

# The Alaska BAR RAG

Volume 2, Number 9

Dignitas. Semper Dignitas

Gala Anniversary Issue

September 1979 \$1.00

## Judiciary Committee Public Hearings Announced

The House Judiciary Committee of the Alaska Legislature will be holding public hearings in five Alaskan communities this fall. It will be the first time this committee has taken public testimony outside of Juneau. The communities scheduled are: Anchorage, Fairbanks, Nome, Bethel and Ketchikan. Local legislative information offices have the specific dates and places of all hearings, as well as a listing of the bills currently pending action in the house judiciary committee. **The public hearings will include all matters within the justice system:** The courts, corrections, law enforcement, discrimination, rural justice, domestic violence, and lawyers, as well as specific bills. They include SB 104, establishing an intermediate court of appeals, HB 392, an act relating to domestic violence, HB 252, an act relating to juries, and HB 479, an act relating to Alaska's drug laws. Copies of bills are available at local legislative information offices. All interested persons are urged to attend. Those not wishing to testify may send written statements to the House Judiciary Committee, Pouch V, Juneau, Alaska 99811.

### House Judiciary Committee Interim Schedule

- September 6th Anchorage**  
Charlie, Peggy and Rocky - work session at office: 1016 W. 6th Ave., Suite 201
- September 13th Anchorage**  
Committee Briefing - 9:00 a.m. - office: 1016 W. 6th Ave., Suite 201  
Public Hearing - 7:30 p.m. - Eagle River Public Library
- September 14th Anchorage**  
Committee tour of correctional facilities - Time TBA - Ridgeview, McLaughlin, Third Ave. (Sixth Ave. time permitting)
- September 15th Anchorage**  
Public Hearing - 9:00 a.m. - Alaska Court Building, 303 "K" St. rm 402
- October 5th Bethel**  
Committee tour of Bethel jail - Time TBA  
Public Hearing - 2:00 p.m. - Legislative Information Office, Kuskokwim Inn Annex
- October 6th Bethel**  
Public Hearing - 9:00 a.m. - Legislative Information Office, Kuskokwim Inn Annex
- October 19th Fairbanks**  
Committee tour of Fairbanks jail - Time TBA  
Public Hearing - 2:00 p.m. - City Council Chambers, 410 Cushman St.
- October 20th Fairbanks**  
Public Hearing - 9:00 a.m. -

## Judge Taylor Elected to AUS Board

CHICAGO: The Honorable Robin L. Taylor, Judge of the District Court, First Judicial District, Wrangell, Alaska, has been elected to the Board of Directors of the American Judicature Society.

The American Judicature Society is a national membership organization of lawyers, judges and non-lawyer citizens founded to promote the effective administration of justice through judicial improvements and court modernization.

Judge Taylor was president of the Young Lawyers Section of the American Bar Association, 1972-76; served on the Alaska Bar Association Ethics Committee from 1973-1976; and was Alaska Coordinator of Emergency Services, Federal Disaster Assistance Administration. In 1975, Taylor was president of the Ketchikan Chamber of Commerce and served one term as vice-mayor of that city. He is a member of the American Bar Association and the Alaska Bar Association.

## Contracts Let For Criminal Conflict Defendant Representation

Contracts between the Alaska Court System and private practitioners have been entered into to provide legal representation for conflict criminal defendants in four areas of the State. Drathman, Wiedner & Bryson will provide representation in Area 3 (Anchorage, Palmer, Glennallen, Valdez and Cordova) and Area 5 (Kenai and Kenai Peninsula). James Hackett and Irwin Raven jointly will represent conflict criminal defendants in Area 6 (4th Judicial District excluding Bethel Service Area but including Barrow Service Area). Law Offices of Myron Angstman will provide legal services in Area 8 (Bethel Service Area).

No contracts were let for the First Judicial District; The Chain, Bristol Bay and Alaska Peninsula; or Nome and Kotzebue because no responsive offers were submitted that were cost efficient for the Court System.

Borough Assembly Chambers, 520 5th Ave.  
November 2nd Nome  
Committee tour of Nome jail - Time TBA  
Public Hearing - 2:00 p.m. - Nome City Hall

(continued on page 7)

## Ombudsman Springs New Subpoenas on Bar



Frank Flavin

The latest salvo in the power struggle between Frank Flavin, Ombudsman, his anonymous informants, and the Alaska Bar Association consists of a series of subpoenas for attendance and production of documents from Frank Flavin's office. Those summoned to appear before Flavin's Deputy, Padeen Moriarity, are Donna Willard, President, William Garrison, Bar Counsel and Vicki Goodrow, Bookkeeper. They are required to produce the following documents:

1. Latest audit report.
2. Ted King's letter to Board of Governors dated Sept. 12, 1978 concerning Sunset Audit.
3. Mary LaFollette's letter of resignation.
4. All vouchers, billings or other requests for reimbursement from the Bar Association to the Alaska Court System.
5. Monthly Financial reports for the period July 1, 1978 to June 30, 1979.
6. All vouchers, billings, or requests for reimbursement for members of the Board of Governors for the period January 1, 1979 to June 30, 1979.
7. All vouchers, billings and receipts which back up the Profit and Loss statement for the Midwinter Hawaii Convention prepared by V. Goodrow on August 27, 1979.
8. Original disciplinary report prepared for Supreme Court for last quarter of 1977.
9. Revised disciplinary report for last quarter of 1977.
10. Letter of explanation explaining reasons for revised disciplinary report for last quarter of 1977.
11. Form for reporting disciplinary cases to Board prior to May, 1979.
12. Form for reporting disciplinary cases to Board after May, 1979.
13. The card index on discipline, indicating the type of case, disposition, whether or not appealed, if appealed the disposition, and if sent to the Supreme Court, the disposition there. (Names of attorneys may be removed.)

14. For the period July 1, 1978 - June 30, 1979, all statistical data reflecting

- a. the types of complaints against attorneys received and acted upon;
- b. the types of investigation conducted and the results thereof;
- c. the procedural steps taken with respect to each type of complaint processed and the ultimate disposition of each such action, and
- d. the number of times any member of the Bar subject to the Bar rules is the subject of a complaint or investigation, the type of complaint or investigation in which each such attorney is the subject, the dates on which each procedural step was taken with respect to each such complaint or investigation, and the ultimate disposition of each such action with respect to each such attorney. (The names and identifying information for each such attorney may be removed from any such data.)

15. A summary of facts, without reference to an attorney by name, in complaints or investigations completed in the period July 1, 1978 - June 30, 1979.

In addition, Willard, Garrison and Goodrow are commanded to appear in the hearing room of the office of the Ombudsman on Wednesday, October 31, 1979 at 10:00 to give testimony.

### Moody Moots Motion

On September 13th Judge Moody summarily dismissed Flavin's motion to compel compliance with another subpoena holding it moot in as much as the Bar had voluntarily supplied the information to Frank in his capacity as a Bar member rather than Ombudsman.

Donna Willard announced, on the advice of Counsel, that the Bar office will provide, once again, all records, not deemed confidential, to Frank in his capacity as a member of the Association.

### Donna Available

Willard indicated she will be present in the Association offices, at the date and time set forth in the subpoena, to answer any questions which Frank, as a member of the Bar, might have.

## Inside

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## Random Potshots

"Can the Supreme Court Define the 'Practice of Law'"

by John Havelock

On receiving his 25 year membership award at a September Bar lunch, Verne Martin recalled the circumstances of his first case. A dozen or so lawyers, the entire Anchorage Bar of the day, made a point of being on hand to congratulate Martin on his humiliation by a lay practitioner.

Willkey Jefferson, already a "living legend" 25 years ago, still enlarges his career. At perhaps its high point, Jefferson cost the Anchorage borough hundreds of thousands of dollars in legal defense expenses and costs of interest and bond sales disrupted by litigation. One might fairly ask "if the Bar couldn't put Willkey out of business, what is it doing asking the Supreme Court to adopt a definition of the "practice of law" reaching conduct far beyond Mr. Jefferson's busy practice?"

### Unfazed by Cannon

The Bar Association was evidently unfazed by Canon Three of the ABA Code of Professional Responsibility which recites, "It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law."

Perhaps the adoption of AS 08.08.230 brought this knotty task to the fore. There the legislature, while going out of its way to announce that its actions were founded on "the legislature's inherent power," criminalized the unlicensed practice of law "as that term is defined in the Alaska Bar Rules..." It may be that there is no prohibition on unauthorized practice until such a definition is promulgated. Take note Willkey imitators but first consult a lawyer.

### Draft Ruminations

The Board of Governors approved a draft rule at the end of March of this year, a draft upon which the Supreme Court still ruminates.

It is not without its difficulties. One of the problems is that the same section of statute which calls for a definition excludes from the definition "the use of paralegal personnel as defined by the rules of the Alaska Supreme Court." How does one define the principle without also defining the exception?

The legislative action places in confusing juxtaposition two "inherent" powers. It makes sense that the power of courts should include, without specific constitutional recita-

tion, the power to control who may appear in courts, the conduct of parties and their representatives therein and closely related conduct outside the court having a major impact on the judicial forum. But, absent specific legislative authorization, what stretch of imagination and power allows the court to control the modalities used in transactional counseling?

### Fiduciary Filmflam

There is a public interest in the control of various classes of fiduciary conduct. The giving of legal advice and the preparation of documents having legal effect may be activities which the legislature has a legitimate interest in controlling in the interest of consumer protection at least to the point where First Amendment rights take over. But does the court have a legislative power over such transactional management? It seems unlikely.

### Claiming The World

Arguendo, the court may have an inherent interest in controlling the management of disputes which may clearly be heading for the courts. But of the sea of law which envelopes virtually all transactional activity in the modern era, pre-litigation disputes are but a small fraction. To claim an interest in the management of all transactions which could become disputes which could come to court is to claim a legislative power covering the entire world of human affairs.

Court claims to regulate the rendering of advice beyond the context of litigation are on soft ground. Is the ground firmed up by a delegation under "the legislature's inherent power?" The Court itself would probably say no. At least it said that in the Sabre Jet case when the court disclaimed power granted by the legislature to license liquor dealers.

### Turf Tussles

With the integrated bar now under intensive review and lawyers' turf claims challenged on several fronts, the court today may be reluctant to move into an arena where it could end up with a legislatively bloodied nose. No inside knowledge is claimed, but it does not surprise this observer that the definition of the practice of law has been sitting in the Justices' in-basket for some time.

## BOG Meets for Four Days in September

The Board of Governors of the Alaska Bar Association met in Anchorage, Alaska on September 6, 7, 8, and 9, 1979. In addition to handling five bar examination matters and recommending to the Supreme Court disciplinary action in a matter before it as the Disciplinary Board, the Board also heard reports from Nancy Gordon, CLE Committee; Carolyn Jones, Legal Education Opportunities Committee and Mike Rubinstein, Executive Director of the Judicial Council.

The following actions were taken by the Board. Special committees on Specialization and Prepaid Legal Services were established to report to the Board in March, 1980 and report to the membership in June, 1980 at the Annual Meeting. A standing insurance committee was established and assigned the task of monitoring the Bar endorsed Professional Malpractice program and the Bar sponsored group health and life programs.

The proposal of Bill Erwin and Joe Kalamarides to prepare and write a Workmen's Compensation manual for members of the Alaska Bar Association was tentatively accepted by the Board. The Board considered budgeting \$5,000 in 1980 to pay for secretarial and manuscript preparation. Erwin and Kalamarides agreed to present a CLE program at which the manual would be distributed. They also agreed to present a CLE program at which the manual would be distributed. They agreed to present a budget to the Board in December.

The Board approved a line item budget procedure and determined that the budget for each year would be considered at the December meeting. By unanimous vote, the Board decided to publish for membership response an amendment to the By-laws of the association which would provide for the election of a Treasurer. In the interim, Pat Kennedy was selected to act as Fiscal Responsibility Officer until the Annual Meeting in 1980.

The Board adopted a policy requiring support staff evaluation in December for annual merit raises. To effectuate the policy, merit raises will be considered in December, 1979, which raises, if any, will be effective July 1, 1979 for the remainder of 1980.

Several rule changes were forwarded to the Supreme Court for its consideration. These changes make all time periods for Committee appointments consistent. The Board also approved an Association By-law change establishing an adjunct membership available to lawyers employed in the State of Alaska by the Federal Government and in-house Counsel. Without taking the Bar Exam, such attorneys can apply for

an adjunct membership by payment of \$147.50 per year. This entitles them to full benefits of the Association except they cannot vote or hold office. The Board further voted to publish rule changes regarding law school accreditation and graduation certificates.

The Board adopted Ethics Opinion 79-2 which holds that it is unethical for an attorney to ransack the opposing attorney's trash and garbage. Ethics Opinion 79-3 was deferred until the October Board meeting and Opinion 79-4 was returned to the Committee for clarification.

The proposal of the Bar Polls and Elections Committee to conduct a pro bono activity poll was adopted by the Board with some clarification instructions being forwarded to the Committee Chairman, Ron Baird.

The Board adopted the recommendations of the paralegal Committee and its Chairman, Stephen Conn, to give associate committee membership to paralegals at no fee.

The Board referred to the special committee studying the Alaska Bar Examination the issue of whether prolonged inactive status should require a Bar exam in order to transfer to active status.

The Board adopted a new policy whereby examinees can receive a copy of their essay exam answers and the questions by payment of \$10.00 to cover handling and administrative costs. The multi-state exam questions and answers can not be made available because of restrictions of the National Conference of Bar Examiners from whom the multi-state exam is purchased.

The 1980 mid-winter CLE meeting of the Association will be in Kona January 16th through the 20th, 1980. The 1982 mid-winter CLE meeting will be at the Maui Surf January 20, 21, 22, 23 and 24. The Board is seeking input from the membership as to whether it prefers that the 1981 mid-winter CLE meeting to be held on a cruise ship or some alternative location in the continental United States. Consideration is being given to a seven day round trip cruise from Los Angeles to Mexico. The projected cost per person ranges from \$800 to \$1,500. Special air rates from Anchorage to Los Angeles can be arranged as a part of the cruise package. Final determination on the location of the 1981 mid-winter CLE program will be made at the October Board meeting.

The President reported to the Board on the American Bar Association meeting in Dallas, the 9th Circuit Judicial Conference, the Alaska Legal Services Corporation meeting and the meetings with the Alaska Supreme Court Chief Justice and Court Administrator.

As an economy consideration, the Board voted to hold the remainder of the 1979 BOG meetings in Anchorage. The next meeting is scheduled for October 25, 26 and 27 at the Association Offices.

## ALASKA STATUTES



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## Special Conflicts Committee Dissolved

The Conflicts Committee voluntarily formed in July by representatives of the Court System, Department of Law, Bar Association and Public Defender Agency has been dissolved by committee vote. The purpose of the committee was originally twofold. First, with Court System approval, the committee determined procedures, drafted documents, and wrote solicitation letters to members of the Bar urging private practitioners individually or as a group, to submit offers to enter into a four month contract with the Court System to provide legal services to conflict criminal defendants in one or more of eight specific geographical areas of the state. This goal has been accomplished as reported elsewhere in this issue of the Bar Rag.

The Committee's second goal was (1) to review criteria for determining indigency and conflicts; and (2) to consider and recommend long-term solution(s) to assure competent representation at reasonable cost in all cases where court-appointed counsel is required. This goal will not be pursued by the Committee.

In a letter to Chief Justice Rabinowitz, the Conflicts Committee has urged the Court System to appoint a committee to review such criteria, to recommend rule changes, if any, to establish criteria to determine "indigency" and "conflict" and to recommend rule changes, if any, in order that competent counsel can be provided at reasonable cost in all court appointed-counsel cases. The Committee also recommended that such a Committee be comprised of representatives from the Court Administration, Trial Court Bench, Bar Association, Department of Law, the Public Defender and ALSA. Until such an investigation can be completed, the Committee further urged the Court System to continue to provide representation for criminal conflict defendants by contract with private practitioners.

The Committee members were Karen Hunt, chairperson; Rick Barrier, Grant Callow, Bob Fisher (Court System); Will Condon, Tom Jahnke (Department of Law); Brian Shortell (Public Defender); and Dick Savell and Donna Willard (Bar Association).

## Criminal Misdemeanor Pretrial Order by Judge Beverly Cutler

The following Pretrial Order now is effective in all misdemeanor cases in Anchorage District Court. It is patterned after the Superior Court Omnibus Hearing and Trial Order, but there are distinctly different deadlines and procedures authorized for District Court. The District Attorneys' Office, Municipal Prosecutor's Office, and Public Defender Agency were consulted over wording the order and establishing the deadlines. Most of the order merely sets forth in writing the existing or modified procedures for motions and trial settings in District Court, which policies previously were unwritten.

### New Discovery

One important new part of the order pertains to discovery. The need for defense attorneys to file "form" motions for discovery has been eliminated, because the prosecution now is obliged to disclose everything required by Criminal Rule 16(b)(1-3) within 5 days of entry of a plea of Not Guilty. Defense attorneys must still contact the prosecutor's office and arrange to pick up the materials, however. There is a parallel requirement that the defense disclose certain matters to the prosecutor at least 10 days prior to trial without the necessity of the prosecution applying for a court order.

Deadlines also are set for the filing of motions, at least 21 days before trial, unless new information becomes available after that. If oral argument is desired on motions, a motions hearing date must be requested at calendar call. If an attorney requests a motions date but does not file any motion, he must inform the court when the deadline passes.

Change of pleas must be accomplished on or before the trial date. If a defendant requests a trial and then later decides that he wants to change his plea, he may do so at anytime but must do so on or before the trial date. He may not announce at trial that he intends to change his plea at some future date, unless special leave of the court is sought and granted.

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## Anchorage Motion Practice: Civil & Criminal Cases

**MEMORANDUM**  
 TO: Members of the Anchorage Bar Association  
 FROM: Ralph E. Moody  
 Presiding Judge  
 Third Judicial District  
 RE: Motion Practice—Civil and Criminal Cases

In order to better utilize judicial time and insure that important matters receive the attention to which they are entitled, the judges of the superior court in Anchorage have agreed on certain changes in procedure regarding the calendaring of motions which became effective September 1, 1979. In order to put those changes in the context of existing procedures and answer some questions that have arisen, I am circulating this memo. We in the Third Judicial District are not adopting local rules, rather we are explaining local procedures.

Henceforth, the hours between 9:00 a.m. and noon and 1:30 p.m. and 4:00 p.m. will be set aside for the trial of lawsuits and the hearing of disputes. Each judge will hear oral argument on dispositive motions at 4:00 p.m. each day. The calendaring department will not schedule oral argument on non-dispositive motions unless directed to do so by a superior court judge.

### Short Notice Motions—Screening Hearings

Henceforth, all applications to shorten the time for the hearing of a motion (see Civil Rule 77(j)) will be presented to the presiding judge or, in his absence, the acting presiding judge for consideration. If the presiding judge or acting presiding judge is on the bench, the motion and supporting papers should be left in chambers and will be acted upon at the judge's earliest convenience. Individual judges, including those nominally assigned cases for motions, should not be contacted. Counsel will be notified by the presiding judge's secretary regarding his disposition of the request. Should a hearing be granted on the application for shortened time, it will be calendared before the presiding judge for screening and will be limited

to the question whether time should be shortened on the principal motion (see Civil Rule 77(j)(3), last paragraph). If it is determined that the motion should be considered on short notice, the presiding judge will set an abbreviated briefing schedule (see Civil Rule 77(b) and (c)) and refer the matter to the assigned judge, or if no judge has been assigned, assign the matter to a trial judge for determination.

The granting of such an abbreviated schedule will not ipso facto entail the granting of oral argument. Should the presiding judge determine at the shortened notice hearing that oral argument or an evidentiary hearing is warranted, he shall schedule such further proceedings before the assigned judge and see that the parties are notified. It should be stressed that the presiding judge will only be determining whether consideration of the motion on an abbreviated schedule is warranted and whether oral argument or an evidentiary hearing is desirable. He will not attempt, at the first appearance, to resolve the merits of the motion, though an opportunity will be given counsel to record a stipulated resolution of the motion mooted further proceedings.

### Motions to Dismiss for Failure to Comply with Discovery

The current policy is to grant oral argument as a matter of right on dispositive motions. Technically, a motion to dismiss for failure to make discovery is such a dispositive motion. Technically, a motion to dismiss for failure to make discovery is such a dispositive motion. Practically speaking, such motions are almost never granted. In effect, such motions are treated as discovery motions (see Civil Rule 77(f)), i.e., applications for sanctions under Rule 37, and some sanction less than dismissal almost always imposed. Consequently, oral argument will not automatically be granted on motions to dismiss for failure to make discovery. Before such a motion is calendared for argument, counsel must specifically

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**Stephen Conn's**



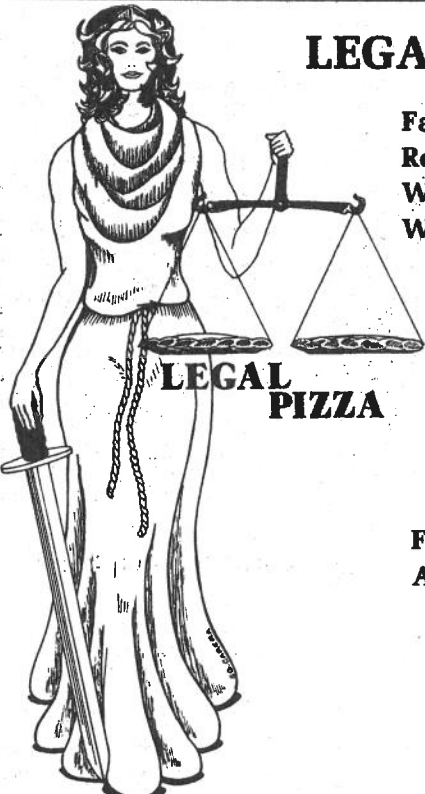
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## Gala Anniversary Issue

The Alaska Bar Rag is one year old. Not a long time in the life of a commercial or house publication, but an advanced stage for a voluntary effort by lawyers. We celebrate our survival in this gala anniversary issue and fervently hope we will be able to continue to mark the passage of the years with twelve issues per annum; more or less on time, depending upon our skills at collecting advertising monies and copy that is worth reading.

We are amateurs at the newspaper business—and as such have made plenty of mistakes. Fortunately, our readers have been kind enough to overlook or tolerate this learning process. We have misspelled difficult words like lawyer and memoriam, fitted the wrong headline to a story or the wrong title to a poem. We have run photographs backwards, but not, so far, upside down. Sometimes our paper looks to us like it is almost a professional effort. Then we read it closely, and find otherwise.

As we review our first year, we note that we have brought to you all the news we can find about the Alaska and Anchorage Bar Associations; and all we dared print about the Ketchikan and Tanana Bar Associations. In addition, we have tried to select and print news stories of general interest to attorneys everywhere in the state.

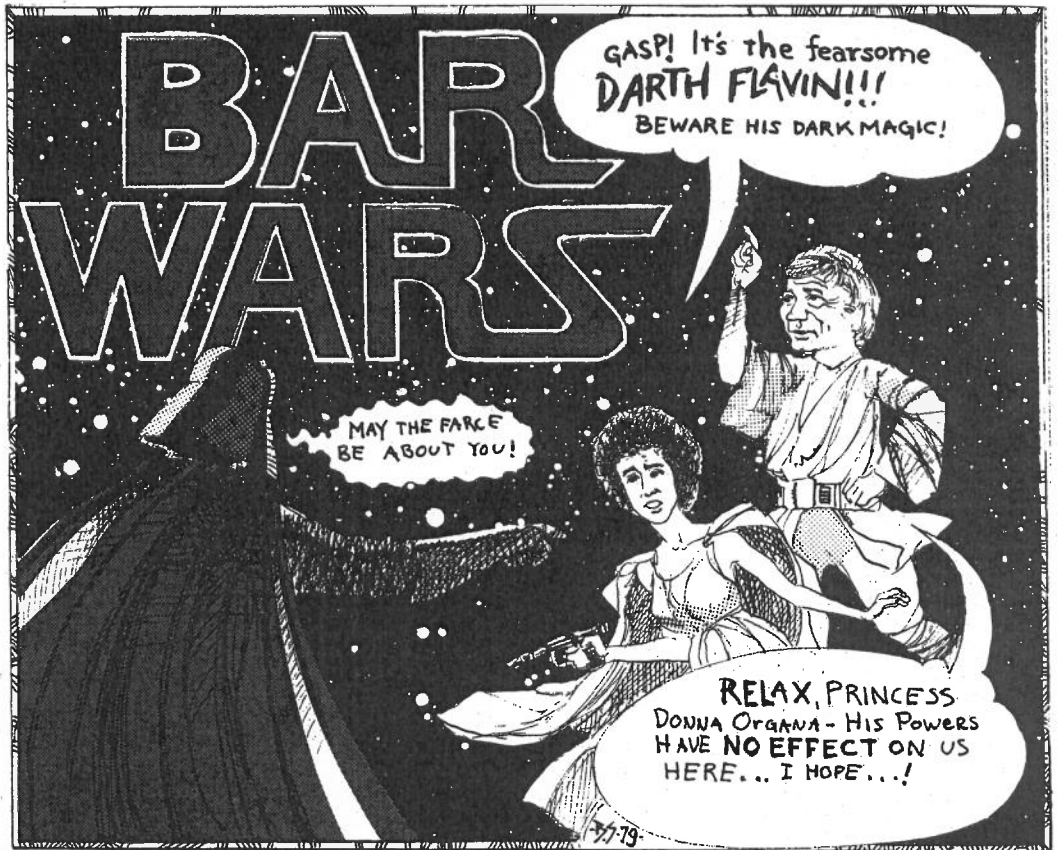
We have brought to you, our readers, the fascinating mental processes of John Havelock, the musings of Russ Arnett, the field and stream writing of Wayne Ross, cartoons, poems, interviews and wherever possible photographs of interest. We have featured articles on the judicial Council, Equal Rights Amendment, tax considerations for small corporations, malpractice insurance the new Alaska Lien Law, how to pick a jury and how to cross-examine, as well as critiques of Superior Court cases of significance.

On the lighter but perhaps no less informative side, we have shown you Stanley Ditus in his element; shared Dick Savell's uncanny know-how at raising chickens, Jack Fyfes hanggliding savvy, the news of the nose, and Steve Dunning's introduction to the art of judo. We brought the news of the legislature to attorneys around the state through Norm Gorsuch's Bills and Notes. We hope to have even closer coverage of the legislature in the next session particularly with the sunset legislation looming ahead for the Alaska Bar Association.

We tried to make elections more interesting by printing stories and pictures about the Board of Governors candidates and Judicial candidates. We also covered the Hawaii and Sitka conventions and hope to continue to cover the two annual major events of the Alaska Bar Association.

This isn't meant to be an exhaustive list, but we think it touches some of the more interesting highlights of a fascinating year for all of us here at the Bar Rag. We expect the news and features to come will be every bit as interesting, perhaps more. Eventually, we may even produce an error free edition.

We appreciate all of the help we have had from contributing Alaskan attorneys and others who have had something to say to our readers. We are delighted with the writing ability of some of our contributors and anxious to uncover new talent in the years ahead. Given your help and support, we hope to be around this time next year to celebrate again.



## Wallace Stevens: Poetry, Lawyers and Alaska

by William T. Ford

I was in New York one day this week, but had very little time to spare. However, I did manage to see Mr. Kent's exhibition [Alaska Paintings of Rockwell Kent] at Knoedler's. Frankly, I was disappointed. This may be because I had not the time to study the pictures. Moreover, I was very much badgered by a female who, judging from my size and the roughness of my regalia, evidently mistook me for a strayed Klondiker. After all, would a Klondiker recognize in all that old gold, old rose, boudoir blue, and so on, not, of course, the actual Alaska, but any sense of Alaska that he had ever had, or any sense of life that he had ever had there?

Wallace Stevens, Letters, p. 217

The interrelationship of literature and law has often been commented upon. Many of the world's greatest writers have had legal training or juristic service: Dante, Mont-

aigne, Goethe, Balzac and Kafka, to name but a few. Both Shakespeare and Dickens are supposed to have served legal apprenticeships, based on evidence in their writing. Portia's courtroom oration in *The Merchant of Venice* and the interminable machinations of Jarndyce v. Jarndyce in *Bleak House* both reveal the artist's fascination with the mechanics of the legal process. Interestingly, each of these works in turn is credited with having had an important influence on the development of English law: Shakespeare in predicting the victory of equity (chancery) over law, which is said to have influenced Bacon's historic decision in *Glanvill v. Courtney*; and Dickens with bringing about a reform of the worst abuses of Victorian chancery procedure.

In the twentieth century connections between legal training and literature are more tenuous. The best recent writing about law and lawyers, one thinks especially of Auden's "Law Like Love," and John Barth's *The Floating Opera*, has been by non-attorneys. And of American

literary figures we know to have been members of the legal profession: Masters, MacLeish and Wallace Stevens, only the most sensitive reader might make a connection between the poet's occupation and his literary work.

Wallace Stevens

Wallace Stevens, lawyer, insurance executive and the best, if not best known modern American poet, was born a hundred years ago, this month in Reading, Pennsylvania. He came from a family of attorneys—his father, and later, his two brothers, had legal practices in Pennsylvania. But Stevens decided early for a life in poetry. He spent three years at Harvard as a special student, taking courses in French and literature and editing the *Harvard Advocate*. After Harvard, he worked for a year as a newspaper reporter in New York City. But at length despairing he would ever be able to make a comfortable living as a journalist, he took his father's advice to enter the family occupation. He enrolled in New York Law School, then as now an undistinguished institution, sometimes confused with New York University Law School, though at the time it boasted retired Supreme Court Chief Justice Charles Evans Hughes on its faculty.

Little is known of his law school days. He spent his summers clerking for W.G. Peckham, a friend of his father and during August of 1903 accompanied Peckham on a hunting trip to the Canadian Rockies in British Columbia. This was as close to Alaska as Stevens ever got but the event was a memorable one of which he wrote and spoke all the rest of his life. In later years, Stevens traveled extensively throughout the United States either on vacations or in the course of insurance litigation. But unlike Robert Service, who ranged from the Klondike to Turkey, Wallace Stevens never traveled abroad ("Abhorring Turk as Esquimeau") and visited Alaska only in his considerable imagination.

[continued on next page]

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# Stevens

(continued from preceding page)

He graduated uneventfully from law school, was admitted to the New York bar in 1904, and opened a law office in New York City with another young attorney. But he was not successful in private practice, although he kept at it with a number of firms until 1908, when he joined the New York office of the American Bonding Company, finally discovering what was to become his life's work. In 1916 he joined the Hartford Accident & Indemnity Co., as a surety bond claims specialist. In 1934 he was named a vice president of the company, a post he held until his death in 1955.

## Poetry

Stevens's mature poetry dates from about 1915, when he was thirty-five years old. In that year he published "Peter Quince at the Clavier," and "Sunday Morning," two of his best known works. From this same period come: "Thirteen Ways of Looking at a Blackbird," "The Emperor of Ice Cream," "Anecdote of the Jar," and two poems which anticipate the poet's increasing preoccupation with winter imagery, journeying to the North, cabin building, living in snow and ice, and contemplating the beauty of the aurora borealis, "The Snow Man."

One must have a mind of winter  
To regard the frost and the boughs  
Of the pine-trees crusted with snow;

And have been cold a long time  
To behold the junipers shagged with ice,  
The spruces rough in the distant glitter

Of the January sun;...

and "The Comedian as the Letter C:"

America was always north to him,  
A northern west or western north, but north.  
And thereby polar, polar-purple, chilled  
And lank, rising and slumping from a sea  
Of hardy foam, receding flatly, spread  
In endless ledges, glittering, submerged  
And cold in a boreal mistiness of the moon.

.....  
Perhaps the Arctic moonlight really gave  
The liaison, the blissful liaison,  
Between himself and his environment,  
Which was, and is, chief motive, first delight,  
For him, and not for him alone. It seemed  
Illusive, faint, more mist than moon, perverse  
Wrong as a divagation to Peking.

These lines, written sixty years ago, seem almost prophetic of modern day Alaska and its concerns.

Such themes recur constantly in the work of this poet who has been called (by poet Leonard Nathan) The Master of the Winter Landscape. And these remained constant throughout his life.

In *The Auroras of Autumn* (1947), the poet in his candlelight cabin, opens his door on the Northern Lights:

...He opens the door of his house  
On flames. The scholar of one candle sees  
An Arctic effulgence flaring on the frame  
Of everything he is. And he feels afraid.

Stevens' poetic reputation grew steadily during the 1930's and 40's, although his work was considered to be neither "popular" (like Frost) or "serious" (like Eliot) in that it frequently seemed to lack either subject or readily discerned antecedents in the tradition. But if he was a puzzle to readers and critics, other poets came to regard him with highest admiration. As early as 1919, Hart Crane could write: "There is a man who makes most of the rest of us quail," and after Stevens' death in 1955, Theodore Roethke would compose "A Rouse for Stevens:"

Roar'em, whore'em, cockalorum,  
The Muses, they must all adore him,  
Wallace Stevens, are we for him?  
Brother, he's our father!

# A Trip to China or What I Did Last Summer

by James Blair

During late June and early July my wife, Shirley, and I visited China. Our visit was for the sole purpose of seeing as much of China as we could in 13 days. It was not a legal or judicial tour so we had no contact with courts, judges or lawyers. Accordingly, it was a real vacation.

The tour was organized by faculty members of Montana State University, and the full cost of the tour was paid in advance to the China Travel Services. In return, China Travel Services provided all transportation, lodging, meals and tour guides who took care of the details. Two guides met us in Canton, and they accompanied us during the entire trip. We visited four major cities, Canton, Shanghai, Sian and Peking, and were assisted by two local guides in each city, and our permanent guides were responsible for arranging travel between cities and dealing with the daily management problems inherent with a 24-person group. This system worked very well. Our local guides could answer almost any and all questions because of their familiarity with their own region, and our permanent guides were free to make sure that all necessary advance planning was done.

The daily itineraries were designed to keep the group busy all day and most nights, but there was no requirement that individual members participate in the scheduled tours. We were free to venture off on our own to explore as we wished if we could make our own arrangements. Language barriers prohibited any complicated ventures, but we did enjoy just walking around the cities exploring and looking. The Chinese

people in Peking seemed to be used to Westerners, but we were apparently still unique in Canton, Shanghai and Sian. I suspect this is because we often went to places on our own which were well off the beaten tourist track. In these areas



it was not unusual to be surrounded by more than one hundred people. They were unfaillingly polite and courteous, but they were certainly curious. At no time were any of us ever nervous or concerned for our welfare during these encounters. I learned to just accept and enjoy the crowds as a part of China. There wasn't actually much choice. It is very difficult to be inconspicuous when you wear a beard and are nine inches taller than the average Chinese.

## Tour Highlight

The highlight of our tour was a visit to the excavation site of the buried terra-cotta army which stands guard a few miles from the tomb of Chin Shih Huang, first Emperor of the Chin dynasty. The tomb is located about 25 miles from Sian in Western China.

Chinese archeologists are laboriously piecing together the smashed fragments of 8,000 life-sized pottery figures of warriors and horses. The army consisted of infantry, cavalry, chariots and bowmen. It had a vanguard and a rearguard and two lines facing outwards on the flanks. They were buried 20 feet deep approximately 2,100 years ago.

The warriors are all six feet tall. They carried swords, spears and crossbows. The wood has vanished, but the bronze trigger mechanisms for the crossbows remain intact. The trigger mechanisms have several



It has taken readers awhile to catch up. Now it seems one cannot pick up a piece of popular literature without coming upon a quotation of Stevens. We find in John Irving's bestseller *The World According to Garp*, an indulgent novel, yet full of favorite things: Newfoundland dogs and calligraphy pens, Wellesley girls—and Wallace Stevens. On page 465, the author/protagonist, son of a famous feminist writer, wants to write a novel titled "The Plot Against the Giant." The significance is not clear, but the poem, one of Stevens' most sensuous ("Heavenly labials in a world of gutturals.") is possibly the closest thing to a feminist manifesto Stevens ever wrote.

And a recent book of scientific essays, Lewis Thomas' *The Medusa and the Snail: More Notes of a Biology Watcher*, in a piece called "The Scrambler in the Mind:"

Maybe there is a need for secrecy where language is involved. It is conceivable that if we had anything like full, conscious comprehension of what we are doing, our speech

moving parts and, of the numerous mechanisms thus far excavated, the parts are interchangeable. Testing of the swords shows that 13 separate elements were used to produce the extremely hard steel from which they were made. They remain as sharp and durable as any weapons produced since.

Only a small portion of the three acre site has been excavated. At least 95 percent of the figures are still buried. Numerous Chinese archeologists, assisted by laborers, were scraping away the soil with hand trowels. Some of the statues have survived mostly intact. It was a powerful experience to see them particularly unearthed. Heads and torsos projected out of the ground at odd angles.

The whole excavation site is now covered with a huge cantilever roof. The building, which resembles an airplane hanger, measures 200 feet by 700 feet. The long range plan is to excavate the whole site, restore all the figures and replace them as they originally were with all 8000 figures lined up at attention. It is now estimated that it will take 20 more years to complete the project.

The tomb that the figures guard is covered by a sloping, hand-constructed hill several hundred feet high. It has not been opened, and the Chinese have no plans to open it in the near future.

## The Lure of Peking

In Peking we visited the Great Wall, the Forbidden City and Chairman Mao Tse Tung's Mausoleum.

The Great Wall has been more than adequately described many times elsewhere, but it was a great thrill to see. We walked along the top of the wall for several hours. In the days of horseback armies it must have been a formidable obstacle.

The former Imperial Palaces were the residences of the emperors of the Ming and Ching dynasties. They form the biggest and the best preserved group of ancient buildings now existing in China. The Palace Quarter is surrounded by a wall 35 feet high and a moat 170 feet wide. The area inside the wall used to be called the Forbidden City since only royalty and staff could enter. The palaces are now used to house national art treasures, and the whole area is called the Imperial Museum. There are many palaces and over 9,000 rooms so several days could easily be spent there.

Just outside the main gate to the Forbidden City is Tien An Men Square—one square mile of concrete open space in the center of Peking. Over one million Chinese can

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would be degraded to a permanent stammer or even into dead silence. It would be an impossible intellectual feat to turn out the simplest of sentences, the lovely Wallace Stevens sentence, for example: "The man replied, Things as they are, are changed upon the blue guitar."

These are merely instances.

A lawyer, Stevens is not a lawyer's poet. His concerns have to do with the relation of reality and the imagination, and the role of poetry in defining this relationship. One may occasionally come upon a *lex res*, but the language is not legal. Stevens' idea of a "supreme fiction" may have some antecedents in legal fictions, but there is ample literary tradition to account for this concept. If there is any one thing about Stevens' work, aside from its generalist aspect, that ought particularly to appeal to the legalistic sensibility, it is his habit of argument by dialectic, so reminiscent of trial procedures, (or sometimes) of motion hearings. It is these arguments that a fellow lawyer might best be able to follow,

appreciate and judge. And what lawyer does not wish to be a judge, especially of another lawyer's work?

## The Centennial

The centennial of Wallace Stevens' birth (October 2, 1896) is to be the occasion of a number of tributes, poetry readings, and new critical works: a new biography by Peter Brazeau is to appear in a few months, a book of essays has been announced by Princeton University Press, special issues of literary periodicals *The Southern Review*, *Antaeus* and *The Wallace Stevens Journal* are in the works, and festivals are being held at The University of North Carolina, Chapel Hill, and in New Haven and Hartford, Connecticut. It is hoped that from all this will come an increased readership and appreciation for this lawyer's supreme literary achievement.

William T. Ford is an Anchorage attorney and managing editor of *The Bar Rag*. He formerly edited and published *The Wallace Stevens Newsletter* and is associate editor of *The Wallace Stevens Journal*.

## Bar Rag Interview Wendell Kay

A Candid Conversation in two parts with "The Silver Fox"  
by Ace Reporter  
Kathleen Harrington

**KH:** Wendell, you have been an established practitioner in Anchorage for years. What initially brought you to Anchorage?

**WK:** Came up here in 1946 but I didn't start practicing until January 1, 1948 because at the time I came up here I was Executive Director of the Alaska Housing Authority. Something I knew absolutely nothing about. But it was an interesting job.

**KH:** And you were there for two years?

**WK:** Yes. Actually I came up here in the fall of 1946.

**KH:** With a law degree in hand?

**WK:** Oh yes, I had practiced law before the war in Centralia, Illinois. I got out of law school in 1938 and worked for the National Labor Relations Board for a year in Washington, D.C. and then my brother and I opened a law office in Centralia, Illinois. We didn't know what we were doing, but we had a lot of fun anyway.

**KH:** That's a farming community isn't it?

**WK:** Centralia was a farming community, peach orchard area, but they struck oil there so it was like Alaska in a way, it was full of pointed-toed boots from Arizona, Oklahoma and Texas and they were drilling oil wells all over town. They were drilling them on city lots, if you can imagine that.

**KH:** A real boom.

**WK:** A real boom town. And so nobody knew one lawyer from another. We hung up a sign. You know, as far as the average guy from Texas knew, we were just as good as lawyers as anybody else, so we had a

lot of fun fooling people that way.

**KH:** How long did you practice in Centralia?

**WK:** The war got both of us. My brother went in the Army in 1941 and I went in late 1942. I was in the Army until September of '45. I got out and I took a look at Centralia and it was the old story of how you gonna get 'em back on the farm after they've seen Paree' so I went from Centralia to Portland, Oregon. The little government agency I worked for in the Department of Interior became the nucleus of the first regional office of the Bureau of Land Management. We created the Bureau of Land Management and so I was really the first acting regional attorney of the first region of the Bureau of Land Management. Then this job offer came from Alaska and I came up here.

**KH:** Did your brother stay in Centralia?

**WK:** My brother didn't. It's an interesting story too. He got out of the Army. He had never really been too hot about practicing law. He was really a musician. So he was wounded in the war and when he got out he took a look at Centralia and said "I'm not only not going back to Centralia but I'm not going to practice law," so he commenced teaching piano and he's been teaching piano ever since.

**KH:** In the mid-west?

**WK:** In Louisville, Kentucky. He's the dean of the piano teachers of Louisville I guess. He is very happy, very successful. He and I just got back from a trip to Spain this summer.

**KH:** What was the practice of

law like when you initially came up here?

**WK:** Well, when I came up here there were 18 lawyers in town. The entire bar association is in that picture up on the wall. I'm the top one on the right. Come on I'll show you. The front row is Harold Butcher, John Manders and old George Grigsby who was the president of the bar. This is George here, Dorothy Tyner, Warran Cuddy that's Dan's father, who was my partner, and Bill Olson. In the middle row that's Dan Cuddy over on the left, Stan McCutch, Paul Robison, Harold Stringer, Ed Davis and Evander Smith. In the back row, Cecil Roley, Wendell Kay and Pete Kalamarides. There were a couple more that weren't in the pic-



ture. Bill Renfro wasn't there. But that was the entire bar. Anchorage was a town of about 15,000 people, very busy, very exciting place to practice law. Everybody was doing everything. Buying and selling and shooting each other, and getting divorced.

**KH:** What did you do after working as executive director of the Alaska Housing Authority?

**WK:** I went in with Mr. Cuddy. Mr. Cuddy had had a partner, Ed Arnell. Ed was actually the founding member of the firm of what is now Burr, Pease & Kurtz. Ed died many years ago. But anyway, he had been Mr. Cuddy's partner and he decided he was going back to Seattle. So he quit, leaving Mr. Cuddy without a partner and without anybody to do his trial work. Mr. Cuddy liked office law but he didn't like to try cases. He could try them but he didn't like to so he was desperate. Somebody told him that I was a lawyer. He called me up out at the Housing Authority and said, "I understand you are a lawyer," and I said, "Yes I am." He said, "What are you doing out there," and I said, "I'm marking time." He said, "Why don't you come down and talk to me?" So I came down and we started talking at 8 o'clock and at 11 o'clock we had formed a partnership. Believe it or not that was the way it went. I never met him before that night, he'd never met me. But by 11 o'clock he offered me a partnership and I accepted it.

**KH:** What was your practice like?

**WK:** Very, very busy. Mr. Cuddy at that time was the President of First National Bank as well as having a law office. A couple of years later the controller of currency told him he had to quit that. Do one or the other but at that time in addition to doing a great deal of business work for all the bank's customers and Mr. Cuddy's friends and so on and so forth we also did a fairly large just general litigation practice, so it was very, very busy. We had two lawyers and six secretaries.

**KH:** Were you in court a lot?

**WK:** I was in court almost continuously.

**KH:** Who was your favorite judge, then?

**WK:** There was only one in those days. The judge then was Judge An-

thony Dimond who was the father of Justice John Dimond who retired from the Supreme Court. I remember when John was admitted to the bar. I was his examining lawyer. In those days you took a little exam and then a practicing lawyer examined you on the law and then took you over to court, introduced you to the judge and moved your admission. And so I asked John a few perfunctory questions and marched him over to court and moved that he be admitted. I introduced him to his father who acknowledged that he knew him faintly and he was admitted, whereupon we all went over to the Mer-mac Lounge and had several drinks.

**KH:** When did you start getting interested in the criminal law?

**WK:** After two or three years. I did a great deal of litigation but it was mostly civil litigation in the early couple of years and then George Grigsby who was the best and most prominent lawyer in town, he was really a very tremendous trial lawyer, you could write a book about him incidentally, he came to Alaska in 1900 in Nome and he practiced all over Alaska until about 1963 when he finally retired. That is a pretty long career, 63 years practicing law in Alaska. Great lawyer. Well anyway, George called me up and asked me if I would help him on a murder trial. He needed somebody to counsel with, sit at the table, run errands, run down witnesses so on and so forth. And I said I would be delighted. So he and I were defending a young man by the name of Buzz Barbow, that was quite a case. Buzz was convicted of negligent homicide by virtue of having accidentally shot a fellow right under the chin with a Ruger pistol. Rather amazing result. George was a fine lawyer. Well, that got me interested in criminal law.

Then a few months later George was asked to go down to Ketchikan and defend a fellow by the name of Joe Patterson on a charge of bribery. He was invited to come down there by Adolph Ziegler who was the head of the Ketchikan bar and the father of Bob Ziegler, the present state senator and lawyer in Ketchikan. George couldn't go so he recommended that Mr. Ziegler have me come down and try the case. I went down and tried the case and it was a great case, Joe Patterson was a very well liked young man there in Ketchikan who was charged with attempting to bribe a fish officer to permit him to fish illegally and it turned out to be an absolute classic case of entrapment. Trial lasted three days. In those days the courtrooms were full, that was before television in Alaska and if a case had any prominence at all it was standing room only.

**KH:** Theater.

**WK:** Yes, it was real theater. Standing room only. There would be 15, 20, 30, 40 people standing across the back of the courtroom at all times. Fascinating, fascinating case. Great case. And then in about 1951 or 1953 Mr. Cuddy as I said was requested to either practice law or continue to serve as President of the First National Bank. The bank was too big for a part-time president and so of course he elected to pursue the bank. By that time his son Dan Cuddy was a partner and also Roger Cremo was associated with us and so Roger and Dan formed a law firm and I was left in the office with a great many of the clients and the furniture when Mr. Cuddy went over to the bank. And I promptly formed a partnership with Paul Robison who had been working for Davis & Renfro and Paul and I had a very happy relationship for about two years when he decided to go off on his own and in the meantime Ralph Moody had joined us. The firm was Kay, Robison & Moody for a year or so. And Dave Talbot was working for us as a clerk. And during

[continued on next page]

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that time while I was continuing to do a great deal of civil work, I also began to do a lot of criminal cases.

**KH:** Did you every try a case with Judge Moody?

**WK:** I tried cases against Ralph when Ralph was Assistant United States Attorney before he came with our firm. I tried a number of cases with Ralph. He was a good trial lawyer. After we were partners, no, I don't believe we ever had



occasion to go to court at the same time. Ralph was the attorney for what is now the Alaska State Bank. In those days it was the City Bank. And he also was, the firm was also the city attorney's of Anchorage. In those days the city did not have its own house counsel but they were engaging law firms in town to do the city's legal work. Our firm was the city attorney and Ralph was the one who went to the meetings and did the city's work. So he was pretty busy between the bank and the city. He didn't try too many cases after he went into private practice, at least while he was with me. He did later but not then.

In 1954 or so, Ralph and Dave moved out and formed their own firm. Shortly thereafter, I went to the 1955 session of the legislature as Speaker of the House and came back and S.J. Buckalew and I had formed a very close friendship during the legislature. When we came back we formed a law partnership and so the firm was Kay & Buckalew for a number of years.

**KH:** Was there still only one judge on the bench in Anchorage?

**WK:** Well, the situation in territorial days was there was one judge for the Third Judicial District. There was a judge in Nome, a judge in Fairbanks and a judge in Juneau and Anchorage. Anchorage was of course the busy place so quite frequently we would get the judge from the First Judicial District, from Juneau to come up and help. For a long time that was Judge Folta who was later followed by, I can't recall the judge's name, who succeeded him briefly at about the time Alaska became a state. And there was Judge Pratt in Fairbanks would come down occasionally and try cases. Judge Pratt was succeeded by Judge Vernon Forbes, who is still in the banking business up in Fairbanks. The judge at Nome was for a time Judge Joe Kehoe. Judge Kehoe was a painter of some renown. In fact he was a water colorist and a very good one. After he retired from the bench in 1951 or 1952, he became a professor of art at the University of Washington, and died there after many years of teaching art. He was a better painter than he was a judge, let me say that. He was a nice old fellow, but a fine painter.

**KH:** You talked about a courtroom providing drama and theater when there wasn't any other form of entertainment. Did the judges that you practiced before allow that theater to happen?

**WK:** Well they were good judges. I wouldn't say that they in any way lacked in dignity or the ability to maintain the proper atmosphere in the courtroom. I think that generally the practice of law was a little bit looser, let's put it that way, then maybe it is now. There might be a little bit more frontier flavor, of bravado and daring to make

some remarks that you might not make today. Daring to ask questions that you might not ask. In other words the practice of law was a lot of fun. Incidentally, in criminal cases discovery in those days was unheard of. There was no discovery. You found out what you could about the other side of the case but it was really a battle of wits. You knew that the other side was going to attempt to surprise you and you hoped that you would be able to surprise them. And so I think the trials did have a lot more excitement to them than they do now, when you know everything, the government is going to present, or hopefully everything, and the government has a pretty good idea of what you are going to say.

**KH:** Did you do your own investigation back in the 50's or did you hire someone to do that discovery for you?

**WK:** No, in those days I don't believe there were any investigators in Anchorage for anybody and so in personal injury cases and all kinds of investigation, criminal investigations, you did what you could yourself. Or maybe you had some young man working for you, or young lady working for you, who you would send out to do some of the investigation. Most of it you did yourself. And most of the legal work you did yourself. You went to the library and you stayed until 11 o'clock briefing the legal points.

**KH:** What is your favorite criminal case from this period of time, the 50's?

**WK:** Well, it would be hard to say what would be my favorite one. I think probably one of the most exciting cases from the 50's was the case of Frank Maroney, he was charged with murder. That case was transferred for trial from Anchorage on a change of venue to Juneau and was tried there by myself for the defense and George Hayes was the United States attorney prosecuting. It was a real exciting knock down drag out case. Went four or five days in Juneau. Pretty exciting event for little old Juneau because Maroney and his entire entourage of bail-bondsmen, lawyers, witnesses and everything else occupied the penthouse at the Baranof Hotel.

**KH:** In practicing criminal law did you spend a lot of time with

people who, so to speak, live on the edge?

**WK:** I discovered fortunately, very early in my practice that while these people might be very charming and entertaining, that associating with them outside of your law office could be a very dangerous thing to do. I was fortunate.

I was advised by an old lawyer from Texas back in Centralia that one thing you didn't do was hobnob with people who were accused of crime. They might be fine people but confine it to your office and so on and so forth and I did. And I've seen fellows who didn't do that, who got too chummy with their clients, get into trouble. I've seen two or three guys who were friends of mine, good lawyers, disbarred. No longer in practice simply because they got too chummy with the people they were representing and eventually that fine line between...Well, they just got too chummy, let's put it that way.

**KH:** So you didn't stay up in the penthouse at the Baranof?

**WK:** No, I did not. And sometimes when you're busy late at night and early evening and instead of coming down to the office you think to yourself, this guy is a nice guy, why shouldn't I bring him over here to the house and we can work on the floor in the living room and get all this stuff done. And then I would think to myself, no, let's go down

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**Judiciary Committee**  
[continued from page 1]  
November 3rd Nome Public Hearing - 9:00 a.m. - Nome City Hall  
November 9th Ketchikan Committee tour of Ketchikan jail - Time TBA  
Public Hearing - 2:00 p.m. - 3rd Floor District Court Room, 415 Main St.  
November 10th Ketchikan Public Hearing - 9:00 a.m. - 3rd Floor District Court Room, 415 Main St.  
November 29th Anchorage Committee Hearing with invited persons - 9:00 a.m. - Place TBA  
November 30th Anchorage Committee work session & wrap-up for final report - 9:00 a.m. - office: 1016 W. 6th Ave., Suite 201  
Public hearings will include all matters in the justice system: courts, law enforcement, corrections, discrimination, domestic violence, lawyers, as well as specific bills: SB 104, HB 392, HB 252, HB 479.

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## Plea Bargaining in Alaska

by Russ Arnett

Mayhem was charged against a man who shaved off his girl friend's pubic hair without her consent. The prosecutor believed the public interest could be assured and the accused adequately punished for some offense less heinous than mayhem, but he and defense counsel knew no lesser included offense. Judge Folta suggested "barbering without a license." Nowadays in Alaska the case would presumably be concluded as guilty or not guilty of mayhem because in 1975 Av Gross told his prosecutors not to plea bargain.

On another occasion Judge Folta was present when prosecution and defense negotiated and agreed upon a change of plea and recommended sentence. After a guilty plea was entered Judge Folta imposed a more severe sentence than recommended. When defense counsel claimed this was unfair in view of his silence during the negotiations Judge Folta claimed he was not a party to the negotiations.

To clarify such matters Criminal Rule 11(e) was promulgated by the the Alaska Supreme Court in 1973. It approved plea bargaining and imposed reasonable safeguards. The Supreme Court recognized that prosecution and defense can as a rule be trusted to work out an appropriate disposition. The requirement of Rule 11 of acceptance or rejection of the plea agreement by the judge provides further assurance of its reasonableness.

### The Untold Story

The untold story of plea bargaining in Alaska is that it is alive, but not well. If the accused is a snitch, or if the accused turns state's evidence, fine, the State will plea bargain. The D.A. may plea bargain where the expense of prosecution is excessive. Excessive expense to the defense not so. Plea bargaining has occurred as to traffic manslaughter. There may be plea bargaining for sexual offenses, particularly child molesting, or in drug cases. Misconduct by a police informant which might have embarrassed the police also resulted in plea bargaining in several drug cases. Mental or emotional problems of defendants has resulted in plea bargaining. The State may plea bargain when the

D.A. realizes his case is weak and may not get through an Omnibus Hearing. This, of course, is one of the main reasons why prosecutors the world over plea bargain and establishes the practical necessity for plea bargaining. Negotiations for dismissal of a whole raft of proveable charges against a defendant who pleads guilty to one charge still takes place.

### Subjective Standards

For the Attorney General to refuse to let his prosecutors plea bargain implies he is afraid they are weak and may give away the store. Anchorage once had a prosecutor who would regularly check into the hospital when defense counsel put on the pressure. Whether plea bargaining will occur now usually depends upon case by case decisions in the A.G.'s office in Juneau, often by the Attorney General himself. The determination must be relatively subjective or written standards could be adopted which would free the A.G. from this task. It was originally contemplated by the Attorney General that records of all exceptions to the ban would be kept on file in Juneau at the Criminal Division offices and that all requests be in writing. Requests now may be phoned in. In addition to official requests for permission to plea bargain there are also unofficial requests which are granted. Though some plea bargaining authorizations are found in the exceptions file in Juneau others are not. Though exceptions may prove the rule, an incomplete record of exceptions to the ban does not prove anything. The Attorney General has embarked on a policy of limiting plea bargaining even though it is a time honored practice which the Supreme Court has authorized. The Bar, the judiciary, and the citizenry at the very least are entitled to know everything presently going on and to have written and consistent plea bargaining standards which district attorneys and defense counsel may follow.

### Sentencing Function

One of the reasons given by the Attorney General for the plea bargaining ban is that district attorneys were blamed by the public for lenient sentences. His ban on plea bargaining was intended to reduce or eliminate the role of prosecutors in sentencing. It was argued that sentencing is a judicial function and counsel should stay out of it. On the contrary, because sentencing in one of the most critical stages of a criminal case it is one where active

participation by counsel is most needed to protect the public and the accused. Nearly always counsel have spent more time on the case and know more about the accused than the judge. The public is entitled to have the prosecutor argue forcefully that the defendant be given a stiff sentence if this is necessary to protect the public.

The December 1978 report of the Judicial Council on plea bargaining concludes that in the Anchorage, Fairbanks and Juneau study area the absolute number of felony trials increased 37 percent from 109 trials in Year One to 149 in Year Two, and that prosecutors, defense attorneys, and court officials were noticeably busier with trials than formerly. The percentage of felony cases which went to trial increased from 6.7 percent to 9.6 percent. This is an increase of 30.20 percent. My personal view is that the ban on plea bargaining has finally put the trial courts in Anchorage over the brink with the resulting disruption of all civil and criminal litigation.

## Practice of Law Committee Notice

On May 19, 1979, the President of the Alaska Bar Association appointed an Ad Hoc Committee to survey current practices of law in Alaska with respect to advertising, use of firm names, compliance with the Alaska Bar Rules and the Code of Professional Responsibility, and those current practices' effect on the Board of Governor's and Supreme Court's powers to discipline the practice of law in Alaska. This Committee consists of Robert Baker, John Bradbury, Keith Brown, David Bundy, Daniel Gerety, Robert Mahoney, Lester Miller, James Powell, Richard Thaler, and Eric Wohlforth. Frederick H. Boness has since been appointed to the Committee.

The Committee will receive written comments from members of the Bar and any other interested persons concerning the above mat-

## Federal Arbitration Conference Scheduled

The Federal Mediation and Conciliation Service (FMCS) and the American Arbitration Association are sponsoring a conference on arbitration in Anchorage on October 29, 1979. The conference starts at 8:00 A.M. in the Kuskokwim Room of the Sheraton Anchorage Hotel. The program includes a speech from Lawrence L. Schultz, Director of Arbitration Services, FMCS in Washington, D.C., a panel including Chairman Neal Blacker, Regional Director, American Arbitration Association on the selection of an arbitrator, and afternoon workshops on the following topics:

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Reservation for the program should be sent with the \$50.00 fee to:

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Federal Building and U.S. Court House  
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Anchorage, Ak. 99513

ters. The Committee desires to make its recommendations, if any, to the Board of Governors by October 15, 1979. Written comments may be submitted to Dan Gerety, Chairman, Ad Hoc Committee, 1007 West Third Avenue, Anchorage, Alaska 99501.

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If you were involved in any Civil or Misdemeanor court case filed in the Fourth Judicial District before January 1, 1978, which is now closed and not on appeal, you should make arrangements to immediately remove from our file any exhibits, depositions and transcripts you wish to keep.

If these exhibits, depositions and transcripts are not claimed and removed from the court system on or before January 1, 1980, they will be destroyed.

You may call 452-1551 or write to the above address for further information.

DATED at Fairbanks, Alaska this 21st day of August, 1979.

JAMES R. BLAIR  
Presiding Superior Court Judge

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# Cutler

[continued from page 3]

## PRE-TRIAL ORDER-CRIMINAL MISDEMEANOR

(1) Calendar call in this case will be held at the date and time indicated in the attached papers. At that time defendant or counsel shall be prepared to request a trial date, a date for hearing motions, or change of plea. Discovery, investigation, and conference with the prosecutor necessary to preparation for the foregoing must be completed before that time.

(2) Within five (5) days after entry of a plea of not guilty the prosecuting attorney shall make available for inspection and copying all information and material within his possession and control which he is required to disclose by subsections (b)(1), (b)(2), and (b)(3) of Criminal Rule 16. Such materials coming into his possession or control after that date shall be disclosed promptly without the necessity of a defense request or further order of this court.

\*\*\*

(3) In not less than ten (10) days prior to trial defense, counsel shall disclose to the prosecuting attorney and make available for inspection and copying, any reports or statements of experts made in connection with the case, including results of physical or mental examinations and of scientific tests, experiments or comparisons which are intended by the defendant to be used at trial, and give notice of any intent to present a defense of alibi, insanity, or lack of capacity. Such materials or information coming into his possession or control after that date shall be disclosed promptly without the necessity of a request or further order of this court.

\*\*\*

(4) Upon a showing of good cause, the disclosure required by this order may be restricted, deferred or denied

pursuant to subsections (d)(4), (d)(6) or Criminal Rule 16.

(5) In not less than fourteen (14) days prior to any motion date, counsel or the defendant shall file with the clerk of the court and serve on opposing counsel all pre-trial motions. Opposing counsel's response (if any) shall be filed and served not less than seven (7) days prior to the motion date. If the party requesting a motions date later decides that he does not intend to file a motion or for any reason he does not file a motion by the deadline set, he shall inform the court immediately and the court will set the case for the next available calendar call with notice to all parties.

\*\*\*

(6) Subject to constitutional limitations, failure to raise any pre-trial error or issue by filing appropriate motions at least twenty-one (21) days before the day or trial and/or requesting a motion date at calendar call if oral argument is desired shall constitute a waiver of such error or issue unless the party concerned, despite the exercise of reasonable diligence, does not possess the information necessary to raise it.

(7) No attorney shall represent the defendant at any proceeding without filing, immediately after being retained, an entry of appearance with the court and serving a copy upon the prosecution (Criminal Rule 50) with the exception of public defenders, including specially appointed public counsel, who instead must indicate at calendar call the attorney assigned to the case.

(8) The defendant shall be present at each stage of the proceeding unless a consent to proceed has been filed with the court, according to the provisions of Criminal Rule (38)(c). Failure of the defendant to appear at calendar call will result in the issuance of a bench warrant unless a consent to proceed has been filed with the court. Failure to appear of an attorney who has filed an appearance will result in the issuance of an order to show cause.

(9) If defense counsel requests a trial date at calendar call, he shall thereby be deemed to assert,

as an officer of the court, that he has had contacts with his client of such a recent nature that he reasonably believes that the client will be able to be reached to be informed of the trial date and be present at trial. The prosecuting attorney upon accepting a trial date shall thereby be deemed to assert that he reasonably believes the necessary witnesses can be reached by subpoena or otherwise and will be available.

If either counsel cannot make the above assurances, he must inform the court of that fact.

(10) Defense counsel shall inform the prosecution at least (1) working day before trial if he has not been able to inform the defendant of the trial date or else be subject to possible sanction for unnecessary appearance of witnesses should the defendant fail to appear for trial. The prosecuting attorney shall similarly inform the defendant or defense counsel if he learns prior to trial that he is unable to subpoena or otherwise secure the appearance of a witness without whom he does not intend to proceed, or else be subject to similar sanction for unnecessary appearance of defense witnesses.

(11) If a defendant decides after requesting a trial date that he wishes to change his plea, he may do so at any time without leave of the court provided the change of plea is accomplished on or before the day of trial.

Both the prosecutor and the defendant or defense counsel are hereby ordered to comply with the terms of the foregoing unless specifically otherwise directed or be prepared to show cause why appropriate sanctions should not be imposed.

All time periods referred to in this order are computed by calendar days unless otherwise indicated.

This order applies to all misdemeanor prosecutions in Anchorage District Court effective immediately.

This done at Anchorage, Alaska, this 16th day of August, 1979.

BEVERLY W. CUTLER,  
DISTRICT COURT JUDGE

# China

[continued from page 5]

gather here, and they do on May Day. The only building in the Square is Chairman Mao's Mausoleum. We joined thousands of Chinese in marching solemnly past the crystal bier containing Mao's body. I can report that Mao looks well, old and very dead. What is left of him is extremely well preserved, and he is certainly recognizable.

## Personal Impressions

Several things impress me most after several weeks and several thousand miles in China: Every acre that can produce food is being cultivated. Even the banks of irrigation ditches contain poles which support bean vines which grow over the ditches.

The people generally appear to be well fed, happy and content with their lot in life. Naturally this is the rankest form of speculation based only upon my limited contact, but that is the impression I received.

The cities and the people we saw were immaculate. In a city like Shanghai with more than 12 million people, it is most impressive to note the almost total lack of filth and garbage. Throughout the country the people were clean and neatly dressed. Given that bathtubs and hot water taps are almost unknown, this is a real accomplishment.

The major tasks of building, cultivating, harvesting, repairing roads, etc. are done almost entirely by hand with little help from machines. On one stretch of 10 miles of road which was being rebuilt, I saw one small tractor and one roller. Everywhere else were people with shovels, picks and baskets full of rocks.

Tourism in China is in an embryonic stage: Some of the facilities are a bit primitive by our standards, but they are certainly adequate.

We thoroughly enjoyed the experience and hope to return before all the statues are unearthed at Sian.

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# Wendell

[continued from page 7]

to the office. I wouldn't say that I hadn't in the old days had drinks with some of these guys because I did. Lots of times. In a small town like Anchorage was in those days you bumped into people around town all the time. But I tried to keep it at arm's length. And I think I succeeded pretty well. Some of these people were very entertaining. I recall Buckalew and I had offices in a little white house down on Second Avenue right behind what is now the older building occupied by Hughes & Thorsness. We were down behind them. I was representing a burglar by the name of Stewart and I made an appointment for him to come down to the office one night; this was in the winter time so that we could go over his testimony. I told him to meet me there at 8 o'clock. Well I was a little late and I didn't get there until 8:30. Drove up in the little yard and I could see the lights on in the building. I thought Buck must have let them in or somebody is down

here so I went up and rattled the door and went on in. Here they were sitting in my office, he and his friend with their feet on the desk chatting away. And I said, "Hi, fellows, how did you get in?"

Mr. Stewart looked at me and said, "Mr. Kay, are you kidding?"

I think he may have been guilty of burglary, I'm not sure. He was presumed to be innocent, let's put it that way.

KH: Did the jury find him guilty?

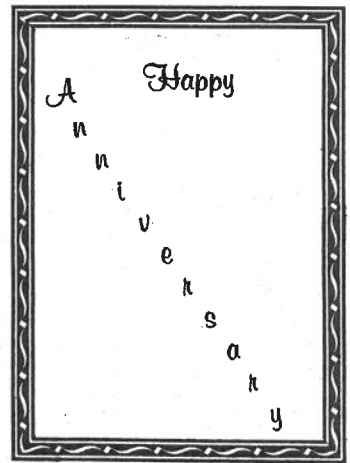
WK: He was found guilty and that is an interesting thing too. He was found guilty because of poor selection of the jury. A very prominent Anchorage banker was on the jury panel, very nice guy, I knew him. He said, "Hello" as he walked by, I said "Hi, Jim." And he went on into the jury box. I said to Stewart who was sitting beside me, "Well, that's one that's got to go."

He said, "Why would he have to go? I like him."

I said, "No, you don't like him. He's a banker, he'll convict you, bankers don't like burglars, forget it." So anyway we had quite an argument. I exercised all of my challenges, I got down to the last one and he's still insisting that Jim, the

banker stay on the jury. I kept telling him no, no, no. I said, "You're going to have to serve the time now, he's going to convict you. He's a leader, it's going to be a one man jury. Don't leave him on." He insisted he be left on. He was convicted. I later had a chance to interview some of the members of the jury which is a very good habit to find out what mistakes you made. Turned out that the first vote was nine to three for acquittal but Jim was the foreman of the jury. He led the fight, it took him all day but he eventually convinced the other nine and convicted Mr. Stewart which taught Mr. Stewart a lesson and I'm sure taught me a lesson. Don't let your client tell you to leave any bankers on a burglary jury.

Continued in Next Issue



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### Position Available:

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## ASSOCIATE ATTORNEY POSITION AVAILABLE

Six person, well established law firm is looking for a bright, energetic, young attorney with one to two years experience in the area of corporate, commercial and real estate, or wills and estates. This associate must be interested in establishing an office practice in one or more of the above fields. If you are interested, please send a complete resume and your salary requirements to Law Firm, P.O. Box 1178, Anchorage, Alaska 99510. All replies will be strictly confidential.

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Requirements include admission to the Alaska State Bar and 1-5 years experience.

Interests should include general corporate matters and commercial practice. This individual should be willing to accept considerable responsibility and have the desire to become part of a growing practice.

Interested persons should submit a comprehensive resume by November 1 to Box 3576, Anchorage, AK 99510. All replies will be held in strict confidence.

## LEGAL SERVICES POSITIONS

Send Resumes, References and Sample of Legal Work to Don Clocksin, Alaska Legal Services, 736 G Street, Anchorage, AK

**Supervising Attorney;** Salary \$23,000. Available immediately. Supervise Nome office of ALSC, staffed by 2-3 attorneys and support staff. Responsible for carrying caseload, administrative functioning of office, caseload management and review and maintaining relationships with local communities. Also responsible for establishing local CETA paralegal programs and recruiting, training, and supervising about four paralegals residing in surrounding villages. The Nome office serves the city of Nome (3,000 population) and approximately 18 Inupiat Eskimo villages in northwestern Alaska. Subsistence fishing, hunting and gathering are predominant activities of the client population. Applicants must have the ability to practice law in a multi-cultural setting and must learn to respect and protect cultures different from their own.

Applicants must have at least 2-3 years experience, preferably in legal services, and must be willing to make at least a two-year commitment to ALSC. Women and minorities particularly encouraged to apply.

**Supervising Attorney;** Salary \$23,000. Open 11-1-79. Close when filled. Supervise Fairbanks office of ALSC, staffed by 3-4 attorneys, 2 paralegals, and support staff. Responsibilities include carrying caseload, office administration functions, case-load management and review, and maintaining relationships with local bar association and communities served. The Fairbanks office serves both the urban Fairbanks area (40,000 population) and about 35 surrounding villages throughout interior Alaska each with a population of 500 or less. Practice in

Fairbanks is a typical urban poverty law practice; rural practice involves providing services to a client population of predominantly Athabascan Indians living a largely subsistence life. Must have the ability to practice law in a multi-cultural setting and must learn to respect and protect cultures different from your own. Three years experience required, preferably in legal services, and willingness to make a two year commitment to Alaska Legal Services also required. Minorities and women particularly encouraged to apply.

**Staff Attorney** (four positions); Salary \$20,000. Available January 1, 1980. Staff positions available in Anchorage, Bethel, Juneau, and Kotzebue offices of ALSC. Responsible for caseload, impact litigation and certain amount of community legal education. Anchorage position in 7-8 attorney primarily urban office. Juneau position in 3 attorney urban/rural office. Bethel position in 4-5 attorney rural office. Kotzebue position in 2-3 attorney rural office.

Rural practice involves providing legal services to predominantly Native American (Indian and Eskimo) population residing in numerous, scattered subsistence hunting and fishing villages not connected by roads. Severe weather conditions, poor housing, isolation, and cultural differences make legal work in Alaska challenging. Must have ability to practice law in multi-cultural setting and must learn to respect and protect cultures different from your own.

At least one year experience and admission to any state bar required. Two-year commitment to Alaska Legal Services requested. Women and minorities particularly encouraged to apply.

## Moody

(continued from page 7)

move for such argument and support his motion with an affidavit setting out sufficient facts indicating that such extraordinary relief is likely to be granted. An order directing a party to make discovery and evidence that the party nevertheless failed to comply would appear a prerequisite to such a showing. Counsel should be warned, however, that the court will not tolerate disobedience to discovery orders and, where established, substantial sanctions will be imposed, even where warranted, against counsel personally. Counsel are also warned that while failure to make discovery standing alone will not authorize dismissal or harsh sanction, it will support an inference of willfulness which, unless rebutted, might lead to such a harsh sanction. Finally, counsel are warned that if conditions beyond their control prevent them from complying with a discovery or other order, they should not merely wait to have the opposing party bring a motion to compel, but should seek relief from the other party and if that party is obdurate, seek an order relieving the moving party from the order previously imposed. Failure to do so standing alone would warrant the imposition of monetary sanctions against counsel.

### Other Dispositive Motions

Oral argument will be calendared as a matter of course on dispositive motions where opposition has been filed. Occasionally, the moving party requests and schedules oral argument before the time for opposition runs. Should no opposition be filed, the matter will be automatically removed from the calendar. For purposes of this memorandum, an opposition will be defined as a presentation that fairly and completely meets the moving party's case on the law and the facts. Counsel are cautioned that a mere request for additional time will be decided without oral argument.

### Evidentiary Hearings

In the past, the word "hearing" has been used ambiguously to describe oral argument and evidentiary hearings. Unfortunately, while oral argument on most motions can be effectively compressed within a half-hour, it is rare that an evidentiary hearing can be completed in that time. In order to prevent future confusion, the judges in the Third Judicial District have adopted the following policy:

Any party relying upon evidence in support of or opposition to a motion must present that evidence by affidavit (see Civil Rule 43(e)). This rule applies to both civil and criminal cases, including inter alia on the civil side motions for preliminary injunction, motions for pre-judgment attachment, and other ancillary relief and civil contempt proceedings. On the criminal side it will include all proceedings for the suppression of evidence for post-conviction relief and for reduction of sentence.

Where an examination of the affidavits submitted pro and con lead counsel to conclude that there are disputed issues of material fact, he may apply by a motion, properly served and filed with the presiding judge, for the scheduling of an evidentiary hearing. If, and only if, the presiding judge agrees that the papers filed manifest disputed issues of material fact, such a hearing will be calendared before an assigned judge, allowing sufficient time to resolve the existing disputes. In the absence of such an express order, no evidentiary hearings will be calendared. (When calendared, evidentiary hearings shall be treated as trials and placed on the calendar between 9:00 a.m. and noon and 1:30 p.m. and 4:00 p.m.) If necessary, such a hearing may interrupt a continuing trial. In all other cases where a motion matter is scheduled before the court, the parties will be limited to oral argument.

### Special Proceedings

The civil rules contemplate a variety of special proceedings that have this in common with hearings after orders shortening time: At the time the motion is made, it is not certain whether there will be opposition or not; thus, in connection with applications for temporary restraining orders and preliminary injunctions (see Civil Rule 65), applications for change of name (see Civil Rule 84), applications to recover property, i.e., forcible entry and detainer (see Civil Rule 85), applications for habeas corpus (see Civil Rule 86 and c.f. Criminal Rule 35), applications for civil arrest (see Civil Rule 87), applications for claim and delivery of personal property (see Civil Rule 88), applications for attachment (see Civil Rule 89), applications to hold a party in civil contempt (see Civil Rule 90), and motions to withdraw by attorneys (see Civil Rule 81(d)); past experience indicates that, of the possible results at the initial hearing, it is more likely that the opposing party will either default, appear and request additional time

to answer, or appear with the moving party and enter into a stipulation, than that disputed issues of fact or law will be presented for resolution. Consequently, in the future, all motions relating to the foregoing matters shall be calendared for a screening hearing before the presiding judge. If a party defaults or a stipulation is reached, the presiding judge will resolve the matter. If service is not obtained or a continuance is requested and granted, the matter will be rescheduled before the presiding judge for a further screening hearing. A request by the moving party for relief pending service on the opposing party will be determined by the presiding judge according to the standards developed for temporary restraining orders. A moving party seeking relief before notice should comply with Civil Rule 65. If it appears that the matter is disputed, it will be referred to the assigned judge or assigned to a judge for determination. Should it appear that oral argument or an evidentiary hearing is warranted, the presiding judge will direct the calendaring department to schedule such proceedings before the assigned judge, allowing sufficient time for their completion. The presiding judge will not resolve disputes going to the merits of motions at the screening hearing. Counsel may, however, settle the matter at such a hearing.

### Use of Masters and Parajudicials

In order to meet an increasing caseload and allow sufficient time for judges to hear, consider and resolve disputed matters, it is contemplated that the court will be making a

greater use of masters and parajudicials to handle matters previously heard by judges which do not involve the resolution of a dispute going to the merits of the action. Counsel are cautioned that while a party may, pursuant to Civil Rule 42 and its criminal counterpart, challenge a master, it may not challenge all masters. The court will determine, upon application, whether a matter may or may not properly be delegated to a master. Counsel are also cautioned that it may be necessary in the future, in cases involving protracted litigation, to appoint a member of the bar as special master at the parties' expense to resolve discovery disputes.


### Peremptory Challenge

A.S. 22.20.022, Criminal Rule 25 and Civil Rule 42 provide for change of judge as a matter of right. In *Gieffels v. State*, 552 P.2d 661 (Alaska 1976), the court held that the presiding judge could continue to carry out his calendaring functions despite a timely exercise of rights under Rules 25 and 42. None of the matters addressed in this memorandum involves the resolution of a dispute going to the merits of an action and, consequently, none of the procedures described herein will be affected by "Notice of Change of Judge" directed at the presiding judge or an acting presiding judge.

### Exception

The above procedures do not apply to family court and juvenile matters. Orders to show cause and motions for orders shortening time for these matters shall continue to be presented to the family court judge.

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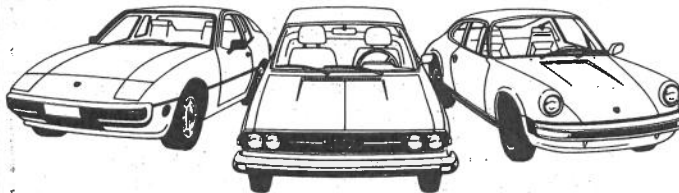
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