejection "amounts to such a breach as would entitle the [party] to treat such lease or [contract] as terminated by virtue of its own terms, applicable nonbankruptcy law, or other agreements...." [§§ 365(h)(1); 365(n)(1)]. In § 365(h)(1), rejection is used synonymously with "disaffirmance" for these purposes; in none of these subsections is rejection or disaffirmance equated with termination. Under an objective reading, the provisions of § 365 may be redundant and complex, but Congress was not confused in its differing usages of the terms rejection, breach and termination.

It is also worth pointing out, as several courts have done, that breach and termination of leases or executory contracts are not synonymous terms under state law. Under Alaska law, breach does not necessarily result in termination [*Klosterman v. Hickel Inv. Co.*, 821 P2d 118 (AK 1991); *Dillingham Commercial Co. v. Spears*, 641 P2d 1 (AK 1982)]. Congress could have chosen to depart from the state law meanings of these terms, but taken as a whole, § 365 suggests that it did not.

The four circuit courts that have directly addressed the issue have squarely held that rejection and the deemed breach under § 365(g) do not *ipso facto* result in termination [*In re Lavigne*, 114 F3d 379 (CA2 1997); *Matter of Continental Airlines*, 981 F2d 1450 (CA5 1993); *In re Modern Textile*, 900 F2d 1184 (CA8 1990); *Leasing Service Corp. v. First Tennessee Bank, N.A.*, 826 F2d 434 (CA6 1987)]. Although it has not officially weighed in on the issue, a panel of the Ninth Circuit in an unpublished decision disagreed with the bankruptcy court's determination that rejection equated to termination [*In re Dailey*, 17 F3d 394 (CA9 1994) [Table]].

Cases that equate rejection with termination under § 365(d)(4) ultimately rest on a manufactured definition of termination as "breach plus surrender of the premises." Thus, the breach caused by the trustee's failure to assume or reject the lease within 60 days is "so serious" that § 365(d)(4) requires the debtor to surrender the leased premises immediately, and the breach plus surrender "can only be seen" as a termination of the trustee's rights. Contrary to this line of reasoning, the word "termination" does not appear in § 365(d)(4). Moreover, that a lease is "deemed rejected" in § 365(d)(4) cannot uniquely cause it to be "terminated," when no such consequence follows a "deemed rejection" in § 365(d)(1), and termination precedes a "deemed rejection" under the terms of § 365(d)(5) (providing that an air carrier's lease of an aircraft terminal or gate may be "deemed rejected" five days after the occurrence of a "termination event"). Section 365 offers no textual support for equating "breach plus surrender" with "termination"; to the contrary, it furnishes good reasons for deducing that Congress did not collapse breach or rejection into the termination of a lease or executory contract.

In the Ninth Circuit, *Elm Inn* and *Sea Harvest* have made clear that § 365(d)(4) terminates the right to possession. However, although the BAP may believe otherwise [*In re Port Angeles Waterfront Associates*, 134 BR 377 (BAP9 1991)], neither case discussed "termination" in any other context and are not authority for the position that a lease is terminated [*In re Locke*, 180 BR 245 (Bank.CD.Cal 1995) (this decision should be read for its comprehensive analysis of the issues)].

Like its predecessor, § 70(b) of the Act, § 365(g) does not terminate the lease but merely places the obligation to perform under the lease outside the bankruptcy estate without destroying the leasehold interest [*In re Austin Development Corp.*, 19 F3d 1077 (CA5) *cert. den.* 115 SCt 201 (1994)]. Thus, unless the lease agreement itself or otherwise applicable law so provides, rejection of a lease or executory contract does not terminate the lease or any of the rights, duties or liabilities under that lease except the right to possession where § 365(d)(4) applies (non residential real property) and the nature and amount of the claim against the es-

Continued on page 5

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Board of Governors meeting takes actions

At its meeting on September 5 & 6, 1997 the Board took the following actions:

• Accepted a stipulation for a private reprimand.

• Voted to send Bar Rule 15(b) & (c) to the supreme court. This amendment defines what disbarred and suspended attorneys may do for other attorneys, and the type of notice which must be given to clients.

• Voted to send Bar Rule 16(c) to the supreme court. This lists the factors to be considered when imposing costs and fees in a discipline matter.

• Voted to send Bar Rule 28(g) & (h) to the supreme court. This provides for public notice of discipline in probation, censure or public reprimand discipline cases.

• Voted to send Bar Rule 41 to the supreme court. This eliminates the requirement for personal delivery or certified mail in fee arbitration cases, except for service of the petition on the attorney.

• Voted to send Bar Rule 48(a) to the supreme court. This expands the size of the Lawyers' Fund for Client Protection Committee.

• Voted to send Bar Rule 61 to the supreme court. This shortens the period in which an attorney must pay a fee arbitration award and shortening the time for the required notice before suspension for nonpayment.

• Discussed the proposed amendment to ARPC 7.4 which would require lawyers who have not been certified as specialists to list a disclaimer in their advertising. Board members Stone, Brown and Schuhmann will write a pro/con article for the Bar Rag and the proposed amendment will be republished. (See the articles and the published proposal in this issue.)

• Rejected a stipulation for a private reprimand on the condition that the attorney submit to Bar Counsel audited statements of the attorney's trust accounts and office accounts for 6 month periods in 1997 and 1998. If no problems are discovered, the case will be dismissed in 1999.

• Voted to publish an amendment to ARPC 1.6. This changes the rule which states that an attorney shall not reveal "information" relating to representation of a client to "confidence or secret."

• Accepted a stipulation for a private reprimand.

• Authorized reimbursement of $4,600 to Trustee Counsel Brad Owens in the matter of John McGee under Bar Rule 31.

• Heard a report by the Executive Director on the July Bar Exam, committee appointments, the Bar's new homepage (www.alaskabar.org), the proposed 401(k) plan for the Bar staff and the status of the database conversion.

• Voted to send Bar Rules 11, 13, 15, 39 & 40 to the supreme court. These amendments change conciliation to mediation.

• Heard a report from Brant McGee on the status of the committee's meetings with the court system regarding the court security system.

• Heard a report from the Committee on the Future of the Bar Convention. The Board discussed the relatively small number of members who attend the Convention, if anything could be done to increase attendance, and whether the Bar should continue to hold a convention. The Board voted to reserve space in Fairbanks for 1999, with a 1 year cancellation clause; and for the year 2000, get the right of first refusal for space in Anchorage.

• Voted to change the name of the Torts Section to the Torts and Personal Injury Section.

• No motion was made on the Torts & PI Section Chair's request for reimbursement for attendance at national seminars.

• Adopted an amendment to the Standing Policies of the Board regarding special accommodations for the Bar Exam, which allows the Board to refer the applicant or the materials submitted to a specialist of the Board's choice for evaluation.

• Approved two reciprocity applicants.

• Heard a status report from the Budget Subcommittee.

• Delegated to the Executive Director the authority to approve all status changes, with the provision that she will bring any requests with eligibility questions to the Board.

• Approved the Board minutes as corrected.

• Tabled a member's request for a dues waiver until the October meeting, and ask the member to submit the information required by the Bylaws.

BANKRUPTCY BRIEFS

Continued from page 4

tate [§§ 365(g); 502(b)(6)].

In conclusion, rejection by the trustee of a lease of residential or personal property: (1) relieves the estate of an asset that is economically burdensome; (2) establishes that any claim arising out of the rejection is, as against the estate, a prepetition claim; (3) does not terminate the lease or otherwise extinguish the rights, duties and obligations of the lessor or the debtor as lessee thereunder; and (4) effectively operates as an abandonment of the lease to the debtor, thereby leaving the parties in the same position as though no bankruptcy had occurred. The debtor may surrender the leased property or continue to perform the lease, provided any pre-rejection defaults are cured. If the debtor defaults, the lessor may exercise any remedies against the debtor it has under otherwise applicable nonbankruptcy law, except collection of damages to the extent constituting a claim against the estate.

Our neighborhoods have no borders

The Immigration and Refugee Services program of Catholic Social Services (I&RS, CSS) has designated November 2-8, 1997, "Alaska Immigration Week," and invites the legal community to several events promoting the theme "Our Neighborhoods Have No Borders." With the generous financial assistance from the law firm of Birch Horton Bittner & Cherot and other major sponsors including the law firm of Sonosky Chambers Sachse Miller & Munson, the law firm of Atkinson Conway & Gagnon, and immigration attorney, Keith Bell, I&RS/CSS plans to celebrate the cultural diversity of our communities and raise needed funds for the program's work.

On Thursday, November 6, 1997, an evening of events will be held at UAA's Wendy Williamson Auditorium in Anchorage. The "Our Neighborhoods Have No Borders" photography exhibit, which features many Southcentral Alaskan immigrant and refugee families and includes their diverse stories, will open with a reception at 6:00 PM in the auditorium foyer. International foods will be served. Anchorage attorney and I&RS/CSS Advisory Board member Barbara Hood is coordinating this exhibit.

At 7:00 PM, immediately following the photography reception, a multicultural program of dance, music and other creative expression will take place on the Wendy Williamson stage. The first half of the program will feature interpretive works that speak to the evening's specific theme – "Our Neighborhoods Have No Borders." Prominent Alaskan dancer Rona Mason, coordinator of this segment of the program, is currently working with several groups of youths and adults to create special pieces that celebrate unity. The second half of the program will feature traditional dance and music from several ethnic communities in Anchorage. Anchorage attorney and I&RS/CSS Advisory Board member Lynda Limon, herself a dancer, is coordinating this part of the program. The evening promises to be an inspiring reminder of the I&RS/CSS philosophy that "all come bearing gifts . . . every newcomer adds color, beauty and strength to the fabric of our society."

In addition to the November 6 events, I&RS/CSS is asking religious leaders throughout the state to highlight the cultural diversity of their communities at services during Alaska Immigration Week. Archbishop Francis Hurley of the Catholic Archdiocese of Anchorage and Bishop Michael Warfel of the Archdiocese of Juneau have already dedicated Masses on Sunday, November 2, 1997, to the theme.

The mission of Immigration and Refugee Services is to "work toward unity, despite our differences, to make Alaska a place where all people of different ethnic backgrounds, religions, tongues, and creeds live harmoniously." Anyone interested in information about the program may call program director Robin Bronen at 276-5590. For details about "Our Neighborhoods Have No Borders" events and Alaska Immigration Week, please contact Anchorage coordinator Trang Duong at 263-2055 or Juneau coordinator Irma Mireles at 780-4475.

Mara Kimmel, Associate with the law firm of Birch Horton Bittner & Cherot in Anchorage (Front) meets with (Back, Left to Right) Immigration & Refugee Services Program Director Robin Bronen, Advisory Board members Lynda Limon and Mary Bloes, and Advisory Board Chair Ingrid Varenbrink. The law firm of Birch Horton Bittner & Cherot is a major sponsor of the upcoming activities of Alaska Immigration Week, November 2-8, 1997.

New immigration laws

Continued from page 1

The plights of the people she has encountered in her travels have left Bronen plainly moved and concerned. "The new laws place the well-being of many fine people in jeopardy," she says.

For example, to achieve citizenship an immigrant must learn to read and write in English. "Yet many of the elderly people I have met do not read or write even in their birth language," Bronen explains. Literacy--something many Americans take for granted--is not a given in countries where a basic education is neither guaranteed nor readily available. Waivers of the language requirement are allowed only if a doctor certifies that an applicant is unable to learn English because of disability. Under this strict standard, Bronen says, few will achieve waivers despite the enormous difficulty many will face learning a new language at an advanced age.

"Elderly and disabled immigrants are on the verge of having their lives radically and tragically altered," Bronen says.

Not all new immigration laws will pose hardship, however, Bronen notes. The new Violence Against Women Act (VAWA) will help immigrant women who are being abused by husbands who are U.S. citizens or permanent residents. Previously, immigrant women in such situations had to rely on their husbands to apply for lawful permanent residency in the U.S. Abusive husbands often used this fact to perpetuate the abuse, and frequently failed to follow through with the petitioning process. Now, immigrant women in abusive relationships can apply for residency for themselves and their children directly with the Immigration and Naturalization Service (INS). Their husbands do not have to participate or even be aware of the proceedings.

These changes can relieve the legal limbo that abused immigrant women have experienced, Bronen says, but legal consultations are critical because the rules are complicated. Currently, she is planning consultations and workshops at women's shelters and other social service organizations. "We are really trying to get the word out that this new relief is available," Bronen says.

In addition to the above activities, Bronen and Karterman represent numerous clients before the INS. Most recently, they represented two young men from El Salvador who are seeking political asylum based on persecution and killings in their country. One man testified that he was forced to join the El Salvadoran military, then witnessed thepersecution of his family and ultimate murder of his father by the opposing forces. His claim has been denied at the hearing level, but remains on appeal. Another man testified that he and his brother were dragged from their home by military forces and that he watched as his brother was beaten and murdered. The INS Judge granted his claim.

Despite the difficulties she and her staff are facing because of the recent changes, Bronen remains hopeful and inspired. Throughout the state, she has met people who are volunteering countless hours to help the immigrants in their communities. "In August community members in Anchorage and Kodiak created a circle of sanctuary and care for several clients who had suffered intense forms of persecution," she says, "and I was deeply moved by their efforts."

In early November, the Advisory Board of Immigration and Refugee Services will sponsor "Alaska Immigration Week," which will feature several activities to benefit the program (see accompanying article). Bronen says she hopes these events "will educate people about the wonderful gifts that immigrants bring to our community."

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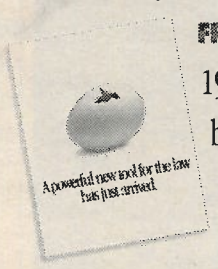

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TALES FROM THE INTERIOR

Unnatural selection

☐ William Satterburg

In late 1982, I decided to open up my private little shop. Over the previous six years, it had become most apparent that I was not well adapted for state or federal public sector work. My ability to hold a cocktail glass in hand at a business reception was woefully lacking, although I was good with a long-necked beer bottle.

Due to a profound lack of funding which all young lawyers experience unless they have rich parents, I began by working out of the back of my 1982 Plymouth Aries station wagon. For file cabinets, I had two shopping bags. In one bag, I carried office files consisting of my one page client ledger, various other paper products, and a bottom full of purloined pens, pencils, and highliters. In the other, I placed my one very valuable client file. Eventually, I was able to put more than one in the bag, but for the first period of time it was simply a luxury to be able to claim to have a client.

I next rented a converted residence in Fairbanks, but there were certain difficulties inherent in the rental. The landlord's wife was living in California, and he insisted on use rights until he decided to leave Alaska. Every morning, he'd stagger from his upstairs bedroom, stumbling bleary-eyed down the steps in his bare feet, grunt incoherently at me or my client, and then disappear into the bathroom where he would proceed to gargle loudly and to read the latest in periodic literature for the rest of the morning. My professional practice was rapidly going downhill.

I returned to the back end of the red station wagon. In conferences, I would meet clients at the Traveler's Inn coffee shop. In an exchange for a daily $5 tip, my waitress would give me a quiet circular table in the back corner, where I would hold court. This went on for approximately two months, during which time my waitress actually became a rather competent receptionist, happily entertaining clients, while plying them with coffee and doughnuts.

Eventually, space became available in the Nerland Building, which had previously been occupied by attorney Ed Niewohner. The Fairbanks Nerland building became the launching post for many of the Fairbanks greats, including not only Ed Niewohner, but Andy Kleinfeld, the Public Defender's agency in the infamous days of Madson, and Backstrom and Cline.

I could only afford a one-room office. After much begging, the Nerland Building built a wall across the center of my new office. It even had a hollow-core door. I invested the remainder of my meager savings in a two-line telephone system, and a used, gray, steel secretary's desk. (It even had an old government property sticker.) To round out the motif, I bought some concrete blocks and wooden planking, and placed my proud assortment of Horn books and Gilberts on the shelf for everyone to admire. My diplomas and high school honor roll certificates were next hung on the wall with care, as well as a couple lawyer-like cliches and a Workers Compensation notice.

I was ready for business. Eagerly, I waited for the droves of clients. Apparently, during the process, something must of been lost in the transition. I began to suspect that my clients were either hanging around the old house or lost at the Travelers Inn. Had I forgotten to put in a change of address?

Something had to be done. In desperation, I consulted a reputed, experienced barrister, Don Logan of Logan and Coons fame. We met at Tommy's Elbow Room (also made famous by Randy Clapp and the *Kavorkian* case.)

"What's my problem?" I asked Don. "I can't seem to get any clients."

A look of bewilderment overcame him, as he glanced around the bar and saw many of his own clients happily sleeping upon folded arms with half finished drinks before them. He thought a bit, and then responded, "You need a good secretary."

"A good secretary? How can that help me find clients?" I queried.

Don then explained to me that a good secretary knew all sorts of things, besides making coffee. Most importantly, they knew how to separate the clients who paid their bills from the ones who didn't. Don impressed upon me that a good secretary was as good as having a pocket full of gold nuggets. Then he surprised me once more and stated, "I'll tell you what. You can have my secretary."

Although I wondered about his bequeathing his secretary to me, I rapidly accepted his offer.

One week later, I learned that she was planning on leaving anyway. He had simply beat her to the punch. (A successful Fairbanks attorney, Jim DeWitt once informed me that, "When they are going to run you out of town, get up front and make it look like a parade.")

In retrospect, probably the best advice that I had ever received with respect to the practice of law, short of advice that my dad gave to me regarding staying out of the area completely, was Don's advice with regard to hiring a good secretary. Over the years, I came to realize that the quality of a secretary directly impacted the success or failure of a legal practice. Not only were the presumed benefits of the secretary invaluable, such as typing, file keeping, telephone answering, and the like, but the most valuable intangible mode turned out to be an attribute which cannot be undervalued by any stretch of the imagination.

I found that the secretary truly was the "bouncer" for the law firm, differentiating good from bad clients, paying from non-paying clients, and

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TALES FROM THE INTERIOR

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letting you know when you simply have overstepped your bounds, or when your spouse is on their way in the door and you are once again behaving like an idiot.

Following the hiring of Don's secretary, Deborah, I next learned that my most important expense would be a computer system. Although Deborah turned out to be a most accepting individual, she finally confessed to me that she was sick and tired of typing on an Olympic manual, even if it had been my mother's pride and joy. It was time to enter the computer age. I began to check the want ads for a used Univac.

Being a computer illiterate, I selected a name brand known as a Victor. Yukon Office Supply, (now defunct, remember?), took great pains to convince me that Victor would be the way of the future. Admittedly, there was always the good old tried and true IBM system, but who would ever want to acquire an IBM when the various computers were developing their own proprietary languages? Victor was obviously the only way to go. Besides, Victor had pioneered adding machines (remember those defunct, adding machines?). And Victors were cheap.

Recognizing that I should always rely on the advice of professionals (most of whom who told me to buy an IBM) I selected the mighty Victor system. In a moment of weakness, however, I also bought a Xerox copying machine. Some of you might remember it. It was the one with the orange cover that you could press your face flat against and make such pretty pictures upon. It served me well for several years, until it also broke down, like the Victor.

Having now acquired an office, desk furniture for the secretary, a computer, a copier, and shelves upon which to put my firm books and Gilbert's, I was almost ready to go. Only one problem remained. I had spent all of my money on my outer office, and had no furniture for my inner office. In a vision, the solution suggested itself.

Having grown quite accustomed to conducting business in the Travelers Inn coffee shop, I looked out my window and recognized that the CO-OP drug store (now defunct) was across the street and readily available to both myself and my clients. It seemed like a natural, since I had developed a rather healthy addiction to caffeine.

It was at this point in time that my wife, Brenda, pragmatically proclaimed that every attorney needs a good desk. We went to a local furniture store and bought an oak desk which still adorns my office. It was an expensive acquisition, and one of which I became quite proud. But, then again, I was proud of almost everything I bought back then. It was a period of time when a $3,000 month meant that I was successful and that my family could eat.

Having now outfitted myself with a complete office, I once again sat back and eagerly awaited clients. I decided to be rather selective and would accept only anyone that was light or weak enough for Deborah to drag in. At first, the initial clientele formed an interesting foundation upon which to build a private career. Nevertheless, I was thankful for these clients, some of whom I still represent at occasional parole board hearings. For even if they didn't pay their bills, they gave me lots of practice. It was an understatement to say that I was very well practiced during that first year.

I soon recognized the need to have a mentor. Although various people explained to me the advantages of having an attorney who was wiser, I elected instead, to find a rich attorney who could help bankroll my contingent fee cases. I figured that, any attorney with money must automatically be older and wiser. I was not far from wrong when I found Bill Brattain. During that first year, Bill assisted me in resolving a couple of matters which had been rejected by virtually every other attorney in town. Surprisingly, I was able to "ring the bell" early on and achieve what Brattain theoretically called "escape velocity." Although the term "escape velocity" might have different meanings to different people (including some of my early clients), what it meant to me is that I would be able to pay my bills and feed my family for two months in a row.

As time progressed, word of mouth apparently went from bad to better, and I found that I was actually beginning to carry clients who I expected should have gone to someone else. When I was younger, my dad had a saying which went like this, "I would hate to be seen with a girl who would go out with a guy like me." That statement underscored my philosophy of clientele at that time. Essentially, to parrot the phrase, "I would hate to have a client who would have me as a lawyer." But as time passed, I actually began to enjoy the practice of law in the private sector and looked forward to what the day would bring. Each morning, along with all the other lawyers on my street, I would anxiously rush to the newspaper tube to determine who had gotten in a particular accident, or whether or not I knew anyone who had been busted the previous evening. Truly, I was coming of age.

Judge Richard Savell, when in private practice, had once asked me whether or not I had planned to, "specialize" in any area of law. I pointed out to Dick that I preferred to think of myself as a condemnation and construction lawyer, but that I planned to take anything that would crawl. Dick pointed out to me that I might actually have some chance at success since, "In Fairbanks, those who specialize in Fairbanks quickly go broke."

Another jurist-to-be who provided significant advice to me at the time was Andrew Kleinfeld. Like most young attorneys, I had quickly become enamored with the concept of law books which did not have those black plastic binders on the outside. The dictaphone salesman had already come by more than once. The word was on the street that there was a new pigeon to be plucked.

During that time of vulnerability, a suggestion was given to me that I should talk to Andy Kleinfeld. After all, Andy had a successful practice.

Desperate for any type of advice, I scheduled an appointment with Andy, who also quite generously gave of his time. Much to my surprise, Andy pointed out to me that daily janitorial services were not necessary. I marveled at the cleanliness of his office, until he pointed out to me that he carried out his own trash. I then asked him where his dictaphones were located and he informed me that he used microcassette recorders. He could buy them for $35 each and he could throw them away when they broke. I asked for a cup of coffee. When he went out to his reception area, I quickly scrounged through his trash trying to find anything of electronic value. He almost caught me when he returned.

Other advice followed, "If you need law books, check with the law library, they are often throwing them out, and they are seldom used in Fairbanks, regardless." "Don't go for top floor accommodations." "Why don't you locate in the News-Miner building like me?" (Because I was allergic to printers ink, I chose not to follow the last suggestion.) And the finale - "Get yourself some law school rocking chairs like mine - it's good advertising!" Unfortunately, my law school didn't make rocking chairs. Instead, I had to sit on a stool in the corner.

Probably one of the best experiences in getting started was the one year that I spent with a big firm. Having returned from the Island of Saipan, where I worked with the Trust Territory of the Pacific Islands as an assistant attorney general charged with enforcing American rule on a happy indigenous population, I had decided to go to work for the prestigious law firm of Birch Horton Pestinger Monroe Anderson, and a whole bunch of other names, a/k/a Birch/Horton. They promised to send me to Fairbanks, where I would be able to practice construction law and eminent domain to my heart's content. In reality, all attorneys in the section spent most of our time defending allegedly drunken Teamsters. (Why a person would drive for a living and then proceed to get busted for DWI is a concept which still escapes me, yet still goes on, much to my financial pleasure.)

During my tenure with Birch Horton, I learned much about the private practice of law. One of the first things that I learned when I arrived in Fairbanks was that Winston Burbank was leaving the firm as manager and starting his own law firm along with David Call. Winston, ever my friend and a person who I admired, shook my hand on the way out the door and pointed to an office that he said I would enjoy. It was definitely a true "on the job" experience and introduction to the private sector. During the next year, I worked for Birch Horton and tried a number of cases involving the Teamster clientele. I also learned valuable things such as how to set up business cards, forms, billing procedures, and other management tools. Unfortunately, it was the year that Birch Horton decided to cut out Christmas bonuses and distribute fruitcakes instead. Realizing that I was rapidly developing a weight problem following my return from Micronesia, I elected to leave the firm, although my business card to this very day bears an uncanny resemblance to the format utilized by Birch Horton. The way I saw it, why reinvent the wheel if you can hijack the whole train?

As the years went by, my little law practice grew. Eventually, I acquired a small house in Fairbanks and remodeled it during the midnight hours. Contrary to most professional practices, my present law office looks more like the Howling Dog or Chilkoot Charlies. Posters and toys adorn the bookshelves and walls. We even have an affectionate lizard which was given to me for Boss's day, named after an unnamed attorney. Although I once had associates working for me, and actually thought for a while of becoming a real law firm, I quickly changed my mind. I attribute most of the current status of my office to the early days, and the extreme patience and tolerance which my family, my staff, attorneys, and clients had with respect to this young upstart.

As my dad has often stated, "All you get out of life is a living. It is just a matter of how you live it." Joe Vogler, another Fairbanks great, put it differently, "It is a lucky man who likes what he does for a living."

For the past 20 years, I can truly say that I have enjoyed the practice of law. Every day brings a new adventure, and questions as to whether or not I will ever get paid. But if you have to practice law for a living, Fairbanks is a great place to do it. The legal community seems to be more of a family as opposed to a profession. Of course, like any family, we do have our spats and idiosyncrasies. But as long as Jeff doesn't yell at me in court anymore, I probably won't tell how he got his last moose.

AYC is seeking volunteer attorneys to teach law classes to junior high and high school level students.
Classes are one night per week for 2 hours lasting 8 weeks, beginning the week of September 27.

For more information or to volunteer, please call 274-5986 and ask for Sharon Leon.

Disclaimers in lawyers' advertising?

Continued from page 1

for various practice areas. Certification in specific areas could be achieved by successfully completing one of the programs currently approved by the American Bar Association, or by successfully completing any other program approved by the Board of Governors of the Alaska Bar Association. Second, the proposal prohibits lawyers from representing that they are specialized, or that they practice in specific areas of the law, unless they are certified or unless they issue a disclaimer stating either that they are not certified or that certification is unavailable.

At its most recent meeting, the Board of Governors discussed the pros and cons of the proposed amendment. Ray Brown led the discussion in favor of the amendment, whereas Barbara Schuhmann spoke in opposition. Ray remarked, "The proposed amendment helps to ensure that the public is provided with correct and accurate information through the commercial media." He noted that the public's perception of lawyers has been significantly tarnished as a result of lawyer advertising, and that this rule helps prevent misleading advertising by requiring adequate qualifications or disclaimers for most communications. The adoption of a certification program also helps the public make an informed decision about an attorney based upon expressed qualifications, as opposed to who spends the most money on advertising. Ray's primary concern is that when the public reads, views, or hears an advertisement, they do not know whether the attorney is competent to practice in a specific area. Communications indicating a particular expertise maybe misleading without some type of certification process. Another benefit of this program, he argues, is that the quality of practice will increase due to the continuing legal education required to obtain and maintain certification. He concedes and is troubled by the fact that the certification process could have the undesired result of hurting excellent, well qualified attorneys who do not or can not seek certification in a given field.

Barbara, speaking in opposition to the proposal, commented that while the intent of the amendment is worthy, she is concerned that the restrictions placed upon the attorneys are excessive. She raised questions about the attorneys' costs associated with becoming certified, and the Bar Association's costs associated with administering the system. She expressed some concern that the proposal is too broad because it affects communications such as firm brochures, business cards, and Martindale Hubbell.

THE CURRENT RULES

Alaska Rules of Professional Conduct 7.1-7.5 provide various restrictions, and some guidance, on all communications, including advertising. Under ARPC 7.1, lawyers cannot make false or misleading communications concerning the lawyer's services. ARPC 7.2 specifically allows advertising, but requires the attorney to retain a copy of the advertisement for two years, addresses referral fees, and requires that all advertisements include the name of the attorney responsible for the advertisement. ARPC 7.3 places restrictions on direct contact with prospective clients through solicitation, and ARPC 7.5 addresses firm names and letterheads. ARPC 7.4, the subject of the proposed amendment, addresses communication of fields of practice and certification. Specifically, the rule provides that an attorney can neither state nor imply that he or she is recognized or certified as a specialist in a particular field of law, unless the attorney is a "Patent Attorney," or unless he or she has been certified as a specialist by some organization and the attorney clearly states that "the Alaska Bar Association does not accredit or endorse certifying organizations."

PROPOSED AMENDMENT

The proposed amendment to ARPC 7.4 creates a certification process for members of the Alaska Bar, and then prohibits uncertified lawyers from communicating either that they are specialized, or that advertising they practice in specific areas, unless a disclaimer to that effect is issued. The Bar Association does not intend to engage in the actual certification of fields of practice, but rather, it intends to approve or deny certification programs offered by various organizations such as the American Bar Association. The proposed amendment to ARPC 7.4 is modeled after a program currently in place in Idaho. The Idaho Bar Association approves all programs approved by the American Bar Association, and then takes an independent look at all other programs submitted for approval. Alaska would follow this procedure. The American Bar Association currently approves of 10 programs for certification. There are only a small amount of administrative costs anticipated with creation of the certification process.

In addition to creating a certification process, the proposed rule provides that an attorney is prohibited from either stating or implying that he or she is recognized or certified as a specialist in a particular field of law, unless the attorney is certified by the Alaska Bar Association or by an organization approved by the Alaska Bar Association. Attorneys are also prohibited from listing fields of practice, in any advertising, unless they are certified by the Alaska Bar Association, one of its approved organizations, or unless they print one of the following disclaimers: "No certification as a specialist has been obtained" or "This field of practice is not presently recognized a as a specialty by the Alaska Bar Association."

CONCLUSION

Practicing law in the United States was once considered a noble profession, comparable to practicing as a Barrister in England. Over time, however, and due to a number of factors, lawyers have earned a less desirable reputation. Communication through the public media, including advertising, has certainly been a contributing factor to the tarnished image of lawyers. It is in this regard that the amendment to ARPC 7.4 was proposed. There are several benefits to the proposal, but not without consequence. The question posed to the Bar is whether the benefits of the proposal are worth the consequence. The Board of Governors solicits your comments and concerns.

(See Ray Brown's and Barbara Schumann's views on this rule.)

ARPC 7.4

PROPOSED AMENDMENT TO ALASKA RULES OF PROFESSIONAL CONDUCT: COMMUNICATION OF FIELDS OF PRACTICE AND CERTIFICATION.

(Additions underlined; deletions bracketed and capitalized)

Rule 7.4. Communication of Fields of Practice and Certification.

(a) A lawyer shall not state or imply that the lawyer has been recognized or certified as a specialist in a particular field of law except as follows:

(1) a lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;

(2)] a lawyer may communicate the fact that the lawyer has been certified as a specialist in a field of law by a named organization[, PROVIDED THAT THE COMMUNICATION CLEARLY STATES THE ALASKA BAR ASSOCIATION DOES NOT ACCREDIT OR ENDORSE CERTIFYING ORGANIZATIONS] but only if:

(i) such certification is granted by the Alaska Bar Association or by an organization which was been approved by the Alaska Bar Association to grant such certification; or

(ii) such certification is granted by an organization that has not yet been approved by, or has been denied the approval available from, the Alaska Bar Association, and the absence or denial of approval is clearly stated in the communication, and in any advertising subject to Rule 7.2, such statement appears in the same sentence that communicates the certification.

(b) Unless authorized by paragraph (a) to communicate certification as a specialist, a lawyer shall not list fields of practice in any communication unless the lawyer includes the phrase "No certification as a specialist has been obtained" or "This field of practice is not presently recognized as a specialty by the Alaska Bar Association" as appropriate to the circumstances. However, if a lawyer is listed under a field of practice in a directory listing, the lawyer need not include either of the preceding phrases if the page on which the lawyer's listing is located contains the phrase "Unless otherwise noted, lawyers listed in these fields of practice are not certified as specialists."

Two

RAY BROWN'S REASONS FOR THE PROPOSAL

One of the many concerns of the Board of Governors, and pos sibly the most troubling, is the public's tarnished image of the legal profession. Countless time and money is spent annually on lawyer discipline and fee arbitration, both of which were primarily created to protect the public from attorney misconduct and to foster a better image of attorneys to the public. Rules governing the conduct and actions of attorneys are continually amended to reflect societal changes. The proposed amendment to ARPC 7.4 is necessary because some lawyers, through the media, disseminate information which could be construed as misleading or inaccurate to the public. Each time an attorney communicates that he or she practices in a certain area of the law, the attorney directly or indirectly represents (at least to the public at large) that he or she is more qualified, in that area, than the average attorney. The Bar Association should not allow this communication, unless it is true to some reasonable degree of certainty. The creation of a certification program helps to ensures that when a prospective client sees, reads, or hears an advertisement conveying that the attorney practices in a particular area, the attorney has actually engaged in a specific program designed for that specific area of law. It does not ensure that the lawyer is competent, but it does allow the public to reasonably evaluate the credentials of the attorney, based upon the premise that the attorney has some degree of proficiency in that area of practice. On the other hand, if the disclaimer is present, the public is put on notice that the attorney is not certified or that no certification is recognized in that area.

This proposal also furthers the quality of the practice in Alaska, because it will result in mandatory continuing legal education classes or programs. This proposal rewards those who continually engage in continuing legal education in order to develop and improve their practice. "The proposed amendment helps to ensure that the public is provided with correct and accurate information through the commercial media." This proposal requires those conveying a particular expertise to present their credentials to back up that statement.

Alaska Legal Services Corporation, its staff and clients would like to thank the following Law Firms who generously gave donations during last year's ALSC Law Firm Fundraising Project.

Bogle & Gates, PLLC
Dillon & Findley, P.C.
Faulkner Banfield Doogan & Holmes, P.C.
Friedman Rubin & White
Ingaldson Maassen, P.C.
Jamin Ebell Bolger & Gentry
Preston Gates & Ellis, LLP
Royce & Brain

views on lawyer disclaimers

BARBARA SCHUHMANN'S CONCERN ABOUT THE PROPOSAL

Now is your chance to comment on the proposed change to the Alaska Bar Rule on specialization, ARPC 7.4. In the interest of encouraging your input, here are some questions and concerns about the proposal.

In the past, the Alaska Bar Association has not recognized fields of specialization. Under this proposal, this bar association could and would recognize certain specialties. More importantly, however, under this proposed rule, Alaska lawyers would be required to put a disclaimer in all their advertising about fields of practice, if the lawyer is not certified by a recognized organization, or if the Bar Association itself has not yet acted to recognize a specialty.

Under the existing rule, a lawyer can communicate the fact that the lawyer is certified as a specialist by a named organization, but only if the communication also states that the Alaska Bar Association does not accredit or endorse the certifying organization. This would change under this proposal.

Under proposed ARPC 7.4, a lawyer would have to give a disclaimer when indicating that s/he has a certification as a specialist if the Alaska Bar Association has not approved of the organization certifying the lawyer as a specialist. In addition, a lawyer would have to give a disclaimer when indicating that s/he practices in a particular area of law if: a) the lawyer is not certified as a specialist by an organization approved by the Alaska Bar Association; or b) the Alaska Bar Association has not approved of any organization to certify that area of practice as a specialty.

Thus, under the proposed rule, if a lawyer wished to communicate or advertise that s/he practices in a particular area of law for which no specialty is recognized by the Alaska Bar Association, the lawyer would have to include the following phrase in any advertising: "This field of practice is not presently recognized as a specialty by the Alaska Bar Association."

If the Alaska Bar Association did approve of such an organization, under proposed ARPC 7.4, a lawyer without certification would not be allowed to advertise his/her practice in an approved specialty unless the lawyer included the following disclaimer in his/her advertising: "No certification as a specialist has been obtained."

Under proposed ARPC 7.4, if a lawyer communicated certification by an organization not approved by the Alaska Bar Association, s/he must clearly state in the communication (or in the same sentence of any advertising about the certification) that the Alaska Bar Association has not yet approved the organization or has denied approval available to the organization.

Should the Alaska Bar Association recognize specialties in the practice of law? I am told that we would only approve of those specialties and organizations approved by the American Bar Association. However, this proposal does not so limit the discretion of the association. Even if the association did limit its approval, surely some oversight and consideration of the certifying organizations should be undertaken by the Board of Governors. Should the Alaska Bar Association endorse other organizations or only the fields of specialization recognized by the American Bar Association?

When the issue of cost arose before the Board of Governors, we were advised that this certification process will not cost the Alaska Bar Association anything, since we will only approve of specialties and organizations approved by the American Bar Association. Assuming this would be the case, the proposal still will have a cost to the association, in my opinion.

Bar staff will be required to answer the members' questions of what should be or should not be stated in advertising, of what specialties the bar recognizes, and of how one may obtain certification. Our offices should have the application forms and backgound information available for our membership. The association should provide assistance with the examinations required, and will need to consider and determine which organizations and specialties should be recognized. One could argue that some liability might accompany the recognition or endorsement the Alaska Bar gives to the specialty, the certifying organization or the attorney certified. Complaints about a lawyer's failure to follow the modified rule might increase the disciplinary load for bar counsel. Complaints of unjust or unfair certification or failure to certify could also cost the association. The impact this proposal would have on the bar's lawyer referral service is unclear to me at this time.

The bar association will need to provide additional continuing legal education opportunities to assist its members to become "certified". The record-keeping and verification of attendance at such "certification" sessions will need to be more strict and perhaps more costly than our present system. However, perhaps attendance at and the income from such sessions will increase and not result in any additional "cost".

As of this writing, the American Bar Association Standing Committee on Specialization recognizes ten specialties, certified by the six organizations listed below. I telephoned and spoke with a number of them. Their requirements will be difficult for most Alaskan lawyers to meet. They generally include substantial experience in the particular field of law, probably requiring several years of substantial practice in that area of law. There is a substantial application process, with peer review and recommendations required. One organization required the peer recommendations to come from among its own members, but it would consider accepting recommendations from non-members in locations like Alaska, where they have few or no members certified.

The application and testing fees range from about $400-$720. Annual fees may also be required. Most if not all require passing a test lasting from several hours to two days, often at a location outside Alaska. One organization uses the Sylvan Technology Center in Anchorage, and perhaps some arrangement could be made to allow testing in Alaska. Some organizations listed will require periodic additional testing.

At least two of these organizations are relatively new. One has certified only one member nationwide; the other had certified a total of 185 lawyers nationwide. The trial advocacy group has certified five active Alaska lawyers. None of the others had certified any Alaska lawyers.

Many lawyers in Alaska have not limited their practice to one field. Many practice in areas where "specialization", as defined by these organizations, is not possible. Since it is likely that very few or no members of the Alaska Bar will be certified as a specialist when the rule might first become effective, (if they ever become so certified), the biggest effect of proposed ARPC 7.4 upon the members of the Alaska Bar will be the requirement to include disclaimers in all their advertising materials. The BOG discussions assumed these would include business cards, brochures, web site materials, yellow page and Martindale-Hubbell listings. What will it cost to add the required disclaimers to all attorney "advertising" materials? Should we require such a disclaimer to be used at all, when some specialty areas simply are not recognized by the American Bar Association, or may not be recognized by the Alaska Bar Association? Should the disclaimer be required immediately, when certification will take time?

Will notice of a "certification" or lack of certification really assist the public in obtaining a competent lawyer who will perform a good job at a reasonable cost? Will the required disclaimer that a "field of practice is not presently recognized as a specialty by the Alaska Bar Association" adversely reflect upon all lawyers practicing in that field?

If the goal is to prevent deceptive advertising or communications, ARPC 7.1 and 7.2 would apply and should be sufficient. If the goal is to increase the competence of the bar membership, a requirement for continuing legal education might better serve the purpose. If the goal or effect is to limit what can be stated or advertised by lawyers, would the proposed rule be constitutional?

These are the concerns that the proposal raised for me. The goals behind the proposal are worthy, but I wonder whether they will be achieved by this proposal, and whether the cost is justified. I find the disclaimer requirement particularly distasteful. When so few Alaska lawyers are or will be "certified", I do not believe the majority should have to include a disclaimer on their listings, business cards, brochures, etc.

The specialty areas of the ABA-accredited programs are listed below.

- American Bankruptcy Board of Certification: Business Bankruptcy; Consumer Bankruptcy
- American Board of Professional Liability: Accounting Professional Liability; Legal Professional Liability; Medical Professional Liability
- Commercial Law League of America: Business Bankruptcy; Creditors' Rights
- National Elder Law Foundation: Elder Law
- National Association of Estate Planners & Councils/Estate Law Specialist Board, Inc.: Estate Planning Law Specialist
- National Board of Trial Advocacy: Civil Trial Advocacy; Criminal Trial Advocacy

Understanding business valuation helps serve clients

Business Valuation 101

By Mike Hanrahan

Most attorneys practicing in the tort, probate, bankruptcy, estate planning, commercial, family, business, taxation and general law areas will have occasion to use a business valuation expert to help value a closely held business or partial ownership interest. Understanding some basics of business valuation and what a business appraiser considers may help you to serve your clients better and avoid costly delays in discovery.

In any situation where your client owns an interest in a business (held as a proprietorship, partnership, S corporation, family limited partnership, LLC or in another form), a business valuation may be an important tool in helping to quantify:

- The value of marital estate for divorce purposes
- The value of a business interest to be bought or sold (either full or partial interest)
- The amount of damages in breach of contract, condemnation, personal injury or other actions
- The amount of an insurance casualty claim
- The amount of life insurance needed to cover estate taxes at death
- The allocation of a purchase price in a basket purchase of a business as required for income tax purposes under Internal Revenue Code Section 338 and 1060
- The value of a business interest for the purpose of computing the built in a gain portion under
- Internal Revenue Code Section 1374
- The value of a charitable gift for income tax purposes
- The value of a family gift for gift tax and estate planning purposes

A business interest can have several different values at one point in time depending on the purpose of the valuation and the standard of value employed. For example, the value of a business for the purpose of admitting a new partner/shareholder could be different from the value of the same business for sale purposes, especially if the selling owners are key management members and will not continue to be involved in the business. The major difference in the two values would be the additional risk associated with the loss of key management personnel. It is therefore critical that not only the purpose of the valuation is made clear, but also the exact interest that is to be valued.

Although a variety of well-qualified people do business valuations, the better known certifications related specifically to business valuation are as follows:

CVA- Certified Valuation Analyst, which is awarded by the National Association of Certified Valuation Analyst (801-486-0600) after passing an extensive 150 questions open book examination and either critiquing or preparing a comprehensive business valuation report. To be a CVA, one must also be a Certified Public Accountant (CPA).

CBA - Certified Business Appraiser, which is awarded by The Institute of Business Appraisers, Inc. (561-732-3202) after passing a 1/2 day closed book examination and submitting two comprehensive business valuation reports for critical peer review.

AM and ASA - Accredited Member and Accredited Senior Appraiser designations are awarded by the American Society of Appraisers (800-272-8258) to its qualified members.

The Society is multi-disciplined and has a business valuation specialty. All society members must pass an ethics exam and a test on the Uniform Standards of Professional Appraisal Practice. To become an AM in business valuation, the member must either take and pass the 8 hour, closed book, open group exam, submit two comprehensive business valuation reports for peer review and have at least 4,000 hours of appraisal experience. The ASA requires 10,000 hours of appraisal experience.

CBV - Chartered Business Valuator designation is awarded by the Canadian Institute of Charted Business Valuators.

The valuation of a business interest can be a time consuming and detail intensive endeavor. A properly done valuation can take from two weeks to several months to gather all the pertinent information, analyze it and draw conclusions. All too often the business appraiser is called in at the last moment and it is too late for additional production requests and depositions to gather the needed documents and information. Our preliminary documentation request list is two pages long and also requests at least five years of income statements and balance sheets. Our initial questionnaire covers all aspects of the business operation including management, product lines, organization structure, financial structure, competition and customer demographics.

The business appraiser will generally use one or more of the three valuation approaches:

Income Approach - under this approach, the appraiser estimates the future income benefits accruing to the owners and discounts them to a present value using a rate suitable for the risks associated with realizing those benefits.

Market Approach - this approach assumes that the value of the subject can be estimated from analyzing recent sales of comparable assets. The appraiser analyzes comparative public companies or comparative transactions to determine the subject's value.

Asset Based Approach - this approach assumes that a business' value is equal to the cost of replacing all of its assets. This approach generally applies to companies with little value beyond that of their tangible assets and entails obtaining a detailed list of all business assets (both on and off balance sheet) and determining their fair market value.

The focus of each of these approaches, as well as the specific methods employed under each, is in the future benefits that the business owner will derive. To do this and employ the various valuation approaches, a detailed analysis should be made of the business' management structure, past and future financial operations, competition, fair market values of specific assets, customer concentration, financial trends, industry trends and economic factors.

The extent and diversity of the information and data needed warrants a business appraiser being involved at the outset of any action to help ensure that no needed documents or data are missed in the discovery process. Often, unless a document is referred to by its specific name or a specific enough description in the Request For Production of Documents, it won't be produced. Early involvement of the valuation expert cannot only help avoid this problem, but the expert may also be able to point out various issues that could become problematic as the case progresses.

Realizing that many clients do not want to incur any costs before they absolutely have to, you should consider hiring the valuation expert on a consulting basis, rather than as an expert witness, to assist you in the initial planning of that phase of your case. Using the valuation expert as a consultant can keep the initial costs low, allow for work product privilege, uncover potential problem areas in the case and help you serve your client better.

Michael R. Hanrahan CPA, CFP, CVA, CBA is secretary of the Alaskan Chapter of the National Association of Certified Valuation Analysts and practices in Anchorage.

Excerpts from the JBA Minutes

August 8

Pre-Meeting Debate. There was a lively and animated discussion at the other end of the table between Lach Zemp and Mark Choate over what used to be the best bars to frequent in local Juneau (in the good old days, of course). During their exchange of fond and extensive memories, this secretary caught mention of the words, "Bubble Room", "ice worm cocktail", and the "Triangle."

Also, Mie said that she received a letter from Bruce Weyrach concerning the future of the Alaska Bar Convention. (See attached letter). This letter tipped off another lively debate by Mark Choate's end of the table about the Alaska Bar Association and its Convention. There was a discussion about how the Convention could draw more attorneys for professional reasons by offering more resources and help for Alaska attorneys. There was a suggestion about offering local CLEs in Juneau by local attorneys: why isn't this happening on a more frequent basis? What are the requirements to organize a local CLE in Juneau? In response to Bruce's letter, the JBA members present decided to schedule a meeting to discuss our position about the future of the Bar Convention on August 22 at our regularly scheduled noon meeting. Sheri will call Bruce Weyrach to see if he is able to attend

—Sheri L. Hazeltine

August 29

What if you had accepted the invitation to visit the Koester Estate this past week? Would the fresh caviar have been any more tasty? (Probably not.) Would the company have been any more congenial? (I doubt it.) Could the witty reparte have sparkled any brighter? (Yeah, right.) Let's face it. We were probably much better off without you.

WHAT YOU MISSED

1. The announcement that Dave Ingram, Chair of the CLE committee, will be appearing at the next meeting (Second Course) to solicit input from anyone who bothers to show up about the issue of mandatory CLE's.

2. The whales doing a synchronized flipper show ala Sea World.

3. The announcement that Mike Christenson and I are going to have a baby in January.

4. The speed race between the trawler and the Matanuska.

5. The motion that we institute "Rave" JBA meetings that move to different locations without notice. Passed by unanimous consent.

—Mie Chinzi

September 5

Guest Speaker. Dawn Colllingworth introduced Dave Ingram, chair of the CLE Advisory committee for the Alaska Bar Association. Dave said that the committee meets in a couple weeks to make a proposal to the Board of Governors about whether mandatory CLEs should be required in Alaska.

The issue of mandatory CLEs has come to a vote before for the ABA membership. At the last vote, the Fairbanks contingent voted strongly against it; Juneau in favor of it; and Anchorage was largely neutral. The vote was approximately 52% opposed 48% in support.

The issues to think about: Should we have a mandatory CLE program in Alaska? If so, how many hours should be required? How should the program be funded?

Dave said that he was personally in favor of adopting a program. Most attorneys won't attend a CLE unless it is required Most states (39 states now have a mandatory CLE program) at least require attorneys to attend an ethics CLE. He suggested a 10 hour/year requirement, that could be fulfilled at the annual ABA convention.

Dave also mentioned that the Board of Governors could just adopt this mandatory CLE program, without a vote of the membership. Mark Choate made the point that he would appreciate more relevant CLEs being offered in Alaska. The purpose of CLEs is to improve us, as attorneys. Dave said that providing CLEs that are important to Alaska attorneys is an on-going problem. They try to put on general CLEs and also more advanced CLEs, but it always seems as if someone is dissatisfied about the type of CLEs offered. He believes that completing a CLE by videotape should also be allowed for credit, although some persons disagree with this. If a proctor wasn't present to monitor the viewing, a person could complete an affidavit stating that they had viewed the video. Dave said that the committee is constantly striving to get CLEs available in more communities (other than Anchorage).

Mary Alice McKeen asked if there really was a perception that there were lower standards for practicing attorneys here in Alaska because of the lack of CLE requirements? Dave said he did not know. Mie Chinzi said that it wasn't so much perception of lower standards, but that the public perception of us as selfregulating, and that we hold ourselves to certain standards.

Mary Alice said that she did not think that having mandatory CLEs would change the Alaska public's perception of attorneys here. David Walker said that maybe the ABA should just spend its money on PR ads to improve Alaska attorneys' image. Joe Sonneman said that he was opposed to a mandatory CLE program because Alaska attorneys already have to do too much. A new case teaches him more than a CLE.

An informal straw poll among JBA members present showed 10 opposed, 9 yes, and 2 undecided.

—Sheri L. Hazeltine

Bar People


Peterson

James R. Peterson has been appointed assistant secretary of National Fuel Gas Company and general counsel of National Fuel Gas Supply Corporation, a subsidiary of National Fuel Gas Company. Peterson joined the company in 1989 as a senior attorney in the legal department.

Peterson graduated from Harvard University and earned a Juris Doctor degree from the University of Michigan Law School. He is a member of the New York State Bar Association, the Alaska Bar Association, and the Federal Energy Bar Association. He is also a member of the Niagara Frontier Corporate Counsel Association. Peterson resides in Amherst with his wife, Mary, and their three children.

Patrick Anderson has relocated from Juneau to the Anchorage office of Hedland, Brennan, Heideman & Cooke.....**Gilman Burke**, formerly of New York, is now with the Anchorage office of Faulkner, Banfield, et.al.....**Bill Cook** has moved his law office from south Anchorage to Eagle River. He's taking criminal defense and personal injury cases.....**Blaine Gilman** and **David Oberg** have formed the firm of Gilman & Oberg in Kenai.....**Karla Huntington** and **Joe O'Connell** have formed the firm of Huntington & O'Connell in Anchorage.

R. Poke Haffner writes that his new address is Florapromenade 24, 13187 Berlin, Germany and that "this one should last a while. Wandering colleagues are welcome. Greetings to all there."....**Mike Hostina** is now with UA Statewide Labor Relations in Fairbanks.....**Eric D. Johnson**, former law clerk with the Court of Appeals, is now with ALSC in Barrow.....**Karen Williams Ince** is now with Mendel & Associates.....**Rick Johannsen**, formerly a Partner with Perkins Coie, has completed a two year assignment for the U.S. Department of State in Guyana, South America and is relocating to New York City for a temporary assignment with the U.S. delegation to the United Nations General Assembly.

Michael Kramer has moved from the law firm of Clapp, Peterson & Stowers to the law firm of Cook Schuhmann & Groseclose.....**Jake Metcalfe**, formerly with the DA's office in Bethel, is now with IBEW Local 1547 in Anchorage.....**Peter Partnow**, formerly of Partnow, Sharrock & Tindall, is now with Rubini & Reeves in Anchorage.....**Michael Mitchell**, formerly with Preston Gates & Ellis, is now with Rubini & Reeves in Anchorage.....**Cynthia Rabe**, former law clerk with the Superior Court in Anchorage, is now with the PD office in Anchorage.

Bonnie Robson, formerly with Partnow, Sharrock & Tindall, is now with Hosie, Wes Sacks & Brelsford.....**Michael Stancampiano** has been appointed to the position of Associate Judge in the Sourthern Ute Tribal Court, Ignacio, Colorado.....**Susan Sharrock** has relocated to Oklahoma.....The firm formerly know as Partnow, Sharrock & Tindall, is now **Tindall, Bennett & Shoup**.....**Mark Sokkappa**, most recently of Micronesia, writes that he is now at 15 Chu Nan Road, Chu Nan Tsen, Chu Nan Shun, Ping Dong County, Taiwan. He can best be reached at his e-mail address sokkappa@ms15.hinet.net.

Jonathan Sperber, formerly with Clough & Associates and the U.S. Environmental Protection Agency Office of Regional Counsel, is now a hearing officer with the Commercial Fisheries Entry Commission in Juneau.....**Stacy Steinberg**, formerly with Green Law Offices, is now with Robertson, Monagle.

J. Burk Voigt, has relocated from Fairbanks to Alabaster, Alabama.....**Jim Valcarce**, formerly with the DA's office in Bethel, is now with Hedland, Brennan, Heideman & Cooke in Bethel.....**Rene Wright** has relocated from Kenai to Golden, Colorado.....**Ron West** has relocated from Spokane to Anchorage.

JAMIN, EBELL, BOLGER & GENTRY

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

is pleased to announce that

JOEL H. BOLGER

has accepted an appointment as District Court Judge in Valdez, Alaska, and has withdrawn from the firm.

DIANNA R. GENTRY

has withdrawn from the firm to become of counsel to the firm.

WALTER W. MASON

has been named a shareholder of the firm.

The firm has changed its name to

JAMIN, EBELL, SCHMITT & MASON

Matthew D. Jamin
C. Walter Ebell
Alan L. Schmitt
Walter W. Mason
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ESTATE PLANNING CORNER

The grantor trust rules

☐ Steven T. O'Hara

Suppose a client wants to create an irrevocable trust. Suppose the trust would be a one-pot trust with a number of beneficiaries. In creating the trust, a fundamental question the client will need to decide is whether she wants the trust's income to be taxed to her, to the trust, or to the beneficiaries when distributions are made.

The grantor trust rules under the Internal Revenue Code deal with these issues (IRC Sec. 671 *et seq.*). Recall that a person who creates a trust is often called a settlor. For example, Alaska's new Asset Protection Trust statute refers to the trust creator as the "settlor" (AS 13.36.035 (e) and .310, and AS 34.40.110 (e)). Another term for the creator of a trust is "grantor." In the trust area, the terms "settlor" and "grantor" are synonymous. Whereas state law tends to use the term "settlor" more than "grantor," federal tax law prefers the term "grantor" and thus the name "grantor trust rules."

When triggered, the grantor trust rules treat, for federal income tax purposes, the grantor as the owner of the trust she created. While the funding of the trust may be a completed transfer for gift, estate and generation-skipping tax purposes, and while the trust may be off the grantor's financial statement from a state-law and creditor standpoint, all of the trust's income, gain, loss, deduction or credit may be reportable on the grantor's individual tax return.

It may be advantageous for the grantor to be treated as the owner of a trust for income tax purposes. One advantage is if the grantor is obligated to pay the income taxes on the trust's income, without reimbursement from the trust, then the trust assets will grow faster than they otherwise would if they had to be used to pay taxes. So more assets would be in the trust to fulfill the grantor's intent in setting up the trust. Note, however, that the IRS has taken the questionable position in a private letter ruling that the grantor's payment of income taxes on the trust's income represents a gift to the remainder beneficiaries (Ltr. Rul. 9444033).

A second advantage of grantor trust status, at least if the grantor is in a lower income tax bracket than the trust, is that the compressed income tax brackets to which trusts are subject may be avoided without having to make distributions out of the trust. Trusts generally reach the 39.6% income tax bracket at approximately $8,000 of ordinary income IRC Sec. 1 (e) and (f)).

A third advantage of grantor trust status is the flexibility it may give the grantor in structuring transactions between herself and the trust without adverse tax consequences. This flexibility would appear to exist insofar as the grantor and the trust are considered the same person for income tax purposes.

For example, if the grantor transfers low-basis assets into the trust and then later reacquires those assets from the trust for adequate and full consideration, it is possible that no capital gain would be recognized on the transaction. It may also be possible that the grantor could transfer her residence subject to a mortgage to the trust and continue to deduct the interest payments, as well as real estate taxes, on her tax return. Moreover, if the trust sells the residence to a third party, it may be possible to roll over or exclude any gain under the roll- over and gain-exclusion provisions that may be available to the grantor in her individual capacity. A grantor trust may also be able to own stock in an S corporation without being subject to the more restrictive or, in some cases, onerous provisions of the S corporation rules (IRC Sec. 1361 (c) (2) (A) (i)).

In determining whether the grantor trust rules apply to an irrevocable trust, consider who the trustee is, and consider whether the trustee's power to make distributions is limited by a so-called ascertainable standard. A distribution power is limited by an ascertainable standard if a court could determine the circumstances that trigger a duty to make a distribution and then compel compliance by the trustee or restrain threatened action (*Jennings v. Smith*, 161 F.2d 74, 77 (2nd Cir. 1947)). For example, a distribution power is limited by an ascertainable standard if the extent of the trustee's duty to exercise and not exercise the power is reasonably measurable in terms of the health, education, or support needs of the beneficiaries (*See* Treas. Reg. Sec. 20.2041-1 (c) (2), 25.2514-1 (c) (2) and 25.2511-1 (g) (2)).

Under the grantor trust rules, if the trustee is the grantor, the grantor's spouse or, indeed, anyone who does not have a substantial beneficial interest in the trust, then trust income may be taxable to the grantor (IRC Sec. 674 (a) and 672 (a), (b) and (e)). This rule has three common exceptions. First, the rule will generally not apply if the trustee's discretion is limited by an ascertainable standard and the trustee is neither the grantor nor her spouse (IRC Sec. 674 (b) (5) (A) and 674 (d), and Treas. Reg. Sec. 1.674 (a)-1 (b) (3) and 1.674 (b)-1 (b) (5)).

Second, the rule will generally not apply (a) if the trustee is not the grantor, the grantor's spouse or a related or subordinate party subservient to the grantor or (b) if there is more than one trustee and no trustee is the grantor, or her spouse, and no more than half are related or subordinate parties subservient to the grantor (IRC Sec. 674 (c)). For these purposes, a "related or subordinate party" means the grantor's spouse if living with the grantor, the grantor's parent, sibling or descendant, an employee of the grantor, a corporation or any employee of a corporation in which the stock holdings of the grantor and the trust are significant in terms of voting control, and a subordinate employee of a corporation in which the grantor is an executive (IRC Sec. 672 (c)).

Third, the rule will generally not apply if distributions of trust principal are chargeable against a beneficiary's separate share or trust and (a) accumulated income is ultimately payable, in general, to the beneficiary or (b) income may be accumulated only while the beneficiary is under the age of 21 or disabled (IRC Sec. 674 (b) (5) (B), 674 (b) (6) and 674 (b) (7)).

Nonfiduciary powers and interests granted or retained by the grantor may also cause grantor trust status. This subject will be discussed in the next issue of this column. At this juncture, consider that if the grantor names herself or her spouse as a current beneficiary, or if trust income may be accumulated for future distribution to the grantor or her spouse, the trust's income may be taxable to the grantor (IRC Sec. 677 (a) (1) and (2)).

In situations where the grantor would prefer to be treated as a trust's owner for income tax purposes, the grantor trust rules can present significant planning opportunities. But where the grantor trust rules are ignored during a trust's drafting stage, they can present traps for the unwary.

Breaking the sound barrier without breaking the bank

BY JOE KASHI

Part 1 of 2

I've recently tested some of the newest and fastest hardware in the market including new, high-speed processing chips, SDRAM, and the newest Ultra DMA hard disks. Here are my results and buying recommendations for cost-effective speed demon computers. Engineering from brand to brand tends not to vary widely anymore. Thus, performance is largely dictated by generic features such as the CPU, system board chipset and hard disk interface. As a result, careful investigation and purchasing can get you a really fast, well adapted new computer for well under $1,400 not including monitor and shipping.

NEW CPU PROCESSORS

Recently, I've seen a major transition in the CPU market. Intel, AMD and Cyrix are shipping successors to the original Pentium CPU and it seems that all CPUs are not created equal. Here's the lineup, from slowest to newest and fastest.

Which chip you choose will, obviously, depend upon your operating system and upon your budget. If you are still using DOS, Windows 3.1 or Windows 95, then the disparity in performance is not great. A Cyrix P166+, an older Pentium generation CPU whose performance is essentially identical to that of Intel's non-MMX Pentium 200, now wholesales between $60 and $80, which is dirt cheap compared to the prices that Intel only recently charged for non-MMX Pentium 166 and Pentium 200 CPUs. In the low-end range, the Cyrix/IBM P166+ is the clear winner for both performance and price. It's just fine for DOS, Windows 3.1X and Windows 95 so long as you are not using any of the still-rare software that utilizes MMX multimedia extension instructions.

MMX software consists mostly of graphics, games and some engineering software. Not much of that is of interest to the average attorney. However, IBM's new continuous speech voice dictation product, ViaVoice, requires a MMX-capable processing chip. As a result, if you intend to use IBM's continuous speech dictation product or anything comparable, then you had better have an MMX capable computer or be prepared to upgrade. Otherwise, the significant price differential for getting an MMX processor and a new, lower voltage motherboard that can run an MMX CPU without frying it probably isn't worth the extra cost.

Intel's MMX-enabled Pentium 166 and Pentium 200 CPUs perform modestly better, about 7-15% faster, than their non-MMX brethren, mostly due to a larger internal L1 cache. However, unless you really need MMX processing capabilities for a specific program, I still continue to recommend the Cyrix 166 megahertz 6X86 processor.

If you need MMX capabilities, though, you should pass the Intel MMX Pentium chips by and look directly at the next generation of processors. These newer generation processors include Intel's Pentium II, essentially a successor to the expensive and little used Pentium Pro, the AMD K6 processor, and the Cyrix 6x86MX M2 chip. All of these later-generation CPUs include MMX capabilities and better performance. When used with DOS, Windows 95 and Windows 3.1X, each of these newer CPU chips perform roughly on par with each other.

Overall, a 200 MHz version of any of these new CPUs should result in about a 30% DOS/Windows 95 performance improvement compared to a 200 megahertz non-MMX Pentium or a 166 megahertz Cyrix 6X86. The new CPUs really sing, though, on more modern, pure 32 bit operating systems like OS/2 WARP, Windows NT, and Netware. Used with pure 32 bit operating systems, the Pentium II, K6 and Cyrix 6x86MX should perform nearly twice as fast.

I tested the CPU DOS/Windows benchmark from the Checkit 3.0 program.

The newest generation Cyrix 200 megahertz 6X86 MX (M2) and 200 megahertz AMD K6 processors showed a significant DOS/Windows 95 performance improvement relative to older processors.

To test 32 bit performance of some of these products, I ran an OS/2 (Dhrystone) benchmark program, the AMD K6 (200 Mhz) outperforming the Pentium 166.

This relative performance improvement should hold equally true for Windows NT. My subjective experience actually using these systems in the real world bears out the major performance improvements in 32 bit operating systems used with the K6, the Pentium II, and the 6x86MX.

200 to 233 megahertz AMD K6 CPUs seem to make the most economic sense. These are priced very reasonably, use standard Pentium style system boards and perform quite well. Their performance and other characteristics are very similar to Intel's much more expensive Pentium II which also has the disadvantage of using a proprietary system board and processor "cartridge". Purchasing any of the Intel, AMD or Cyrix Pentium II class processors with clock speeds in excess of 233 megahertz (i.e., 266 megahertz CPUs) seems to have little real benefit. However, you can certainly expect to see a very substantial increase in the cost of the faster processors.

Floating Point Performance. Floating point performance refers to the processor's ability to do floating point (i.e., non-integer) math. It's particularly important for graphics, voice recognition and multimedia capabilities. Intel and AMD have the best floating point performance, with the Cyrix 6X86 MX processor showing a floating point performance about one-third slower than Intel and AMD. Cyrix's lower floating point performance was consistent, as well, in it's earlier generation 6X86 processors. All other things being equal, go for the processor with better floating point performance.

MMX Capabilities. Intel and Cyrix use the floating point math unit in their processor to perform the MMX multimedia instructions. In that context, Cyrix's lower floating point/math performance adversely impacts its ability to render complex graphics, multimedia and voice recognition applications. In fairness, though, it appears from some benchmarks that the Cyrix 6X86 MX processor has good MMX performance in some graphical programs. To my mind, its future performance in multimedia applications such as voice recognition is up in the air. AMD's MMX performance is quite good. AMD has a separate MMX processing unit burned in the silicon, at least a theoretical improvement compared to the Intel and Cyrix approaches. AMD uses a licensed version of Intel's MMX instruction set, so compatibility should not be a problem.

The System Board. Avoid very expensive "Overdrive" or upgrade processors. A new system board designed to handle a K6 or 6x86MX processor will cost less money, run faster, and work much better.

The "chipset" used on the system board is very important because the chipset model determines the performance and features of a system board. Intel now has 90% of the system board chipset market and sells numerous variants, each with their own performance characteristics and features. Make sure that any Pentium, K6 or 6x86MX system includes a motherboard that uses the newest Intel TX chipset, which works with the Pentium MMX, K6 and 6x86 CPUs. I have used Gigabyte TX system boards with good success and there are other excellent brands on the market.

Be sure that any TX system board comes with CPU and cooling fans that plug into the system board and are monitored for possible failure by the system board. Newer CPUs run so hot that they'll essentially melt down if any fans fail. Because heat buildup is such a problem now, get a larger volume mid tower computer case and be sure to add extra cooling fans inside.

Consider deferring the purchase of a Pentium II system for the time being. Current Pentium II and Pentium Pro systems use the older 440FX chipset which lacks some of the performance and advanced features of 440LX chips now starting to ship. Were I buying a Pentium II system board, I would insist upon one that uses the newest 440LX chipset. Down the road, the 440BX chipset, set for 1998 shipping, should feature noticeably better performance than any Pentium II system now shipping.

You may not be able to use a new system board with computer cases from manufacturers like IBM, Compaq or Dell that generally use proprietary system board designs. Although the components are electronically equivalent, they generally won't fit mechanically. In that instance, you're better off to buy a new, high quality mid tower generic computer case with good cooling and a UL approved power supply.

Recommendation: *Get an AMD K6 200 or 233 megahertz processor with a good quality system board using Intel's TX chipset. It's the best performing processor for the money and does not depend upon proprietary technology, unlike Intel's much more expensive Pentium II.*

Continued on page 16

Breaking the sound barrier without breaking the bank

Continued from page 15

OPTIMIZING MEMORY

As most readers probably know by now, my view is that the primary limiting factor in high performance computing is the ability of the computer to quickly fetch data and program instructions from DRAM memory. Of course, a larger L2 static RAM cache helps. Although most older generation Pentium boards used a 256K cache, the TX chipset boards I've seen use 512K. That definitely helps provide better performance. Ultimately, though, data is currently transferred from the main DRAM memory to the processor on a 66 megahertz memory bus. Standard EDO RAM provides reasonably good performance but is limited by its lack of synchronization with the processor. To get around that problem, some manufacturers are shipping system boards that use synchronized DRAM (SDRAM). By synchronizing data transfers, SDRAM memory speeds the overall transfer rate.

There are some significant problems, however. In the first instance, even SDRAM still runs at only 66 megahertz and so you'll only see a modest overall improvement in performance, on the order of 5-10%. More importantly, achieving synchronization becomes a real problem. SDRAM memory must be specifically matched to the system board you are going to use. That means it's going to be hard to add more SDRAM memory at a later time and still retain stable system performance. Moreover, SDRAM memory is noticeably more expensive than EDO RAM and seems, in my experience, to be more prone to system instability. In fact, even with SDRAM that was supposedly matched to the specific board in use, I have experienced repeated system crashes due to faulty synchronization.

Higher speed alternatives are promised in 1998 and in 1999. Unfortunately, in the meantime, there is no standard for SDRAM and it is not interchangeable in the same fashion as standard EDO memory.

Recommendation: *Stick with 64 megabytes of standard EDO RAM. The performance hit when using EDO DRAM is not great, on the order of 5-10% slower than SDRAM, but your system is much more likely to be stable and more readily upgradeable later. Use 64 megabytes of standard EDO RAM arranged in two 32 megabyte SIMMS. 64 MB should be adequate for voice recognition and other demanding uses. With most system boards, using two 32 MB EDO SIMMs will leave room to later add additional RAM if needed.*

32 BIT OPERATING SYSTEMS

The Pentium II, 6x86MX and AMD K6 processors are, in fact, optimized to give best performance with true 32 bit operating systems like Windows NT, OS/2 Warp 4 and Netware. While I've found that Pentium II class processors provide only about a 30% performance improvement in Windows 95 compared to older Pentiums of the same clock speed, I have found that pure 32 bit operating systems like NT and OS/2 run much faster, at about double the performance compared to similar classic Pentium CPUs.

Recommendation: *If you are using Windows NT, OS/2 Warp or Netware, get either the Pentium II or the AMD K6. This one is a no brainer. If you are using Windows NT 4.0 or later, that operating system can use dual CPU processors for markedly better performance. Because the K6 cannot be used in a dual processor system, any multiprocessing system will use dual Pentium II CPUs. NT 4.0 with a dual Pentium II system using the LX chipset, adequate DRAM, and a fast hard disk will probably break the sound barrier. A system like this is probably the wave of the future but most of us can't justify the cost from a purely business standpoint.*

Alaska Bar Association 1997 CLE Calendar

Program #, Date & CLE Credits	Program Title	Program Location	In Cooperation With	Section
#37 September 19 6.0 CLE Credits Full Day	Medicaid Planning & Long Term Care in Alaska (NV)	Anchorage Regal Alaska Hotel		
#88 September 22 3 CLE Credits Morning	Mandatory Ethics for Applicants (NV)	Juneau Baranof Hotel		
#10 September 22 3 CLE Credits Afternoon	Morgantown Civic Center Collapse: A Case Study in Ethical Issues (NV)	Juneau Baranof Hotel	ALPS	
#88 September 24 3 CLE Credits Morning	Mandatory Ethics for Applicants	Anchorage Egan Convention Center		
#10 September 24 3 CLE Credits Afternoon	Morgantown Civic Center Collapse: A Case Study in Ethical Issues	Anchorage Egan Convention Center	ALPS	
#34 September 26 4.75 CLE Credits Half Day	National Trends in the Representation of Troubled Debtors	Anchorage Hotel Captain Cook		Bankruptcy
#88 September 26 3 CLE Credits Morning	Mandatory Ethics for Applicants	Fairbanks Regency Hotel		
#10 September 26 3 CLE Credits Afternoon	Morgantown Civic Center Collapse: A Case Study in Ethical Issues (NV)	Fairbanks Regency Hotel	ALPS	
#32 Oct. & Nov. 18.75 CLEs Various Times	Utility Finance & Accounting for Attorneys (NV)	Lower-48 Various Locations	Financial Accounting Institute	
#24 Oct. 3 2.75 CLE Credits Morning	Sexual Harassment: Where Do You Draw the Line in the Workplace? Yes, It Really Is A Big Deal	Anchorage Hotel Captain Cook	Gender Equality Task Force & AK Assn. of Legal Administrators	Employment Law Section
#39 Oct. 3-4 7.5 CLEs Two Days	NCMIC Defense Counsel Seminar (NV)	Chicago, IL		
#38 Oct. 9 3.75 CLE Credits Half Day	Limited Liability Vehicles	Anchorage Hotel Captain Cook		Estate Planning & Probate Law, Tax Law & Business Law
#11 October 21-22 Day 1: 7.25 CLEs Day 2: 7.0 CLEs 2 Full Days	10th Annual Alaska Native Law Conference	Anchorage Hotel Captain Cook		AK Native Law & Env./Natl. Resources Law
#40 Nov. 6 CLEs tba Half Day	Documents & Trends in Residential Transactions	Anchorage Hotel Captain Cook		Real Estate Law

Attorney Discipline Summaries

Attorney Receives Private Reprimand for Inaccurate Accounting to Client

Attorney X received a private reprimand for sending a client an inaccurate accounting of proceeds from a settlement. The Disciplinary Board imposed the reprimand at its meeting on September 5, 1997.

Attorney X's client and the opposing party were near settlement on the client's claim. According to the client, she agreed to consider but did not approve an offer by the opposing party. However, according to Attorney X the client approved the offer. The attorney released the client's claim and went on vacation.

Meanwhile the client decided to make a counter-offer, contingent on prompt acceptance. Because Attorney X was out of town, the client conveyed the new offer directly to opposing counsel, who informed the client that Attorney X had already settled the case.

Attorney X returned to town to learn that the clients demanded a higher figure than what he had settled for. Attorney X contributed personal funds, withdrew contingent fees based on the combined amount, and sent the client a check and cover letter stating that the case had settled at the higher figure.

Evidence supported an inference that Attorney X settled without authority and intentionally misled the client so as to avoid explaining circumstances. Other evidence indicated that the inaccurate cover letter resulted from a clerical error. There was no harm to the client. Attorney X and Bar Counsel resolved the case by stipulating to a negligent violation of ARPC 1.15(b), the rule requiring accurate accountings to a client.

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Attorney Disciplined for Failure to Inform Client of Dismissed Appeal

Attorney X represented a client in a criminal sentence appeal. The Court of Appeals notified the attorney of a briefing schedule. Attorney X missed the deadline. The court gave the attorney an automatic extension. On the day the brief was due, Attorney X requested a further extension. The court denied the extension and dismissed the appeal. Attorney X filed the brief a day later, but otherwise took no steps to reinstate the appeal. The attorney also failed to advise the client about the dismissal; the client learned about it from another source. Fortunately for the client, the Court of Appeals overturned a conviction in an earlier case of the client's, which resulted in resentencing in Attorney X's case anyway.

Bar Counsel and Attorney X agreed that the failure to file the brief on the second deadline and to attempt to reinstate the proceeding amounted to neglect in violation of ARPC 1.3. The attorney's failure to tell the client about the dismissal violated ARPC 1.4. The Disciplinary Board, at its meeting of September 5, 1997, accepted a stipulation for private reprimand.

Alaska first in trusts

continued from page 1

creditors to the entire property of the trust." Rev. Rul. 76-103, 1976-1 C.B. 293, 294. What if the settlor was merely a discretionary beneficiary of the trust, retained no powers over the trust, retained no entitlement to possess or enjoy the property in trust, and retained no right to the income from the property in trust?

Every estate planner knows how difficult it is to convince a client that she should make gifts equal to her $10,000 annual gift tax exclusion or her current lifetime exemption equivalent amount (increased under the Taxpayer's Relief Act of 1997 from $600,000 to $1 million by 2006). The problem is that the client always asks, "What happens if I need the money?" The answer used to be that if the rainy day came, the client could not get the money back. What if you told your client that she could cache her assets in an Alaska Trust where her future unknown creditors could not threaten them and if the rainy day comes, the trustee had the power to make discretionary distributions from the trust to her as one of the eligible beneficiaries of the trust?

ALASKA HAS LITTLE TO FEAR FROM DELAWARE'S CURRENT TRUST LEGISLATION.

The estate planning opportunities are enormous. For example, a client with a stock and bond portfolio worth $600,000 could hope that her investments will appreciate at 10 percent a year and in twenty years will be worth as much as $4 million, or more. If these assets worth $4 million are included in her estate at the time of her death, her estate would owe as much as $1,495,000 in federal estate taxes. On the other hand, if the client transferred these assets to an Alaska Trust to be held for the benefit of herself and her family and the trust was structured so that her $600,000 transfer to the trust was a completed gift and the trust was excluded from her estate, then upon her death the $4 million of assets would be excluded from her estate. Her estate would save $1,495,000!

The answer whether the trust is included in the estate of the settlor under IRC §2036(a)(1) or §2038 turns in large part on whether under local law the settlor's creditors can invade the trust. In other words, the creditor protection of the Alaska Trust Act is necessary to achieve any estate tax savings. If the settlor's creditors can invade the trust, then the trust assets will be included in her estate.

Nearly every other state has a statute like Alaska's old AS 34.40.110 that provides that a gift in trust for the benefit of the person making the gift is "void against the creditors, existing or subsequent, of the person." See e.g., Restatement of Trusts §156(2). In *Paolozzi v. Comm'r.*, 23 T.C. 182 (1954), a gift tax case, the court relied on this rule and held for the taxpayer. The court reasoned that the gift to the trust was incomplete because the settlor's creditors could invade the trust under Massachusetts law. The taxpayer owed no gift taxes, but the trust would be included in her estate.

The best estate tax case that we have to rely on is *Estate of Uhl v. United States,* 241 F. 2d 867 (7th Cir. 1957). In this case Mr. Uhl settled an irrevocable trust governed by Indiana law for the benefit of his nieces and nephews and retained the right to be paid $100 per month. The trust stated that "[t]he trustee may in its discretion pay a greater sum than $100.00 per month if it shall deem advisable." The question was whether the entire trust estate should be included in Mr. Uhl's gross estate or whether merely the portion necessary to produce an income of $100 per month should be included. The estate appealed to the Seventh Circuit after the government successfully persuaded the tax court that the entire trust should be included in Mr. Uhl's gross estate under 1939 code §811(c)(1)(B), which is nearly identical to current §2036(a)(1). The Seventh Circuit relied on a gift tax case, *Herzog v. Comm'r.*, 116 F. 2d 591 (2nd Cir. 1941), and reversed the tax court. The court reasoned that under Indiana law at the time Mr. Uhl's creditors could not reach any part of the trust other than that necessary to produce an income of $100 per month and that Mr. Uhl reserved no right to compel the trustee to pay him more than $100 per month. The court held that only the portion necessary to produce $100 per month was included in Mr. Uhl's estate.

In *Herzog* the taxpayer transferred assets in trust for the benefit of himself and his wife. The trustees had the power to pay the trust income in such amounts and proportions as the trustee should in his discretion deem proper. Upon the death of Mr. and Mrs. Herzog the assets in trust eventually were to be distributed to their children. Mr. Herzog filed his gift tax return believing that only the remainder interest of the trust was subject to gift taxes. The court noted that the rights of creditors to invade the trust under New York law at the time was "in doubt." *Id.* at 594. "[T]he taxpayer has not retained a right to the income, nor has he retained in conjunction with any person the right to designate the recipients of it." *Id.* at 595. The court held that Mr. Herzog's transfer to the trust was a completed gift and *was* subject to gift taxes.

A more recent estate tax case involving Maryland law is *Estate of German v. United States,* 85-1 USTC (Ct. Cl. 1985). Here the government argued in its motion for summary judgment that the assets in the six separate trusts created by Mrs. German during her lifetime were included in her estate under §§ 2036 and 2038 because under Maryland law her creditors could attach or levy the trust assets. Under the terms of the trusts the trustees had the discretion to pay income or principal to Mrs. German. The court denied the government's motion for summary judgment after finding that the government failed to establish that Mrs. German's creditors could invade the trusts under Maryland law.

My personal favorite is Private Letter Ruling 9332006 (not precedent). In this ruling the taxpayers proposed to transfer interests in a domestic partnership to a foreign trust for their benefit and for the benefit of other family members. The trustee was an independent corporate fiduciary located in the foreign country. Under the laws of the foreign country the taxpayers' creditors could not invade the trust. The taxpayers were purely discretionary beneficiaries of the trust. A U.S. citizen was appointed trust protector and could appoint another independent trustee. The IRS ruled that the gifts to the trust were complete for purposes of IRC §2511 and that the assets in trust were not included in either of the taxpayers' estates under IRC §§ 2033, 2036, 2037, or 2038.

So what's wrong with the Delaware Trust Act? It includes an estate planning atomic bomb: Del. Code Ann. 12 § 3573(b). This subsection provides that if the settlor expressly agrees in writing that the assets of a Delaware trust are available to satisfy her debts, then under Delaware law the trust is subject to her debts. Del. Code Ann. 12 § 3573(b) gives the settlor the "retained power to, in effect, terminate the trust by relegating the grantor's creditors to the entire property of the trust[.]" Rev. Rul. 76-103, at 294. There is no way that the settlor of a Delaware trust can exclude the trust from her estate and save estate taxes.

Our dream came true after all; Alaska is first in trusts in 1997. The lobbyists in Delaware will be busy.

"SEXUAL HARASSMENT: WHERE DO YOU DRAW THE LINE IN THE WORKPLACE?"

Panelists for the upcoming CLE "Sexual Harassment: Where Do You Draw the Line in the Workplace?" met recently at the Bar Office in Anchorage to finalize their presentation. Each will analyze sexual harassment issues from their respective viewpoints and share practice tips and risk management strategies. The topics of focus will include defining hostile environment harassment, liability, and prevention.

From Left to Right: Jerry Smith, Manager of Human Relations for BP Alaska, will present the corporate perspective based on his many years of experience in a major international company; Doug Parker, Managing Attorney, Bogle & Gates, will bring the dual perspective of an attorney who both represents clients in management and oversees human relations for a major law firm; Tom Daniel, Partner, Perkins Coie, and Co-Chair of the Alaska Bar Association's Employment Law Section, will moderate the panel and share his insights as an employment lawyer who has handled sexual harassment cases on behalf of several major companies; and Lee Holen, Lee Holen Law Office, will present her views as an attorney who has litigated on behalf of plaintiffs in many sexual harassment cases.

NOT PICTURED: Other CLE faculty members include Justice Dana Fabe of the Alaska Supreme Court, Co-Chair of the Alaska Joint State-Federal Courts Gender Equality Task Force, who will introduce the program and serve as a judicial representative on the panel; Presiding Judge Elaine M. Andrews of the Superior Court, Third Judicial District, who will also serve as a judicial representative on the panel.

The CLE will take place on Friday, October 3, 1997, from 8:00 AM-11:00 AM at the Hotel Captain Cook in Anchorage.

It is co-sponsored by the Alaska Joint State-Federal Courts Gender Equality Task Force and the Alaska Bar Association's Employment Law Section in cooperation with the Alaska Association of Legal Administrators.

For more information, please contact the Bar Office at 272-7469.

Anne Gulyassy, of the Employment Discrimination Litigation Section of the Department of Justice in Washington, D.C., will be featured on the faculty of the upcoming CLE on sexual harassment.

Telecommuting: Fad or the Future?

BY NORMAN K. CLARK

In the past five years, telecommuting has become commonplace in service-sector businesses and government agencies. Does this departure from the traditional law office environment hold promise for the legal profession? How should law firms and departments decide whether telecommuting is right for them and their clients?

Telecommuting has emerged as a viable alternative way to work. Its advocates claim 10% to 30% gains in productivity. Telecommuting offers law firms and departments new opportunities to reduce administrative overhead and to improve employee morale.

A survey by Pitney-Bowes Management Services of 116 law firms nationwide indicated that a substantial amount of legal work is now being done outside the law office. Forty percent of the lawyers surveyed indicated that they work on vacations. Few of these attorneys are true telecommuters, but their response spotlights an emerging trend for more legal work to be performed outside traditional settings. It is no surprise, therefore, that 80% percent of the attorneys surveyed said that they expected more lawyers to be telecommuting from home in the near future. Still, telecommuting is not always an easy fit for the legal profession.

TELECOMMUTING IS DIFFERENT

Telecommuting is more than just occasionally working at home or checking voice mail while on the road. Rather, by moving the work to the workers, instead of the workers moving everyday to the work, telecommuting involves a fundamental reorganization of the law office and the way the work gets done. It requires a well-reasoned strategic business decision based on solid business and professional objectives.

WHY AND HOW MUCH?

Telecommuting requires a major investment in equipment and innovation. The first step is to identify significant business or professional objectives that telecommuting will directly and significantly support and advance. The three most important ones usually are:

Profitability: Will telecommuting lower the costs of producing legal services without offsetting equipment costs, reduced productivity, or detriment to professional quality?

Growth: Can we use telecommuting to allow us to take on more work or to reach new clients?

Client service: Can telecommuting meet client needs and expectations better, and allow us to establish a distinct competitive advantage in client service?

Describing a potential benefit of telecommuting is easy. The harder part is to translate a general goal into clear, quantifiable performance measurements.

Surprisingly, profitability — the most numbers-oriented goal — may be the most elusive to quantify accurately. It's easy to measure savings in terms of reduced occupancy and equipment costs. Many managers overlook, however, the subtle offsetting costs that also may arise. What effect will a paralegal's telecommuting, for example, have on work processes back at the office? Will delays, rework, and waste result, thereby driving up costs and decreasing profitability? How should the law firm measure possible loss of client goodwill, which may result if clients perceive that telecommuting has made legal services less accessible or less timely? These offsetting risks should be identified and quantified up front.

DO NOT ATTEMPT THIS AT HOME

Although telecommuting is spreading throughout service-sector businesses, not every function is right for telecommuting. This is especially true in today's mature, competitive legal services market, where the ability to meet client needs faster, cheaper, and with greater overall client satisfaction is often the most important, and sometimes the only, difference between two law firms. For corporate and government law departments, accessability and responsiveness are frequently the strongest selling points in resource environments that place the legal department in direct competition with outside firms.

A good litmus test is whether clients are likely to object if a particular function is performed at home. If the telecommuting is invisible to client — if it produces no perceptible negative impact on client services — the office can usually work around any minor delays or inefficiencies that it might produce.There are few workarounds for client dissatisfaction.

One of the best ways to avoid a client-service disaster is to involve clients in the decision. Discuss the telecommuting proposal with the clients that are likely to be affected. Sharing the cost savings with clients, in the form of reduced fees, can often compensate for any minor delays or inconvenience. It's better to get possible client objections on the table and address them candidly beforehand, than to have clients express their dissatisfaction by taking their matters elsewhere.

This functional analysis is not always as easy as it seems. Telecommuting can be a powerful morale booster, and many organizations use it to reward good work and faithful service. No matter how wonderful the employee, it's the function that the employee performs that must be the focal point. The needs and expectations of the client with respect to the function, and not the person performing it, must be paramount.

TELECOMMUTING IS NOT FOR EVERYONE

Just as not every job is right for telecommuting, some people should not be telecommuters. Telecommuting involves a fundamental change in the relationship of the individual to supervisors, colleagues, and workplace culture. Telecommuters frequently report feelings of isolation and fears about their promotion prospects: "out of sight, out of mind." There may even be a temporary deterioration of employee-supervisor relationships. Managers and telecommuters alike often have difficulty moving away from a traditional management paradigm stressing a hierarchical chain of command. This can be particularly pronounced among people — managers and workers alike — who place a high personal emphasis on authority and orderly routine.

Research in a wide variety of companies and organizations consistently points to several key personality traits of the ideal telecommuter:

Volunteer. First, and most importantly, a telecommuter must be a volunteer. Most employees value their daily relationships with colleagues and with their workplace culture. They tend to define themselves, at least to some extent, by their work. Telecommuting removes the employee from this familiar culture, and usually results in at least some sense of isolation. Despite its attractive features, telecommuting poses significant challenges to most people. Participation must be the result of an informed, voluntary choice by the employee. Coercion, cajoling, and unrealistic promises just won't work.

Realistic expectations. Telecommuting is not just working at home. The telecommuter should have a home environment that can realistically be turned into a work setting that promotes productivity and quality. In evaluating potential telecommuters, managers need to ask some frank, sometimes intrusive, questions. Does the employee have adequate space at home that can be dedicated to work? How frequently will the telecommuter be interrupted by friends or family members, and how will he or she prevent or respond to interruptions? Do the employee's customary work style and work habits require the synergy and stimulation provided by frequent daily contact with colleagues and supervisors? How will the employee handle the feelings of isolation or promotion disadvantage that many telecommuters encounter?

Self-confidence. Working at a remote location decreases the everyday opportunities for consultation with colleagues and supervisors. Telecommuters need to be confident in their own ability to make independent decisions. By the nature of their profession, most attorneys tend to be independent thinkers; but colleagues will need to make an effort to ensure that the telecommuting lawyer is not cut off from the office's intellectual resources.

Self-management. The office culture provides constant, subtle feedback that encourages and assists individual initiative, self-discipline, and organization. The greater an employee's internal self-management, the more productive he or she will be as a telecommuter.

Self-motivation. Telecommuters need to be self-starters, who can work effectively up and down organizational levels and across stovepipes. The boss will not be there to guide the telecommuter and his or her work through the organization's channels. The telecommuter will need to be motivated and resourceful enough to chart his or her own course, and to work directly throughout the law office organizational structure. In traditional, hierarchical organizations, this can require unusual self-motivation, determination, and resourcefulness. Most people are more comfortable working within the system; fewer can work effectively outside and across it.

Seniority. Experienced people, who are not only familiar with their functions and practice areas, but also those of many of their colleagues, usually are the most successful telecommuters. Their knowledge and background make them better able to analyze and solve problems independently, and more likely to call on colleagues when they need help.

GETTING STARTED

The experiences of other companies and organizations provide law firms and departments with lessons learned (sometimes the hard way) and suggestions to increase the likelihood of success. Three of these are particularly important because they are easily overlooked.

Always prototype. Start with a small, well-defined mixture of functions and employees and allow at least four to six months for office work processes to adjust. Carefully observe and measure the costs and the impact on productivity and

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efficiency. Telecommuting requires a significant investment in hardware, software, and communications capabilities. A prototype provides the opportunity to test the options and select the system that best meets the needs and goals of the firm or law department. It's easier to adjust a limited-investment prototype — or even walk away from it entirely — than it is to attempt to salvage a large-scale experiment and undo organization-wide damage to profitability, client services, employee morale, or office work processes..

Anticipate problems. Telecommuting involves more than just letting a paralegal take a computer and modem home. As noted above, the fundamental change in working relationships, the need for an unusual degree of self-confidence and self-management, and the technical issues will all pose problems. Although more senior employees are usually more adept at meeting these challenges, no one will be immune from them.

Technical support is one of the first problems that should be anticipated and addressed in advance. Does the law firm or department have the resources to provide remote technical support and repair services? Like any new computer or communications system, telecommuting will produce a surge in technical support demand at first. Will in-house technical support resources be able to handle the spike in demand at remote sites? What will be the impact on service and support to users in the office?

Fast technical support is particularly critical. A problem at a home work station will have a disproportionately greater impact on productivity than it would in the office. An office worker can usually move to another computer, with little delay or loss of productivity. The telecommuter must either wait at home until the problem is solved, or come into the office, where there might no longer be an available desk or computer to use.

Another problem that should be anticipated early is how management will respond to short-term adversity. The telecommuter's individual productivity will probably decrease at first. The need to work with the remote telecommuter is likely to produce delays and inefficiencies in work processes back at the office. Does the firm have the flexibility and constancy of purpose to absorb these short-term dips in productivity and profitability during the adjustment period? Or will senior management panic and want to pull the plug?

Train and communicate. Most organizations overlook the need for training and ongoing communications about the goals and challenges of telecommuting. Training must not be limited merely to prospective telecommuters and their bosses. It must address more than just technical details, such as how to do file transfers or on-line research. Instead, the goals, expectations, and performance metrics for telecommuting should be communicated to everyone in the organization. Everyone also needs training, to some extent, on how to adjust to the organizational, management, and work process issues that will surely arise.

An important part of this training and communications effort is the need to address the selection issue. It should not be sidestepped, no matter how unpleasant. As discussed above, telecommuting is not for everyone nor for every function. Management should openly and candidly discuss function-selection criteria and rationales. More importantly, management must also ensure, on a private and personal level, that each potential telecommuter understands and participates in the decision on whether he or she will be offered the opportunity to telecommute.

OTHER CONSIDERATIONS

Telecommuting is a strategic decision that should be made in the context of clearly-defined business and professional objectives. Law firms and legal departments should also consider business issues such as:

Stated telecommuting policy. Management and telecommuters should work together to develop a clearly-stated policy governing work requirements, reporting and supervisory relationships, and performance measurements. Corporate and government legal departments will often be governed by company or agency telecommuting policies. Law firms will frequently have to develop their own.

A telecommuting policy statement should start with a precise definition of what activities, circumstances, and locations constitute telecommuting, and are therefore covered by the policy. The statement should explain the business goals and objectives that telecommuting are intended to support, as well as the limitations imposed by these goals. For example, a goal of telecommuting may be to reduce operating costs and thereby improve profitability (the driving business goal), without adversely affecting client services (the limitation imposed by other business goals).

The policy statement should be incorporated into a written telecommuting agreement, by which management and the telecommuter acknowledge their awareness and commitment to their respective expectations, rights, and responsibilities.

Clarity and comprehensiveness are crucial. The policy statement should provide clear guidance on nuts-and-bolts questions such as:

- What functions are targeted for telecommuting and which ones are excluded?
- What are the selection guidelines for telecommuting candidates?
- What equipment, technical support, and training will the firm or company provide?
- What space, facilities, or equipment will the telecommuter be required to provide?
- What spatial, safety, and ergonomic standards will the telecommuter be required to meet?
- What out-of-pocket expenses will be reimbursed to the telecommuter? What special accounting and documentation policies and procedures will apply to telecommuter expenses?
- What work hours, productivity levels, and other performance standards will the telecommuter be expected to observe?
- How, when, and to whom will the telecommuter be required to submit reports?
- What, if any, special standards or criteria will be used in performance evaluations?
- What time-keeping requirements and procedures will the telecommuter be required to meet?

Who has the authority to authorize exceptions, and under what circumstances?

Security. Telecommuting always involves a potential threat to the confidentiality of client communications, proprietary information, and attorney work product. Managers and telecommuters alike need to understand the information security features built into software and communications systems, as well as the importance of resisting the temptation to disable or circumvent security measures such as file access restrictions and passwords. These issues will not affect only telecommuters, but also everyone in the organization. Telecommuting therefore offers a good opportunity to review, improve, and inform everyone about information security policies and practices.

Equipment. As a general rule, telecommuters need the best equipment, not the cast-offs. The old 286 PC and a 2400 baud modem from the back room, if they work at all, will be too frustratingly slow to be effective. Performance, not price, is the key factor. The basic telecommuting workstation for a law firm or department should include at least:

- 100 MHz Pentium processor (or equivalent)
- megabytes memory
- 1 gigabyte hard drive
- quad-speed CD drive
- 14400 baud fax modem.
- small laser printer

Software should include all the basic applications, such as word processing, presentation graphics, and communications packages, that are used back at the office. Of course, it should also include up-to-date fax, e-mail, and remote access capabilities. In short, the telecommuter's equipment should not just be "as good as what's in the office"; it should be better.

Insurance. Management should consider the requirements and additional cost for property and liability insurance to cover the firm's equipment and the telecommuter's activities at home on behalf of the firm. Homeowner policies usually will not provide this coverage. While the telecommuting agreement should impose a duty on the employee to exercise reasonable care, he or she should not be expected to assume otherwise any risk of loss or damage.

KEEPING FOCUSED

Telecommuting is more than just the latest techno-fad. It can, and probably eventually will, fundamentally change the way that law firms and departments serve their clients. Telecommuting is, therefore, an important strategic issue that will become even more so in the future. As such, it will require clearly-defined business objectives and well thought-out planning. It will also demand the flexibility to adjust to new work relationships and the courage to absorb short-term challenges. By keeping focused on the goals of profitability, practice growth, and improved client service, law firms and departments have an opportunity to use telecommuting to improve all three. Moreover, telecommuting can help create a leading-edge competitive advantage that will position them favorably for the future.

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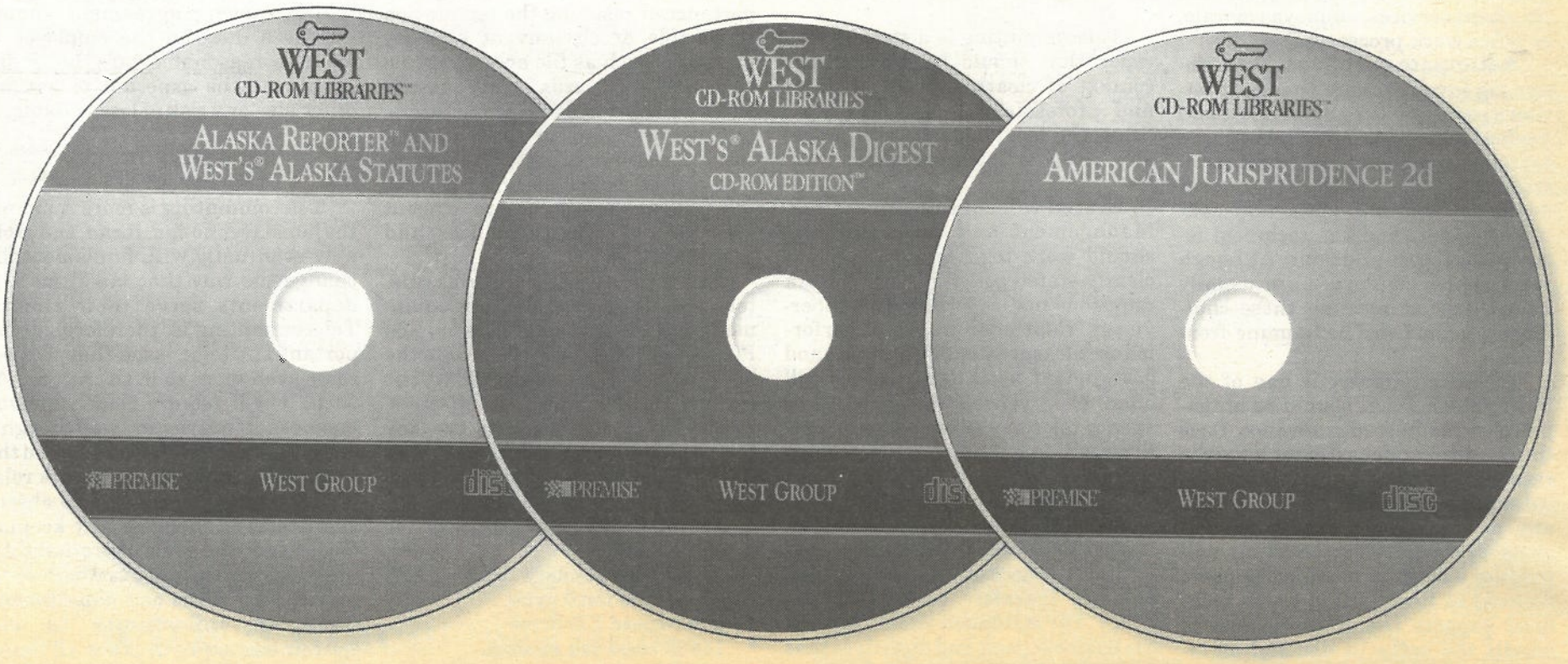

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