The Alaska BAR RAG

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Inside:

Clinton talks tobacco, health & guns at ATLA

By Joe Sonneman

President Clinton

Imagine a ceiling tile one foot square, and then imagine a lacuna or re-cessed part of the ceiling which is 25 squares wide by 20 squares deep, with a longish, oblong chandelier about 15' x 10' in the center of the lacuna. Now imagine a ballroom six chandeliers wide by 4 deep, with 10' ceiling spaces between each lacuna and you have a room roughly 210 feet wide by 100 feet deep, filled with about 2000 chairs, 95% of them occupied by ATLA (American Trial Lawyers Association) convention delegates and exhibitors, who—sans signs—had to go past metal detectors and sniffer dogs to get in.

That was the Hyatt Regency scene in June, as for the first time, a U.S. President addressed a full ATLA convention. What sounded like a live band played "Hail to the Chief," and everyone stood and applauded as President William Jefferson Clinton walked onstage with the ATLA President, who offered a short introduction—mostly explaining how the United States had improved since 1992—followed by another round of applause, not quite unanimous, for Clinton, the man from Hope with a message of hope.

"Shame on you for your perjury!," a lone voice shouted out, to a chorus of 'boos' for the shouter.

"I knew there was one bad lawyer here," Clinton joked, adding that he was glad it was not all of them.

"We love you, Mr. President," another lone speaker said.

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Clinton said he was proud of ATLA for standing up for the right of injured Americans since 1946—the year of Clinton's birth—long before Congress—sometimes under pressure from years of lawsuits—passed laws creating citizen rights.

The President spoke of the need for reasonable access to courts and the comparable need for Congress to help. He particularly noted tobacco legislation, gun safety laws, and the need to keep the civil justice system working. "An ounce of preventive law is worth a pound of corrective law suits," he said.

"The Supreme Court says Congress must act to give the FDA regulatory authority over tobacco," Clinton said, adding that he hoped "Congress can break their addiction to the tobacco lobby."

America is not safe enough, he added, calling for the licensing of gun owners just as we now license automobile drivers, but he said that so far there was no action on this in Congress. He spoke about the government's agreement with Smith & Wesson, but said the gun lobby is working to destroy both Smith & Wesson and that lone gun manufacturer's agreement with the government.

"I hope we'll see a change in attitude," the President said, adding "I hope the American people can make their attitude clear in November."

Clinton reported a person whose HMO refused permission to go to the nearest emergency room, because the person—unconscious at the time—hadn't called for permission first. "A Patient Bill of Rights is not a partisan issue," he said, "it is a special interest issue," because 70% of all Americans want it. The bill passed in the House, he reported but failed in the Senate, 49-50.

Clinton said with one more vote, Vice President Al Gore would have broken the tie by voting to pass the

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BATCHING IT WHILE FAMILY'S AWAY

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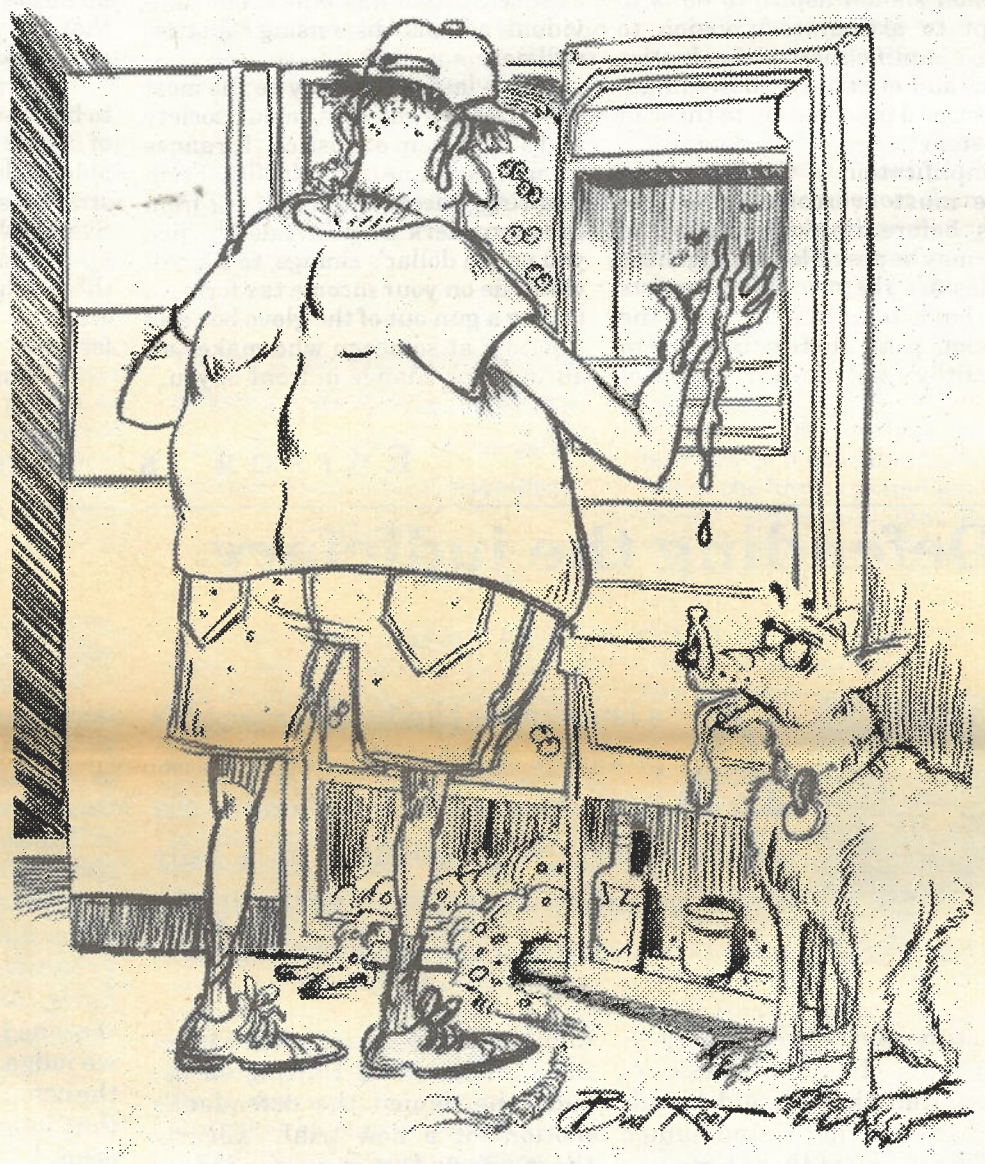

Judicial Council recommends retention of judges on the ballot

The Judicial Council has voted unanimously to recommend that the voters vote yes to retain the judges who will be on the ballot this November. The recommendations follow a comprehensive evaluation in which almost 10,000 Alaskans were surveyed on judicial performance (with almost 5,000 returned surveys).

The Council has made literally hundreds of pages of evaluation material available to the public online at its Internet site: www.ajc.state.ak.us. The amount of information is unprecedented and unmatched anywhere. It includes:

- Official Election Pamphlet Page
- Election Pamphlet page submitted by Judge
- Attorney Survey Results
- Peace and Probation Officer Survey Results
- Social Worker, GAL, CASA Survey Results
- Court Employee Survey Results
- Juror Survey Results
- Staff Memo on Juror Comments
- Staff Memo on Peremptory Challenges
- Staff Memo on Recusals
- Staff Memo on Appellate Review
- Staff Memo on Salary Warrants
- Staff Memo on Public Comments
- Staff Memo on Prior Survey Scores
- CourtWatch Evaluation

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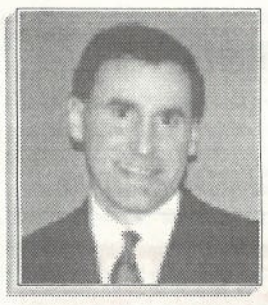
President's Column

Simplifying the justice system?

☐ Bruce B. Weyhrauch



"One man's justice is another's injustice."

—Ralph Waldo Emerson

Efforts to simplify the "Justice System" for some, may add increased complexity for others. Moreover, the "need" for simplification may not be the "wants" of those subjected to the change. What our profession should aspire to do is to attempt to articulate a vision to achieve simplification of the Justice System, and effectively disseminate solutions and information to those in the System.

Simplification of the System of Justice must overcome major obstacles before implementation of change may be possible. Among these obstacles are rhetoric that suggests change but actions that oppose it; the perception that Justice belongs to the wealthy; and the alienation of individuals who perceive that the Justice System has failed, but individual actions dispensing "justice" will not.

This last notion may be the most subtle and pernicious to our society and our System of Justice. It ranges from the sublime to the deadly. From knowingly accepting a $10 bill from the store clerk who intended to give you only a dollar's change, to a small white lie on your income tax form, to taking a gun out of the glove box and shooting at someone who makes an abrupt lane change in front of you.

In each case, the individual justifies the act as simple justice. The store charged me too much anyway, the IRS takes too much, I will teach someone else a lesson because no one will help me and I will act on my own definition of justice.

The need to simplify the Justice System is apparent in order to keep us all in a society of laws that are adhered to and fairly applied. The method to simplify that system, however, is elusive.

Too many who make a lot of money off the current system perceive change as a threat to their economic status. Too many who have been dealt "bad" justice or no justice at all from the current system, have no incentive to participate in actions that may change, or simplify, the system for the better.

Therefore, anything that "needs" to be done must involve all segments of society, must set realistic, achievable goals, and must, in fact, demonstrate a simplification of the Justice System that brings in those who fear alienation and economic harm and those who have been alienated, in order to achieve economic benefits for both.

Ultimately this will involve not just our political leadership, but teachers, businesses, religious leaders, labor unions, and of course lawyers, judges, and law schools.

Lawyers, as the primary players in the Justice System, can and should be instruments for simplification. They must guide others whose concept of justice is that it is too foreign, too complex, and too expensive.

Suggestions and opinions for simplifying the Justice System abound.

Kentucky Federal District Court Judge William Bertelsen underscored the important role of judges to ensure the public's right to a speedy trial. Former American Bar Association President John Curtin suggests that professionalism be a mandatory component of each law school's curriculum. Another former ABA President, Michael McWilliams, underscored the importance of alternative forums to resolve disputes.

If all these are well thought out ideas of simplification and improvement of the Justice System, they must go beyond the confines of speeches and articles and into the courts, offices, schools, and workplaces of society.

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Editor's Column

Defending the judiciary

☐ Thomas Van Flein

As lawyers we handle other people's problems and try to resolve them. Since most of us labor under the weight of these responsibilities on a daily basis, I generally want to focus on the lighter side of the practice of law when writing here.

Sometimes there are pending issues that are of such importance, however, that they should be addressed, even if there is no humor in it. This is one of those times.

There is a political effort afoot bent on undermining our judiciary. Recent years have shown increased efforts to restrict the judicial process. Not content with relying solely on that approach, others are taking aim on certain judges.

Justice Dana Fabe and Judge Sen Tan have been targeted by one or more groups that disagree with various abortion decisions, such as *Valley Hosp. Ass'n, Inc. v. Mat-Su Coalition for Choice,* 948 P.2d 963 (Alaska 1997), which involved Justice Fabe at the trial court level. Judge Sen Tan ruled on a dispute involving Medicaid funding for abortions. That abortion is at the root of this discontent is not surprising, as it remains a festering political wound, not likely to heal anytime soon.

The late Robert S. Daggett wrote about similar situations in California, where efforts to unseat Judge Nancy Wieben Stock were undertaken because she awarded O.J. Simpson custody of his children. In another case, the family of a murdered boy tried to remove Judge Everett Dickey because they believed the sentence imposed was not harsh enough. The friends and family of a defendant sought to remove Judge John Darlington because he denied the defendant's motion for a new trial. Clearly these efforts to remove the judges were based on the merits of the outcome of the case pending before the judge, not on the judges' behavior or qualification for office.

My concern, and the concern of many others, are not the relative merits of either the legal or political arguments in the abortion cases. Rather, the concern is the lack of comprehension regarding the role of the judiciary and the judges who work in the third branch of government.

There is a qualitative difference between the outcome of a decision, and whether one agrees or disagrees with the reasoning therein, and an attack on the judge or court that issued the decision. It is our widely accepted ability to distinguish between the two that forms the basis of our independent judiciary. It is a bright line, but one that is blurred by those seeking to unseat judges because they disagree with the outcome of a particular decision.

That one particular decision may be in error or a particular judge may err from time to time reflects many factors, including the uncertainty and complexity of the law, the factual record before the court, and, if nothing else, the fallibility of people, even highly educated people who become judges.

For purposes of debate, we could agree an outcome or decision was in error. But even so, that would not, or should not, form the basis of a drive to remove or not retain a judge.

The decision not to retain a judge should be based on whether the judge has diligently performed his or her duties, acted with the appropriate decorum, treated the parties fairly, and applied the law in a reasoned manner. Further, when we judge the judges, let us do so on the complete record and history for that judge, not on one case or one issue.

To compound matters, judges are limited in their ability to defend themselves against such attacks. As Daggett observed, "the judge faces a quandary: If the attack on the judge is focused on the decision of an isolated case (especially if the decision is then on appeal), the judge is ethically and perhaps legally prohibited from speaking out." Two groups have formed, however, to assist the judges, including Alaskans For Judge Sen Tan and Alaskans For Justice Dana Fabe. What the judges cannot say on their own behalf, presumably these groups can.

Daggett further observed that "Judges do special nonpolitical work. They need to be independent, protected from public outcry over an unpopular decision mandated by the law. Appeals belong in the appellate courts within a stable and independent legal system, not in the tumult of a contested election and the frenzied distortions which have become commonplace in today's politics."

The *Los Angeles Times* has editorialized that "a judge's job is to follow the law, not public opinion."

In deciding whether to retain a judge, our touchstone should be the judge's competency and qualifications, not the public opinion of those who lost a case.

The Alaska BAR RAG

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Memories of David Thorsness

By Russ Arnett

Let me tell you some of my memories of Dave Thorsness, a colleague of many years who will not soon be forgotten by Alaskans who knew him. Dave served at Adak in the Aleutians from 1944 to 1946 and achieved the rank of staff sergeant, directing work crews in the far reaches of the Pacific.

Military personnel during the war complained constantly about where they were stationed. After all, they were mainly civilians. But Adak was really bad. They lived m quonset huts and the weather was rainy and windy. Once when they were watching a movie, an earthquake struck. One of the soldiers said loudly, "Oh, fall in," which reflected the sentiment of the group. It is a wonder that Dave decided to return to Alaska. He had use of a skiff for recreation which helped. Also, he maintained a positive attitude both toward Alaska and the Army that I am sure was shared by few.

I took the bar exam with Dave in 1954. It was given only once a year and most of us had to wait a long time to take it. When we did take it in October, we had to wait until March for the results. I believe only 18 of us took it that year. During this waiting period we had to do something to support ourselves, and Dave was married to Priscilla. In Anchorage you could work as a free-lance law clerk and perhaps earn $100 for a brief. We wanted to work for a salary as law clerks, but there were very few of these jobs. When the city attorney was authorized to hire a law clerk, the pay was $400 per month. Dave went to work for John Manders, who was a crusty old lawyer with a Vandyke beard. When John was Mayor of Anchorage, he refused to sign the paycheck for the city engineer because of a dispute they had. When the District Judge ordered John to sign the check, he resigned.

Most of the civil cases never came to trial because of the caseload and the fact that we had only one District Judge in the Third Division. When a person who had been sued went to see a lawyer, the lawyer would ask for $200 to prepare and file an answer. Often that was the last of the case.

Things improved financially somewhat after we were admitted to practice. Most lawyers in Anchorage practiced solo or in two-member firms in those days. The vast majority said they did not wish to get larger and so would not hire us; lawyers were individualists back then. There were a few jobs as Assistant U.S. Attorney, but the pay was pretty bad, and a few jobs were available as Assistant U.S. Commissioner, which was a judicial position. These paid between $500 and $600 per month. We most admired Roger Cremo who, after passing the bar, set up practice by himself, later to be joined by his buddy, Cliff Groh.

Many think of Dave as "Mr. Insurance Defense" as though the nature of his practice was ordained by the stars. Actually, he was hired by Davis, Renfrew and Hughes because Bill Renfrew was hunting tigers in India and there was some work that needed to be done. Dave stayed on. The firm handled much of the insurance defense in Anchorage. Of the rest, most was handled by Ray Plummer, later joined by Burt Biss and later still by Jim Delaney. Ray Plummer did not want anything but insurance defense, but Davis, Renfrew and Hughes, like nearly all of the lawyers, handled other things as well. The public never asked a lawyer, "What is your specialty?"

Ed Davis and Bill Renfrew came to Anchorage together and practiced as Davis and Renfrew from 1939 to 1951 when John Hughes became a partner. Bill hunted rabbits in the Turnagain area to augment his law practice earnings during his first winter in Anchorage. When the Territorial lawyers have their annual party, the most likely topic of conversation would be Bill Renfrew stories. Bill never liked desk work. His secretary would place reminder notes on the prongs of a large set of caribou antlers in his office and it looked like a blizzard. Once while I was preparing to write about Bill, I asked Dave for a story. He gave me one about one of the various times Bill out-foxed Fish and Wildlife. I included it verbatim. Shortly thereafter, I received a letter from a lawyer for one of Bill's daughters, saying that after consideration they decided not to sue me, making specific critical reference to the material Dave gave me. I shared offices with Bill much later and he loved to tell outrageous stories about himself.

Dave Thorsness loved flying in the back country in Alaska and did so for 25 years. He hunted moose with his brother, Lowell, ducks with his son John and fished with his son Dan. A particular source of pride for Dave was watching his daughter Kristen's

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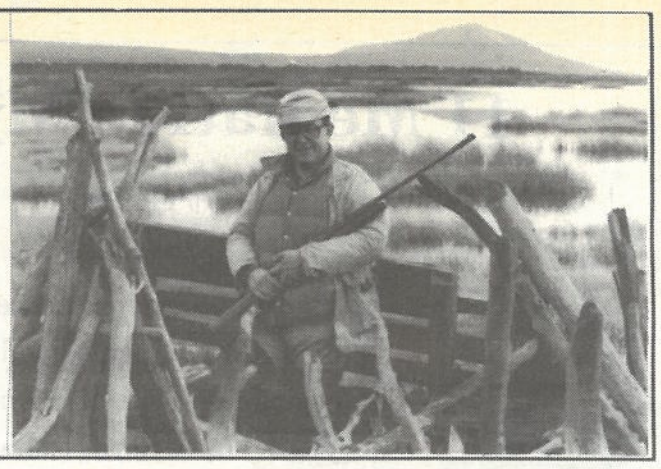

Dave Thorsness enjoyed Alaska's outdoors and duck-hunting in the fall.

Bar Letters

Sincere frustration

Hidden away in the last issue of the *Bar Rag*, in a president's column so dry hardly anyone would read it, I found a little firecracker. According to the Bar's president, one of the plans of the organization will be to establish an "outreach program" to inform people on various themes, including "the critical need for an independent judiciary."

Had I not attended the last State of the Judiciary address, I might have missed the hidden meaning of that phrase. The then-Chief Justice used it repeatedly, as shorthand for opposing legislative efforts to rein in the excesses of the court system. Based on this understanding, I conclude that the Bar Association may be planning an effort to influence the political system, by sending out attorneys to civic groups, schools, and other places where they might be heard, to try to convince people that the efforts being made by our legislators, are wrong-headed. In my view, this would be an inappropriate use of the Bar Association's power, position, and resources.

Make no mistake: the only threat to the independence of our judiciary, is the judiciary itself. This is true at the state level, and even moreso at the federal level. Judges and justices have taken it upon themselves to decide any issue which interests them, based on their personal political philosophies, rather than on the law as passed by the legislative branch. In doing so, the judiciary disenfranchises the public, which has little or no ability to influence the judicial system. As just two examples, consider the complete lack of actual constitutional support for the U.S. Supreme Court's decisions on Miranda warnings, or the abortion decisions of either the state or federal high courts.

I have not seen, in any of our recent legislatures, a philosophical dislike for the judicial branch. What I have seen is sincere frustration at the obvious abuse of power exercised by so many on the bench. The solutions which legislators have proposed may or may not be the best ways to solve the problem, but something is going to have to change. A system in which any really important decision is made, not through the public process, but by a handful of unelected lawyers, cannot long endure.

—Kenneth Kirk

Insufficient respect shown

I respectfully submit that insufficient respect was shown to the doctrine of jury nullification in a recent article on voire dire in *The Alaska Bar Rag*. The right of the jury to acquit against instructions is the people's only protection against abusive judicial and prosecutorial functionaries.

—Grant W. Hunter

In Memorium

David Thorsness

March 16, 1926 - August 2, 2000

David was born in Darwin, Minnesota, the youngest of 4 children to Martha and Julius Thorsness. He grew up in Vincent, Iowa, enlisting in the Army after his 18th birthday. He served on Adak in the Aleutians from 1944 to 1946 and achieved the rank of Staff Sergeant.

After graduating from the University of Iowa with a BA in Political Science, he attended the University of Washington law school where he met Priscilla Coverdale during his 2nd year. They were married June 17, 1954 and upon David's graduation they moved to Alaska. David went to work with the law office of Davis Renfrew and Hughes which became Hughes Thorsness and grew to become the largest law firm in Alaska.

The most cherished part of David's life was his 46 year marriage to his wife Priscilla. His unconditional love and dedication to her was an inspiration to his children and all those who knew him. After raising their family, they traveled extensively throughout the world to Scandinavia, Antarctica, China, Europe and a recent trip to Australia to visit his brother, Ray. But David always looked forward to returning home to his beloved Alaska.

David was an active member of Central Lutheran Church for 45 years and numerous professional organizations including: Alaska Bar Association, President 1964, the Judicial Qualifications Commission, the Boys Club Board of Directors, Providence Hospital Foundation Board, Anchorage Lions Club and the prestigious American College of Trial Lawyers.

"Dad was a pillar of strength, hope and generosity to all who knew him. Integrity and honor were his hallmarks and his legacy."

--Excerpts from from David Thorsness Memorial Services

11 Mediation Myths

☐ Drew Peterson

It is time to revisit some of the myths of mediation which often lead attorneys to reject mediation as an alternative. Over the years I have noticed that more and more attorneys are recognizing the usefulness of mediation, and it's widespread applications.

There remain many myths about the process, however, which get in the way of its application in much appropriate cases. Some of these are:

1. IT'S TOO EARLY FOR MEDIATION

This complaint is heard most commonly in the context of needed discovery and the belief that effective mediation cannot occur until discovery has been completed. In fact one of the most effective forms of mediation, and one which has been embraced especially by the courts, is "early neutral evaluation" whereby a mediation stage is imposed shortly commencement of an action and before formal discovery would normally commence. One of the primary advantages noted for the early neutral process is its ability to focus early on efficient and appropriate discovery, and thereby notably diminish the cost of that expensive stage of the litigation process.

Indeed, in a substantial number of cases, early neutral evaluation can actually result in a complete settlement before discovery has even been initiated. I suspect that most mediators would agree that they would rather get a case early than in an advanced stage of litigation. In the earlier stages of a dispute the parties are typically not as set into their position and they are more willing to look at alternative and creative methods of finding outcomes for mutual gain.

2. IT'S TOO LATE FOR MEDIATION

The flip side of the first myth is that many attorneys believe that mediation must be commenced early to be effective, and it will not succeed if it is introduced late in the mediation process. Ask any experienced mediator, however, and he or she will regale you with stories of successful mediations which were not initiated until the last possible moment before trial. Although the mediator might have preferred to have received the case earlier, there are still many successful cases which are commenced late.

The primary evidence of the effectiveness of late mediation is the usefulness of Settlement Conferences, which we are all familiar with. Settlement Conferences are a form of mediation, which are often employed shortly before trial. Such mediations often result in a more coerced agreement, which the parties do not feel as good about in retrospect as they do with a more facilitative style of mediation. Because of this coercive element, some mediators do not believe that Settlement Conferences are "real mediation." I believe it is more correct, however to see Settlement Conferences as a form of mediation, which can be very effective when, used appropriately.

3. MY CLIENT WILL BE PUSHED AROUND IN MEDIATION

Many attorneys, especially in family cases, are concerned that their clients will be pushed around in mediation and agree to things that are not in their best interests. Indeed some domestic violence advocates (not as many as in the past) argue that mediation is inherently dangerous for abused women because of the inherent imbalances in power involved with such cases.

THERE REMAIN MANY MYTHS ABOUT THE PROCESS, HOWEVER, WHICH GET IN THE WAY OF ITS APPLICATION IN MUCH APPROPRIATE CASES.

The easiest response to such myth, however, is that the attorney is welcome to be present at all stages of the mediation process. How then can the client be disadvantaged any more than at any other state of litigation at which their attorneys are present? It is true that attorneys in mediation are sometimes (but not always) asked to sit a bit more in the background and let the clients do most of the talking. But this is just for the comfort of the parties and the process, and is negotiable in an appropriate case where the client is extremely non-assertive.

It is pretty much universally recognized in the mediation field these days that attorneys should always be allowed into the mediation process, and my own advise is to run not walk away from any mediation process that does not allow the attorneys to participate in all stages. This is not to say that you might not agree to let a client go to mediation alone. But this should be a decision made solely by the client consulting with his or her attorney and other adviser, with no influence from the mediation process.

The final response to this myth is to note that mediation is itself a very empowering process. Mediation treats all parties with respect and guarantees that the quieter voices are heard in a respectful manner. Everyone has some degree of power in negotiations, and mediation recognizes this and focuses on the areas of strength of all participants in the mediation process.

4. THE CASE IS TOO COMPLICATED FOR MEDIATION

Attorneys will sometimes assert that a particular type of case is too complex for mediation, and needs to be handled through the litigation process instead. It needs to be recalled, however, that the parties in mediation have total control over who their mediator is, as opposed to the process of choosing either a judge or a jury. If you have a complex technological case, you can choose any technological genius you can agree upon to act as a neutral evaluator/facilitator, with or without the assistance of another individual more experienced in the mediation process itself.

Mediations have been utilized in disputes in the high tech industries and among the Fortune Five Hundred companies for years, most notably through the auspices of the Center for Public Resources (CPR) program headquartered in New York City. Using procedures such as Minitrials and Summary Jury Trials, they and others have resolved complex cases into the hundreds of millions of dollars.

5. THERE IS NO REASON FOR MEDIATION BECAUSE WE KNOW WE WILL WIN IN COURT

Perhaps the most obvious reasons favoring mediation over litigation, based on statistical analysis, are timing and cost. The average mediation is over twice as fast at less then half the cost of going through the litigation process.

Even more important than the timing and cost of litigation, however, is the long lasting effect of litigation on the parties. Studies have shown that 70-80% of disputes are between people who will have a continued relationship, as members of the same business community, neighbors, family, etc. As we have all observed, litigation can create scars between people that can take lifetimes to heal. When people resolve their own disputes, they can remain friends thereafter, and continue to work cooperatively in their respective communities.

6. MEDIATION FAVORS COMPROMISE AND WE WANT A COMPLETE VICTORY

In fact, compromise is the frequent result of the competitive mode of problem solving, whereby both sides prepare their strongest possible case and refuse to budge from it. Mediation, in contrast, looks for "options for mutual gain," the so-called win-win solution. In mediation it is ideally possible for one side to win without such victory being at the expense of the other party to the dispute.

Of course we don't always live in an ideal world, and a complete win-win is often not possible through mediation just as we often do not get the complete victory that we seek through the competitive (litigation) process. Another and more accurate way to look at the collaborative negotiation process utilized in mediation, is to realize that we can almost always get more of what we are seeking through a cooperative process than through a competitive process. Through collaborative problem solving we can "expand the pie" to result in more of a victory for each side than in the typical compromise reached through the competitive process.

7. CUSTODY MEDIATION ALWAYS RESULTS IN JOINT CUSTODY

It is true statistically that mediation results in more join custody awards than are either ordered by the court or negotiated by the parties in a traditional manner with attorneys. Indeed such studies have noted that mediation agreements on average result in the children spending one or two extra days per month with their non-primary care parent than orders reached in more traditional ways.

The reason for this joint custody bias of mediation is that the mediation process focuses the discussion on the needs of the children rather than on the needs of the parents. And there is pretty convincing evidence that children whose parents are separating need the love and affection of both of their parents after the separation, with the least possible amount of acrimony between them.

This is not to say, however, that mediation always results in joint custody. Many mediation agreements provide full custody to one parent or another, in line with what both parents agree is in the best interest of the children. Primarily, mediation tries to "change the game," to focus on the needs of the children, rather than upon who gets to possess them. Indeed even the word "custody" is disfavored in mediation. I try to use the word "co-parenting" instead, to emphasize that the parties divorce themselves, not their children.

8. MEDIATION IS USED BY DEADBEAT DADS TO AVOID QUICK AND PROPER CHILD SUPPORT ORDERS

This is one of the most ironic and incorrect myths about mediation. Indeed, almost the opposite is true. Numerous studies have demonstrated that fathers (and non-custodial mothers for that matter) who engage in mediation pay their child support more fully and in a more timely fashion than those parents who are court ordered to do so. Indeed any experienced family mediator will tell you that it is not unusual in mediation for parents to pay substantially more child support than is required by the local child support guidelines. This happens because the parties in mediation focus on the actual financial needs of the children rather than upon the desires of the parents.

9. MEDIATION IS NOT APPROPRIATE FOR MY KIND OF CASE

When asked what kinds of cases are appropriate for mediation, I tell people that any case that can be litigated can be mediated, as well as many kinds of cases which cannot be effectively litigated. (Parent adolescent disputes, and disputes between juvenile criminal defendants and the victims of their crimes are examples of the latter category.)

While mediation is appropriate for any kind of case, that is not to say that all forms of mediation are appropriate to all cases. Thus for example a case involving domestic violence should only be mediated using protocols providing maximum protection for the victims, such as in caucus mediation where the parties never meet face to face. Other kinds of mediation may require similar kinds of protocols, especially where there is a major power imbalance between the parties. It is nevertheless true that there is no case which is inappropriate for any kind of mediation. As a voluntary process, you have almost nothing to lose but much to gain by trying mediation as an option.

10. REQUESTING MEDIATION IS A SIGN OF WEAKNESS TO THE OTHER SIDE

Over the past twenty years or so, this myth of mediation has greatly decreased in its hold over the legal profession, to the point where I now believe that actually the opposite is true. Judges and legal scholars have recognized for years that rather than being a sign of weakness, that exploring appropriate alternatives to litigation is actually the ethical duty of every attorney to seek the best

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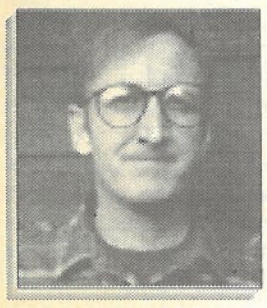
Devolution

☐ Dan Branch



"Show me what you eat and I'll tell you who you are."

The bear was more at home on our street than the cruise ship tourists who watched it munch our neighbor's garbage. It was Sunday morning and I had just started drinking my first mug of coffee. Even in a pre-caffeine state I could tell that there was something different about this bear.

First thing, it was late June. We usually don't see our first bear until dark September when they skulk around the neighborhood looking to build up fat content on left over pizza and pampers. Then there was the fact that the bear appeared on a sunny morning and that he chose the middle of the road for his mensa.

In a hour or so he was gone, leaving behind some happy tourists and shredded plastic bags. We saw the bear and his kin many times before the wet autumn. One day a bear would slap open the door of our neighbor's crawl space in search of Costco potluck leftovers. The next day another would work his way down the street, knocking off trash can lids in search of Big Mac scraps.

Other bears were doing the same thing all over Juneau. The police were receiving hundreds of "bear calls." At least three bears were killed. Most escaped even though they wandered into public buildings, cars and kitchens. One even opened the back door of a car to take away some scones.

Something is definitely changing in the Juneau bear world. The urban bears are too comfortable with people and their trappings. While their rural buds can be chased off of a salmon carcass by the mere sound of an approaching hiker, the city bears appear not to notice people. What they lacked in interest in humans, they made up for by their interest in human stuff.

One night, while trying to watch a money give away show on TV, one of our neighbors looked up to see a street bear peering at Regis Philbin through the plate glass window. Over on the next block, another bear walked through a kitchen door and made himself at home while the householder chatted outside with a neighbor.

At Salmon Creek, during the height of the dog salmon run, one bear tried to move into a dumpster. The police found him inside one morning, sleeping among the leavings.

The police and bear experts gave sensible explanations for these strange bear behaviors. "They are just looking for food," they told the press, "The bear in the lady's kitchen was looking for pork chops." I don't think so. It's time for Mulder and Skully to show up in town. These bears aren't just looking for chow. They want a life change.

Juneau's urban bruins are evolving into a new species—changing into creatures who would rather eat the bones of Colonel Sander's chickens than fresh salmon. They prefer Ben and Jerry's ice cream cartons over sweet blueberries.

The switch in diet predated the changes in their behavior. After summers of garbage they are acting more like us—the human residents. They now saunter rather than prowl down our streets. Given a chance, they will be sitting in our good easy chairs, eating chips and watching Tiger Woods on TV.

It must be something in the contents of our trash that they swipe with abandon. The contents of those convenience food leftovers are causing the bears to devolve toward humanity.

It will take America a while to accept this phenomenon. Purveyors of convenience foods will try to divert our attention from it. By the time we sort it out, the the Juneau bears will have leased out half the rental space along the North Douglas Highway. Once they wrap their claws around a remote control, they will never return to the wild.

Mediation Myths

Continued from page 4

possible outcomes for their clients. Court rules and local practice have emphasized this obligation for some time now, with greater and greater authority. By now I believe that the message has spread to the general practitioner as well, and this myth is dead forever.

11. THE OTHER SIDE WILL NEVER AGREE TO MEDIATION

While mediation may not be seen as a sign of weakness, the "paradox of mediation" remains, namely that those who are most in need of mediation are typically those who are lease willing to try it out as an option. The reasons for this are varied, but usually focused on the needs of parties to somehow vindicate themselves and prove to the world that they have been wronged. As noted in 10 above, many factors now are directed to overcoming this dilemma, including the ethical duties to advise clients of alternatives to litigation, and pressures from the clients themselves to resolve disputes quickly and inexpensively. All in all, they make this another dying myth of mediation, and one which will soon be gone forever.

Collaborative Law Redux. My article about collaborative law in the May-June issue of the Bar Rag drew a moderate, if not overwhelming, interest in trying out the collaborative law process in Alaska. Any interested parties are invited to a discussion of the topic immediately following the next ADR Section meeting of the Alaska Bar. The Section meeting is scheduled for noon at the Bar office on Thursday, October 12, 2000. For more information call 561-1518 or 245-4545.

The bankruptcy trustee's strong-arm power and the concept of inquiry notice

By David H. Bundy

Nothing gladdens the heart of a bankruptcy trustee like using the so-called "strong arm" powers of Bankruptcy Code Sec 544 (a)[1] to avoid a secured creditor's unperfected lien.

Under § 544, the trustee can avoid any interest that a hypothetical judgment lien creditor, or a bona fide purchaser of real property, without knowledge of the interest, could avoid. In the proper case, the successful use of this power can realize millions of dollars for the estate and its unsecured creditors. So any diligent trustee will check the appropriate real property records for recording information and order a UCC lien search to see if necessary financing statements were not filed, or have lapsed. If a search discloses no recorded or filed liens against a particular estate asset does the trustee then take that asset free and clear of the claims of any creditors who should have recorded or filed evidence of their liens? Not necessarily.

IN THE PROPER CASE, THE SUCCESSFUL USE OF THIS POWER CAN REALIZE MILLIONS OF DOLLARS FOR THE ESTATE AND ITS UNSECURED CREDITORS.

The trustee's avoidance power is subject to the concept of "inquiry notice", which has been incorporated into state law. So, in addition to showing the lack of a properly recorded or filed document perfecting the lien to be avoided, the trustee must also convince the court that a hypothetical creditor or purchaser would not have discovered the interest through investigation of any unusual circumstances regarding the property which would have come to the attention of a reasonable buyer or voluntary mortgagee.

Suppose A, the owner of a used automobile, borrows $5,000 from B. B intends that the loan be secured by a lien on the car, and A signs a security agreement granting B a lien, but B fails to take possession of the certificate of title and further fails to obtain a new certificate from the Department of Motor Vehicles showing the lien, as required under AS 28.10.371 - 401. A then advertises the car for sale in the newspaper. C inspects the car and asks to see the certificate of title. A produces the title certificate and C observes that no liens are noted on the certificate. C may buy the car free of B's unperfected lien. If instead of selling his car, A filed a bankruptcy petition, then A's bankruptcy trustee, like C, takes the car free of B's lien claim. On the other hand, suppose that B placed a sticker on the windshield stating, in three inch letters "this vehicle is subject to a security interest in favor of B." Even if B has failed to note his lien on the title, a reasonable buyer in C's position would inspect the vehicle, note the sticker, and ask about B's alleged lien. Even if A still denied the existence of a lien, a reasonable buyer would at least check with B, and failing to do so would not obtain title free of B's interest. And neither, in this situation, would A's bankruptcy trustee.

The problem, of course, is that real cases are never as straightforward as the hypothetical situations used to illustrate a legal principle. The property in question can be much harder to analyze or inspect than a motor vehicle, and the suspicious circumstances surrounding the property may be much more ambiguous or difficult to ascertain than a sign in the window. The U.S. Bankruptcy Court for the District of Alaska was presented with such a difficult situation in *Stewart Petroleum Co. v. Nugget Nevada, Inc.*[2].

Stewart Petroleum owned and operated oil and gas wells in Southcentral Alaska, and in 1989 acquired two oil and gas leases from the State of Alaska in the West MacArthur River Unit ("WMRU"). Chronically undercapitalized, Stewart was in need of additional investors in order to continue drilling and production. To raise funds, Stewart sold interests in its oil and gas properties. Overriding royalty interests (ORRIs) entitle the holder to a specified share of the gross revenues from the sale of oil or gas from a specified property, before any expenses of operation or production are deducted. ORRIs are not required to pay any costs of well development or production.[3] Working interests (WIs), on the other hand, pay the holder from the property's net income after the ORRIs are paid, but also require the holder to pay a proportionate share of the property's development and operating expenses. WIs are simply shares of the leasehold. Carried working interests (CWIs) pay the holder from the net income of the property after all expenses are paid, but do not require the holder to pay any share of the operating costs.

ORRIs, WIs and CWIs are all interests in real property, and under Alaska law nearly all interests in real property must be recorded in the appropriate recording district in order to afford the holder protection against a subsequent bona fide purchaser.[4] In addition, the State lease to Stewart covering the WMRU required that all assignments of interest in the leasehold be approved by the Alaska Department of Natural Resources ("DNR").[5] Over the course of its leasehold in the WMRU, Stewart sold many ORRIs, WIs and CWIs, and a significant percentage of these assignments were not recorded in the Anchorage Recording District, at least initially. Beginning in 1990, Nugget Nevada, Inc. ("Nugget") acquired WIs in the WMRU leases. Although these interests were in writing, they were not approved by DNR or recorded in the Anchorage Recording District.

Stewart's financial problems escalated and it appears there was an effort by some of Stewart's creditors to regularize their filings. On September 12, 1996, Stewart executed assignments to Nugget covering the interests previously conveyed, and these assignments were submitted to DNR for approval on September 13. Unfortunately for Nugget, an hour or so later, an involuntary bankruptcy petition was filed against Stewart. DNR approval, and recordation, of the Nugget assignments followed a few days later.

Stewart's Chapter 11 bankruptcy was resolved by the confirmation of a liquidating plan of reorganization, and the reorganized Stewart, acting as a trustee under 11 U.S.C. § 1107, sued Nugget to avoid its assignments as unperfected. Nugget countered that even though its assignments were unrecorded when the bankruptcy petition was filed, they were valid against the trustee because a hypothetical creditor or purchaser would have had inquiry notice of the assignments by virtue of the eleventh-hour filing with DNR.[6]

The court agreed with Nugget and granted summary judgment in its favor. The evidence showed that there were many assignments of ORRIs, and some WIs, on DNR approved forms, which had been recorded. The evidence also showed that other investors had recorded notices, not signed by Stewart or on DNR forms, under which the investors claimed to hold interests in the WMRU.[7]

The trustee, as a hypothetical purchaser, was on constructive notice of all recorded documents affecting the WMRU, and the court reasoned that the recorded documents, including the notices that indicated a lack of thoroughness in some prior assignments and their documentation, would have alerted a purchaser to check with DNR for any interests which had been transferred but not (or not yet) recorded. Such a hypothetical purchaser, arriving at the DNR counter exactly as the bankruptcy petition was being stamped in a few blocks away, would not have found Nugget's assignment in the filed records, but, the court reasoned, would also have known to inquire of the clerk for any unfiled assignments awaiting action, and would then have been rewarded with the Nugget assignments which had come in to the office only hours earlier.

THE QUESTION IN EACH OF THE ALASKA CASES WAS WHETHER THE CIRCUMSTANCES WOULD HAVE RAISED A SUSPICION IN THE MIND OF AN ORDINARILY PRUDENT PERSON

The court had to determine the degree of sophistication regarding the property which a hypothetical purchaser is deemed to possess, and the consequent extent of effort to which the doctrine of inquiry notice puts such a hypothetical purchaser. In this case the court determined that a relatively high degree of sophistication, and consequent investigation, was called for.

Alaska case law has established the doctrine of inquiry notice, but the Alaska Supreme Court's decisions do not clearly point the way in this situation. In *Burnett, Waldock & Padgett Investments v. C.B.S. Realty*, 668 P.2d 819 (Alaska 1983) a purchaser at a deed of trust foreclosure sale knew, from prior recorded documents, that a senior creditor had also noticed a foreclosure sale. Although there was no record of the outcome of the senior sale, an inquiry to the senior creditor would have disclosed that senior lien had been foreclosed about ten days before the sale on the junior deed of trust. Hence the junior lien had been eliminated and its purported foreclosure sale on the junior lien was a nullity. In this case the prior recorded documents stated the name of the senior holder and alerted all readers to the possibility of a foreclosure which would have changed the ownership of the property.

First National Bank of Anchorage v. Dent, 683 P.2d 722 (Alaska 1984) took the concept of inquiry notice further. Dent, a mechanic's lien claimant, recorded a notice of his lien and subsequently filed suit to foreclose, but did not record a notice of lis pendens. The bank subsequently obtained a deed of trust on the affected property, after the time for commencing a lien foreclosure had expired. With no lis pendens of record, the bank argued that it was not bound by Dent's lien, and was entitled to assume that the lien had expired with no foreclosure action having been filed. But the court ruled that the existence of the lien claim suggested the possibility of a lien foreclosure action, which would have preserved the lien, and subsequent purchasers therefore were bound to inquire about a possible foreclosure. The bank, accordingly, took subject to Dent's lien claim.

A recent decision, *Methonen v. Stone*, 941 P.2d 1248 (Alaska 1997) made it clear that a buyer of real property is chargeable with interests that might fairly be revealed by inspection of the property itself, as well as the recorded documents. A 1970 subdivision agreement required the owner of the developer's lot, on which a well was located, to provide water service to the other lots in the subdivision. The water agreement was not recorded, but the water lines were visible to a later buyer of the developer's lot. The Alaska Supreme Court held that although the buyer did not have notice from the deed he received, or from any recorded document, that a servitude had been created which burdened his property, the buyer's knowledge of the clearly visible water lines running from his well to the adjacent property was sufficient to impose upon him a duty to investigate the water rights of adjacent owners. If the buyer had performed such an investigation he would have been advised of the water agreement, and hence the buyer was bound by that agreement as much as if it had been recorded at the time of his purchase. And as far as the scope of a reasonable investigation is concerned, the court made it clear that "[R]eliance on the statements of the vendor, or anyone who has motive to mislead, is not sufficient." 941 P2d at 1252.

The question in each of the Alaska cases was whether the circumstances would have raised a suspicion in the mind of an ordinarily prudent person, and in each case the answer seems fairly clear. In *Burnett* and *Dent*, the suspicious circumstance was apparent from a recorded instrument which named the potential interest holder; in *Methonen*, suspicions were aroused by an improvement apparent on the property. All buyers are charged with knowledge of recorded instruments, and it is neither burdensome or unusual to charge buyers with knowledge of facts which can be observed, or reasonably inferred, from an inspection of the property itself.

In the case of the Stewart lease,

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The bankruptcy trustee's strong-arm power and the concept of inquiry notice

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however, neither the recorded documents, nor the property itself, bore any signs of Nugget's involvement. It does not in fact seem reasonable to require a potential buyer of oil and gas property to inspect the property itself for potential signs of an unrecorded interest holder. While inspection should reveal the usual oilfield equipment, only the names of the field operator or its contractors, and perhaps the principal lessee, would ordinarily be displayed. The Bankruptcy Court did not require the trustee, as hypothetical buyer, to inspect the property, but the court did charge the trustee with notice of the assignment Nugget had filed with DNR. That assignment had been filed with DNR, not for the purpose of giving notice of Nugget's interest, because the DNR records were not intended to provide a parallel recording system, but to meet the requirement that assignments of interest in a State oil and gas lease must be approved by DNR. DNR records are public and open for inspection because the State's general public records law, AS 09.25.110, so requires, not because there is a State policy to enhance constructive notice beyond that available from the district recording offices.

Nugget bolstered its case with evidence that conventional title insurance is not generally used in conveyancing of oil and gas properties in Alaska, and that buyers and lenders frequently undertake an extensive title investigation through experienced lawyers and other professionals. Such investigations routinely include examination of DNR lease files and may even include inquiring of the file clerk for any recently filed documents not yet entered in the DNR computer index. But is this the type of investigation the Bankruptcy Court expects of the hypothetical reasonably prudent buyer or investor? Several § 544 (a) cases from other courts in the Ninth Circuit suggest that a buyer need not go so far.

In re Sale Guaranty Corporation, 220 B.R. 660 (9th Cir. BAP 1998) was a case in which the court held that a bankruptcy trustee is charged with any discovery which would have been unearthed by a "prudent purchaser." The court said:

> A prudent purchaser is someone who is knowledgeable in the management of practical affairs and who acts with wisdom and circumspection. Specifically, a prudent purchaser is charged with knowledge of (1) the nature of the property; (2) the current use of the property; (3) the identity of the person in possession of the property; and (4) the relationship between the person in possession and the person whose interest the purchaser intends to acquire.

220 B.R. at 666.

A hypothetical buyer from Stewart of a working interest in the WRMU on the petition date would have discovered the correct answers to all the foregoing without ever learning of Nugget's unrecorded ownership.[8]

Furthermore, not every irregularity in the debtor's apparent ownership or occupancy will impart constructive notice of another's possible interest. In *In re Thomas*, 147 B.R. 526 (9th Cir. B.A.P. 1992) the debtor held real property under a deed from his grantor which had not been recorded, so that the grantor was the owner of record on the petition date. The grantor, who lived on the property with the debtor in a "family-like" relationship, alleged that the deed had been procured by fraud and claimed that the unrecorded deed put the Trustee, as a hypothetical BFP, on constructive notice that the debtor's title was suspect. But the court held that the non-recordation of the deed was not, by itself, a suspicious circumstance requiring investigation or imparting constructive notice. Even the grantor's actual occupancy was insufficient to raise a suspicion as to her claim of ownership, said the court, citing "many courts" for the proposition that

> . . . when the title holder jointly occupies property with a stranger to the title claiming an interest in the property, the occupancy by the stranger to title does not provide constructive notice of his or her interest.

The court went on to further hold that a hypothetical buyer would have no duty to inquire of the grantor despite her occupancy of the property, as her occupancy was consistent with the debtor's apparent ownership.[9]

SO SHOULD THE HYPOTHETICAL PRUDENT BUYER OF A RELATIVELY EXOTIC REAL ESTATE INTEREST BE CHARGED WITH THE DEGREE OF CARE AND DILIGENCE EXPECTED OF AN EXPERT TITLE EXAMINER?

In re Probasco, 839 F.2d 1352 (9th Cir. 1987) also involved the extent to which constructive notice could be imparted from a physical inspection of the property. In that case a deed from the debtor to a joint owner mistakenly failed to describe one of three contiguous parcels that were to be conveyed. However, all three parcels shared common fencing, roads and survey marks indicating a unified development. The court said that a prudent purchaser, knowing of the joint ownership of two parcels, and seeing evidence of common development, would be bound to inquire as to the joint owner's interest in the third parcel. In this case, a superficial inspection of the property was sufficient to raise ownership doubts.

Reconciling all inquiry notice cases is not easy, but in each the court had to decide how a prudent purchaser would act when confronted with arguable "red flags." Some flags are clearly red, while others may be just a little pink. Under *Methonen v. Stone*, it is never sufficient merely to inquire of the seller, or anyone else with a "motive to mislead," as to the color of the flag, and further investigation of neutral sources is needed, provided, of course, that there a flag is waving at all, no matter the color. This was really the issue for the court in *Nugget Nevada*. Nothing about the property itself, and nothing in any recorded document, hinted at Nugget's actual interest. Some of the recorded documents hinted at other potentially unrecorded interests with unknown owners. The DNR records are a source of information regarding interests not evident elsewhere, and it was established to the Bankruptcy Court that DNR's records are routinely consulted by professionals charged researching the title to State leasehold property.[10]

So should the hypothetical prudent buyer of a relatively exotic real estate interest be charged with the degree of care and diligence expected of an expert title examiner? There is no precedent for such a high standard in the case of a routine real estate purchase. Does the nature of this property impose a higher standard? Alaska and Ninth Circuit case law do not answer this question, but it is reasonable to argue that the nature of the property does matter. Do the facts here impose an "expert" standard, or can the *Nugget* ruling be defended without going so far? An alternative ground does exist, most of which does not require great expertise of a hypothetical buyer. State regulations, which are of course public documents, require that assignments of State leases be approved by DNR if they are to bind the State.

Any hypothetical buyer of a leasehold interest would know that the State was the owner of the fee and would be charged with knowledge of the regulation requiring State approval of a leasehold transfer. So even if no transfer was recorded, a search of DNR's records would not be an unreasonable burden. The problem here is that such a search would not have found the Nugget interest, which had arrived at most a few hours pre-petition. It would have been necessary to ask the DNR staff person on duty for permission to search through the "in basket." Would a hypothetical prudent buyer, as opposed to a professional title examiner, be expected to know that a pile of unfiled papers was accessible for the asking? This is the requirement imposed by the *Nugget* decision, and while it is defensible under the unusual facts of the case, a lesser requirement is equally defensible given the lack of clear precedent.

In *Nugget*, the Bankruptcy Court took the concept of inquiry notice beyond established boundaries. Because the case has settled, Alaska bankruptcy practitioners will not have the benefit of an appellate review of this interesting decision. When the next exotic "strong arm" case comes along in Alaska, the trustee's job will be just a little harder than it was before this ruling.

FOOTNOTES

[1] 11 U.S.C. § 544

[2] Case No. A96-00795-003-DMD, April 1, 1999 The author wishes to express his thanks to U. S. Bankruptcy Judge Donald MacDonald IV for suggesting that this case would be appropriate for an article in the Bar Rag.

[3] Lowe, Oil & Gas Law in a Nutshell, 3rd Ed; West Publishing.

[4] AS 40.17.080(a). The WMRU is located in the Anchorage Recording District.

[5] 11 AAC 82.605(b).

[6] The post-petition approval and recordation of the assignments was not authorized by the Bankruptcy Court and did not operate retroactively.

[7] None of the recorded documents mentioned Nugget as possibly having an interest in the WMRU.

[8] The answers would be (1) remote mineral property, (2) oil and gas exploration and production, (3) Stewart or a contractor, and (4) the parties are the same.

[9] One member of the panel dissented, arguing that the grantor's presence on the property in conjunction with the unrecorded deed from the grantor, imparted constructive notice of the grantor's potential interest. 147 B.R. at 536.

[10] It was clear from the affidavits on file with the Court that any competent title examiner would examine the DNR records.

Dave Thorsness, Territorial Lawyer: "He died well."

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rowing career which culminated with her winning Alaska's first gold medal in the 1984 Olympic Games.

He took great pride in "the Homer house," a beautiful log home overlooking Kachemak Bay, that he and Priscilla built in 1981. They enjoyed many happy occasions there with friends and family.

Dave was proud of his Norwegian heritage, as well. He and Priscilla frequently attended the Sons of Norway lutefisk and lefse dinners. He regularly challenged his guests to develop a taste for the unforgettable fish served for generations by Norwegians. After raising his family, Dave and Priscilla traveled extensively, to Scandinavia, Antarctica, China, Europe and a recent trip to Australia to visit his brother, Ray.

Dave was elected to the Board of Governors of the Alaska Bar Association and was President in 1964. He served on the Judicial Qualifications Commission. He was a member of the American College of Trial Lawyers.

Throughout our careers, I represented mostly plaintiffs, so when I met Dave in court we were on opposite sides. Nice guys may have a problem in sports, but Dave was one and I am certain that it made him a more effective trial lawyer. I do not remember any unpleasantness with Dave. I also believe that most lawyers prefer to have strong, able lawyers on the other side. Dave was a strong lawyer but always pleasant and straightforward in our dealings.

For several years when Dave and I met we would agree that we should get together with those with whom we took the bar exam. One day he suggested that we expand it to include all who practiced in Territorial Alaska. We set a date, and the party was a tremendous success. We have held them annually since.

Herodotus tells us that after Croesus had shown Solon, the Athenian lawgiver, his riches and praised Solon's wisdom, he asked Solon if he had ever come across anyone happier than everyone else, expecting Solon to name him, Croesus. Instead, Solon named a particular individual and explained why he was happier. Croesus pressed Solon to name another. He was sure this time Solon would name him. When Solon did not, in exasperation Croesus asked about himself. Solon answered that although Croesus was very wealthy and ruled over many people, he could not answer the question until he learned whether he died well and with all of his advantages.

I visited Dave 2 days before his death. His family was near. He had lived an honorable and productive life which the public recognized and appreciated. He was in a very pleasant and confident mood. He said that a road has only so many bricks and when they are all used up, that's it. He was talking about his life, of course. He died well.

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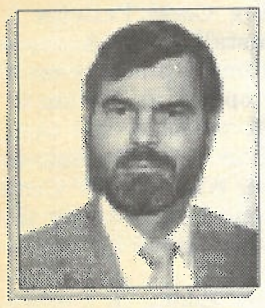
Denial of discharge: 727(a)(2)

☐ Thomas Yerbich



Two elements comprise an objection to discharge under § 727(a)(2): 1) disposition of property by, or at the sufferance of, the debtor by transfer, removal, destruction, mutilation, or concealment; and 2) subjective intent on the debtor's part to hinder, delay or defraud a creditor through the act disposing of the property. Both elements must take place within the one-year pre-filing period (or after the petition is filed); acts and intentions occurring before this period are forgiven. [*In re Lawson*, 122 F3d 1237 (CA9 1997)]

Section 727(a)(2) is, to some extent, an adjunct to § 548(a)(1)(A), which provides for the recovery by the trustee for the benefit of the estate property that the debtor transferred with the intent to hinder, delay, or defraud a creditor. "Transfer" includes any mode, direct or indirect, absolute or conditional, of disposing or parting with an interest in property. [Code § 101(54)] Thus, the creation of a sham or bogus security interest will suffice. [*In re Lawson, supra*] A transfers an interest in Blackacre to B with the intent to keep the property out of the hands of C, a judgment creditor of A. The trustee can avoid the transfer and bring the property back into the estate under § 548(a)(1)(A), plus the debtor may be denied a discharge under § 727(a)(2). Not only is the property not protected, the debtor incurs the bankruptcy equivalent of the death penalty: no discharge. The two, acting in tandem, should, but, unfortunately frequently do not, put the brakes on debtors making fraudulent transfers on the eve of bankruptcy. This may be a result of either ignorance of the consequences, or a belief that the debtor will not be caught. Irrespective of the reason, if the requisite intent is established, the debtor loses both ways!

There is, however, a distinct difference between the trustee's avoidance powers and the denial of discharge under § 727(a)(2). In addition to the "actual fraud" provision of § 548(a)(1)(A), the trustee can recover property under a "constructive fraud" theory under § 548(a)(1)(B). Under § 727(a)(2) "constructive fraud" is insufficient, "actual fraud" must be shown. [*In re Adeeb*, 787 F2d 1339 (CA9 1986)] However, in addition to intent to defraud, intent to hinder or delay a creditor is sufficient. [*In re Bernard*, 96 F3d 1279 (CA9 1996)]

As with any situation involving specific improper intent, although it has happened, one should not expect the debtor to admit that he or she intended to hinder, delay, or defraud anyone, at least not those properly counseled as to likely consequences of such an admission. The court deduces intent from circumstantial evidence or inferences drawn from a course of conduct. [*In re Devers*, 759 F2d 751 (CA9 1985)]

In cases involving transfers, courts follow essentially the same guidelines as apply to § 548, *i.e.*, "badges of fraud" including (1) a close relationship between transferor and transferee; (2) transfer in anticipation of a pending suit; (3) debtor was in poor financial condition at the time of the transfer; (4) debtor transferred all or substantially all his property; (5) the transfer left no assets to satisfy creditors; and (6) debtor received inadequate consideration. [*In re Wills*, 243 BR 58 (BAP9 1999)] As in § 548 cases, these badges are not all-inclusive, nor need all the badges be present to establish intent to hinder, delay or defraud.

In many cases, the results turn on the credibility of the debtor, *i.e.*, the plausibility of the testimony as to the reason or reasons for the actions taken under all the facts and circumstances. For example, intent to hinder or delay may be established when the debtor plays a game of "hide and seek" with assets. [*In re Aubrey*, 111 BR 268 (BAP9 1990)]

It is not a defense that the estate was not diminished by the transfer, *e.g.*, a transfer to a wholly owned corporation, as long as the intent was to hinder, delay or defraud a creditor. [*In re Wills, supra*] Moreover, success is immaterial; a lack of injury to any creditor is not a defense. [*In re Bernard, supra*] It is also appropriate for the court to take into consideration the value of the property transferred or concealed. The gratuitous transfer of valuable property raises a presumption that actual fraudulent intent accompanied the transfer. The fact that the property transferred or concealed is of small value, however, tends to negate fraudulent intent. In addition, intent to hinder, delay or defraud a creditor is lacking if the property transferred is subject to a security interest and the debtor has no equity in it. [*In re Mereshian*, 200 BR 342 (BAP9 1996)]

One of the more common methods of "concealment" is omission from the schedules. In those situations, the demeanor of the debtor is certainly a significant factor. Was the omission deliberate or merely an oversight, negligent, or due to faulty memory? One factor that may tip the scales is whether there is a voluntary disclosure, its timing, and the circumstances leading to the disclosure. For example, making full disclosure at the creditors' meeting may be sufficient to purge any wrongful intent. [*See In re Mereshian, supra*] On the other hand, it is only one factor, and not a guaranty that the court will be convinced. [*Compare, In re Beauchamp*, 236 BR 727 (BAP9 1999)]

Another requirement is that the transfer occurs within one year of the date the petition is filed. Transfers occurring outside the one-year period are forgiven. However, a transfer that occurred more than one year preceding the petition filing may nevertheless be considered as having occurred within one year by application of the "continuing concealment" doctrine, *i.e.*, the transfer is done in a manner that permits the debtor to retain a secret interest in the property. [*In re Lawson, supra*; *see also Rosen v. Bezner*, 996 F2d 1527 (CA3 1993)] *Lawson* was a case of concealment, not fraud. The facts in *Lawson* illustrate the broad scope that § 727(a)(2) can take. In *Lawson*, the debtor, faced with an adverse state court judgment, granted her mother a deed of trust in the debtor's residence to secure an obligation owed to the mother, which deed of trust was duly recorded more than one year prior to the date the petition was filed. [The court accepted that while this transfer may have been preferential, it was not fraudulent.] Subsequent to granting her mother a deed of trust, debtor borrowed $175,000 from another creditor, and her mother subordinated her deed of trust to the interests of the new creditor. This subsequent subordination by the mother was the principal evidence relied on by the court in upholding denial of the discharge: the "beneficial interest" of the debtor in being able to obtain subordination of the mother's loan to a new loan was a "secretly retained" interest. [Before reading too much into *Lawson*, be aware that the Ninth Circuit was **not** ruling that the transfer involved constituted concealment as a matter of law. It was upholding a factual determination by the bankruptcy court. Indeed, the Ninth Circuit acknowledged that a contrary inference could be drawn from the facts presented, but the inference drawn by the trial court was supported by substantial evidence.]

IT IS ESSENTIAL THAT THE ISSUE OF INTENT BE WON AT THE TRIAL COURT LEVEL; THINKING ONE MIGHT GET A MORE FAVORABLE RULING AT THE APPELLATE LEVEL IS LIKE PLAYING RUSSIAN ROULETTE WITH A DOUBLE-BARREL SHOTGUN WITH BOTH BARRELS LOADED.

In summary, finding an intent to hinder, delay, or defraud is a factual matter dependent on all the facts and circumstances; credibility and demeanor of the witnesses, especially the debtor, is a major factor in the process. It is essential that the issue of intent be won at the trial court level; thinking one might get a more favorable ruling at the appellate level is like playing Russian roulette with a double-barrel shotgun with both barrels loaded. As long as there is some credible evidence to support the findings of the trial court, it is highly unlikely reversal on appeal on that issue will be forthcoming.

Attorney Discipline

FAIRBANKS LAWYER SUSPENDED FOR TWO YEARS

The Alaska Supreme Court suspended Fairbanks attorney Warren A. Taylor II (ABA Membership No. 8406052) from the practice of law for a two-year period, effective July 11, 2000, for violating numerous professional conduct rules during his representation of several clients.

For months Mr. Taylor neglected to file a motion to modify child support on a client's behalf and repeatedly ignored his client's requests for status updates. After his client discharged him, Mr. Taylor delayed refunding the unearned fee.

In another matter Mr. Taylor disregarded the potential or actual conflict when he undertook to represent a wife in a divorce action after earlier consulting with and agreeing to represent the husband. In another divorce and custody dispute, Mr. Taylor began an intimate relationship with his client while still representing her in divorce proceedings. This breached both conflict of interest rules and Alaska Ethics Opinion Nos. 88-1 and 92-6.

Mr. Taylor violated Alaska Bar Rule 15(a)(6) by practicing law while administratively suspended from the practice of law for non-payment of his bar dues.

Finally, Mr. Taylor violated Alaska Bar Rule 15(a)(4) by failing to answer four grievances filed against him. He failed to cooperate with bar counsel during the course of the investigations, and he failed to answer the petition for formal hearing alleging misconduct despite his obligation to respond.

Mr. Taylor and Bar Counsel entered into a stipulation for discipline by consent under Alaska Bar Rule 22(h). After considering the professional duties that Mr. Taylor violated, his mental state at the time, the actual injuries incurred by his clients, and the existence of aggravating and mitigating factors, Mr. Taylor and Bar Counsel agreed that a two-year suspension from the practice of law was an appropriate discipline. The Disciplinary Board on May 16, 2000, approved the stipulation and recommended its adoption by the Supreme Court.

A copy of the clerk's file is available for inspection at the office of the Alaska Bar Association.

HI-TECH IN THE LAW OFFICE

Software tips and recommendations

BY JOSEPH L. KASHI

Part II

TIME AND BILLING SOFTWARE AGAIN

I used the DOS version of Timeslips for many years as my sole time and billing software because it handled all of my office billings with a minimum of difficulty. Unfortunately, Timeslips was not Y2K compatible and I tried several other 32 bit Windows 95/98/NT billing programs, including later versions of Timeslips 9, which had data conversion and accuracy problems along with some stability issues. I was unable to use my 13 years of accumulated billing data.

I considered the main Windows alternatives, PCLaw Jr. and STI's TABS III, version 9, and submitted them to that ultimate acid test, my own billing staff, who decided that they preferred PC Law Jr. because of the integrated accounting that ships with the network product. It is entirely possible, though, that we would have decided upon Tabs 3 had the optional Tabs accounting program been directly integrated with the time and billing software rather than an option. Either software package is competent, reliable and easy to use. However, my staff finally gave the nod to PC Law Jr. because of its clean accounting integration.

That said, dealing with Alumni Computer Group has been very frustrating. Alumni's technical support staff does their best and they are very polite, knowledgeable and helpful. We have no complaints about them whatsoever. However, I encountered several different installation problems, mostly because of unnecessary file path problems introduced by the installation process. Those installation problems required me, on several different occasions, to delete the existing set of books and start a new set. In order to use any new set of books for more than 30 days, you'll need to separately register the new set of books and, in order to do that, Alumni's corporate policy requires that you fax them a letter and then stand by for a telephone call back from technical support with a registration code. Unfortunately, Alumni's switchboard closes 5:00pm Eastern time. This situation is frustrating enough for East Coast users, but those of us whose time zone is three or four hours earlier than Eastern time find that changing a set of books forces us to wait at least overnight by the time that our fax makes its way from receptionist to technical support staff.

Certainly, every vendor, including Alumni, has a right to protect its intellectual property. However, Alumni's fax and callback procedure is probably the most frustrating and slow installation and technical support process that I have encountered in ten years of reviewing software. I hope that Alumni doesn't damage the standing of a good product by continuing to overzealously force already registered users through this fax and callback process.

After a month of frustration, my network installation of PC Law Jr. was working well for everyone. Only afterwards did I accidently find out that Sage, parent of Timeslips, recently released a version 5.5 update to its earlier DOS versions of Timeslips. Sage/Timeslips sells both the single user and network versions of this update for a mere $29.95, which I view as mostly shipping and handling. The update installed very quickly and easily, with no noticeable problems whatsoever. If you still have a non-Y2K compliant DOS version of Timeslips around and desire to use it again, then this update's for you. I only wish that Timeslips had offered this corrective version much earlier rather than trying to sell at full price Sage's troubled Timeslips version 9x as their only Y2K compliant upgrade path. Timeslips may have bet the farm on that approach, and may have lost.

DECISIONQUEST'S TIME MAP.

Case chronologies are one of the best, most persuasive means to present information to a jury. Developing a visually appealing case chronology, however, has generally been tedious. CaseSoft, the publisher of CaseMap 3, now publishes a companion product, TimeMap, which does nothing but case chronologies. It does them very well. DecisionQuest has announced that they will eventually integrate TimeMap into CaseMap, but in the meantime, TimeMap is a very worthwhile product easily used by any litigator and TimeMap easily integrates into CaseMap version 3.1. Recommended.

PERSONAL FIREWALL SOFTWARE.

I previously discussed some free personal firewall software that provides a modicum degree of security for frequent Internet users. My favorite to date, and the favorite of other reviewers, has been ZoneLabs' ZoneAlarm. I found that ZoneAlarm does a good job of controlling access between your own computer and the Internet. Sometimes, though, it works a bit too well. Frequently, I found that ZoneAlarm will cause long unattended downloads or complicate reconnection of browser and e-mail software, such as NetScape, to the Internet. If you encounter these problems with ZoneAlarm, then simply close the program, redial, and restart ZoneAlarm. Attempting to reconnect to the Internet when ZoneAlarm is already active tends to cause some otherwise inexplicable problems. Another useful product is the BlackIce hacker intrusion detection software made by Network Ice. BlackIce is complementary with ZoneAlarm. While ZoneAlarm reduces incoming rogue access, BlackIce provides information about hacking attempts, recording and categorizing such attempts. Even though BlackIce costs $39.95 (purchase available over the Net) while ZoneAlarm is a free download, I recommend that you use both products simultaneously, particularly if you're using a persistent always-on Internet connection like DSL or cable modem.

DSL - HERE, THERE AND EVERYWHERE

DSL has been available in Alaska for some time and is an obvious choice for high speed Internet access if your office is located close enough to the phone company's central exchange and if the phone company has recently upgraded its equipment and tariffs. I've shifted to DSL and am able to connect everyone on our office's local area network (LAN) simultaneously to an always-on, dedicated high speed Internet connection. Our office's cost with ACS is a mere $99.95 per month, including the router and DSL modem. Shifting over is easy: you must have an Ethernet network hub or switch connected to your computer and the DSL router simply plugs into an open Ethernet port on one end and into a clean regular telephone line on the other end. Anyone planning to use DSL from their desktop computer merely needs to bind TCP/IP to an Ethernet card located in their desktop computer and the router and modem handle the rest. Usually, your DSL ISP will provide you with 10 to 25 email addresses. For security, you can configure the router to reject any dial-in connections, which I believe to be a good security measure, at least initially. Most DSL router hardware can provide DHCP Ethernet addressing services, a real configuration advantage as you change your internal office network over to the TCP networking protocol. Remember, DSL is an always-on connection, so you'll need to implement both hardware and software level security. Another advantage: ACS allows you to use the DSL line for voice and Internet connections simultaneously, which saves the cost of installing and maintaining another telephone line. This is a highly recommended upgrade for any Internet user.

COREL LINUX/COREL OFFICE FOR LINUX

Anyone who purports to know something about computers claims to be seriously considering using Linux. Until now, though, installing and using Linux simply has not been sufficiently straightforward to merit serious, as opposed to speculative, consideration. That's slowly changing, particularly with the release of Corel Linux and Corel Office for Linux. Of course, there are some very good reasons not to use Linux for core law office functions. Corel's financial stability remains to be seen and some of the most useful legal software, such as CaseMap litigation support software, do not yet run on Linux.

I really liked Corel Linux/Corel Office for Linux. The average user's biggest problem with Linux - and perhaps its greatest attraction for computer "geeks" - has always been Linux's essential obscurity, particularly the complex installation process, and Linux's lack of mainstream software. Until now, using Linux has always been a badge of avant garde computing.

Corel has solved those problems quite nicely. Corel Office 2000 for Linux includes Corel's own packaging of the Debian Linux version along with native Linux versions of Corel Office, including Corel Paradox 9. Corel's Linux installation was almost completely automatic and was one of the smoothest operating system installations that we have ever seen, far smoother than most installations of Windows 98 or Windows NT. Corel deserves tremendous praise for the installation routine of its Linux version.

Corel's Linux seems to perform well, showing excellent "snap" on a 233 megahertz dual Pentium processor computer, performance which substantially exceeded Windows NT on the same machine and in the same dual processor mode.

Corel uses the KDE windowed desktop environment. Although the KDE interface, as implemented by Corel, is a reasonably usable and visually attractive windowed environment, Microsoft's Windows 98/NT interface is more refined and runs many valuable programs specifically designed for the law office. If your decision depends upon using a particular legally-oriented program like CaseMap or one of the Windows-based litigation support or case-management programs, then Corel Linux is not for you- at this time, Linux simply can't run Win32 API programs although open source Linux will probably add this capability in the future. However, if all that you need is a general purpose office suite, then Corel Office for Linux should prove not only adequate but technically refined and quite stable. If you're a Linux fan, then it makes sense for you to also consider Sun's Star Office Suite 5.1 for Linux. This office suite is available by download and on a CD from Sun, for a nominal shipping charge.

Corel's Word Perfect 9 for Linux operates smoothly, has file format transparency with Corel's Windows-based programs, and, to our way of thinking, has an even more pleasing interface than Word Perfect 9 for Windows.

Overall, Corel hit a home run with this product, at least for Linux fans. Whether Corel wins the game, however, seems more problematic, what with Corel's recent financial difficulties. Given the quality of this software and the excellent ease of installation for all products, we wish them the best.

Hoge & Lekisch joins Hartig Rhodes

Hoge and Lekisch has joined with Hartig, Rhodes, Norman, Mahoney & Edwards, effective Sept. 15. The new firm name will be Hartig Rhodes Hoge & Lekisch.

Peter Lekisch, Peggy Rawitz and Michael Jungries have joined Hartig offices, with a new address of 717 K St., Anchorage 99501. Their new telephone number is 276-1592; their new fax number is 277-4532. Andy Hoge will relocate to the Hartig offices Oct. 1.

Hoge & Lekisch's Jacob Allmaras has decided to open his own practice, effective Oct. 1. His offices will be located at 629 L St., Suite 101, Anchorage 99501. His new telephone number will be 277-3521.

Billy G. Berrier passes on

My uncle Billy G. Berrier's body was found in his apartment on Sept. 8. He died of natural causes. We would like the people who knew him in Alaska to know that he has passed on to join his mother, daughter, and sister. His remaining relatives are four nieces and their extensive families. There were no services at our uncle's verbal request after his daughter died. So we did for him what he did for his daughter. I will enclose my e-mail address in case anyone has any andantes or information about our uncle. We love hearing things about his life. My e-mail address is lotacar@harbornet.com

--Carolota Miller

NEWS FROM THE BAR

Board takes action on 25 agenda items

At its meeting on August 17 & 18, 2000, the Board of Governors took the following action:

• Certified 18 reciprocity applicants.

• Voted to publish an amendment to Bar Rule 2 deleting the requirement for reciprocity applicants to have an Alaska Bar member sponsor the application.

• Asked staff to draft a Policy which would require special testing accommodation applicants to take the exam in Anchorage unless waived by the Executive Director; Bar Counsel will investigate whether this meets the ADA standards.

• Adopted the Multistate Performance Test (MPT) effective with the February 2001 bar exam.

• Voted to amend the Standing Policies so that Special Testing Accommodation requests are referred to the Law Examiners Subcommittee for review & recommendation to the Board.

• Approved $200 to pay a drafter to draft an extra short question for each bar exam for a question bank.

•Decided to review the draft of a policy on public interest grants at the next meeting.

• Decided to redraft the Board policy to reimburse Board members for actual reasonable expenses, and to set mileage reimbursement at the state rate.

• Authorized the VCLE regulations.

• Approved the estimate of $15,400 for computer programming for VCLE.

• Decided that the VCLE list will be published in the *Bar Rag* and on the website; copies will be given out on request.

• Add AK Assn. of Legal Administrators to the Section News and agenda mailing lists.

• Allow any local Bars to have a homepage on our website.

• Adopted the Findings of the Area Hearing committee for a 3½ year suspension.

• Adopted a policy that dates of employment only will be given for employee references.

• Approved the May Board meeting minutes.

• Approved allowing Jim Clouse to pay inactive dues for 1994 & 1995 and to transfer to retired status retroactively as of 1996.

• Listened to a proposal by ALSC for a filing surcharge to benefit ALSC and agreed to invite Stephanie Cole to the October meeting to comment on the proposal.

• Adopted the ethics opinion entitled "Referral of Client Identity to Credit Bureau".

• Adopted a stipulation in a discipline matter for a suspension for 1 year (stayed), probation & censure.

• Refered ARPC 1.5 on contingent fees in domestic matters back to the ARPC committee to discuss Max Gruenberg's concerns.

• Voted to publish ARPC 3.6 on trial publicity and the accompanying memo in the Bar Rag; and to send to the Criminal Defense & Prosecution Sections for comment.

• Voted to send Bar Rule 29 on specifying a clear & convincing standard and deleting the timeframe to the Supreme Court.

• Postponed proposed Bar Rule 61 amendment which would allow for an audit of a member's trust account if suspended for nonpayment of bar dues, until October.

• Voted to publish a housekeeping change to Bar Rule 30.

• Adopted the recommendation of the Lawyers' Fund for Client Protection Committee.

In the Supreme Court of the State of Alaska

In the Reinstatement Matter Involving:) Supreme Court No. **S-09788**
)
William D. Artus,) **Order**
)
Petitioner)
)
) Date of Order: **8/29/00**
)

Trial Court Case **#3AN-00-00001CI**

Before: Fabe, Chief Justice, Matthews, Bryner, and Carpeneti, Justices (Eastaugh, not participating)

On consideration of the petition for reinstatement pursuant to Alaska Bar Rule 29, filed on 7/25/00, and the Alaska Bar Association's non-opposition, filed on 8/4/00,

It is Ordered:

The petition is Granted. William D. Artus is reinstated from the suspension imposed on 5/1/00.

Entered by direction of the court.
Clerk of the Appellate Courts
/s/ Marilyn May

PUBLIC NOTICE

FOR REAPPOINTMENT OF PART-TIME MAGISTRATE JUDGE

The current term of the office of United States Magistrate Judge Matthew D. Jamin at Kodiak, Alaska is due to expire October 31, 2000. The United States District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new four year term.

The duties of the position are demanding and wide-ranging: (1) conduct of most preliminary proceedings in criminal cases; (2) trial and disposition of misdemeanor cases; (3) conduct of various pretrial matters and, evidentiary proceedings on delegation from the judges of the district court; and (4) trial and disposition of civil cases upon consent of the litigants. The basic jurisdiction of the United States magistrate judge is specified in 28 U.S.C. § 636.

Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the court and should be directed to:

Chair, Merit Selection Panel
United States District Court
222 West 7th Avenue - No. 46
Anchorage, Alaska 99513

Comments must be received by Close of Business on October 20, 2000.

VCLE Rule

Remember to Keep Track of Your CLE Credits!

The minimum recommended guidelines are at least 12 credit hours of approved CLE, including 1 credit hour of ethics, each year.

VCLE Reporting Year
The first VCLE Reporting Period is September 2, 1999 - December 31, 2000.

You will be receiving a VCLE Reporting Form with your Bar Dues Statement in November. Watch for it in the mail.

Return the VCLE Reporting Form with your Bar Dues Statement and Dues Payment to qualify for the Bar Dues Discount of $45 and to be included on a list of attorneys who have voluntarily complied with the VCLE Rule minimum recommended hours of approved CLE as set forth by the Alaska Supreme Court. Only attorneys who voluntarily comply with the VCLE Rule may register for the Lawyer Referral Service.

Contact Barbara Armstrong, CLE Director or Rachel Batres, CLE Coordinator for more information:
907-272-7469/fax907-272-2932
armstrongb@alaskabar.org batresr@alaskabar.org

NOTE!!! New for February 2001 Exam:

Effective with the February 2001 Bar Exam, the Alaska Bar Exam will contain the Multistate Performance Test (MPT). This will replace the previously used, locally drafted Research Question. Two Multistate Performance questions will be given over a three hour period on the first afternoon of the exam. For information and sample tests from previous MPTs, please go to the National Conference of Bar Examiners (NCBE) website at http://www.ncbex.org/Tests/mpt.htm.

SOLICITATION OF VOLUNTEER ATTORNEYS

The court system maintains lists of attorneys who volunteer to accept court appointments. The types of appointments are listed in Administrative Rule 12(e)(1)-(e)(2). Compensation for these services is made pursuant to the guidelines in Administrative Rule 12(e)(5).

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

First District:
Neil Nesheim
PO Box 114100
Juneau, AK 99811-4100
(907) 463-4753

Second District:
Tom Mize
604 Barnette St. Rm 228
Fairbanks, AK 99701-4576
(907) 451-9251

Third District:
Wendy Lyford
825 W. 4th Ave.
Anchorage, AK 99501-2004
(907) 264-0415

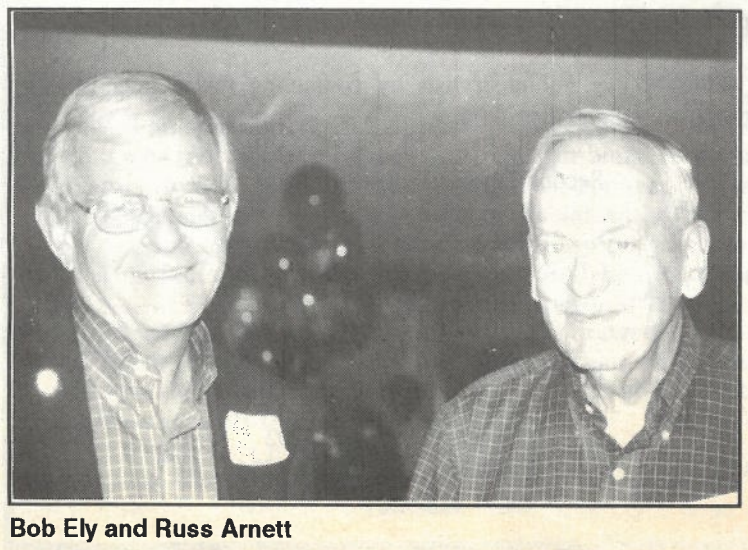
Fourth District:
Ron Woods
604 Barnette St. Rm 202
Fairbanks, AK 99701-4576
(907) 452-9201

Alaska's Territorial Lawyers Celebrate Third Annual Get Together

Ashley Dickerson and Ken Atkinson

Betty and Russ Arnett

Gene Williams & Judge James von der Heydt



Bob Ely and Russ Arnett

By Pamela Cravez

Rain didn't dampen spirits at the third annual gathering of lawyers who practiced in Alaska before statehood, their spouses, and friends July 27.

U.S. District Court Senior Judges James Fitzgerald and James von der Heydt donated the wine while Charles and Louise Tulin opened their spacious home for the nearly 50 people gathered for a potluck dinner.

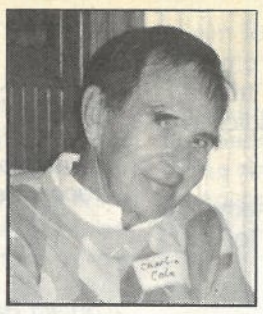
The annual affair, organized by Russ and Betty Arnett, Helen Williams, Roger and Ghislaine Cremo, along with the Tulins, maintained a light festive mood, even as best wishes were sent to ailing members of the bar, David Thorsness and Edgar Paul Boyko.

Happy Birthdays were celebrated for Arnett (a youthful 74) and Lucy Groh. Groh thanked organizers for having the party downtown near her home so that she could attend. She added that last year's party had been her husband Cliff's last and he'd enjoyed himself immensely.

Before dinner partygoers mingled as State Law Librarian Cynthia Fellows snapped photos memorializing the occasion. Betty Connolly Ratterman, wife of former territorial lawyer John Connolly, flew up from Seattle for the event. Ratterman, Larue Hellenthal, wife of the late John Hellenthal, and Betty Arnett (sporting an "I hiked the Chilkoot Trail" T-shirt) stood together and chatted while Ken Atkinson sat down next to M. Ashley Dickerson.

"Ken was one of the few lawyers to prepare against me," Dickerson said with smile. "Many underestimated me, but he prepared."

Atkinson added that the first time he ever had problems with his back occurred while he was in trial with Dickerson. He'd had to stand up and object so often that it threw his back out.



Charlie Cole

The two laughed while Atkinson whipped out his checkbook and bought a copy of Dickerson's autobiography, Delayed Justice for Sale.

Later in the evening Dickerson announced that at 88-years-old (in October) she is probably the oldest living, practicing territorial lawyer in Alaska. She got no argument.

—*More photos, page 13*

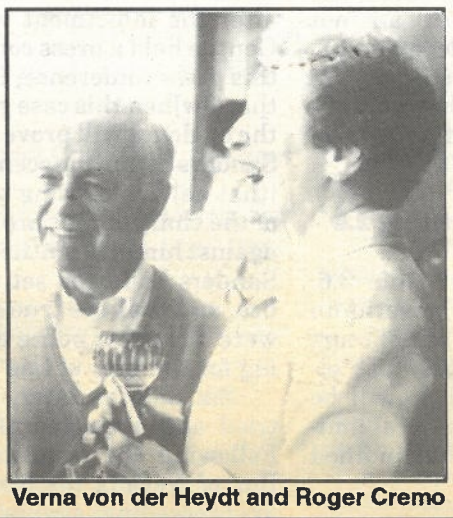
Gathering around the Tulin's table

Photos by Cynthia Fellows

Alaska's Territorial Lawyers Celebrate Third Annual Get Together

(Left to right) Jim Delaney, Gene Williams, Leroy Barker, Christine Cole, Charlie Cole, and Charles Tulin enjoy the evening.

Ashley Dickerson and Lucy Groh



Verna von der Heydt and Roger Cremo

Alaska Bar Association 2000 CLE Calendar

Date	Topic	Live in	Time
September 22 #2000-888	Mandatory Ethics for New Admittees – A Basic Program for New Lawyers	JUNEAU Centennial Hall	1:30 – 4:45 p.m.
September 22 #2000-012	The Ethics of Litigation – in cooperation with ALPS	JUNEAU Centennial Hall	9:00 a.m. – 12:15 p.m.,
October 12 #2000-029 video available	Real Estate Issues: Easements -- Written and Unwritten	Anchorage Hotel Captain Cook	8:30 a.m. – 12:30 p.m.
October 12 #2000-032	Wills, Probate & Estate Planning	JUNEAU Centennial Hall	8:30 a.m. - 3:00 p.m.
October 18 #2000-013 video available	13th Annual Alaska Native Law Conference	Anchorage Anchorage Hilton	8:30 a.m. – 5:00 p.m.
October 27 #2000-027 video available	7th Annual Workers' Comp Update: Throwing Out A Few New Bones to Gnaw On	Anchorage Hotel Captain Cook	8:30 a.m. – 12:30 p.m.
November 1 #2000-028 video available	3rd Biennial Legal & Tax Issues for Nonprofits	Anchorage Hotel Captain Cook	8:30 a.m. – 4:30 p.m.
November 7 #2000-014 video available	Admiralty Law Essentials: Keeping Your Head Above Water	Anchorage Hotel Capt. Cook	8:30 a.m.– 12:30 p.m.
November 15 #2000-034 video available	Integrated Advocacy: Identifying and Utilizing Your Strengths as an Advocate – with Bill Barton, Barton & Strever P.C., Oregon	Anchorage Hotel Captain Cook	8:30 a.m. – 4:15 p.m.
December 1 #2000-35	Working Smarter Not Harder in Your Law Practice – with Tom Clark, Legal Management Consultant, Arizona	Anchorage Hotel Capt. Cook	8:30 a.m. – 4:00 p.m
December 7 #2000 –36 video available	Ethics Update with Alaska Bar Counsel	Anchorage Hotel Capt. Cook	8:30 – 12 noon

Bar People

Kevin J. Sullivan

Kevin J. Sullivan has become a shareholder of the law firm Baxter Bruce Brand P.C. Kevin was admitted to the Alaska Bar Association in 1993. His areas of practice include estate planning, trusts and trust administration, commercial transactions, real estate, and general practice. Kevin is active in several community service organizations, including the Glacier Valley Rotary Club, the Douglas Volunteer Fire Department, and the Board of Directors of Catholic Community Service.

Sarah E. Josephson

Jermain, Dunnagan & Owens, P.C. announces the addition of lawyer **Sarah E. Josephson** to the firm. Sarah is licensed to practice in the U.S. District Court for Alaska, the state courts in Alaska, and the Ninth Circuit Court of Appeals. Sarah was a law clerk for the Hon. Larry Card and worked as a public defender in Kodiak and the Anchorage law firm of Eide & Miller before joining the firm. A member of the Alaska Bar Association, Sarah practices primarily in the area of labor/employment law....Judge **Joan Woodward** (nee Katz) and **Tom Woodward** are relocating to Colorado following travel abroad. They can be reached at tom_r_woodward@hotmail.com.

Chris Canterbury is no longer with Preston Gates & Ellis. He has joined the firm of Kelly & Kelly and will be opening an office in Wasilla .....**John Bioff** is now with Kawerak Inc. in Nome .....**Aisha Tinker Bray** is now with Guess & Rudd in Fairbanks.....**Jay Durych**, formerly with James B. Wright & Associates, has now opened the Law Office of Jay D. Durych.....**Lynn Erwin**, formerly with the Municipality of Anchorage, is now with Alaska Communications Systems.

Mark Fullmer, formerly with the Department of Revenue, is now with Bankston & McCollum.....**Stacie Kraly**, formerly with Faulkner Banfield, is now with the Human Services Division of the A.G.'s office in Juneau.....**Ken Lord**, formerly with Heller Erhman, et.al., is now with the Office of the Solicitor, Department of the Interior, in Anchorage.....**Patrick Lavin**, formerly with the Alaska Human Rights Commisson, is now with the National Wildlife Federation.

Jeff Mayhook, formerly with GST Telecom, is now with Prenet Corporation in Portland, OR.....**Shane Osowski** and **John Wendlandt**, formerly with Walker Walker Wendlandt & Osowski, have opened up the law office of Wendlandt & Osowski, LLC.....**Ann Benson**, of Seattle, who has been running the Northwest Immigrant Rights Project for the last 5 years, is now running a project called the Washington Defenders Immigration Project. She provides technical assistance for criminal defenders who are representing immigrants in criminal proceedings to try to keep them from being deported.

Board of Governors invites comments

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

The amendment to Alaska Rule of Professional Conduct 3.6, Trial Publicity, would address constitutional concerns with the present wording of the rule in light of the U.S. Supreme Court case of *Gentile v. State Bar of Nevada*. A memorandum from the Alaska Rules of Professional Conduct Committee is reprinted below.

The amendment to Alaska Bar Rule 30 simply reflects the change in name of the "National Discipline Data Bank" to the "National Lawyer Regulatory Data Bank" in Bar Rule 30 regarding disability.

Please send comments to: Executive Director, Alaska Bar Association, PO Box 100279, Anchorage, AK 99510 or e-mail comments to the alaskabar@alaskabar.org by October 13, 2000.

Ref: Reconsideration of Alaska Professional Conduct Rule 3.6 in light of the United States Supreme Court's decision in *Gentile v. State Bar of Nevada* and the American Bar Association's subsequent amendment of Model Rule 3.6

INTRODUCTION

Alaska Professional Conduct Rule 3.6 restricts an attorney's freedom to make out-of-court statements about court cases (whether pending or impending). Our rule is based on ABA Model Rule 3.6 as it existed in 1993, when our state's Rules of Professional Conduct were enacted.

As noted in the commentary to Rule 3.6, "It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression." This Committee has always felt that Rule 3.6 does a poor job of striking this balance. In fact, when Alaska was formulating its current Rules of Professional Conduct, we recommended that Alaska reject the ABA's Model Rule 3.6. Instead, this Committee suggested that Alaska should enact *no rule* on trial publicity, except to prohibit attorneys from making knowingly false statements. We recommended that the problem of trial publicity be solved on a case-by-case basis by judges and litigants who were familiar with the particular facts and needs of their case. The Board of Governors, and later the Alaska Supreme Court, rejected the Committee's approach and instead voted to adopt ABA Model Rule 3.6.

Since that time, the ABA has amended Model Rule 3.6. As explained in more detail below, the ABA amended its model rule in response to the United States Supreme Court's decision in *Gentile v. State Bar of Nevada*. In Gentile, the Court found that one portion of ABA Model Rule 3.6 was too vague to satisfy the First Amendment. And, in addition to the vagueness problem, four members of the majority suggested that, under the facts of Gentile's case, Model Rule 3.6 amounted to an unconstitutional ban on speech critical of the government. The ABA has now re-worded Rule 3.6 in an effort to avoid these constitutional problems.

This Committee has been asked to evaluate the ABA's changes to Model Rule 3.6 to see if Alaska should amend our Rule 3.6 in the same manner. After examining the ABA's amended rule, we believe that the ABA has not solved the constitutional problems inherent in the rule. Moreover, the Committee continues to believe (as we have from the beginning) that these constitutional problems are present in Alaska's current Rule 3.6 and any other variation of the ABA Model Rule. We therefore again recommend that Alaska seriously consider amending Rule 3.6 so that it would simply bar attorneys from making public statements when the attorney knows that the statements (a) are false or (b) are not supported by admissible evidence. Any further restrictions on an attorney's public speech would be formulated and litigated on a case-by-case basis.

ALASKA'S CURRENT RULE 3.6

Professional Conduct Rule 3.6, entitled "Trial Publicity", governs an attorney's ability to make out-of-court statements about matters that either are being litigated or will be litigated in court. The general limitation on attorney speech is codified in Section 3.6(a):

> A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that [the statement] will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

Section 3.6(b) elaborates on this general rule by defining types of statements that presumptively violate the rule. Under section 3.6(b), a lawyer is presumed to have prejudiced the fairness of an adjudicative proceeding — and is therefore presumed to have violated the Rules of Professional Conduct — if the lawyer identifies a potential witness[1], or comments on the expected testimony of a party or a witness[2], or talks about the physical evidence that may be introduced[3]. Likewise, a lawyer presumptively violates the Rules of Professional Conduct if the lawyer expresses any opinion about the guilt or innocence of a criminal defendant[4], or even states publicly that a person has been charged the crime — unless the lawyer expressly adds that "the charge is merely an accusation and ... the defendant is presumed innocent until ... proven guilty"[5].

Although no one doubts that an over-zealous attorney can inflame the community with prejudicial out-of-court statements, Rule 3.6 has always been a troublesome cure for this problem. For example, Rule 3.6 would apparently authorize the Bar Association to discipline a defense attorney for publicly stating, "John Randall has retained me to defend him against the criminal charges recently lodged by the district attorney. When we get our day in court, I intend to show that those charges are false." The defense attorney's statement violates Rule 3.6(b)(6) because "it relates to ... the fact that a defendant has been charged with a crime" without adding the explicit *caveat* that the charge is merely an accusation and that the defendant is presumed innocent. The defense attorney's statement also violates Rule 3.6(b)(4) because it expresses an "opinion as to the guilt or innocence of a defendant ... in a criminal case".

This example may seem far-fetched, but it is based on a real case. That case is *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1990).

THE SUPREME COURT'S DECISION IN *GENTILE V. STATE BAR OF NEVADA*

Dominic Gentile represented a client, Grady Sanders, who was indicted on criminal charges. Hours after the indictment was returned, Gentile held a press conference.[6] At this press conference, Gentile stated that "[w]hen this case goes to trial, ... the evidence will prove ... that Grady Sanders is an innocent person and [that he] has nothing to do with any of the charges that are being leveled against him[.]" Gentile asserted that Sanders had been set up by the police, and that the true guilty parties were dishonest police officials working for the City of Las Vegas.[7]

Six months later, Sanders was tried and acquitted of all charges. Following the acquittal, the State Bar of Nevada instituted disciplinary proceedings against Gentile. The Bar alleged that Gentile had violated the Nevada trial publicity rule (a rule based on ABA Model Rule 3.6 and similar to Alaska Professional Conduct Rule 3.6) when Gentile told the press that his client was an innocent "scapegoat" and that the real culprits were "crooked cops".

Gentile defended by relying on Nevada's equivalent of Rule 3.6(c), the so-called "safe harbor" provision of Rule 3.6. Under subsections 3.6(c)(1) and (c)(3), an attorney may make public statements that would otherwise violate Rule 3.6(a) and Rule 3.6(b)(1) – (5) if the attorney limits himself or herself to "stat[ing] without elaboration ... the general nature of the claim or defense ... and, except when prohibited by law, the identity of the persons involved[.]" Gentile contended that his statements at the press conference did no more than identify, in general terms, the nature of the defense he would present in court.

The Nevada State Bar rejected Gentile's argument and recommended that he receive a private reprimand. The Nevada Supreme Court agreed.[8] Gentile then took his case to the United States Supreme Court.

Five members of the Court concluded that the "safe harbor" provision of Model Rule 3.6 was unconstitutionally vague.[9] The Court concluded that the wording of the rule failed to give an attorney fair notice of the kind of public comment that would be allowed:

> [Model Rule 3.6(c)] provides that a lawyer "may state without elaboration ... the general nature of the ... defense." Statements under this provision are protected "notwithstanding subsection [(a) and (b)(1)–(6)]." By [virtue] of the word "notwithstanding," the Rule contemplates that a lawyer describing the "general nature of the ... defense" "without elaboration" need fear no discipline, even if he comments on "the character, credibility, reputation or criminal record of a ... witness," and even if he "knows or reasonably should know that [the statement] will have a substantial likelihood of materially prejudicing an adjudicative proceeding."
>
> Given this grammatical structure, and absent any clarifying interpretation by the state court, the Rule fails to provide "fair notice to those to whom [it] is directed." A lawyer seeking to avail himself of [the Rule's] protection must guess at its contours. The right to explain the "general" nature of the defense without "elaboration" provides insufficient guidance because "general" and "elaboration" are both classic terms of degree. In the context before us, these terms have no settled usage or tradition of interpretation in law. The lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated.

Gentile, 501 U.S. at 1048-49, 111 S.Ct. at 2731.

In addition, four members of the Court would have held that Model Rule 3.6 was unconstitutional as applied to Gentile's case, quite apart from the "safe harbor" provision. Justice Kennedy, writing with the concurrence of three other members of the court, concluded that the disciplinary proceedings against Gentile were unconstitutional because the Nevada bar rule was being used to ban speech that was critical of the government and its agents.[10] Justice Kennedy declared that it "would be difficult to single out any aspect of government [having] higher concern and importance to the people than the manner in which criminal trials are conducted"[11], and he concluded that this high public interest would be defeated if the citizenry did not have ready access to publicity surrounding criminal trials:

> The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. ... Without publicity, all other checks are insufficient: in comparison [to] publicity, all other checks are of small account.

Gentile, 501 U.S. at 1035, 111 S.Ct. at 2724 (quoting In re Oliver, 333 U.S. 257, 270-71; 68 S.Ct. 499, 506-07; 92 L.Ed. 682 (1948)).

In its First Amendment cases, the Supreme Court has generally declared that the government can suppress and/or punish speech only if the speech creates a "clear and present danger" of public disorder or physical harm. ABA Model Rule 3.6 does not speak of "clear and present danger" to the fairness of the judicial process; rather, it prohibits public statements that raise a substantial likelihood of material prejudice to a court proceeding. Even so, Justice Kennedy and his three concurring colleagues were hesitant to declare Model Rule 3.6 unconstitutional:

> The difference between the requirement of serious and imminent threat found in the disci-

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> plinary rules of some States and the more common formulation of substantial likelihood of material prejudice [found in ABA Model Rule 3.6] could prove mere semantics. Each standard requires an assessment of proximity and degree of harm. Each may be capable of valid application. ... [N]othing inherent in [the Model Rule's] formulation fails First Amendment review[.]

Gentile, 501 U.S. at 1037, 111 S.Ct. at 2725-26.

But Justice Kennedy added that Gentile's case "demonstrates ... [that the Model Rule] has not [always] been interpreted in conformance with those [constitutional] principles".[12] Justice Kennedy concluded that the record in Gentile's case "[did] not support the conclusion that [he] knew or reasonably should have known [that] his remarks created a substantial likelihood of material prejudice, if the Rule's terms are given any meaningful content."[13] Justice Kennedy reviewed the Supreme Court's own decisions in which the Court upheld criminal convictions even though the community was exposed to potentially inflammatory publicity. Comparing the inflammatory publicity in those cases to the statements Gentile made at his press conference, Justice Kennedy and his three colleagues concluded that no reasonable person in Gentile's position would have believed that the statements made at the press conference would materially prejudice the fairness of the future criminal trial, especially since the trial would not be held for several months.[14]

THE ABA'S RESPONSE: THE 1994 AMENDMENTS TO MODEL RULE 3.6

Following the Supreme Court's decision in Gentile, the ABA amended Model Rule 3.6. The ABA's primary goal was "to address the [Supreme] Court's concerns that the Rule was unconstitutionally vague".[15] To achieve this goal, the ABA made three notable changes in the rule. As explained below, we of the Committee believe that all of these changes either are ineffectual or make things worse.

First, the ABA deleted subsection (b) — the list of statements that are presumed to be prejudicial to the fairness of court proceedings. But instead of getting rid of this list altogether, the ABA put the same list into the official commentary to the model rule. *See* Section [5] of the commentary. The purpose of this cut-and-paste exercise, the ABA explained, was to clarify that the six listed types of suspect statements are intended "only to provide guidance".[16]

The drafters of the ABA commentary do not specify what "guidance" they are talking about, but it can reasonably be inferred that the list of statements is intended to guide attorneys, bar disciplinary officials, and judges who need to interpret subsection (a) — the subsection that contains the general rule restricting attorneys' speech. If this is so, then it appears that the ABA achieved little or nothing by moving the list of suspect statements into the commentary.

Even when the list of suspect statements was included in subsection (b) of the rule itself, these six classes of suspect statements were not automatically actionable; an attorney who made one of these types of statements would not automatically violate the general ruled codified in subsection (a). Instead, the introductory language of subsection (b) declared that these six types of statements "ordinarily" would be likely to prejudice the fairness of the judicial proceeding to which they related. That is, these types of statements were *presumed* to violate the general rule, but this question ultimately had to be decided under the particular facts of the case.

Although the list of statements now appears in the commentary to the Model Rule, rather than in the text of the Rule, the result is the same for all practical purposes. The ABA commentary makes it clear that the general rule contained in subsection (a) is to be interpreted so that, even now, the six listed types of statements presumptively violate the rule.

> There are ... certain subjects which are more likely than not to have a materially prejudicial effect on a [judicial] proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:
>
> [Here follows the list that used to appear in subsection (b).]

Moving the list of presumptively unlawful statements from the text of the rule to the commentary may have been philosophically satisfying to the ABA drafters. But, from the standpoint of the lawyers who must abide by (and enforce) Rule 3.6, this change did not alter the meaning of the rule one whit.

Second, the ABA added a "retaliatory exception" (the ABA's own words) to the rule prohibiting attorneys from engaging in prejudicial speech.[17] This "retaliatory" exception is contained in a new subsection (c):

> Notwithstanding [the general rule contained in] paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

In other words, the ABA has adopted the theory that "two wrongs make a right". Under this new subsection (c), attorneys are allowed to make public statements that violate subsection (a) — statements that are substantially likely to materially prejudice an adjudicative proceeding — so long as they are responding to a similarly prejudicial statement made by an opposing party, or an opposing lawyer, or the media, or indeed by anyone else. Apparently, the ABA drafters concluded that the proper cure for inflammatory publicity is to expose the public to competing inflammatory publicity.

Even if we accepted this dubious premise, the ABA's subsection (c) is riddled with the sort of First Amendment problems highlighted in *Gentile.* Under subsection (c), an attorney is granted a license to make inflammatory, prejudicial statements to the extent "[reasonably] required to protect a client from the substantial undue prejudicial effect of [somebody else's] publicity". But what is the scope of this license? At some point, presumably, the responding attorney's inflammatory and prejudicial statements become so inflammatory and prejudicial that they are no longer "reasonably required" to counter or mitigate the unfair prejudice to the client. But how is an attorney to know where this line is drawn?

Moreover, if opposing counsel believes that the attorney has crossed this line — *i.e.,* believes that the attorney has made inflammatory and prejudicial statements that go beyond a "fair reply" to the initial prejudicial publicity — then subsection (c) apparently grants the opposing counsel the right to respond with yet another, escalating round of inflammatory and prejudicial publicity. This can hardly be conducive to the fair and proper administration of justice.

Third, the ABA deleted the words "without elaboration" from the introductory language to the "safe harbor" provision, which is now found in subsection (b) of the Model Rule.[18] Under the ABA's current "safe harbor" provision, an attorney is authorized to violate subsection (a) — that is, the attorney is authorized to make "an extrajudicial statement that ... the lawyer knows or reasonably should know ... will have a substantial likelihood of materially prejudicing an adjudicative proceeding" — if the lawyer is describing a "claim, offense[,] or defense involved" in the litigation, or if the lawyer is "identi[fying] the persons involved".

The ABA's motive for deleting the phrase "without elaboration" is obvious: in *Gentile,* a majority of the United States Supreme Court held that this phrase was unconstitutionally vague. But the ABA's cure appears to be worse than the original disease. Stripped of the limiting phrase "without elaboration", the "safe harbor" provision appears to be very bad law.

Under the ABA's "safe harbor" provision, an attorney can violate Model Rule 3.6(a) — that is, the attorney can make inflammatory and prejudicial statements to the media — as long as the attorney is describing a claim or defense involved in the case. This does not make much sense. While no one would dispute an attorney's right to publicly describe a client's claim or defense, there appears to be no good reason why the attorney should be allowed to do this in an inflammatory manner, making statements that are likely to substantially prejudice an opponent's ability to get a fair trial. Yet that is what the "safe harbor" provision allows.

In the former version of the "safe harbor" rule, the phrase "without elaboration" acted as a safeguard. By limiting the scope of the attorney's remarks to an "unelaborated" explanation of the claim or defense, the ABA drafters tried to provide some protection against the excesses that would otherwise be authorized under the "safe harbor" provision.

In *Gentile*, the Supreme Court held that this particular formulation of the safeguard was unconstitutionally vague — that the phrase "without elaboration" failed to give an attorney a reasonable indication of where to find the line between protected and unlawful speech. But the need for such a safeguard continues. As explained above, without some kind of limiting language, the ABA's "safe harbor" provision is a gaping hole in the rule against inflammatory and prejudicial public speech. Rather than try to come up with a new formulation for this needed limitation, the ABA drafters abandoned the attempt to limit the scope of the "safe harbor" exception.

By amending Model Rule 3.6 in this manner, the ABA has avoided the vagueness problem that the Supreme Court identified and condemned in Gentile. But the ABA's amended version of Rule 3.6 allows attorneys to fill the media with inflammatory and prejudicial statements, no longer constrained by the need to explain their claims and defenses "without elaboration".

THIS COMMITTEE'S RECOMMENDATION

As is obvious from the foregoing discussion, the Committee recommends that Alaska not adopt the ABA's 1994 amendments to Rule 3.6. These amendments only make the rule worse.

The fact remains, however, that Alaska's Rule 3.6(c) probably violates the First Amendment because it contains the phrase "without elaboration" — the phrase that was condemned as unconstitutionally vague in *Gentile*. Given the decision in *Gentile*, there is legitimate concern that Professional Conduct Rule 3.6 may be largely unenforceable.

This Committee has always recognized the tension between the First Amendment and the need to put some boundaries on trial publicity. In 1987, we recommended that there be no general rule governing this subject, other than a prohibition on knowingly false statements. Instead, we recommended that any other restriction on a lawyer's First Amendment activities be litigated by the parties involved and decided on a case-by-case basis. We hoped that this procedure would provide the specific focus necessary for the delicate balancing of the public's right to know (and an attorney's right to speak) against society's need to insure that trials are fair. As we said, over a decade ago:

> The Alaska Committee concluded that the difficult balance to be struck between protecting the right to a fair trial and safeguarding the right of free expression should be left to a case-by-case determination. The parties to a judicial proceeding that has a reasonable potential for substantial pretrial publicity will have an interest in seeking an appropriate order limiting communication with the media. Additionally, it is felt that constitutional issues are more appropriately litigated in the courts than in bar disciplinary proceedings.

In 1987, we proposed a trial publicity rule that categorically prohibited only one type of speech: the public dissemination of information that the

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lawyer knows to be false or reasonably should know to be false. That rule read:

> A lawyer shall not make an extrajudicial statement concerning any matter triable to a jury that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that the statement is false.

The Board of Governors and the Alaska Supreme Court chose not to follow the Committee's approach at that time. We now ask the Board and the Court to re-assess their decision.

We have re-examined our 1987 proposal, and we continue to endorse its basic approach: in general, restrictions on pre-trial publicity should be imposed by judges on a case-by-case basis. There should be a blanket rule prohibiting attorneys from making public statements that they know, or should know, to be false. In addition, the Committee now believes that Rule 3.6 should prohibit attorneys from making public statements that are not supported by admissible evidence. In both of these instances, an attorney could potentially prejudice the fairness of an anticipated trial by making public statements before a judicial officer had the chance to impose case-specific restrictions on pretrial publicity. But aside from these two blanket prohibitions, restrictions on publicity should be left to a case-by-case determination — for, absent unusual circumstances, it seems unlikely that a fact-finder would be prejudiced by hearing information that they will later hear at trial anyway.

The Committee therefore offers the following substitute for Alaska's current Rule 3.6:

> A lawyer shall not make an extrajudicial statement concerning any matter triable to a jury if a reasonable person would expect the statement to be disseminated by means of public communication and if the lawyer knows or reasonably should know that the statement is false or that it is not supported by admissible evidence.

This formulation prohibits those extrajudicial statements that pose the greatest danger to the administration of justice: assertions that are false, and assertions that will not be heard at trial.

CONCLUSION

Alaska's current Rule 3.6 contains a serious constitutional flaw. The American Bar Association has offered an amended version of the rule that is worse than the original. This Committee believes that the time has come to ask again whether Alaska should depart from the ABA model and forge its own path on this important issue. We therefore ask the Board of Governors and the Supreme Court to consider our proposed revision of Rule 3.6.

However, should the Board and the Court decide to keep Alaska's current Rule 3.6 and try to modify it to meet the constitutional concerns identified in *Gentile*, then the Committee of course offers its services in formulating and drafting a modified rule that would avoid both the constitutional problems of the current rule and the substantive problems that plague the ABA's modified version.

—Robert C. Bundy
Chair, Committee on the Rules of Professional Conduct

ARPC 3.6

PROPOSED AMENDMENT ADDRESSING CONSTITUTIONAL CONCERNS WITH PRESENT WORDING OF RULE

(Additions italicized; deletions bracketed and capitalized)

Rule 3.6 Trial Publicity.

[(A)] A lawyer shall not make an extrajudicial statement concerning any matter triable to a jury if *[THAT]* a *reasonable person would expect* the statement *to be disseminated by means of public communication* and *if the lawyer knows or reasonably should know that [IT WILL HAVE A SUBSTANTIAL LIKELIHOOD OF MATERIALLY PREJUDICING AN ADJUDICATIVE PROCEEDING]* the statement is false or that it is not supported by admissible evidence.

[(B) A STATEMENT REFERRED TO IN PARAGRAPH (A) ORDINARILY IS LIKELY TO HAVE SUCH AN EFFECT WHEN IT REFERS TO A CIVIL MATTER TRIABLE TO A JURY, A CRIMINAL MATTER, OR ANY OTHER PROCEEDING THAT COULD RESULT IN INCARCERATION, AND THE STATEMENT RELATES TO:

(1) THE CHARACTER, CREDIBILITY, REPUTATION OR CRIMINAL RECORD OF A PARTY, SUSPECT IN A CRIMINAL INVESTIGATION OR WITNESS, OR THE IDENTITY OF A WITNESS, OR THE EXPECTED TESTIMONY OF A PARTY OR WITNESS;

(2) IN A CRIMINAL CASE OR PROCEEDING THAT COULD RESULT IN INCARCERATION, THE POSSIBILITY OF A PLEA OF GUILTY TO THE OFFENSE OR THE EXISTENCE OR CONTENTS OF ANY CONFESSION, ADMISSION, OR STATEMENT GIVEN BY A DEFENDANT OR SUSPECT OR THAT PERSON'S REFUSAL OR FAILURE TO MAKE A STATEMENT;

(3) THE PERFORMANCE OR RESULTS OF AN EXAMINATION OR TEST OR THE REFUSAL OR FAILURE OF A PERSON TO SUBMIT TO AN EXAMINATION OR TEST, OR THE IDENTITY OR NATURE OF PHYSICAL EVIDENCE EXPECTED TO BE PRESENTED;

(4) ANY OPINION AS TO THE GUILT OR INNOCENCE OF A DEFENDANT OR SUSPECT IN A CRIMINAL CASE OR PROCEEDING THAT COULD RESULT IN INCARCERATION;

(5) INFORMATION THE LAWYER KNOWS OR REASONABLY SHOULD KNOW IS LIKELY TO BE INADMISSIBLE AS EVIDENCE IN A TRIAL AND WOULD IF DISCLOSED CREATE A SUBSTANTIAL RISK OF PREJUDICING AN IMPARTIAL TRIAL; OR

(6) THE FACT THAT A DEFENDANT HAS BEEN CHARGED WITH A CRIME, UNLESS THERE IS INCLUDED THEREIN A STATEMENT EXPLAINING THAT THE CHARGE IS MERELY AN ACCUSATION AND THAT THE DEFENDANT IS PRESUMED INNOCENT UNTIL AND UNLESS PROVEN GUILTY.

(C) NOTWITHSTANDING PARAGRAPH (A) AND (B)(1-5), A LAWYER INVOLVED IN THE INVESTIGATION OR LITIGATION OF A MATTER MAY STATE WITHOUT ELABORATION:

(1) THE GENERAL NATURE OF THE CLAIM OR DEFENSE;

(2) THE INFORMATION CONTAINED IN A PUBLIC RECORD;

(3) THAT AN INVESTIGATION OF THE MATTER IS IN PROGRESS, INCLUDING THE GENERAL SCOPE OF THE INVESTIGATION, THE OFFENSE OR CLAIM OR DEFENSE INVOLVED AND, EXCEPT WHEN PROHIBITED BY LAW, THE IDENTITY OF THE PERSONS INVOLVED;

(4) THE SCHEDULING OR RESULT OF ANY STEP IN LITIGATION;

(5) A REQUEST FOR ASSISTANCE IN OBTAINING EVIDENCE AND INFORMATION NECESSARY THERETO;

(6) A WARNING OF DANGER CONCERNING THE BEHAVIOR OF A PERSON INVOLVED, WHEN THERE IS REASON TO BELIEVE THAT THERE EXISTS THE LIKELIHOOD OF SUBSTANTIAL HARM TO AN INDIVIDUAL OR TO THE PUBLIC INTEREST; AND

(7) IN A CRIMINAL CASE:

(I) THE IDENTITY, RESIDENCE, OCCUPATION AND FAMILY STATUS OF THE ACCUSED;

(II) IF THE ACCUSED HAS NOT BEEN APPREHENDED, INFORMATION NECESSARY TO AID IN APPREHENSION OF THAT PERSON;

(III) THE FACT, TIME AND PLACE OF ARREST; AND

(IV) THE IDENTITY OF INVESTIGATION AND ARRESTING OFFICERS OR AGENCIES AND THE LENGTH OF THE INVESTIGATION.]

BAR RULE 30

PROPOSED HOUSEKEEPING AMENDMENT TO CORRECT NAME OF NATIONAL LAWYER REGULATORY DATA BANK

(Additions italicized; deletions bracketed and capitalized)

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

...

(f) Circulation of Notice Transferring to Inactive Status. The Board will promptly transmit a copy of the order of transfer to interim disability inactive status or disability inactive status to the presiding judge of the superior and district court in each judicial district in the state; to the presiding judge of the United States District Court for the District of Alaska; and to the Attorney General for the State of Alaska, together with the request that the Attorney General notify the appropriate administrative agencies. The Board will request action under Rule 31, as may be necessary, in order to protect the interests of the disabled attorney and his or her clients.

Bar Counsel will transmit to the National [DISCIPLINE] *Lawyer Regulatory* Data Bank maintained by the American Bar Association, and any jurisdiction to which Respondent has been admitted, notice of all transfers to inactive status due to disability and all orders granting reinstatement.

FOOTNOTES

[1] See subsection (b)(1).
[2] See subsection (b)(1).
[3] See subsection (b)(3).
[4] See subsection (b)(4).
[5] See subsection (b)(6).
[6] 501 U.S. at 1033, 111 S.Ct. at 2723.
[7] 501 U.S. at 1059-1060, 111 S.Ct. at 2736-37.
[8] See id., 501 U.S. at 1033, 111 S.Ct. at 2723.
[9] See Part III of the Court's opinion, 501 U.S. at 1048-1051, 111 S.Ct. at 2731-32.
[10] 501 U.S. at 1034, 111 S.Ct. at 2724.
[11] 501 U.S. at 1035, 111 S.Ct. at 2724 (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575; 100 S.Ct. 2814, 2826; 65 L.Ed.2d 973 (1980)).
[12] 501 U.S. at 1037, 111 S.Ct. at 2726.
[13] 501 U.S. at 1037-38, 111 S.Ct. at 2726.
[14] 501 U.S. at 1039-1048, 111 S.Ct. at 2726-2731.
[15] American Bar Association, Annotated Model Rules of Professional Conduct (3rd ed. 1996), "Rule 3.6 – Trial Publicity", p. 350.
[16] Id., p. 351.
[17] See id., p. 351.
[18] The "safe harbor" provision used to be subsection (c). It was redesignated because former subsection (b) — the list of presumptively prejudicial statements — was moved into the commentary.

PROPOSED AMENDMENT TO DELETE SPONSOR REQUIREMENT FROM ADMISSION WITHOUT EXAMINATION (RECIPROCITY) RULE

(Additions underlined; deletions bracketed and capitalized)

Rule 2. Section 2. (a) An applicant who meets the requirements of (a) through (d) of Section 1 of this Rule and

(1) has passed a written bar examination required by another reciprocal state, territory or the District of Columbia for admission to the active practice of law; and

(2) has engaged in the active practice of law in one or more states, territories or the District of Columbia for five of the seven years immediately preceding the date of his or her application may, upon motion be admitted to the Alaska Bar Association without taking the bar examination. The motion shall be served on the Executive Director of the Alaska Bar Association [AND SPONSORED BY A MEMBER IN GOOD STANDING OF THE ALASKA BAR ASSOCIATION]. An applicant will be excused from taking the bar examination upon compliance with the conditions above, and payment of a nonrefundable fee to be set by the Board for applicants seeking admission on motion. For the purposes of this section, "reciprocal state, territory or district" shall mean a jurisdiction which offers admission without bar examination to attorneys licensed to practice law in Alaska, upon their compliance with specific conditions detailed by that jurisdiction, providing the conditions are not more demanding than those set forth in this Rule.

U.S. District Court invites comments

Notice and opportunity for comment on proposed local court rule for alternative dispute resolution.

Comments are invited on the attached proposed new Local Rule for the United States District Court for the District of Alaska. Comments should be submitted in writing by October 27, 2000 to:

Michael D. Hall
Clerk of Court
222 West 7 Th Ave, Box 4
Anchorage, Alaska 99513

D. AK. LR 16.2 ALTERNATIVE DISPUTE RESOLUTION

a) POLICY FAVORING SETTLEMENT BY ADR METHODS-

(1) Mediation- The court favors resolution of cases by negotiation to reduce litigation expense. To this end, the court promotes the use of mediation.

(2) Other ADR Processes- Other Alternative Dispute Resolution (ADR) processes may be used where agreed by the parties, including early neutral evaluation, arbitration, settlement conference, summary jury trial, and mini trial. It should be noted that the court will not make its personnel or facilities available for summary jury trials or mini trials and will not summon jurors to participate in such proceedings.

(b) USE OF ADR PROCESSES-

(1) Early Consideration of ADR Processes- At an early stage in every case, the parties must actively consider mediation or other ADR processes to facilitate, less costly resolution of the litigation.

(2) Coordination of ADR With Case Management Rules- At the meeting of parties pursuant to F. R. Civ. P. 26(f) and D. Ak. LR 26.2(f) and any conference regarding case management under F. R. Civ. P. 16 and D. Ak. LR 16.1, litigants shall discuss the advisability of using mediation or other ADR processes.

(c) ADOPTION OF ADR PROCESS IN A PARTICULAR CASE-

(1) Mediation- The court may order mediation upon request of the parties, or one of them, or on the court's own motion.

(2) Other ADR Processes- In addition to mediation, the parties may stipulate, subject to court approval (and, in the case of arbitration, 28 U.S.C. 654-658), to the use of any appropriate ADR process.

(d) TIMING OF MEDIATION- Unless otherwise ordered, mediation ordered by the court must be conducted within 90 days after the issuance of the initial case management order.

(e) CONDUCT OF MEDIATION-

(1) Use of Agreed Upon Mediator; Order- Where the parties agree to mediate and on the choice of mediator, the parties shall lodge a proposed order setting forth:

(A) Mediator- the name and address of the mediator;

(B) Parties' Statements- whether mediation statements are to be submitted to the mediator, whether they are to be shared or confidential, any limitation in length, when they are to be submitted (note: mediation statements submitted to the mediator in confidence or shared with other mediation parties may not be disclosed to anyone else without the parties' express consent and are not admissible in evidence in any proceeding related to subject matter of the mediation);

C) Cost of Mediation- the mediator's fee schedule and required payment arrangements, including how the parties will allocate those costs;

(D) Time and Place of Mediation- the time and place the mediation is to commence and time available; and,

(E) Name of Principal Who Will Attend- the name and position of the principal who will attend, who will normally be someone with authority to approve a settlement or one with substantial influence in whether a settlement should be approved (in which case, someone with authority should be readily available to ratify a settlement).

(2) Selection of Mediator by the Court; Order-

(A) Judges- If the parties cannot agree upon the mediator, the court may order that they meditate before a United States district, bankruptcy or magistrate judge, including a senior judge or a retired judge, who is not assigned to the case and who consents to serve. The judge will have the same duties, powers and rights as any other mediator under these rules, except as otherwise noted in this rule or as required by statute.

(B) Order Regarding the Mediation- Upon selection, the parties must meet with the mediating judge and lodge an order similar to that required under paragraph (e)(1), except the order will not provide for payment of compensation to the judge for acting as a mediator.

(3) Mediator's Report of Results of Mediation- Upon conclusion of the mediation, the mediator shall promptly file a report indicating whether the case has settled in whole or in part, whether any follow up is scheduled, and any additional information which all parties have agreed in writing should be included in the report. The parties or their counsel must sign the mediator's report and any separate document setting forth their agreement, which, following an appropriate motion, the court may allow to be filed under seal.

(4) Implementing A Settlement- If the mediation results in a settlement, the parties must lodge appropriate closing papers, or in the case of a partial settlement, papers appropriate to accomplish the partial settlement, within 30 days from the filing of the mediator's report. Upon written request filed within 30 days, the court may enlarge the time within which to file the appropriate closing papers.

(f) CONFIDENTIALITY OF MEDIATION COMMUNICATIONS-

(1) Communications by the Mediator- No communication by a mediator may be disclosed by any person unless all parties to the mediation and the mediator consent. This applies to communications during, preliminary to, or after all mediation sessions.

(2) Communications by Others- A communication made by a person other than the mediator may be disclosed by a person other than the mediator only if all parties consent in writing. This applies to communications during, preliminary to, or after all mediation sessions.

(3) Unprotected Communications- Notwithstanding paragraphs (f)(1) and (f)(2), a communication is not protected to the extent that disclosure is required by state or federal law.

(4) Court May Authorize Disclosure- Notwithstanding subsections (f)(1) and (f)(2), a communication may be disclosed if the court, after a hearing, determines that (a) disclosure does not circumvent F.R.E. 408 and F. R. Civ. P. 68; (b) disclosure is necessary in the particular case to prevent a manifest injustice; and, (c) the necessity for disclosure is of sufficient magnitude to outweigh the importance of protecting the general requirement of confidentiality in mediation proceedings.

(5) Rule Applies to Associates and Staff- Disclosure of confidential information to the staff and associates of the parties, of their counsel, or of the mediator, may be necessary to accomplish the mediation. All staff and associates are subject to this confidentiality rule.

(g) CONFLICTS OF INTEREST-

(1) Definition- A conflict of interest for a mediator is a dealing or relationship that might reasonably be thought to create an appearance of bias.

(2) Disclosure; Further Proceedings- The mediator has a responsibility to disclose all dealings and relationships defined in paragraph (g)(1). If all parties agree, in writing, to mediate after being informed of all actual, apparent, or potential conflicts of interest, the mediator may proceed with the mediation; otherwise the mediator must decline to proceed.

(h) IMMUNITY OF NEUTRALS- All private persons serving as neutrals under this local rule are deemed to be performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity. United States district judges, bankruptcy judges, magistrate judges, senior judges and retired judges are entitled to absolute judicial immunity while serving as neutrals.

(i) COMPENSATION- Unless the parties agree or the court orders otherwise, the cost of mediation will be borne equally by the parties. The mediator will advise the parties of the mediator's fee schedule and required payment arrangements so the parties can include this information in the proposed order required by paragraph (e)(1). If the expense of mediation or any matter regarding compensation creates issues that the parties, among themselves or with the mediator cannot agree upon, the parties or the mediator may ask the court to resolve the matter. In doing so, the court will take into consideration the financial conditions of the parties.

(j) ADMINISTRATOR- The chief judge of the district will designate an employee or judicial officer of the district to act as the Administrator of the court's mediation program.

(k) SELECTION OF MEDIATORS AND OTHER NEUTRALS; ROSTER OF NEUTRALS- The court recognizes that the parties have control over their own neutrals. The court expects any private person who agrees to serve as a neutral to have training or experience commensurate with the responsibility undertaken. In court-connected and other forms of mediation, it is desirable that the mediators selected by the parties have the requisite training and experience. The court lacks the resources to, and does not, investigate and approve mediators and other neutrals. Similarly, the court lacks the resources to create and maintain a roster of neutrals.

(l) DEFINITIONS- The term Alternative Dispute Resolution (ADR) refers to any method other than litigation for resolution of disputes. Definitions of some common ADR terms follow:

Neutral- The term "neutral" as used in these rules refers to an impartial person who facilitates discussions and dispute resolution between disputants in mediation, case evaluation or early neutral evaluation, and arbitration, or who presides over a settlement conference, summary jury trial or mini trial.

Mediation- Mediation is a process in which a neutral facilitates settlement discussions between parties. The neutral has no authority to make a decision or impose a settlement upon the parties. The neutral attempts to focus the attention of the parties upon their needs and interests rather than upon rights and positions. Although in court-annexed or court-referred mediation programs the parties may be ordered to attend a mediation session, any settlement is entirely voluntary. In the absence of settlement, the parties do not lose the right to a jury trial.

Arbitration- Arbitration differs from mediation in that an arbitrator or panel of arbitrators renders a decision after hearing an abbreviated version of the evidence. In non-binding arbitration, either party may demand a trial within a specified period. The essential difference between mediation and arbitration is that arbitration is a form of adjudication, whereas mediation is not.

Case Evaluation or Early Neutral Evaluation- Case evaluation or early neutral evaluation is a process in which a lawyer with expertise in the subject matter of the litigation acts as a neutral evaluator of the case. Each side presents a summary of its legal theories and evidence. The evaluator assesses the strength of each side's case and assists the parties in narrowing the legal and factual issues in the case. This conference occurs early in the discovery process and is designed to "streamline" discovery and other pretrial aspects of the case. The early neutral evaluation of the case may also provide a basis for settlement discussions.

Summary Jury Trial- The summary jury trial is a non-binding abbreviated trial by mock jurors. A neutral selected by the parties presides, acting in the fashion of a judge. Principals with authority to settle the case attend. The resulting advisory jury verdict is intended to facilitate settlement negotiations.

Mini Trial- The mini trial is similar to the summary jury trial in that it is an abbreviated trial presided over by a neutral. Attorneys present their best case to party representatives with authority to settle. Generally, no decision is announced by the neutral. After the hearing, the party representatives begin settlement negotiations, perhaps calling on the neutral for an opinion as to how a court might decide the case.

ESTATE PLANNING CORNER

Taxes will never die

☐ Steven T. O'Hara

This election year there is much talk about killing the federal estate tax. For these purposes, the term "estate tax" includes all three of the federal wealth transfer taxes, since the gift and generation-skipping taxes are designed to close perceived loopholes in the estate tax.

Throughout most of its history, the federal government has depended upon wealth transfer taxes only during times of extraordinary revenue demands, such as wartime. The clearest example is the Civil War: a wealth transfer tax was enacted in 1862 and, when no longer needed, repealed in 1870.

Wealth transfer taxes were also called upon in 1797 (revenue needed for strong naval force; tax repealed in 1802), in 1898 (revenue needed for Spanish-American War; tax repealed in 1902), and in 1916 (revenue needed to offset reduced U.S. trade tariffs during World War I).

In other words, during the 119-year period beginning in 1797 and ending in 1916, we had a federal wealth transfer tax in only 17 of those years.

Since 1916, the estate tax has been resilient if not a big revenue raiser. In 84 years, the estate tax has never been repealed.

Currently the estate tax is raising significant revenue. In addition, there is untold wealth projected to be passed on by older Americans in the coming years; this event is projected to raise significant revenue.

In the face of current and projected revenue from the estate tax, the federal government will not, in this writer's opinion, abolish the estate tax. Consider that the estate-tax repeal under discussion would not become effective until 2010; so the federal government would have plenty of time to scale back the "repeal."

On the other hand, perhaps repealing the estate tax would have the effect of raising even more revenue. Here note that the estate-tax repeal under discussion includes eliminating, to some extent, the step-up in tax basis at death. Recall that when a lifetime gift is made, the donee takes, in general, a carryover basis in the gifted property (IRC Sec. 1015). By contrast, a so-called "stepped-up basis" (to fair market value) is obtained, in general, on a death transfer (IRC Sec. 1014).

By way of illustration, suppose the federal government does not wait until 2010 to repeal the estate tax. Suppose the repeal is effective today, along with the repeal of the step-up in tax basis at death. Suppose an unmarried client, an Alaska domiciliary, dies today with $1,000,001 worth of publicly-traded stock. She held the stock long-term, had no other assets, and never made a taxable gift. Her tax basis in the stock was $1.

In a world with no estate tax and no step-up in tax basis at death, the client's beneficiary would receive a carryover tax basis of $1 in the stock. So when the beneficiary sells the stock, the beneficiary could owe roughly $200,000 in federal income tax under today's capital gain rate, in general, of 20 percent (IRC Sec. 1(h)).

In contrast, had the estate tax and step-up in tax basis at death been left in tact, the client's estate taxes would have been roughly $125,000 (IRC Sec. 2001(c) and AS 43.31.011). This figure of $125,000 in estate taxes is $75,000 less than the $200,000 in capital gain tax under our previous example. Moreover, the client's beneficiary would have received a step-up in tax basis of $1,000,000 in the stock; so the beneficiary would have been free to sell the stock for as much as $1,000,000 at absolutely no income tax cost.

To create true tax reduction, at least initially, the theory under discussion is that the repeal of the step-up in tax basis at death will apply only to the rich. In other words, each of us might be given a limited exemption amount with respect to which assets (sheltered by that exemption) could enjoy a step-up in tax basis.

But it does not take a Washington insider to anticipate that the federal government could someday extend carryover tax basis to all taxpayers. Meanwhile, the federal government could increase the capital gain rate. To add insult to injury, the federal government could also someday reinstate the estate tax, while leaving carryover tax basis at death and a higher capital gain rate in place.

Repeal of the federal estate tax could cause Alaska and other states to institute significant death taxes. Under current law, on the death of an Alaskan or a person holding property in Alaska, the state "picks up" its share of the estate-tax credit that the federal government allows for death taxes actually paid to any state (AS 43.31.011 and IRC Sec. 2011). Accordingly, the Alaska estate tax is often referred to as a "pickup tax."

In other words, the current Alaska estate tax can, in general, be thought of as <u>not</u> increasing estate taxes but rather as a revenue sharing mechanism. But if the federal estate tax is repealed, then a material source of revenue for the state will no longer be available. Faced with a need for revenue, Alaska could institute a significant death tax. Later, the federal estate tax could be reinstated and Alaska may choose to continue its separate (and then additional) death tax.

In the end, any "repeal" of the federal estate tax could be the beginning of a whole new round of direct or indirect tax increases. But who knows? Maybe the politicians will surprise us.

ALSC . . . and justice for all

☐ Loni Levy

STAFF NOTES

Time constraints prevented mention in my last column of the attorneys in the Barrow, Nome and Dillingham ALSC offices. These hardy souls handle the entire caseload in each location.

Jim McGuire, a former special prosecutor, Department of Interior attorney/advisor, criminal defense lawyer and New York City cabbie, whose chance encounter in a Brooklyn bar with a bookmaker led him to Boston College Law School, came to Barrow via Rochester, Las Vegas, Phoenix, Cheyenne, northern California, Washington D.C. and the Bay area. His fascination for Alaska developed while working on tribal government issues for the Department of Interior. Alaska now feels like home to him, though he often returns to the Jersey shore for refueling.

Margie McWilliams in the Nome office is the youngest ALSC attorney. At 26, and a first year practitioner straight out of Harvard Law School by way of Mount Holyoke College, Margie is thriving on the diversity of cases and cultures she encounters. For fun and relaxation, she plays guitar and fiddle in an old time band, currently named "The Landbridge Toll-Booth." Catch her on stage when you are next in Nome.

With a generous grant from the Bristol Bay Native Association, the ALSC Dillingham office was reopened in 1998 under the direction of Thea Schwartz. She previously worked in the Dillingham Public Defender agency and as staff attorney for BBNA's Tribal Government services department. She is a 1995 graduate of Lewis and Clark School of Law.

Finally, we are pleased to announce that, through the efforts of alternative ALSC Board member Louie Commack from Ambler, the Kotzebue office will re-open on October 1 funded by a grant from the Maniilaq Association. Here's your chance to apply for a job you will never forget.

UPDATE ON PARTNERS IN JUSTICE

We are headed into year three of our annual fund-raising campaign which will be chaired by James Torgersen of Heller Erhman. The modest goal this year is $ 250,000.00. Get out your checkbooks !

ACCESS TO CIVIL JUSTICE TASK FORCE REPORT

The Alaska Supreme Court issued its Civil Justice Task Force report in May of 2000 and included in its recommendations that Alaska Legal Services explore the possibility of a filing fee surcharge as an additional means of funding.[1] ALSC Development Director Jim Minnery is doing just that and we invite the support of all members of the bar in this endeavor. This funding mechanism has been successfully adopted in a number of jurisdictions. Indeed, some courts are considering the imposition of a civil response fee as an additional means of funding legal services programs.

The Task Force Report also suggested that the pro bono program be expanded to accept cases that ALSC is prohibited from handling.[2] We have done eaxctly that earlier this year and are proud to introduce to you the new pro bono program.

THE NEW PRO BONO PROGRAM FAQ

Q. What is the new pro bono program?

A. The Alaska Pro Bono Program, Inc. (APBP) was incorporated in March of this year with the assistance of Sue Mason of Dorsey & Whitney. Its current Board of Directors is co-equal with the ALSC Board, but we anticipate expanding the board of the new organization to include representatives of the bench, bar and stakeholder groups.

Q. Why was APBP created?

A. In years past, the pro bono program was operated and administered by ALSC, using funds provided by the Alaska Bar Foundation and others. In 1996, Congress imposed restrictions on entities receiving federal funds including ALSC which effectively restricted the use of virtually all other funds received by ALSC, regardless of the source of funding. Thus funds supporting the ALSC pro bono program were suddenly encumbered by these federal restrictions which included, but were not limited to, a flat prohibition on claiming and receiving attorneys fees, on representing prisoners and most aliens, on handling class actions, redistricting and welfare reform cases, and legislative and administrative advocacy.[3]

ALSC's challenge to these restrictions, reported in earlier columns, resulted in adoption of regulations permitting LSC entities to establish separate and distinct pro bono programs. After many months of study and dialogue, and with the guidance provided by the American Bar Association's Committee on Pro Bono, the ALSC Board and staff decided it was necessary to "liberate" the pro bono program.

Q. So what is really "new"?

A. The new APBP can accept a much wider variety of cases than could the old pro bono program, and therefore meet the substantial needs of those who depend upon pro bono legal services but were not being served.

The office and phone and fax numbers are also new; APBP is located at 3300 Arctic Blvd., Suite 103 B, Anchorage Alaska 99503. The new phone is: 565-4300; toll free: 1-888-831-1531. The fax is: 565-4317.

An open house will be held on Thursday, September 28th from 4:30 to 6:30 and we cordially invite all bar members and other friends and supporters of pro bono to attend.

Even the furnishings are new, thanks to the generous donations of furniture and equipment from the Disability Law Center, Rhonda Fehlen, Hughes Thorsness Powell Huddlestone, & Bauman, Southcentral Foundation and Shelaine Thompson. APBP is still looking for a donation of a conference table and eight chairs, so if you have one, let us know.

Maria Elena Walsh, former ALSC pro bono co-ordinator, is the new APBP Executive Director and Christina Borge is the new APBP operations director.

Q. Have any other changes been made in the delivery of pro bono services?

A. Yes. John Treptow, who is in charge of pro bono assignments at Dorsey & Whitney has graciously committed to providing an "attorney of the day" every week for six months to help APBP with intake and referral. John intends to be active in the stakeholders committee which will consist of private social services agencies along with public agencies whose constituencies often require pro bono services.

Q. How can I help?

A. You can join the APBP panel and become one of the many attorneys who are making big differences in the lives of low income Alaskans. Like Frank Nosek who helped two sets of elderly clients about to lose their homes in municipal tax deficiency sales by negotiating settlements in their favor. And Robert J. Bredesen who fought an unlawful eviction notice served on an 82 year old client with multiple disabilities. And Joseph Pollock who handled a landlord/tenant referral and engaged the help of his friends and relatives to physically relocate his clients to a new, safe home. Or Michael Grisham of Patton Boggs LLP who not only has been conducting a bi-lingual Spanish English general law clinic for the pro bono program, but has also assisted a young mother of two small children in defeating unmeritorious claims for repairs to her trailer home. Or you can join the other attorneys and firms who have been conducting free legal clinics throughout the summer months, despite the sunny evenings, including Marcia Davis, Sally Hinkley, James M. Shine, Mendel & Associates, Ken Kirk, Delaney,Wiles,Hayes, Gerety,Ellis & Young, Michael Shaeffer and Sean Maltbie/Assistant Staff Judge Advocate (EAFB).

Q. How else can I help?

A. You can petition the Alaska Bar Association to adopt the approach of the New York state judiciary which has recently allowed attorneys to accumulate CLE credits by performing pro bono work.[4]

Or you can you can promote the practice of Manuel Newburger, an Austin, Texas attorney who has made pro bono fund raising a firm project by generating charitable contributions as part of settlements in civil litigation. His firm waives contingent fees for the charitable component of a settlement.

Or your firm can make a commitment to provide lawyer of the day assistance to APBP, like Dorsey & Whitney.

Q. What if I can't help right now?

A. You can make a pledge of future assistance to the program or you can plan to attend the Barrister's Ball which will be held in the winter of 2001 as the first annual APBP fund raiser. Call Maria Elena for details.

There is no limit to the kind of support you can and should provide to the new pro bono program.

[1] See Task Force Report (May 2000) at 25.
[2] Id. at 27-30.
[3] See 45 CFR Part 1610.
[4] See New York Law Journal March 6,2000 at 1.

The argument for Ballot Measure 2

By Sen. Dave Donley

During last legislative session the Legislature approved placing Ballot Measure 2 on this November's election ballot. Ballot Measure 2 proposes to amend Alaska's State Constitution by:

1. Defining amendments as changes that are limited to one subject and may affect more than one constitutional provision; and by
2. Prohibiting a court from changing the wording of proposed constitutional amendments or revisions before the people of Alaska vote on them.

Ballot Measure 2 does not infringe on the Court's power to strike proposed amendments from the ballot if they overstep other constitutional limitations.

These proposed changes are in response to the State Supreme Court's decision in the recent case of *Bess v. Ulmer*. They are intended to restore the original intent of the framers of Alaska's Constitution regarding when and how the people of Alaska may amend our constitution.

In *Bess*, the Supreme Court concluded "that a revision is a change which alters the substance and integrity of our constitution in a manner measured both qualitatively and quantitatively" under a hybrid approach. An enactment, the Court said, which

> "is so extensive in its provisions as to change directly the 'substantial entirety' of the constitution by the deletion or alteration of numerous existing provisions may well constitute a revision therefore [while] even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision also. The process of amendment, on the other hand, is proper for those changes which are 'few, simple, independent, and of comparatively small importance.' The core determination is always the same: whether the changes are so significant as to create a need to consider the constitution as an organic whole."

THE COURT HAS CREATED SUCH A SUBJECTIVE AND CONFUSING STANDARD THAT IT IS IMPOSSIBLE TO SAY FOR CERTAIN WHETHER A PROPOSED CHANGE IS AN "AMENDMENT" OR A "REVISION."

This subjective, nebulous test places Alaskans in a constitutional straightjacket by creating a confusing distinction between amendments (the way Alaskans have traditionally changed our constitution) and revisions (which can be proposed only by a constitutional convention). Justice Compton, in his dissenting (in part) opinion, noted that "[T]his court's failure to carefully articulate the test it is adopting is unfortunate." Indeed, he later points out the subjective nature of the test and the lack of consistency within the decision itself.

> "[T]he proposed constitutional "revision" regarding prisoners affects a narrow class of persons comparatively few in number. Yet because it implicates numerous state constitutional provisions, and divests prisoners of state constitutional protections, we conclude that it is a constitutional "revision" that cannot be brought before the voters as a constitutional "amendment" initiated by legislative action. On the other hand, we conclude that the proposed change regarding reapportionment, which fundamentally redistributes among all three branches of government constitutional power previously held by the chief executive alone, impacts all voters within the state, and restructures the manner by which the voters are grouped together to elect their legislators, is a mere constitutional "amendment" undeserving of the politically impartial deliberation inherent in the constitutional convention process. The irony is remarkable."

The court has created such a subjective and confusing standard that it is impossible to say for certain whether a proposed change is an "amendment" or a "revision." This uncertainty undermines a fundamental element in the success of our democracy—the right of the people to amend their constitution.

During the comprehensive debates over this proposed constitutional amendment, several key concerns were articulated about the ramifications of the followed by the Bess decision. Those concerns included:

1. The Court violated the separation of powers doctrine when it deleted a sentence from a proposed amendment to the constitution;
2. The test adopted by the Court for distinguishing between an amendment and a revision is subjective, vague and vulnerable to judicial abuse; and
3. These problems significantly reduce the power of the people of Alaska to amend their constitution.

I. The Court Does Not Have The Power To Strike Language From A Proposed Constitutional Amendment.

Nothing in the constitution empowers a court to alter, amend, or redraft a proposed constitutional amendment. The Legislature is the only branch of the government allowed to "propose" constitutional amendments under Article XIII, Section 1. In *Bess,* the Court strayed beyond its powers when it deleted an entire sentence from a constitutional amendment that had been proposed by the Legislature pursuant to Article XIII section 1 of the constitution.

As the Court has recognized on several occasions, the procedures for amending or revising the constitution must be strictly adhered to. See *Bess v. Ulmer*, 985 P.2d at 982; *State v. Lewis*, 559 P.2d 630, 639 (Alaska 1977). Unfortunately, the Court did not adhere to these procedures in *Bess*. When the Court changes the wording of a proposed amendment it changes the meaning of the amendment. By doing so, the Court assumes the role of proposing an amendment, thereby usurping the Legislature's exclusive constitutional power to propose amendments under Article XIII section 1. In so doing, the Court violated the separation of powers doctrine, which, as you are aware, provides a system of checks and balances that divides power among the coordinate branches of government and prevents any one branch from becoming too powerful.

The Court's role in reviewing constitutional amendments and the process by which they were adopted is a significant check on the people of Alaska and their Legislature's ability to propose amendments to the constitution. The separation of the power to propose amendments from the power to review and apply them creates a system of checks and balances on the process of amending the constitution. When the Judiciary rewrites proposed amendments, it impermissibly alters this system of checks and balances because the branch of government drafting proposed amendments is also the branch reviewing the proposals for constitutionality and applying the amendments to specific cases.

THE COURT SHOULD NOT HAVE VIOLATED THE SEPARATION OF POWERS BASED ON AN ATTORNEYS' STIPULATION.

Under Ballot Measure 2, the Court would maintain the power to strike an unconstitutional amendment from the ballot, but it would make explicit that the Court could not alter the language of a proposed amendment.

In decisions before *Bess*, the Court has conceded its lack of power to rewrite legislation. In *State v. Campbell*, 536 P-2d 105 (Alaska 1975), the Court was faced with a challenge to the constitutionality of a statute. Noting that the role of the Court was to reconcile, whenever possible, the statute with the constitution, by rendering a construction that harmonizes statutory language with constitutional provisions, it nonetheless recognized that its power to interpret the statute was limited by the separation of powers doctrine. *Campbell*, 536 P.2d at 110; see also *Kimoktoak*, 584 P.2d at 31 n.6 *Veco Intern v. Alaska Pub, Off, Com'n.*, 753 P.2d 703, 713 (Alaska 1988). Since the separation of powers doctrine limits the ability of the Court to imply terms in a statute, it certainly prohibits the Court from engaging in the wholesale rewriting of a proposed constitutional amendment.

The only justification for this action given by the court was the allegation that counsel representing the Legislature stipulated to the modification of the amendment. This concession was allegedly extracted from the Legislature's counsel at oral argument, and, therefore, counsel had no opportunity to consult the Legislature, his client. In testimony before the Legislature, that attorney took exception to the Court's characterization of what was said at oral argument and contends he did not agree to the removal of the stricken language. Even if he did, no attorney or party can waive the specific language of the constitution or the doctrine of the separation of powers.

The Court should not have violated the separation of powers based on an attorneys' stipulation. It is beyond debate that the specific language of a proposed amendment can be approved only by a two-thirds vote of both houses of the Legislature. The so-called Marriage Amendment that ultimately passed was not proposed by the Legislature in the manner required by the constitution, but rather was proposed by the Court. The constitution does not allow attorneys or the Court to modify proposed constitutional amendments.

II. The Bess Test For Distinguishing Between An Amendment And A Revision Is Too Vague To Serve As A Practical Guideline For The Legislature.

In *Bess*, the Court held that the Alaska Constitution distinguishes between an amendment and a revision. Because the Court found no guidance in the minutes of the Constitutional Convention on how to distinguish between an amendment and a revision, it adopted an allegedly modified version of a test used by the California Supreme Court to distinguish between the two.

The test articulated by the Court in *Bess* is too vague and unpredictable to be a useful guide to Alaskans. Alaskans and their elected Legislature have a strong interest in having a distinction between an amendment and a revision that is clear and meaningful.

There are many reasons for adopting a clearer test for distinguishing between an amendment and a revision. First, a clear distinction between an amendment and a revision informs the public and the Legislature whether a proposed change to the constitution can be accomplished as an amendment. The vague test articulated in *Bess* leaves the public and their elected representatives guessing whether a proposed change to the constitution is an amendment or a revision, and thus may stymie needed changes to the constitution. For example, extensive public testimony before the Legislature has contended that the proposed constitutional amendment regarding subsistence is really a "revision" under *Bess*, and thus would not be allowed on the ballot.

Delegates to Alaska's Constitutional Convention may not have clearly articulated the distinction between an amendment and a revision. However, they would not have adopted a definition that was so vague and problematic that the validity of every proposed amendment would have to be decided by the courts in expedited litigation.

Third, the subjectivity of the *Bess* test undermines the democratic nature of our government. It raises the specter that judges and justices may use the *Bess* test to strike down proposed amendments that they personally deem unwise. Were Courts to do so, they would be substituting their judgment for that of the people and their elected representatives.

In future cases, the Court should adopt the "single purpose" test as a litmus test for determining whether a proposed change to the constitution constitutes an amendment or a revision. Several states use the "single purpose" test to limit the scope and breadth of amendments to their constitutions. *See In Re Title, Ballot Title, Submission Clause*, and Summary for 1999-2000, 977 P.2d 845 (Colo. 1999); *Armatta v. Kitzhabe* 959 P.2d 49 (Or. 1998); *Wall v. Board of Electors*, 250 S.E.2d 408 (Ga. 1978); *Buchanan v. Kirkpatrick*, 615 S.W.2d 6 (Mo. 1981); *O'Grady v. Brown*, 354 N.E.2d 690 (Ohio 1976); and *Carter v. Burson*, 198 S.E.2d 151 (Ga. 1973).

In *Carter*, the Court stated:

> The test of whether . . . a constitutional amendment violates the multiple subject matter rule is whether all of the parts of the . . . constitutional amendment are germane to the accomplishment of a single objective. If so, it does not violate the rule; otherwise, it does.

This test is a much more practical test than the *Bess* test for distinguishing between an amendment and a revision. First, it is easier to under-

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The argument for Ballot Measure 2

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stand and apply than the vague standard articulated in *Bess*. Second, it allows the Legislature to propose amending the constitution to achieve a single narrow purpose, but prevents it from making sweeping revisions to the constitution. Third, it allows voters to clearly understand the purpose of a proposed amendment. Fourth, it allows more than one section of the constitution to be changed, so long as the changes are all designed to achieve the limited, narrow, articulated purpose of the amendment.

Since statehood, Alaskans have understandably been reluctant to call a constitutional convention due to the uncertainty of what would result. But Alaskans have voted in favor of 25 amendments since statehood. Several of these amendments, such as those concerning the right to privacy and limited entry, arguably do not meet the vague test the court adopted in *Bess*. To now force Alaskans to call constitutional conventions to make even single subject changes to their constitution is terrible public policy and bad government. The court action forces Alaskans into an undemocratic, take it or leave it risk of a constitutional convention to make future improvements to our constitution.

The single purpose test is far superior to the *Bess* test in achieving this objective. It is easier to understand, and therefore will allow the Legislature to propose amendments which will pass judicial scrutiny. It allows amendments to be made to the Constitution which are designed to address a single problem, even if it requires amending several sections of the constitution to address that problem. At the same time, it preserves the distinction between amendments and revisions by preventing the Legislature from proposing widespread changes to the constitution.

In conclusion, Ballot Measure 2 is an attempt to maintain the balance of power between the three branches of government by offering language which maintains and clarifies the power the people of Alaska always thought they had, the power to reasonably amend their constitution.

President's Column: Simplifying the justice system?

Continued from page 2

Even then, there will be problems. A story helps illustrate.

Once upon a time, a boy seeking knowledge set upon a journey to discover the true meaning of Truth and God. He climbed the highest mountain seeking out the oldest and wisest of men. Upon his meeting, the young man asked the wise man, "what is God?" The wise man replied: "The answer is simple, everything is God."

Serene and confident in his knowledge, the boy descended the mountain to return home. On his way, he was walking down a narrow road when he saw a man on the back of an elephant approaching him. The man on the elephant began yelling at the young man in the road to step aside, as there was no turnoff on the narrow road. The now-enlightened boy continued confidently on his way, secure in the knowledge that since everything was God, the elephant was therefore God, and that surely God would not harm him. The man on the back of the elephant continued to yell and wildly gesture at the boy to get out of the way. But the boy continued on until he was run over by the elephant.

Dazed, bruised, and bewildered, the boy made his way back to the old man to tell him that his definition of God left much to be desired. Upon his assent up the mountain and his explanation about being trampled by the elephant, the boy questioned the wise man how everything could be God, since God in the form of the elephant had just run over him. "Surely," the boy said, "if God were the elephant, he would not have harmed me."

After listening to the story, the wise man replied to the boy, "But my son, did you not hear God on top of the elephant yelling at you to get out of the way?"

Ideas to simplify the Justice System come from all quarters. All should be considered and bravely implemented, experimented with, and then cast off if better ways exist to achieve simplification. But no one idea of simplicity, or no one source of ideas about simplification, should be considered a panacea.

Frederic Bastiat, in *The Law*, wrote: "The nature of law is to maintain justice. ... This belief is so widespread that many persons have erroneously held that things are 'just' because law makes them so."

Bastiat's conception of law and justice are like the parable of the boy trampled by the elephant. The public may have the belief that because we have laws, we have justice. Those same people may be trampled by the laws and then pick themselves up believing there is no justice. Certainly justice existed somewhere. What was needed was either better listening to those who could have guided them through the law, or better guides to help them avoid being trampled.

Our System of Justice and our civilization will not soon become simpler. All of us must adapt to the changing and increasing complexities of society. But lest we become trampled ourselves, we must strive to make the Justice System simpler for those who might someday trample us.

Judicial Council retention

Continued from page 1

• Non-confidential portion of Judge Questionnaire

The Judicial Council urges attorneys to support retention of the judges who will be on the ballot this fall. In particular, I urge you to respond to misleading letters to the editor and news stories in the press and communicate your views and the availability of evaluation information to others. Please give me a call if you would like handouts about the evaluation process for presentations to community groups.

Evaluation information available online at www.ajc.state.ak.us

There will of course be those who attack the independence of our judiciary, arguing that judges have incorrectly decided cases and have improperly limited legislative or executive actions. However, our constitutional founders established an independent judiciary in Alaska precisely to act as a check on the governor and legislature. While judges, like everyone else, make mistakes, the Council's review of judicial performance and decisions show that our judges strive to correctly apply our law and constitution in an unbiased manner.

We all disagree with court decisions from time to time, and judges certainly should be evaluated. But they should be evaluated on their fairness, knowledge and good faith application of the law. Their role is not to determine the popularity of the law but to apply it fairly, to determine whether the legislature has exceeded its constitutional limits, and to make the decisions required by our constitution and our laws, based on their best judgment. The Judicial Council members, from the very conservative to the very liberal, unanimously concluded that each of the judges on the ballot this fall have fulfilled this standard and should be retained.

—William T. Cotton, Executive Director

Family vacation

☐ William Satterberg

It has become a dysfunctional tradition: the summer trip. Every year, my wife, Brenda, and our two daughters, bid adieu to Fairbanks in June and travel to Florida. They go there, in part, to enjoy the warmth. They often also descend upon Mickey Mouse, and their various pals from MGM, Warner Brothers, and Universal Studios. It is a traditional trip that allows the children to see their maternal grandmother before she comes to Fairbanks for another two weeks in July.

Experience has shown, however, that it is best that I remain in Fairbanks during this trip. It is not that I am anti-social.

Rather, we have found during our vacations that things often happen to the house and the animals. Whether the tragedies are broken pipes, floods, furnace outages, break-ins, or the like, it has been best for one of us to remain in Fairbanks to guard the roost. I generally am volunteered.

The summer trip normally lasts two to three weeks. During that period of time, following the initial shock of watching my family trundle down the jetway with their mass of carry-ons in tow, I settle into a regular routine which some describe, as well, as a "vacation." The only difference between my vacation and their vacation is that I don't go anywhere unless I want to. My vacation is, instead, a departure from the regular routine of family existence.

I WANTED TO SEE HOW MANY DIFFERENT TYPES OF MOLD COULD GROW IN THE REFRIGERATOR OVER A THREE-WEEK PERIOD.

Not that I don't enjoy family life. My wife and I recently celebrated our 20th anniversary. We have two marvelous children, and three pets. It is just that there are certain restrictions which family life places upon the male of our species.

Science has shown that, with time, males forget and fail to appreciate the little things. June vacation is, in effect, a chance for me to revert to my primordial beginnings, much like the smelly amoebas that slithered out of the swamp during the creation of man. (I mean, Homo sapiens.) I suspect that the creation of woman was a much cleaner affair.

I THROW ALL THE CLOTHES INTO THE MACHINE AT THE SAME TIME, POUR IN A BUNCH OF LIQUID SOAP, EAT POPCORN, AND WATCH THE BUBBLES CASCADE OUT.

Our family is a polyglot. We all have different interests. The concept of "Father Knows Best" went out the window years ago. Something about the modern age.

We also have three animals who are an equally unique lot. The oldest is a Golden Retriever, who we prefer to call a Golden Retreater, due to its demonstrated temerity. Our second dog is what can only be described as a mixture of the North Half of the City of Fairbanks. That mutt has a chronic breath problem. I attribute the breath to an undiagnosable gum disease.

Then, there is the cat. The cat was orphaned at birth. As such, it naturally thinks that it is a human. After all, it was raised by humans. Early on, the cat taught the dogs who was boss. This aggressiveness compelled us to have the cat de-clawed so that the dogs wouldn't be hurt anymore. But, no one told the dogs, for the cat's sake. Over the years, a peaceful co-existence has developed between the three animals, with the cat often knocking food off the countertops late at night so that the dogs can eat.

Then there's the garden. My wife is an avid gardener, who truly enjoys the time she spends in the mud, dirt, and weeds, doing battle with mosquitoes, while I relax on the porch.

When my family leaves town, I only have two jobs to do. One is to take care of the animals. The other is to take care of the garden. Unfortunately, that tasking is deceptive. It is better said that these are the only two "mandatory" jobs that need to be done.

Other duties emerge with time, and which need attention lest I be overcome and killed outright.

For example, have you ever looked in your refrigerator? I mean *really* looked? Just how many jars of mustard or mayonnaise can a person own? Is that white fuzzy stuff on top normal? How many bottles of half-used salad dressing can exist? And how long can a pound of hamburger last before it turns green? *Really* green?

During the last trip, I conducted an impromptu experiment. I wanted to see how many different types of mold could grow in the refrigerator over a three-week period. Real mold. Not just the slime mold genus, *Getus Sickem*, that won my oldest daughter a science fair award recently. I decided to see how long it would take to sour three different varieties of milk: non-fat, 2%, and whole fat. I also wanted to establish how many take-out containers the refrigerator could hold before the compressor began to rattle and overheat.

It started out as a grand experiment. It stopped when I realized that it was life threatening. (Something tried to attack me one weekday morning as I was getting my second breakfast beer.)

Exercising my newfound freedom to strut proudly around the house with nothing on, and to eat gaseous foods without reserve, I next began to evaluate the laundry situation. A quick count told me that, if I could control my courtroom nervousness, I should have enough dress shirts to make it until the family returned. Although I could certainly do the laundry, and actually did so once, I began to realize that something was missing. It wasn't the usual starch in my underwear. For some magical reason, only known to me when my wife was in town, my shirts always come back wrinkle-free. However, the shirts that I washed came back looking like the proverbial unmade bed, no matter how long I left them in the dryer after the cycle stopped.

I DISCOVERED A NEW TECHNIQUE. SIMPLY STATED: IF YOU DON'T FEED THE DOGS, THE DOGS WILL CLEAN THE LITTER BOX FOR YOU.

Admittedly, laundry is a difficult concept. I still cannot figure out why people believe that dark clothes need to be separated from white clothes. Maybe it's a throwback to the Southern sixties. As for my own style, I throw all the clothes into the machine at the same time, pour in a bunch of liquid soap, eat popcorn, and watch the bubbles cascade out. When the machine finally stops clunking and jumping, I toss the whole batch into the dryer. I set the dial for maximum heat and time, and come back in the morning to pull the dry clothes out.

After my mother died, my father told me that he could get six days out of a pair of shorts. He claimed he would put them on and wear them for three days. He next would turn them inside out and wear them for another three days. It was a good theory, but he was only halfway there. What he forgot to recognize was that, if you also spin them around on each side, you can get at least another six days out of the same pair. True, there are certain social complications inherent in that process, but it does save on water.

EMPTYING THE GARBAGE IS A SELF-ALERTING TYPE OF THING.

Socks, on the other hand, are cheap. I usually just wear socks until they wear out. I then buy a new set at K-Mart. Fortunately, I found that the cat likes to chew on my socks. This appetite draws the cat's attention away from beating up on the dogs, an added benefit to family harmony.

Animals certainly do take a fair amount of time in any house-sitting type situation. Ordinarily, I am not particularly fond of cats. Instead, I tolerate them. Cats respond to me in a similar fashion. In fact, it normally takes the family cat two to three days just to warm up to the fact that the wife and kids are no longer around, before it will relate to me. Every summer, during that period of time, a love-hate relationship develops. Feline bonding.

The major reason that I do not enjoy cats is because I do not like litter boxes. Even with the new clumpless litters, litter scoops, and machines that do it all for you, a cat litter box still is as bad as a six-month-old baby's diaper. In many respects it can be worse, when you choose to neglect it the way I do.

GOD HAS DONE A GOOD JOB CREATING THIS WORLD, SO I FIGURE THAT HE WILL DECIDE WHEN IT IS TIME TO WATER.

To solve this dilemma, during this last family vacation, I came up with a whole new concept of litter box control and animal management. In previous years, I would race home at 11:00 p.m. to feed the dogs and clean the litter box. During those earlier vacations, the dogs would usually fend for themselves simply by climbing up on the kitchen counter and knocking things off, breaking into candy bags, or engaging in other pantry raids.

Fortunately, this year, I discovered a new technique. Simply stated: if you don't feed the dogs, the dogs will clean the litter box for you. Obviously, there are some minor drawbacks, such as the bad breath of the one dog, for example. But, all in all, it is a balanced relationship. Moreover, I have found that the dogs tend to relate to the cat better. After all, nobody wants to bite the hand, (or whatever portion of the anatomy) that feeds them. On that issue, I am not alone. Local Fairbanks attorney, John Tiemessen, recently told me that his Golden Retriever also likes "the little Almond Rocas" that the cat leaves behind, as well. Maybe it is a Golden Retriever thing.

I have never understood why a person makes a bed. It doesn't make sense. The only reason to make a bed is if you plan to have somebody come over and look at the bed, or otherwise pass judgment upon your living conditions. But that risk only happens to me for two weeks in July. In my opinion, bedmaking wastes valuable sleep time. Practically speaking, moreover, I have never been able to figure out how to get a fitted sheet to stay on a mattress, regardless. In fact, it took me more than a year, alone, to realize that the fitted sheet was for the bottom mattress only. When putting on a fitted sheet, usually I tend to end up sprawled spread-eagled across the mattress, trying simultaneously to pin all four corners like a frustrated pro-wrestler. Lately, I decided that it is much easier just to let the covers pile up, climb in, and then kick them to wherever they belong. Since I have a tendency of kicking the bed covers around, anyway, it makes no sense to try to organize the process prior to doing the destructive acts.

Oops, I almost forgot about the garbage, again. Like kitty litter, emptying the garbage is a self-alerting type of thing. At a certain point in time, unless the dogs have also gotten into the garbage, it becomes obvious when it is time to take the garbage to the dumpster. Fortunately, years ago, I bought an Israeli gas mask at an auction, which has proven to be quite effective for the interminably long, one mile drive to the dumpster.

Gardening presents yet a different task. Each year, I believe that my wife will be pleased when she returns to find all of the pretty little yellow flowers that have grown in the garden. They are the same type of flowers that grow all over the lawn. To my dismay, Brenda never seems too impressed by my stewardship. As for watering, I figure that watering is nature's task. God has done a good job creating this world, so I figure that He will decide when it is time to water.

The final chore that needs to be mentioned concerning the house-sit-

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In Savage Arms:

Alaska Supreme Court rewrites liability law?

By Jim DeWitt and Aisha Tinker Bray

On June 30, 2000, the Alaska Supreme Court significantly rewrote the law of products liability as it affects a business that purchases the assets, but not the liabilities, of another. A business that purchases assets as an ongoing concern will be liable for the product liability claims of its seller, despite what the purchase documents may say.

In *Savage Arms, Inc. v. Western Auto Supply Co.*, Opinion No. 5293, (June 30, 2000) a minor was injured by an allegedly defective .22 rifle manufactured by Savage Industries, Inc. Savage Industries, Inc. sold its assets to Savage Arms, Inc. in 1990, apparently after the rifle in dispute had been manufactured. The court acknowledged that "[g]enerally, when one company sells all its assets to another, the acquiring corporation is not liable for the debts and liabilities of the selling company," subject to four exceptions not relevant to the case. *Savage Arms*, No. 5293, slip op. at 9.

But the court elected to follow a minority rule, a rule that was rejected by the American Law Institute's Restatement (Third) of Torts and the majority of courts to consider it, that greatly expands the liability *of* a purchaser for the torts of *the* seller. Id. at 13. The court articulated a new "continuity of enterprise" theory as looking beyond the formal requirement of identical shareholders and considering the substance of the underlying transaction. Id. at 12.

> The key factors under the "continuity of enterprise" exception, first articulated in *Turner v. Bituminous Casualty Co.*, [244 N.W.2d 873 (Mich. 1976)] are: (1) continuity of key personnel, assets, and business operations; (2) speedy dissolution of the predecessor corporation; (3) assumption by the successor of those predecessor liabilities and obligations necessary for continuation of normal business operations; and (4) continuation of corporate identity. This is a limited exception that looks past the identity of shareholders and directors, and focuses on whether the business itself has been transferred as an ongoing concern.

Id. at 12 (internal footnotes omitted).

Critics may argue that the court would be better off leaving significant expansions of product liability to the Legislature,[1] but this article focuses instead on what appears to be a seriously flawed analysis of the benefits and detriments of adopting such an expansion.

The flaw is this: each of the rationales advanced by the court for adopting the "continuity of enterprise" standard logically argues only for prospective application, yet the court gives this new policy retroactive application.

The court first notes that the "continuity of enterprise" rationale has been criticized for its impact on the value of businesses which, for one reason or another, are attempting to sell the business as a whole or in substantial parts.

> Critics of the modern exceptions (such as "continuity of enterprise") argue primarily that expanding liability harms the overall economy by making it more difficult for companies to reorganize or sell their assets without destroying the value of the ongoing business enterprise.

Id. at 14. The court's treatment of this concern is less than complete:

> But we have not been referred to any evidence that adopting this modern "continuity of enterprise" exception (or the marginally more popular "product line" exception) has in fact increased the number of corporate liquidations or piecemeal breakups, or that rejecting the modern exceptions has in fact decreased liquidations or piecemeal sales. And our research has not disclosed studies that have so concluded.

Id. at 14-15 (internal footnote omitted). As the court acknowledged earlier, this doctrine has been recognized in only a few states, and only relatively recently. Id. at 13. It's hardly surprising that the court has not been able to find studies demonstrating its economic effects. For the court to rely upon the absence of data is surprising, however, and could be criticized as conclusive.

The court next looks to the economic effects of imposing the "continuity of enterprise" rule:

> We also note that permitting successor liability under the "continuity of enterprise" exception will not discourage large-scale transfers so long as anticipated successor liabilities do not exceed the value of the corporation's accumulated goodwill. Presumably, many corporations will continue to engage in efficient and productive transfers, with the purchasing firm merely factoring into the purchase price the cost of those successor liabilities.

Id. at 15. The court's reasoning here is sound, but only provided the rule is given prospective and not retrospective application.

The flaw is this: each of the rationales advanced by the court for adopting the "continuity of enterprise" standard logically argues only for prospective application...

In fact, negotiations for the sale of assets can and usually do take the risk of liability into account. But for sales that were conducted under the old rule, negotiations are no longer possible, and the purchasers in those transactions will now find themselves saddled with a class of risks they did not assume. Indeed, in many cases, the sales would have been "asset sales" only, without liabilities - including contingent product liability claims - intentionally leaving the risk of such claims on the seller. For the court to simply state, "we would expect selling and purchasing firms simply to negotiate to a rational price that takes account of these potential claims" begs the question of how that is to be accomplished in a completed transaction. Id. at 16.

Put another way, a purchaser of assets that consist of a line of manufacturing or perhaps an entire company has presumably paid fair market value for those assets. The court in *Savage Arms* has changed the definition of "assets" to include a large class of "liabilities." As a result, the true fair market value of the "assets" necessarily changes. If the seller has subsequently distributed its assets to its shareholders, as is its right, and has subsequently dissolved itself, as is also its right, the purchaser has been deprived of the benefit of its bargain, and has no meaningful recourse.

If a purchaser is larger and wealthier than a seller, then the "pocket is deeper" for a tort plaintiff under the court's new rule. The court concludes that is only fair. Id. at 16-17. Without going into the justice of the situation, or whether or not this results in a "windfall" to a tort plaintiff, by giving this new rule retroactive application the new rule is made patently unfair. A large tort claim, unknown and perhaps unknowable to the purchaser, will simply deprive the purchaser of its bargain. The court's offhand comment in this regard, that "once again, purchasing corporations can attempt to account for this risk of loss in the purchase price," is meaningless as to consummated transactions. Id. at 17.

The court acknowledges that this new rule will create complications in bankruptcy, where the goal is to maximize the value of assets for the creditors. Id. at 17. While the court is being a little presumptive in concluding federal law won't sell assets free and clear of all claims, including unknown tort claims, 11 U.S.C. § 365, the court's treatment of the issue borders on flippant.

> But we see no persuasive reason to favor corporate creditors over claimants later injured by the seller corporation's products.

Id. at 17. It does not seem to occur to the court that the "creditors" in bankruptcy can include tort claimants. In effect, the court proposes to diminish the bankruptcy recovery of known claimants for the benefit of potential future tort claimants. And, again, it is impossible to find justification for retrospective application in the court's arguments.

The court acknowledges that there may not be a causal relationship between the harm created and the purchaser, but argues that the "goodwill" it believes is inherent in an asset purchase justifies holding the purchaser liable. Id. at 17-18. It is in that context that the court comes closest to recognizing the retrospection problem:

> When a firm negotiates to purchase another corporation, keeping the "enterprise" intact, it must anticipate any potential successor liabilities and negotiate an appropriate price. To permit the successor, which presumably negotiated a discount for potential successor liabilities when dickering over the purchase price, to avoid liability based on lack of causation would give the successor an unwarranted windfall.

Id. at 18. The verb tenses are instructive: "must" and "would give;" again the court's justification speak to prospective application yet Savage Arms involves retrospective application.

Finally, the court concludes that the new doctrine will encourage the traditional purposes of products liability law: it will encourage manufacturers to create safer, defect-free products to maximize their business value for the future. Id. But in the cases of completed sales, the policy is preposterous.

For businesses that have already made asset purchases, the only option now is to purchase insurance or other suitable risk management solutions to take into account the new classes of claims that the court has created.[2] Those insurance premiums and similar costs are an unfair, unreasonable burden, but unless the court recognizes that its reasoning only justifies prospective and not retroactive application, the alternatives are even worse.

[1] An argument rejected by the court "because [successor liability] is directly related to products liability law, a doctrinal road long traveled by courts." Savage Arms, No. 5293, at 19.

[2] While the decision is limited to products liability, long-time observers of the court might anticipate the rule being generalized to services and well as products, and other kinds of claims besides torts.

Family vacation

Continued from age 22

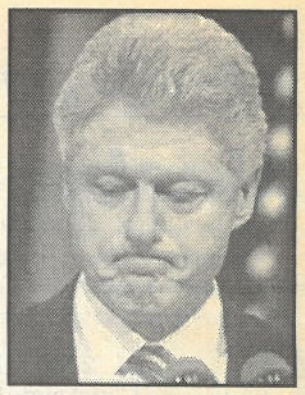
ting experience pertains to the finding of meals. For some reason, when my family is in town, meals magically appear on the dinner table each night. During the absence, I become a regular at the local fast food gas station for breakfast. I also become the object of many a person's sympathy as they invite me for dinner. But, I'm not one for waiting. If they don't invite me, I just show up at 5:00 p.m. and refuse to leave. Invariably, I get an invitation by 7:30 p.m.

Not bashful about accepting leftovers, I always establish a rather hearty collection in the refrigerator, which I later consume the day before the family returns, fluffy white stuff on top or not. I have grown especially fond of the chunky milk. It is a learned taste.

There is something to be said for these mini-vacations for all concerned. Not only do the girls get a chance to get away from me, which can be quite exhilarating, I'm told, but I, as well, appreciate the value of having the crew return. True, there is an emotional value to the return that cannot be quantified. There is also a lot to be said for not having to make the bed, cook the dinners, or do the laundry. The house does not run automatically, even though I would like to think so. (Now, if I could just figure out where they put that blasted dog food, I'll be okay. I don't want them to think that I ran out early. After all, they may make the connection with the litter box, which would require some rather difficult explaining.)

Clinton's a surprising tort reformer

Still, trial lawyers welcome him as a conquering hero


President Clinton

By Bob Van Voris

When president Bill Clinton spoke to the Association of Trial Lawyers of America convention in Chicago on July 30, he got a reaction the city usually reserves for Sammy Sosa.

Maybe that's no surprise. He and the plaintiffs' bar are no strangers — although, strangely, it was the first time he had officially addressed them as a group. Many of them have given generously to and hosted fund-raisers for the president and his party. He has shared their battles against the tobacco industry, gun makers and health maintenance organizations (HMOs). And in his speech, which urged Congress to pass a patients' bill of rights that would permit lawsuits against HMOs, he uttered a phrase that could serve as ATLA's motto: "A right without a remedy is just a suggestion."

Still, an examination of the Clinton tort reform legacy raises questions about why the president got such a warm reception. At least 11 times during his presidency, Clinton has signed bills that limit the remedies of injured people and their lawyers in cases involving defective aircraft, faulty medical implants, Y2K glitches, securities fraud and other things.

• The General Aviation Revitalization Act of 1994. It sets an 18-year statute of repose for small aircraft and aircraft parts. That means a plaintiff can't sue if a defective airplane or part is more than 18 years old. Backers claimed products liability lawsuits were killing the small-aircraft business in the United States.

• The Federally Supported Health Centers Assistance Act of 1995. This law limits the liability of community health centers by treating them as though they were agencies of the federal government. Plaintiffs may sue only under the Federal Tort Claims Act.

• The Small Business Job Protection Act of 1996. A provision of this bill declares that punitive damages and damages for emotional distress are taxable income. President Clinton signed the bill despite reservations, saying that emotional-distress damages should be treated like damages for physical injury, which are not taxed.

• The Aviation Disaster Family Assistance Act of 1996. This law prohibits lawyers and insurance representatives from contacting the survivors or families of people killed in an airline crash for 30 days from the date of the crash.

• The Bill Emerson Good Samaritan Food Donation Act of 1996. This act protects people or companies from most civil suits and criminal prosecution that otherwise might arise from food donations.

• The Coast Guard Authorization Act of 1996. This law includes a controversial provision limiting the medical malpractice liability of cruise ship operators.

• Volunteer Protection Act of 1997. It bars negligence lawsuits against people who volunteer for nonprofits or government agencies. In other cases, it requires plaintiffs to show clear and convincing evidence that the volunteer acted intentionally or with flagrant indifference to the plaintiff's safety. The act also abolishes joint-and-several liability for pain and suffering and other noneconomic damages, requiring that defendants pay the plaintiff in proportion to their responsibility for causing the injury.

• The Amtrak Reform and Accountability Act of 1997. It caps damages from a single passenger rail accident at $200 million. It also says that plaintiffs may not recover punitive damages without proving a defendant acted with a flagrant indifference to the rights of others.

• The Securities Litigation Uniform Standards Act of 1998. In the wake of the Private Securities Litigation Reform Act, a broad set of limits on federal securities lawsuits passed in 1995 over President Clinton's veto, plaintiffs' lawyers began filing their cases in state courts. The 1998 law closed off that avenue, requiring that class actions involving 50 or more plaintiffs be filed in federal court.

• The Biomaterials Access Assurance Act of 1998. This law partially immunizes companies that supply raw materials or components for medical implants. Plaintiffs can sue suppliers only if they failed to meet product specifications and if the failure actually caused the plaintiff's injury. Litigation against silicone breast implant manufacturers, well under way at the time, was specifically exempted from the law.

• The Year 2000 Information and Readiness Act. The Y2K act pitted two of the administration's most important blocs of support, trial lawyers and high-tech companies, against one another. High-tech won. In addition to many new procedural and factual requirements for plaintiffs claiming damages from a year-2000 failure, the law requires that a plaintiff provide the defendant with a 90-day notice period in which to fix any problem. It also raises the bar for punitive damages, requiring that plaintiffs show by clear and convincing evidence that such damages are warranted. Punitives against small-business defendants are capped. The law also provides that defendants generally will be required to pay only their proportional share of the damages, and are not jointly and severally liable. Class actions claiming $10 million and involving more than 100 plaintiffs are to be heard in federal court. Although one of the broadest and most bitterly fought of President Clinton's tort reform measures, the Y2K Act became a nonissue when New Year's Day came and went without disaster.

Despite all these laws signed by President Clinton, Sherman Joyce, president of the American Tort Reform Association, does not consider Clinton an ally in his fight against plaintiffs' lawyers. Joyce says that tort reformers have successfully pressed their case in state legislatures and in Congress, but have often run into a roadblock in the White House.

"When it came to the major proposals, the ones that were more comprehensive in scope, [Clinton] was an opponent," says Joyce.

In addition to his veto of the Private Securities Litigation Reform Act, which Congress overrode, President Clinton vetoed the one bill aimed at setting federal products liability rules, the Common Sense Product Liability Legal Reform Bill. Passed in 1996, it would have barred punitive damages unless a plaintiff could show by clear and convincing evidence that a defendant acted with a "conscious, flagrant indifference to the rights or safety of others." Even then, punitive damages would have been capped. It set a two-year statute of limitations for plaintiffs to sue. And products more than 15 years old would have been made immune from suit, under a statute of repose. Finally, defendants would have paid only their proportional share of pain-and-suffering and other noneconomic damages.

President Clinton's use of the presidential "bully pulpit" has also helped the trial lawyers considerably. Under Clinton, the Food and Drug Administration fought to regulate nicotine until it was rebuffed by the Supreme Court. And the Justice Department has investigated Big Tobacco and has brought an unprecedented lawsuit, pending in Washington, D.C., federal court, for billions in dollars the government claims it spent treating sick smokers.

"[Presidential support] scares the hell out of the defendants," says John Coale, a veteran of battles over tobacco, guns and HMOs. He is a partner at Washington, D.C.'s Coale, Cooley, Lietz, McInerny & Broadus. "It's not just a bunch of plaintiffs' lawyers any more," he says. "It's plaintiffs' lawyers and the White House."

Joyce, the tort reformer, blames the president for claiming that Congress is unable to stand up to certain industries, inviting trial lawyers to step into the vacuum.

— Excerpted from The National Law Journal August 7, 2000

Clinton talks to ATLA

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bill. He smiled wryly and said that Gore likes to say "Whenever I vote, we win." But the problem with health care, Clinton said, is that the system has three levels of permission, "and the first two levels know they will never get in trouble for saying 'no'."

"A right without a remedy is just a suggestion," Clinton said, adding, "We're working away at it."

Clinton complained about the Senate slowdown in nominations and confirmations to the courts, especially, to appellate courts. The judge nominees have the highest ratings in forty years, he said, and are the most diverse. Clinton said he'd tried to find mainstream judges who would follow U.S. law and Constitution, something apparently not ideological enough to some in Congress. He added that women and minority judicial nominees take longer—and are far less likely—to be confirmed.

He pointed specifically to the 4th Circuit, where he tried for seven years to put an African-American on the court, but the two Texas Senators "won't let me do it; no one can even get a hearing." Clinton said "diversity sharpens our vision and makes us a better Nation." He said those Senators seem willing to accept 25% vacancies on the 4th Circuit bench rather than confirm African-Americans to the Court.

"The next President will make 2-4 Supreme Court appointments," Clinton noted, "so it's very important that you make up your mind and share that with others."

President Johnson spoke to an ATLA group—not the full Convention—in 1964, Clinton said, recounting that 1964 was, as now, a time of long almost automatic economic expansion and progress in civil rights. But two years later, the U.S. had riots in the streets and four years later President Johnson said he would not run again.

"My point," Clinton said, "is that I don't know when we'll ever have another time like this, with all indicators going in the right direction. But nothing stays the same; things change. So it's profoundly important that the American people make up their mind what to do with this magic moment."

"We are not burdened now, as we were" with civil rights fights in 1964, he said, though we will have to deal with Social Security and other issues. "At the core, what is important is our fundamental notion of what it is to be a citizen."

"I've done everything I knew" to "build a great nation for our kids," President Clinton said. Speaking philosophically of an old Italian saying, that "after the chess game, the king and the pawn are put back into the same box," he said again that "You've got [this magic moment] now and I hope you will [use it wisely]." (Chicago, July 30)