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C.L.E. Plans Shape-up

The Southcentral C.L.E. Committee, under the chairmanship of **Terry Fleischer**, met last week to develop the Committee's program for 1979. Plans have been completed for the Hawaii C.L.E. program in February, 1979. About 130 advance registrations have been received for the program, which will feature a trial practice seminar on product liability litigation, a consumer protection and unfair practices seminar, and a seminar on stress management.

The Committee has started planning a series of programs for the fall of 1979. These tentatively include a one-day seminar on bankruptcy, to assist the practioner in preparing for implementation for the new Bankruptcy Act on October 1, 1979. Another program, which will be held statewide, will cover the new Alaska Criminal Code which becomes effective January 1, 1980. A program under consideration would update practitioners on recent revisions in the lien statutes. A variety of programs is being considered for presentation in spring of 1979.

The Committee has also been directed to prepare a report and recommendations on mandatory C.L.E. for presentation at the Sitka convention. The Committee plans to review the experience in other states which have adopted mandatory C.L.E. The Committee hopes to present a program to local bar associations throughout the state in the spring of 1979 to help prepare for discussion and voting on this issue at the Sitka convention.

Responding to suggestions made at the Fairbanks convention last year, the Committee will plan a C.L.E. program for the Sitka convention which will include updating in various major areas of the law, as well as a report on recent legislative changes. Because malpractice insurance will be a major item on the business agenda at the convention, the Committee will present a speaker who has had substantial experience in attorney malpractice litigation.

Members of the Bar are regularly submitting recommendations and ideas to the Committee about programs which might be presented. These are extremely useful to the Committee. You can send your ideas and suggestions to **Ron Kull**, Executive Director of the Alaska Bar Association, or Terry Fleischer, Chairman of the Southcentral C.L.E. Committee.

Inside

Ron Kull is New Bar Director

Ronald L. Kull, formerly of Boise, Idaho, has been appointed Executive Director of the Alaska Bar Association. He replaces **Loyette Goodell**, who recently resigned.

Before coming to Alaska, Kull was Executive Director of the Idaho State Bar. He previously served as a program director for the Practising Law Institute, New York, and as Executive Secretary of the Kanses Bar Association.

A native Kansan, Kull received a bachelor's degree in journalism from the University of Kansas, and attended the University of Michigan Law School.

He and his wife, **Darcy**, make their home in the Turnagain area with their three sons.

Ron Kull

Calendaring Difficulties in Anchorage Courts

By James Arnold

Our present trial scheduling situation has considerable worsened during the past year, and I believe it will get even worse before it gets better. For the past several years, civil cases could be processed through the system almost as quickly as desired. However, about six months ago, a change started to occur and dates certain for civil cases became a thing of the past.

It is true that the interval from the filing of the Memorandum to Set Civil Case for Trial, to the Trial Setting Conference has increased from four to seven months at the present time and the interval from the Trial Setting Conference to the trial date has widened from 12 to approximately eighteen weeks. I could predict that if all things remain the same and no changes are made to the system, by July or August of 1979, the intervals may widen another three or four months.

All of the above boils down to the fact that civil litigants must now wait approximately eleven and one half months from request to trial, and of course have no real assurance of going to trial on a date certain. It also suggests that it could be extended to fourteen or fifteen months by next summer.

If you would compare the delay in the Anchorage Trial Courts to almost any other metropolitan court, you would quickly see that ours is in far better shape that most others. In fact, I am frequently told to enjoy a good thing, because it can't last. I'm sure you've also heard the horror stories that in some courts it takes as much as five years to get civil cases to trial. That is of course unacceptable and should never be allowed to happen in Alaska.

The Administrative Director and I recently engaged an expert in the field of Courts Calendar Management to come to Alaska and work with his staff and mine, to take an objective and fresh look at out system. Ms. Solomon reviewed our system, and talked to judges, lawyers and court personnel. Although I haven't seen her report as yet, she left me with the impression that she was impressed with the amount of time our judges spend on the bench (as compared to judges in other jurisdictions) and the current state of our calendar.

Ms. Solomon did confirm our in-house determination that in all probability we are going to have to reduce the present civil settings as much as 25% to regain trial dates certain. You can immediately see that if we do, it will still widen the interval from request to the trial date, but this should firm up the trial date certainty somewhat.

There are other possible areas that could and should be addressed. I wish I could list numerous new and brilliant ideas for improving the current posture, but at the present can only suggest the following:

1. Rule changes to lessen the ever increasing motion practice.
2. Expedite jury selection.
3. Limit discovery (in the courtroom).
4. Explore arbitration of civil cases $3,000.00 or less.
5. Additional judges.
6. More extensive use of Retired, Pro-Tempore and Special Masters.

[continued on next page]

Jim Arnold is Area Court Administrator for the Third Judicial District.

Intermediate Appellate Court Considered

Justice **Robert Boochever**, while addressing the 1978 Annual Alaska Arbitration Day Luncheon, stated that the formation of a "three man" intermediate appellate court to handle criminal appeals is currently being considered.

He revealed that the number of appeals filed with the Supreme Court had jumped from 217 in 1969 to 617 in 1977 and that a further increase would occur in 1978.

The former Chief Justice suggested that other alternatives, such as the addition of more justices at the Supreme Court level and the splitting of the Supreme Court into panels, were currently viewed as unacceptable.

The litigation explosion being experienced nation-wide has also had an impact in Alaska, according to Justice Boochever. The attorney population of the state has risen from 100 in 1946 to over 1200 in 1978. Case filings have increased over 400% in the last eight years, with 31,394 filed in 1969 and 126,000 in 1977.

On the other hand, the disposition rate has also gone up by virtue of increased efficiency and the addition of new judges at the superior and district court levels. In 1969, there were 27 judges. That number has been increased to 37 as of 1978.

Juctive Boochever attributed the litigation explosion to three major causes: the increase in population, greater access to the court for more people through such agencies as legal services and prepaid programs, and the increasing variety of disputes which were previously not presented to courts, such as legislative reapportionment and the need or desirability for high schools in rural areas.

Beside the possibility of an intermediate appellate court, other alternatives for handling the increased caseload are being examined. The Judicial Council is developing a program of Neighborhood Dispute Centers, for the small claims system has been improved, and a compulsory arbitration procedure for claims of $3,000 or less is being studied.

Additionally, the Supreme Court is very supportive of arbitration clauses in contracts, as a study of the opinions in recent years will reveal.

Matanuska Bar Association Formed

PALMER—**Noel Kopperud**, President, announced the recent formation of the **Matanuska Bar Association**, an organization of twelve attorneys who practice in the Palmer-Wasilla area. Other officers are: **Randy Luffberry**, Vice-President; **Jack Snodgrass**, Secretary; and **Eric Jensen**, Treasurer.

Among the Association's immediate goals are the creation of a full-time District or Superior Court judgeship in Palmer, and improved law library services at the court there. An initial achievement has been the establishment of a Superior Court filing district in Palmer. Previously, such cases had to be filed in Anchorage, where no statistics are kept on filings coming from the Mat-Su area.

Luncheon meetings are held on the first and third Thursdays of each month at the **Bounty** in Palmer. Recent speakers have included Third District Superior Court Presiding Judge **Ralph Moody**; Area Court Administrator, **Jim Arnold**; and State Law Librarian, **Bill Ford**.

Other members of the Matanuska Bar Association are: **Burt Biss; Dan Burton; John Davies; Brian Gray; Sam Roser; John Shaw; Bill Tull** and **Tom Williams.**

Lawyer Referral Service Popular

A total of 2,356 Alaskans have participated in the Alaska Bar Association's Lawyer Referral Service during its first six months of operation.

An average of 17 calls each working day are handled by the ofice of the Alaska Bar Association.

By far the majority of referrals—2,110—have been made to lawyers in Anchorage, including the Palmer-Wasilla area.

Another 98 referals went to members of the Alaska Bar Association in Fairbanks. The remainder of the referrals were for clients from 35 smaller communities.

The area of the law receiving the greatest attention was family law, with 778 referrals. Other major areas of referral included negligence, 344 cases; commercial (including real estate), 292; criminal law, 192; consumer law, 146; wills, 151; landlord/tenant, 98; bankruptcy, 95; labor relations, 65; administrative law, 56, and tax, 36.

The Lawyer Referral Service was started on May 15 of this year. Thus far, only 118 lawyers have signed up to handle referrals from the Alaska Bar Association office.

Alaska Lawyers may sign up to receive referrals by contacting the Alaska Bar Association office, at Box 279, Anchorage 99510.

In brief, the service provides:

- For a fee of $25 per year each lawyer may register in five categories of law in which he/she will accept referrals.
- The state is divided into nine geographical areas and each area will be kept separately for referrals.
- Each attorney agrees to charge a maximum of $25 for the first one-half hour of consultation. Any further charges are subject to a fee agreement between the client and the attorney.
- All registration cards will be filed in alphabetical order by category in each geographical area and then shuffled to get random selection.
- A caller/writer seeking a referral will be given three names of attorneys registered inthe category of needed service for the geographical area in which the caller seeks service.
- Each participating lawyer shall maintain errors and omissions insurance of at least $50,000 limits.

Anchorage Bar Lunch Schedule

The Anchorage Bar Association's luncheons are scheduled as follows:

December 11
Art Snowden, Administrative Director of the Alaska Court System, on Intermediate Appellate Court.

December 18
Mike Rubenstein, Executive Director of the Judicial council—will discuss evaluation of judges.

December 25
No meeting

January 1
No meeting

January 8
U.S. District Court Judge **James Fitzgerald**

These meetings will be held at the Anchorage Westward Hilton, in the Commodore Room. The luncheon price will be $6.50 per person.

More on Pro Bono

Report From Juneau

By Lis Werby and Peggy Berck

Two articles in the April issue of the **Bar Brief** explore the problem of providing legal services to low and middle income clients. Addressing the issue in terms of broad ethical and pragmatic considerations, both articles ignore local efforts to resolve the problem. [*Apparently references to these local programs were edited in order to accommodate* **Bar Brief** *spacing requirements.*]

In both Juneau and Ketchikan, cooperation between the local bar association and ALSC has resulted in an effective system for handling ALSC conflicts of interest. While these local programs may neither provide a long term solution to a complex problem nor a model that can be implemented on a state-wide basis, they do suggest that the pro bono issue can be resolved without antagonism between the private bar and ALSC.

The plan adopted by the Juneau Bar Association in March, 1978 provides for a three member referral committee. After an initial eligibility determination at ALSC, conflicts are referred to the committee which, in turn, makes a referral to a member of the private bar. The committee is responsible for keeping track of those attorneys who have accepted cases and making assignments accordingly. To date, eight clients have obtained legal representation from members of the private bar, pursuant to this plan.

The costs incurred in representing indigent clients was a central concern in developing the Juneau plan. To meet this concern, ALSC has provided the Committee with certain form pleadings which reduce or eliminate some cost factors. Additionally ALSC obtained the consent of the Superior Court that any filing fees incurred by the Committee's clients will be waived pursuant to a letter issued by ALSC. Furthermore, ALSC explained that its clients pay for necessary service costs. The committee determined to require its clients to assume the same fiscal obligations as those assumed by ALSC clients. Moreover $1,000.00 of dues [*presently these funds remain intact and will be available indefinitely until exhausted*] has been allocated to cover certain necessary expenses. Approval of any expenses must be obtained in advance from the Committee. Undoubtedly this fund will be used primarily to reimburse the private attorney for necessary travel costs.

Continued success of the current plan may ultimately depend on two issues: participation by attorneys employed by the state [*An article appearing in the May* **Bar Brief** *expressly dealt with this issue.*] and availability of additional funds to cover costs. Broader questions regarding credit for court appointment and pro bono community service will also require future evaluation. A satisfactory solution to the immediate problem seems indicative of probable success in the future. If local solutions are to be pre-empted by a state-wide plan for pro bono work, the efforts of the bar associations in Southeast are suggestive of the potential for developing a flexible solution satisfactory to both ALSC and the Bar Association.

Liz Werby has recently joined the Anchorage office of Alaska Legal Services. She formerly was with their Juneau office. Margaret Berck was until recently Supervising Attorney for Alaska Legal Services in Juneau, is currently vacationing in Canada and thinking about private practice.

Calendaring Difficulties in Anchorage Courts

[continued from preceding page]

7. Restricted use of Notice of Change of Judge.

The Anchorage Trial Courts have had an approximate 40% increase in civil filings since the last Superior Court Judgeship was created. It could have been at that time we were then over-staffed for the work at hand. I don't think anyone could believe that to be the case as of now. In addition, statistically the trial judges in Anchorage are "on the bench" almost twice as much as their counterparts in many lower-48 courts. I often see judges in their chambers as early as 7:00 a.m., and most are here from time to time at 6 or 7:00 p.m.

I believe one of the most beneficial things that we could do at the present time would be to lessen each judges workload, to enable him an opportunity to review files prior to presiding over their hearings or trials. The quality of their work would most certainly improve, but quantity would decrease, and widen the interval from request to trial even more.

All of the foregoing is nothing more than my notice to the Anchorage Bar that I must make some adjustments in our calendar management system. I utilize this media since it is gaining in circulation to lawyers. And, I am very serious when I extend an invitation to any and everyone to offer suggestions as to how we may make this a better court and be more responsive to the lawyers and the citizens.

MIKE GRAVEL
ALASKA

United States Senate
WASHINGTON, D.C. 20510

December 1, 1978

The Honorable Jimmy Carter
President of the United States
The White House
Washington, D.C. 20500

Dear Mr. President:

It had been my firm hope that upon enactment of the Omnibus Judgeship bill the State of Alaska would be represented on the Ninth Circuit Court of Appeals by having one of its citizens named to serve on that court. As you know, Alaska is a land which is unique and diverse in its social, economic and cultural bases and I had been hopeful that having an Alaskan serve on that court would bring a new and refreshing perspective to the court's decisions.

Earlier this week, the Justice Department informed me that Alaska would not be represented on the expanded Ninth Circuit. It is my understanding that this decision was based upon two factors, population of the State and input caseload from the State.

Mr. President, I have examined the data provided by the Administrative Office of the U.S. Courts and feel that the decision to exclude Alaska cannot be justified.

By virtue of your Executive Order of February 17, 1977, Alaska will be considered as part of the Northern Ninth Circuit for the purpose of considering nominations to the court. It is my understanding that every State within the Northern Ninth Circuit is currently represented on the court except Alaska. The Justice Department indicated that Washington and Oregon will divide the three new judgeships which have been allocated to this area.

The following chart compares the States in the Northern Ninth Circuit on the basis of population and input caseload.

State	Population (1976)	Caseload 1976	1977	1978
Alaska	382,000	38	59	82
Hawaii	887,000	53	56	65
Idaho	831,000	54	54	37
Montana	753,000	51	56	63
Oregon	2,329,000	129	134	151
Washington	3,612,000			
Eastern District		40	42	51
Western District		167	186	203

(Source: Population, Statistical Abstract of the United States, 1977. Caseload, 1978 Annual Report of the Director, Administrative Office of the United States Courts.)

From the chart, it is clear that Alaska's input caseload was similar to three States in 1977 and exceeded those three States in 1978. It is important to remember that while Alaska exceeded Hawaii, Idaho and Montana in caseload, those States exceed Alaska in population by at least 97 per cent or more. It should be clear that Alaska's smaller population is developing a larger reliance upon the actions of the Ninth Circuit Court.

Over the three year period shown above, Alaska's input caseload increased by 115 per cent. Hawaii shows an increase of 22 per cent and Montana shows an increase of 23 per cent, while Idaho's caseload declined by 31 per cent. Over that time period, Oregon's input caseload increased by 17 per cent and Washington's increased by 23 per cent. On a percentage basis, Alaska is clearly in need of the same representation on the court as provided to those states.

Finally, although Alaska accounts for only 4.5 per cent of the population in this district, it accounts for 13 per cent of the input caseload, according to 1978 data.

The Administrative office also supplies data going back to 1974. Since that time, Alaska's input caseload has increased by 272 per cent. No other State in the Northern Ninth Circuit experienced an increase of more than 85 per cent over the same time period.

It might also be useful to compare Alaska with five other small states, all of which are represented on their respective circuit courts.

State	Population (1976)	Caseload 1976	1977	1978
North Dakota	643,000	38	37	37
Wyoming	390,000	no data		
Maine	1,070,000	14	16	20
New Hampshire	822,000	49	41	30
Vermont	476,000	22	39	20

It should be clear from an examination of the above chart that Alaska is at least deserving of representation on its circuit court as are these states.

Mr. President, it seems quite evident that Alaska should be represented on the Ninth Circuit Court of Appeals. The State has grown quite dramatically in the last several years and with that growth has come increased use of the federal court system and, as evidenced above, the Ninth Circuit. Certainly, Alaska is as deserving of representation as any other State of similar size.

I urge your reconsideration of this decision.

Sincerely,

Mike Gravel

Mike Gravel
U.S.S.

cc: Honorable Griffin Bell
Attorney General of the United States

Ninth Circuit Judge

Sen. **Mike Gravel** told an Alaska Bar Association delegation Friday in Anchorage that he believes **President Carter** will change his mind on a previously announced decision not to consider an Alaskan for a newly created seat on the Ninth Circuit Court of Appeals.

"I don't think that it was a very well thought out decision," **Gravel** said. "The actual recommendation probably was made by some underling in the Justice Department."

Gravel met with **Kenneth O. Jarvi**, President of the Alaska Bar Association; **Donna Willard**, President-Elect; **Keith Brown**, the Association's delegate to the American Bar Association House of Delegates, and **Ronald L. Kull**, Executive Director.

On Dec. 1, **Carter** announced that he was allocating the three new judges for the Northern Division of the Ninth Circuit by giving two judges to Washington and one to Oregon. Gravel promptly protested this action in a letter to the President. (This letter is printed in its entirety on this page.)

Gravel told the Alaska Bar delegation that he intends to see Carter and Attorney General **Griffin Bell** personally to argue his case.

Jarvi told Gravel that thus far the Alaska Bar has contacted the A.B.A. office in Washington, D.C., the A.B.A.'s Ninth Circuit Screening Panel member, Eugene C. Thomas of Boise, and coordinated these activities with the senator's office in Washington.

Asked what the Bar can do in helping support his position, Gravel told Jarvi that he should try to get as much help from the Outside as possible "to act in a sense of fairness."

Brown promised that he will telephone **S. Sheperd Tate**, President the A.B.A., and personally seek his support.

"Even after 20 years of statehood it seems that we're still being ignored," Brown commented.

In addition to his optimism, Gravel also promised the group that he plans to continue to work on this project.

"I'm not going to let this thing drop," he said.

The new judgeship legislation creates 10 additional seats on the Ninth Circuit. Apparently, all the remaining appointments in the Ninth Circuit will go to California.

October Board Meeting

At its meeting in Anchorage on October 26, 27 & 28, 1978, the Board of Governors was confronted with a formidable agenda which included admission of the successful candidates from the July 1978 bar examination and interviews of applicants for the position of Executive Director of the Bar Association.

In addition to the formation of a new standing committee denominated the Taxation Committee, the Board approved proposed Bar Rule 43.1 and forwarded it to the Supreme Court with a recommendation for its adoption.

Also presented to the Court for adoption were the revised Ethical Considerations and Canons permitting lawyer advertising, a proposed rule relating to disposition of the disciplinary files of deceased attorneys and an amendment to Rule 2 deleting the requirement of citizenship as a precondition to admission.

With respect to proposed Rule 63, defining the practice of law, the Board referred the matter back to Committee for additional work. A workshop session will be held in January out of which another proposal for circulation to the membership and the public will hopefully be generated.

Two ethics opinions, the full texts of which appear elsewhere in this edition, were adopted and two more were referred back to Committee. Additionally, numerous disciplinary and admissions matters were considered.

A request was forwarded to the Supreme Court that the By-Laws of the Association be published in the blue Rule Books.

Representatives of KIMO television presented several proposals for institutional advertising which will be considered by the Board at its next meeting.

Because all of the items on the agenda could not be disposed of, the Board scheduled a two-day meeting in Anchorage on December 2 & 3, 1978.

ATTENTION BAR REVIEW FANS:

Bernard Trink is currently engaged in an in-depth study of the bars in Nome. We expect to publish his exhaustive researches in next month's BAR RAG.

Buck McLean is New West Rep

Buck McLean, 47, has been named West Publishing representative for Alaska and western Washington. He replaces **Roger Gill**, who died in Anchorage on September 4.

Buck McLean

A native of Texas, McLean attended Oklahoma University Law School and practiced law in Austin, Texas, for 13 years before joining West in 1970. He was previously based in Salt Lake City, where his territory covered Idaho, Utah and New Mexico.

No stranger to Alaska, Buck spent two years (1957-58) in the army at Fort Greeley, near Fairbanks. He plans to make his home in the Seattle area with his wife, **Ann**, and their two children. He expects to visit Alaska at least two or three times a year.

President's Column

With the last dust settling from the election, it seems a proper time to examine the shortcomings of the judicial retention election process.

Without fail, this hybrid of the political world pleases few. As a base of departure in the analysis, we have to recognize that 20% of the voters fail to credit anything of value to any judge. Such a conclusion seems apparent from an analysis of the "No" votes for all judges. This may simply be an indictment of the entire judicial system or reflect an attitude that none should ever be returned to office.

Also, without fail, and for obvious reasons, the retention election process provides little to please those judges up for re-election who have not been recommended for retention by the Judicial Council. Although this year, the Judicial Council survey results from police officers and the bar were remarkably parallel, the survey results were criticized. One criticism repeatedly heard was that the poll rating categories were misleading or vague. The prime example in point was the category "needs improvement." This criticism was normally linked with the comment that the pass-fail mark was unknown to the rater. Presumably, people leveling this criticism who rated a judge "needs improvement" would not have done so if they knew that such a rating would be the basis for anything other than constructive criticism, i.e. the rating would be the basis for a recommendation of non-retention.

Oral Survey

Apparently, the Judicial Council was sensitive to such criticism of the written survey because a follow-up oral interview of selected attorneys was conducted. As explained by Judicial Council Executive Director, **Mike Rubenstein**, in the September 1978 *Bar Rag*, this survey was an interview of 16 or more attorneys appearing before each judge who received failing marks on the written survey. This narrative survey, in the Judicial Council's interpretation, confirmed the results of the written survey in the instances of two judges but provided sufficient positive information in the case of two other judges to cause the Judicial Council to recommend their retention.

Serious questions have been raised about the accuracy of the results of this second survey. At least one attorney, representing a judge not recommended for retention, advised that his investigation of attorneys interviewed reflected a majority of those contacted recommending for retention of the judge.

Attorneys Dispute Board Posture

Dissatisfaction with the preliminaries to the judicial retention election do not end with the Judicial Council survey. Members of the bar have expressed dissatisfaction with what they feel was a non-aggressive posture taken by the State Board of Governors in campaigning against the judges recommended for non-retention. One suggestion made was that an aggressive, broad-based, advertising campaign begin at least two weeks before the election.

In response to this "too-little, too-late" criticism, and partially in answer to the "aggressive-campaign" suggestion, a chronological description of what took place this year is in order.

First, because of what was assumed to be an oblifation and because the State Bar had done so in the past, the Board of Governors decided again to involve the State Bar in the judicial retention election. The survey results from the Institute for Social Research at the University of Michigan were studied by the Board at its September meeting in Fairbanks.

Survey Fairness Questioned

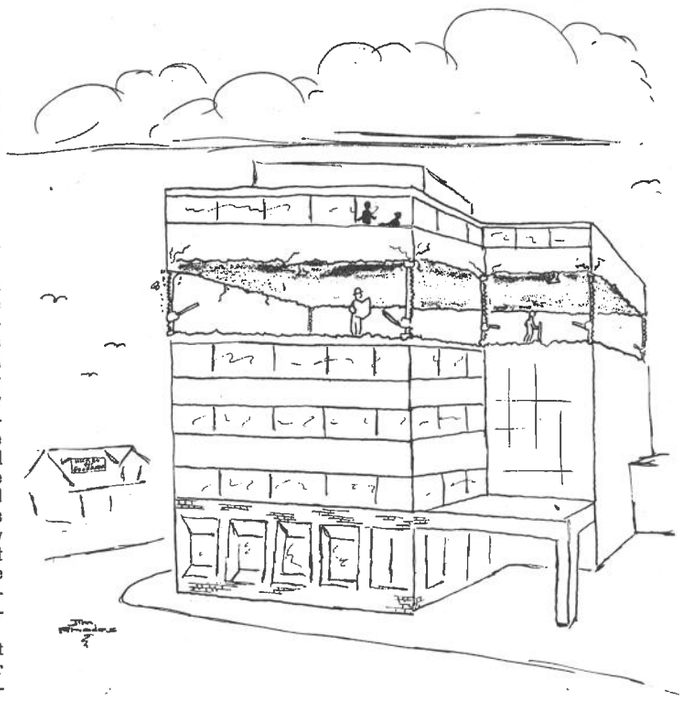
Questions immediately arose regarding the fairness of the survey. Mike Rubenstein was asked to explain the procedures for arriving at the final recommendations. His explanation satisfied the Board of Governors even though some confusion had been possible in the written survey. Any gaps were filled by the oral survey of attorneys with substantial experience before the judge. Thus, the Board of Governors concluded it would endorse the recommendations of the Judicial Council. Second, it was decided that since the written survey results for lawyers and police were so closely parallel, the advertising would be joint advertising with the Alaska Peace Officer's Association (APOA) endorsing the Judicial Council's recommendations and doing so in the print media.

The decision was not without second thoughts. Before the October Board of Governors meeting in Anchorage, it became clear that in the event that one of the judges was not elected, litigation would result and any group arguably contributing to his defeat would be a party.

The question of endorsing, through advertsiing, the Judicial Council's recommendations, again came up at the October Board of Governors meeting. Again, Judicial Council's recommendations were endorsed. Again, advertising was directed in conjunction with the APOA but only if the advertising referred to, and endorsed, the Judicial Council's position.

Dialogue continued to take place with the APOA as to the form of advertising. The APOA decided not to incorporate an endorsement of the Judicial Council recommendation in their advertising. This decision was made so close to the election that there was not sufficient time to get Board authority to proceed on a separate course. Accordingly, the APOA was informed that the Alaska Bar Association would not advertise with them. The APOA informed the newspaper, but due to an error at the paper, the ad appeared in the police format and included an apparent ABA endorsement.

In defense of the initial decision to advertise endorsement of the Judicial Council recommendations with the APOA, the Board of Governors felt that greater credibility would be achieved with the public if the ad took place in conjunction with the APOA. This was reinforced by the dramatically parallel results of the written survey of the police and lawyers. This theory lost viability when the police decided not to endorse the Judicial Council's recommendations.



"JAY, WE TEND TO THINK THAT YOU'RE TAKING THE IDEA OF AN INTERMEDIATE APPELLATE COURT A BIT TOO LITERALLY...."

The second defense to the ABA not conducting a more aggressive, extensive campaign, and thus utilizing the dues dollars of members statewide, should be obvious. In this election, the judges not recommended for retention were from one locality-Anchorage. To spend substantial sums of State Bar dues to address an Anchorage problem can, and should, draw objections from other quarters of the State. True, the local bar could address the issue. Perhaps, in the present instance, the Anchorage Bar did so. However, no decision of that type was made public. In this context, local State Board of Governors members could do more in liaison with the local bars. This time, it simply was not done and the Anchorage State Bar Board members must accept responsibility for this omission.

A third point on the "too-little, too late" criticism is tied in with the question above regarding dues money and how it is spent. Developing case law suggests that serious limitations exist on the political activity of any group that has a mandatory membership. This issue has arisen most frequently in the union membership context, but a case is presently pending before the Supreme Court of Michigan on this question as it relates to the integrated bar. Presumably, political activity is acceptable for an integrated bar when it addresses an area of principal concern to that group. In the present instance the question is the core element of the system's function—the judge. It was for this reason that the Board of Governors, even in view of the threatened litigation, decided to advertise to endorse the Judicial Council's recommendations. A decision in the near future in the Michigan litigation should provide guidance on this aspect of bar activity.

Separate Political Entity Considered

As a side note, but related to the question of proper bar political activity, is the creation of an entity separate from the State Bar to conduct political activity. Certain political issues beyond the election of judges continue to arise which impact the legal profession, with the profession having little ability to influence their direction. Bar impact on legislation has diminished with the decline in attorney members in the legislature. Other professional groups, trade associations, and labor groups have a political arm. The time has come for lawyers, as a group, to organize a political action arm. This will provide the legal profession with a vehicle to contribute to the election of legislators who will work on problems related to the judicial system and the legal community. For the reasons set forth in the third point above, such a group cannot exist as a part of the integrated bar. It must be a separate voluntary group that is separately funded. Other states with integrated bars have established such political arms. No reason exists why it can't be done in Alaska. Such a body would be better suited to conduct an aggressive, extensive campaign in the judicial retention election.

Future Changes Recommended

A review of the experience, criticism and responses to criticism about the conduct of the various elements of the judicial retention election process suggest changes for the next judicial election.

First, the written survey needs improvement. The category "needs improvement" should stay in the written survey. It provides constructive criticism of certain specific areas of judicial performance. To remove an ambiguity from the rater's selection

[continued on next page]

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Josephson at Large

By Joe Josephson

Earlier this month, over 400 lawyers from around the country gathered in Washington, D.C., for a meeting about parallel grand jury and administrative proceedings.

The turn-out was over twice as large as the American Bar Association had expected. And the most striking aspect of the registration was the number of big civil law firms, and corporation house counsel, in attendance.

There's a burgeoning area of law—the interplay between civil and criminal practice as the federal statutes extend their reach, increasing the risk of criminal exposure for corporate management.

Increasingly, federal prosecutors have used the federal conspiracy statute (18 U.S.C. § 371), the mail fraud law (18 U.S.C. § 1341), and the law prohibiting false statements to a government agency (18 U.S.C. § 1001) as predicates for the prosecution of corporate officers.

For corporations, one growing problem is the threat of derivative criminal liability for the acts of a corporate agent acting within the scope of his employment or authority. A lead case, incidentally, is from the Ninth Circuit (**United States v. Hilton Hotel Corporation**, 467 F. 2d 1000), holding that criminal liability may attach even when the acts were without the knowledge of the corporation's officers, the executives exercised care to prevent the unlawful activities, and the acts were contrary to specific orders.

Conversely, an individual corporate officer may be held liable for failing to supervise properly the activities of the corporate organization.

Strict liability penal statutes may apply, and become the basis for guilty judgements against an officer-defendant who was not even present at the time of the violation, and who had no supervisory authority over the active wrongdoer. The apparent theory in support of such strict liability concepts is that, in their absence, high corporate officials could insulate themselves from prosecution by erecting walls of "deniability" (to borrow a term that grew out of the Watergate era) and by allowing subordinates to take the criminal blame.

For sheer volume, many of the federal cases in the new trend emanate from investigations into payments by American corporations to agents of foreign governments. The Alaska practitioner is unlikely to see such cases. But lawyers everywhere will feel the effects of the erosion of old distinctions between the world of the criminal lawyer and the world of the civil lawyer.

One effect is the increasing possibility that the same client—corporate or individual—may be involved in the civil and criminal arenas at the same time, in the so-called "parallel proceedings". So lawyers used to looking at grand jury investigations or indictments only from the standpoint of the possible criminal sanctions must broaden the professional outlook. Conversely, lawyers who could once feel safe in taking an overview of a corporation's civil and administrative law problems must consider the increasing possibilities of concurrent or subsequent grand jury procedures involving the activities of the business client.

And since the accelerating trend is new, the advocate is thrown upon the resources of instinct and intelligence to an unprecedented extent, having little clear guidance from traditional sources.

At least four philosophical questions arise. The trend towards the prosecution of the so-called "white collar" crimes may be salutary in terms of affording more protection to the public, which is too often the economic victim of such offenses.

On the other hand, new discretionary powers are put at the disposal of prosecutors, especially because some statutes have scanty interpretative histories, are written unclearly, were enacted under vastly different social and economic conditions, or involve extremely subtle questions of the mental state of the putative offender.

Second, to the extent that businessmen and corporate officials are put at risk increasingly for acts which they did not perform or authorize, but which can lead to indictments against such officials or their companies, how will such risks affect corporate and business behavior?

One effect may be to deter "white collar" crimes. But another effect could be to deter the exercise of entrepreneurship, of corporate initiative and the willingness of officers to delegate authority. If so, society will pay a certain economic price for that too.

We may see something in the business world that will be akin to "defensive" professional practice that followed the growth of malpractice actions.

Third, one of the deterrent qualities of our criminal law has been the fear of reputational loss. If the quantity of prosecutions increases, and embraces more and more strict liability offenses in the business world, we may see some erosion in the deterrent effect of the threat of criminal prosecution itself.

Fourth, the application of old statutes to new situations means pouring new wine into old bottles. The citizen who wants to make sure that both he and his company steer clear of the prosecutor's concern may have trouble predicting, even with counsel's help, what new concoctions are being poured out of the prosecutor's office. The predictability of the criminal law has meant that clever people can understand just how close to the line of proscription they could adapt their behavior, but it also has meant that the system has been marked by fair play and clear signals. This predictability is now less clear.

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of the "needs improvement" category, the rater should be informed that if this rating is a "fail" rating, then the appropriate accumulation of that rating will lead to the judge not being recommended for retention. The written survey also needs a category where the rater can express his conclusion that the judge should not be retained.

The oral interview process is beneficial, but it can be improved. Written guidelines should be established defining the qualifications of the persons conducting the interview. Similarly, criteria should be established for what persons are going to be interviewed. Finally, criteria should exist for what points are to be covered by the interview.

Any evaluation process has subjective elements which cannot be eliminated. As long as guidelines are established, and followed, the subjective element will be reduced to a minimum.

Local Bar association involvement in the election process should take place or increase. With potential limitations on integrated bar activity, local, voluntary associations can, without the same fear of becoming a defendant, more properly address local judicial election questions.

As a supplement to local bar involvement, lawyers should, statewide, create a political action arm. Such a group could properly, without the threats posed to the integrated bar, become involved in the broad range of political questions concerning the legal profession.

Voter Survey

To reduce speculation to fact, some group, perhaps the Judicial Council, should undertake an analysis of what sources of infomation are significant in influencing voter conduct in judicial elections. It seems obvious from the last election results that the Judicial Council survey and recommendations were given credence by some voters. What information, from what source, influenced voters to vote "No" should be determined.

In the final analysis, if judicial retention elections are to continue, it seems clear that a fair evaluation of judicial performance must take place. A voter should be able to understand the basis of the evaluation in order that he or she might have confidence in it and follow it. Appropriate groups within the legal profession must make a substantial effort to publicize the means of evaluating judicial performance and the results of that evaluation. Until such a process takes place, the judicial retention election system will be a questioned process. Such ambiguity can only contribute to the pressure to make judicial elections part of the adversary political process with all of its promise of favors to be repaid by the victorious candidate. This spectre can be avoided by continued effort, throughout the legal profession, to improve the evaluation system by striving to make the results more credible and more widely known.

Ken Jarvi

"Random Potshots"

By John Havelock

"A Snooping Phone in Glass Loses"

The recent case of **State v. Glass** (No. 1725 - Sept. 15, 1978) barred the introduction in a criminal trial of evidence obtained by surreptitious electronic surveillance. A landmark case in the criminal law you say? Read closer; **Glass** has more profound implications for civil law than criminal.

In August 1972, the people of Alaska adopted a new constitutional amendment:

"Article I. Section 22: The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section."

The legislature has taken only limited implementing action so far, (for example: **AS 12.62** Criminal Justice Information System Security and Privacy and **AS 18.23** Health Care Service Information, the latter of which could be viewed as limiting rather than establishing privacy rights)and none implementing Article I, Section 22 explicitly.

However, this has not stopped the Court from proceeding with gusto to advance the cause and scope of privacy under this Article.

Article XII, Section 9 commands that the "provisions of this constitution shall be construed to be self-executing whenever possible." Of course, self-executing means executed by the courts.

The phrasing of Section 22 as "recognizing" a right gives support to judicial activism. If the right is already there after all, the Court is merely unveiling eternal principles, not making law out of whole cloth—or is it?

Privacy as Tort or Constitutional Right?

A common law of privacy has been building by slow, very slow accretion since days of the 1890 Warren and Brandeis article. But recognition of privacy as a tort has followed a different tradition than the development of privacy as a constitutional right against government. Common law tort is uncomfortable in the rigidity strictures of constitutional interpretation. Conversely, constitutional limitations may not suitably be bound by tort definition. However, in **Glass** the Court seems content with the merger, at least to the point of making the tort conclusive as to existence of the constitutional violation.

"If, for the purposes of civil litigation, participant electronic bugging constitutes an invasion of a common law right to privacy, such conduct obviously violates an expressed constitutional declaration of the right" (**Glass** at p 22). Well then, is it just as obvious the other way round? "Federal courts have recognized the power of the states to regulate rights to privacy in a manner broader than the federal [constitutional] protections" (**Glass** at p 16).

Definition Of The Tort

The Alaska Court also relied on a (there unnamed) federal diversity case from California, **Dietemann v. Time Inc.** 449 F2d 245, 247 quoting: "It has been consistently held that surreptitious electronic recording of the plaintiff's conversation causing him emotional distress is actionable...there is agreement that publication is not a necessary element of the tort, that the existence of a technical trespass is immaterial, and that proof of special damages is not required." (citing other cases)

The rationale of the **Glass** decision ("clever prodding may elicit thoughtless comments about sex...." the "risk that comments will be 'etched in stone'...the manifest diminution" of spontaneity) seem equally compelling in justifying the creation of a tort disincentive as a constitutional sanction.

Legislative Responsibility

So we might conclude with **Glass**, an expanded privacy tort is well out of the bag and, constitutionally armoured. The legislature will have to put on a burst of speed if it is to catch up on the Court's expanding definition of privacy rights in criminal or civil proceedings.

We think it is much in the public interest that this occur. The future history of the right to privacy will be a happier one if the legislature, with its superior flexibility, takes the lead in shaping it rather than the Court acting in a constitutional mode. Once the constitution establishes the scope of a tort, there are limited potentials for balancing of interests in the private law sphere. Private citizens are not entitled to search warrants.

Risks For Attorneys

For now, let the attorney be advised, there are many good privacy suits lurking about town, some against attorneys, if past practices are any indication.

After **Glass**, any electronic recording activity without the consent of the person recorded appears actionable. Investigators or lawyers interview potential witnesses with the tape deck running and who do not get consents may find themselves on the pointed end of a tort claim. Lawyers who record conversation of others on the phone or in person as a memory aid likewise face tort exposure. Remember, publication (replay to a third person) is not necessary. Emotional distress upon discovering evidence that a tort was once committed against a person is merely the minimum statement of damages necessary to sustain a claim. When the claimant's attorney gets worked up about your intentional violation of his client's constitutional rights, punitive damages loom much larger as they do with federal civil rights actions.

Frequency of Occurrence

The volume of occurrences of this tort is legion. Low production costs and convenience has made the cassette pack an implement of common use for people of all ages in all forms of activity. Unlike most torts, privacy by recording

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Letters to the Bar Rag

Attorney General

Dear Editor:

The editorial in your issue of October, 1978 questions the ethical propriety of an appointed Attorney General representing conflicting interests. You suggest that in the recent election case, it may well have been unethical for me to have represented three separate interests—the Lieutenant Governor, the public, and my "boss, the Governor," who was a candidate in the election. Faced with that hypothetical ethical conflict, the editorial suggests that an elected Attorney General might well be a means by which we might avoid these types of problems in the future.

I think the editorial reflects a popular misconception of the role of an attorney general. The recent election contest provides a good example of how the office actually works. In the course of the election, the Department of Law was called upon by the Lieutenant Governor and various election officials to make a number of legal interpretations on ballot procedures. In my view, the Lieutenant-Governor and those officials were not separate and distinct from the public, but were in fact elected and appointed officials representing the public, and accordingly it was the public that was our client. The decisions which were rendered by this office were based on our honest evaluation of the law and had little or no relation to what would be good or bad for the Governor, even though he is in fact the appointing authority for the Attorney General. In some instances, the opinions of the office were contrary to the Governor's interest as a candidate. For instance, one major question in the recent suit concerned whether or not certain ballots obtained by the Teamsters should have been included in the count. We ruled that they should have been so included, even though there was no question but that they ran heavily in favor of the Governor's chief opponent in the primary. Similarly, we were required to render a host of rulings on whether or not to count particular ballots due to the peculiar nature of the markings on them. When the Supreme Court eventually reviewed our opinions in ruling on the case, it upheld nearly all, except that it did conclude that the Lieutenant Governor, acting with our advice, had improperly deprived **Governor Hammond** of five votes which he should have received. The error then was again in favor of **Mr. Hickel** rather than Mr. Hammond.

The Governor, of course, was represented in his capacity as a candidate in the recent lawsuit, but it was not by the office of the Attorney General. He was represented by a separate attorney, **Robert Wagstaff**, who in some instances took positions which were not consistent with those argued by this office. Mr. Wagstaff saw his role, quite properly, as an advocate for the Governor as a candidate. I saw the role of this office as giving legal advice to the Lieutenant Governor, a public official, so as to insure that his actions were in accordance with law. Of course, my feelings about the election were obvious, but I had no greater difficulty separating myself from my personal feelings in rendering legal opinions than I did in a whole host of instances in private practice. Lawyers are professionals—they render a professional service, and hopefully do not render legal advice on the basis of how they personally would like to see something come out. If they do not separate personal inclination from professional advice, they're going to get their client and a lot of other people in serious trouble. In this case, my client was the public, which was acting through its duly elected and appointed officials. That is the interest I sought to protect.

I am sure that there are persons who might serve in this office and would attempt to render legal advice to the various agencies of state government based on their personal likes or dislikes, or their personal political favoritism. An Attorney General who did that would, in my view, not be doing his job very well, and would in fact do a disservice to the Governor. Under our constitution, the Governor is held responsible for the conduct of cabinet members, who have no separate elected base, and if the Attorney General renders politicized advice or just bad advice, the Governor is going to have to bear the consequences. The Attorney General stands in no different capacity than any other member of the cabinet. If he does a good job, and renders fair and reasonable advice to state agencies, and defends the state properly in court, it reflects well on the Governor. If an Attorney General wants to help the Governor, he can do so not by giving him politically slanted advice, but by simply doing well what the law requires him to do. I think most people who have held this job have felt exactly the same way.

I think the appointed Attorney General system has worked out well over the roughly twenty years of statehood. I think the elected Attorney General system would not work well. In election cases, for instance, the situation would be much worse than it is today since, while the Attorney General would not be making rulings concerning his "boss," the Governor, he would be making decisions which affected his own political future. An Attorney General who is elected is by definition a politically ambitious individual, and most of them end up running for Governor or some other statewide office. If you are to assume that an Attorney General will make rulings motivated by his interests in preserving a Governor, then it is far easier to assume that he will make biased rulings concerning his own election or the election of people he might consider favorable to his advancement at a later time, or against people whom he considers political rivals. Put in its simplest form, is an Attorney General likely to be more or less political if he is himself an elected political figure than if he is an appointed member of a cabinet? I think the answer to that is fairly obvious, and it's the reason the people who wrote our constitution decided not to have an elected Attorney General.

Avrum M. Gross
Attorney General

Debates Judged

Anchorage high school debate teams, launching the season with a November 18th tournament at Chugiak High School, face a serious shortage of judges. Local attorneys would be welcomed as volunteer judges.

Not easily intimidated, high school teams will tackle the same question to be addressed in intercollegiate debate: Resolved, that the federal government shall establish a comprehensive program to significantly increase the energy independence of the United States. A majority of Anchorage high schools will compete, with each school fielding from two to five two-member teams.

Tournaments are planned in January, February and March, on Saturdays, at alternating area high schools. Final all-state competitions will be held in April. Each tournament consists of three sixty-minute rounds of debate. However, a lack of qualified volunteers to act as judges could limit the number of rounds possible at any given tournament.

Attorneys willing to lend a hand at one or more tournaments this year may contact Abbie Dunning at 265-5356.

Potshots

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does not announce itself, so even with knowledge of legal requirements, the temptation to commit this tort of convenience is widespread as evidenced by common knowledge of routine widespread violations of Federal Communications Act prohibitions on telephonic recording.

The Next Direction

The next test of privacy torts may be in the area of record keeping. The Court cites from Westin's 1967 classic "Privacy and Freedom:" privacy is "the right of persons to determine for themselves when, how, and to what extent information about them is communicated to others." Such definitions are free of electronic recording requirements and may be welcome, in part, as legislatively applied to national credit bureaus. But what of other records which you may keep which mention by name without their knowledge? Do we want to see a sweeping pattern frozen into constitutional law?

Implementing The Constitution

The legislature would do well to take a stab at fulfilling the mandate it asked of itself in promoting the constitutional amendment: "The legislature shall implement this section." In following the mandate, legislation could shape answers to a dozen obvious criminal law applications of **Glass** that are now potentially costly hazards as law enforcement sorts out the answers. But in the long run, keeping control of the definitions and remedies for the emerging range of privacy torts may be more important to public justice.

Lathrop v. Lampert Decision Spotlighted

By Andy Kleinfeld

Lathrop Company v. Lampert, (op. No. 1728, September 22, 1978) involves a dispute which ought not to have arisen. The dispute doubtless caused sleepless nights for clients and attorneys, high legal fees and considerable bitterness. It could have been avoided by a drafting technique.

Shortly after the 1964 earthquake, the landlord leased undeveloped land south of Anchorage to the tenant for fifty years with an option to buy. Rent was $1,500.00 per month, to be adjusted for inflation every five years by reference to the Department of Labor wholesale price index. Tenant spent nearly $2,000,000.00 building three movie theaters on the property.

Both parties forgot to adjust the rent in January 1975. When the landlord discovered the omission in December 1977, he could have written tenant a demand for the adjustment, retroactive to 1975 with interest, but he did not. Instead, he attempted to evict the tenant, first with a letter, then with a forcible entry and detainer action.

I suspect that Anchorage land values rose much faster than the wholesale price index between 1964 and 1977, and that the landlord hoped to use the leverage of his FED action to negotiate a higher rent. The landlord claimed that the lease rent was less than 1% of tax appraised value and yielded less than a 1% return on actual value of the land. The tenant could probably be squeezed to within a few hundred a month short of what would justify walking away from a $2,000,000.00 investment, if the tenant lost the FED action.

The tenant tendered the wholesale price index increase, retroactive with interest, but the landlord turned it down. The Superior Court tried the FED November 1977 and decided it in April 1978, ordering that the tenant could avoid eviction only by negotiating a new rent clause and a new method of periodically adjusting the rent; if the parties could not agree, the Superior Court judge would write the new provision for them. Evidently the landlord persuaded the judge that it was unfair for him to be stuck with the $1,500.00 per month adjusted for inflation, because land and fair rental values in the market were much higher.

The Supreme Court granted the tenant's petition for review, stayed the case (the Superior Court turned down a stay request and then succeeded in losing the file), and reversed. The Supreme Court held that the Superior Court had no power to condition the tenant's relief from forfeiture on negotiation of a new rental clause.

The Supreme Court obviously decided the case correctly, and signalled the obviousness by labelling the decision "per curiam". The bargain had been for $1,500.00 per month, adjusted for inflation. The landlord, and evidently the Superior Court, were apparently attempting to substitute periodic revisions to current fair rental value, an entirely different deal. Nevertheless, the litigation illustrates the riskiness of going to court with a commercial dispute such as this one.

The trial judge was obviously wrong, just as clearly as the Supreme Court was obviously right. From April 27, 1978, when the Superior Court ruled, to September 22, 1978, when the Supreme Court reversed, the landlord had tremendous bargaining power. Most cases like this are settled during pendency of the appeal, because no one can be certain of a reversal of even the silliest decision. For five months, the tenant's lawyer probably predicted reversal, and the tenant, remembering what had happened in April, probably shook in its boots. I suspect that it took either a very greedy landlord or a very gutsy tenant or both to keep the case alive from April to September.

Situations like the one in **Lathrop Company v. Lampert** arise frequently in long term leases, contracts, and deeds of trust. The frequency of disputes is not reflected by a frequency of appellate court decisions, because the stakes are so big that the parties risking forfeiture are scared to take the chance on erroneous resolution by the courts. There is a reason for the frequency of erroneous decisions and there is a reason why the disputes are common. We lawyers can do people a lot more good by avoiding these disputes in our offices than we can by rolling the dice in court.

When a contract is made, the parties are always looking forward to the future. They are planning a relationship for a time which has not yet occurred and about which they have no certain knowledge, only predictions. When disputes are resolved by courts, however, they nearly always involve history, a past about which knowledge is available and predictions can be shown to have been erroneous. The court's perspective is thus radically different from the perspective of the parties when they made their contract. In this case, the landlord turned his land into a long term, inflation protected annuity, in a small, depressed town recently destroyed by an earthquake. The litigation occurred in an oil boom town growing more and more like Dallas.

A sensitive judge understands the difference between looking forward and looking back and takes account of it, but a trial judge with an exaggerated notion of his abilities to be fair and an inadequate respect for the principles of contract cannot really be trusted with resolution of long term contract disputes. Such a judge will feel that justice can be done only by substituting his knowledge of what actually happened in the market place for the parties' earlier erroneous predictions of what would happen, and he will look for any legal peg to hang his hat on so that he can do what he thinks is fair.

I think most of the judges in the state of Alaska will think themselves to be in the first catagory, but most of the practicing lawyers will think there are a number in the second category. The practicing bar therefore likes to avoid litigating these cases. But when inadvertent breaches of long term contracts occur, giving rise to pretty good claims of forfeiture, potential claimants are looking at enough money if they prevail to make rolling the dice superficially attractive.

The potential claimant has too much to lose in court too, not just the party facing potential forfeiture. The landlord in **Lathrop Company** probably spent six months rent on lawyers' fees and costs, and got nothing in exchange except an embittered tenant from whom he can no longer expect anything but the bare minimum compelled by the lease. If the landlord has miscalculated, as sometimes happens, and the tenant had accepted the forfeiture and walked away, the landlord could have been stuck with a property he could not rent out because of its development for a particular use and his reputation for aggressiveness. Like many lawsuits, **Lathrop Company** left no one better off except the lawyers, which is none of their fault.

I suggest that long term leases, contracts and deeds of trust ought to be drafted to avoid litigation like **Lathrop Company**, and with an awareness of the problems to which long term agreements are especially vulnerable. It should be assumed that people will not regularly read the instruments to see that all terms are being complied with. It should also be assumed that personnel in the firms involved will turn over, and new personnel will not even be aware of the existence of the instruments. As secretaries turn over, the instruments are likely to get lost because of changes in filing systems. Many laymen also have the tendency to imagine that if an instrument is old, the actual words of the instrument do not really mean what they say.

One helpful drafting device is to condition operation of a requirement upon written notice, but cause the requirement to operate retroactively after receipt of notice. For example, the lease in **Lathrop Company** could have conditioned operation of the rent increase on sixty days notice by the landlord, and provided that upon such notice, the increase would be retroactive to January 1, 1975, with interest. That is how the case came out, and a large amount of attorneys' fees could have been saved had the lease so provided.

Notice requirements by themselves are not really enough. There was a notice requirement in the **Lathrop Company** lease, but the courts seem not to have been very impressed by it. Simply conditioning a requirement on notice is unfair to the beneficiary of a requirement, because he is almost as likely to forget about it as the other side, so he will not accept it in the initial bargain.

The notice provision is made fair to both sides, and attractive to the promisee of the obligation, by a reasonable provision in the instrument for what happens if both parties forget about the requirement and the notice, and the promisee of the requirement discovers it late. Avoiding a forfeiture for the promisee is the device necessary to fairness and to selling the deal, if the promisee has significant bargaining power. The rights at stake usually boil down to money, so retroactivity and interest avoid unfairness to either side, and the rate of interest can adjust for special circumstances.

Andy Kleinfeld graduated magna cum laude from Wesleyan College, Middletown, Connecticut, in 1966 and obtained his J.D. magna cum laude from Harvard Law School in 1969. He was legislative editor of the Harvard Journal on Legislation and has published articles on the Family Law Quarterly of the ABA Section on Family Law. Since his clerkship with Justice Jay Rabinowitz, Andy has been practicing law on his own in Fairbanks. He is a past treasurer, secretary, vice president and president of the Tanana Valley Bar Association, and served on the board of directors of the Alaska Legal Services Corporation 1971-1974. During the same period he was U.S. Magistrate in Fairbanks. He has taught business law, constitutional law and estate planning at the U. of A., Fairbanks.

Bar Office Offers Mailing Service

The office of the Alaska Bar Association will do addressing and mailing for any Alaska local bar association, on a cost-reimbursement basis.

The only requirement is that the bar office be notified far enough in advance so that the work may be properly scheduled.

For further information, contact Ronald L. Kull, Executive Director, at Box 279, Anchorage 99510.

In Memorium: Joe Rudd

Joseph Rudd was born August 30, 1933 in Utica, New York. He is survived by his wife, Lisa Rudd, and his daughters, Alison Comfort Rudd, age 20 and Sandra Starr Rudd, age 18. Joe was the son of the late Thomas B. and Helen N. Rudd. He is also survived by his brother Neilson Rudd of Mt. Vernon, Illinois.

Joe worked in Alaska in the summer while in college and returned to Alaska permanently in 1959. His preparatory education was at Williams College in Massachusetts where he received his BA in 1955. His legal education was at the University of Denver where he received his LLB in 1959. He was admitted to the Colorado Bar in 1959 and to the Alaska Bar in 1961.

From 1959 to 1961 he was an assistant in the State Attorney General's Office responsible primarily for drafting oil, gas and mineral legislation and regulations. In 1961 he was a founding member of the Anchorage law firm of Ely, Guess & Rudd with Robert C. Ely and the late W. Eugene Guess. His legal career was devoted to natural resource law.

Joe was the author of "Who Owns Alaska" published in 20 Rocky Mountain Mineral Law Institute 109 (1975). He was a lecturer on Mining Law at the University of Alaska in 1962, 1965 and 1967 and a member of the Western Governors Mining Advisory Council from 1970 to 1974. At the time of his death he was a Trustee of the Rocky Mountain Mineral Law Foundation.

Joe was one of the first members of the Board of the Alaska Kidney Foundation; he was instrumental in helping the Kidney Center in Anchorage grow to serve the entire State. Joe received a kidney transplant in 1973 from his brother Neilson following a lengthy illness resulting from the failure of his kidneys. He had fully recovered from the illness and the transplant was considered a success at the time of his untimely death on December 4, 1978.

Joe was generally regarded as the foremost natural resources lawyer in Alaska and one of the foremost natural resources lawyers in the United States. But such a simple statement of Joe's preeminence does not adequately convey the deep sense of loss felt by his friends and fellow members of the Bar. Joe was a genuinely good person, highly regarded by his friends as well as by his opponents in the legal arena. Although his primary expertise was in the field of natural resources he could be counted on for valuable counsel on any matter, whether legal or personal. Joe's quiet, unassuming manner belied the depth of his keen intellect.

Joe was a devoted and loving husband and father. He supported and encouraged Lisa's activities and was genuinely proud of her accomplishments. His strong support and interest in the individual development of Lisa, Alison and Sandra strengthened each as an individual and yet created a strong family unit. His untimely death will leave a void which his family, friends, members of his firm, the Bar, and the people of Alaska will not easily fill. The comments of Anchorage attorney Richard Gantz following Joe's death are illustrative. Said Gantz, "We were in different law firms, but he's the type of fellow any lawyer would have to be his partner."

The Rudd family has asked that memorials be sent either to the Joe Rudd Memorial Fund, Alaska Kidney Foundation, 3500 LaTouche, Anchorage, Alaska 99504, or to the Rocky Mountain Mineral Law Foundation, c/o Ely, Guess & Rudd, 510 "L" Street, Anchorage, Alaska 99501. The Rocky Mountain Mineral Law Foundation will establish a memorial scholarship fund in Joe's name.

Bar Association Looks at E&O Self Insurance

The Self-Risk Management Committee of the Alaska Bar Association is studying a lawyer's malpractice self-insurance proposal made to the Board of Governors by **Peter Norman**, risk-management consultant from British Columbia. Norman patterned his proposal upon the program that has been in effect for the Canadian Law Societies during the past nine years.

Norman's proposal requires mandatory participation by each attorney engaged in any form of private practice in the state of Alaska. Each attorney would be required to pay a flat fee per year to a group fund managed by the Bar Association or lose the license to practice law. The fund would pay costs, defense fees and damages for malpractice claims between the limits of $2,501 and $25,000. The individual attorney would pay the first $2,500. For an additional mandatory amount, each attorney would be covered up to $100,000 liability limit with the coverage obtained by the Bar Association from an insurance carrier. The carrier would also provide stop-gap coverage in the event that fund monies were exhausted during the policy year. The fund would pay defense costs on claims of $25,000 or less. The insurance carrier and the fund would each pay a pro rata share of the defense costs of each malpractice claim between $25,001 and $100,000. Attorneys that wanted more than $100,000 limits would need to secure the additional coverage from an insurance carrier. Prior acts would be covered by up to the $100,000 limit. Upon retirement or appointment to the Bench, an attorney could purchase "tail" coverage for claims presented in the future for some act or omission during the policy period.

To administer his program, Norman has projected annual costs of $102,000 for purchase of the $2,501 to $100,000 limit coverage; $25,000 Broker's fee; $25,000 for his ongoing consultation; $8,000 for administration and claims handling; $8,000 for accounting and office costs; and $100,000 for legal and adjusting/expertise fees. Norman projects premium income of $461,250 which will be generated because there are 750 attorneys in private practice who will each pay $525.00; 100 publically employed attorneys who do part-time private practice who will each pay $525.00 and 150 who will each pay $525.00 and 150 retired attorneys or judges who will each pay $100.00 for tail coverage. He projects that the maximum number of annual claims will be six and that $22,500 will be paid on each claim.

Norman's figures are based upon data supplied by the members through E & O questionnaires responded to by 88.4% of the lawyers in private practice and 65.83% from public sector lawyers in May, 1978. He also consulted with defense attorneys and received data from insurance E & O carriers. Norman's reports indicate that six claims were made in 1974, eight claims in 1975, eight claims in 1976 and twelve claims in 1977. According to the data received from the present Bar-endorsed carrier, twelve claims had been presented to that carrier in 1978 as of August 31, 1978. Norman's data from the questionnaire returns indicates that $145,544 has been paid to E & O claimants in the past five years. The Committee data indicates approximately $500,000 has been paid for claims in the past five years.

All attorneys engaged in the private practice of law in Alaska would be required to participate in the program except government employed attorneys; corporation employed lawyers (this does not exempt professional corporations); public attorneys; patent attorneys and admitted attorneys not engaged in the private practice of law in Alaska. Exempted attorneys would be required to participate in the fund if they did any pro bono, family or friends' legal work, however.

The Bar Association would administer the fund; issue policies; bill for premiums; and investigate, adjust and otherwise handle the claims. The Association would also be responsible for either complying with the Alaska Insurance Code requirements or getting legislative exemption, in part or in whole, for its insurance program. If legislative exemption resulted in the insurance industry anti-trust exemptions being non-applicable, the Association would also be responsible for complying with the state and federal anti-trust laws. The tax exemption issues would also be the responsibility of the Association.

Norman's proposal also incorporates an aggressive loss prevention/loss control program to be administered by the Bar Association. The main provision of Norman's loss control program would be an attempt by the Association adjuster to repair the claim in lieu of payment of damages. To repair a claim, the adjuster would utilize the expertise of attorneys practicing in the area of law in which the claim is made. The adjuster and the expert with cooperation from the defendant-attorney, would first attempt to rectify the harm allegedly suffered. For example, the adjuster and expert would attempt to set aside a default which resulted from a missed statute of limitations filing deadline. Only when repair efforts failed would the claim be processed as a traditional lawsuit. A second feature of the loss control program would be for the Association to make available to the defendant attorney a counseling service which would review the attorney's practice to assist in early identification of law office management techniques which would avoid repetition of similar future claims. A third major feature of the loss control program would be Association presentation of CLE programs in those areas in which two or more malpractice claims are made against attorneys.

At its request and with Board of Governor's approval, the Self-Risk Management Committee is studying not only the Norman proposal but other malpractice coverage alternatives of multi-state group funding; carrier plus loss prevention, loss control programs and the status quo. The committee plans to present the Norman proposal and other alternatives for malpractice coverage to Alaska attorneys during April, 1979 in accordance with Resolution Three referred to the committee by the membership at its annual meeting in Fairbanks in June, 1978.

Ode to a Chenaburger

A bunch of attorneys were whopping it up
at the Chena View Saloon;
The waitress was there, with messed up hair
but the tables were set by noon.

When out from the street, where it was 50 below,
and into the din and the glare...
there stumbled some attorneys fresh from the bar...
there was **Madson, Noonan** and **Blair.**

They looked like men with their feet in the grave,
and were covered all over with louse;
but they found their chairs, and the meeting began,
after Madson toasted the house.

With faces...most hair...and dreary stares...
like a dog, whose day in dunz;
they ordered their **Chenaburgers**...one by one,
knowing...they'd soon have the runs.

There are men that somehow just grip your eyes,
and hold them hard like a spell;
but the men that were here were not like these,
altho they carried an awful smell!

Then the President stood, like we hoped he could,
and he called for his meat and his brew;
but no one heard, the strange man's word,
til he slammed his fist in my stew.

Then his eyes went rubbering round the room
and he seemed in kind of a blur;
but the Minutes were read, and they cleared his head,
and he realized where we were.

Then the hungry bunch received their lunch
and tried to stuff it down;
but it fought like a dog...and wouldn't unclog,
and lifted some right off the ground.

Then the heartburn came, like a burning flame,
and it seemed that it wouldn't pass;
but sure enough, before too long...
it was followed by some gas.

Then all of a sudden, the stomach howls became so loud
you scarce could hear;
and you thought that your stomach had been looted
clean of all that it once held dear.

That someone had sat on the food that you ate,
that your tongue had been covered with lye;
that your guts were gone, and the best for you
was to crawl away and die.

'Twas the crowning cry of a stomach's despair,
and it thrilled you to the pink;
"I guess I'll have a second one,"
said Attorney **Jonathan Link.**

Then **Savell** slurped and **Fenton** burped,
and the business at hand was completed.
There was more that took place, but of questionable taste,
and mention thereof is deleted.

Then as quick as it began, the meeting did end,
and the attendance began to erode;
and crowd did appear, and started to cheer,
as the attorneys rushed to the commode.

These are the simple facts of the case,
and I guess I ought to know.
They say the attorneys were crazed with hooch...
and I'm not denying it so.

I'm not as wise, as the lawyer guys,
but strictly between us two;
The **Chenaburgers** that they love so much...
sawdust, manure and glue.

RESPECTFULLY SUBMITTED this day of , 1977.

TANANA VALLEY BAR ASSOCIATION

By Ralph R. Beistline

These are the minutes of the Feb. 1977. meeting of the Tanana Valley Bar Association.

The Paper Chase

By Russ Arnett

Several years ago I asserted at a bar convention that in the last twenty years the amount of paper in the average court file increased at least ten times. I also asserted that of the paper which was intended to be read by the judge very little was in fact read, and because of the excessive volume very little should be read by him. The solution I urged was that we return to the scrivener.

I now see that the solution was not to be found in looking backward but in looking ahead. We have existing technology to solve the problem. The Synchronous Computer Analysis Module (SCAM) involves components some of which are presently used by the Court System. The necessary additions would make the system compatible with today's specialized communications protocols. It would be necessary for the Court System to buy or lease software consisting of the National Reporter System, treatises, law review articles, etc.

When the attorney had a brief to write he would give the facts to a legal assistant who, with the use of a somewhat more complex key number system which would separately state authority on either side of an issue, would prepare a simple computer program. This would be dropped in a basket in the clerk's office or entered on a terminal directly into a Court System computer. The larger firms would have visual display terminals in their office. Other attorneys would have access to terminals.

The practising attorney might well ask how he would charge for a brief involving perhaps thirty minutes work by a legal assistant and microseconds by the computer. Clearly it would not be fair to have the chargeable time based upon legal assistant rates or micro-seconds. Technology should serve the attorney as well as the public. A Binary Shunt (BS) from the computer to the attorney's accounts receivable ledger would base the charges on word volume and would approximate the time charges for pre-computer briefs. To allay fears, the billing shunt operates even though the judge never reads the brief. The client who complains of the charges for a computer brief should be told that he pays no more, and that this system frees the attorney to attend to more important matters of the client. It must be accepted that a few clients, particularly insurance companies, may not willingly accept this billing procedure. This calls for consistent billing practices by the entire profession though not of course enforced through professional discipline.

Opposing counsel would be notified electronically when the brief had been entered into the computer, and could read it on their terminal. Security devices would need to be devised to protect the integrity of the computer product from the few bad apples found in every profession.

If the judge did wish to read the brief, he could do so either on the visual display terminal in his chambers or have his secretary obtain a printout. Briefs and other documents could be routed between cities and courts, vertically and horizontally.

In the event of an appeal, a great saving in costs would be achieved in preparing the Record of Appeal. Tell this to the insurance companies.

The deer and the beaver would frolic in the forest left standing.

KHAR radio runs a contest every Thanksgiving wherein they award a goose to those persons who write telling why they should have a goose. This was my entry and I won a goose for this entry.

A hundred years ago, today,
the wilderness was here.
A **man** with powder in his gun
went out to hunt a **deer.**
But now today, things have gone,
according to a different plan,
a **dear** with powder on her nose,
goes out to hunt a man.

A mere ten years ago today
my youthfulness was here.
And out I'd go a hunting,
for fowl or great horned deer.
But things have changed again,
it's sad, but forsooth.
Instead of seeking fowl or game,
I hunt now for my youth.

Thanksgiving times have even changed
and I have changed also
instead of being fleet of foot
Alas, I am so slow.
In raising up my gun, I find,
the geese to be miles past my blind.

So today, feeble of leg
I put my thinking cap on to beg
send me a goose
dear radio station.
So that the canary won't be our
Thanksgiving ration.

Wayne Anthony Ross

Bar Rag Classified

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Ethics Opinions

The Board of Governors, at its October meeting in Anchorage, formally approved the following Ethics Opinions:

Ethics Opinion 78-1

The question has been asked: When may an attorney record a phone conversation?

The American Bar Association has adopted a formal opinion which fully sets out the history of informal opinions rendered on this subject, and the reasons proscribing such conduct. D.R. 1-102(A)(4), which prohibits conduct involving "dishonesty, fraud, deceit, or misrepresentation," clearly prohibits recordings of any and all conversations without the consent of all parties. The opinion goes on to state that "No lawyer should record any conversation, whether by tapes or other electronic devices, without the consent and prior knowledge of all parties to the conversation."

The American Bar Association Opinion No. 337 is hereby adopted by the Ethics Committee. *[This opinion originally appeared at 60 ABAJ 1448 (Nov. 1974)]*

Formal Opinion 337

(August 10, 1974)

With certain exceptions spelled out in this opinion, no lawyer should record any conversation, whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation.

Canons, disciplinary rules, and ethical considerations cited. Canons 1, 4, 7, and 9. Disciplinary Rule 1-102(A)(4). Ethical Considerations 1-5, 4-4, 4-5, 7-1, 9-2, and 9-6.

Recent technical progress in the design and manufacture of sophisticated electronic recording equipment and revelations of the extent to which such equipment has been used in government offices and elsewhere make it desirable to issue a formal opinion as to the ethical questions involved.

Attorneys may desire to record conversations to which the following three classes of persons may be party: (a) clients; (b) other attorneys with whom they deal; (c) the public, including but not limited to witnesses and public officials. These would include conversations in which the attorney was not himself a party.

No prior formal opinion has been issued which deals directly with the problem. Informal opinions have addressed the issue only in part.

Formal Opinion 150, issued in 1936, held that a prosecuting attorney could not ethically use a recording of conversation between the defense attorney and his client in evidence in the prosecution of the defendant, even though such recording was legally admissible at the time of the opinion. The committee based its holding in part on the duty of attorneys in public employ to avoid the appearance of impropriety. The opinion also stresses the nature of the intercepted conversation (between the accused and his counsel) as to which the attorney and client were entitled to confidentiality.

Informal Opinion C-480, issued in 1961, requires disclosure to the court and opposing counsel before using a recording device in court.

Informal Opinion 1008, issued in 1967, holds that a lawyer may not make a recording of a conversation with a client without previous disclosure.

Informal Opinion 1009, issued on the same day, makes a similar ruling as to conversation with an attorney for the other party. This opinion cites Opinion 201 of the Michigan Ethics Committee, Henry S. Drinker, *Legal Ethics*, page 197, and New York City Committee Opinions 848 and 290.

So far as clients and other attorneys are concerned, the prior informal opinions make the conclusion clear. Attorneys must not make recordings without the consent of these parties to the conversation.

A survey of state opinions listed in the *Digest of Bar Association Ethics Opinions* reveals the same pattern with only one opinion to the contrary: Texas Opinion 84, issued in November of 1953 and published without comment in 16 *Texas Bar Journal* 701 (1953). A recent New York State Bar Association opinion (Opinion 328, issued March 18, 1974) holds it unethical for a lawyer engaged in private practice to record conversations with any persons without their consent.

Authority as to recording by lawyers of conversations of "other persons," except for the New York opinion just rendered, is scant, and the legal position less clear. Federal and state laws and F.C.C. regulations are in conflict and do not settle the ethical questions involved.

Two California bar opinions (Los Angeles Opinion 272 and California State Bar Opinion 1966-5) held that because of the public policy adopted by the F.C.C. in requiring the use of the "beep tone" in order to inform all parties that a recording is being made, and because a telephone user who violates F.C.C. regulations may be enjoined from such practice or may have his telephone service disconnected, it would be unethical for an attorney to record a telephone conversation without the use of a warning device.

While the law is not clear or uniform as to recording by lawyers of conversations of "other persons," it is difficult to make a distinction in principle. If undisclosed recording is unethical when the party is a client or a fellow lawyer, should it not be unethical if the recorder person is a lay person? Certainly the lay person will not be likely to perceive the ground for distinction.

At least by analogy to Formal Opinion 150, secret recording by attorneys of conversations of *any persons* is unethical, even though legal under federal law.

Present Canon 9 of the Code of Professional Responsibility. "A lawyer should avoid even the appearance of professional impropriety," expresses in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession, for all attorneys.

D.R. 1-102(A)(4) of the Code of Professional Responsibility states that "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." This disciplinary rule is substantially equivalent to but somewhat broader than Canon 22 of the former Canons of Professional Ethics which imposed on an attorney an obligation to be candid and fair "before the court and with other lawyers." Informal Opinions C-480, 1008, and 1009 rely on Canon 22.

Canons 1, 4, 7, and 9 and ethical considerations all clearly express axiomatic norms for attorney conduct. Each in the view of the committee supports the conclusion that lawyers should not make recordings without consent of all parties. E.C. 1-5, E.C. 4-4, E.C. 4-5, E.C. 7-1, E.C. 9-2, and E.C. 9-6 all state in various ways the conduct to which lawyers should aspire. None would condone such conduct. The conduct proscribed in D.R. 1-102(A)(4), i.e., conduct which involves dishonesty, fraud, deceit, or misrepresentation, in the view of the committee clearly encompasses the making of recordings without the consent of all parties. With the exception noted in the last paragraph, the committee concludes that no lawyer should record any conversation, whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation.

There may be extraordinary circumstances in which the attorney general of the United States or the principal prosecuting attorney of a state or local government or law enforcement attorneys or officers acting under the direction of the attorney general or such principal prosecuting attorneys might ethically make and use secret recordings if acting within strict statutory limitations conforming to constitutional requirements. This opinion does not address such exceptions which would necessarily require examination on a case-by-case basis. It should be stressed, however, that the mere fact that secret recordation in a particular instance is not illegal will not necessarily render the conduct of a public law enforcement officer in making such a recording ethical. (Footnotes omitted.)

Ethics Opinion 78-3

The Committee has been asked the following question: Is there a conflict of interest if a law firm represents a defendant in an action filed on behalf of a plaintiff by an attorney that, before trial, joined the defendant's law firm?

It is our understanding that the facts are these: Attorney A, an employee of Alaska Legal Services Corporation in a certain rural community, was retained by the plaintiff in an action for divorce, which also contained an issue of child custody. Attorney A consulted with the plaintiff, prepared the necessary documents, and initiated the action for divorce, and proceedings to secure custody of the children for the plaintiff. Prior to trial, Attorney A terminates his employment with Alaska Legal Services Corporation, and becomes an employee of the partnership of Y & Z, attorneys. The defendant had previously retained the firm of Y & Z as counsel. The partnership of Y & Z maintains an office in that same community, but it is our understanding that Y & Z are themselves only present part of the time. Attorney A is the only attorney employee in the partnership in the subject community. We have been asked to assume that Attorney A does not disclose or otherwise take advantage of any confidential communication to which he may be privy as a result of his previous representation of the plaintiff. In this factual situation, is the firm of Y & Z required to withdraw from the representation of the defendant?

The Code of Professional Responsibility properly counsels that the "... decision by a lawyer to withdraw should be made only on the basis of compelling circumstances..." E.C. 2-32. However, an attorney is required to withdraw from employment, after proper compliance with the rules of the court, when "he knows or it is obvious that his continued employment will result in violation of a disciplinary rule." D.R. 2-110(b)(2). If a lawyer is required to withdraw from employment, he is required to take all reasonable steps to avoid forseeable prejudice to the rights of his client. D.R. 2-110(a)(2).

The primary ethical consideration which presents itself in this matter is whether the employment of Attorney A by Y & Z creates an appearance of impropriety in the subject child custody case.

It is clear that Attorney A could not personally undertake the representation of the defendant, for such representation would present a

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Ethics

[continued from preceding page]

specific breach of his duty to preserve the confidences and secrets of plaintiff under Canons 4 and 9 as set out in our Opinion 75-2, (App. by Bd. of Gov. October 17, 1975). In that prior opinion we quoted from ABA Opinion 165, August 23, 1936, which interpreted former Canon 6 as preventing acceptance of professional employment against a former client

> ...which will or even **may** require him to use confidential information obtained by the attorney in the course of [such former employment]. (Emphasis in the original).

The question of whether or not the firm of attorneys, Y & Z, by whom Attorney A is now employed is disqualified, was, no doubt, posed because of the hardship to defendant, particularly if Y & Z is the only law firm in the community so that he or she must now retain counsel from the next nearest city which may be hundreds of miles distant. The question also raised implications regarding the mobility of attorneys in Alaska, particularly in communities in rural Alaska, where the prospect of such possible conflicts is high.

Notwithstanding these legitimate and somewhat unique concerns, the Committee is impelled to determine that the firm of Y & Z must withdraw from the subject litigation.

The continued representation of defendant by the firm Y & Z would create an irresistible appearance of disclosure by Attorney A of the confidences and secrets of plaintiff as prohibited by a combination of Canons 4 and 9. It is well settled that an

> attorney may not accept litigation against a past client if such requires that the attorney contest the same issue for which he previously was an advocate in the prior litigation. Nor may a partner of such attorney accept such litigation even though he was not a partner at the time of the prior litigation.

A.B.A. Formal Opinion 33.

A similar result was reached in A.B.A. Informal Decision C-493 (November 22, 1961) in which the Committee stated:

> [The former] Canon 6 also is designed to make it unethical to divulge confidences in situations where there may be conflict of interests between clients. This has been interpreted to prevent a lawyer from representing a client when there has been prior disclosure of confidences to himself or another member of his firm by a person who has an adverse interest to the proposed client in the litigation which the client proposes to undertake.
>
> ★★★
>
> It is also true that it is not what the lawyer may have learned in the previous lawyer-client relationship but what others, the bar and the public, may have thought was learned that prevents assuming a new lawyer-client relationship with a former opponent.

The Alaska Supreme Court in **Aletu Corp. V. McGarvey**, 573 P.2d 473 (AK 1978), has confirmed this position, holding

> We believe that an attorney may not represent a third party against a former client where there exists a substantial possibility that knowledge gained by him in the earlier professional relationship can be used against the former client, or where the subject matter of his present undertaking has a substantial relationship to that of his prior representation.
>
> ★★★
>
> It is well established that where one member of a firm is disqualified from representing a client all are.

Ethics Opinion 78-4

The Committee has been asked whether or not it is proper for an attorney representing the plaintiff, in a personal injury context, to directly contact the claims supervisor for the defendant's insurer, despite objections by defense counsel. The Committee has likewise been asked whether it is appropriate for the plaintiff's attorney to continue a conversation with a claims representative of the defendant's insurer, when that contact is initiated by the claims representative.

Outside the personal injury context, the answer to the question posed is obvious. The plaintiff's attorney is not entitled to contact the defendant directly, without the prior consent of his counsel. Likewise, the plaintiff's counsel is not ethically permitted to continue a conversation initiated by the defendant, without prior consent of the defendant's counsel. The question posed for the Committee is whether or not a claims representative of an insurance company should be entitled to substantially the same consideration. In the Committee's opinion, the claims representative should receive such consideration.

In typical personal injury litigation, the defendant is insured. A portion of the contract of insurance entitles the defendant's insurer to control the litigation, and designate the counsel for defense of that litigation. This, coupled with the insurer's duty of good faith and fair dealing toward its insured, effectively places the insurer in the position of the insured for purposes of the suit. In the Committee's view all of the evils of direct contact between an attorney for one party and the opposing party are present in direct contact with a claims representative and the Committee can see no justification for drawing a special rule to include only insurance companies and their representatives. Thus, the Committee's opinion would be that the plaintiff's attorney in the situation posed is not entitled to either contact, or continue discussion with, a claims representative of the defendant's insurer.

By-Law Amendment Considered

Pursuant to Rule 62 of the Alaska Bar Rules, notice is hereby given that the Board of Governors intends to adopt the following amendments to the By-Laws of the Alaska Bar Association thirty (30) days from the date on this edition of the Bar Rag:

Article III

Section 2. ACTIVE MEMBERS.

(a) Any member now or hereafter admitted to the Alaska Bar Association and who either resides within the State of Alaska or who continuously maintains within the State of Alaska an office in which he conducts the practice of law, and with which the public can readily communicate regarding such member's practice in Alaska, shall be considered an active member of the Association.

(b) Any member now or hereafter admitted to the Alaska Bar Association who does not at any time fulfill the requirements of subsection (a) above, and who desires to continue as an active member of the Association shall file with the Board, not less than annually, an affidavit that such member does not reside, or conduct the practice of law within the State of Alaska, and will not practice law within the State of Alaska.

(c) Any member who fulfills the requirements of either section (a) or section (b) above shall maintain active status unless transferred to inactive status by the Board of Governors, or unless the member is suspended, disbarred, or judicially declared incompetent, or disabled.

Article III

Section 6. TRANSFERS FROM ACTIVE TO INACTIVE MEMBERSHIP. Only the following methods shall be effective to transfer from active to inactive membership:

(a) Application to and permission granted by the Board of Governors; or

(b) Transfer by the Board of Governors after notice and an opportunity to be heard has been afforded such member; or

(c) Transfer to that status by the Supreme Court of Alaska, pursuant to Rule 26 of the Disciplinary Rules.

ARTICLE III

Section 8. TRANSFER FROM INACTIVE TO ACTIVE MEMBERSHIP.

(a) Upon written request, an inactive member may be transferred to active status, if the following conditions are fulfilled:

(i) In the case of members who have been inactive for one year or more, the Board makes the determination of good character; and

(ii) The member fulfills the requirements of Section 2(a) or (b), above; and

(iii) Full annual active membership fees for the current year, less any inactive fee previously remitted, are paid.

(b) The Board may transfer a member from inactive to active membership if the Board determines that the member is no longer eligible for inactive status.

The purpose of the amendments is to require active members of the Association to either reside in the State of Alaska, maintain an office here, or file an affidavit that he or she is not in fact practicing in this State. The amendments were drafted ty the Statutes, By-Laws and Rules Committee in response to complaints about the inaccessibility of attorneys holding licenses and practicing here,

[continued on next page]

The Nose...(Knows the news)

WHAT DISTRICT COURT Judge recently apologized to members of the jury and counsel for being late...because his hair dryer broke down...?

DID YOU KNOW Dave Thorsness gets his jokes by hotline from New York? His latest has to do with buttercups and pussywillows. Ask him...

THEY MUST PAY WELL in the District Attorney's office...**Steve Branchflower**, Assistant D.A. in Anchorage, recently returned from Europe with a brand new $15,000 Mercedes.

HAVE YOU NOTICED Jim Arnold's distinguished new look now that he's no longer using Grecian Formula 9...

RUMORS, RUMORS - have it that **Av Gross** will step down as Attorney General and IS NOT seeking a bench appointment? Will Condon, Deputy A.G. has been mentioned as a possible successor.

FIREWORKS are expected at the annual **Tanana Valley Bar Association** 4th of July party on December 15th at Eilson Air Force Base. The dinner menu features a judicial roast.

CONGRATULATIONS are in order to Kenai attorney **Roger E. Holl** and his wife Connie on the recent arrival of their baby boy Bradford Eric.

DITTO to Anchorage attorney **Gene DeVeaux** and his wife Carol on the birth of their baby daughter Katherine Anne.

DISTINGUISHED JURIST OVERHEARD at Anchorage Restaurant:

"If a person boards an airplane and does not survive the flight, and there is insurance, you have clear liability."

"My Condensed Explanation of No-Fault Insurance: All PI and wrongful death cases can be solved by simply filing a Complaint followed by Interrogatories consisting of 2 questions: 1. Was there insurance? If the answer is yes, you have established liability. 2. What were the policy limits? The answer to this establishes damages."

By Law Amendments

[continued from preceding page]

but residing outside Alaska and not maintaining an office in the State.

Lobbying

With the next legislative session only weeks away, the members of the Association should keep in mind Article X, Section 1 of the By-Laws which provides that no lobbying or other attempts to influence legislative or administrative action shall be done in the name of the Association unless consent is first obtained from the Board of Governors.