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Judge Stout: Insight on Women in Law

On October 9th, 1983 at the Sheraton Hotel in Anchorage, Alaska, one of America's foremost jurists addressed the Anchorage Chapter of the National Association of Women Lawyers. Her name is Juanita Kidd Stout. She serves as Judge of the Court of Common Pleas in Philadelphia, Pennsylvania. She is the first black woman to be elected to a Court of Record in the United States. She has been on the bench since 1959. She currently sits in the Homicide Division.

Judge Stout, a native of Oklahoma, earned a B.A. degree in music from the University of Iowa, Iowa City, Iowa, and earned a J.D. and an LL.M. degree from the School of Law of Indiana University, Bloomington, Indiana. She has been awarded eight honorary doctorate degrees in addition to the Distinguished Service Award by the University of Iowa; the Jane Addams Medal by Rockford College, Rockford, Illinois; the Henry G. Bennett Distinguished Service Award by Oklahoma State University, Stillwater, Oklahoma; the Veil-Lifting Award by the Philadelphia Chapter of the Alumni Association of Tuskegee Institute; and the 1982 Criminal Justice Section Award of the Philadelphia Bar Association.

On November 16, 1981, Judge Stout was inducted into the Oklahoma Hall of Fame.

She has served as Administrative Secretary to the late William Hastie, Judge of the United States Court of Appeals for the Third Circuit, and as Chief of the Appeals, Pardons and Paroles Division of the Philadelphia District Attorney's Office. She was appointed by President Kennedy as a member of the United States Delegation, with rank of Special Ambassador, to the Kenya Independence Celebration in 1963, and was appointed American Specialist under the Cultural and Educational Exchange Program of the State Department to tour six African countries in 1967. In May of 1983 Judge Stout, with 30 other women judges from various states, traveled to China, Hong Kong, and Japan as a participant in a People-to-People mission.

Spirited Introduction

Judge Stout was introduced by Anchorage Attorney Harry Branson who opined that he was called upon to introduce Judge Stout solely because he was the only attorney in Alaska who had ever appeared before Stout in Court. Branson reminisced that when he was in Stout's court room, he couldn't get away with a damned thing. "She always knew what I was thinking, and not only that, she knew what I was going to think next." He said, "She was everything a judge should be. She really knew how to administer justice—and I must say she scared the hell out of me. This is that rara avis a truly great American Jurist. I have forgotten some of my clients and their causes over the years, but I will never forget this Judge."

Women in the Law

Judge Stout began her address with a look at the position of women in public positions in judicial legislative and executive branches in Federal and

Juanita Kidd Stout

State Governments. She noted the ascension of women to the bench has been slow. At the Federal level the first woman was appointed in 1934 when President Roosevelt approved Judge Florence Allen to the U.S. Court of Appeals for the 6th Circuit. Fifteen years later, in 1949, President Truman appointed the first woman to the U.S. District Court when he appointed Judge Burnita Shelton Matthews to the U.S. District Court for the District of Columbia. Twelve years passed before President Kennedy appointed Sarah Tilghman Hughes to the U.S. District Court for the Northern District of Texas in 1961. In 1966, President Lyndon Johnson appointed Constance Baker Motley, a black woman, to the U.S. District Court for the Southern District of New York, and in 1969, he appointed Shirley Hufstedler to the U.S. Court of Appeals for the 9th Circuit. When President Carter took office only five women served on the Federal Bench. He appointed 41 during his term. Presidents Nixon and Ford each appointed one woman to District Courts. President Reagan appointed the first female Supreme Court Justice in 1981. He has appointed 106 judges. They include only one woman to the U.S. Court of Appeals and only three to District Court. He has appointed one to the District of Columbia Superior and one to the U.S. Court of Claims.

Judge Stout pointed out that even though there are fifty women on the Federal Bench, 73% of the United States District Courts have no women jurists and 33% of the U.S. Circuit Courts have no women jurists.

The State of the States

At the State level, there are 23 women on the highest courts, however, two thirds of the states still do not have a woman on the highest court. Judge Stout noted that according to latest statistics available from the National Center for State Courts, approximately 320 women sit on State Courts of General Trial Jurisdiction, some 370 sit on Courts of Limited Jurisdiction, and approximately 226 serve as Administrative Law Judges.

In the private practice of law, few women are found in positions of power according to Judge Stout. According to a recent survey published by Flaherty & Nash in the *National Law Journal* 9,210 partners in 151 of the country's largest firms, only 296 are female. 32 of the 151 firms have no women partners.

After looking at the position of women lawyers today, Judge Stout stated "we must recruit, recommend and support, financially and otherwise, women for elective and appointed office. We must make sure that women lawyers are involved in the selective and elective processes for whatever offices are available, and we must support those candidates for Governor and President who support us. We must support women who are fighting legal battles for the elimination of sex discrimination, and we must be alert for opportunities to establish our own partnerships especially in new and unique areas of practice. There must be a continuous fight to eliminate existing discrimination and to forge new frontiers." In closing, Judge Stout called for a "revitalized" National Association of Women Lawyers.

Update: The Alaska Exemptions Act

The Twelfth Legislature/Second Session introduced House Bill No. 74, the Alaska Exemptions Act, to modernize the procedures for execution on a judgment and offer a judgment debtor adequate protection of his personal property and income necessary to provide for his own needs and the needs of his dependents while remaining independent of further public assistance.

The judiciary had little, if any, direct involvement in the creation of this law, yet faced the intimidable task of making it work procedurally in the short period of time before its effective date, August 26, 1982.

Concentrated efforts continue as Court System personnel attempt to interpret the law to determine adequate procedures and develop viable forms. Portions of the statute are vague or silent on essential matters, so that clear and concise interpretation on all points is not possible at this time. As questions arise and contradictions become apparent, the legislature will be approached for clarification.

For those of you not yet confronted with execution/exemption practice under the new law, it might be briefly categorized as follows:

1. Garnishment of Earnings (A.S. 09.38.030,040,045)
2. Levy of Real and Personal Property (A.S. 09.38.080)
3. Levy of Personal Property Subject to Value Limitation (A.S. 09.38.020 and 075)

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Judicial Council Submits Four Names

Anchorage Attorneys Joan Katz, Karen Hunt, Gene DeVeaux and Bill Erwin were selected from seven names applying for the Superior Court Judge seat left vacant when Justice Daniel Mohr assumed his seat on the Supreme Court.

Joan Katz works primarily as a hearing officer in mediations involving State regulations. Karen Hunt, a former president of the Alaska Bar Association, is presently a partner in the Anchorage law firm of Delaney, Wiles, Hayes, Reitman & Brubaker.

Gene DeVeaux is a partner in the law firm of Wannamaker, DeVeaux & Crabtree. Bill Erwin presently practices solo in Anchorage, Alaska.

Katz, Hunt, DeVeaux & Erwin were ranked first through fourth in the pole of judicial qualifications.

The governor must fill the vacancy within 45 days.

Update: The Alaska Exemptions Act

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4. Levy of Exempt Property (A.S. 09.38.065)

Although all four categories are representative of changed procedures, Garnishment of Earnings, a popular form of 'execution' on a judgment is worthy of review.

Garnishment of Earnings
Under the New Law

A judgment creditor may garnish an individual judgment debtor's earnings to satisfy a judgment. "Earnings" means money received by the individual for personal services and denominated as wages, salary, commissions, or otherwise.

How to Garnish a Judgment Debtor's Earnings: The form of writ issued by the court on request of a judgment creditor is a Writ of Garnishment, which contains pertinent information regarding the judgment and states an amount due, not to exceed the amount of the total unpaid judgment, costs and interest to date of issuance. Post-judgment interest and costs incurred after issuance of the writ may be collected by a Supplemental Writ of Garnishment, after the principal amount stated on the initial Writ of Garnishment has been paid.

How to Serve a Writ of Garnishment: A Writ of Garnishment is personally served on the judgment debtor's employer by authorized process server and the Writ must be accompanied by a form response to be utilized by the employer. The original writ must be promptly returned to the court with proof of service.

How to Respond to a Writ of Garnishment: An employer must promptly respond to the Writ within twenty-four (24) hours (A.S. 09.35.110; 09.40.060) by directing the response to the court for filing. Judgment creditors desiring a copy of the employer's response may provide a self-addressed, stamped envelope at time of service of the writ and the employer may forward a copy of the response as directed. Of course, the employer should retain a copy of the writ and response for his records.

If the judgment debtor is not employed, the employer need only note that fact on the response and file it with the court.

An affirmative response to a Writ of Garnishment becomes a continuing lien on subsequent nonexempt earnings of the judgment debtor until the total amount on the face of the Writ is paid in full. The lien terminates sooner if the employment relationship is terminated, if the underlying judgment is vacated, modified or satisfied in full, or if the writ is dismissed. A lien obtained under A.S. 09.38.035 shall have priority over any subsequent garnishment lien or lien assignment.

Any writ creating a continuing lien served upon an employer while a continuing lien imposed by a previous writ is still in effect shall be answered by an employer with a statement that he is holding no funds and with a further statement as to when all previous liens are expected to terminate. The subsequent writ shall have full effect from the termination of all prior liens or until it is otherwise terminated under A.S. 09.38.035. However, a subsequent writ is not effective if a writ in the same cause of action is pending at the time of service of the subsequent writ.

How to Obtain a Response from an Uncooperative Employer: An employer who fails or refuses to satisfactorily respond to a Writ of Garnishment may be ordered to come before the court and show cause why he should not be held in contempt for failure to comply with the law.

How to Compute a Judgment Debtor's Garnishable Earnings: With certain exceptions, an individual judgment debtor is now entitled to an increased exemption of his weekly net earnings not to exceed $175.00 (A.S. 09.38.030). Federal garnishment limitations of not more than twenty-five percent (25%) of an individual's disposable earnings (15 USC 1673) has not been waived to date. Therefore, a convenient formula for determining the amount of an individual judgment debtor's earnings subject to garnishment *(excluding exceptions)* is as follows:

> Subtract from weekly gross earnings all sums required by law or court order to be withheld then pay to the judgment debtor $175.00 *or* seventy-five percent (75%) of the remaining earnings, whichever is more.

The balance of the judgment debtor's nonexempt earnings is paid directly to the court by the employer and applied to the satisfaction of the outstanding judgment. Each payment directed to the court must contain the appropriate case action number to assure prompt and accurate processing by the court.

The response prepared by the employer may be based on an "average" pay period, or the most recent pay period of the judgment debtor, if it reflects the general average earnings of the individual. The bottom line figure on the response is not the amount that will be automatically directed to the court for each future payment. Future payments made to the court must be based on the current pay period of the judgment debtor, which will necessitate a recomputation of garnishable earnings.

How to Serve Judgment Debtor with Notice of Garnishment: After service of the Writ of Garnishment, the judgment debtor must be personally served with forms, Notice of Garnishment and Claim of Exemptions. Service of this Notice may be effected by authorized process server or by certified restricted delivery mail. Proof of service of the notice should be promptly filed with the court. Service of the notice is timely under the new law if served before, at the time of, or within three days after service of the Writ of Garnishment on the employer. (A.S. 09.38.080(b))

Monies received by the court in response to a Writ of Garnishment will not be released to the judgment creditor until more than fifteen (15) days has passed from date of service of the Notice. Should a Claim of Exemption be filed within that fifteen-day period, the court will schedule a hearing and after the hearing an order may issue granting or denying the Claim of Exemptions and specifying exemptions as appropriate.

Under the new law, the exemption amount of $175.00 may be increased when the individual judgment debtor submits to the court an affidavit, under penalty of perjury, stating that his earnings alone support his household. By so doing, the maximum part of his aggregate disposable earnings for any week subject to garnishment may not exceed the amount by which his disposable earnings for that week exceed $275.00.

Pros and Cons to Garnishment of Earnings under New Law

"Points of Advantage"

The Writ of Garnishment requires only one service. Notice to the judgment debtor may be effected by certified restricted delivery mail. The Writ of Garnishment becomes a continuing lien on the individual judgment debtor's nonexempt earnings. Judgment creditors may gain a priority position on garnishment of earnings.

"Points of Disadvantage"

Accrued post-judgment interest after issuance of the Writ of Garnishment requires a Supplemental Writ, after the initial writ has been paid in full. The judgment creditor must research court files to obtain dates of payment, to compute post-judgment interest on payments made directly to the court. The employer has a heavier burden in responding to a Writ Garnishment, which may require accounting/bookkeeping assistance or legal counsel. Judgment creditors may be placed at the "end of the line" until satisfaction of previously served writ(s).

Notice: This opinion is subject to formal correction before publication in the *Pacific Reporter.* Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 "K" Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

Romance in a Misty Fjord

by Russ Arnett

A young man who was a flooring contractor made bail and was released from jail. I said it must have been tough. He said, "No. There were a nice bunch of guys in jail." He would concede that most had an excessive amount of misspent energy. Alaska is the best place for these loose cannon.

I was on deck of the Princess Louise early one morning in 1952. She was tied up but the gangway had not yet been lowered. A smiling young rascal pulled himself onboard over the stern like a buccaneer. Probably he was a commercial fisherman or a logger. He headed for the passengers' cabins.

About ten minutes later he appeared on deck, angry instead of smiling, shoving a tired-looking, plain woman of about forty whose eyes remained fixed on the deck. "Friggin' with that German" he kept repeating for those on deck. He liked the ring of it.

I thought it unusual to have a uniformed Canadian policeman stationed on board. He looked like everybody's favorite grandfather. He was perplexed and embarrassed. He didn't prevent the man from driving his woman before him and off the ship.

After about five minutes the "German" appeared on deck in a fedora and trenchcoat. The coat was several shades browner than the American model and had a pointed yoke. I suppose a plain-looking woman of about forty might find him appealing. What he was doing in Southeastern and why he would want to stay I can't imagine. The young rascal and his woman, on the other hand, are indispensible and form the very backbone of Alaska.

POEMS by Stephanie Schoenfeldt Barnes

Peach Leather

quince kumquat
rose geranium
soft ball stage
paradise jelly
glaced grapes
gooseberry jam
currant tarts
gifts from your heart;
egg nog mousse
noel cookie gems
ever-so-easy fruitcake
holiday fondant
my mother's "x" in the corner
now my own
divinity
and homemade fudge
testing with a thermometer
red candles on the table
and a tree nailed to the wall

nougats, Mr. B's caramels
peach leather
old-fashioned peppermints
and a roaring
cigarette
by my side;
chocolate cream Maine peanut
brittle almond butter crunch
pralines toffee velvet molasses
penuche Chantilly cream squares
brandied peaches quince honey
raisin roll almond paste Toll
House cookies marzipan nut
balls champion nougat velvet
molasses candy can't bring her
back to life not the smell of
the tree nor all these wishes
and cold feet and lethargy and
white leather nooses and silly
gooses and ganders and wishes
ain't no horses
ain't nowhere where she
is, but she is and she's an
angel, and my Christmas dreamings
drone on and on for a dream
that still runs like a Christmas
toy. Day she left this all began.
Day she left I left, too, day she
left I felt like dying, rising on
a cross, dying. Christmas candy =
no love, many blemishes and scars
then. Day she left, day I found
those "x's" in her cookbooks.
I
I
I
ready cookbooks like manna
from her heaven and choose no one
recipe, no S.O.S.
thumbprints.

Summer Ripe

Someone whistled from the dense gray
staircase,
humid as styrofoam, and the
whistle was
a young man flecked
with black spills.

He'd need rest from the amorous heat,
that murder-sleuth; he needed pink
enough
to outweigh humility. The rape
blew open like a beach parasol,
frilly as the ckicken-lady's bikini,
rape cried from the screen and the
spotted floor. . .

while the refrigerator or a hit-and-miss
motor
hummed a spiteful, monotoned chorus
and a spring chicken fried
in angry unison.

Just a Blind

So in love with you it's like
being eaten by termites,
I dreamt again of standing outside
where pieces of men's bodies
were being flung off.

The crowd Oohed and Aah-ed.
I gave them the reticent pieces,
consuming and sublime,
overtaxed in this city
like a renal artery of floodwaters.

There is no hope, no dollop,
no welfare in this love.
In all ways I have been
numbed and concreted
like a loathsome stranger

and there is no release: just
barren sicklies,
blind albino dates,
sighing out.

I never allow them sight of me.

Death Roses

A low-flying bird,
huge black
plane-shaped
over the calendar.

I am letting the man
squeeze out in his charcoal valise
even packing it
with my numbness dumbness
shaking like a quail
on its short rain flight—
gray gray
sleet underhead
wings nailed down
squawking for the frills,
some laughter
my nails red with his blood;
only coyotes know me.

Let me go
let me know
a summer with a drier
man's comment—
there are only death
roses here,
not even corpses whisper.

Harry's Girl

Where is the cabdriver tonight
with my roses:
The roses that Harry gave me
in the train station. Imagine
giving a taxidriver
a dozen roses
for no reason at all.
The driver was black and mildly
surprised;
I was married to my black house.

No room for roses there.
No love in the dense living room.
Only you leaning up from the couch—
I heard that jambled sob
of your wedding band
hurled against the radiator.
Unmistakable metal, unforgettable.

That was the end of our marriage
long ago,

but oh,
I have never been pierced
by any sacrificial morning-after
of straight-faced steak and eggs
as when I gave up those birthday roses
that Harry bought in the train station
for "his girl"
with laughter petals on them.

Neither have I loved again.

Judges Three Refuse To Compensate a Tree

by William Fisher

There was both rhyme and reason behind a recent Appellate Court decision upholding the dismissal of a lawsuit seeking damages for injuries to a tree hit by a car.

William Fisher of Oakland County, Michigan claimed he was entitled to damages beyond the expense of having a tree surgeon repair his "beautiful oak" because it was "a living thing" with "esthetic quality such as beauty, majesty, and loveliness."

The suit, against the owner of the car and a woman who was driving it when it left the road and hit the tree, was dismissed by the Oakland County Circuit Court: Fisher appealed.

We though that we would never see
A suit to compensate a tree
A suit whose claim in tort is prest
Upon the mangled tree's behest.
A tree whose battered trunk was prest
Against a Chevy's crumpled chest.
A tree that faces each new day
With bark and limb in disarray.
A tree that may forever bear
A lasting need for tender care.
Flora lovers though we three
We must uphold the court's decree.

"I always remembered Joyce Kilmer's poem 'Trees' so I started fooling around with it and got some help from a staff person who should remain unknown, but is quite a poet," Gillis said.

The tree surgeon repaired the damage for $550 and the insurance company said we'll pay it," the judge added. "His (Fisher's) contention was that the tree was a living thing, almost like somebody dear to him, so he asked for

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President's Column

Dear Colleagues:

Although **Harry Branson** indicated when he asked me to write my first president's column for the *Bar Rag* that I could be very thoughtful and esoteric, I have chosen to acquaint the membership with two items which came before the Board of Governors at our last meeting. The Board held its first meeting of the 1983-84 year in Alaska's capital city of Juneau. Both Board member **Ron Lorensen** and the Juneau Bar Association were very hospitable and certainly made the Board's stay in Juneau pleasurable.

One issue which has come to the Board's attention as a result of Anchorage Telephone Utility's preparation of its 1984 ATU/GTE telephone directory is the ability of members of our Association to designate the fields of the practice of law in which they either specialize or would like to specialize. ATU/GTE offers fifty-two categories under which an attorney may list his or her name. The ATU/GTE specialization listing has obviously been prepared by a non-lawyer since there are many categories which are duplicative. Prior to dissemination, ATU/GTE did contact the Bar Association and was informed that the Bar Association does not subscribe to nor has a program of specialization and that the Association would prefer not to have this type of advertising available since it could conceivably mislead the public into believing either the Bar Association has some type of specialization program or is supportive of self-designation of specialties by attorneys. Financial gain being what it is, ATU/GTE determined to go ahead with their categorization. The Bar Association, although it certainly cannot eliminate this type of advertising, is very concerned as to the ramifications in the discipline/malpractice field of designating oneself as a specialist. Certainly, a client who has been misserved by a lawyer who has self-designated in an area has a much better case that the lawyer is truly a specialist and thus should have done a much better job for his client. In addition to the disclaimer presently in the ATU/GTE directory relative to the fact that the Association does not currently have a program which certifies an attorney practicing law in Alaska possesses specialized training or skill in a particular field of law, the Board of Governors has determined it appropriate, in order to further protect the public, to run similar ads with respect to the self-designations in the local papers of the communities in which the type of advertising is occurring in telephone directories.

Another issue which was discussed at the August meeting was an amendment of the Bar rules relative to attorneys who apply for admission to the Alaska bar. Discussion was had with respect to allowing an attorney who had practiced five of the last seven years to be admitted to the Alaska Bar on motion pending a character investigation which would include investigation through the bar associations to which the attorney belonged. This item will be taken up by the Board again in December and it would be advantageous to discuss the pros and cons of such a proposal with either your local Board member or me. The rationale behind such a move would be that if an attorney has practiced law five out of the last seven years, has submitted to the rules of profesisonal conduct as administered by the state bar association of admission and is of good moral character, another exam would serve little but to measure competency which already has been measured perhaps even more effectively by the practice of law.

Mary Hughes

Letters

Dear Mr. Branson:

Enclosed you will find a copy of an article I found in the August 22, 1983 issue of *U.S. News & World Report*. The article reveals that a California Court of Appeals has held that a seller of a house may be liable for not disclosing that it was the site of a murder. The Court's ruling was based upon the fact that the ill-repute associated with a murder scene could significantly depress real estate value. I have taken steps to analyze the impact of that decision on Alaska real estate transactions and to obtain the assistance of fellow members of the Bar in complying with what is apparently a new protection for home buyers.

First, I took the liberty of contacting Mr. **Gail Roy Fraties** of the District Attorney's Office in order to provide for a coordination between the prosecuting authorities and State offices dealing with real estate. Mr. Fraties informed me that, henceforth, a copy of any judgment of conviction for first degree murder (or whatever it's called now) would be filed in the real property recording district where the defendant committed the murder. However, I told Fraties that I believed there are other crimes equally repulsive that could also effect home values. Moreover, I stated that these crimes are not necessarily restricted to felonies.

For example, A.S.11.61.130 makes necrophilia a Class A misdemeanor. Most people would not want to buy a house where necrophilia was going on. On the other hand, Section 1 (e) of that statute makes it a misdemeanor to make a lien claim upon a corpse. This does not seem so bad, especially if it only involves filing papers. Or take a look at A.S.11.66.210 which makes it a Class A felony to run a gambling establishment. Although a person might not be repulsed by purchasing a home formerly

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Happy Holidays

Our Public Image

A Victory in Homer

A Homer judge last year got into big trouble with the lawyers in that little Kenai Peninsula town by posting an announcement in bars that people convicted of drunken driving in his court—the only court in town—were going to jail for 15 days instead of the usual three.

That announcement got the lawyers there all bent out of shape, and they started using their right to peremptory challenge to blackball District Judge **James Hornaday** from his own courtroom. He was peremptorily challenged in 82.5 percent of the criminal cases assigned him between March and November of 1982.

That meant another judge had to be brought in, at state expense, to hear the cases.

Mark Rowland, the presiding judge in the Third Judicial District, found this inconvenient. Moving substitute judges around proved an administrative problem. To solve it, he decided to move Judge Hornaday to Anchorage, where he presumably would stay out of hot water with the bar association.

Judge Hornaday challenged that decision, saying he liked Homer just fine and Judge Rowland was overstepping his authority.

A Fairbanks judge backed Judge Rowland, and Judge Hornaday appealed to the Alaska Supreme Court, where he won his right to stay in Homer.

The high court said a presiding judge has the authority to move a judge for more than 90 days, but only with that judge's consent. The justices did not, however, buy Judge Hornaday's other arguments, that only the governor can tell a judge where to go and that the peremptory challenge law is unconstitutional.

We're glad Judge Hornaday won the main part of his battle. The action that got him in the hot water may not have been the best move for a judge, but it in no way reflected on his legal ability, and surely it was not grounds for wholesale peremptory challenges. At no point did anyone, the lawyers or Judge Rowland, say he was unfit to serve. The lawyers just seemed to be worried that if they were unsuccessful in getting their clients off on a drunken driving charge the sentence would be stiffer than the minimum mandated by the Alaska Legislature.

This whole tempest seems to boil down to a group of arrogant lawyers trying to run a judge out of town using peremptory challenges.

Sometimes a judge should be disqualified. There are any number of reasons for that, such as a conflict of interest. But the challenges made for no particular reason should be limited.

We have a suggestion to cut down on the peremptory challenges made only on general principles: Make the bar association pay for bringing in another judge from out of town.

If the lawyers have to pay for their arrogance, maybe they will think twice.

Juneau Empire
December 5, 1983

'Ignorant' Editorial Blames Wrong Party

Dear Editor:

I write in reference to your editorial (*Empire*, Dec. 5) regarding the Alaska Supreme Court's ruling that Judge Hornaday may not be permanently moved from Homer to Anchorage. The editorial blames Judge Hornaday's troubles on a bunch of "arrogant" lawyers who were "using their right to peremptory challenge to blackball" Judge Hornaday. This display of ignorance on your part is about as logical as blaming the bad news we read in the paper everyday on those nasty journalists who write it.

When an attorney is hired to defend a person accused of a crime, the attorney's sole obligation is to do everything possible within the limits of the law and moral decency to defend the rights of the client. To do less would not only be wrong, but it could subject the attorney to a malpractice suit as well as discipline by the state bar. Accordingly, when an attorney feels that trial before a particular judge will result in a stiffer sentence for the client, the attorney has nothing less than an ethical obligation to assert the client's right to peremptorily challenge that judge. This is not "arrogance" on the part of the attorney, it's the attorney's job. Anyone who has ever been accused of a crime understands this only too well.

Your misguided confusion over this issue probably stems from your mistaken association of the attorney with the crime the client is accused of. When an attorney defends a drunk driver, this does not mean that the attorney advocates drunk driving. The attorney is not defending the crime, the attorney is defending the client's right to the fair, impartial trial guaranteed to all of us by the United States and Alaskan Constitutions.

Keith Levy
1802 Mark Alan Ave.
Juneau

Juneau Empire
December 8, 1983

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Letters

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used for such purposes, subsequent buyers may be irritated by individuals quietly tapping at the front door, uttering various passwords in order to pursue some game of chance. These are just a few examples.

I have taken the liberty of contacting several title companies in town and have asked them to address their title reports to this new case law development. Naturally, we would expect the title report to reflect prior convictions for certain crimes committed on the premises as we would expect the report to show easements, etc. For example, a title report on a parcel of property could reflect the following exception.

THE EFFECT OF

A conviction in 1982 for violation of A.S.11.61.120(A)(4) (harassing phone calls). Defendant was convicted of calling numerous persons late at night and threatening to come over and reupholster all their furniture with plastic slip covers.

Finally, we must consider the effect this new law would have upon the availability of title insurance. Does this sort of thing "run with the land"? I think so. I am referring this matter for further inquiry to the real estate committee of the Alaska Bar Association.

Sincerely,
J. B. Dell

Dear Judge Roberts,

Recently we had a short conversation relative to my appointment to represent an "indigent" defendant charged with possession and distribution of a controlled substance. At that time I expressed verbally my feelings relative to these appointments and you suggested that I submit them in writing along with any suggestions in that regard.

As you are aware, there are relatively few attorneys in Anchorage who practice in the criminal law sphere in Federal Courts. Although the vast majority of Anchorage attorneys are admitted to practice in the Federal Court System, most limit their practice to civil litigation. As such they are exempt from being placed on the criminal defense roster to represent indigent defendants. These persons are however, put on a separate list to handle civil type matters. This is an attempt to "equalize" the burden through the bar community. Unfortunately, as you are aware, there is an inverse relationship between the number of civil matters requiring pro bono work as balanced against the number of attorneys available and the number of criminal matters requiring such representation against the number practicing in part in this arena. To put it another way, an attorney on the criminal roster can expect to be called upon to represent an "indigent" either on a misdemeanor or felony approximately once each year while those practicing solely in the civil area need not expect to be called upon more than twice in their working career. This disparity is wholly inequitable and forces those of us who handle criminal matters to subsidize the entire remaining bar. Unfortunately, most attorneys practicing criminal law are those who can least afford this enforced subsidy while the large civil law firms reap the benefit of our agony.

I recognize that the amounts of $20.00 an hour out of court and $30.00 an hour in court are set by statute and the courts have almost no control over that ridiculously low rate, but one must still consider that the wage of a secretary alone is at least 50% of that amount and that does not include any overhead such as office space rental, equipment, library and insurance which amounts to at least two and one-half times that amount. This means that the representation not only is pro bono, but in fact costs the attorney a substantial amount of out-of-pocket expense.

I further recognize that all defendants are entitled to representation by persons familiar with criminal practice, and many attorneys practicing solely in the civil area would not feel comfortable in a criminal case. Still, those of us who do engage in such practice are being penalized for doing so while those in a solely civil practice are in effect rewarded for not so engaging.

There does seem to be a viable solution to equalize the responsibility however, and that would be to place every lawyer admitted to practice in the Federal Courts on one list. When their name comes up for pro bono representation, with civil or criminal, they are responsible for that case. If that person chooses not to do so, he may in effect "subcontract" the work out to another attorney competent in the field, at the price negotiated between the two. In so doing, those of us engaging in a criminal law practice would still retain our responsibility to take pro bono work but it would then be on an equal basis with those choosing not to maintain that type of practice. If the rate charged by the substituted attorney was the normal hourly rate of the attorney originally assigned, the attorney originally assigned could hardly complain since he could simply offset the amount by filling in the time it would take to represent the indigent criminal defendant with civil work. Both sides of the bar would thereby be equalized.

I am unaware of any specific statutory prohibition to this solution and would appreciate the court's consideration and comments on this proposal.

Sincerely,
DENNIS, KIRBY & MOSS
Richard D. Kirby

Dear Editor:

I read with interest the recent article about **Judge Shortell**'s problem with the toilets and also **Judge Johnstone**'s problem with the telephones. A junkett finally paid off. Some years ago the State sent me to a National District Attorney's conference in Houston. Of course it was in July, but one of the featured speakers told of an interesting phenomena discovered in New York. (The same speaker was later indicted.) It seems that in a large prison in Long Island the inmates learned that by getting all the waste out of the toilet bowls you could have an excellent communication system with other inmates who had done the same thing. As the prison was coed, certain other relations may have developed where the inmates were on the same party line so to speak. What I envision here is a whole network of working phones which may not be pushbutton but where the sewer systems are interconnected may be long distance yet. But be careful before you flush—be sure no one is using the phone.

Gene Williams

Poems

[continued from page 3]

$15,000. The tree is not dead. It's repaired and living."

Gillis said the poem fully explains the court's position and was not a frivolous undertaking.

Judge Gillis was also the author of perhaps the shortest ruling in the history of the state appeals court a few years ago.

In a case where a man tried to convince an appeals panel to distinguish certain allegations different from facts as stated in a lower court decision against him, Gillis wrote:

He didn't. We couldn't. Affirmed.

Off

by Clifton Bates

Off my chain and regular feed
I drool and foam at the mouth and run wild alone
I glide across the veldt with head down,
tongue out, and my eyes, in slits, are cold-blooded.
I skim across the open, flat, featureless land of suburbia.

The moonlight brings my shadow with me, quietly and smoothly.
I do this stealthily, breaking the laws as I roam the streets.
If I could continue, I would disappear into foreign lands
I would settle back and form a new character:
not letting it get covered with the boring fat, the hum drum,
the sweet saturated solution that smothers and kills the beast.

IN THE TRIAL COURTS FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

In the Matter of the Establishment of a List of Attorneys Re: Appointments for Criminal Conflict Cases.

ORDER

It appears there is an unequal distribution of court appointments of counsel to criminal conflict cases between attorneys residing in one-judge/magistrate locations and attorneys residing in the Anchorage area. It further appears this unequal distribution is further enhanced by the existence of contracts with various Anchorage law firms for criminal defense services where the Public Defender Agency must conflict out of assignments; therefore,

IT IS ORDERED that the following procedure for assignment of counsel by the court shall take effect on Monday, October 3, 1983, and shall remain in effect until modified or rescinded by further order of this court and shall supersede any previous order pertaining to the appointment of counsel in criminal cases.

1. The area court administrator shall provide each court location with a list of attorneys available for appointment in crminal conflict cases. The source of the list will be the Alaska Bar Association membership roster list for the third judicial district.
   a. **Local list:** Each court location will be provided an alphabetical list of those attorneys residing in that general court location.
   b. **Third district list:** The Anchorage superior court calendaring division will be provided an alphabetical list of all attorneys in the third judicial district.
2. Whenever it becomes necessary to appoint private counsel for indigent defendants, the court shall appoint an attorney to represent the defendant from one of the lists set forth above under the following guidelines. The appointments shall be made in the order that the attorneys are listed.
   a. In cases filed in rural court locations where there are no local attorneys, the court shall contact the Anchorage superior court calendaring division for the name of the next attorney on the third district list. The attorney appointed may not be from any location other than Anchorage.
   b. In cases filed in rural court locations where there are local attorneys, appointments shall be made as follows:
      (1) A local attorney will be ap-

[continued on page 14]

All My Trials

by Gail Roy Fraties

In this age of computers, communication is the watchword—and state government is definitely uptown in this department. The District Attorney's Offices alone have AJIS to track the citizenry, PROMIS to organize the caseload, and just about every sort of space-age typewriter, telephone system, and dictating equipment known to western man. Former prosecutor William W. "Bangkok Billy" Garrison was in Anchorage the other day on one of his infrequent visits from the Far East, and I took him on a tour of the Anchorage District Attorney's Office. Of course, I boasted about our progress, and Bill responded with a reference to the halcyon days when (for an unforgettable five years) he was the District Attorney in Nome.

"I don't know where all you guys had gone (he was referring to the general exodus of Republican attorneys when Governor Bill Egan regained the throne in 1971) but I did know that John Havelock was the new Attorney General. Nome was pretty far north in those days, and I found out about the change when a memo arrived, advising all District Attorneys that John wanted a monthly report of the activities of our respective offices."

Send Us More Japs

Mr. Havelock had apparently hit upon the novel idea of having each District Attorney write a monthly letter, addressed directly to Governor Egan. This letter was to contain not only a statistical summary of prosecution activities, but also general information concerning law enforcement, community attitudes, and problems—*if any*—that were being encountered in the complex endeavor of protecting the public. District Attorney Garrison, no great lover of paperwork, complied with as much grace as his anarchistic nature would allow.

"It was in the dead of winter," he recalled, "and everybody was too cold to be committing crimes—at least, the police weren't finding out about them. The first month, I wrote Governor Bill a long letter, complete with the number of cases tried, convictions, acquittals, office and community problems, police data, and just about everything I thought might interest the old boy. He didn't reply, and—as I recall—I sent a report faithfuly every month until spring."

As the time wore on, without a reply either from the Governor or the Attorney General (through whose offices the communications were directed), Attorney Garrison began to feel neglected. Never one to maintain a low profile, he decided that his detailed reports were dull reading, and needed something more calculated to provoke interest. The first paragraph of his next report was a grabber. "LAST WEEK," it announced tersely, "IN A JOINT EFFORT WITH THE FEDERAL GOVERNMENT (UNITED STATES COAST GUARD) THE ALASKA DISTRICT ATTORNEY'S OFFICE FOR THE SECOND JUDICIAL DISTRICT COOPERATED IN THE SINKING OF THIRTY-FIVE THOUSAND TONS OF JAPANESE SHIPPING. NO PRISONERS WERE TAKEN."

There was no reponse. Piqued at this rebuff, the offended prosecutor allowed his monthly newsletters to degenerate into a creative writing exercise. Successive reports detailed a counter attack by the Japanese empire, a visit by emissaries from the lost city of Atlantis, and a pitched battle between the Nome police force and invaders from outer space who had landed on the outskirts of the city in a long, cigar-shaped, flying object. According the Bill, it was the governor's failure to respond to a request for instructions concerning an exchange of prisoners between the Nome residents and the flying saucer people that caused him to give up writing his reports altogether.

"Did you ever get any reaction?", I wanted to know.

"As a matter of fact, I did," he replied with a smile. "The very first time I failed to send in a report, I got back a form letter inquiring what had happened to it. I didn't resume writing, and every month I got the form letter—and we were all happy. I really don't think either John or the governor were reading them," he concluded pensively.

The Children's Hour

I wasn't through showing him the wonders of our new offices, however, and took him to see the special facility used by our Sensitive Crimes Unit for the interrogation of juvenile victims of various sorts of sexual crimes. It consists of a comfortable room, complete with tiny furniture, dolls, children's picture books, and just about everything that is necessary to make the toddler/victim comfortable and at home. The idea is that the prosecutor and defense attorney can sit with them among their toys and discuss the variety of bizarre acts that have been perpetrated on them by their mothers, fathers, teachers, counselors, neighbors, ministers, or friends. All of this can be observed through a one-way mirror, and in the adjoining room a video camera stands ready to tape the testimony—often precluding the necessity of exposing victims of tender years to the ravages of cross-examination in open court. It's all very sensible, humane, and effective.

Garrison digested all of this silently, and seemed to be attracted to the pictures on the walls—depicting, as they do, a variety of fictional characters beloved by all children, including most of the principals of the Walt Disney animated cartoons. Bill was apparently formulating some sort of direct examination as he studied the pictures of Donald Duck, Pluto, Porky Pig, Mickey Mouse, and other members of the Disney high command—and the direction his thoughts had taken quickly became apparent.

"Was it white, like Uncle Donald's" he cooed in dulcet tones, "or black, like Uncle Mickey's?"

With Justice For All

Most members of the large public law firms in Anchorage, particularly the District Attorney and Public Defender offices, have had the dubious distinction of appearing on a complex motion, without warning and without preparation, before a frustrated and generally growly Superior Court judge—who is not inclined to listen to any excuses, simply because the responsible attorney is otherwise occupied. I was having coffee in our lunchroom the other day when Renee Erb, an effective and dedicated prosecutor, returned from such a harrowing experience.

"I'm getting tired of this," she stated emphatically. "Every god damned time somebody around here screws up motion practice, I'm the one that gets to run over to court and try to explain to the judge."

I was aware that she had been having a rough week, and asked who she was talking about.

"White Fang" (Honorable [name withheld by request]), she replied. "He's got me three times running. He doesn't even ask my opinion any more because he knows damn well I won't know what I'm talking about. Why do I always have to be the whipping boy, . . .girl, . . .person?" (Renee is a dedicated, although nonmilitant, feminist.)

Out of her agony, after due deliberation, members of the District Attorney's staff have devised a new rule which is hereby presented to the Bar, in the hopes that it will eventually receive some consideration by the Supreme Court:

Criminal Rule 60. Designated whipping person.

(a) These rules take specific notice of the fact that attorneys are required, on occasion, to appear in court concerning motions of which they are not the author, and have little knowledge. Such individuals will hereinafter be recognized as having a protected status, with rights and responsibilities commensurate with their position before the court. The degree of protection enjoyed by such attorneys will vary in inverse ratio to the amount of time they have had to prepare for their appearance.

(1) Three to five minutes: The court, despite the degree of provocation by the concerned office, will treat the designated whipping person with courtesy. No sanctions may be invoked, nor may the court's voice be raised.

(2) In excess of five, but not more than ten minutes: The court may raise its voice, and may—in extreme cases—inquire as to what the hell is going on.

(3) Ten to twenty minutes: The court may raise its voice, engage in veiled threats, inquire what the hell is going on, and ask the courtroom generally if anybody knows what the hell is going on.

(4) In excess of twenty minutes: The sky's the limit.

(b) Inasmuch as judges grow understandably weary of dealing with the same whipping persons (frequently those at the lower end of the hierarchy), every court is entitled to one challenge per motion to a designated whipping person. It must, however, accept the substituted whipping person, unless a challenge can be predicated for cause.

(c) Where a court has been required to deal with a whipping person from any given firm more than three times in one week, it will be entitled to nominate its own choice of whipping person from said firm to make appearances for the remainder of the week in question.

(d) Fines, penalties, and other manifestations of the court's displeasure will be shared between the designated whipping person, as defined in this section, and the responsible attorney, without regard to contribution.

Comments on this suggested rule from interested members of the bench and Bar are invited.

Instant Replay

I like to watch movies on home box office, at least I did until I saw "The Verdict" (Paul Newman and Charlotte Rampling, 1982). I like Mr. Newman, and the picture was highly recommended by some of my friends, none of whom happened to be trial lawyers.

I don't know about you, but when something about a movie that I'm watching on television makes me uncomfortable, I either switch around to another channel until the offending scene is over, or go out to the kitchen to fix myself something to eat. This frequently happens in horror movies, where the slime monster is about to bite somebody's throat out, or worse. After I had switched to "Knight Rider," "The Jeffersons," and "Women of San Quentin" a number of times, I began to realize that "The Verdict" was bothering me—and it didn't take long to divine the reason.

Here's a man who's getting old, has no money, and drinks too much. His wife has divorced him, and the girlfriend is working against his interests. His star witness splits, and is not under subpeona. The insurance company is spending a fortune to defeat him, and the other lawyer knows more evidence than he does. Finally, both the judge and his clients hate him, and are giving him a bad time.

I don't care if he is good looking, that's normal for trial lawyers. For this other shit, I have to watch television? If I want to play "This Is Your Life," I'll sign up for a game show.

House of Delegates Approves Ethics Code

by Donna C. Willard

At its 105th annual meeting, the American Bar Association's House of Delegates acted upon some 61 resolutions, the most significant of which was the approval of an entirely new model ethics code. Denominated the Model Rules of Professional Conduct, the new provisions replace the present Model Code of Professional Responsibility. However, legal effect will be given to the new Rules only upon enactment by the State agency charged with responsibility for lawyer discipline.

Controversial Provisions

The new Rules contain several controversial provisions in the areas of attorney-client confidentiality and with respect to advertising, all of which will be considerd when the Alaska Bar Association undertakes its review and analysis to determine whether it should recommend to the Supreme Court that the provisions be adopted.

Discriminatory Membership

Reversing itself for the third time, the House voted 183-152 to endorse an amendment to the Civil Rights Act of 1964 which would prohibit discriminatory membership policies in private clubs. The resolution urges the inclusion, within the definition of "public accommodation," private clubs which derive a substantial portion of their income from business sources. If enacted by Congress, such clubs would be prohibited from discrimination on the basis of sex, race, religion, or national origin.

By a vote of 158-134, the House defeated a resolution urging federal, State, and local governments to adopt legislation prohibiting discrimination in employment, housing and public accommodation based on sexual orientation.

Deferred until the next meeting because of drafting problems was a resolution which would amend the commentary to the Canons of Judicial Conduct to provide that judges should not be members of organizations that practice invidious discrimination.

FTC Investigation

In its continuing opposition to FTC investigation of the profession, the House overwhelmingly passed a resolution submitted by the Texas Bar which opposes legislation pending in Congress which would authorize the FTC to preempt the traditional powers of the State Supreme Court, to regulate lawyers, particularly in the areas of ethics, disciplinary rules and commercial and business practices.

Only in the event that the FTC or any other federal agency could show lack of effectiveness to prevent unfair or deceptive practices would the delegates condone such federal activity.

Private Schools

After lengthy, heated debate, the delegates, by a vote of 136-134 refused to adopt a resolution which would oppose legislation prohibiting tuition tax credits for parents whose children attend private elementary or secondary educational institutions. The effect of the vote was to leave the ABA with no policy on the issue.

Freedom of Information

Two amendments to the Freedom of Information Act were supported while a third was deferred for further classification. Adopted were provisions granting intelligence agencies significant relief from the Act and exempting law enforcement rules and manuals where related to investigation and prosecution which if disclosed would help persons to violate the law or evade prosecution.

The question of exemptions for information furnished by confidential sources was deferred until the 1984 mid-year meeting of the House which will be held in Las Vegas next February.

Federal Tort Claims

In action which amended current ABA policy, the delegates voted to support several amendments to the federal tort claims act. If passed, the United States, rather than its individual employees, would be the defendant in constitutional tort cases but only if the government waivers the "good faith" defense, a jury trial is permitted and punitive damage claims are allowed.

The purpose of the proposed amendment is to strike a balance between the right of the citizen to bring suit pursuant to the Act and the ability of government employees to carry out their duties.

Potpourri

In other action the House of Delegates:

—broadened the scope and power of the Special Committee on Prepaid Legal Service in order to encourage development of such plans and assist those who wish to enter the field.

—adopted Guidelines for Prosecutorial Education and Training for state and local prosecuting attorneys.

—established a Special Committee on Lawyers' Public Service to review, evaluate and foster the development of *pro bono* services.

—urged the adoption of legislation to amend the fraudulent conveyance provisions of state and the Bankruptcy Code to make it clear that property purchased at properly conducted non-collusive foreclosure sales are to be considered transferred for reasonably equivalent value.

—created a Standing Committee on Federal Judicial Improvements.

—supported the increased availability of child care resources to families in need including both expansion of and improvement in the quality of such programs.

—in response to the Siberian pipeline controversy, urged that the Export Administration Act be applied extra-territorially only in ways which are consistent with generally recognized principles of international law so that the U.S. is not attempting to extend its law to foreign corporations in foreign countries.

—passed Guidelines for Reviewing Qualifications of Candidates for State Judicial Office.

—supported the introduction of competitive considerations into state regulatory rule making proceedings in order to allow the market place rather than rate regulation efficacious.

—adopted Guidelines for Fair Treatment of crime Victims and Witnesses in the Criminal Justice System.

—passed a resolution providing for a ban on capital punishment with respect to any person under the age of eighteen.

—urged Congress to preserve rights of judicial review and travel in any legislation granting the President emergency powers with respect to immigration and severally limiting state and local police enforcement of national immigration laws.

—approved support of amendments to the Social Security Act in order that senior federal judges serving on active duty would not, as currently occurs, suffer a diminution of social security benefits.

Anyone seeking additional information on any of the foregoing may contact Alaska's House members, **Dick Gantz, Keith Brown** and **Donna Willard.**

Routine Discovery/DWI Cases

by Marc Grober

Many a DWI can be defended successfully without a flourish of jurisprudential genius. Thorough discovery procedures will often reveal monumental flaws in the prosecution's case (and/or the hardly noticeable crack that cries for exploitation). Failure to adhere to standard procedures or a lack of such procedure (such as failure to require officers to tape record all questioning post-Miranda warning) may produce glaring inconsistencies in the arresting officer's testimony as well as potential grounds for pretrial motions.

A recent example of the necessity of thorough discovery occurred in Fairbanks this fall. Apparently the Fairbanks D.A.'s office does not regularly produce for the defendant the subsequent calibration of the B.A. machine. That office also indicated that the subsequent calibration is not included in the B.A. packet usually offered to Defendants as part of discovery. In the case at hand defense counsel made demand for the second calibration. As a result of this demand and a variation in the BA standard test the calibrating officer was subpoenaed to trial by the D.A. Prior to his being called to testify the calibrating officer revealed that the B.A. machine (or at least one of them if more than one was in use at Fairbanks AST between June and August of 1982) was taken out of service because of technical difficulties. The officer could not testify as to the accuracy of the machine. The DWI charge was dismissed.

The instant case arose in July. The subject BA machine was calibrated in June. The trial was calendared at arraignment. The subject trial was the first notice the D.A.'s office had of the problem. Now is it possible that any number of cases arising from arrests made between the calibration and the subject arrest (approx. one month) involving the subject machine went to trial or were disposed of without the defendant, his counsel, or the prosecution being aware of this major flaw in the prosecution's case? Is it reasonable for defense counsel to go to trial without requiring production of the second calibration?

Discovery can also reveal that the arresting officer mixed the standard test solution himself (rarely disclosed to juries) or that no expert witness will be called. Such information is valuable as the Supreme Court has yet to rule on the admissibility of the BA when there is no expert testimony as to the relation of the BA at the time of test to the BA at the time of arrest. Recent testimony by Dr. Duboski clearly shows that it is impossible to ascertain the BA level of a subject at time "a" from a BA test given at time "a+b".

Also of interest to defense counsel is the absence of any tape recorded questioning combined with a police report reflecting post-Miranda warning questioning. *Cisneros* (Ct of Appeals Opinion No 115) and *Mallott* (608 P2d 737) make it clear that where it is feasible to record questioning failure to do so may render statements inadmissible. Counsel can note that at least one peace officer in Alaska carries a micro-cassette recorder is his pocket...

This little piece is not in any way intended to be a practice and procedure manual for DWIs. The point, however, is that no stone is too small to turn over, no aspect so mundane as to avoid the closest scrutiny. Attention to detail before trial may not render your case any stronger, but will reflect weaknesses in the prosecution's case, and after all, they go first and have the burden of proof and your case may never be heard.

One more anecdote in closing, this from a fish and game case. A bear hide, allegedly snared, was sent to a State biologist to garner further evidence supporting the charge. Discovery, however, yielded a report that suggested the presence of bullet holes and the absence of any evidence suggesting the bear was snared and the case was dismissed.

Traffic offense or felony, your client deserves a complete defense. Though other evidence in the bear case might normaly have resulted in guilty plea or other disposition, two hours additional effort resulted in a dismissal. Be aggressive and pay attention to detail; both you and your client deserve it.

The things we did last summer (we'll remember all winter long)

photos by Jack Chisolm (the shy pornographer)

What's in here?

(Naughty photo deleted)

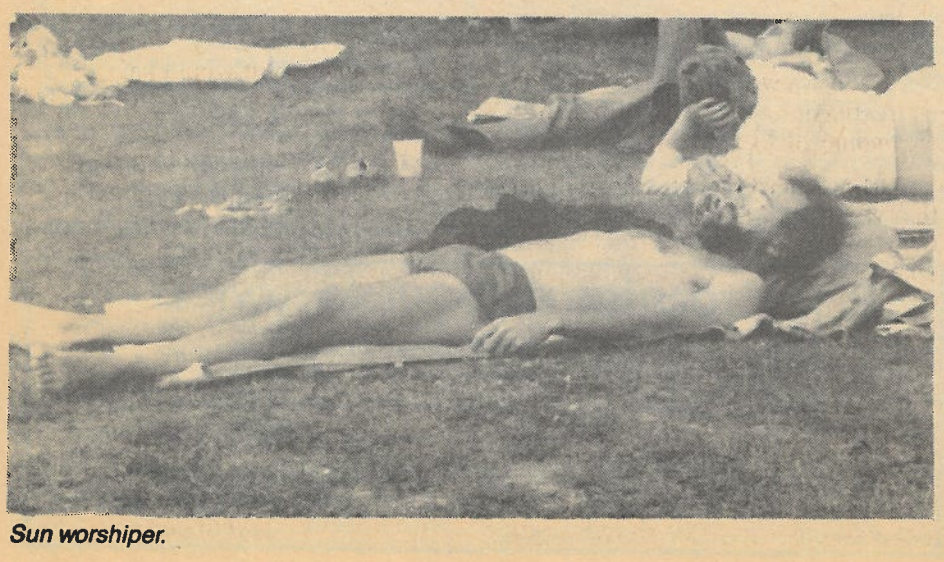
Contact lens

The eyes have it.

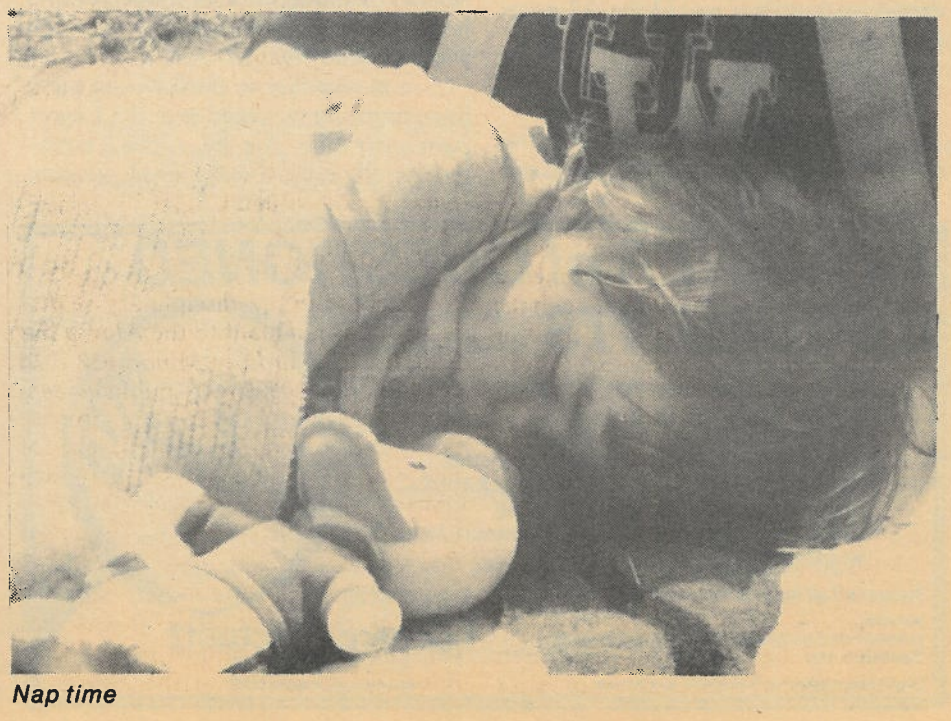
A kid and a llama

Quarterback

Side bar conference



Sun worshiper.



Nap time

Discipline Cases

NOTICE: This opinion is subject to formal correction before publication in the *Pacific Reporter.* Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE SUPREME COURT FOR THE STATE OF ALASKA

In the Disciplinary Matter Involving:

PETER B. WALTON,

Respondent-Attorney.

File No. 6289
OPINION
[No. 2734 - September 30, 1983]

Appeal from the Disciplinary Board of the Alaska Bar Association.

Appearances: **Robert H. Wagstaff,** Wagstaff, Middleton & Pope, Anchorage, for Respondent. **John R. Lohff,** Lohff and Van Goor, Anchorage, for Alaska Bar Association.

Before: **Burke,** Chief Justice, **Rabinowitz, Matthews,** and **Compton,** Justices, and **Carpeneti,*** Superior Court Judge. (**Moore,** Justice, not participating.)

PER CURIAM
RABINOWITZ, Justice, with whom MATTHEWS, Justice, joins, dissenting.

This is a disciplinary matter involving attorney Peter B. Walton. Walton allegedly "created" a document, a copy of which he later attached, as an exhibit, to an unverified complaint. This action resulted in the Alaska Bar Association [ABA] initiating disciplinary proceedings against him. The Disciplinary Board[1] of the ABA recommended that Walton be suspended from the practice of law for eighteen months.[2] Walton contends that he has been denied due process of law and that the evidence does not support a finding of any wrongdoing.

Walton "created" the document while representing the Aleut Corporation in civil litigation against **L. William Childs.** Childs has been Aleut's chief executive officer from 1972 until mid-1975, when his relationship with the corporation's board of directors and officers deteriorated. When Childs left Aleut, there was disagreement as to Aleut's obligations under its employment contract with Childs. Aleut filed a declaratory judgment action against Childs to resolve the uncertainty.

In early March, 1978, **Frank Cowden,** Aleut's vice-president and director of litigation, reviewed all of Aleut's outstanding loans. He discovered a March 2, 1973, promissory note, executed by Childs in favor of Aleut for $13,000. The promissory note stated that it was secured by a deed of trust on a specified parcel of real estate. Unable to find a copy of the deed of trust in the corporation's records, Cowden went to the Recorder's Office and obtained a copy of the recorded deed. Although the promissory note referred to a deed of trust, the one found at the Recorder's Office was labeled a *second* deed of trust and contained a subordination clause. The deed of trust was signed by Childs and notarized on March 2, 1973. The subordination clause stated that the deed was subordinate to another deed of trust held by Alaska Mutual Savings Bank, which secured a $47,000 loan to Childs executed on March 5, 1973, and was recorded on March 6, 1973. Thus, on its face, the deed of trust in favor of Aleut appeared to have been altered, by adding the subordination clause after Childs had signed it. In addition, Childs had not recorded the deed until October 6, 1973.

In mid-March 1978, Walton filed a second lawsuit on Aleut's behalf against Childs [Childs II], alleging that the $13,000 loan was illegal. Childs moved to dismiss the complaint. However, so that scheduled depositions could be completed, the parties stipulated that Aleut's opposition to that motion did not have to be filed until April 25, 1978.

Childs' deposition began on April 13, 1978. He testified that the $13,000 loan was made pursuant to an understanding that Aleut would furnish the down payment that Childs needed to purchase a home in Anchorage, in consideration for his moving to Alaska to work for the corporation. He stated that he had signed the promissory note March 2, 1972, and that he had executed and delivered a copy of the deed of trust to Aleut on the same date. He further testified that the deed of trust had not been altered after he signed it. On April 21, 1978, Childs' deposition was resumed. Before any questioning began, Childs stated that he wanted to change his earlier statement that the deed of trust had not been altered. He admitted that it had and that he knew of this prior to having it recorded.

On April 25, 1975, Aleut, through Walton, filed an amended complaint in Childs II alleging that Childs had defrauded the corporation in obtaining the $13,000 loan. Paragraph 4 of that complaint stated:

> 4. Accordingly, on 2 March, 1973, for the purpose of financing a down payment in connection with the purchase of a home in Anchorage, Alaska, defendants obtained funds from the plaintiff totaling $13,000, repayment of which they professed would be made according to the terms of a Promissory Note attached hereto marked Exhibit A. At that same time, defendants executed a Deed of Trust for the benefit of the plaintiff Corporation and delivered a copy thereof to the president and secretary of the plaintiff corporation. *A copy of that copy is attached hereto marked Exhibit B.*

The original Deed of Trust was either retained by Defendant L. William Childs or, at his discretion, was left with a legal secretary named **Susan Abbott,** then employed by attorneys for the plaintiff Corporation. On its face, the original Deed of Trust (*of which a copy is attached marked Exhibit B)* appeared to be a first Deed of Trust, not secondary to any other lien on the subject property.

Either by express representations or by his silence, defendant L. William Childs represented to plaintiff and/or led the plaintiff to reasonably believe that the said Deed of Trust, *Exhibit B,* was a first Deed of Trust and not subordinate to any other lien on the subject property. In fact, however, defendant did not own the real property in which he purported to grant plaintiff a security interest in the form of a Deed of Trust.

(Emphasis added.) In Paragraph 8, the amended complaint alleged that Childs later materially altered the original deed of trust by adding the word "Second" to the top of the document and by adding the subordination clause. The complaint referred to this allegedly altered deed as Exhibit D.

Although the references to Exhibit B in Paragraph 4 suggested that the original deed of trust is a copy (or a copy) of an existing document signed by Childs,[3] that was not in fact the case. As stated in the opening brief submitted by Walton to this court:

> Walton created illustrative Exhibit "B" by making a xerox copy of the deed of trust as altered and recorded by Childs. Using this copy, Walton then blanked out what he believed to be those provisions that had been wrongfully added to the instrument after its execution.

The blanked out parts consisted of: "(1) recording data; (2) the word 'Second'; (3) the subordination clause; (4) and the recording information on p. 2 (reverse side) of the deed of trust. . . ." Walton "created" this document on April 14, 1978, the day after Childs stated in his deposition that the deed had not been altered, but before Childs later corrected his earlier statement.

The amended complaint was served on Childs attorney, **Hugh G. Wade,** on April 25, 1978. Although Walton believed that filing the amended complaint

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THE SUPREME COURT FOR THE STATE OF ALASKA

In the Disciplinary Matter Involving:

MICHELLE V. MINOR

Respondent-Attorney.

File No. 7661
OPINION
[No. 2726 - September 9, 1983]

Review of Decision and Recommendation by the Disciplinary Board of the Alaska Bar Association.

Appearances: Richard J. Ray, Eric Ostrovsky, Anchorage, for Alaska Bar Association. Paul L. Davis, Boyko, Dennis and Davis, Anchorage, and Thomas A. Flippen, Anchorage, for Respondent.

Before: Burke, Chief Justice, Rabinowitz, Matthews and Compton, Justices.

PER CURIAM.

This attorney disciplinary matter is before us pursuant to the Alaska Bar Rule II-15(j).[1] In *In re Minor,* 658 P.2d 781 (Alaska 1983), we publicly censured Michelle V. Minor, an attorney licensed to practice law in Alaska, for her failure to cooperate with the Disciplinary Board of the Alaska Bar Association (the "Board") in its investigation of a complaint filed against her. We now consider the underlying substantive complaint. The Board has determined that Minor breached a fiduciary obligation in the course of handling one of her cases. It recommends that Minor be publicly censured for this violation of the Code of Professional Responsibility. The only issue before us is whether this recommended sanction is appropriate.

I. Factual and Procedural Background

Minor represented Cynthia Rubits and her husband, Victor Rubits, in a personal injury action arising out of an automobile accident in which Cynthia Rubits was injured. At the time of the accident, Victor Rubits was a member of the United States Air Force. Cynthia Rubits received medical and hospital care from the Air Force. The value of the care received was approximately $1,900.00.

In response to a request by the Air Force, Minor agreed to assert the Air Force's claim for reimbursement of the cost of providing medical care. The assertion of this claim took the form of a "model allegation" which Minor inserted into Rubits' complaint. The allegation stated:

> Cynthia A. Rubits has received medical and hospital care and treatment furnished by the United States of America. Plaintiff Cynthia A. Rubits, for the sole use and benefit of the United States of America under the provisions of 42 U.S.C. 2651-2653, and with its express consent, asserts a claim for the reasonable value of said care and treatment in the approximate amount of $1,887,70.

Minor agreed with the Air Force that she would not settle the claim of the United States for less than the full amount demanded without obtaining the express approval of the Air Force. In return, the Air Force promised to cooperate with Minor in producing medical records and witnesses.

After the complaint was filed, Minor attempted to convince the Air Force to waive its claim, but was unsuccessful. In a letter to the Air Force dated January 3, 1980, Minor argued that is was not worth the Air Force's time and expense to go to trial. Counsel for the Air Force replied that it could not waive the claim.[2] Throughout this period, the Air Force repeatedly called Minor's office to keep abreast of developments in the case. Without informing representatives of the Air Force, Minor negotiated a settlement for $12,500 on March 3, 1980. She distributed approximately $7,000 to the Rubits and kept $4,162.50 as attorney's fees. After the settlement, the Air Force inquired into the status of the Rubits' case and was told by Minor's office that the case was still set for trial. When the Air Force did learn of the settlement, and before disbursement of the settlement proceeds, Bandy's superior, Captain Coe, called Minor's office, but was unable to reach her. He left a message with her secretary that the settlement funds should not be distributed until he talked to Minor. This request was not heeded.

When the Air Force eventually learned of the settlement, it filed a complaint with the Alaska Bar Association. After completing an investigation, the Disciplinary Hearing Committee of the Alaska Bar Association ("the Committee") recommended that Minor be given a private reprimand. Counsel for the Alaska Bar appealed this decision to the Board, which reviewed the record and recommended that Minor be publicly censured. The Board stated that it would have recommended suspension except for the Committee's finding that Minor's conduct did not involve "dishonesty, fraud, deceit, or misrepresentation."[3] The Board emphasized that Minor had undertaken a fiduciary obligation on behalf of the Air Force and then breached that obligation. The Board noted that public confidence in the bar is not enhanced when attorneys mishandle and divert other people's money. *See* Code of Professional Responsibility DR 9-102.

II. Disciplinary Sanctions

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Walton . . .

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rendered the motion to dismiss moot, he filed an opposition to the motion in wich the deed of trust he "created" was referred to[4] and attached thereto as Exhibit K.

Wade eventually discovered through depositions that Exhibit B was a reconstruction of the deed of trust, and filed a motion for sanction in the superior court. The superior court dismissed the amended complaint in Childs II without prejudice, and referred the matter to the district attorney for possible criminal prosecution under AS 11.30.300 (Preparing False Evidence)[5] and to the ABA for possible disciplinary action.

On August 5, 1980, the State Bar Disciplinary Administrator, pursuant to Bar Rule II-15(e), filed a Petition for Formal Hearing with the Disciplinary Board. That petition alleged that Walton's use of Exhibit B in the amended complaint filed in Childs II violated: (1) DR 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); (2) DR 1-102(A)(5) (engaging in conduct prejudicial to the administration of justice); (3) DR 7-102(A)(1) (asserting a position that will obviously serve merely to harass or maliciously injure another); (4) DR 7-102(A)(3) (concealing or knowingly failing to disclose that which by law is required to be disclosed); (5) DR 7-102(A)(6) (participating in the creation of evidence that is obviously false); (6) DR 7-106(C)(1) (alluding to a matter that has no reasonable basis of support in relevant admissible evidence); and (7) Alaska Bar Rule II-9 (obstructing the administration of justice).

On October 7, 1980, Walton filed his Response to Petition for Formal Hearing. Although in effect admitting that he had created Exhibit B, Walton denied that it was ever intended or

[continued on page 11]

Minor . . .

[continued from page 9]

This court is not required to adopt the Board's recommendations. *In re Simpson*, 645 P.2d 1223, 1228 (Alaska 1982). Alaska Bar Rule II-15(j) requires us to independently review the record and briefs filed below to determine whether the recommended sanction is appropriate.[4] Nonetheless, we have consistently held that factual findings by the Board are entitled to great weight. *In re Evans*, 661 P.2d 171, 175 (Alaska 1983); *In re Simpson*, 645 P.2d at 1226. In this case, the Board did not make its own findings of fact, but instead adopted the findings made by the Committee. Upon our review of the record, we conclude that the Committee's factual findings, as adopted by the Board, are supported by the record. We disagree, however, with the Board's conclusion that public censure is the appropriate sanction here. Based on our independent review, we conclude as a matter of law that Minor's conduct involved dishonesty and misrepresentation. Therefore, we impose suspension as the appropriate sanction.

In prescribing the appropriate sanction, each case must be judged on its own facts. *In re Minor*, 658 P.2d at 784. Determination of the sanction to be imposed should be based on a balanced consideration of all relevant factors. "These factors include whether there are mitigating circumstances, what efforts the respondent has made to remedy the problem, and the respondent's prior disciplinary record." *Id.*

The potentially mitigating circumstances in this case are Minor's relative inexperience and the complex and ambiguous nature of the situation in which she placed herself. Minor had only been practicing law for a year when she undertook to represent the Rubits and agreed to include the Air Force's claim in the Rubits' complaint. She had no previous experience with military medical liens. There was testimony before the Committee from another attorney which illustrated the professional dilemma of representing both a personal injury client and her medical care provider. This attorney's clients were in the same auto accident as were the Rubits, and one of them was also treated by the Air Force. Their complaint similarly included a claim on behalf of the United States for reimbursement. In testifying before the Committee, the attorney stated that he did not apply for a waiver of the Air Force claim until after he had settled the suit. He also stated that he did not consider the Air Force to be his client.

These factors, however, do not mitigate Minor's failure to take effective remedial action once she knew that the Air Force would not waive its claim. Although Minor's situation may have been problematic at first, there was no disagreement by the Committee or the Board that after she became aware of the Air Force's intransigence, she should have taken steps to fulfill her obligations to it. The Committee characterized her relationship with the Air Force as that of an attorney to a client, and concluded that she had engaged in unethical conduct toward her client. The Board, taking a slightly different tack, stressed that whether or not an attorney-client relationship existed, Minor had accepted a fiduciary obligation to the United States. We agree with the Board that when the Air Force demanded an accounting of its portion of the settlement and Minor ignored their repeated requests, she was guilty of more than mere negligence because she withheld or diverted funds which did not rightfully belong to her. Her inexperience and the difficulty of her situation do not excuse her breach of a fiduciary duty. Furthermore, the record does not indicate that Minor has ever reimbursed or attempted to reimburse the Air Force on its claim.

Neither the Committee nor the Board indicated that there has been any prior disciplinary action against Minor. Except for the sanction imposed in *In re Minor*, 658 P.2d at 784, it appears that Minor does not have a previous disciplinary record. *In re Minor* involved Minor's failure to respond to Bar Association requests for information about the Air Force's complaint; thus it cannot be properly considered a "prior" violation. Minor did not have any opportunity to reform her behavior between that case and this one; indeed, the facts which gave rise to a disciplinary sanction in *In re Minor* arose *after* the events under scrutiny in this case. Therefore, despite its serious nature, *In re Minor* does not constitute a prior disciplinary record for the purposes of this review.

The Board's recommendation of public censure reflects an insufficient consideration of the relevant factors involved. Minor's inexperience and the complex nature of the demands upon her are not sufficient to excuse her error in failing to take corrective action once it became clear that she was not released from her obligations to the Air Force. Whether or not she had a duty to the Air Force as its attorney, her duty as a fiduciary was clear. We have held that an attorney who receives money on behalf of another becomes a fiduciary to that person in the absence of an agreement to the contrary. If the money is converted by the attorney, there is a breach of fiduciary duty. *In re Cornelius*, 520 P.2d 76, 85 (Alaska 1974).

We agree with the Board that because Minor asserted a claim on behalf of the United States, part of the settlement she received should have been held in trust for the Air Force. Failing to do so was a diversion of funds. In *Cornelius*, the sanction imposed for similar conduct was suspension from practice for four months on one count and forty-two months on another. 520 P.2d at 86. The Board did not recommend that Minor be suspended, but we believe that such a sanction is warranted.

The Board declined to recommend suspension because the Committee specifically found that Minor's conduct did not involve "dishonesty, fraud, deceit or misrepresentation." Although we accord great weight to the Committee's factual findings, as adopted by the Board, we cannot agree with their interpretation of the events in this case.

Regardless of the conflict which Minor may have perceived in representing two apparently adverse interests, she had an obligation to share the settlement proceeds with the Air Force. We find as a matter of law that the Committee's conclusions are erroneous, and that Minor's conduct was dishonest. It is not disputed that she failed to inform the Air Force of the settlement and then her office misrepresented her actions. Accordingly, we hold that the appropriate sanction is to suspend Minor from the practice of law for ninety days. In addition, as a precondition to reinstatement to the bar, she is required to pay the Air Force the portion of the Rubits' settlement to which it is entitled.

IT IS ORDERED:

Michelle V. Minor's license to engage in the practice of law in Alaska is suspended for ninety days.[5] Her reinstatement is conditioned upon a showing that she has made full restitution of all amounts owed to the Air Force.

---

1. Alaska Bar Rule II-15(j) provides, in part, that:

> If the Board has recommended discipline as provided in Rule 12(a), (b) or (c), the Board shall submit the record, which shall include a transcript of all proceedings before the Board, with briefs to be submitted in accordance with Appellate Rule 212. . . .If neither the Respondent nor the Administrator objects to the conclusions and recommendations of the Board, the submission of briefs may be waived by stipulation, subject to approval by the Court. The Court shall review the record and briefs and enter an appropriate order, which may include a requirement that the Respondent reimburse the Association for reasonable costs and attorney's fees incurred by the Association in connection with the proceedings.

Neither the Respondent nor the Administrator objected to the Board's recommendations, and both sides waived the submission of briefs to this court.

2. Minor testified that following this she telephoned Captain Bandy of the Air Force who seemed to be in charge of the Air Force claim and told him, in effect, that she was no longer going to pursue the Air Force's claim. Bandy could not recall this conversation and stated that if it had occurred he would have made a note of it and that he had no such note. The hearing committee found on this point as follows:

> The respondent made no effective attempt to withdraw as counsel for either the Air Force or the Rubitses. The respondent made no effective attempt to clearly inform representatives of the Air Force that she would compromise and settle the lawsuit without continuing to protect their claim for reimbursement. The respondent failed to afford the Air Force effective, reasonable advance notice of her intentions, to enable it to protect its own interests by other means, if any such protection was in fact available to it at that time.

3. The Code of Professional Responsibility provides that a lawyer shall not "[e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation." DR 1-102.

4. *See* note 1 *supra* and *In re Evans*, 661 P.2d 171, 175 (Alaska 1983).

5. The Board may prescribe the date upon which suspension will commence.

Walton . . .

[continued from page 10]

represented to be "a true and correct copy of an existing document." He further denied that is conduct was unethical or that he had violated any disciplinary rule.

On August 5 and 6, 1981, a hearing was held by a Hearing Committee pursuant to Bar Rule II-15(f). In its Report, the Hearing Committee concluded that Walton had violated DR 1-102(A)(4) (intentional misrepresentation), DR 1-102(A)(5) (engaging in conduct prejudicial to the administraiton of justice) and DR 7-102(A)(1) (asserting a position where it is obvious that such would serve merely to harass the opposing party). The Committee's recommended discipline was to publicly censure Walton.

After learning of the contents of the Hearing Committee's Report, counsel for Walton and for the ABA agreed not to appeal the findings and recommendations to the Disciplinary Board. They further agreed to waive the submission of briefs and oral argument.

On August 28, 1981, the Disciplinary Board issued its Findings of Fact and Recommendations. The Board's findings differed from those of the Hearing Committee. First, in addition to the violations found by the Hearing Committee, the Board found that Walton violated DR 7-102(A)(3) (concealing or knowingly failing to reveal what Walton was legally required to disclose), DR 7-102(A)(6) (participating in the creating of obviously false evidence), DR 7-106(C)(1) (stating a matter before a tribunal that Walton had no reasonable basis to believe was supported by admissible evidence) and Bar Rule II-9 (obstructing the administration of justice). Second, the Board recommended suspending Walton from the practice of law for eighteen months and that he reimburse the ABA for reasonable costs and attorney's fees, pursuant to Bar Rule II-15(j).

On September 8, 1981, Walton moved that the board reconsider its findings and recommendations. The motion was denied and the matter is now before this court.

I. Due Process Claims

We have previously stated that when an attorney is "subject to suspension or disbarment, the disciplinary proceedings must conform to the requirements of due process under both the federal and Alaska constitutions." *In re Robson*, 575 P.2d 771, 773-4 (Alaska 1978). Walton contends that he has been denied due process in a number of respects. We will address these assertions individually.

A. Commingling of Functions by Rule and Practice

The due process clauses of both the federal and Alaska constitutions require that a disciplinary hearing be conducted before an impartial tribunal. *McGinnis v. Stevens*, 543 P.2d 1221, 1228 (Alaska 1975). Walton first argues that the Alaska Bar Rules allocate responsibility in disciplinary matters in such a way that there is an impermissible commingling of prosecutorial and adjudicatory functions. Rule II-13(c) provides:

> The Board shall have the power and duty:
>
> (1) To appoint a State Bar Disciplinary Administrator (hereinafter referred to as "Administrator").
>
> (2) To supervise the investigation of all complaints against lawyers and to supervise the Administrator and his or her staff.
>
> (3) To retain legal counsel.
>
> (4) To hear appeals from the recommendations of Hearing Committees, and to modify the findings of fact, conclusions of law or proposed orders of Hearing Committees, regardless of whether there has been an appeal to the Board, and without regard to the discipline recommended by the Hearing Committee.

Rule II-14(a) states that the Administrator serves at the pleasure of the Board, and further provides that the Administrator shall:

> (7) In his discretion, prosecute complaints and appeals. . . .
>
> (10) Keep the Board fully informed about the progress of all matters in his charge.
>
> (11) Perform other duties set forth herein or assigned by the Board.

According to Walton, the above rules make the Board in effect both prosecutor and judge, which, he claims, is unconstitutional.

Due process requires some separation between those persons prosecuting the complaint and those adjudicating it; the prosecutor, who has a "probable partiality," should not be in a position to influence the decision makers. *In re Robson*, 575 P.2d 771, 774 (Alaska 1978). There may, however, be some combination of these functions within a particular agency. In *In Re Cornelius*, 520 P.2d 76, 83-4 (Alaska 1974), we stated:

> There is . . . no merit to the claim that the combination of functions of the state bar attorney, alleged to be that of complainant, prosecutor and adjudicator, violated due process or AS 44.62.630. The combination of investigative and judicial functions within an agency does not violate due process; a board may make preliminary factual inquiry on its own in order to determine if charges should be filed.

Similarly, in *In re Hanson*, 532 P.2d 303, 306 (Alaska 1975), we held that the rules of the Commission on Judicial Qualifications, which allowed the Commission both to conduct a preliminary investigation and to adjudicate facts, did not violate due process. In light of these precedents, we are not persuaded that the allocation of responsibility under the aforementioned sections of Rule II-13 and Rule II-14 violate due processes.

This does not mean that proceedings conducted pursuant to the above Rules are immune from constitutional attack. In *In re Robson*, 575 P.2d 771 (Alaska 1978), we held that the presence of Bar Counsel during the Disciplinary Board's deliberations violated the respondent's due process rights, even though Bar Counsel had not participated in the actual prosecution of the case before the hearing committee, or taken an active part in the Board's deliberations. *Id.* at 773-75.

Walton's claim of impropriety in the instant case is directed at the role played by **Karen Hunt**, the ABA's then President.[6] Bar Rule II-15(a) states that the President shall select members of Hearing Committees, subject to the Board's ratifaction. In addition, as a member of the Board of Governors, the President is a member of the Disciplinary Board. Bar Rule II-13(a). Hunt, among other things, acknowledged receipt of Walton's Motion for Reconsideration of the Board's findings and recommendations, and denied Walton's Motion for Continuance, an action that was later ratified by the Board. Walton is correct that Hunt's performance of these administrative duties aligned her with the adjudicatory arm of the ABA. The only alleged commingling of roles by Hunt, however, is based on the assertion that she once intended to represent the ABA in the proceedings before this court.

Apparently because it was suggested by Walton that her representation of the ABA might pose a conflict of interest, Hunt never appeared on behalf of the ABA. The ABA was represented before this court by **John R. Lohff**, a private practitioner acting as Bar Counsel. While it may have been poor judgment for Hunt to have even considered representing the ABA before this court, we do not think that her having done so was sufficient to taint the proceedings. Her action certainly falls far short of the impropriety that was held to violate due process in *In re Robson*, 575 P.2d at 773-775. Accordingly, Walton's due process argument, based upon commingling of functions, fails.

B. Non-Appearance Before the Board

Walton contents that the Board's departure from the Hearing Committee's findings and recommendations without calling for briefs or oral argument denied him due process. The Bar Rules expressly afforded Walton the right to submit briefs to the Board and to appear before it for oral argument. Bar Rule II-15(i). Walton chose not to, however, and instead, with counsel for the ABA, waived appeal to the Board as well as oral argument and submission of briefs. Bar Rule II-13(c)(4) confers upon the Board the power and duty

> to modify the findings of fact, conclusions of law or proposed orders of Hearing Committees, regardless of whether there was an appeal to the Board, and without regard to the discipline recommended by the Hearing Committee.

We believe that the Rules clearly afforded Walton an opportunity to be heard by the Board. Furthermore, since Walton was on notice that the Board might depart from the Hearing Committee's findings and recommendations, whether or not there was an appeal, Walton waived his right to be heard, by entering into the stipulation.

C. Membership of Board

Before these disciplinary proceedings were initiated, the district attorney sought an indictment against Walton for the same conduct at issue here. The indictment was dismissed because of improprieties occurring before the grand jury. No further indictment was sought. At the time the District Attorney's Office was prosecuting Walton, **Elizabeth Kennedy**, one of the members of the Disciplinary Board, was employed by the Department of Law in the civil section of the Attorney General's Office. Walton claims that the Disciplinary Board was, therefore, improperly constituted.

In support of his argument, Walton cites Canon 3 C(1)(b) of the Code of Judicial Conduct, which states that a judge should recuse himself when "a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter." However, even if the Code of Judicial Conduct applies to members of the Disciplinary Board, we do not believe that the entire Department of Law should be considered one law office, or that all attorneys employed thereby should be considered to be practicing law together for purposes of Canon 3C(1)(b). Although within the same department, the Attorney General's Office and the District Attorney's Office operate separately, and there is no indication that Kennedy had any part in the prosecution of Walton. Thus, the Disciplinary Board was not improperly constituted. *Cf. Keel v. State*, 552 P.2d 155 (Alaska 1976) (former assistant district attorney not disqualified from acting as judge in a criminal action).

D. Standard of Proof

According to Walton, the required standard of proof in this case is proof by "clear and convincing evidence." Proof by a mere preponderance, he argues, amounts to a denial of due process of law.

Alaska Bar Rule II-15(f) provides, partly: "The Administrator shall have the burden . . . of demonstrating by the preponderance of the evidence that the Respondent has, by act, or omission, committed an offense. . . ." The use of this standard in bar disciplinary matters was approved by this court in *In re Robson*, 575 P.2d 771, 776-77 (Alaska 1978). Although the respondent in *Robson*, unlike Walton, did not argue that use of the preponderance standard violated his right to due process, Walton's argument in the present case fails to persuade us that he is entitled to be judged by a different standard.

Walton cites no authority holding that proof by clear and convincing evidence is required as a matter of federal due process, and we have found none.[7] Nor does the authority that he cites persuade us that such is required under the state constitution.[8]

II. Fabrication of False Evidence

Walton contends that, as a matter

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of law, he did not create false evidence in violation of DR 7-102(A)(6), since, according to Walton, an unverified complaint is not evidence. The Bar Association contends that the term "evidence," in this context, should not be limited to its technical meaning under the Rules of Evidence. According to the ABA, DR 7-102(A)(6) should apply to any false document concerning a critical aspect of an ongoing lawsuit, produced by manipulations outside the courtroom.

Like the ABA, we believe that the term "evidence," in this context, was meant to apply to a broader category of items than those admissible at trial under the technical requirements of the Rules of Evidence. Documents attached to pleadings, although not always admissible evidence, are often relied upon by the court and counsel in matters of importance. Opposing counsel, for example, upon seeing a document such as the one in the case at bar, might well conclude that his client's position was untenable and so advise him, despite the fact that the document was fabricated. The danger is that others will be misled, to their detriment, with a potential for harm as great as if the item had been admissible at trial.

III. **Evidence of Wrongdoing**

Where, as here, findings of fact entered by the Disciplinary Board are challenged in this court, "the respondent attorney bears the burden of proof in demonstrating that such findings are erroneous." **In re Simpson,** 645 P.2d 1223, 1227 (Alaska 1982). And,

> [t]hough this court has the authority, if not the obligation, to independently review the entire record in disciplinary proceedings, findings of fact made by the Board are nonetheless entitled to great weight. The deference owed to such findings derives from the responsibility to conduct disciplinary proceedings which this court has delegated to the Bar Association.

Id. at 1226-1227.

Upon review of the entire record, we conclude that the findings of the Board, in all material respects, are supported by the evidence. The findings and recommendations of the Board are AFFIRMED. Respondent Peter B. Walton is ordered suspended from the practice of law for a period of eighteen months, effective 30 days after the publication date of our opinion. Respondent is ordered to comply with the requirements of Rule II-26, Alaska Bar Rules.

*Carpeneti, Superior Court Judge, sitting by assignment made pursuant to Article IV, Section 16, of the Constitution of Alaska.

[1]In disciplinary matters, the Board of Governors of the Alaska Bar Association is referred to as the "Disciplinary Board." Rule II-13(a), Alaska Bar R.

[2]The Board's findings and recommendations are attached hereto as Appendix "A."

[3]Similar references to Exhibit B are also made in paragraphs 5, 8 and 12 in the amended complaint.

[4]*See* Memorandum In Opposition To Defendants' Motion to Dismiss, p. 3, 4, 9. It bears noting that the ABA's Petition For Formal Hearing alleges only that Walton should be disciplined for his conduct in connection with the amended complaint (i.e., Exhibit B), and makes no mention of the opposition memorandum filed by Walton (i.e., Exhibit K).

[5]Walton was indicted for violating AS 11.30.300, but the indictment was subsequently dismissed because of numerous improprieties that occurred during the grand jury proceedings.

[6]Walton briefly indicates that there is an "internal record memoranda file" available to the attorney prosecuting the disciplinary matter, the Bar Association and the Board, but not available to him. Walton's request for access to the file was denied apparently on the grounds that it was privileged work product and because the Bar Rules do not provide for such disclosure. Since the record fails to demonstrate that any member of the Board had access to the file, we elect not to consider this issue.

[7]Walton's argument fails to make clear whether he relies upon the due process guaranteed by the Alaska Constitution or that contained in the Constitution of the United States. The two guarantees are not necessarily the same. South Dakota v. Neville, 74 L.Ed.2d 748 (1983).

[8]In re H anson, 532 P.2d 303, 308 (Alaska 1975), held that proof by clear and convincing evidence is required in disciplinary proceedings against a judge, for alleged violations of the Code of Judicial Conduct. Today's decision affirms a lesser standard of proof in attorney discipline cases.. *Hanson,* however, was not based on due process grounds. Also, in *Hanson* the applicable statutes and rules contained *no* prescribed standard. *Id.* at 307. Here, there is a prescribed standard: proof by a preponderance of the evidence. Rule II-15(f), Alaska Bar R.

In light of today's ruling, we may be required to reevaluate our holding in *Hanson* if and when we are presented with another case involving disciplinary proceedings against a judge.

BEFORE THE DISCIPLINARY BOARD
ALASKA BAR ASSOCIATION

In the Disciplinary Matter Involving:

PETER B. WALTON,

Respondent-Attorney.

No. 78-13

FINDINGS OF FACT AND RECOMMENDATIONS OF THE DISCIPLINARY BOARD OF THE ALASKA BAR ASSOCIATION

Based on the evidence received the Board makes the following findings:

1. Respondent PETER B. WALTON is, and at all times relevant to this proceeding has been, an attorney at law admitted to practice in the State of Alaska and a member of the Alaska Bar Association.

2. During an extended period, which included the period of April and May of 1978, the Respondent represented the Aleut Corporation in litigation against L. William Childs and Patricia A. Childs.

3. On April 14 and April 15 of 1978, in the manner described more fully below, the Respondent prepared a document which appeared to be a photocopy of a Deed of Trust executed on March 2, 1973, by L. William Childs and Patricia A. Childs as Trustors to Alaska Title Guaranty Company as Trustee for the benefit of the Aleut Corporation.

4. The document referenced in Finding 3 above was prepared by utilizing a photocopy of a Second Deed of Trust of the same date from which the Respondent deleted, by means of "white-out" or some other white obliterating liquid, the word "Second" from above the caption "Deed of Trust," a subordination provision reflecting that the Deed of Trust was second and subordinated to a Deed of Trust executed for the benefit of Alaska Mutual Savings Bank and all recording data, including graphite marks utilized by the recording office to highlight the seal of the notary public.

5. Preparation of the document reflected extreme care in the utilization of the whiting material, particularly in the vicinity of the notary seal, and in photocopying so that the alterations were not detectable.

6. Respondent attached the fabricated document which appeared to be photocopy of an actual First Deed of Trust as Exhibit B to an "Amended Complaint" and as Exhibit K to a "Memorandum in Opposition of Defendant's Motion to Dismiss or Motion for Summary Judgment" prepared in conjunction with services rendered by the Respondent in the *Aleut Corporation v. Childs* cases.

7. In the text of the Amended Complaint, the document prepared by the Respondent and attached as Exhibit B was described first as a "copy of that copy" of the Deed of Trust which had been executed and delivered to the Aleut Corporation. The document was then described as "a copy" of "the original Deed of Trust." Exhibit B was referenced numerous times in the Amended Complaint and none of the references was made with ambiguous language that could be construed to advise that the exhibit was a document created for illustrative purposes.

8. The memorandum to which the fabricated document was attached as Exhibit K referred to that exhibit three times, none of which references was in an ambiguous form that might be construed to advise that the document was recreated for illustrative purposes.[1]

9. Following preparation of the fabricated Deed of Trust and its attachment to the referenced pleadings, those pleadings were reviewed by **Lee Holen,** a law clerk performing services in the Respondent's offices on a contract basis, and after such review Ms. Holen expressed her concern to the Respondent that his description of the document might be misunderstood. That expression of concern was "brushed off" by the Respondent.

10. On April 25, 1978, copies of the pleadings to which the fabricated Deed of Trust was attached were served upon Hugh Gerald Wade, attorney for L. William Childs, after hours by taxi at his home. The original pleadings were not filed with the court until May 4, 1978.

11. During the deposition of Frank Cowden, Vice-President for the Aleut Corporation, on May 5, 1978, Cowden was asked by Childs' attorney on direct examination if he had borught with him any document in compliance with a subpoena. Cowden produced the fabricated Deed of Trust with a communication from Respondent attached to it. This memorandum, prepared April 14, 1978, was produced with an express waiver of the attorney-client privilege, despite opposing Counsel's statement that it need not be produced. It read:

> Dear Frank: Guess what? Here's the smoking gun. Either Childs falsely testified when he said he gave Lily a copy of his deed of trust on March 2nd, or he falsely testified when he said it hadn't been altered after executed it [sic]. But in that case he will have difficulty explaining why he concealed the fact of its alteration. Cheers, Peter Walton.

Nowhere in the memorandum does Respondent refer to the document as a fabrication.

12. During the deposition of Frank Cowden, Vice President for the Aleut Corporation, on May 5, 1978, following evasive testimony on direct examination which made it appear that the fabricated Deed of Trust attached as a copy of the pleadings was or may have been a copy of an actual Deed of Trust in the possession of the Aleut Corporation or the Respondent, the Respondent, through leading questions on cross-examination, elicited testimony to establish that the Deed of Trust attached as Exhibit B to the Amended Complaint and as Exhibit K to the memorandum was fabricated by the Respondent. At no time prior to this cross-examination did Respondent reveal by any oral or written communication that the "copy" of the Deed of Trust attached as an exhibit to various pleadings filed with the Court and delivered to opposing Counsel was, in fact, a fabricated document.

13. Respondent intended that the fabricated document attached to the Amended Complaint as Exhibit B would be understood to be a copy of an existing photocopy of an actual Deed of Trust. This finding is based upon the care exercised by Respondent in the preparation of the fabricated Deed of Trust, the precise nature of the references in the pleadings referring to the exhibit, the repeated references in the Amended Complaint and the Memorandum in Opposition to the Motion to Dismiss, Respondent's decision to ignore the warnings of a colleague regarding the possible misinterpretation of the references to the document, the text of the "smoking gun" memorandum, Respondent's failure to notify opposing counsel or the court that the document was a fabrication, the findings set forth above and the record herein.

14. The document attached as Exhibit B

[continued on page 13]

[continued from page 12]

to the Amended Complaint and Exhibit K to the Memorandum in Opposition to a Motion to Dismiss was not in the nature of an illustrative exhibit designed to demonstrate to the court or opposing counsel the Respondent's interpretation of the evidence or a theory of Respondent's that was supportable by evidence.

Based on the above findings the Board recommends the following

CONCLUSIONS

1. Respondent violated Disciplinary Rule 1-102(A)(4) of the Code of Professional Responsibility by engaging in conduct involving intentional misrepresentation in that he intentionally misrepresented in pleadings served on opposing counsel and filed with the court that a document attached as an exhibit was a copy of an actual Deed of Trust when in fact it was fabricated by the Respondent.

2. Respondent violated Disciplinary Rule 1-102(A)(5) of the Code of Professional Responsibility by engaging in conduct prejudicial to the administration of justice.

3. Respondent violated Disciplinary Rule 7-102(A)(1) of the Code of Professional Responsibility by asserting a position (i.e., that a copy of an existing copy of an actual Deed of Trust was attached as an exhibit), when it was obvious that such action would serve merely to harass the opposing party.

4. Respondent violated Disciplinary Rule 7-102(A)(3) of the Code of Professional Responsibility by concealing or knowingly failing to disclose that which he is required by law to reveal.

5. Respondent violated Disciplinary Rule 7-102(A)(6) of the Code of Professional Responsibility by participating in the creation of evidence when it was obvious that the evidence was false.[2]

6 Respondent violated Disciplinary Rule 7-106(C)(1) of the Code of Professional Responsibility by stating a matter before a tribunal that he had no reasonable basis to believe was supported by admissible evidence.[3]

7. Respondent vilated Alaska Bar Rule II-9.

Recommended Discipline

It is the recommendation of the Disciplinary Board that Respondent be suspended from the practice of law pursuant to Alaska Bar Rule II-12(b) for a period of eighteen months. The recommendation of the Board is based upon the serious nature of Respondent's misconduct and not upon the number of disciplinary rules his conduct violated. It is the further recommendation of the Board that the Court order that Respondent reimburse the Association for reasonable costs and attorney fees incurred herein pursuant to Bar Rule II-15(j) based upon the statement of costs and attorney fees submitted herewith.

RESPECTFULLY SUBMITTED by the Disciplinary Board of the Alaska Bar Association this 28th day of August, 1981.

Andrew J. Kleinfeld
Chairman
Richard D. Savell
Recorder
Harold M. Brown
Mary K. Hughes
Elizabeth Page Kennedy
William B. Rozell

[1]The Area Hearing Committee determined as follows:

The Petition did not assert that the Respondent committed misconduct arising from submission of Exhibit K to the motion and the Area Hearing Committee took no action in that regard. The Committee determined, nevertheless, that utilization of the re-created document in conjunction with the Memorandum in Opposition to the Motion to Dismiss is properly considered as bearing upon the Respondent's intent.

The Board Concurs with this determination.

[2]The Board does not consider the actual submission or admissibility of evidence as determinative of this issue. For example, a violation would occur if a lawyer impressed a murder victim's fingerprints on a gun, left the gun at the murder scene, departed and thereafter took no active role.

[3]The Board concludes that an appearance before a tribunal may be in written as well as verbal form.

RABINOWITZ, Justice, joined by MATTHEWS, Justice, dissenting.

I dissent from the majority's rejection of Walton's due process claim as it relates to the applicable burden of proof in bar disciplinary matters. I further dissent from the majority's affirmance of the Disciplinary Board's findings of fact regarding Walton's alleged violation of the various Disciplinary Rules involved in this proceeding. Employing a clear and convincing burden of proof, my review of the record persuades me that the Bar has only demonstrated that Walton's conduct was both negligent and grossly negligent, thus violative of DR 1-102(A)(5) and (6). I would therefore impose the sanction of a public censure.

I. Whether the "Preponderance of the Evidence" standard is violative of due process under the Alaska Constitution.

Walton's position is that the use of a preponderance of the evidence standard called for by Alaska Bar Rule II-15 violates due process under Alaska's Constitution in disciplinary proceedings, particularly in those proceedings in which fraudulent conduct is charged. In my view, the United States Supreme Court's decision in *Santosky v. Kramer*, 455 U.S. 745, 71 L.Ed.2d 599 (1982) furnishes persuasive support for Walton's position. In *Santosky*, the Court was called upon to determine whether the "preponderance of the evidence" or "clear and convincing" standard should be applied in parental rights termination proceedings. Applying the three factors enunciated in *Mathews v. Eldridge*, 424 U.S. 319, 335, 47 L.Ed.2d 18, 33 (1976), which govern a determination of what process is due under the Fourteenth Amendment in any given fact situation,[1] the *Santosky* court concluded that the first factor, the importance of the individual interests at stake, dictated that a clear and convincing standard be applied:

> This Court has mandated an intermediate standard of proof—"clear and convincing evidence"—when the individual interests at stake in a state proceeding are both "particularly important" and "more substantial than mere loss of money." *Addington v. Texas*, 441 U.S., at 424, 60 L.Ed.2d 323, 99 S. Ct. 1804, quoting *In re Winship*, 397 U.S. at 365-366, 25 L.Ed. 2d 368, 90 S. Ct. 1068, 51 Ohio Ops. 2d 323, the Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with a "significant deprivation of liberty" or "stigma." 441 U.S., at 425, 426, 60 L.Ed. 2d 323, 99 S. Ct. 1804. *See, e.g., Addington v. Texas, supra*, (civil commitment); *Woodby v. Ins*, 385 U.S., at 285, 17 L.Ed.2d 362, 87 S. Ct. 483 (deportation); *Chaunt v. United States*, 364 U.S. 350, 353, L.Ed. 2d 120, 81 S. Ct. 147 (1960) (denaturalization); *Schneiderman v. United States*, 320 U.S. 118, 125, 159, 87 L.Ed. 1796, 63 S. Ct. 1333 (1943) (denaturalization).

455 U.S. 745, 71 L.Ed.2d 599 at 608-09. I think it apparent that the individual interests at stake in a bar disciplinary proceeding are "particularly important and more substantial than the mere loss of money" to the attorney involved. The proceedings stigmatize the attorney and threaten him with a significant deprivation of liberty.

The second *Eldridge* factor, whether the Bar Rule's chosen standard creates a risk of error, again weighs in favor of adopting the clear and convincing evidence standard. This is evidenced by the facts of the instant case. If Walton is indeed innocent of the allegations made against him, the risk of wrongful discipline would be significantly reduced by using the clear and convincing evidence standard.

Concerning the third *Eldridge* factor, it is clear that the state has an interest in protecting society from attorneys who have violated bar disciplinary rules.[2] The Supreme Court has characterized the preponderance of the evidence standard as placing the risk of error equally upon the parties. When adopting the clear and convincing evidence standard in *Addington v. Texas*, 441 U.S. 418, 427, 60 L.Ed.2d 323 (1978), the Supreme Court stated "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." The dispositive inquiry thus becomes whether the potential injury to the attorney from an incorrect determination of a violation of the disciplinary rules is "significantly greater" than the possible harm to the state caused by: (1) an incorrect determination that an attorney has not violated the rules, and (2) the increased burden on the state of meeting the higher standard of proof. In my view, the potential injury to the attorney is significantly greater, and therefore I would hold that due process under Alaska's Constitution requires the use of the clear and convincing standard rather than the preponderance of the evidence standard.[3]

II. Evidence of wrongdoing.

Review of the Disciplinary Board's findings, pursuant to the standards articulated in *In re Simpson*, 645 P.2d 1223, 1227 (Alaska 1982), has convinced me that Walton did not intend to deceive. On the other hand, I conclude that the evidence in the record clearly and convincingly demonstrates that Walton's conduct was both negligent and grossly negligent. He should have known that the language used in the amended complaint—"A copy of a copy"—would be taken to mean a photocopy. He thus violated DR 1-102(A)(5) and (6).[4]

Given my conclusion that Walton did not intend that the fabricated document would be taken to be a photocopy of an existing document, it follows that Walton did not violate DR 1-102(A)(4) (intentional misrepresentation); DR 1-102(A)(1) (asserting a position merely to harass); DR 7-102(A)(3) (concealing or knowingly failing to disclose that which should be revealed); or DR 7-102(A)(6) (creation of false evidence). In addition, I think the record demonstrates that Walton did believe he could prove that an alteration along the lines of the exhibit he prepared had been accomplished by Childs.

My reasons for the foregoing conclusions are the following:

1. Walton did not use the fabricated document in the deposition of Childs even though it was in existence at that time. If he had had any intent of using the document as evidence it would seem that he would have confronted Childs with it.

2. It is difficult to understand what Walton had to gain by foisting the fabricated copy off as an actual photocopy. It is undisputed that the document Childs recorded was materially different than the document Childs signed. That is all that the fabricated document, if it were taken to be real, would demonstrate.

3. There was little chance of any deception succeeding. Walton did not surreptitiously fabricate the document but did so in the presence of Cowden and of Lee Holen, a contract law clerk. The record is not clear on whether other people were present, but is clear that opposing counsel, Wade, had heard that Walton had been using some white-out and a xerox machine in connection with the case, before Wade even received the fabricated document.

4. When ambiguous responses were given by Cowden at his deposition (which was taken only one day after the fabricated document had been filed with the court) Walton promptly elicited the truth of the matter on cross examination.[5]

5. The care exercised by Walton in preparing the exhibit says as much

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about Walton's compulsive nature as about any intent to deceive.

6. Walton's "decision to ignore the warnings of a colleague regarding the possible misinterpretation of the reference to the document" is again equally consistent with innocence as with guilt.

7. The "smoking gun" memorandum was a memo from Walton to Cowden to which the exhibit was attached. It stated, "Dear Frank: Guess what? Here's the smoking gun. Either Childs falsely testified when he said he gave Lily a copy of his deed of trust on March 2nd, or he falsely testified when he said it hadn't been altered after [executing] it. But in that case he will have difficulty explaining why he concealed the fact of its alteration. Cheers, Peter Walton." The memo was not a communication to the court or opposing counsel. It was a communication to a client that could be clarified subsequently. It does not constitute evidence of any intent to mislead the court or opposing counsel.

8. The fabricated document was attached to the complaint and to a memorandum in opposition to a motion to dismiss which was filed on the same day as the complaint. It appears that the motion to dismiss was of no particular consequence and that Walton was told by Wade before the opposition was filed that Wade was going to withdraw the motion to dismiss.[6]

III. **Sanction.**

Given my conclusion that the evidence clearly and convincingly shows that Walton violated DR 1-102(A)(5) (conduct prejudicial to the administration of justice) and DR 1-102(A)(6) (conduct that adversely reflects on his fitness to practice law), I would issue a public censure.

[1]The *Eldridge* court observed:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335, 47 L.Ed.2d at 33.

[2]A principal purpose of attorney disciplinary proceedings is protection of the public and maintenance of the integrity of the judicial system. *See,* In re Kleindeinst, 644 P.2d 249, 256 (Ariz. 1982) (en banc) ("[d]iscipline against an attorney has two purposes: (1) to protect the public from unethical attorneys; and (2) to deter other attorneys from engaging in unethical conduct"); District of Columbia Bar v. Kleindeinst, 345 A.2d 146, 148 (D.C. App. 1975) (per curiam) (a purpose of disciplinary action is partly to maintain integrity of profession in eyes of public); State v. Scott, 639 P.2d 1131, 1134 (Kan. 1982) (per curiam) ("disciplinary proceedings . . . are a species unto themselves which cannot be characterized as either a civil action or a criminal proceeding. . . . Although the errant attorney may receive punishment, the purpose of these proceedings is primarily for the protection of the courts, the legal profession, and the general public from those who have been lacking in professional responsibility.").

[3]Thirty-one states and the District of Columbia use the clear and convincing standard. *See,* for example:

Alabama—Hunt v. Disciplinary Board of Alabama State Bar, 381 So.2d 52 (Ala. 1980).

Arizona—Matter of Rubi, 652 P.2d 1014 (Ariz. 1982).

California—Price V. State Bar of California, 638 P.2d 1311 (Cal. 1982) ("convincing proof to a reasonable certainty").

Colorado—People v. Howard, 364 P.2d 380, (Colo. 1961) ("substantial, clear, convincing and satisfactory").

Delaware—In re Morford, 80 A.2d 429 (Del. 1951).

D.C.—Matter of Thorup, 432 A.2d 1221 (D.C. 1981).

Florida—The Florida Bar v. Ragano, 403 So.2d 401 (Fla. 1981).

Hawaii—Disciplinary Board of Hawaii Supreme Court v. Kim, 583 P.2d 333, (Ha. 1978) ("and beyond reasonable doubt").

Illinois—In re Jafree, 444 N.E.2d 143 (Ill. 1982).

Iowa—Committee on Professional Ethics and Conduct of Iowa State Bar Association v. Thompson, 328 N.W.2d 520 (Iowa 1983) ("convincing preponderance").

Kansas—State v. Scott, 639 P.2d 1131 (Kan. 1982) ("substantial, clear, convincing and satisfactory")

Louisiana—Louisiana State Bar Association v. Mitchell, 375 So.2d 1350 (1979).

Maine—National Center for Professional Responsibility, State Disciplinary Enforcement Systems Structural Survey 61 (1980).

Maryland—Attorney Grievance Commission of Maryland v. Kerpelman, 438 A.2d 501 (Md. 1981).

Minnesota—In re Gillard, 271 N.W.2d 785 (Minn. 1978).

Mississippi—Netterville v. Mississippi State Bar, 397 So.2d 878 (Miss. 1981).

Montana—Matter of Goldman, 588 P.2d 964 (Mont. 1978) (attorney has burden "to show that charges are not sustained by convincing proof and to a reasonable certainty").

Nevada—Copren v. State Bar, 183 P.2d 833 (Nev. 1947).

New Hampshire—Edes' Case, 395 A.2d 498 (N.H. 1978).

New Jersey—In re Sears, 364 A.2d 777 (N.J. 1976).

New Mexico—In re Sedillo, 498 P.2d 1353 (N.M. 1972).

N. Carolina—Matter of Palmer, 252 S.E.2d 784 (1979).

North Dakota—Matter of Lovell, 292 N.W.2d 76 (N.D. 1980).

Oregon—In re Conduct of Paauwe, 654 P.2d 1117 (Ore. 1982).

Rhode Island—Carter v. Walsh, 406 A.2d 263 (R.I. 1979).

S. Carolina—In re Friday, 208 S.E.2d 535 (S.C. 1974).

South Dakota—In re Goodrich, 98 N.W.2d 125 (S.D. 1959).

Utah—In re McCullough, 95 P.2d 13 (Utah 1939) ("convincing proof and fair preponderance").

Virginia—Tenth District Committee of Virginia State Bar v. Baum, 193 S.E.2d 698 (Va. 1973).

W. Virginia—Committee on Legal Ethics of West Virginia State Bar v. Pence, 240 S.E.2d 668 (W. Va. 1977) ("full, clear, and preponderating evidence").

Wisconsin—Matter of Sedor, 245 N.W.2d 895 (Wis. 1976).

Wyoming—State Board of Law Examiners v. Goppert, 205 P.2d 124 (Wyo. 1949).

See also Model Rules for Lawyer Disciplinary Enforcement, ABA Standing Committee on Professional Discipline and the National Center for Professional Responsibility (1979). Rule 17C of these model rules provides as follows:

> **Standard of Proof.** Formal charges of misconduct, petitions for reinstatement, and petitions for transfer to and from disability inactive status shall be established by clear and convincing evidence.

[4]DR 1-102(A)(5) and (6) read as follows:

Misconduct

(A) A lawyer shall not:

. . . .

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

[5]Further, at the evidentiary hearing counsel for the Bar Association, while clearly leaving room for the local disciplinary board to find intentional conduct, suggested that what was involved was unintentional conduct: "Now I would suggest that the conduct of Mr. Walton was misrepresentation. Perhaps at the most generous an accidental misrepresentation, but it still amounted to a misrepresentation to the court." [Tr. 220] "Now whether there was a specific intent to deceive the bar association doesn't intend to say yes, there was a specific intent to deceive, though some of the allegations in the petition might be read to say that." [Tr. 222] . . . "Now clearly as is reported and is responded to by the second trial brief from Mr. Boyko on behalf of Mr. Walton, the case of *State v. Nicklaus* is a far more serious case of misstatements to a court system but the principle still applies and is still approved by this court. The serious misleading in pleadings is disciplinary—is a basis for discipline—disciplinary matter and something for which the bar associaiton has brought Mr. Walton to this proceeding and something for which I suggest that you should find is a basis for discipline of Mr. Walton. There is a spectrum of appropriate penalties based on the indication of intent to deceive in the case law. Clearly in the cases where there is a strong indication of an intent to deceive and a continuing pattern of deception both before a court and the hearing committee following it, it is a far stronger basis for suspension and disbarment. The evidence is not here clear that there is an intentional deception on the part of Mr. Walton, except that he intentionally included this document in his pleadings and intentionally used the language that he did. As to whether he intended to deceive the court there's very little evidence of that except that again he intentionally included it in the pleadings which were filed with the court. Obviously when faced with it or when the question about these documents became apparent, he took steps to clear up the matter, and whatever you believe about his other actions, this certainly should be considered in his behalf. But he placed in the court basket downstairs two pleadings which referred to 2—2 times to the same exhibit, and actually many more times but added the same exhibit twice. And that exhibit was a copy of a copy or an exhibit for which he talked about, which was not anything but what he'd built together out of his belief from Mr. Childs' testimony but it's something he added, pled and deceived if only by actual use of inept language, of mistaken language, of poor judgment language, but it amounted to deception and interference with justice and a basis for discipline. Thank you."

[6]The foregoing paragraphs numbered 6 through 8 are in reference to the Disciplinary Board's findings of fact that:

> Respondent intended that the fabricated document attached to the Amended Complaint as Exhibit B would be understood to be a copy of an existing photocopy of an actual Deed of Trust. This finding is based upon the care exercised by Respondent in the preparation of the fabricated Deed of Trust, the precise nature of the references in the pleadings referring to the exhibit, the repeated references in the Amended Complaint and the Memorandum in Opposition to the Motion to Dismiss, Respondent's decision to ignore the warnings of a colleague regarding the possible misinterpretation of the references to the document, the text of "smoking gun" memorandum, Respondent's failure to notify opposing counsel or the court that the document was a fabrication, the findings set forth above and the record herein.

[continued from page 5]

pointed from the local list by the local court for arraignment and all bail review hearings or any other hearing required before omnibus hearing.

(2) At the same time, an attorney will also be appointed from the third district list for all matters beyond bail review hearings through trial. Rural court personnel will contact the Anchorage superior court calendaring division for the next name on the third district list. The attorney appointed from the third district list may not be from any location other than Anchorage or the court location where the case is filed. The trial attorney will be responsible for all aspects of the assigned case in the trial courts through notice of appeal, if any, regardless of where the defendant is to be tried.

c. In cases filed in Anchorage where the offense occurred outside of Anchorage, appointments shall be made from the third district list. The attorney appointed from the third district list may not be from any location other than Anchorage or the court location where the case is to be tried. The trial attorney will be responsible for all aspects of the assigned case in the trial courts through notice of approval, if any, regardless of where the defendant is tried.

d. In Anchorage cases, appointments shall be made from the third district list and shall only be Anchorage attorneys. The attorney shall be responsible for the case through final disposition and notice of appeal.

3. Attorney Fees:

a. Fees for arraignment and bail review hearings shall not exceed $40 per hour, with a maximum of $50 total for all services.

b. The trial attorney will be reimbursed according to Administrative Rule 12.

4. In the interest of justice and/or administrative efficiency, a judicial officer may deviate from the appointment procedure.

DATED at Anchorage, Alaska this 23rd day of September 1983.

Mark C. Rowland
Presiding Judge
Third Judicial District

New Domestic Relations Procedures

In order to promote more efficient utilization of judicial time and to ensure that litigants are complying with Rules of Procedure, the following is provided to assist domestic relations practice in Alaska.

Most of the procedures set forth in this article apply directly to cases brought before judges and all superior court standing masters in Anchorage. However, the form of procedures might be utilized elsewhere in the state and may serve to answer questions that arise during the practice of domestic relations law.

A. **Complaints:** All complaints involving a custody determination shall be accompanied at time of filing with an affidavit containing information required by A.S. 25.30.080. Failure to comply with this requirement may result in the complaint or motions filed not being considered by the court.

B. **Decrees/Judgments:** All decrees or judgments relating to child support must be accompanied by an income assignment order as required by A.S. 09.65.132. Failure to comply with this requirement may result in the decree or judgment proposed not being considered by the court.

C. **Motions—Supporting Documentation:** Notice on a party, in addition to other service requirements, must be served where more than a year has elapsed since final judgment. See Civil Rule 5(g).

In addition to the normal memoranda required by Civil Rule 77, the following guidelines apply:

(1) *Interim Child/Spousal Support.* All motions involving child support of a minor which may result in an order or judgment of support must be accompanied by an income assignment order as required by A.S. 09.65.132. Failure to comply with this requirement may result in the motion filed not being considered by the court.

All motions involving either child or spousal support must be accompanied by a financial declaration affidavit on either the court form or a similarly comprehensive document. This pleading shall contain the party's monthly income, expenses, major assets of more than five hundred dollars ($500.00) market value, long term obligations and the party's current employment status. Any unusual items or expected changes in financial situations should be explained by way of affidavit as well.

Opposition to child/spousal support motion must similarly meet these requirements. Even though a motion is noticed for hearing, opposition memos and affidavits will still be required to be filed in accordance with the time frames specified in Civil Rule 77. Failure to do so without just cause may result in the court either striking the opposition or ruling against the opposing party at the time of hearing.

(2) *Modification of Support.* Again, all motions involving child support must be accompanied by an income assignment order as required by A.S. 09.65.132. And in addition to presenting a complete financial picture of the present circumstances, including the information listed in (1) above, a petitioner for support modification must also present proof of a substantial and material change of circumstances occurring since the last child support order.

(3) *Attorney's Fees/Cost Motions.* All attorney's fees and costs motions shall be accompanied by an affidavit by the attorney as to the fees/costs incurred or reasonably expected to be incurred.

D. **Motions—Hearings.** Civil Rule 77 shall strictly govern this motion practice. The following procedures shall be followed.

(1) Hearings must be noticed in accordance with Civil Rule 77(d).

(2) Unless applicant obtains prior court approval under Civil Rule 77(e) and (k), interim support and attorney's fees motions shall not be set for hearing. A judge or master may approve a request for hearing on these motions based upon a showing of good cause made by the applicant. Applicant may be either the moving or the opposing party.

(3) Motions which are submitted on written memoranda and affidavits without a hearing shall either be ruled upon directly by the assigned judge or reviewed by the master, in which case a written or oral master's report shall then be rendered.

(4) Hearings on interim child custody shall not be noticed until completion of the court-ordered child custody investigation (see paragraph "E," below) in the absence of good cause. Hearings on interim child custody may be granted on shortened time even prior to initiation of a court custody investigation if applicant has been able to demonstrate the existence of an emergency circumstance or other justification.

(5) All hearings calendared under the terms of this procedure shall be for a time not to exceed thirty (30) minutes. Prior court approval must be obtained for any hearing which is to exceed thirty (30) minutes and may be obtained through the judge or master assigned to the hearing. Evidence presented may be limited to cross-examination or rebuttal of affidavits already on file. No further direct testimony of a party or nonparty witness will be allowed unless approved by the judge or master hearing the case. Applicants for evidentiary hearings beyond the scope of this paragraph must obtain prior court approval.

E. **Child Custody Determinations.** The function of the Office of Custody Investigations is to provide within the Court System a program of evaluation, negotiation and settlement with the expressed purpose of minimizing the use of courtroom and adversary actions with respect to custody and/or visitation in divorce actions. The goals of this program are to arrive at reasonable settlements in custody disputes and a stipulated agreement. When this is not possible, this office provides, Court with a recommendation which should best meet the needs of the minor children.

Custody investigations are normally utilized in the following actions: initial divorce/contested custody cases; split custody cases; joint custody cases; modification of custody cases; cases involving visitation problems.

All motions seeking an interim determination of child custody shall be referred to the court custody investigator when it is known that the motion is at issue. It shall be the responsibility of the attorneys/parties to promptly notify the court that custody is at issue so an order referring the case for investigation may be entered. No hearing on the merits of such a motion shall be calendared or heard, absent emergency circumstances or other justification, until completion of the investigation.

Attorneys are further advised that motions dealing with establishment or modification of visitation schedules may also be subject to referral to the custody investigator at the discretion of the court and may therefore fall within the above restrictions as to calendaring hearings.

F. **Orders To Show Cause.** Hearings on orders to show cause shall initially be scheduled before a master. If at the hearing, the party being allegedly in contempt requests a trial before a judge for trial. Masters may hear contempt actions where the ultimate sanctions are civil fines upon the mutual stipulation of both parties; however, contempt actions involving possible criminal penalties of confinement must be heard directly before a superior court judge.

G. **Tro-Preliminary Injunctions.** Injunctive relief is available in domestic relations matters under Civil Rule 65; however, attempts to obtain temporary support or child custody through injunctions will not be accepted in the absence of a clear showing of emergency need or irreparable harm. Normal referral for child custody investigation will be made at the time of preliminary injunction hearing.

H. **Assignment and Pre-Emptory Challenge of Judge/Master.** Upon filing of a divorce complaint, there shall be an assignment of judge and master. The master assignment is for the hearing of motions only. Any pre-emptory challenge of a judge and master shall be governed by Civil Rule 42, and timeliness shall be calculated on the basis of notice of the assignment order to the party. Only the assigned judge and the assignment master may be pre-empted. Upon any such pre-emption, another judge and/or master shall be assigned.

I. **Dissolutions/Residency Requirements.** In order for a divorce or dissolution to be heard by the court, the court must first determine whether the husband or wife are residents of Alaska. At one time there was a one-year residency requirement for all non-military persons, but the Alaska Supreme Court in 1974 found that law unconstitutional. So for *non-military* persons seeking a divorce or dissolution, the court is interested in the parties' length of residency in Alaska as well as their intent to remain here.

If the parties have been in Alaska more than a year, there is usually no problem. If they have been here less than a year, but can show an intent to remain in the form of a voter's registration card; Alaska license to drive, hunt or fish; proof of owning an Alaska residence; or proof of permanent employment in Alaska, then the "intent" test has probably been met. There is no iron-clad rule on this test and it is a matter of judgment by the court.

Those persons in the military service come under a different test, because the law (A.S. 09.55.160) on residency requirements of military persons is still in effect. It states that military personnel must be stationed here for one year before they can obtain a divorce in Alaska. This would also apply to dissolution proceedings.

Finally, there is a statute (A.S. 09.55.150) which allows the Alaska residency of one spouse to be used by the other spouse. For example, if a military person who has been here less than one year is married to an Alaska resident, the that military person can use his or her spouse's residency for the benefit of obtaining a dissolution or divorce in Alaska.

Let's Hear It For The Common Law

By Russ Arnett

Powell on Real Property, Section 378, gives one of the historical reasons for the Rule in Shelly's Case to be "...Holding the heir by descent rather than purchase did assure overlords of tenurial fruits of reliefs, wardships, and control of the tenants marriage... No present problem in American law depends, for its solution, upon the policy considerations which functioned in the English history of the Rule..."

The 1983 Alaska Legislature repealed the Rule in Shelly's Case. AS 34.27.020.

So they finally got around to it.

Lawyers' First Mistake Looking For Computers

by
Kline D. Strong, CPA, JD, PhD

The first mistake is to go looking for computers! Sound silly ... or redundant? Sure it is but that's still the first mistake and it breeds shock waves of secondary mistakes as you will quickly see.

It's as much a mistake to look *first* for a computer as it would be for a farmer to go looking first at cars when what he really *needs* is a pickup.

Need is the first consideration and, indeed, the computer itself is—for reasons to be listed—one of the last priorities. Why buy a barrel stave to swat a fly or a power mop to clean ash trays!

If need is first and the computer last, then what is second, third, and so forth? Software is second ... and third ... and everything in between, because software puts the engine—the computer in this analogy—into gear and on the right course at the right speed. Software—not hardware—satisifes need and this, then, is the total solution.

Why Hardware is Not First

Although hardware technology can still be improved and further miniaturized and sped up, the functions performable on 'good' hardware are now so adequate and satisfactory that these aspects of choice are virtually worry-free. That's not to say that a 'lemon' cannot be encountered nor that sensible configuration rules, such as having a 10-key pad if the computer is to be used for data processing, can lightly be disregarded—only that most present vendors with good track records for reliable equipment *and service* can usually provide these physical requirements rather faultlessly.

The Elements of Determining Needs

In a big firm, this determination of need can get 'real hairy' because the interacting variables to consider are an exponential function of the number of bodies around, to say nothing of egos, staff problems and potential personality conflicts. Thus, if the complexity of decision-making for one lawyer is 1, the complexity for two lawyers is 4 ... for three, 9 ... and so forth. But for twenty-five lawyers, the complexity factor is 625! Incidentally, that is why large firms still use consultants—informal 'referees' in many cases—and RFP's, an abbreviation which literally stands for "Request for Proposal" but really means "here are our numerous needs, give us a proposal to solve our problems."

So, unless the smaller firm really wants to hire a consultant at $50-100 per hour or wants to fill out a full-blown, large-firm RFP to obtain bids from 3 or 4 competing vendors—either or both of which may be highly desirable—it must look for quick and accurate ways which are already developed to assess need. Happily, need for smaller law firms has exhaustively been investigated and sensible parameters have been established, of which the following abbreviated list contains the most essential and typical of the concerns to be considered.

1. **Word or Data Processing ... or Both**

   Microcomputers (herein sometimes 'micros') can be run as word processors during business hours while—literally at the swapping of a floppy disk—they can be run as data processors after hours ... or *during* hours for that matter. Again, the hardware is usually not the problem—though as the definitive research checklist shows, some hardware is less flexible than other hardware—*the real problem is the software.* And with respect to software, the usual problem is not the word processing program but the data processing program.

2. **Full Screen, Window or Blind Manipulation.**

   The first rule is, 'if it ain't broke, don't fix it'. In other words, don't throw away anything that works, not even 'blind' word processors—i.e., mag cards, without windows or screens—if they can continue to pump out 'boilerplate-type' documentation which does not require significant editing or manipulation.

   The second rule is, 'if text manipulation of any significant kind or extent is necessary—or if any data processing is involved'—get at least a standard 24 line by 80 column screen. Anything less will be disappointing and anything larger may be profligate.

   Again, your need is all that counts, not what the vendor has to sell.

3. **Capacity of Internal and External Memory.**

   This is usually the crucial factor. For any adequate word processing manipulation, 64 Kbytes—64,000 letters, numbers, etc.—of internal or 'resident' memory is essential. However, this does not usually present a problem.

   The critical problem involves external memory, i.e., floppy disk or archive memory, which, for efficient processing purposes must be 'on line' *while the program is running.* For word processing purposes, this is, again, usually available with few problems, but for data processing, it is frequently the Archilles heel!

   So what are the expected needs of various sizes of law offices for 'on-line' external storage of data? Table I is a quick overview for a fully-integrated data processing program—one that handles both 'time/account/billing' functions as well as the regular accounting books of the office including financial statements, aging of accounts receivable and lawyer productivity reports.

   And why are these measurements critical? Because very few 5" floppy disk drives can handle the data needs of a fully-integrated data processing program without excessive and very inefficient 'disk swapping'. Furthermore, even many 8" floppy drive systems handle such data processing requirements badly because either (1) the disks each have low capacity (e.g., neither double sided nor double density) or (2) there are not enough disk drives available where data can be accessed as needed simultaneously.

So, to illustrate, if a 3-lawyer office expecting to grow to 5 or 7 in the next few years were to choose a barely adequate system now, it would assuredly regret that choice shortly as either clients or timekeepers increased in number or service demands.

Because of space limitations, the third element of the trilogy of 'Need, Software & Hardware' will be discussed in the next issue. Entitled "Software, the Solution to Lawyers' Needs," this last element is crucial. Meanwhile, readers who want references to ABA Economics Section monographs or other sources of relevant help from which extracts have been summarized above may write to the author at 1039 Vista View Drive, Salt Lake City, Utah 84108. Please enclose a stamped and self-addressed envelope.

TABLE I: DATA PROCESSING DISK STORAGE REQUIREMENTS BY SIZE OF LAW OFFICE

Based upon the following presumed averages: (1) 100 active clients per lawyer; (2) 2 active legal matters per client; (3) 45 days of unbilled data—called work in process or W/P; (4) 50 bills mailed per month, and (5) 3-month collection cycle. (All data shown in Kbytes.)

		Realistic Needs Per Size of Law Office					
Irreducible Space—Programs	**Kbytes**	**Solo**	**2-5**	**6-10**	**11-15**	**16-20**	**21-25**
Micro operating system including routines for language, forms, backup and other utilities	100-125						
Applications program for "time/accounting billing" only	135-200						
I. 'Program' requirements	235-325	325	325	325	325	350	350
Time/Accounting and Billing—Data							
Timekeeper, client and matter	115						
Time records, advances for clients—unbilled, i.e. W/P	68						
Billings mailed but unpaid—so-called 'accounts receivable'	77						
Practice specialties, standard rates, billing phrases and other utility functions and reports	40						
II. Total per timekeeper		300	600-1500	1800-3000	3300-4500	4800-6000	6300-7500
Totals of I and II		625	925-1825	2125-3325	3625-4825	5150-6350	6650-7850
Complete Accounting—Data							
General ledger, financial statements, management reports and journals		100	100	100	125	125	150
Space requirements for total package		725	1025-1925	2225-3425	3750-4950	5275-6475	6800-8000
Computers							

Software, the Solution To Lawyers' Needs

by
Kline D. Strong, CPA, JD, PhD

As was forecast in the previous article, once a law office has determined its needs, the next step is *not to go looking for hardware*—the next step is to find software which will satisfy those needs. The *last step* is to find acceptable hardware!

Actually, there are several reasons why hardware is last. *First*, software cannot usefully be written in a vacuum, so whoever wrote the software will already know on which micros it will run and—for time-saving, at least—where NOT to look. *Secondly*, without adequate software, the finest hardware can be assembled in garages as the saying goes, so there are always a staggering number of options to consider if you start there; whereas specialized applications packages such as legal software are relatively few if you limit it to equipment costing $10,000 or less—the true micro—so starting with software saves untold hours of potentially fruitless searching.

What to Look for in Data Processing Applications

In point of fact, all legal software programs can be sorted into one of two classifications ...

- those that perform only the 'time/accounting and billing' functions—called TAB for short—and
- those which integrate the TAB functions into the general ledger of the office where all asset, liability, equity, income and expense accounts are kept. This latter category is sometimes referred to as a 'fully-integrated general ledger or GL' program.

One of the principal deficiencies of running a TAB system only—the tax trap of not reporting the reimbursement of some kinds of client advances while at the same time deducting the same amounts—has been fully discussed in another article. Some of the other critical deficiencies to avoid and some of the crucial subsystems to be sure are included in a TAB system are ...

1. **Billing rates.** Some systems will not permit—or permit only inflexibly—the changing of standard rates by timekeepers. Unlike other portions of a program which must be rigidly adhered to, complete flexibility in fixing and changing rates is a must. Similarly, some programs will not permit more than one timekeeper to bill at the *same rate* ... this, too, is nonsense.
2. **Handling prepayments and other credit balances.** Some systems have no provision for allocating client prepayments later, i.e., when bills are prepared, between client 'advances'—client costs 'advanced' by the law office—and service fees. Yet, more and more lawyers realize the economic necessity of obtaining such prepayments. Worse, even if no 'advances' were involved or the credit balance arises as a result of overpayment (or even misapplied payments, where more than one matter for a client is being handled, many systems do not contain a mechanism for allocating such credit balances among affected timekeepers! Either no credits are given for lawyer-productivity-report purposes, or the first-named lawyer gets it all, regardless of the contributions of others.
3. **Correcting errors.** Some systems have no way to detect inputting errors such as entering time or advances or receipts *before* such data is 'set into concrete' by being written to disk. (As explained in other articles, there are various remedies for this deficiency, one of the better of which involves the use of Hash Totals.) Thus, the first apprehension of an error may be encountered on the *proposed bill* to a client—which, of course, beats having the detection occur *after* the bill has been sent, *especially by the client!* But how are corrections made, whenever the errors are detected and, insofar as lawyer productivity records are concerned, how are adjustments made.

   In this case as in many others, *Murphys Law* holds that anyone who claims computers make no errors is either a computer salesman or a Martian!
4. **Providing audit trails.** There are two so-called audit trails—written records that can be traced to reconstruct or to verify how computer results were obtained—which must be maintained at all times and at all costs because negligence—to say nothing of static electricity and other 'acts of God—can and frequently do destroy magnetic records wholesale. These two audit trails are (1) books of original entry such as time sheets, checks and check books, bank deposit forms etc.—the kinds of records you always must keep, even for manual systems—and (2) micro journal printouts for each function performed on the computer. To illustrate, the first kind of records referred to will verify for all time *what should have gone into the micro*—so if a disaster struck, it could all be reconstructed—and the second kind of record—the micro 'journals' which should be printed out periodically—would verify item-by-item *what actually went into and came out of the micro.*

   Because of these system-saving capabilities, these micro 'journals' are in reality more important by far than many of the 'reports' some legal software programs produce, yet many such systems cannot run such journals.
5. **Training manual.** Of the dozens of other desireable micro functions to look for, an ancilliary consideration is vastly more important than many because, in this day of limited personal support, if the so-called 'documentation' that accompanies software is not 'user friendly' as well as accurate and kept up to date, no amount of sophisticated programming can compensate. Like the necessity of being able to repair hardware—which is every bit as important as getting the right machine in the first place—software without an adequate training manual is like putting in for sick leave for the 4th of July ... a total waste!

Where to Look for Software Packages

Data processing software written for lawyers by *micro hardware vendors* is *very rare* whereas word processing software is quite normal. Moreover, several 'transportable' word processing packages—especially those which run under the CP/M operating system—can be run on micros, whether or not the vendor also has such a package.

So the problem is not usually word processing software, it is data processing software which presents problems. Worse, though a host of computer periodicals and services advertise software, they are, alas, usually of little help because ...

- they are written almost exclusively for general businesses—or computer specialists—which 'know not' our legal peculiarities, and
- few lawyers know how to find such publications, let alone justify the expense of subscribing to and reading them, and most of the leads are either (a) to minicomputers or mainframes, i.e., *not micros* or (b) to business or accounting applications in general rather than to legal packages.

Hence, there are few specialized sources of information regarding data processing programs for lawyers. These such sources are ...

1. A brochure available from the ABA Economics Section, 1155 East 60th Street, Chicago, IL 60637 entitled LOCATE. Re-compiled in 1982 by Bruce D. Heintz of Arthur Young and Co., CPAs, this source must be carefully studied to be certain the suppliers are (a) still in business (b) run their software on micros you can afford, (c) provide adequate service, and (d) otherwise qualify under the checklists for selecting hardware and software which have been developed.
2. Robert Wilkins, former chairman of the ABA Economics Section, publishes "The Lawyers Microcomputer"—RPW Publishing Corp., P.O. Box 1046, Lexington, SC 29072—a monthly periodical which will be carrying information about suppliers of 'legal' software for a variety of purposes including word and data processing. This is not the main purpose of this periodical, so coverage is not intended to be comprehensive.
3. NIRAD, Law Division, 1039 Vista View Drive, Salt Lake City, Utah 84108, has compiled a short list of suppliers of legal software not only for data processing but also (a) for substantive specialties such as probate, collections, etc., (b) for both internal and external retrieval systems and (c) for docket control.

The foregoing is a very general summary of the subjects referred to. More details can be obtained from ABA monographs and other sources available from the author. If more information is desired, please enclose a stamped and self-addressed envelope.

The Bottom Line . . .

by
Kline D. Strong, CPA, JD, PhD

As I reported in the ABA Economics Section's monograph on Word Processing Equipment (1979) dedicated word processors (WPs) and data processors (DPs) are becoming more and more similar with respect to many of their functions. Thus, microcomputers (herein, sometimes, 'micros') are now almost universally capable of running WP software programs, whereas many dedicated WP vendors are beginning to offer DP options.

So what are the principal differences between dedicated WPs and DPs. Aside from various discreet 'technical' differences, there are two basic differences, one somewhat superficial but the other of supreme significance.

The Observable Difference

Remember, as the merger of technology continues, most differences will become less distinct. Nevertheless, for the moment and with respect to most equipment, WPs characteristically 'show' more 'special function' keys than do micros. That is, to perform specialized operations such as 'insert' or 'delete' or 'move' or 'global search', only a single 'special function' key need be pressed on most WPs while 2 or more keys must be pressed on most micros—usually a 'control' key and a standard key, pressed simultaneously—but sometimes followed by a second 2-key sequence.

Briefly, three other collateral comments are germane ...

- having to memorize the key stroke common to micros is harder to learn than where a special function key is located;
- on some micros, the keyboard is non-standard, i.e., one or more keys have been moved;
- symbols may 'surround' a special print feature on the screen rather than show the feature 'exactly', e.g., underlining may be indicated on the screen by symbols at the beginning and end rather than showing the underlining itself.

So—for word processing, at least—it would appear that WPs have an edge. But not necessarily. Those 'special function' keys may be scattered all over a larger WP keyboard and most will not be *'reachable without looking up'* as are the usual keys on a standard keyboard. By contrast, the 'control' key and the other 'standard' key to be pressed simultaneously on a micro are usually 'reachable' without looking up—like playing chords on a piano.

So—bottom line—it may be more of a question of what one gets used to. Clearly, secretaries who become accustomed to the micro 'chord-key' requirements become very proficient and register few complaints, though, perhaps they could become even faster on the other kind of equipment. At this point, no one has produced probative empirical evidence one way or the other.

An excellent source for a more detailed discussion of the preceding WP/DP comparisons is Loftin, "Word

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"Oldies But Goodies"— Tanana Valley Bar Assoc.

MINUTES OF THE TANANA VALLEY BAR ASSOCIATION Friday, August 27, 1982

King Arthur called the meeting to order at 12:31 p.m. **Jim Blair** introduced **Judge Fitzgerald** of the United States Federal Court as his guest; **Linda Walton** introduced **Phil Cummings;** and **Dave Call** introduced attorney **Cory Borgeson** who, by the way, expressed a desire to the Secretary to become a member of the TVBA. He should be advised, through Dave Call, that the intricate membership and initiation process merely requires the payment of 60 bucks to the Treasurer and Mr. Borgeson would immediately become a card-holding member.

Wayne Wolfe appeared and offered an apologia for the destruction, construction, and reconstruction that has been going on in the Clerk's office. He pointedly commented that his own office is now much smaller and that his staff got all the extra space. He also commented lengthily on the meaning of the August 26th law as to debtors, creditors, and garnishment proceedings. He stated that he was preparing new forms for the garnishment law and would shortly make them available to all attorneys. The record should reflect that my package arrived on the afternoon of the same day that Wayne promised them.

Dick Savell commented, not without justification, that we ought to ignore the new law altogether and everything would come out even in the end.

Barbara Schumann announced for the Judicial Council that it would meet on September 30th to interview judicial candidates and that there are only two applicants for the Barrow position.

King Arthur commented for CLE that two new tapes were on their way. He will tell us when they get here. One has to do with due on sales clauses and the other has to do with misrepresentations in real estate transactions. One of the tapes is two hours long and the other is one and one-half hours long. **Bob Groseclose** moved that we have a CLE session to hear the tapes after the bar luncheon omitting next Friday because that is going to be the trial Friday in the Traveler's provided that it would be all right with management. Bob's motion was seconded and carried.

King Arthur commented that he had also to report that there were only three quarters as many attorneys in this area as one year ago. He did not comment in any other way as to the demise, disappearance, liquidation in bankruptcy, or whatever else may have happened to one quarter of this area's legal population.

Bar President **Andy Kleinfeld** was queried as to the new CLE person and he responded saying that that person was not full time and not well remunerated.

Paul Barrett announced that **Steve McAlpine** needs help in Valdez. Paul went on to say that Valdez is a neat place, that he had spent considerable time there and some unidentified person asked him why he had come to Fairbanks. To which Paul responded in a friendly way that Fairbanks was a neat place too. **Hugh Connelly** reported briefly on the new 1982 session laws wherein counsel may move to modify sentence but it must be done within 60 days of imposition of sentence instead of anytime during the sentence as was the former rule. He pointed out that Rule 35 had not, up to this date, been amended but that it is possible that the Supreme Court may amend it to make it consistent with the new law. The bill will become effective October 1, 1982. Counsel who pursue the vagaries and complexities of criminal law ought to have a look at the 1982 session laws, Rule 35, and if they don't understand them, they should call **Uncle Hugh** and ask him what they mean. If anyone knows, including any member of the Alaska legislature, it is bound to be Uncle Hugh. The Secretary inserts parenthetically that it would be a hell of a time-saving device for pertinent counsel to call Hugh and discuss the matter rather than try to plough through **Fred Brown**'s verbiage.

Nothing more happened and the meeting was adjourned at five minutes to one with a reminder that we will try out the soup and salad (formerly sandwich) or the buffet in the Traveler's which I understand is exactly the same buffet that was offered when this association met there in 1972.

Respectfully submitted,
R. Dryden Burke
Secretary

MINUTES OF THE TANANA VALLEY BAR ASSOCIATION Friday, August 13, 1982

President DeWitt called the meeting to order at 12:30 p.m. saying as he did so, that he did not believe that his law partner, Winston Burbank, had the nerve to come. **Mike Parise** introduced **Dick Haggart** as his guest and **King Arthur** introduced **Bonnie Robson** and **Jim Pentlarge** who are students at the University of California at Davis Law School.

President DeWitt announced that some lady was seeking assistance in the matter of collecting child support arrearages and he made a number of CLE announcements—one being that a tax law section was taking place at the same time as our meeting and that course concerned the consequences of a flat tax. He also announced that a workshop on appellate advocacy will take place on October 29 and 30, that it cost $150.00 and that there was to be a glittering array of speakers. **Dave Call** asked why the courses were so expensive and **Judge Van** kindly offered to present the same course for five bucks.

There was some discussion about protesting the prices of the CLE seminars and the fact that they were given only in Anchorage and it was moved and seconded that we adopt some sort of resolution to express our views. President DeWitt kindly volunteered to draft the resolution.

Bar President **Andrew Kleinfeld** proposed that there ought to be low cost CLE programs for new attorneys going into private practice just out of law school. He said that he thought that $30 was reasonable for such sessions and Andy said that he would take the matter up at the next board meeting.

Dave Call announced that as of August 26th there is a new law as to creditors and debtors, that there are some very significant changes and that all members of the private bar should read the new laws especially as to exemptions.

Will Schendell announced that there would be a meeting in early December in Kenai of the ALSC Committee.

John Frannich spoke for the food committee and said that he had investigated the facilities at the Travelers who offer a standard buffet for $7.50 or a soup and salad for $3.50 and that the individual has an election between the two. It was moved and seconded that we try out the Travelers for lunch on the first Friday in September which will be Friday, September 3rd. The Motion carried.

The secretary then brought up the Fourth of July party again and there was little if no enthusiasm. Someone suggested that we wait and see what the weather would be like. It is remarkable that the secretary keeps bringing up the Fourth of July party since he has never been to one in the 11 years that he has been a member of this association.

A seldom seen member, **Lyle Carlson,** gave an entertaining Delta report. He reported that he was very depressed because he had just sold his prize bull. He said that farming was fine and invited everyone to visit the barley project and told us how to get there. He also said for anyone wishing to go to the trouble and make the trip all the wood they wanted was free to haul back to Fairbanks. In a true lawyer-like manner, Lyle admitted that the cost of driving to Delta to get wood would far outweigh the value of the wood but he did extend an invitation to everyone.

This is all that happened and it wasn't very much. The meeting was adjourned at five minutes to one.

Respectfully submitted,
R. Dryden Burke
Secretary

MINUTES OF THE TANANA VALLEY BAR ASSOCIATION Friday, September 3, 1982

President DeWitt called the meeting to order at 12:34 p.m. **Cory Borgeson** was introduced as a guest but he is already practically a member. **Judge Blair** suggested that henceforth the microphone be taken away from the Secretary, if there happens to be one, and when the Secretary had suggested that people call **Uncle Hugh** for advice as to the new changes in Rule 35 that they be prepared to file brief to support their position. Treasurer **Paul Canarksy** gave three separate choices for the balance in our account and it, the balance, seemed "up for grabs." All three of the suggested balances were over $4,000.00 which indicates to the Secretary that we should start planning the Fourth of July party.

President DeWitt announced that the Black Angus has offered to vary its menu but there was no mention of their being willing to vary the price. The Secretary was instructed to call the Black Angus to ascertain if the Arctic Penguin Room is available for the hearing of CLE tapes on September 10, 1982. **Niesje Steinkruger** announced that the Board of Governors is going to meet on September 18th and she also gave a report on the NIETA conference. She stated that the accommodations were not successful and that she had ended up sharing some sort of nocturnal space with **Ray Funk** and **Jerry LaParle.** Niesje also stated that the NIETA seminars were too long but there was no mention of the Japanese whatsoever. Apparently, their proprietorship is restricted to the home office in Tokyo.

John Franich announced that he

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The Bottom Line . . .

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Processing on a Microcomputer" carried in the July/August 1982 issue of Legal Economics, the ABA Economics Section's periodical.

The Less Visible But More Significant Difference

Dedicated WPs were developed relatively recently—circa 1970—specifically to handle the written word, not mathematical computations. In contrast, DPs derive from digital computers developed historically for mathematicians and physicists where input needed no 'editing' and output required no 'massaging' because 'word processing' consisted essentially of 'sterile' communications between a scientist and his 'intellectual' robot.

Accordingly, the DP micro 'learned how' to do WP by being equipped with new software from a floppy or hard disk but kept its 'standard' keyboard more or less intact. On the other hand, WPs were relatively slow to become equipped with the necessary power—via computer-type 'chips'—to handle DP functions adequately and even slower to get adquate software.

Note, the differences discussed above have no affect upon the speed with which the 'words' or 'data' is printed-out when finally 'processed'. That is, some WPs can run printers at 30 wpm while others drive printers running at 55 wpm and the same can be said of micros.

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had served the first Writ of Execution under the new law on **Dick Savell** and Dick stated that it took his secretary and he, Savell, one and one half hours to figure the mess out—or vice versa. Dick said that he thought the law was an atrocity and he felt so strongly about it that he called both the Bar Association and **Fred Brown** about the matter. Fred copped out in a mini-Watergate. Dick suggests that we forget debtor's rights and says that execution on unexempt property is a major hurdle in the whole business.

As a nonsequitur, **Jim Blair** suggested that we run a large ad in some publication saying "we need Fred in Juneau."

It was moved and seconded that a committee be created to look into the new law and Dick Savell was appointed to organize the committee. Jim DeWitt will also be a member.

President DeWitt announced that the State Court Administrator doesn't want **Carol Davis** to hear any other kinds of probate matters other than informal proceedings. That edict from **Lord Snowdon** upset the entire membership and **Mack Gibson** suggested that Carol's job needs to be upgraded from Probate Registrar to Probate Master. **Judge Van** pointed out that Carol's office was understaffed, that she had not had a raise in a very long time and **Judge Connelly** suggested that our Association present a resolution to the presiding judge for his endorsement as to the upgrading of Carol's position and for forwarding to Lord Snowdon.

Charley Silvey suggested that a committee be formed to meet periodically to discuss substantive changes in the law. It was fairly late in the meeting by that time and nothing definitive was done as to that matter.

Respectfully submitted,
R. Dryden Burke
Secretary

MINUTES OF THE TANANA VALLEY BAR ASSOCIATION
Friday, September 10, 1982

President DeWitt called the meeting to order at 12:30 p.m. **John Frannich** introduced **Dan Cooper,** currently in his office hoping to be admitted to the Alaska Bar in the October results. **David Call** breached his alliance with **Mrs. Thatcher** and the Secretary and made some extremely uncouth remarks about the Secretary's performance. It is rumored that instead of an apology Mr. Call will send Stanford University $100.00 to buy 10 more football players. Mr. Call did not affirm that promise and he didn't apologize either.

President DeWitt announced that a CLE session for January 1983 is in the planning stages and that session will have to do with judges telling us how things ought to be done or vice versa. He also announced that the West Law Committee will meet on September 14th.

Bar Association President **Andy Kleinfeld** announced that **Deborah Reagan** is the new CLE coordinator and that he had heard from **Professor Derschowitz** who said that he would love to address the Bar Association at its convention in June of 1983 subject to certain financial conditions. It was moved and seconded to bring up Professor Derschowitz as one of the speakers for the Bar Convention and that the Bar Association set aside $2,500.00 for that purpose. Andy and the members of the Board will take this up with the Bar Associaiton. **Dick Madson** commented that his record was as good as Professor Derschowitz's and no one challenged that statement.

President DeWitt prepared a resolution concerning Probate Registrar **Carol Davis** which recommended that Carol be promoted to Probate Master, that her salary be increased, and that her staff be increased. The resolution will presumably be endorsed by **Judge Van** and sent to **Lord Snowdon.** The resolution was unanimously adopted.

There was considerable discussion about reorganization of the legislative committee and **Hugh Connelly** commented that all judges and magistrates receive synopses of the legislation in the last session. In connection with this discussion, Dave Call wanted to tell a war story and that was strenuously objected to by the Secretary, but he told it anyway and it had to do with his drafting a piece of cogent legislation and giving it to **Bettisworth** who dropped it in the hopper. According to Dave, what came out of the hopper was quite unlike what he had proposed. The war story ended with a warning to those who might think about proposing legislation. President DeWitt proposed that the legislative committee reactivate itself and Judge Connelly agreed to that since he is the once who has done all of the work in the past anyway.

As a sop to Dave Call and because I haven't got any more time anyway, this is the end of the minutes.

The Secretary moved that the meeting be adjourned at 1:00 p.m., the motion was never seconded and technically the meeting of September 10th is still in session.

Respectfully submitted,
R. Dryden Burke
Secretary

MINUTES OF THE TANANA VALLEY BAR ASSOCIATION
Friday, September 17, 1982

The meeting was called to order at 12:30 p.m. by **President DeWitt** and **Andy Kleinfeld** introduced **David Case** and **Mike Lowery** as his guests.

Treasurer Paul announced that there are $4,535.76 in the treasury and **Niesje Steinkruger** made two announcements: one concerned the Hawaii CLE which will be held on February 22, 23, and 24th at the Maui Surf in 1983. She also commented that at the last bar examination someone left behind an attractive portfolio with United States House of Representatives engraved on the front and she wondered to whom it might belong.

Dick Savell commented that there was going to be a live CLE program perhaps in October and that it would be a good one.

Bar President Andy Kleinfeld announced that the Board of Governors would meet on Sunday, September 19th, in Anchorage, and **Hugh Connelly** reported for the Legislative Committee saying that it had met the preceding Wednesday at lunch and discussed the possibility of inviting all candidates for a one shot appearance as guests of the TVBA and suggested that they appear without speeches. After some discussion, a motion that had been made and seconded was ruled out of order by the President as being contrary to the policy of the TVBA.

President DeWitt then commented rather extensively on the proposed West Law Center and compared costs and rates with the Lexis System. A number of cost figures were given comparing the two systems and I have them all in my notes but rather than bore you with the figures, which are complicated, I suggest that you contact President DeWitt who has been doing all of the research into these two systems and has all of the figures immediately at hand. From what I heard and for what it's worth, the West Law System seemed better to me than the Lexis System cost wise.

This is the end of the minutes because the Secretary arrived late and had to leave early. Hopefully, **Dave Call** will be pleased with the minutes brevity.

Respectfully submitted,
R. Dryden Burke
Secretary

MINUTES OF THE TANANA VALLEY BAR ASSOCIATION
Friday, September 24, 1982

The meeting was called to order by **President DeWitt** at 12:30 p.m. **Andy Kleinfeld** introduced Attorney **Ken Jacobus** of Anchorage as his guest and **Niesje Steinkruger** introduced **Elizabeth Ingraham** as her guest. **Judge Connelly** introduced **Pat Smith** of the Anchorage Alcohol Program and **Judge Williams** introduced **Randy Farley,** his bankruptcy law clerk.

Treasurer Paul received a nasty letter from an Apple computer—the text of which is not included in these minutes but is on file for those who wish to see it.

President DeWitt made a number of announcements concerning directories of State officials, a directory for the 1981-1982 legislative session and three summaries of Alaska Legislation saying as he did so that he knew that there would be a rush for all of these items, and so come while they are still hot. Jim also announced that the new United States District Court Rules are available. He has the order forms and the Rules cost $16.50 and come in a beautiful binder which costs $4.50.

King Arthur announced that the Ketchikan Bar refuses to give up the CLE tapes on real estate and is contemplating a trip to Ireland, tax deductible, to investigate real estate in County Cork.

Dick Savell's committee on Chapter 62's horrendous problems will be meeting at noon on Tuesday, September 28th.

Alaska Bar President **Andy Kleinfeld** reported on last Sunday's Bar meeting, announcing, among other things, that everything got done in one day although people had difficulty getting to the men's room and ladies' room on time, if at all. He also announced that costs for the Alaska Bar Association *last* six months came to one-third of a million dollars, and commented on the Board's other activities and that there is a new CLE coordinator whose name is **Deborah O'Reagan.** Dick Savell has been appointed to the CLE committee and Andy commented on the Board's discussion of the local CLE program for new lawyers going immediately into private practice. There were numerous other cogent comments which are not summarized here because there was a tremendous attendance at the Bar Association and every lawyer in town appeared to be there including some people who weren't lawyers. **Niesje Steinkruger** added to Andy's comments saying that the new lay members were delightful, highly qualified people and that the Board was very pleased to have them present. She also announced that there will be a Board meeting on October 18th, 19th and 20th dealing with admissions.

President DeWitt advised us that local Bar Presidents now have copies of the minutes of the Board meetings.

There then followed considerable discussion concerning the computer law terminal and it was moved and seconded that we purchase the West Law Computer terminal and that motion carried 19 to 8.

This concludes the minutes of the September 24th TVBA meeting.

Respectfully submitted,
R. Dryden Burke
Secretary

MINUTES OF THE TANANA VALLEY BAR ASSOCIATION
Friday, October 1, 1982

The meeting was called to order by **President DeWitt** at 12:31 p.m. **Skip Slater** was introduced as a guest but was advised by someone that his status as a guest will be no more as soon as he pays his dues.

President DeWitt announced that he should have the West Law Terminal contract to review with us next week.

Justice Rabinowitz said there wasn't much to report from the Supreme Court and **Judge Van** commented that that was not unusual. Bar President **Andy Kleinfeld** reported for the Board of Governors and announced that there would be a budget meeting on October 18, 19 and 20th, that the Bar's budget will be decided in December and that there had been an extensive cutting down on travel costs.

Barbara Schumann reported for the Judicial Council saying that they got their business done all in one day and that there were seven applicants for the Superior Court job in Palmer and she mentioned three names that were sent up to **Governor Hammond**. There were a lesser number of applicants for the Barrow job and she mentioned the names of the persons that were sent up to the Governor for that slot but I don't have them so please check with Barbara. Barbara also told us that there would be

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a permanent replacement for the Executive Director position and that the Chief Justice of the Supreme Court will announce who it is on October 1st. That job will be open as of January 1, 1983. Also, the Council is looking into ways of expediting small civil cases on the case calendar.

Jim DeWitt announced that the Chapter 62 committee will write all of their bitches on October 5th and on October 10th will have a meeting with **Wayne Wolfe** concerning the bitches. **Bob Groseclose** announced that Merdes, Schaible, Staley & DeLisio, etc. are now Schaible, Staley, DeLisio and Cook and that he was going to Anchorage with **Dick Savell** on October 23rd to attend a course in accounting for lawyers. The meeting, one of the dullest this year, sputtered out at 10 minutes to one over the continuing objections of **King Arthur** that it had expired too soon.

Respectfully submitted,
R. Dryden Burke
Secretary

MINUTES OF THE TANANA VALLEY BAR ASSOCIATION
October 8, 1982

Once upon a time, long, long ago, in a distant land near the Arctic Circle, called Fairbanks, those of residents who practiced at law, gathered together for a meeting. The meeting was held atop the second tallest building in the City of Fairbanks, at the end of a long dark elevator, which rarely worked. Those of the citizenry in attendance laughed and talked gaily, while their President, a sturdy young lad named **Jim DeWitt**, tried to get their attention.

It soon became apparent that these were not ordinary citizens because they paid no attention to their so-called leader. He, in turn, called on the great leader of the entire territory, whose name was **Andy Kleinfeld.** Great leader Kleinfeld introduced a person by the name of **David Case.** Great leader Kleinfeld seemed to think that this was a significant introduction, and pointed out that it was the second time that he had made such an introduction. The members were unimpressed and suggested that the entire announcement could have been voided, if only Mr. Case had been sent a dues billing, and had paid such dues billing. This angered Mr. DeWitt, who took out his venom by appointing **King Arthur** to read minutes of a prior meeting prepared by **R. Dryden Burke,** Esq. and to take minutes of the current meeting.

As the members began to calm down and dipped their fingers into the nearest tuncheon to gobble the goodies they found there, Mr. DeWitt pointed out that the person charged with keeping track of the monies for that group of attorneys was missing. He implied that there was a good reason for him to be missing, because **Joe Sheehan** had paid dues, covering a period of something like 30 years, and hence, the lawyers in Fairbanks had become collectively very rich, or at least they were very rich, until the treasurer turned up missing. This produced a hubbub, which was actually the most interesting event of the whole meeting.

President DeWitt was disturbed that the members paid more attention to their goodies than to him, and so he took to reading letters that he had received recently. The subject matter was avoiding unethical grievances. The members threatened to leave. President DeWitt, then changed this tack, and announced that **Deborah O. Regan** had announced that there would be a seminar in Anchorage on how to choose a business entity, and that this would be recorded in the manner of those times on electronic tape which could be played on a small screen called a boob tube. President DeWitt announced that it would so be played in Fairbanks, at a cost of approximately fifty 50 worthless United States dollars for each person in attendance, on about the 10th day of December. Presents in the form of literature would be given away in order to spur attendance. This announcement also failed to stir the interest of the group, so President DeWitt turned to announcing that **Cam Travis,** who was a semi-historian, would show slides and play tapes and tell all about the history of the Alaska Bar Association at a meeting scheduled one week from the very time President DeWitt was speaking.

Once again, interest wained, and several members began experimenting with the principle of a catapult, whereby the central pivot is the index finger, the catapult itself is a fork and it is used to hurl food about the room. Fortunately, for all concerned, President DeWitt was becoming myopic and hard of hearing, and he missed the fine interplay of the various members. He proceeded to announce a meeting on the 62nd chapter of the Bible, according to Alaska Lawyers, called the Alaska Statutes. Said meeting to be held in a short office on the following Tuesday, noon. Something about the audience reaction caused President DeWitt to decide that he was too efficient, because no one could think of anything to do at the meeting.

A certain very distinguished member of the group, who so happens to be the author of this particular set of minutes, moved that we resolve to advise the State Judicial Council that the problem of untimely filing by Judges desiring retention in their position, be solved in an equitable manner, to wit: any Superior Court Judge who is untimely in filing to retain his position, should have to start all over again at the bottom of the ladder, same being the potential Superior Court position in Barrow.

The meeting grew noisier, and as it grew noisier, some wit announced that boring and dull meetings were, in point of fact, usual, rather than something singular enough to be reported. The President quit trying to preside, with which the first successful parliamentary coup came about. **D. Rebeca Snow** finally brought the group, the thing it wanted most—a Motion to Adjourn. **John Franich,** in a gentlemanly act, seconded this bold move, voting was done by grunts and moans. The grunts narrowly outvoted the moans, and the meeting ceased.

Such was the nature of these people. They filed patiently to the top of the long elevator shaft, entrusted their lives to the elevator, and left. Their trust was rewarded because of the basic principle of physics, which decrees that a loaded elevator will go down even though it may not go up.

Thus endeth the reading for the morning.

King Arthur

MINUTES OF THE TANANA VALLEY BAR ASSOCIATION
Friday, October 15, 1982

President DeWitt called the meeting to order at 12:27 p.m., and introduced as his guests **Pam Cravis,** of Anchorage, and **Bruce Anderson,** a political science major from the University of Alaska. Bruce allegedly attended the meeting as DeWitt's guest to study animal behavior among those present.

Judge Van suggested that **Pat Brown** be appointed as a private prosecutor to pursue this rather serious matter but a former member of Pat Brown's law firm whose initials are J.R.B. strenuously opposed that suggestion.

President DeWitt announced that the West Law committee will meet on October 18th in Andy Kleinfeld's office at noon and that the West Law contract was ready for the committee's inspection. **Bill Satterberg** announced that he was looking for law books and that apparently, he would need them earlier than he had expected.

The rest of the meeting was taken up with a showing of a film pertaining to the history of the Alaska Bar Association. The film was interesting but dealt almost entirely with the state of the law in communities other than interior Alaska.

The rest of the meeting was taken up with a showing of a film pertaining to the history of the Alaska Bar Association. The film was interesting but dealt almost entirely with the state of the law in communities other than interior Alaska.

The meeting was adjourned by President DeWitt without a supporting vote at 1 p.m.

Respectfully submitted,
R. Dryden Burke
Secretary

MINUTES OF THE TANANA VALLEY BAR ASSOCIATION
Friday, October 22, 1982

The meeting was called to order at 12:25 p.m. by **President DeWitt** and there were no guests despite the fact that the entire Supreme Court was in town. Jim DeWitt said that he had invited them but the fact that they did not appear undoubtedly pleased **Judge Van.** Bar President **Andy Kleinfeld** and Board Member **Niesje Steinkruger** reported for the Board of Governors. Among other things Niesje reported on the results of the first All Alaska Bar Exam in which 69.7% of the applicants passed. Among the attorney applicants the passing rate was 71%. Fairbanks did not do as well this time with a passing rate of only 44% or four out of nine applicants. Both Niesje and Andy indicated that the Board is pleased with the exam and Andy pointed out that the correlation between those passing and those failing using the Alaska portion of the Bar with the two multi-state is .7 which is really quite good. Both Andy and Niesje pointed out that the Alaska Bar Association's expenses have been considerably reduced primarily because large amounts of travel have been cut out. Bar President Andy Kleinfeld said that he was most excited about the possibility of appointing a second disciplinary lawyer to assist **Dick Ray** and indicated that delays in completing disciplinary matters in the past had been deplorable. For those of you who missed the meeting of October 22nd, please consult with either Andy or Niesje or both of them for more complete details of the large number of matters the Board took up.

It was moved and seconded that $100.00 be expended by the TVBA to provide refreshments for the Bar admittees when they are sworn in. The motion passed unanimously. The meeting was adjourned at 1 p.m. without a quorum and **Dick Burke**'s car got impounded to the tune of $55.00 so he couldn't take **Hugh Connelly** back to Court on his birthday. Let this be a warning to the rest of you. If you cannot find local parking it is not likely they will impound your car if you park it on the ice of the Chena River.

Respectfully submitted,
R. Dryden Burke
Secretary

Attention Attorneys!

The Probate Court is in the process of updating its list of those attorneys interested in serving as court-appointed counsel for respondents in guardianship cases.

Payment is at the rate of $40.00 per hour, the usual hourly rate for court-appointed counsel.

Attorney time in these cases varies, but averages between three and six hours in the uncontested cases.

If you are interested, please contact Lana Anthony, in the Probate Department, 264-0436.

Merry Christmas
and a
Happy New Year