Wagstaff v. Hickey on sentencing

Page 5

Gruenberg on Juneau
Page 16


Weidner v. Everybody
Page 12

Non-Profit Organization
U.S. Postage Paid
Bulk Mail
Permit
No. 401
Anchorage, Alaska

The Alaska BAR RAG

Volume 9, Number 2 | *Dignitas, Semper Dignitas* | August, 1985 | $2.00

# Candidates rated by poll

A total of 951 attorneys responded to an Alaska Bar Association advisory poll on the U.S. District Court judicial appointment. Results were tabulated Aug. 19.

The Bankruptcy Amendments and Federal Judgeship Act of 1984 made provision for the appointment of an additional U.S. District Court Judge in Alaska. The President traditionally relies upon recommendations from the congressional delegation representing the state to which the appointment shall be made.

The Alaska Delegation, Senator Frank Murkowski and Senator Ted Stevens and Congressman Don Young, contacted the Alaska Bar Association Board of Governors and requested them to provide a list of candidates whom the Bar considered qualified. The delegation also requested that the methodology utilized in preparing the list give consideration to attorneys who practice in the less populated areas of Alaska.

Continued on page 11

# Former A.G. gives lesson in government

by John E. Havelock

I guess it was three or four months ago now that I read a newspaper report explaining that Alaska's Department of Law, at some point, had declined to investigate the trouble in the North Slope Borough because "the governor had ordered nothing be done."

"Oh, my," I thought, "how little does this cub reporter really know about where the joints are in the long arm of the law?" Then again, I wondered, "did the Governor really say something that might have fed this reporter's misapprehension? Any governor might have felt obliged to say something like that to assure the public, of what "we all know," after all, that he is in charge,—isn't he? How embarrassing to admit that something as important as the North Slope investigation or the leasing practices of the Department of Administration, Criminal Division's oversight of his own staff and of members of the legislature is largely out of his control. But that is the fact.

The governor has no more real power to stop a criminal investigation than a chief hospital administrator has to decide whether an appendix will come out. In either case, an administrator that attempts such an intervention will find tender parts of hiw own anatomy suddenly under the knife.

Remember when Nixon tried to stop an investigation by ordering Attorney General Richardson to fire prosecutor Archibald Cox? Subsequent evaluations of that history have indicated that Richardson went as far as anyone could to be a loyal team member. But Nixon put Richardson in an impossible position. He was asking him to fire a competent surgeon in the middle of an operation. Richardson could only quit when asked to commit professional suicide. Those who suggest that the Alaska prosecutor's office cannot maintain an investigation that may indict the governor or his staff have lost their memory of that exemplary history.

A governor can stimulate resource allocation affirmatively, but the chances are that the governor is responding to public pressures which are already being considered by the District Attorney.

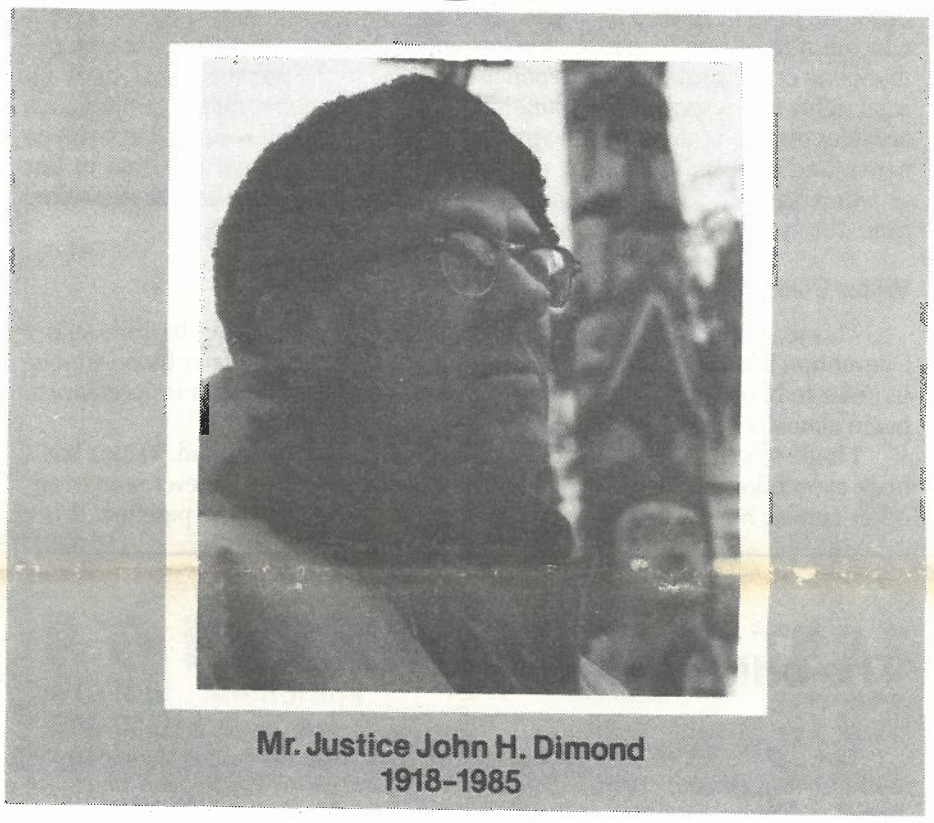
"Norm, what are you doing about that situation in the valley?", says the chief executive on the phone with a crime story in front of him. "We have someone on it right now" is the rejoinder, followed by a phone call to the local D.A.: "there's a lot of heat on this, move as fast as you can; are you getting all you need from the local chief?" The D.A. sighs, having been on the problem, with or without public relations, already for twenty-four, sleepless hours.

A governor who was so witless as to say, "Norm, go easy on that North Slope, some of those guys helped us a lot in the campaign" or, "let's go after our opponents from the last election," has just handed the Attorney General a loaded gun, cocked and aimed at the speaker's political head. No governor in his right mind, even if as crooked as Nixon, wants to give to another person that kind of power over him. Even if the attorney general had the will, where will he find the memo to carry out the scheme? Any move he makes would spread self-incriminating information.

The strictures on the relationship between governor and attorney general are repeated in that betwen the attorney general and his subordinates. The attorney general cannot tell an assistant district attorney how to handle a case, except in the narrow confines of oversight, guided strictly by professional principles. Practically speaking, an attorney general cannot make even an inquiry regarding the conduct of a criminal prosecution unless there is a legitimate, public reason for it.

The same issues attends a gubernatorial inquiry or a briefing. Where is the need to know? What is not a legitimate inquiry for a member of the public is not an inquiry for the governor. Sure, he can make the pointed call, but he raises more questions for himself by the inquiry than the worth of the satisfaction from the answer.

Continued on page 17



Mr. Justice John H. Dimond
1918–1985

# Dimond remembered as judicial leader

By Jeneane Moore

Retired Alaska Supreme Court Senior Justice John H. Dimond died Friday, June 28, at Harborview Hospital in Seattle. He died of complications resulting from injuries received in a fall at his home.

Justice Dimond, one of the state's three original high court justices, was born in Valdez, Alaska, in 1918. He received a bachelor's degree in chemical engineering from the Catholic University of America. When war was declared, he returned to Alaska and enlisted at Fort Richardson. He served in active combat in the Pacific and

*Related story on page 10*

was badly wounded by a mortar shell in March, 1944.

After the war, Justice Dimond returned to the Catholic University of America to earn his law degree. Upon his return to Alaska he served as an assistant attorney general from 1949 to 1952. He practiced law in Juneau from 1952 until his appointment to the Supreme Court in 1959 by Governor Bill Egan. Shortly after his appointment, Justice Dimond authored the very first opinion handed down by the new Alaska Supreme Court.

Continued on page 10

## INDEX

# President's column

*Harry Branson*

### Long Range Planning

A couple of years ago, Mary Hughes, then President of the Alaska Bar Association, began her first Board meeting with a day devoted to long range planning for the Bar. Instead of the usual crowded agenda we had the luxury of a full day's time to discuss and propose future changes and developments that we felt would benefit The Bar and the public. Out of this meeting ultimately came a streamlining of our discipline code, changes in the administration of the Bar Examination, and the reinstitution of reciprocity in Bar admissions at the annual business meeting the following spring.

Since this meeting, there have been a number of developments and happenings both inside and outside of Alaska that suggest it might be a good time to take another day with the Board to look at where we are and where we think we should be going in the next few years. Accordingly, at the August 22 meeting in Anchorage, the first day's agenda was devoted to long range planning. The regular business of the Board was conducted on August 23 and 24.

The topics we considered at the Planning Meeting included the following: higher rates for malpractice insurance; attempts by the American Medical Association and State Medical Associations to put caps on jury awards in medical malpractice cases; increasing numbers of economically marginal practices with recently admitted attorneys; insuring adequate representation in criminal cases; the development of a mentor program for new practitioners; the attorney with drinking, drug or related problems affecting competency; providing law related education in our high schools and communities; improving the processing of discipline cases; providing clear, concise answers to the public's questions about legal rights and responsibilities; finding ways to raise money for Bar projects and activities outside of dues income; improving and increasing cooperation between bench and bar; and increasing membership services and participation in Bar activities. We will be reporting on some of the new program ideas that resulted from this meeting in the next edition of the Bar Rag.

### Valdez Convention

This year, I hope to have all of our speakers and programs for the 1986 Valdez Convention lined up and released to the Bar membership no later than October. In order to book prominent or particularly interesting speakers it is necessary to begin almost a year in advance.

I hope to see the best turnout at a convention we've ever had. Valdez has a huge convention center with more features and facilities that I've ever seen in any other similar building in Alaska. The town has grown with the pipeline. It is a beautiful site for a convention. I expect we will arrange pipeline terminal and harbor tours among other recreational activities. Valdez is a town that loves softball. There is a ballpark just outside of town. We hope to arrange a tournament. There are several good hotels and motels. We have already reserved an ample number of rooms. It is easy to fly, boat or drive to Valdez. We will keep you posted.

### Federal Defender

At the Sitka convention this year, a Board sponsored resolution to support a Federal Defender Agency for Alaska was overwhelming passed by the membership in attendance. On behalf of The Board and membership I have written several letters to persons who can move this project explaining its importance to Alaska and urging them to act favorably.

### Hal Brown

Hal Brown has resigned from the Board of Governors. The Sitka and Ketchikan Bars recommended Mike Thompson of Ketchikan to fill Hal's seat until the next election in the spring of 1986. In a recent telephone conference call the Board appointed Mike to the board. He was in attendance at the Board meeting in August.

Hal was a hard-working and extremely effective Bar President. I think all of the Board members looked forward to having him around for a couple more years. I know I did. In offering his resignation he stated that he felt that the time demands of his new office (Alaska Attorney General) would conflict with his commitment to the Board. We all wish him well in his new assignment.

### Public Member

Glenda Straube, the public member of the Board from Fairbanks, leaves the Board effective August 1 in order to attend Harvard University, (a very good school in Massachusetts). The Governor must eventually appoint her successor. I would urge Fairbanks members to suggest a suitable replacement to the Governor soon. Without some action, it may be several months before anyone is appointed.

I hope to see an increase in membership participation in Bar activities this year. I particularly encourage you to contact me and your other Board members about issues that are important to you and to other attorneys in your community. You are welcome and encouraged to attend Board meetings, to visit the new Bar offices and to let us know what you think. Keep in touch.

# The editor's desk

Some of you will be alert enough to notice that there has been a change in editorial management, Harry Branson having gone on to greater and more dignified activities on behalf of the bar (See President's column). I have already invited a few friends to contribute, as you will notice in these pages—their cooperation being easy to secure as an alternative to seeing their name in my column.

"All My Trials" notwithstanding, I consider the *Rag* a family paper—in the sense that I would like to see it read and enjoyed by everyone. Therefore, if one or more of you disagrees with something you read in our paper, kindly do not hesitate to fire off a letter to the editor—or an unsolicited article. I have discovered in the course of an overly long and eventful life that you can disagree completely with people without hating them, or even disliking them. Further, every time I get someone nicely categorized as a bigot, facist, flake, sexist, liberal or conservative (some of these terms are interchangeable), I find out—on meeting them personally—that they are nice people, with lots of good ideas. I am sure that the readers will make much the same discovery, on meeting a variety of their fellow lawyers in this paper.

In this issue, John Havelock has produced a timely insight into the function of the attorney general vis a vis the governor, Brant McGee explains what the OPA is going to do about solving the appointed attorney dilemma, Max Gruenberg recounts some of his experiences as a freshman legislator, Bob Wagstaff and Dan Hickey square off on mandatory sentencing and Phil Weidner takes on everybody.

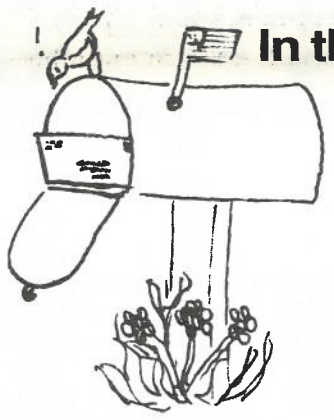
The readers are invited to contemplate the mystery of Fairbanks rules, as explained by Niesje Steinkruger and Ketchikan continuing education of the bar (Judge Gucker and co-founder Clark Stump). Future issues will include articles by Walter Share ("Who the Hell Needs the Court of Appeals"), Public Defender Cindy Strout ("The Alaska Insanity Defense—How Crazy Can You Get?"), Betsy Sheley ("Prosecution of Child Molesters—What's the Use?"), and Jim Bendell's manic insights into civil litigation. Finally, Justice Roger G. Connor will be doing a definitive article on one of Alaska's great jurists, Mr. Justice John H. Dimond, whose recent passing saddened and depleted the bar.

In response to our recent mail-in reader survey, an irate member stated that she didn't want to read "any more old boy crap," apparently forgetting that "old boys" of either sex are simply attorneys that have been around long enough to have known a few people worth knowing, and heard a few stories worth re-telling. This paper proposes to be not only a sounding board for ideas, but a newsletter concerning the activities of all of us. In soliciting a wide and broad based spectrum of opinions, we hope and expect to print spirited defenses of every conceivable idea concerning the legal profession and our various insights concerning it.

In short, we will be delighted to publish everything except anonymous hate mail. That sort of thing is better left to the bar polls.

—Gail Roy Fraties

# In the Mail



## *Why no election?*

Mr. Francis L. Bremson
Executive Director
Alaska Judicial Council
1031 West 4th Avenue
Suite 301
Anchorage, Alaska 99501

Dear Mr. Bremson:

This writing is to confirm the oral concern I expressed to you last week regarding the current policy of the Alaska Court System to utilize retired superior court judges who have not been approved by the voters as required by Article IV, Sections 6 and 7 of the Alaska Constitution, which provide:

"Section 6. **Approval or Rejection.** Each supreme court justice and superior court judge shall, in the manner provided by law, be subject to approval or rejection on a nonpartisan ballot at the first general election held more than three years after his appointment. Thereafter, each supreme court justice shall be subject to approval or rejection in a like manner every tenth year, and each superior court judge, every sixth year."

"Section 7. **Vacancy.** The office of any supreme court justice or superior court judge becomes vacant ninety days after the election at which he is rejected by a majority of those voting on the question, or for which he fails to file his declaration of candidacy to succeed himself.

The following retired superior court judges continue to sit even though they did not submit to approval or rejection at the polls as required by the Constitution:

**C.J. Occhipinti**
Appointed: February, 1968
First and Last Retention Election: 1972
Retired: October, 1977

**Eben H. Lewis**
Appointed: September, 1967
First and Last Retention Election: 1970
Retired: January 31, 1977

**Ralph E. Moody**
Appointed: May 2, 1962
First Retention Election: 1966
Second Retention Election: 1972
Last Retention Election: 1978
Retired: January 4, 1985

Continued on page 18

**The Alaska Bar Rag**

Editor in Chief . . . . . Gail Roy Fraties
Editor Emeritus . . . . . Harry Branson
Spiritual Adviser . . . . . Hon. James Blair
Contributing Writers . . . . . Wendell Kay
Russ Arnett
John Havelock
James Bendell
Edward Reasor
Design and
Production . . . . . The Alaska Group
Advertising
Agent . . . . . Computer Composition

The Alaska Bar Rag is published quarterly by and for the membership of the Alaska Bar Association in Anchorage, Alaska. Inquiries regarding editorial copy submittal and subscriptions should be directed to the Alaska Bar Association, 310 K Street, Suite 602, Anchorage, Alaska 99501 or at (907) 272-7469; Deborah O'Regan, Executive Director. Inquiries and orders for advertising should be directed to Computer Composition, 813 W. 25th Avenue, Anchorage, Alaska 995 )3 or at (907) 279-0752.

# In the Mail . . .

Continued from page 2

## Insurance policy panned

7/2/85

Dear Bar People,

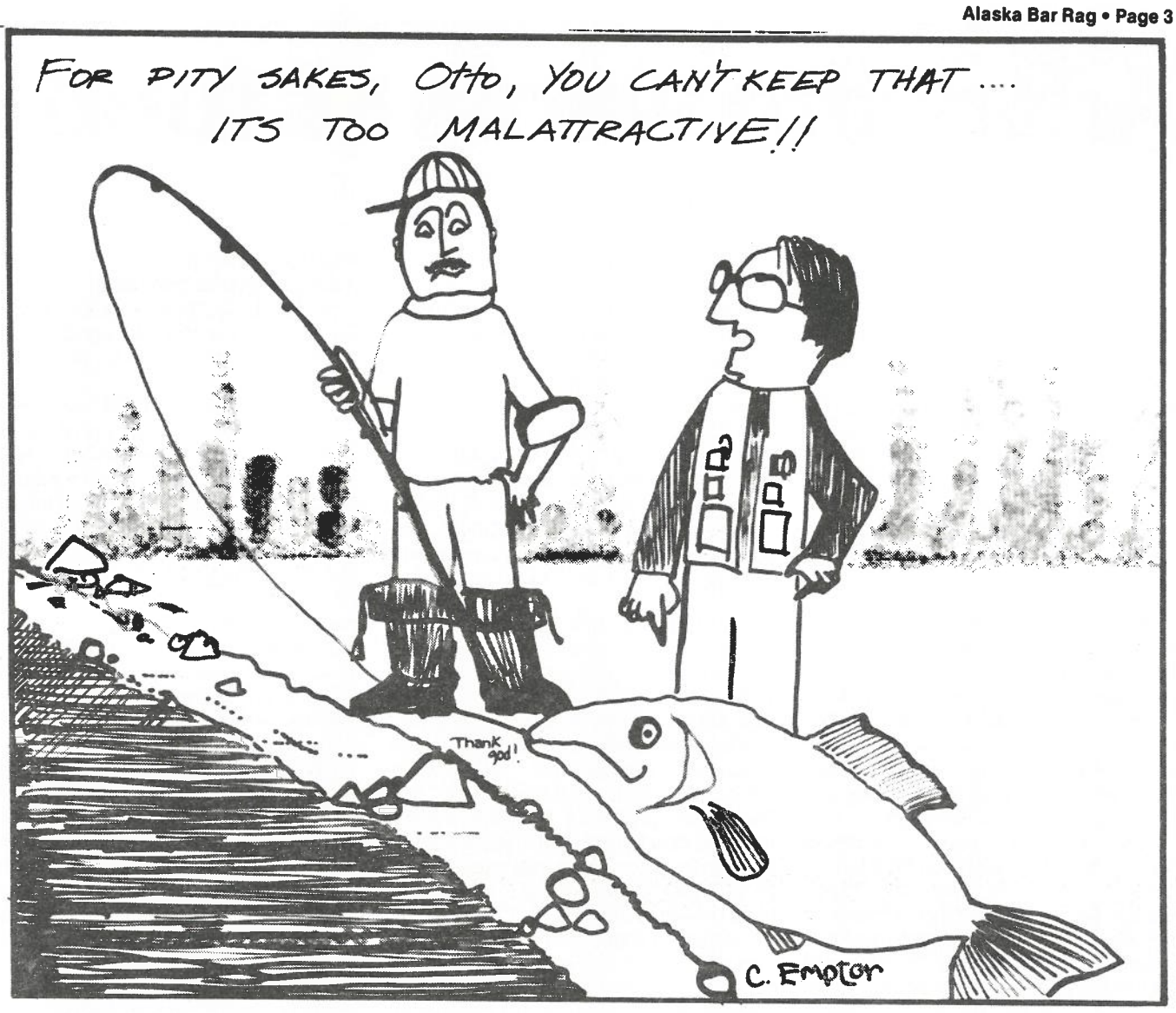
Please be advised I have purchased life insurance from NY Life Ins. Co. to replace the plan I had with you. (enclosed billing)

The agent was able to give me the same coverage for $202.00 per year—which I compute to be about fifty-six percent of the $360.00 I would be paying for my "money saving group plan" made available through the Bar Association. (Figure one each, 43-year-old male non-smoker at $100,000.00 coverage)

Something seems wrong to me when a bunch of lawyers can't get a better deal in a group plan than an individual going to another company. I know that you have to "compare apples to apples" when comparing plans, but for the vast majority of the members of the bar my research seems to show that we are not being served by this "deal." And no, I don't have stock in NY Life!

Please run this as a letter in the Bar Rag too—it wouldn't hurt to let a few others out there know if I'm right. I invite your comments if there is a side of this that is escaping me.

Steve Cline




## Insurance defended

August 2, 1985

Stephen R. Cline
100 Cushman Street, #310
Fairbanks, AK 99701

Dear Mr. Cline,

It is indeed possible for an individual in good health to qualify for coverage equivalent to the Bar's group term life insurance plan at rates lower than the group plan. An individual applicant for life insurance undergoes a rigorous review (one that often includes a physicial examination as well as a detailed medical history questionnaire), and the insurance company can "rate" the applicant at a higher than standard premium to compensate for conditions that the review reveals. On the Bar's group plan, Great West Life relies on a medical questionnaire and occasionally on supplementary written physician's reports; this is considered minimal checking in the life insurance industry and results in more higher risk applicants being approved at standard group rates than occurs with individual coverage.

In addition, when the Great West Life Plan was formed, coverage was extended to the initial group of applicants on a guaranteed issue basis, in order to provide continuous coverage for Bar members who had relied on a previous plan that was being cancelled by its insurance carrier due to falling enrollment. Plans with guaranteed issue, particularly for smaller groups or where participation is not mandatory for all members of the group, are considered to result in adverse selection (more higher risk participants) and they therefore have higher rates. While guaranteed issue is no longer a feature of the Bar's plan, many of the original group of applicants have maintained their coverage and thus still contribute to the risk factor of the group as a whole. And, of course, not all members of the association participate in the plan and this, too, is considered to adversely affect the risk of the group.

Group insurance premiums tend to be higher for smaller groups as well. The Bar's plan is characterized by a two-level structure, "basic" coverage of $50,000 per member, and "optional" add-on coverage of a variable amount (from $10,000 to $100,000 per member and/or the member's spouse.) There are fewer participants in the add-on program than in the basic program, thus it forms an even smaller group than the basic participants; for many age categories the "optional" rates are higher than the "basic" rates. This also has an effect on your premium comparison. Under the Bar's plan, $100,000 of coverage is made up of $50,000 "basic" and $50,000 "optional," again with a total premium that can indeed be higher than the premium charged for $100,000 of coverage purchased as a unit by an individual in good health.

In the early years of the group plan, premiums were nonetheless competitive with the industry in general. Recent changes in the life insurance industry have resulted in many new products for both individuals and groups and it appears our present group rates are no longer as favorable as they once were. However, Don Morrow, our account executive at Great West Life, advised us that his company is in the process of a major life insurance review.

"As you know," he wrote to us on July 22, 1985, "much has happened within the life insurance industry since your plan was written . . . [and] . . .we are now in the process of reviewing all our life insurance products as well as the pricing structures. Since mortality has improved over the years and since we have not changed the basic pricing structure of our products within the last four or five years, I am hopeful of receiving news regarding rate reductions in the near future. The basic life insurance rates are currently being reviewed and we anticipate reviewing the add-on life insurance rates sometime in the late fall of 1985. If we can pass on any economies to you and your members, I will be in touch with Walt Baldwin [the Bar's insurance agent for the Great West Life Plan] as soon as possible."

On August 1, 1985 we did indeed receive notification by telephone from Great West that the rates for basic coverage will be reduced effective October 1, 1985. Following is a comparison chart of the new and old rates with the premiums annualized to show the yearly premium reduction for each age group. Rates are shown in cents per thousand dollars of coverage per month.

### Rates for $50,000 Group Term Life Insurance

| Age Group | New Rate | Annual premium |
|---|---|---|
| Under 30 | .08 | $ 48 |
| 30–34 | .10 | $ 60 |
| 35–39 | .12 | $ 72 |
| 40–44 | .17 | $ 102 |
| 45–45 | .30 | $ 180 |
| 50–54 | .61 | $ 366 |
| 55–59 | 1.02 | $ 612 |
| 60–64 | 1.80 | $1,080 |
| 65–69 | 2.56 | $1,536 |

| Age Group | Old rate | Annual premium | Annual reduction |
|---|---|---|---|
| Under 30 | .10 | $ 60 | $12 |
| 30–34 | .14 | $ 84 | $24 |
| 35–39 | .18 | $ 108 | $36 |
| 40–44 | .25 | $ 150 | $48 |
| 45–45 | .41 | $ 246 | $66 |
| 50–54 | .65 | $ 390 | $24 |
| 55–59 | 1.09 | $ 654 | $42 |
| 60–64 | 1.91 | $1,146 | $66 |
| 65–69 | 2.71 | $1,626 | $90 |

While these reductions for basic $50,000 coverage do not make the group plan premium as low as your particular example, many plan participants will find these new rates to be of benefit in planning their overall life insurance program. A future reduction in premiums for the optional coverage, if it occurs, would make the group plan even more competitive with insurance products developed in the last few years.

While discussing the Great West rates, we also asked our agent, Walt Baldwin, whether the association should consider structuring an entirely new group plan, since there have been some recent changes in the Alaska statutes concerning group term life insurance that may make a new plan more suitable for our members. He replied that while we might get lower rates with a differen company than we have with our present plan he felt certain we would not be able to obtair guaranteed issue for those members current ly covered by Great West. While some participants would undoubtedly be able to obtain approval for coverage on the new plan, many would not.

Would it then be feasible to maintain and administer two separate plans? As the original group reduced in size (and increased in age) premiums for that group would undoubtedly rise, a clear disservice to those members who have relied on the coverage and who might not be able to obtain individual coverage for themselves at this point. If participation fell below a viable group level, the plan could even be cancelled on its July anniversary date instead of being renewed annually as it has been since its inception. Even so, could a new group plan attract enough participants to command really attractive premiums? Again, assuming the original plan would be maintained for those unable to obtain new insurance, the answer is probably not. Enrollment in the Bar's group life insurance program has remained stable from the beginning year of the plan, with only approximately 10% of the association's membership participating; there has been no significant fluctuation at annual premium increases or decreases.

However, if the number of participants as well as the percentage of participants did significantly increase, we might indeed obtain even more favorable rates on our present plan at some time in the future. From Mr. Morrow's response to our rate inquiries, it seems Great West recognizes that favorable rates can have the beneficial effect of enlarging the group and lowering risk factors still further. At present the main benefit of group participation is that approved coverage can be maintained as long as a participant remains a member in good standing of the association, the premiums are paid timely, and the participant has not reached the age of 70 and has not retired. In addition, the association charges no administration fee, but provides plan administration as a member service. Whether these benefits make the plan cost effective for a particular member is something that member must evaluate according to his individual circumstances.

Thank you for providing an opportunity to discuss the Great West group plan's insurance rates. I hope this information assists you with your own coverage evaluations.

Sincerely yours,
Geraldine F. Downes
Insurance Administrator
Controller

## Chief Justice thanks volunteers

*(Editor's Note: A total of 94 attorneys of the Alaska Bar responded to a call for volunteers to accept appointments in conflict cases. The following is the text of a letter sent by Chief Justice Jay A. Rabinowitz, thanking these volunteers for their service.)*

Dear (Attorney): July 22, 1985

Brant McGee, Alaska Public Advocate, has advised that you have volunteered to serve in cases where the Office of Public Advocacy has a conflict which prevents that office from providing legal services. I want to thank you for your expression of support. Your action is reflective of the highest traditions of the legal profession and will constitute a significant contribution to the task of bringing justice to all in Alaska. In return, you have my pledge that I will urge our next Legislature to fund the Office of Public Advocacy at a level which will more adequately compensate conflict attorneys for the services they render to indigents.

Again, I am delighted that you have volunteered to serve. My thanks and best wishes.

Sincerely,
Jay A. Rabinowitz

Continued on page 18

# Advocate warns of funding needs

by Brant McGee

The Office of Public Advocacy (OPA) is no longer a cloud of dust on the horizon. The cavalry has arrived and dispatched the last vestiges of the lawyer conscription system. Most lawyers believe that the most positive corollary of the creation of the Office of Public Advocacy has been the hopefully permanent elimination of the involuntary appointment of attorneys in conflict cases. This result, of course, depends entirely on our future ability to obtain sufficient funding to pay contract firms and individual volunteer attorneys throughout the state.

The OPA was created by the legislature in 1984 and now has offices in Anchorage, Juneau and Fairbanks. Its primary statutory functions are to represent indigent criminal defendants and to act as guardians ad litem for abused and neglected children. The office has also absorbed the public guardian function from the Alaska Court System and has five public guardians in Anchorage and one each in Juneau and Fairbanks.

The Anchorage criminal attorneys (Valerie Tehan, Louise Ma and Fred Dewey) represent defendants when the Public Defender Agency has a conflict of interest in Anchorage and in major cases throughout the state. Whenever possible, the OPA legal staff handles complex cases because of cost factors. For example, the OPA has taken homicide cases in Nome, Palmer, Juneau and Ketchikan because of the high cost of obtaining contract attorneys.

**In Anchorage there are seven** contract attorneys who have agreed to take our conflict criminal cases. In the event of a major multiple co-defendant drug case, we will call upon those many attorneys who have volunteered, at the invitation of Chief Justice Rabinowitz, to provide representation at the minimal fee level of $50 per hour for out-of-court work and $60 per hour for in-court work.

Our list of volunteers has grown to nearly 150 statewide. These volunteers will fill the inevitable gaps in our contractual structure created when multiple defendant cases arise in smaller locations and in complicated children's proceedings where a large number of parties must be repesented by counsel.

In most areas of the state, OPA has contracted with private attorneys to provide both criminal and civil representation to those within our statutory mandate. We believe that citizens are almost always better served by a local lawyer who is readily available and familiar with local practice. The Fairbanks office of three attorneys (Charles Easaw, Bob Beconovich and John Franich) provides representation in both Fairbanks area courts and Barrow. Several Fairbanks area law firms provide backup representation where OPA has a conflict of interest.

While our statute (AS 44.21.400) mandates OPA representation in a host of civil areas, our primary function is the representation of abused and neglected children in CINA proceedings. We have hired two experienced professionals (Pamela Montgomery in Anchorage and Sonja Mazurek in Fairbanks) to act as guardians for children. Wherever possible in other areas of the state we have contracted with non-lawyer professionals to provide these services. While there is some resistance from judges accustomed to attorney GALs, these non-attorney professionals are less costly and certainly better qualified than most attorneys as advocates for children.

**We have not assumed** that we will receive sufficient funding to meet an ever-increasing caseload. Jay McCarthy of the Anchorage office has instituted a volunteer guardian ad litem program that has trained a core group of local professionals willing to learn the new role and work at no cost to the state. If the program proves successful, we will train other interested citizens to act as guardians ad litem in a program similar to that developed in Seattle and Dallas. In this way we hope to be able to continue to provide effective representation of children's interests while maintaining reasonable caseloads.

We have joined the Alaska Public Defender Agency as yet another stepchild in the organization chart of the Department of Administration. The late Lisa Rudd and our newly appointed commissioner, Eleanor Andrews, have been most supportive on budget, legislative and administrative matters. The Public Defender Agency, especially Dana Fabe, Bob Stokes and John Hagey, has provided invaluable assistance in everything from policy issues to finding the best source of paper clips.

We have built a strong staff of able and dedicated people. Our contractors, attorneys and non-attorney professionals alike, have been carefully selected to provide the best and most cost effective representation to the citizens for whom we are responsible. As a newly created agency, it is difficult to predict at this time whether we will have sufficient contractual funds to maintain a superior level of representation. Whether we can permanently retire the lawyer draft system depends entirely on our ability to obtain adequate levels of funding in the coming years.

*Brant McGee is director of the OPA.*

## All about lawyers

**A recent survey of attorneys in Anchorage, Palmer and outlying areas of the Third Judicial District shows that the typical Anchorage lawyer is 38 years old, and has been practicing for nine years. Conducted by the Alaska Judicial Council in August of 1984, the study included 418 attorneys, or 36% of the District's 1,175 active Bar members. Most of the attorneys are male (83%); 17% of those questioned were female. Attorneys had resided in the state for an average of 13½ years, with a range of one year to 63 years.**

**What do they do? Most attorneys (71.7%) are in private practice, according to the Council's study, and spend 90% of their time working on civil cases. Government attorneys made up only 14.9% of the sample, and divided their time among civil**

Continued on page 6

# Ketch bar teaches survival skills

The infamous KETCHIKAN BAR ASSOCIATION "ANNUAL CONTINUING LEGAL EDUCATION SEMINAR" received its auspicious beginning in 1965 when some disgruntled members, frustrated by the lack of educational seminars provided by the Alaska Bar Ass'n. elected to take matters into their own hands, and conduct some legal seminars under conditions less strenuous than a classroom setting.

Plans were formulated and invitations sent to attend the first ever KBA "Annual Continuing Legal Education Seminar & Bait Handling Class" at Bell Island Hot Springs. Travel arrangements were made courtesy of Bill Stump, who offered the use of a 50-foot ex-Coast Guard vessel called the "Zoomie;" after having first checked with his insurance carrier, and securing the necessary releases.

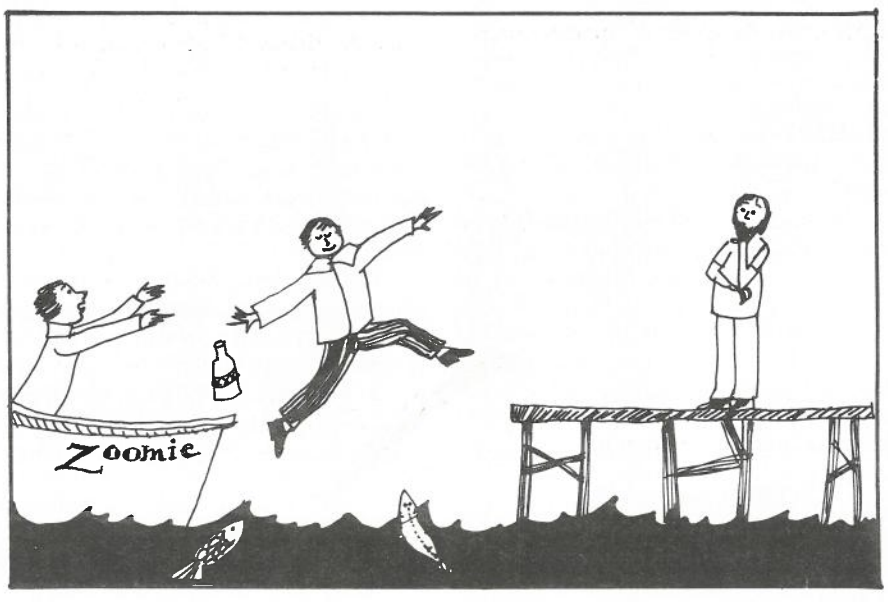
Other members of the KBA contributed toward the "necessities" of a long and arduous voyage to Bell Island (40 air miles, and 546 nautical miles as the Zoomie cruises). It was reported that after provisions had been stored aboard, two bar owners retired from business.

Though the skipper had full and complete confidence in his crew of shanghied relics from the local waterfront drinking establishments, he was unaware of one "cheechako" member who had recently arrived from Wyoming.

Having given his election to "stand to" and "clear all lines," he proceeded to thrust both engines in full reverse gear only to discover, about 50 feet away from the moorage, that A. Fred Miller had failed to untie the bowline, and they had half the dock in tow. Miller stood to, and though he admitted later the voyage was somewhat uncomfortable, he did manage to have an excellent view from atop the yardarm. By way of defense, he reasoned that horses had only to be tied at one end, so. . . !

Word of the successful venture soon spread, and subsequently invitations were issued to those select persons who had indicated a strong and convincing desire to maintain their education of the law through other than formal criteria.

Notables such as Dean Schweppe, former dean of the U.W. School of Law, applied for honorary membership with the KBA and attended faithfully until he later learned that this honorary endowment carried with it the requirement he contribute monthly dues to the KBA. Others who traveled from outside the Ketchikan area were Norm Banfield and Av Gross, whose sole purpose, it was suggested, was to "teach Bob Ziegler how to play bridge." Admiral George Synon, Commander of the 17th U.S.C.G. District, also attended and it was with a great deal of relief to the members of the KBA that he was included, as he always ventured forth with a large flotilla of C.G. vessels.




Frank Doogan made his presence known on many a trip to Bell Island, but no one can forget the session when he appeared at the "watering hole" sporting a black eye and several broken ribs, after attempting to demonstrate his maritime skills while jumping from a moving vessel to the dock. Releases were quickly presented, and his signature secured after the 15th round of medicinal comfort.

Sometimes judicial temperament was stretched to the limit, such as on one occasion when Tom Schulz went fishing with Fred Miller. They left in early afternoon, and when night came, there were scattered reports that the two maritime masters had not returned. A vote was taken on whether to launch a search and rescue mission, but was defeated 23 to 2. Their return was punctuated well into the night by howls of profanity and other latin legal maxims; and it was later determined that the two nautical novices could not agree on a reading of the chart; and it wasn't until well in the evening they elected to turn the chart right side up to obtain their bearings.

Anchorage members could well benefit from the lesson taught KBA members by Michael Keenan. It appeared that Magistrate Bill Marks was taking his yacht along, and had instructed Keenan to take his 13-foot skiff out of the harbor, rendezvous with the yacht, and they would tow it to Bell Island. Keenan followed instructions and later another small vessel stopped Marks' yacht to likewise join in on the cultural lessons being taught aboard, only to discover that Keenan had left the small engine on the skiff running—IN REVERSE! How Keenan managed to survive the "keel-haul" is beyond the comprehension of most of those in attendance, considering this was their first, and most likely their last experience at such shenanigins.

The annual event wasn't all formal and businesslike, as Bob Ziegler used to issue challenges to newcomers to a swim competition; the bait being taken by many a new admittee that he could certainly outswim this veteran, only to learn later that Ziegler had been on the University of Virginia varsity swimming team. He retired undefeated.

One would think the dedicated members of the KBA would heave to early after a difficult day of study and lectures; but no, the frail were oft times awakened in the middle of the evening with threats and cajoling to join in on the annual "Chuck Cloudy Ragtime Marching Band Parade & Fire Starting Seminar;" normally conducted after the last stalwart had nestled into bed, hoping for some reprieve of his lamented conduct. The band would form wherever Cloudy happened to be at the time, and members would be required to pick the instrument of their choice from whatever object happened nearby. Even the hale and hearty from Anchorage sometimes found themselves unable to compete with the lasting attitudes of the KBA members, as Gail Fraties found on several occasions.

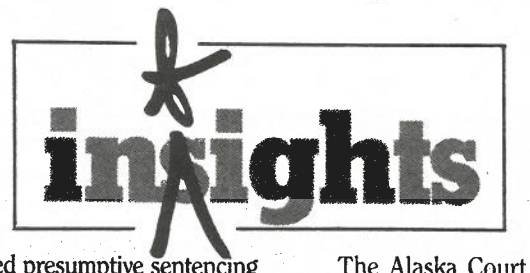
Visual arts was one of the forms used to conduct these seminars, with particular emphasis on the outer limits of the First Amendment, and it is well remembered by the proponents of this form of instruction of the time when some enthusiasts attempted to start the VCR aboard John Sund's yacht en route to Bell island, only to discover later they had damaged one of the components. Though the instructor could still get the audio to work, many members recollect it "just wasn't the same." This may have been the same year that one of Harold Brown's selections literally set the projector afire; and "Wild Bill" Garrison spent the evening tied

Continued on page 6

# Chief prosecutor, defense attorney: Presumptive sentencing

## Law reflects needed reform

by Dan Hickey




During a recent discussion about presumptive sentencing at the Bar Association's Convention in Sitka, Bob Wagstaff complained that presumptive sentencing (along with the changes made by Alaska's revised criminal code) had taken the "fun" out of being a defense attorney. Prior to presumptive sentencing, Bob reminded his listeners, a "creative" defense attorney could always hope to find a sympathetic judge to sentence a defendant convicted of a serious crime to probation or a suspended imposition of sentence. This was possible, of course, because under Alaska's prior indeterminate sentencing laws a judge had virtually total unguided discretion to impose any sentence up to the statutory maximum.

In looking back over the years, I suppose I can agree with Bob's conclusion that it is no longer "fun" to be a defense attorney. But then again, I never understood that it was supposed to be. Presumptive sentencing is only one of several factors that has contributed to this result, along with the Department of Law's plea bargaining policy, the substantive changes in the revised code and, perhaps most importantly, greatly improved trial skills in the district attorney's offices.

Presumptive sentencing *does* restrict some of the more "creative" arguments that were made at sentencing in the old days. (Gail Fraties, for example, used to argue that if the Lord could part the Red Sea through Moses, then a thrice convicted 52-year-old sex offender who had a particular affinity for young boys but who had found God in prison several months earlier could be expected to stay on the straight and narrow.*) My own view, however, is that neither prosecutors nor defense attorneys have been as effective as they should be in presenting evidence and arguments that are available within the presumptive sentencing scheme.

Presumptive sentencing, it will be recalled, was enacted against the background of several Judicial Council studies of sentencing practices. These studies indicated that, as a statistical matter, the two most prevalent factors which affected sentence length were the defendant's race and an individual judge's sentencing philosophy. It should be stressed that this does not suggest that Alaska's trial judges were racists. Rather, what the Council's studies showed is that when sentencing discretion is unstructured, racial disparity is going to play a role for a number of fairly subtle cultural reasons.

Of course, everyone agrees that neither the defendant's racial or cultural background nor the identity of the sentencing judge should influence sentence length. The problem, of course, is that not every defendant under an indeterminate sentencing system is going to have a creative defense attorney or find himself in front of a lenient judge. It is therefore not surprising that the sentencing disparities highlighted by the Judicial Council occurred under indeterminate sentencing.

It was partially in response to these findings by the Judicial Council that the legislative adopted presumptive sentencing. The objective was and remains today one of insuring that only appropriate factors influence the outcome at sentencing. The fundamental premise of presumptive sentencing is that sentencing should be a predictable and uniform process and that sentence length should principally reflect two important considerations: the nature of the defendant's current crime and the defendant's prior criminal history.

One thing that has particularly struck me during the more recent attention given this subject is the assumption apparently made by many that presumptive sentencing was largely a Department of Law proposal that was imposed on an unwitting legislature. The initial proposals for presumptive sentencing, however, were based on a study published by Professor Alan Dershowitz entitled "Fair and Certain Punishment." This study recommended presumptive sentencing as an alternative to both mandatory and indeterminate sentencing.

The Alaska Judicial Council, through its executive director, Mike Rubenstein, had a significant role in adapting Dershowitz's proposal into a bill submitted jointly by the Judicial Council and Governor Hammond to the legislature in 1977. In three successive State of the Judiciary addresses, former Chief Justice Boochever called on the legislature to enact presumptive sentencing. Presumptive sentencing was originally supported by a wide spectrum in the criminal justice system as a way to restore credibility to Alaska's sentencing system, and I believe that it has done precisely that. It was not adopted with the purpose of increasing sentence length. Rather, its purpose was to ensure greater uniformity in sentencing and to reduce the possibilities of unjustified sentencing disparity.

As I stressed during the discussion at the Convention in Sitka, I think it is far more important and useful to focus on the question of how presumptive sentencing can be improved, than on whether it is a good thing. The reason I say this is that I see no viable alternative to presumptive sentencing. Neither the public nor the legislature is likely to find it acceptable to return to an indeterminate sentencing system that retained substantial unguided judicial discretion. On the other hand, few would argue for the adoption of a mandatory determinate sentencing scheme that eliminated all judicial discretion.

I am not arguing that presumptive sentencing cannot be improved. Everyone recognizes that there were problems with the original statutory scheme, and it is for that reason that there have been numerous amendments since it was first enacted. Primarily, the list of aggravating and mitigating factors have been expanded as the legislature has become aware of sentencing considerations that should have been included in the original version. I expect that this process will continue.

One significant recent criticism has been that the 1982 amendment to the consecutive sentencing statute has introduced an element of potential disparity into presumptive sentencing in that prosecution charging practices can have an excessive effect on the sentence ultimately imposed. I have to agree that this potential exists, particularly under the Court of Appeals' interpretation of this statute in *Griffith v. State*, and would indeed be a problem *if* prosecutors are abusing their discretion. However, in legislative testimony in February, both Chief Judge Bryner and the public defender stated that in their judgment prosecutors are not currently abusing their charging discretion. Moreover, while it is concededly a close question, my own personal view is that *Griffith* was incorrectly decided and that the statute is sufficiently ambiguous to be reasonably interpreted to allow for concurrent sentences in a broader range of circumstances.

Nevertheless, the 1982 legislative decision to significantly restrict concurrent sentences coupled with *Griffith* does go too far. The consecutive sentencing statute is difficult to understand and in some cases may result in inappropriate results. Consequently, modification of the consecutive sentencing statute would be one appropriate step that should be taken to ensure that our overall approach to sentencing is fair, consistent and rational.

Additionally, several members of the bar, including the public defender, have highlighted the need to include as an additional mitigating factor the consideration that the defendant had no prior criminal history at the time of the commission of the offense. Many states with presumptive sentencing schemes, recognize a similar mitigating factor, and it should be added to our statute.

A focal point of much of the recent debate on this subject has been the eight year presumptive sentence for first-time felony offenders for sexual assaults upon children that occur in a family situation. While the legislature will most likely remain reluctant to reduce that sentence, the circumstance where a defendant commits a first felony and has had no prior criminal history should be a mitigating factor. The addition of this mitigating factor makes sense, of course, independent of any particular crime to which it might be applied. Additionally, it should resolve much of the concern that has developed in child sexual assault cases.

In summary, while there are quite obviously several areas where presumptive sentencing can still be improved, I believe that it has generally worked well in the last five years in achieving its basic objectives. While presumptive sentencing has taken the fun out of being a defense attorney, it has added a degree of certainty and uniformity to the criminal justice system that was, and still is, rightfully expected by the public.

*Dan Hickey's term as chief prosecutor spanned 1975–85.*

**Juneau District Attorney Joe Balfe's famous response: "It would be easier to part the Red Sea." —Ed.*

## Court autonomy in danger

by Robert H. Wagstaff

The Alaska Court System today faces the greatest challenge to its autonomy and integrity since statehood. Ten years ago a seemingly innocent suggestion was made that perhaps in the cases of some repeat offenders for whom rehabilitative efforts had failed, a short, swift, and sure term of imprisonment would be an appropriate means of attempting to modify behavior.

From this well-intentioned suggestion has flowered the most pervasive legislative incursion into constitutional and criminal law and the authority of courts in the history of Alaska if not the nation. This seed, rooted in politics and fertilized with passion and prejudice, has blossomed to strip the judicial branch of government of its constitutional authority and severely prejudice the specifically guaranteed rights of those who have been unfortunate enough to come in contact with it.

What was suggested as a possible treatment for hard-core multiple offenders has now become mandatory treatment for many first offenders.

A person convicted of First Degree Assault, a crime that does not even require *mens rea*, must spend a mandatory seven years in prison with no hope of parole. Vehicular homicide where no crime was intended but in which criminal responsibility is imputed, is punishable by a mandatory five years with no parole.

While innocuously named "presumptive sentencing," with purported aggravating and mitigating factors, the mitigating factors are so narrowly drawn and so completely inapplicable to crimes with imputed criminal liability, as to be meaningless window dressing. The so-called safety valve of three-judge panels is so narrowly applicable as to be nonexistent.

The selected terms of years imposed by the Legislature as sentences are wholly arbitrary and reflective of only a perceived desire to enhance political positions. Sentences are not based upon any rational decision making but represent collective passion and prejudice.

Presumptive sentencing has so infected the criminal justice system that if a judge dares to speak out that a particular defendant is not appropriate fodder, the Legislature personally seeks his removal from office. Indeed, on January 24, 1984 the following press release came from the Legislature:

> Representative Ramona Barnes (R. Anchorage), the House Majority Leader, took issue with recent remarks by Anchorage Superior Court Judge Victor Carlson regarding presumptive sentencing. In those remarks from the bench on December 22, 1983, Judge Carlson had castigated the Legislature for imposing presumptive sentencing (a range of permissible ties), saying he believed it was wrong; suggesting that people contact their legislators and urge that it be changed; and urging a man he was sentencing for first degree sexual assault of a 7-year-old girl to appeal to the governor for executive clemency.
>
> "I consider it an impropriety for a judge to proselytize from the bench in such a manner," said Representative Barnes, noting that she has just completed reviewing the trial record. "I agree that it was unfortunate that the Legislature had to impose minimum sentences for serious crimes, but it was indeed necessary in order that justice be served and that punishment serve as a deterrent," she continued, "and Judge Carlson's handling of this case represents a prime example of the unreasonable lenience on the part of judges that caused us to have to resort to such measures."
>
> When asked for another example of an unreasonably lenient sentence, Representative Barnes cited the case of Venson Brown, who was convicted of multiple counts of sexual abuse of young boys entrusted to his care as Assistant Director of the Boys' Club of Alaska, and who was put on probation by Judge Carlson. "Those are not the only examples," said Representative Barnes, "there are others, and, there are several other judges who follow a similar pattern in sentencing," she added. For an example, she cited a recent case where Judge Justin Ripley placed Robert L. Wilson on probation, despite his pleading guilty to first degree sexual assault involving penetration and sexual abuse by fondling of an 11-year-old girl. She noted that a mandatory minimum presumptive sentence of eight years would have been required if the crimes had been committed after the presumptive sentencing law took effect in October 1982.
>
> "I would suggest that agencies and individuals who contact me and other legislators with their concerns about the rampant incidence of crime in our community keep tab on judges and publicize their record of sentencing when they come up for retention at election time."
>
> Representative Barnes concluded, "Until such time that judges appropriately weigh the rights and concerns of the victims of crime *vis a vis* compassion shown for the criminals, I would be adamantly opposed to doing away with presumptive sentencing.

It is time to stop. It is time for judges to be judges and legislators to be legislators. It is time for the courts of the State of Alaska to recognize that it is the Constitution from which government power emanates, not the fashionable passions of the Legislature.

The Constitution of Alaska creates three separate and equal branches of government, each with its own defined areas of responsibilities. The responsibility and duty invested in the judicial branch is to fashion a fair and appropriate sentence for those charged with criminal offenses. In defiance of this basic document, the Legislature has seized this responsibility, duty, and authority from the courts and imposed its own arbitrary and political judgment.

The courts of Alaska must act, and must act decisively, if the judiciary of the State of Alaska is to remain viable and the rights of the people as expressed in our Constitution are to be maintained. The courts are now being asked to find presumptive sentencing violative of the doctrine of separation of powers, violative of the rights of the accused to the due process of law, violative of the accused's right to equal protection under the law, violative of the accused's right to reformation, violative of the accused's right to parole, and finally, violative of the accused's right to be free from cruel and unusual punishments.

*Robert Wagstaff is an Anchorage attorney.*

# All my trials

*Gail Roy Fraties*

I knew that I was inviting problems by giving away one of my trade secrets ("What's My Sign," sub-section of All My Trials, the *Alaska Bar Rag*, April 1985). Anyway, Anchorage trial attorney **Greg Oczkus** is not only a friend, and a reader, but a resourceful practitioner as well.

### What's My Sign II

We were trying a felony case in Courtroom J the other day (Honorable **Rene Gonzalez**, presiding) and Greg wearied of the gambit I described in my last column. As my readers will remember, I occasionally like to throw in a comment on voir dire indicating that I have noticed the jurors' birthdate, and know their sun sign. A very nice lady had responded amiably enough to my questions and had stated—among other things—that she enjoyed music, reading, and the arts, to which I replied with what I hoped was a winning smile, "A typical Pisces."

Greg had heard enough. Marching resolutely to the jury rail, he transfixed the offending juror with his piercing gaze.

"Mrs. Wilson," he stated, "I am a double Leo with a Scorpio moon. Does that tell you anything about what the hell I think, or whether I should be involved in this case?"

On receiving the juror's emphatically negative reply, Greg proceeded with some satisfaction to another line of questioning—and I desisted, at least for the purposes of that particular trial, from further metaphysical inquiries.

### Law South of the Yukon

I tried a murder case in Bethel recently, and jury selection there has nuances all its own, as opposing counsel Anchorage trial lawyer **James D. "Jim" Gilmore** (who won, incidentally) can attest. We were dealing with what was apparently an all-Eskimo panel, drawn exclusively from some of the 56 villages scattered along the banks of the Yukon and Kuskokwim Rivers. Jim had a sophisticated defense predicated on the purported menacing behavior of the victim, which eventually compelled Jim's client to shoot him (as I understood the argument) in anticipatory self-defense.

Neither of us could get anything out of the prospective jurors, who—as is the custom of Yupik people, skillfully avoided sharing any of their thoughts on voir dire by retreating behind the Yupik language barrier. They appeared to be completely nonplussed by our questions involving fair trial, the right of self defense and other legal niceties, but trial judge **James Blair** refused defense motions for a change of venue or a new panel. "These people are Alaskans, highly intelligent, serious minded, and better qualified for jury duty than most," he stated pragmatically. "Further, we have been using Yupik juries on felony cases for years, with eminently sensible results. Motion denied."

Attorney Gilmore, who could not anticipate his success at that point, was distressed for his client—and I tried to cheer him up.

"Don't worry, Jim," I said brightly. "They're not going to understand our testimony either. How do you think they're going to handle scientific evidence from (Anchorage forensic pathologist) **Dr. Rogers?**"

Jim refused to be comforted. "White God comes in iron bird," he muttered.

### Power Negative Conditioning

There are some places in Anchorage which are inadvisable to visit after sundown, unless one is accompanied by the 82nd Airborne Division. That is true of Chilkoot Charlies, for most people, and applies also to the Jade Room—at least for Marvin (surname withheld by request), an amiable gentleman who has figured, as a witness, in three of our recent felony trials.

I first met him when **Robert C. "Bob" Bundy**, former Chief Assistant District Attorney and presently Anchorage litigator for Bogel and Gates, was interviewing witnesses for an assault which (with deference to the Jade Room's function as a meeting place for Anchorage's homosexual community) he referred to as "the shootout at the Oh-Gay Corral." In that particular incident, poor Marvin got in the way of a bullet that was intended for someone else. It struck him in a fleshy and non-vital portion of his anatomy, and he bore the ignonomy and pain of his wound with stoic good nature. We all liked him.

He didn't stop meeting his friends at the Jade Room, either, and soon was back as the victim of a terrible beating which had been inflicted by a local denizen who not only took Marvin's money, but savaged him with sadistic pleasure. I conducted that trial, and in the course of it got to know him well enough to be worried about his safety if he kept on hanging around the fringes of Anchorage night life. By this time, all the prosecutors were aware that he was having a run of bad luck, and it wasn't long before he surfaced again—once more a victim of the dynamic environment of his favorite bar.

On this occasion, a stranger had appeared—offering to show the regulars how to get out of bonds, presupposing that they wished to do so. The idea was that he would tie up their hands, and show them a simple way to undo the rope and mystify their friends. It being a quiet evening, everyone—including Marvin—volunteered, and soon half a dozen patrons were securely tied up—whereupon the mystery guest proceeded to rob them. Outraged, they fell upon and managed to immobilize him, the police intervened and the case routinely arrived at the District Attorney's Office.

**Stephen E. "Steve" Branchflower**, the head of the felony intake section, was concerned. "Marvin's been shot, beaten and robbed, all in the space of about six months," he said. "He's gonna have to give that shit up, if he wants to stay alive."

Chief Assistant District Attorney **Leonard M. "Bob" Linton** agreed. "It's called 'scared straight'," he remarked.

### The Final Solution

I was trying a case with Anchorage Assistant Public Defender **Craig S. Howard** the other day, and during one of the breaks we discussed a topic of mutual interest, the practices and tribal lore of the District Attorney's Office. Craig agrees with me that a motivated individual on the prosecutor's staff can do more to get people out of undeserved trouble than anywhere else in the judicial system. His only codicil, I suppose, is that we don't do it often enough.

Anyway, it was in the course of this discussion that I suddenly realized that we could improve the entire system immensely, and satisfy practically everyone involved, by the simple device of switching the personnel of our two offices.

By doing so, we would have the compassionate and humanitarian people who now comprise the Public Defender's personnel making charging decisions, and all of the tough bastards in the DA's Office who don't care about anything except winning trials would be fighting for the defendants' rights. I'm not entirely sure that anyone would ever be charged, much less convicted, but it would certainly serve to relieve the present pressure on the court system.

### Quotable Quotes

Superior Court Judge Warren W. Taylor, commenting with mild exasperation on the court system in general: "It reminds me of what **Judge (Everett W.) Hepp** used to say. 'It's like owning a sick goldfish—you know something is wrong, but you don't know what to do about it."

Anchorage District Attorney and aquarist **Victor C. Krumm**'s corollary to **Judge Hepp**'s maxim, "I just flush the little bastards."

•

Anchorage Police Officer **Gereth D. Stillman** (armed robbery at Quik Stop, APD report 86-42650): "I advised the suspect of his Miranda rights, told him I wished to ask him some questions concerning the armed robbery, and he stated he would rather have an attorney present before he incriminated himself."

•

Alcoholic defendant (remarks in alocution before Superior Court **Judge Rene Gonzalez**, after spirited argument by his attorney, Public Defender **Beth Kertulla**): "Hey, your Honor—like, this program I'm going through and stuff—"

Probation Officer **Debbie Gevfert**, re above (sotto voce to prosecutor): "Why don't we just revoke him right now? We're all here, and everything. . . ."

•

Anchorage Superior Court Judge **Seaborn J. Buckalew**, responding in his usual patient fashion to defense counsel's angry argument that the prosecutor was attempting to make her client sound like one of Genghis Khan's mongol horde: "Now, counsel—I know that your client didn't ride with Genghis Khan's horde. Mind you (with a gentle smile), if he had I don't think he would have stood out, particularly."

## Down with Termination Dust

## Poll . . . Continued from page 4

(51%), criminal (36%), and administrative (13%) work. Judges (3.6% of the sample) were the only ones to spend more time on criminal cases (53%) than on civil work (47%).

Where do they do their work? The answers given to the Council's researchers indicate that it's not in the courtroom. Private attorneys said they spent, on an average, only 10% of their time in the court face-to-face with a judge. Government attorneys (many of whom are prosecutors or assistant public defenders) estimated that they spent 60% of their time working in their chambers, and only 40% in the courtroom, face-to-face with lawyers.

With whom do they work? Nearly one-third (30%) were sole practioners. Thirty-eight percent worked in offices with two to seven attorneys. About one-quarter (26%) were in medium-sized offices with 8 to 30 attorneys. Only a handful of lawyers (6%) were associated with firms that employed more than 30 attorneys.

## School . . . Continued from page 4

upside down to a stretcher with his most recent paramour, a mounted goat's head (there were no chickens at Bell Island). Photographs are available upon request to former KBA President Ed Stahla.

George Gucker's brother once made a "fly-by" while members were basking in or near the pool catching up on some routine studying. On his next pass, a streamer came floating down, and was quickly retrieved. Much to the relief of Gucker, who had thoughts of mechanical problems plaguing his brother's plane, the streamer informed the members in attendance that the pilot was ". . . in need of HELP. Am being attacked by two left handed nymphomaniacs."

The annual seminars changed from Bell Island several years ago, and are now being hosted by the most gracious family of Art Hack at nearby "Yes Bay Lodge." New areas of law are being taught to the members, and those in attendance can even expect to compete in the annual "KBA Fishing Derby & Tortfeasors Anonymous" sessions should they desire. The seminars have been coed for some years now as 1979 derby winner Donna Willard can attest. Inflatable party dolls have been banned by majority vote of the KBA, meeting in a rump session. The Derby now carries a handsome trophy—the coveted Baxter—along with a moderate honorarium.

Those courageous members of the ABA who have strong hearts and a burning desire to rekindle the flame of knowledge should write Clifford Smith of the KBA, 320 Dock Street, Ketchikan, AK 99901 for information and invitations to attend the "20TH ANNUAL KBA CONTINUING LEGAL EDUCATION SEMINAR" which commences this year on September 20 and ends later!!!


# The movie mouthpiece

*Edward Reasor*

This is the first column I have written for this August legal publication, and as a word of introduction let me say that for seven years I wrote a column entitled "Cinema Critique" for The Anchorage Times, which may or may not be the largest newspaper in Alaska. In addition to writing a weekly Sunday column for The Anchorage Times, I have been a screenwriter for both television and movies ("Marlo Brando's Tahiti"); a producer ("Sourdough"); a financer ("Tayaru"); and a professor of films both in Alaska and Hawaii.

The most important thing however, with regard to critiquing movies is that I see on the average seven movies a week, read four serious cinema publications monthly, and I am infatuated with the Silver Screen. To my generation, movies are today's form of art.

In the months to come under the able editorship of trial attorney Gail Fraties, (who is quite a movie buff himself), I shall review movies not only from the standpoint of an attorney's perspective, but also interview various cinema people including movie stars, directors, producers, and historians. On occasion, I will use the space as an essay for the purpose of shedding some light on the very wonderful occupation of film making. In this regard, I was a student of Conrad Hall in cinematography. Conrad won the Oscar for best cinematographer for the work he did on "Butch Cassidy and the Sundance Kid." I have also studied (although only for two days) under the able tutorship of the late Alfred Hitchcock (while in Tahiti) and I have discussed film writing with such well known and successful screenwriters as Neil Simon. In short, I have been exposed to cinema in almost all of its facets.

Acquiring a working knowledge of cinema is a continuing occupation similar to becoming an expert trial attorney. The learning experience never ends. In this regard, I will be attending in October of this year a one week course in special effects being tutored in part by the makers of "Star Wars," "The Adventures of Indiana Jones, and the Temple of Doom," and by Mr. Art Whitlock, a long time special effects professor for Universal Films. While a student at this course, I plan on renewing my acquaintances at Columbia Studios and it may very well be that future articles this winter will talk about the new financing concepts in films, the trend toward short, almost unbelievable action films, and the continuing saga of trying to sell either a story idea, a well written script, or oneself to the Hollywood crowd. Some columns also will cover the expanding tourist attraction of film festivals and the granddaddy of them all, the Academy Awards.

The best film of 1984 clearly was "Amadeus," which won eight separate Academy Awards. Although film critics rarely go to see a film more than once; and frequently in larger cities such as Chicago and New York critics stay only for the highlights; or, depending on their press responsibilities, watch intermittently only several, three- to four-minute "clips." I was drawn back to "Amadeus" on three separate occasions. On the second occasion I made a valiant attempt to close my eyes during most of the dialogue to see if I could get an appreciation for the music the film director and players would lead into simply by the rhythym of the story movement. Try it, it works!

Although I religiously watch both Sneak Preview and At the Movies, and generally agree with about 80 percent of our T.V. weekend critics, I find that their reviews place far too much emphasis on the clips that are actually shown. I receive from Los Angeles about three "clips" a week. Mine come in video cassettes that run anywhere from 18 to 20 minutes and are several varied sequences of the film that the studio wishes to promote. Most recognized film critics across the nation receive the same courtesy.

The film clips, of course, have some redeeming qualities. First, one can watch the film without having to listen to the conversation of next door movie watcher or her kids throwing popcorn across the aisle and they are available to be reviewed so that one can pin the exact quotation or the exact wording of dialogue that seems important.

On the other hand, who makes film "clips?" The studio, of course, and generally the public relations department of the studio. The public relations department may or may not appreciate what a great film or poor film for that matter the studio has produced. So a critic who relies solely on film clips is seeing someone's very subjective view of what he thinks is best in the film. Thus, the "clip" critique is restricting his overall view of the film. I do not think that the film clips for "Amadeus" were particularly well done, but the movie was fantastic.

On the other hand, the film clips for "The Razor's Edge" starring Bill Murray were excellent—tall impressive monasteries filmed against the backdrop of the Himalayas—beautiful photography—but the film itself had terrible pacing, was way too long, way too complicated, and took itself much too seriously.

Well that's it for an introductory phrase. For attorneys, the two films one should watch on late television (and we get each at least once every three years in Anchorage) are: "Witness for the Prosecution," an Agatha Christie work, starring Charles Laughton, Marlene Dietrich, and Tyrone Power. In that film, Laughton is an exact replica of Edgar Paul Boyko.

I also suggest that the whole District ttorney's Office (including those self-proclaimed "Chief Prosecutor of the State" and "Trial Lawyer Criminal Division for the State") watch the black and white "A Tale of Two Cities," a story of the French Revolution as written by another attorney, Charles Dickens. The interesting point in that film is that the real legal hero is a barrister without an office, without a secretary, without honor among his own profession, who feeds the answers and trial suggestions to a rather pompous, rich, civilized barrister who has by reason of political influence acquired his position. Sometimes I think Dickens must have visualized Alaska in his midnight seance.

# Annual meet seeks friendly towns

by Pete Ehrhardt

If you've actually read this Edition of the Bar Rag you've seen a number of articles about the Sitka convention. You've also probably looked at the unfamiliar faces in the pictures and wondered for the thousandth time why anybody would go to a Bar Convention.

Judges go because they have to go. They don't have a choice. Somebody makes them. I've really got to find out who it is. I can't get judges to do anything.

If you leave out judges, DAs and Hal Brown, there are lots of other attorneys who attend Bar Conventions. I'm not sure why. There are better ways to spend four days in May: Maui for example, or even 4th Avenue. So, there must be some good reasons for going to the convention.

One of the best reasons to attend a convention in Sitka is, Sitka: The Paris of the Pacific. I try to be polite when folks rave about Homer or Valdez, (or even Sand Point) but, if Sitka isn't the prettiest spot in Alaska, take me there.

Another reason to attend is Leroy Cook's hospitality room and the continuous poker game presided over by certain judicial and senior members of the Bar. This isn't a *good* reason to go to a convention, though. If you really want to lose your shirt, go to Vegas. There, you won't have to worry about getting pounded in court by the same turkey who stole your allowance the week before.

Then there are CLE courses. Of course, no self-respecting attorney would attend such stuff. Alaska attorneys don't need CLE. Out here on the last frontier we have to cut to the heart of a problem. We can't be making mountains out of moosehills. Besides, CLE isn't fun.

While we're on the subject of fun, you could go to the bar convention and try to out-party the Ketchikan Bar Association. I tried. It can't be done. The flip side is to try to be more serious than the Anchorage Bar Association. On second thought, don't bother.

## Plan Ahead for Valdez

Have you ever wanted to experience . . .

the thrill of rafting white water,
the chill of a glacier trek, or
the serenity of a hike through an alpine meadow?

You can do it and more in Valdez and *your* convention is taking you there, June 4-7, 1986!

Your Bar Association is working hard to provide you with a variety of interesting and knowledgeable speakers on worthwhile and timely topics. The city of Valdez and the Valdez Bar Association, headed by Bill Bixby, are going all out to make the Alaska Bar Association's convention a memorable one.

VARIETY is the operative word! Plan on spending a few extra days in Valdez, perhaps with your family, and hike Mineral Creek Canyon, take a J-rigged pontoon boat trip to Shoup Glacier, raft or kayak Keystone Canyon, or fish the waters of Prince William Sound.

OR perhaps you would like to play racquetball or swim at one of the local schools, enjoy a game at Valdez' fabulous softball facility, take a tour of the Alyeska Marine Pipeline Terminal, or dance the night away to live music.

There's all this and more in Valdez. Fly, take the ferry or drive. Plan on Valdez in '86!

How about sex? You were waiting for this, right? Unfortunately, a resolution passed by the Bar Association at Sitka determined that: "Sex occurring at a Bar Convention constitutes moral turpitude." There was, alas, no sex in Sitka.

Seriously, I can't believe they let some of those beautiful people practice law. Outrageous! That gorgeous blonde tax expert, who claimed she worked for a big Anchorage firm, must have been hired by the Sitka Bar to impersonate an attorney. Still, you'd do better in Fresno. Sex is not a good reason to go to a bar convention.

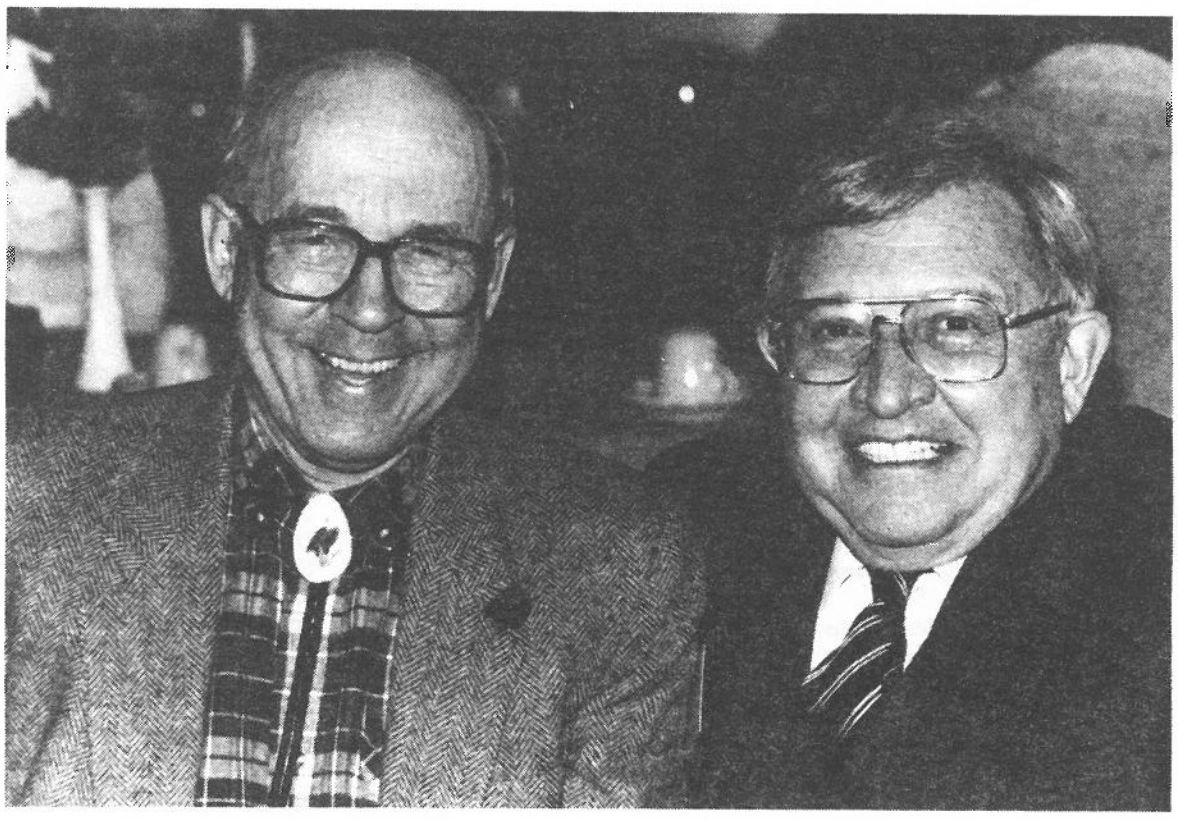
A good reason to go was the 1985 Libel Show. The singing Judge sang sweetly and the show, starring the Sitka Bar Association (and special guests), was a smash hit. Afterwards, certain Sitka bar members were overheard discussing a possible tour with Arts Alaska.

Now you know some of the reasons why people who don't have to go attend the bar convention. But the very best reason to go is sitting on your desk. It's your telephone. I've never seen figures, but I'd bet that more than 20% of an attorney's time is spent talking on the phone. To what?. . .To disembodied voices.

It turns out that those voices belong to real live people: The members of the Alaska Bar. It's worth going to a convention just to connect empty voices with whole persons, and to meet your friends, colleagues and enemies face to face. I'm glad I got off my phone and went to the 1985 Convention. Try it yourself next time. See you there.



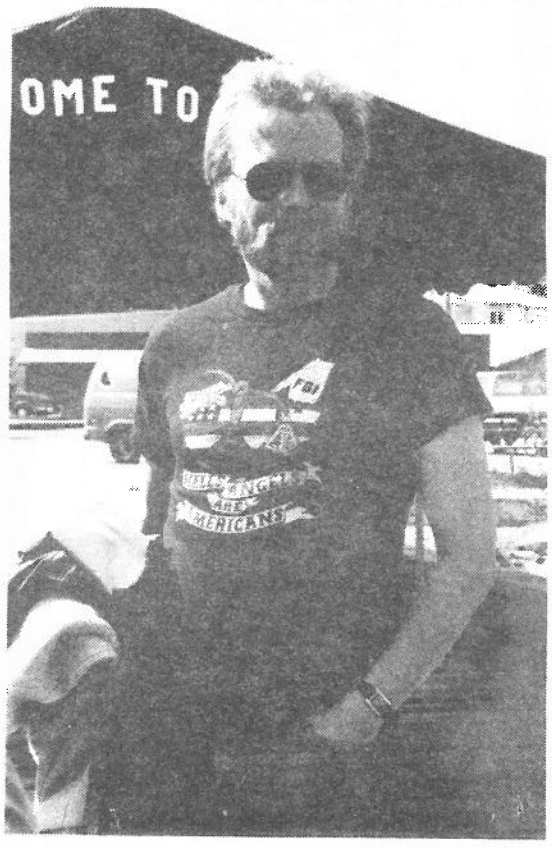
# Bar people share year at



*Judge Tom Stewart with guest Judge Phillip Roth, Circuit Court, Portland, Oregon.*

*Andy Hoge and R. Stanley Ditus skip hand-in-hand towards the picnic after negotiating the jagged rocks on Pirate's Cove Beach.*

*Slimy Boggs, Esq. (Pete Hallgren) "pays the fine due," after having been found in contempt of court by Judge Quickly (Don Craddick).*

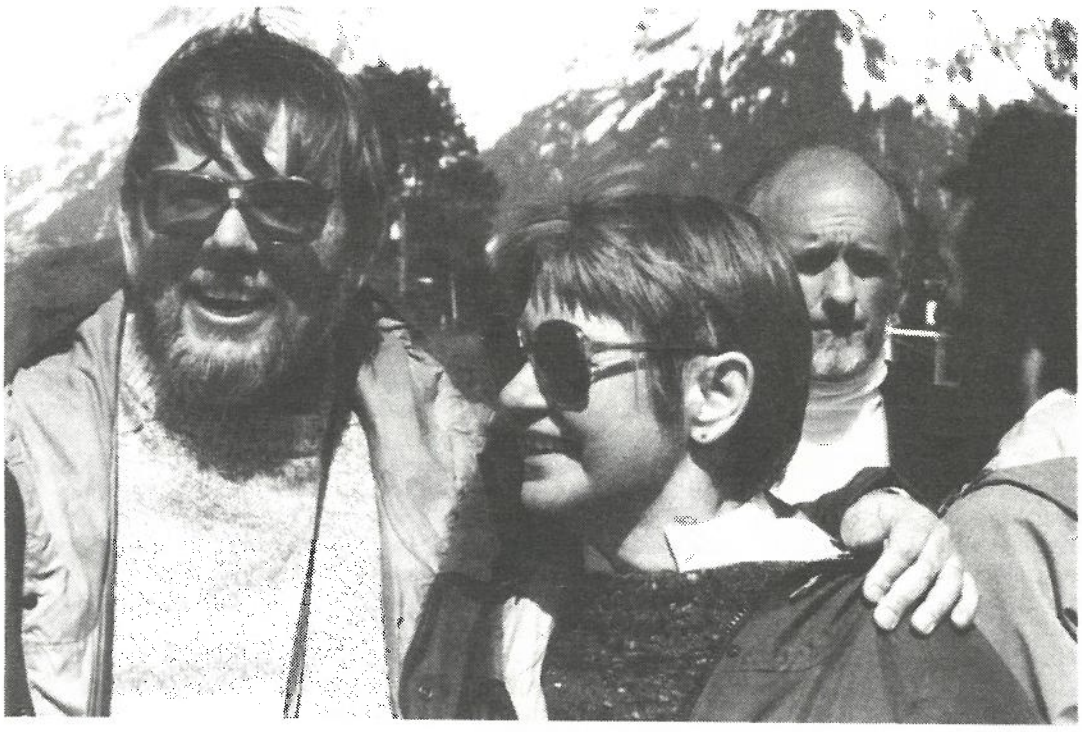



*Judge Michael Jeffrey and family made the long trek from Barrow to enjoy the company of some 250 attorneys and judges in Sitka.*

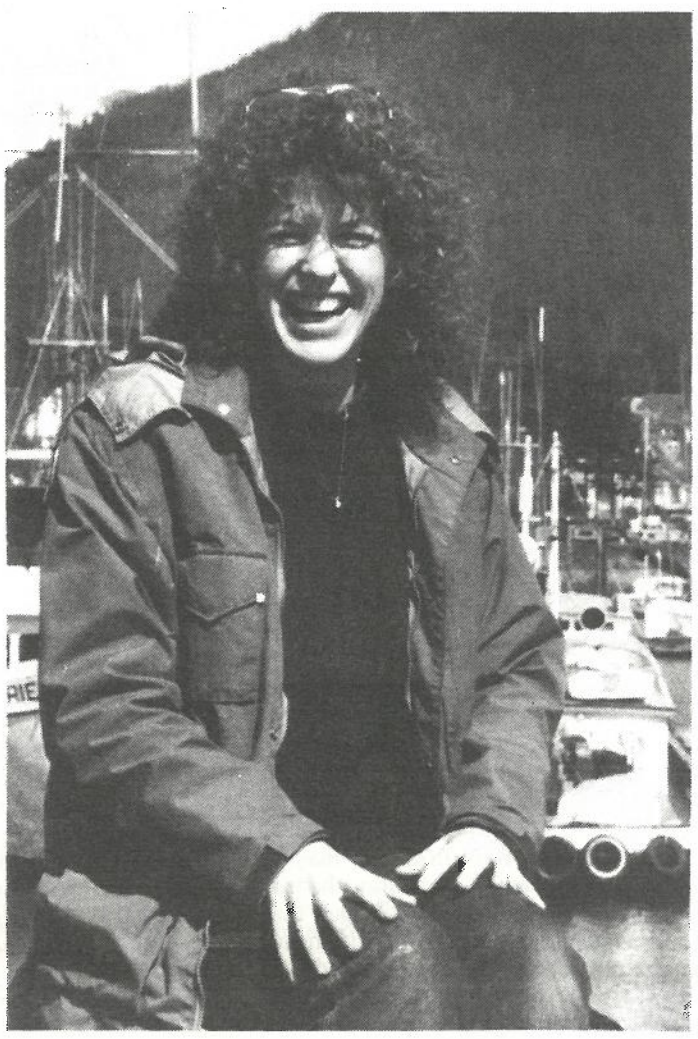
*Niesje Steinkruger roasts outgoing president and new A.G. Hal Brown during the Bench & Bar Banquet.*

*Bill Bryson sports an All-American T-shirt. Rumor has it though that he drives only flashy foreign sports cars.*

# another convention historic Sitka



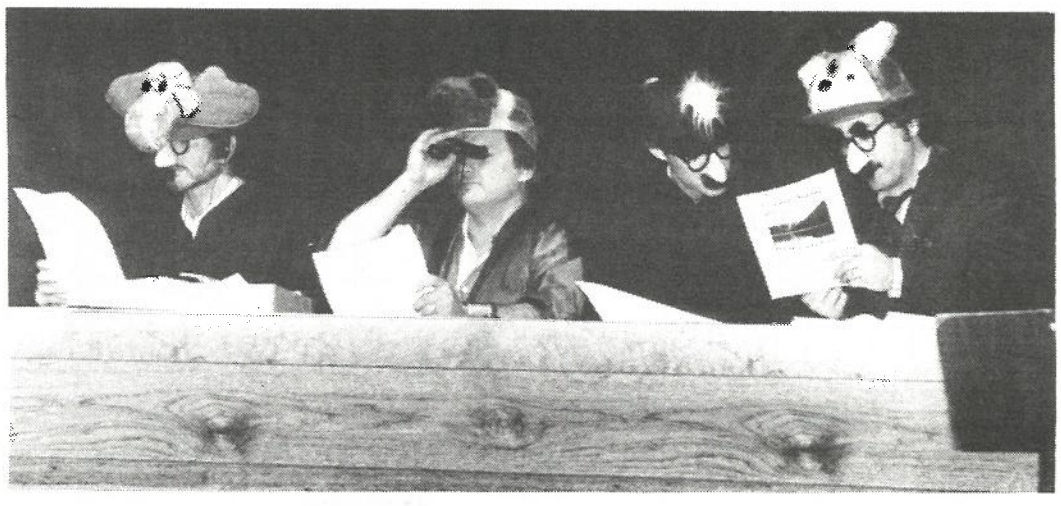
*Harry Branson and wife Ciri are backed by the breathtaking beauty of the Sitka mountains, while they await the cruiseship to the Pirate's Cove Picnic. In the back are Reid Peyton Chambers and Lloyd B. Miller.*



*Bar Executive Director Deborah O'Regan strikes an exuberant pose for the photographer while waiting to board the boat to the Pirate's Cove picnic. O'Regan had just been offered the E.D. position, thus her beaming face.*

*Judge Chris Cooke from Bethel dazzled the audience with his good looks and remarkable musical talent.*

*Harold Cheatum, Esq. (Denton Pearson) gets a pie-in-the-face for contempt of court. "Thank you, Your Honors," he responded.*



*The Supreme Court convenes. (Left to right) Justice Moose (Bob Scavron), Justice Beaver (Ed Stahla), Justice Skunk (Tom Meyer) and Justice Wolf (Jim Bowen).*

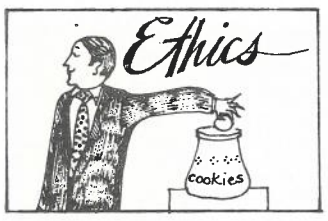
Photos by Photo Illusions

**Board of Governors Schedule**

The following is a list of the meetings of the Board of Governors during Harry Branson's term as president. If you wish to include an item on the agenda of any Board meeting, you should contact the Bar Office or your local Board member at least three weeks before the Board meeting.

August 22, 23 & 24, 1985
November 7, 8 & 9, 1985
January 9, 10 & 11, 1986
March 20, 21 & 22, 1986
June 2, 3 & 4, 1986 — Valdez

ALASKA BAR
News
Augu




# Bar acts on discipline

**Suspension**

HOMER L. BURRELL was suspended from the practice of law for 90 days, effective August 19, 1985, for engaging in a conflict of interest with a former client and for continuing to assist in the representation of his second client after the superior court entered an order prohibiting him from doing so.

ROBERT J. BUCKALEW was placed on interim suspension status on July 19, 1985, pending further order of the Alaska Supreme Court.

**Private Reprimand Imposed by Board**

Attorney A received a private reprimand from the Disciplinary Board for violating DR 5-105 (A) and (B), by accepting and continuing representation of co-defendants without full disclosure when his professional judgment would likely be adversely affected and for violating DR 7-101(A(3), by making tactical decisions before and during the trial of one co-defendant which damaged that client in order to give the other co-defendant greater protection. The Board found that Attorney A's candidness and remorse, and the unique circumstances of his practice, to be mitigating circumstances in imposing discipline.

Attorney B received a private reprimand from the Disciplinary Board for continuing to practice law while suspended for nonpayment of Alaska Bar Association dues.

Attorney C received a private reprimand from the Disciplinary Board for intentionally failing to carry out a contract of employment and for misrepresenting the status of the case to his client. The Board found the substantial lapse of time before the conduct was reported by the client and the full restitution paid by Attorney B to the client to be mitigating factors in imposing discipline.

**Private Admonitions by Discipline Counsel**

Attorney D had purchased some items from another party for a substantial amount of money, only to learn that the items were not what they were represented to be. He wrote the other party a letter accusing the other party of fraud and advised that a law suit would be filed for substantial damages and that cooperation would be given to the other party's probation officer, the Internal Revenue Service and local law officials for possible prosecution. Later, Attorney D hired Attorney E to represent him. Attorney E sent a demand letter to the party which advised that if the dispute was not resolved to the satisfaction of Attorney D and his wife, a law suit would be filed and he would personally contact the U.S. Attorney and the Alaska Attorney General to present them with the information upon which the dispute was based. Both attorneys received written private admonitions for threatening to present criminal charges in order to obtain an advantage in a civil case in violation of DR 7-105. The Discipline Section's research concluded that the courts in various states have uniformly found violations of DR 7-105 when a criminal prosecution is threatened in a civil matter to obtain a settlement or payment of money.

Attorney F received a private admonition for violating DR 5-105 by representing two co-defendants at a bail hearing and making an argument in favor of one co-defendant that all the evidence pointed to the less culpable co-defendant. Discipline Counsel found Attorney F's inexperience to be a mitigating factor.

Attorney G, an out-of-state attorney, received a private reprimand for appearing in an Alaskan civil action without being a member of the Alaska Bar Association or complying with the Alaska Rule of Civil Procedure 81.

Attorney H received a private admonition for advising the court to cancel a criminal trial date because his client would enter a guilty plea, without consulting with his client or advising him of his action.

Attorney I received a private admonition for not providing notice to his clients or the court in approximately 25 cases that he was leaving the state and had turned over his fiies to the Office of Public Advocacy.

Attorney J received a private admonition for refusing to provide a client he had been appointed to represent access to his file and for requesting the court to order the client to pay him for his past services at his regular hourly rate as a condition for substituting new counsel.

Attorney K received a private admonition for demanding and receiving a fee from a client in a workers' compensation case in violation of federal law.


## Who's News

*If you know of news of members, jot it down for future "people" columns—new partners and associates, new or relocated offices, wedding bells, babies. For this issue, a Bar staff update is found below.*

This summer has seen a lot of staff changes at the Bar Association. First of all, Randall Burns, after five years as executive director, really did leave the Bar last winter to attend the USC School of Cinema-Television. After one semester of school, he has taken a year's leave of absence from filmmaking to work as Special Assistant to Attorney General Hal Brown. (He must be looking for more material for future films.)

Deborah O'Regan, who was assistant director, stepped in as acting executive director following Randall Burns' departure. The Board of Governors conducted a national search for a new executive director. At the annual business meeting in Sitka, then President Hal Brown announced the selection of Deborah O'Regan as executive director. O'Regan said that following in Randall Burns' footsteps will be a challenge.

"Nobody could fill Randall's shoes," O'Regan said, "so we had them bronzed." She also said that she is enjoying her new permanent position.

Linda Nordstrand was promoted to fill the position of assistant director and CLE director, which was vacated by Deborah O'Regan. Previously Linda had been executive secretary for the bar association.

"Linda has a good understanding of the functioning of the bar," said O'Regan, "and has a lot of good ideas for making things better or more efficient." Linda will be directing the CLE program, planning the Valdez convention and working with the sections and bar committees.

Virginia Ulmer has joined the staff as executive secretary. Virginia recently moved to Alaska from Cleveland, Ohio, where she worked for the Red Cross. Her experience in working with volunteers and crises should help her keep on top of things at the Bar. Virginia says she loves her new job, so we are trying to do all we can before she changes her mind.

Jolene Corriell was recently hired as the statewide lawyer referral receptionist. Jolene had been a homemaker, as well as bookkeeper for her husband's business and recently completed a nine-month business course. We were going to start her off slowly so she'd be impressed with the "glamour" of the office; however she's already found out what it's *really* like to work in an office.

Other staff changes:

Jeanne Bradley, accounting clerk, has recently left the Bar, upon giving birth July 29, to her second child, a girl, Rebecca Ann.

Jill Wilson, who always brought a lot of warmth and enthusiasm to her position as receptionist, was promoted to fill the accounting clerk job. Jill said she is excited by all the new skills she's learning with the different position.

Kelly Klemper has been promoted to receptionist. Kelly held her first office position as the lawyer referral secretary/receptionist and has done so well, we are bumping her up the ladder.

**Last, Sue Daniels, the assistant discipline counsel, had a baby girl, August 8, and is currently on maternity leave until the end of September.**

# ABA suffers loss of friends

Continued from page 1

In 1971 Justice Dimond became extremely ill and resigned from the bench. After regaining his health, he returned to the court as a justice pro tem in 1973.

Mona Torrence, supreme court deputy clerk and secretary to Justice Dimond, wrote the following for the Newsletter. "In helping to lay the foundations of the court system in this state to revising court rules to writing opinions for the court, indeed in all his work, he evidenced great wisdom and an unwavering sense of justice. He was a man of the greatest dignity and integrity, the likes of which we will probably not see again. To those of us who were fortunate enough to know him, he will be remembered as a very tall, lanky man who walked without making any sound, an unassuming man forever thoughtful of others, truly a gentle man and always a gentleman."

## Edward V. Davis Dies

Retired Anchorage Superior Court Judge Edward V. Davis died at Humana Hospital in Anchorage on July 27. Judge Davis was one of the original superior court judges appointed by Governor Bill Egan in 1959 after Alaska became a state. He served on the bench until his retirement in 1973. From 1973 until 1979 he sat frequently in Anchorage and Fairbanks as a judge pro tem.

Judge Davis graduated from the University of Idaho Law School and served as an Idaho probate judge prior to moving to Alaska in 1939. He was in private practice in Anchorage with William Renfrew for 20 years and served on the constitutional convention that met in Fairbanks in 1955 to write Alaska's constitution. Judge Davis was a past president of the Alaska Chamber of Commerce and a past member of the Anchorage School Board.

*Reprinted with the permission of the Alaska Court System Reporter.*

**IN MEMORIAM**

The members of the Alaska Bar Association are saddened with the passing of six of its numbers in recent months. The Bar extends heartfelt condolences to the families of these fine professionals.

Senior Justice John H. Dimond
*July, 1985*

Judge Edward V. Davis
*July, 1985*

Barbara Miracle
*May, 1985*

Bruce G. Frenzel
*June, 1985*

Richard G. Lindsley, Jr.
*June, 1985*

David R. Walker
*July, 1985*

# ASSOCIATION Notes

5

# Candidate ranks in poll

Continued from page 1

The Board of Governors solicited names of interested persons and ran an advisory poll of the active members of the bar association. The poll listed the ten persons who had submitted their names to the association and allowed the membership to rank the candidates as extremely well qualified, well qualified, qualified, not qualified or indicate that the respondent does not have sufficient information to comment on the candidate.

Since a candidate may be well known to members in one judicial district and not another, the results are broken down by the four judicial districts in Alaska, as well as active members who reside Outside.

This poll is purely advisory to the Congressional Delegation and the delegation may recommend an individual who elected not to participate in the poll.

Below are the results by judicial district, with the number of Bar members who ranked the candidates in each category.

## Alaska Bar Association
### U.S. District Court Judgeship Poll Tallies
#### FIRST JUDICIAL DISTRICT

| Name of Candidate | Extremely Well-Qualified | Well Qualified | Qualified | Not Qualified | Don't Know or Blank | TOTAL |
|---|---|---|---|---|---|---|
| Blair, James R. | 13 | 23 | 22 | 7 | 24 | 89 |
| Bradbury, John H. | 3 | 5 | 17 | 13 | 51 | 89 |
| Gallagher, Sheila | 2 | 3 | 13 | 10 | 61 | 89 |
| Kleinfield, Andrew J. | 13 | 9 | 20 | 6 | 41 | 89 |
| Moore, Daniel A. | 37 | 19 | 10 | 1 | 22 | 89 |
| Rindner, Mark | 1 | 0 | 5 | 3 | 80 | 89 |
| Roberts, John D. | 1 | 2 | 7 | 7 | 72 | 89 |
| Sedwick, J. W. | 5 | 4 | 12 | 0 | 68 | 89 |
| Singleton, James K. | 7 | 23 | 26 | 5 | 28 | 89 |
| Yerbich, Thomas J. | 0 | 1 | 2 | 5 | 81 | 89 |

## Alaska Bar Association
### U.S. District Court Judgeship Poll Tallies
#### SECOND JUDICIAL DISTRICT

| Name of Candidate | Extremely Well-Qualified | Well Qualified | Qualified | Not Qualified | Don't Know or Blank | TOTAL |
|---|---|---|---|---|---|---|
| Blair, James R. | 1 | 0 | 4 | 2 | 2 | 9 |
| Bradbury, John H. | 2 | 0 | 1 | 0 | 6 | 9 |
| Gallagher, Sheila | 0 | 0 | 0 | 1 | 8 | 9 |
| Kleinfield, Andrew J. | 0 | 1 | 2 | 1 | 5 | 9 |
| Moore, Daniel A. | 3 | 2 | 1 | 0 | 3 | 9 |
| Rindner, Mark | 0 | 0 | 2 | 0 | 7 | 9 |
| Roberts, John D. | 0 | 0 | 2 | 0 | 7 | 9 |
| Sedwick, J. W. | 0 | 0 | 0 | 0 | 9 | 9 |
| Singleton, James K. | 2 | 1 | 4 | 0 | 2 | 9 |
| Yerbich, Thomas J. | 0 | 0 | 0 | 0 | 9 | 9 |

## Alaska Bar Association
### U.S. District Court Judgeship Poll Tallies
#### THIRD JUDICIAL DISTRICT

| Name of Candidate | Extremely Well-Qualified | Well Qualified | Qualified | Not Qualified | Don't Know or Blank | TOTAL |
|---|---|---|---|---|---|---|
| Blair, James R. | 44 | 72 | 185 | 100 | 295 | 696 |
| Bradbury, John H. | 46 | 49 | 142 | 300 | 159 | 696 |
| Gallagher, Sheila | 9 | 25 | 140 | 220 | 302 | 696 |
| Kleinfield, Andrew J. | 64 | 76 | 136 | 75 | 345 | 696 |
| Moore, Daniel A. | 378 | 144 | 98 | 14 | 62 | 696 |
| Rindner, Mark | 9 | 20 | 50 | 109 | 508 | 696 |
| Roberts, John D. | 25 | 50 | 137 | 168 | 316 | 616 |
| Sedwick, J. W. | 32 | 71 | 135 | 85 | 373 | 696 |
| Singleton, James K. | 142 | 189 | 205 | 78 | 82 | 696 |
| Yerbich, Thomas J. | 7 | 19 | 89 | 211 | 370 | 696 |

## Alaska Bar Association
### U.S. District Court Judgeship Poll Tallies
#### FOURTH JUDICIAL DISTRICT

| Name of Candidate | Extremely Well-Qualified | Well Qualified | Qualified | Not Qualified | Don't Know or Blank | TOTAL |
|---|---|---|---|---|---|---|
| Blair, James R. | 25 | 26 | 40 | 22 | 4 | 117 |
| Bradbury, John H. | 5 | 7 | 10 | 3 | 92 | 117 |
| Gallagher, Sheila | 0 | 5 | 8 | 9 | 95 | 117 |
| Kleinfield, Andrew J. | 55 | 30 | 18 | 8 | 6 | 117 |
| Moore, Daniel A. | 32 | 13 | 19 | 3 | 50 | 117 |
| Rindner, Mark | 0 | 0 | 1 | 4 | 112 | 117 |
| Roberts, John D. | 0 | 3 | 5 | 4 | 105 | 117 |
| Sedwick, J. W. | 0 | 3 | 3 | 3 | 108 | 117 |
| Singleton, James K. | 2 | 24 | 37 | 10 | 44 | 117 |
| Yerbich, Thomas J. | 0 | 1 | 4 | 7 | 105 | 117 |

## Alaska Bar Association
### U.S. District Court Judgeship Poll Tallies
#### ACTIVE OUT OF STATE

| Name of Candidate | Extremely Well-Qualified | Well Qualified | Qualified | Not Qualified | Don't Know or Blank | TOTAL |
|---|---|---|---|---|---|---|
| Blair, James R. | 6 | 5 | 5 | 3 | 21 | 40 |
| Bradbury, John H. | 3 | 4 | 6 | 9 | 18 | 40 |
| Gallagher, Sheila | 2 | 2 | 7 | 9 | 20 | 40 |
| Kleinfield, Andrew J. | 2 | 2 | 12 | 2 | 22 | 40 |
| Moore, Daniel A. | 11 | 6 | 8 | 2 | 13 | 40 |
| Rindner, Mark | 1 | 0 | 3 | 3 | 33 | 40 |
| Roberts, John D. | 1 | 2 | 1 | 4 | 32 | 40 |
| Sedwick, J. W. | 2 | 5 | 3 | 7 | 23 | 40 |
| Singleton, James K. | 9 | 5 | 12 | 3 | 11 | 40 |
| Yerbich, Thomas J. | 0 | 0 | 9 | 2 | 29 | 40 |

## Ethics seminar scheduled

"Common Ethical Complaints and How to Avoid Them" is the subject of a day-long CLE seminar on Thursday, September 26, 9 a.m. to 4:30 p.m., at the Egan Convention Center. Guest Speaker is Forest J. Bowman, professor of law at West Virginia University and former executive director of the West Virginia State Bar.

Legal ethics is a subject that affects *every practicing lawyer.* Utilizing a series of problems drawn from a lifetime of experience in legal disciplinary matters, Professor Bowman brings to the subject an immediacy and realism that is both rare and stimulating.

A widely acclaimed speaker, Professor Bowman was named Professor of the Year at the WVU College of Law in 1983 and 1984, where he teaches Professional Responsibility and has lectured extensively on ethics and other legal topics. Professor Bowman is now serving his second term as a member of the Committee on Legal Ethics of the West Virginia State Bar and is a member of that bar's special committee to study the proposed Model Rules of Professional Conduct. His combination of academic specialization and practical application gives him a unique insight into the problems lawyers face as they make their way through the maze of ethical rules and regulations.

The seminar concludes with a panel discussion, "How to Keep Your Client Out of the Bar Discipline Office," and an opportunity for questions. Panel members include Professor Bowman; Stephen J. Van Goor and Teresa E. Williams, Discipline Counsel; Kenneth P. Jacobus, chairperson of the Bar's Ethics Committee; and John E. Reese, member of the Third Judicial District Fee Arbitration Committee.

This is a seminar no lawyer can afford to miss! For registration information, call the Bar Office at 272-7469.

Plan Ahead for Valdez

## The defense's unrest

# Beware of playing with constitutional fire in the kitchen

by Philip Weidner

When Harry S. Truman made his now famous statement, "If you can't stand the heat. . . ," it is unlikely he envisioned those so foolish as to burn down the house out of displeasure with the cook. Yet, the past few years, and most assuredly the next few, present the spectre of a "scorched earth" policy with regard to the persecution (no [sic.] intended) of those unfortunates targeted as transgressors against the prevailing order, mores, social customs, or various other sacred cows which the "tyranny of the majority" holds dear.

As a fellow brethren at the Bar (as opposed to member of the Bar—the distinction is one of no minor significance) once observed with regard to this phenomenon, "It goes with the territory." Unfortunately, given the present mindless enthusiasm of the powers that be, the territory may "go" altogether unless we realize that we all share the danger and the exposure that come from removing all restrictions or checks on the "hounds of justice."

It appears that the warders and their masters, frustrated at the perceived failure of the Draconian Presumptive Sentencing laws;—Preventive Detention Statutes; vague and overbroad statutes designed to sweep all they desire into their nets; and general emasculation of the Constitution by the Burger Court to totally eradicate unpopular lifestyles, conduct, and thoughts, have now decided that the best route to such "efficiency" is to silence the voice of the defenders by training their firepower upon the Criminal Defense Bar.

One need not look far to see evidence of the pressures being brought to bear both on a national and local level.

### The attorney subpoena

Increasingly, prosecutors have seized on the ploy of subpoenaing lawyers to testify before grand juries and in court, in order to drive a wedge between them and their clients, maintaining that their purpose is to inquire as to the source of fees and the existence of physical evidence in purported "conspiracies to obstruct justice." Needless to say, it is no great feat for a lifetime prosecutor, never having sullied his hands with private money as opposed to the pure manna from the great mother government, and never having compromised his principles by listening to a private citizen-accused's problems, to find a conspiracy to obstruct justice wherever more than one defendant stands before his sights. Locally, court records, both state and federal, already contain instances of prosecutors attempting to maintain that the defense attorney's obligation extends to seeking out and locating physical evidence to incriminate their clients.

For approximately two years, it has been the position of the local District Attorney's Office to file a standard pre-trial motion reading in part:

MOTION AND ORDER FOR DISCOVERY

> The State of Alaska, by the District Attorney, moves this honorable court *to order defense counsel to disclose the following:*
>
> . . .(4) *To disclose and deliver to the prosecutor any and all physical evidence which incriminates or tends to incriminate the accused*. . .(State's Standard Motion and Order for Discovery, Emphasis Added)

When the inherent ludicrousness of this position is brought to the court's attention at arraignments, i.e., that a strict reading requires the Defense attorney to seek out and deliver such evidence, the standard position of the court is a remarkable disinterest or "yawn."

Apparently, the premise on which this distorted view of the defense function is founded is the Alaska Supreme Court decision in *Morrell v. State*, 575 P.2d 1200 (Alaska 1978), itself a low point in the court's sensitivity to the sacredness of the defense attorney's duties to the accused.

### Questionable fact-finding tactics

Equally frightening is the practice of sending "informants," wired with transmitters and recorders, into attorney's offices in an alleged search for criminal activity.

Within the past two years, there have been instances of such activity directed at members of the defense bar renowned for their ethics, their demonstrated expertise before the Alaska and Federal courts, and their unfailing zeal in upholding the Constitution. This includes instances of informants sitting in on conversations that any dispassionate observer or court would recognize as privileged.

Significantly, the fruits of said activity, as might be predicted, came to naught since the criminal defense attorneys targeted conducted themselves in a manner consistent with their past behavior; namely of the highest ethical and moral caliber. However, when the fact of the invasion of the sanctity of the offices and other privileges was discussed with members of the prosecution and the court, again the "yawn" and disinterest.

Of course one might say that the protection against these transgressions is that of the proverbial "neutral and detached" magistrate. Sadly enough, the "neutral and detached" magistrate is more largely one of fiction than of reality. Detached perhaps, but not neutral. While they do exist and have actually been encountered in practice, one is reticent to afford them the recognition and acclaim they deserve out of fear that they will likewise become targets of the prosecution and press and will thus retreat into shells and self-serving acts like many of their brethren.

### Influence of the press

Which of course brings us to the remarkable tendency of judges to concern themselves about thee press and its perceived power to influence the retention elections. Presumably, having attained their public role, they would have realized the necessity for discharging their duties free of concern for press reviews and the often misguided public perception of the exercise of their obligations. Tragically, the reverse is more often apparent; one can discern a ready willingness on the part of many members of the judiciary to couch remarks for the reporter behind the bar as opposed to the defendant in front of it, and to make decisions with an eye on an upcoming retention election as opposed to a just or proper result.

Perhaps with the recent targeting of the men in black in Chicago in the Greylord investigation, and the FBI's run at Federal Judge Hastings in Atlanta, the judiciary may rouse momentarily from its slumber and realize that "it can happen here."

### Organized crime defendants

Other evidence of the decision to still the defense bar lies with the recent President's Commission on Organized Crime Report which contains pointed messages regarding the purported "questionable ethics" of attorneys representing organized crime defendants.

Given the all-encompassing nature of the RICO Act and the court's apparent willingness to allow prosecutors to apply it to any activity involving two phone calls, and the prosecutor's perception of crime, it is interesting to ask whether the right to counsel applies solely to those persons not merely presumed innocent, but perceived innocent, by the very prosecutors who bring the charges. That is, not only is conspiracy often in the eye or mind of the beholder, but likewise, "organized crime" is often in that eye or mind. Under most definitions of "organized crime," the aforementioned Greylord activity (which was a RICO indictment), the threatened North Slope indictments (which most assuredly would be brought under a RICO indictment, as the civil counterpart suit has been brought), would fall under the meaning of "organized crime."

Does the President's Commission mean that it was unethical to defend judges charged in the Greylord investigation (some of whom were acquitted) or to defend local businessmen involved in a quasi-political dispute such as the North Slope investigation?

### Reporting requirement threat

Equally ominous is the new Cash Transactions Reporting Act (Section 60501 of the Federal Statutes) and its implication for the attorney/client privilege coupled with the new comprehensive Crime Control Act forfeiture provisions and the announced and demonstrated intention of prosecutors to use them to target attorney's fees. Such prosecutors, secure in the certainty that their monthly cardboard checks will arrive untouched by other than computer processing, chortle at the prospects of waging financial war on defense attorneys.

The reporting requirements represent a clear threat to the sanctity of defendant/client privilege, and further, an inherent conflict of interest since a reporting attorney can most likely become the target of a government subpoena and be called to testify against his client. Further, the forfeiture provisions appear calculated to deter an attorney from undertaking representation in a criminal case in the first instance. The Criminal Justice Committee of the American Bar Association has strongly urged the ABA to disapprove the forfeiture provisions, stating that this practice "will erode the elements that assure fundamental fairness and balance in our criminal justice system."

### Questionable searches

Equally as frightening as the apparent willingness of the courts to authorize electronic "eavesdropping" in the attorneys' offices is the courts' willingness to authorize broad ranging physical searches of attorneys' files.

Recent cases in California have seen search warrants issued for attorney's offices on such a broad scale that officers and prosecutors are quite literally empowered to seize files, haul in a photocopying machine, and fulfill their wildest fantasies. Irrespective of the personal anguish and emotional destruction for the targeted attorney, the threat to the attorney/client privilege with regard to the numerous clients who are not the focus of the primary investigation is obvious. Moreover, the temptation to actually use the evidence gained in such a foray into a defense attorney's office is impossible to monitor, particularly given the insensitive nature of the courts to applications for relief in that area.

### Legislative actions

Prosecutors, in their efforts to tip the balance of power, have found willing allies in the legislature.

The recent Draconian Presumptive Sentencing Laws and restrictive rights to bail on appeal for Class A felonies in the state courts, and other felonies in the federal courts, present a picture of an ever-burgeoning jail system filled with persons for whose incarceration there is no rhyme or reason. That is, the traditional mercy and discretion afforded a judiciary has been eroded, and in many instances destroyed, and we are only now starting to see the groundswell of suffering represented by these laws.

And even in those instances in which the judicial authority to set bail exists, and where the Constitutional provisions of the Bill of Rights as to bail would seem to require a reasonable bail, judges often do not do so. Despite the statutory presumption for release on one's own recognizance, and the Constitutional prohibition against excessive bail, the courts now routinely set "cash only" bonds of hundreds or thousands of dollars with the obvious purpose of making pre-trial release unobtainable, since corporate bonds are equally effective or more effective in insuring appearances.

Continued on next page

# Beware of playing with constitutional fire in the kitchen

**Double-standard conduct**

Another arrow in the well-stocked prosecutorial quiver is the ability to seek sanctions and/or indictment of defense attorneys for conduct that is readily acceptable for members of the prosecution camp. Since most members of the bench found their way to their exalted positions via a carefully constructed prosecutorial career and/or other "state service," most are decidedly out of touch with the realities of private practice in general, and criminal defense practice in particular.

Thus the conduct of defense attorneys, and their efforts to represent their clients and simultaneously deal with the myriad of demands on their time and energy in attempts to sustain a private practice unaided by the "givens" of treasury warrants, state equipment procurements, and "supplemental appropriations," while investigating and preparing a defense in two months as to charges for which the state has often spent a year or more (and literally hundreds of thousands of dollars) is viewed by the bench with the proverbial "double standard."

It may appear humorous to observers not directly affected that there is such a willingness on the part of judges to forgive prosecutors' late filings, absence of filings, and other commonplace bending or ignoring of court rules. Prosecutors are routinely given leave to enter oral oppositions to motions, call witnesses with no requirement of affidavits or offers of proof, make extended arguments with no time restrictions, and otherwise conduct themselves precisely as they desire and see fit.

What judge has ever faced even the threat, let alone the reality, of sanctions for late appearances, overdue opinions, clearly biased or inappropriate comments or rulings, or other actions that are regrettable but to be expected when one deals with humans and the pressures inherent for all participants in the justice system?

**Judicial comments**

Even more insidiously, in many trials and hearings, judges, unable to restrain their old prosecutorial instincts, find it necessary to "fill gaps," to *sua sponte* make and sustain objections to questions, telegraph messages to the jury, and otherwise attempt to aid the prosecution in what they misguidedly see as their function; namely to seek a conviction as opposed to seeking a fair trial.

One visible ediface of this swing in the pendulum of the courts' function from neutral arbitrator to ally of the prosecution may be the "bunker phenomenon" now embracing 303 K Street. It is indeed interesting to ponder the forces and fears that led to the recent locked doors, intercoms, bullet proof glass, and other "security" measures at the entrance to the judges' chambers. Are the dangers perceived as reactions to truly fair and even-handed justice, or perhaps a recognition of the predictable response of a population that may see the courts moving towards a role of fostering and aiding repression versus their traditional function of preventing same?

**Handling witnesses**

One of the most egregious areas of the disparity of treatment between defense attorneys and prosecutors is that of investigation and interviewing witnesses. Any effective attempt at investigation or interviewing witnesses by the defense counsel is often met with cries of "witness tampering," "intimidation of witnesses," "suborning perjury," and other threats of sanctions or prosecution. Our own local history carries instances of a noted criminal defense attorney being investigated by a grand jury for preparing a case, and there are repeated cries by prosecutors for court sanctions in this area.

Yet when witnesses in a major murder case recently sought their own counsel and attempted to recant their testimony due to what they maintain was untrue testimony under oath at a grand jury and which had been induced by prosecutorial misconduct, the prosecutor's smug response was that the prosecution was simply discharging its "ethical" obligation to debrief witnesses. Clearly, when the power to charge and indict lies with one adversary, and when the power is used against the other adversary as to legitimate attempts to prepare its case, there is little semblance of checks or balances and a fair system.

Continued on page 18

# *Pleadings ain't what they used to be*

by Wendell P. Kay

Back in the olden days, the emphasis in the earlier stages of litigation was on the pleadings. You picked a legal cause of action, such as "assumpsit" or "trespass de bonis asportatum," and then you pled a lot of facts and fictions. This was intricate and burdensome and time-consuming. So in 1938, the federal courts dropped common-law pleading and adopted notice pleading, accompanied by greatly liberalized discovery.

Of course, these new rules didn't catch on with everybody right away. As late as 1950, Commissioner Rose Walsh, bless her soul, dismissed a perfectly proper complaint filed by Roger Cremo on the ground that it was "too short." And in 1951, John Manders filed a demurrer (abolished in 1938) to a complaint I had filed over stealing an airplane on the basis that I had not properly pled a case in trover. The Ninth Circuit Court of Appeals finally had to get John up to date.

Now that we have simplified pleading, however, we have mounting problems over abuses of the discovery process. In 1947, the Supreme Court declared, "Full mutual knowledge of the facts is essential to proper preparation." There are those, however, who insist that "more" isn't really "better." The scope of discovery is about as broad as it can get: "Anything which is relevant to the subject matter involved." Define "subject matter" broadly, and in comes the kitchen sink and the rest of the plumbing.

The discovery tools are depositions (Rule 26), interrogatories (Rule 33), and demands for production of documents (Rule 34). A generous portion of the bar has discovered that there is money to be made in discovery—grind out the paperwork and ship out the bills. One federal judge refers to discovery use and abuse as "milking time."

Although interrogatories have often been criticized as ineffective and useless (as they are), for a time they were a great source of revenue. In one case, 10,000 interrogatories were filed; in another, one interrogatory contained 2,270 parts. Motions multiplied exponentially. Valuable court time was blotted up, and clients grew old and poor. Now, finally, the courts have grown tired, and placed severe limitations (20-30 in many jurisdictions) on the number of interrogatories which can be filed unless special leave is granted.

There was a time when depositions were sparingly used, largely to question the parties, and folks who might die or leave the jurisdiction. Now, even the most remote and insignificant potential witness must be deposed, as time passes and expense mounts. This is called the "leave no moist rock unturned" theory. Nonetheless, the proper deposition is the real tool of discovery and is of great value, often justifying the increasing costs.

The pursuit of documents in the "possession, custody or control" of your opponent under Rule 34 is another area of horrendous abuse. In one case, the bulk was so great that the court ordered the defendant to create a computer data bank to analyze the documents; a party in another case produced 50,000 requested documents—all in Japanese.

Abuse of discovery has become a very great problem. From 10 to 25% of the court time of many judges is occupied with discovery problems and matters. Weyman Lundquist, once chair of the ABA Section on Litigation (and once an Assistant U.S. Attorney in Anchorage) claims "trial lawyers" are being replaced by "litigators." The former push to get cases tried in court; litigators "discover" interminably in an effort to grind the opponent down and force settlement.

The litigators claim they are only being "thorough"; or that they fear malpractice claims if any stone is left unturned. Have a hearty laugh.

The real answer is good old greed—discovery, properly abused, is a real money maker.

Some potential cures have been suggested and debated. First, let us change the scope of discovery from the breadth of the "subject matter" to the actual relevant "issues" involved. Establish what those issues are in a pre-discovery conference early on: then hold firm on the limits. Second, either limit discoverable documents to those admissible at trial, or impose sanctions on frivolous and unreasonable requests (or unreasonable refusal to produce). Require every attorney to certify that each discovery effort is lawful, proper and aimed at a specific discovery need. Encourage the courts to employ sanctions to curb discovery abuse and cut down the waste of time.

"Automatic" discovery might require the delivery by each party to the other of all pertinent documents and information (such as contracts, correspondence, photographs, diagrams, statements, reports, etc.) by 10 days prior to a pre-discovery conference. Professor Maurice Rosenberg, a Special Assistant to the Attorney General, suggests a "contingent fee system for defendant's counsel," perhaps based on a percentage of what you save in knocking off the abuse of discovery.

Or, we could all go back to the days of trover and trespass quare clausem fregit.

# Interior courts befuddle 'novices'

by Niesje J. Steinkruger

Fourth Judicial District Local Rules are an entity unto themselves. They are seldom written but "common practice" and "well known" by those who assert they govern a controversy. They are always based upon the need for cost-saving efficiency, fairness to home town and out of town litigants alike, adequate notice and common sense. As part of a continuing effort to upgrade attorney practice, some members of the Tanana Valley Bar Association offer the following Continuing Legal Education to members of the Alaska Bar Association:

1. Attorneys and clients must be present for calendar call at 8:15 a.m. the working day prior to your scheduled trial date for all civil and criminal District Court cases. Failure to attend may result in a fine or demerits for the attorney and a bench warrant for the defendant or costs for the civil litigant. Defendants must be prepared to go to trial or plead. A prosecutor need only be present. No satisfactory explanation to the paying client for this or subsequent billable hours at calendar call has been developed. (Fairbanks Order No. 83-2)

2. Fairbanks law clerks, who may not have taken the Bar Exam or practiced, are Judges for the purposes of deciding the issues of voluntariness, fairness, adequate disclosure, and children's best interest in dissolutions of marriage.

3. In civil cases, 60 days after the Answer is filed, the Judge is required to set the case for a trial, setting a conference within 10 days. Counsel must be present and know something about the case. The Judge sets the case for trial and issues a Pretrial Order. If the Judge thinks the case is simple they can skip the conference and just set your case for trial. However, if you disagree you must file a Motion to Vacate the Order, with a showing of good cause, to get an Order for a Trial Date Setting Conference. Huh? (Fairbanks Order No. 84-2)

4. In Juvenile cases denials (not guilty pleas) are frowned upon by some Fairbanks judges at the first hearing even if you haven't met your client or seen the police report. Juveniles are guilty until proven innocent and it is important to deal with their cases promptly in their own best interest.

5. Evidentiary motions are frowned upon. Testimony is not generally permitted at 8:30 and 1:30 when motions are heard. Testimony is also not permitted at Motion Calendar. Calendaring does not like to set motions at other than 8:30 and 1:30 and Motion Calendar as all other times are reserved for trials. Good luck.

6. If you bump Judge Cooke in Bethel you get Judge Blair.

7. Calendaring may assign and reassign cases to accommodate the "demands of the calendar." (Fairbanks Order No. 84-3) Judges and court personnel are not responsible for any resulting costs to clients, inconvenience, uncertainty, or anxiety. Calendaring is not required to notify litigants in writing prior to any scheduling changes. A phone message left at your office late the afternoon before is more than adequate notice. However, in the interest of efficiency and fair play, any change in calendaring time by litigants requires a written stipulation of all parties and a court order if the matter was set on previously in open court (thereby making it a "court order" in calendaring lingo) or a written "Notice of Cancellation" if the matter was set on by written attorney request. For you slow starters, the lesson here is not to agree to hearing dates in open court or they then become "court orders" to calendaring, requiring at least one billable hour to set off. It is far more prudent to leave the courtroom, go to calendaring and set the hearing within "Attorney's Request" Form, thereby only requiring a "Cancellation" Form to set the hearing off. Get it?

8. Part of Criminal Rules 5, 10, 11 and District Court Criminal Rule 1 have been suspended in the Fourth Judicial District for one year to provide for *Television Court*. Arraignments, pleas, sentencing, and bail hearings in Misdemeanor Cases and not guilty pleas arraignments, bail hearings and omnibus hearings in felony cases may be done in the comfort of the Fairbanks jail. The defendant is at jail and the Judge is at the courthouse. It is hoped that declining oil revenues won't result in depriving the other judicial districts of this technological wonder. (Supreme Court Order No. 606)

9. Superior Court trials are not permitted in Fort Yukon anymore. The facilities are inadequate to house Superior Court personnel and the jury. (Fairbanks Order No. 84-9)

10. Dismissal of your case for lack of prosecution can really sneak up on you in Fairbanks. A Notice and Order of Dismissal will appear in your mail from the court if there is no action in the file for three months. Coincidentally, rules and practice have changed so you no longer clutter the court file during discovery. The prudent practitioner might attach all interrogatory answers and questions, subpoenas, returns of service, and depositions to the Opposition to Dismissal, thereby putting evidence of activity in the file!

11. Exhibit filing and disposal is a source of constant judicial ordering in Fairbanks. The Pretrial Conference is where you may be first asked to begin stipulating regarding documents. The Pretrial Order may give you deadlines for exchange of documents and meetings with the clerk for pretrial markings. Fairbanks Order No. 85-5 specifies how to mark exhibits. Supreme Court Orders 598 and 599 further set forth color, coding and alphabetizing procedures. Finally, Snowden's 15-page Administrative Bulletin 84-1 (Amended) specifies what can happen to a poor, tired exhibit after trial.

12. Always remember and never forget, Fairbanks rules are subject to change. Close consultation with Fairbanks lawyers may or may not be helpful in identifying and following these and other Jewels and Rules. Good luck.

## Foundation starts research hotline

The Alaska Bar Foundation is pleased to announce the initiation of the first phase of Alaska Legal Network. The Trustees of the Foundation adopted "Alaska Legal Net" as the Foundation's long-range service project at their March meeting. Through Alaska Legal Net, the Foundation hopes to develop better communications among the bar association, the bar foundation, members of the bar, and the public.

Beginning September 1, the Alaska Bar Foundation will provide toll free access to Alaska Legal Net for members of the Alaska Bar. Alaska Legal Net has employed Leslye Sullivan, a legal assistant, who will respond to lawyers' requests for copies of cases, treatises, law review articles, briefs, periodicals and any other information which lawyers are unable to obtain in the locale in which they practice. The phone call is free and the service is free. The telephone number is 800-478-7878.

The Foundation hopes to be able to continue this service indefinitely. Of course, funding for such special projects comes from members of the bar and local bar organizations. Any donations may be sent to the Alaska Bar Foundation, Post Office, Box 100279, Anchorage, AK 99510.

Support of Alaska Legal Net yields better informed lawyers and therefore a better represented public.

800-478-7878

*The good old days*

# Maverick U.S. Attorney captures Nome

by Russ Arnett

During the first two-thirds of this century lawyers in Alaska did not consciously practice stress management. Instead they would relax by swapping humorous stories about Alaska lawyers and other characters. The best stories were either told by George Grigsby or about him; a few memorable ones are offered here.

George Grigsby was born December 2, 1874. At his birthday parties, which were celebrated by the Anchorage Bar, he would mention that he, Roosevelt and Churchill were born the same day. Of the three, he added, he was the only one who knew of the remarkable coincidence.

It all began back in North Dakota where George grew up. He told us of a poker game in the middle of the winter in which he lost heavily. He agreed to pay up the next day but did not have the money. He was saved, at least temporarily, by a three day blizzard.

George's father had been a colonel in Teddy Roosevelt's Rough Riders. When President McKinley was assassinated and Roosevelt became President, he appointed Colonel Grigsby U.S. Attorney in Nome. George accompanied his father and was appointed by him Assistant U.S. Attorney. Nome was then in the turbulence of the Gold Rush.

Colonel Grigsby would take the last ship out of Nome in the fall and appoint George as U.S. Attorney in his absence. The District Judge did not like George and had other ideas; he appointed his own man to the spot, instead, thus creating prosecutional redundancy and improvisation in Nome. The Judge's man secured possession of the U.S. Attorney's office; George set up his office in a back room of one of the bars. When a Judge asked the U.S. Attorney to "come foward" they both got up and approached the bench.

George also liked to tell stories about Gus Bolts who was a gold miner in Nome. Among other peculiarities, he named his sled dogs after local public officials and regularly swore at them by name on Front Street.

Whenever a new lawyer arrived in town, Gus would bring his cases to him. Eventually, the lawyers would throw up their hands and say "Gus, you're nuts." Gus always replied, "No, you're nuts, I'm Bolts."

Once, when no new lawyer had arrived for some time, Gus became impatient and had one of his cases set for trial. Having watched all the Nome trials, he was convinced he knew as much about trying cases as the lawyers. The District Judge told him to proceed and Gus announced, "Call Gus Bolts." He went forward. Gus continued with, "Swear the witness," which was done. He asked himself his name and answered "Gus Bolts." Next, he asked himself where he lived. Gus proceeded to answer himself, "Oh, about three miles out there on the road to. . ." whereupon he reversed his roles and snapped, "Never mind 'about'. Answer the question."

*George Grigsby*

A Nome winter is a long winter. Testimony in a sex case before the grand jury one of those early winters was particularly lurid. The grand jury decided to return and hear the testimony again. . . repeatedly.

Two miners passed a sporting woman on Front Street. One tipped his hat. After she had passed the other said, "Why did you do that. Don't you know she works on the line?" The miner answered, "Well, she's a lady, isn't she?"

George was examining a juror on voir dire and asked him his attitude toward his client. "I don't have a thing against the son-of-a-bitch," he answered.

Placer gold mining, as distinguished from hard-rock, involves the use of large quantities of water to wash gold-bearing gravels. Consequently, when a miner is deprived of adequate water, it works a great hardship on him. It was even a criminal offense to steal another miner's water, and such a charge came up regularly for trial in the District Court. Grigsby witnessed one such trial. The courtroom was packed with miners and it was a good day for the U.S. Attorney. A man who would steal another man's water, he argued, was capable of a wide variety of evil acts which he proceeded to recite. Even the accused was moved. He finally rose and said, "All right, I stole his water. Send me to prison." The jury retired, returned, and announced a not guilty verdict.

Amazed, the accused again rose and said, "Here I confessed and told you I stole his water and you found me not guilty. You have given me a license. I am going to continue stealing his water."

The jury foreman, also a miner, stood up and said, "Joe, it's true we found you not guilty of stealing his water, but (pause) if you steal his water once more, we'll sure as hell convict you then."

# Freshman learns basics in Juneau

by Max Gruenberg

Have you recently been tormented by questions such as—"What *really* goes on in Juneau? Where is the legislative lounge, and what do they really eat?" If so, you have come to the right place. Read on; you'll learn why the motto of this column is, "Knows all, tells all."

### Majority Coalition Organization

Shortly after the election, the Democratic majority met and organized. I found myself on three committees—co-chairman of the Health, Education, and Social Services (HESS) Committee, the Judiciary Committee, and the Community and Regional Affairs Committee. The secrets of those organizing meetings must, however, remain untold. We are sworn to secrecy under blood oath not to reveal what went on until 99 years after our deaths. If any of you are still around then, contact my executor.

Suffice it to say that, as in the national ticket, a leadership organization must be balanced—geographically, seniority versus freshman, political ideology, by sex, bush versus urban (i.e., Anchorage versus the rest of the state). Like most good negotiated settlements, a good leadership structure satisfies no one completely and everyone more than a little. I was personally satisfied with my own assignments.

As we met for the first time in Juneau the weekend of December 9 to finalize organization, I was impressed with the other 27 members of the majority. There are 21 Democrats and seven Republicans in the majority coalition. Six are from Anchorage (all Democrats) and all other areas of the state are represented.

The members of the majority coalition are: Albert Adams (D-Kotzebue), Johne Binkley (R-Bethel), Red Boucher (D-Anchorage), Rep. Bette Cato (D-Valdez), Rep. Don Clocksin (D-Anchorage), Rep. Sam Cotten (D-Eagle River), Rep. Mike Davis (D-Fairbanks), Rep. Jim Duncan (D-Juneau), Rep. Steve Frank (R-Fairbanks), Rep. Jack Fuller (D-Nome), Rep. Peter Goll (D-Haines), Rep. Ben Grussendorf (D-Sitka and Speaker of the House), Rep. Adelheid Hermann (D-Naknek), Rep. Katie Hurley (D-Wasilla), Rep. Niilo Koponen (D-Fairbanks), Rep. Ron Larson (D-Palmer), Rep. M. Mike Miller (D-Juneau), Rep. Mike W. Miller (R-North Pole), Rep. Mike Navarre (D-Kenai), Rep. Pat Pourchot (D-Anchorage), Rep. John Ringstad (R-Fairbanks), Rep. Dick Shultz (R-Tok), Rep. John Sund (D-Ketchikan), Rep. Mike Szymanski (D-Anchorage), Rep. Robin Taylor (R-Wrangell), Rep. Dave Thompson (R-Kodiak), Rep. Kay Wallis (D-Fort Yukon), and myself.

The legislature convened January 14, 1985. For the first time, we got to know the members of the minority. Most of them, being from Anchorage, were already known to the Anchorage Democrats. Again, I was impressed with the high quality of representatives from all parts of the state and from both parties. This year it has been a real pleasure to work with the other representatives.

### Representing Spenard

Of course, there are sectional differences. Representing *Spenard* was interesting from the beginning. People would say things like, "Is Spenard part of Alaska?" and other similarly complimentary remarks. I decided to set the matter to rest once and for all and, about a week after the session began, deposited on each member's desk a T-shirt with "Spenard In Motion" across the front. The plan sort of backfired because the T-shirts gave rise to a series of floor speeches that day on Spenard—but all was in fun and the resolution to expel Spenard from Alaska failed to receive the necessary two thirds (2/3) majority. As Rodney Dangerfield would say, "no respect."

The T-shirts surfaced yet again when, later in the session, the House basketball team entered the Capitol Hill Basketball Tournament. Mainly due to the presence of Steve Frank, a Republican representative from Fairbanks, who possesses near-professional basketball skills, the House team won handily and wore their "Spenard In Motion" T-shirts throughout the tournament. My attempt to change the name of the team from the House of Representatives Basketball Team to the Spenard All Stars received no support.

Rep. Robin Taylor of Wrangell introduced a number of bills to benefit Hyder, Alaska. Several provided ferry service to Hyder. Robin was so persuasive that he even got me to co-sponsor one of his bills. Most of the bills passed, and Hyder can now be seen by those of you who travel south on the ferry system. From what I understand, this may be about the *only* way you'll see Hyder. Seriously though, Hyder is apparently a most interesting town and is also the northern terminus of a brand-new road through Canada. Because of that, Robin introduced another bill to designate Hyder as "Mile 0" on the Alaska Highway.

Not content to let Hyder steal the spotlight from Spenard, I prepared an amendment, striking "HYDER" wherever it appeared in the bill, and substituting "SPENARD." The Hyder bill was due to come up on the floor one Saturday morning. I secured the co-sponsorship of Spenard's other representative, Roger Jenkins, and told Robin about my amendment. Actually, we thought it would help enliven an otherwise dull Saturday morning session. The plan was that I would say, "I understand that this 'small technical amendment' is agreeable with Representative Taylor, the bill's sponsors." Robin would then stand up and object and I would withdraw the amendment.

Unfortunately, the House staff did not pass out my amendment to the members before the bill came up for floor debate. House Speaker Ben Grussendorf, as is the custom, asked the House Clerk, Irene Cashen, whether there were any amendments. Irene said there was one. Ben then asked her to read it. she then started to read the amendment to strike "Hyder" from the bill from wherever it appeared and substitute "Spenard." This continued for a few minutes until people started to get copies of the amendment. One by one, as they received the amendment, they started to laugh. Irene could barely keep her face straight. Finally, the Speaker received his copy of the amendment and, reading it over quickly, interrupted Irene, saying, "I think we get the idea about *this* amendment."

Sheepishly, I stood up and withdrew it.

### Falling in Love in a Rain Forest

In the past it has been difficult, if not nearly impossible, to obtain good housing in the capital city. Shortly after the voters defeated the capital move, people started to build in Juneau and now there are many houses available. I found a unique apartment in Douglas Island overlooking the Gastineau Channel. The House is the home of a noted Juneau artist, R.T. "Skip" Wallen. Skip's sister, Katy Wallen, lives upstairs and there is an apartment next to hers, which, though small, has a great view of the channel. I was also impressed by Katy and, therefore, took the apartment.

My staff assistant informed me that every legislator for whom she had worked (the most recent being Sen. Joe Josephson), had wound up getting married in Juneau. Since I was a bachelor, she said she would have to be sure that I was no exception.

Anyway, shortly after I moved in, I started taking Katy out. The result is that we are getting married.

### House Judiciary Committee

There are five lawyers in the State House this year. They are: Reps. Don Clocksin, Fritz Pettyjohn, John Sund, Robin Taylor, and myself. The Judiciary Committee is chaired by Rep. M. Mike Miller (D-Juneau). All five lawyers are on the committee, as is Randy Phillips (R-Eagle River). Because all the lawyers are on it, the Judiciary Committee achieved a certain notoriety, which surfaced during the staff legislative skit in April. Depending upon your point of view, the Judiciary Committee is either "exceptionally well-balanced," or "impossibly nitpicky." We've had a number of interesting debates. At times, the committee has almost a mind of its own. Because of the length and technicality of debate, the Judiciary Committee developed a motto, "No bill shall pass before its time." John Sund has collected noteworthy quotes from committee hearings, such as, "Fifty per cent of the crooks in Alaska live in Anchorage." (a Department of Public Safety representative).

### House HESS Committee

Sometimes being a committee chairman can be interesting. I remember one time when the HESS Committee was considering child abuse legislation. Alaska law presently makes it a crime to illegally touch a child in certain areas of the body (see AS 47.10.290). This statute was amended as part of HB 88, the Governor's child abuse bill. A draft bill was prepared and passed out of the child abuse sub-committee, which I chaired. It next went to the full HESS Committee. As is common in complex legislation, there were a few additional amendments that had to be offered in the full committee, because they were overlooked in the subcommittee. One such amendment was to AS 47.10.290. We wanted to make it a crime to touch the "inner thighs" of a child. Therefore, the amendment that we offered was:

*"between 'groin' and 'breast' insert 'inner thighs'."*

This amendment was one of four or five technical amendments on the bill. They were given to the committee members in a packet. We had a room full of witnesses and spectators as we considered these amendments. It is the custom for the committee chairman to read each amendment aloud and ask if there are any comments, questions, or objections. This amendment was the first. Rep. Robin Taylor, who sits to my right, asked to have the amendments considered en bloc and asked that they not be read. Obviously, he was concerned about decorum if I were to read the "inner thighs" amendment. I did not feel that it was appropriate to gloss over any of the amendments, in case any spectator or any committee member wished to comment, so I told Robin I had to read each amendment. It was really tough to keep a straight face as I read the "inner thighs" amendment to the assembled throng. Fortunately, there was no discussion and the amendment passed the committee unanimously.

*(To be continued next issue.)*

*Max Gruenberg is a freshman Alaska House member.*

# ALS board meets

The Board of Directors of Alaska Legal Services Corporation held its annual meeting in Anchorage on June 15, 1985. New members were seated and officers were elected for 1985-1986. New attorney members and alternates include: Linda Wingenbach from the Second Judicial District, Richard Erlich, alternate; Mary Ann Foley from the third Judicial District, Carolyn Jones, alternate; Geoffrey Wildridge from the Fourth Judicial District; and Lloyd Miller representing the Alaska Bar Association, Lewis Gordon, alternate. Augie Kochuten was seated as the alternate lay member from the Bristol Bay/Kodiak/Aleutian Islands region.

Elected as President was Arthur H. Peterson, an attorney director from Juneau. He has been an Alaska resident since 1966 and currently works in the Attorney General's office. Lloyd B. Miller was elected Vice-President. He is an attorney director from Anchorage associated with the law firm of Sonosky, Chambers and Sachse which specializes in Native American issues. Theodore Panamarioff, a lay representative who works in the fishing and airline industries in the Kodiak area, was elected to the combined office of Secretary-Treasurer.

Alaska Legal Services is a private nonprofit law firm which has been providing civil legal assistance to low-income Alaskans throughout the state since 1966. Originally funded with federal money, the firm has survived severe cutbacks in federal funds by receiving grants from the State of Alaska and many local communities. The Board of Directors will meet again on September 21, 1985 in the Anchorage Law Office.



Down with Termination Dust

## Havelock . . . Continued from page 1

Some of these limits on power are inherent in the offices but they have been reenforced by the increasing professionalization of Alaska's Department of Law since 1959. The professional tone is in contrast, for example, to most elected attorney generals' and district attorney's offices and some U.S. attorney's offices where wholesale resignations and new hirings are expected after each election.

The attorney general can anticipate public inquiry by keeping the governor informed on key developments, but he must be careful to tell the governor only what the public should legitimately expect the governor to know. In response to an inquiry he should be ready to say, "governor, I don't think you really want to know that."

The exact nature of the relationship between the Department of Law and the Governor's office will vary according to the personalities involved and the range of skills of the office holders around the governor. But are we conscious that the wearing of the official hat requires behavior consistent with it.

Compared with the relationship between Gross and Hammond or Gorsuch and Sheffield, my own relationship with Egan was more distant, though underlayed by mutual respect and affection. Av Gross was a fishing buddy to Hammond; Gorsuch had been a political advisor to Sheffield before his appointment. Both surely dealt in political advice to an extent that made no sense for me with Egan who had no peer with political judgment in his administration (excepting only Alex Miller for some purposes). Personal intimacy is not coextensive with influence. I probably had as much or more to do with the development of the programs of the Egan administration as either of my successor attorney generals on their governor's programs. Yet in all cases there is a framework which guides the relations of the incoming chief law officer. Governors, with there broader range of preoccupations have not always been so quick to see or appreciate the structural constants of the relationship and the inherent role frictions.

Governor Egan was frequently frustrated and upset by attorney general's opinions. The attorney general's opinion, as opposed to his advice in controversy, is best analogized to the ruling of an administrative law judge. How the attorney general's opinion system works is a topic for another day. But the scope of Governor Egan's reaction, after one particularly bothersome opinion, is instructive on role relationships. He ordered that requests for opinions would come first to his office. After thinking about it, I could see that he could do that. He was the chief executive and could decide, as the alter ego to the commissioner of any department, that no question be asked, —at his peril. If something went wrong for failure to get a legal answer, the attorney general is going to say, after all, that he was never asked. The governor can sometimes stop but he could not change the answer of the attorney general. Egan's order quietly died off as opinion requests became bogged down in the governor's office.

The State Attorney General, like his federal counterpart, is a direct descendant of attorney general and later chancellor Sir Edward Coke, who drove James the First of England up the wall in the seventeenth century with his firm adherence to the proposition that even a king ruling under divine ordinatio (compare a governor's ruling under the people's mandate) cannot change the law. As a governmental officer, Coke saw his loyalty as running to the Crown, not the person of the king and so it is with Alaska's Attorney General. His first duty is fixed by oath—to support the constitution and laws of the United States and of the State. The governor's writ extends no further than the law allows.

Though the public routinely supports the popular election of judges, attorney generals and DAs, two to one, lawyers in this state oppose election in inverse proportion, I suspect because they can see that the current Alaskan system produces a style of legal services obedient to the law, not to the appointing officer, and not to shifting popular majorities as is more likely the case with these offices elective. Elected and appointed attorney generals both struggle between the duty to the law and accountability to the people and popular opinion. But the accountability of an elected attorney general is more problematic than that of an appointed one.

Because the Attorney General is counsel to the Governor, some persons have said he has no objectivity in making judgment calls that might effect the interest of the incumbent governor. Now certainly a lawyer is always anxious to please his client. A client who choses a lawyer not anxious to please is a fool indeed. But the interest in pleasing lies in showing the way through and around the labyrinth of the law, not in breaking it. Moreover, the attorney general is counsel to the office, not the person. Private sector lawyers are familiar with the distinction between counsel to the corporation and private counsel to members of the board, the chairman or a chief executive officer. If a governor has a personal problem, including the possibility of criminal or civil liability for wrongdoing, he had better get his own lawyer. The attorney general will not advise him. Several (probably all) Alaska governor's have sought their own counsel at one time or another for purposes public and private. Past investigations and indictments and convictions of the state's most powerful political figures and the pending investigation into the governor's office, involving the grand jury grilling of the governor himself, are not indications of weakness in the system but how well it works. If an elected attorney general was making this kind of investigation much of the public would write it off as partisan politics.

The Office of the Governor of Alaska is unique among the states in that it is vested with all executive power of the state. In most states, the office and other offices of the executive branch are confined by constitutional provisions describing the form and dividing executive power and elaborating statutes describing the duties of office.

We can not at all be sure what that means in detail as it applies to subordinate sections of the executive branch. Does it mean that the governor can fire a district attorney? Could Nixon have fired Cox himself? Can a governor go out and prosecute a felony in the superior court for the third district? There is a theoretical reach that goes beyond what a governor could do practically without evoking terminal public outrage. The legislature has and can determine how executive power shall be exercised by defining the structure of delegation. I always assumed, when those issues were closer to me, that if the governor wanted to do my job, he could do it. All delegated power can be exercised by the principal. But it would be his signature. He could not sign for me, but he could sign in the name of his own office under the constitutional power. Of course, he would look like a damned fool if he tried.

As a practical matter the governor is stuck with his attorney general. If he does fire him he must explain why he is letting him go and it better be good if there is a difference of opinion. And how can he be sure that the successor will not pop up with the same aggravating obedience to the law?

Since I first started writing this article, another attorney general has hung up his spurs. How well I remember. Every new attorney general has a certain capital that gets used up with each bearing of bad news to the chief executive. It is no accident that only one attorney general has gone full term with his governor, an aspect of the very special person of Jay Hammond and his relationship with Avrum Gross. I am not perturbed by this turnover. The professional staff tradition continues. The relation to the chief executive is renewed but the attorney general remains counsel to the Crown.

*John Havelock served as Alaska Attorney General during Gov. Bill Egan's term.*

# PROFESSIONAL SERVICES DIRECTORY

## Weidner. . . Continued from page 13

### Sanctions against the defense

A particularly insidious prosecutorial tactic appears to be the automatic motion for sanctions and its almost equally automatic granting by judges, where the prosecution or the judge fails to understand defense motions or are otherwise exasperated by them. Such a tactic immediately puts the defense attorney in a conflict of interest with his client, and it forces him to either defend himself at the expense of his client vis a vis directing his attentions, office resources, and energies to doing so, or to reveal confidential attorney/client communications and the results of confidential investigation in his own defense. Hopefully, the courts will realize eventually the danger of this procedure and curb its abuse rather than attempting to cultivate a "gentlemen's club" of defense attorneys committed to pleasing their "masters" as opposed to defending their clients and fulfilling their Constitutional obligations.

### Shifting of the courts

The climate of repression represented by these threatening abuses is enhanced by the apparent willingness of the Appellate Courts to ignore or foster them. As recently as 10 short years ago, the Alaska Supreme Court was recognized as a leader in protecting constitutional rights, including its landmark decisions in *Baker v. City of Fairbanks*, 471 P.2d 386, 402 (Alaska 1970), *Alvarado v. State*, 486 P.2d 891, 897, 906 (Alaska 1971), *Breese v. Smith*, 501 P.2d 159, 167 (Alaska 1972), and *Ravin v. State*, 537 P.2d 494, 504 (Alaska 1975). Unfortunately, due to a multitude of factors, it appears to have moved more and more toward a posture of protectionism and isolation.

We are now faced with a situation illustrated by a matter now pending before the court from Fairbanks, wherein a citizen, aggrieved at the negligent destruction of his pet dog, can take an appeal by right to the Alaska Supreme Court, while a citizen facing life in prison, or a presumptive term guaranteed to destroy his life or family, for an alleged criminal offense, has no such right of direct appeal.

The obvious denial of equal protection from such a "two-tier" system of "second class" litigants appears to be astutely ignored by the legislature and the court out of politically expedient and "practical" reasons.

Thus the Court of Appeals (commonly referred to among members of the Bar as the "Court of Affirmance"—other less kind references are omitted out of a sense of decorum) is interposed as a barrier of discretionary review to criminal defendants, while civil litigants, for no rational reason, are subjected to no such impediment. In both courts, the tendency appears to be one of "result-oriented decisions," with the central question in most cases asked by the court being, "Do we believe the person is guilty?" as opposed to "Was there truly a fair trial?" "Were Constitutional procedures followed?" And, "Were the laws of the land respected?"

Thus the transparent mechanisms of "harmless error," and "waiver" are used to avoid significant Constitutional issues, and to cut off any realistic opportunities for redress of serious Constitutional violations.

The "waiver" doctrine, in its present tortured application, presents an even greater threat to realistic access to the courts than the old "Code Pleading," supposedly put to rest many decades ago. At least under "Code Pleading" one could demonstrate to the court that one in fact fit within the Code required. Under "waiver" and "harmless error," the codes are in the minds and with the pens of the Appellate Courts who constantly shift their standards to suit their own purposes.

An amazing example of this tendency towards such "result-oriented" logic is the recent "good-faith perjury" exception for a police officer that appeared to emerge in a recent Court of Appeals matter, affirming the denial of a suppression motion despite a lower court's finding that an officer had intentionally testified falsely under oath in a pre-trial suppression hearing in a heroin case as to concessions and deals being made with an informant.

### Indigent insensitivities

An obvious example of the insensitivity of the courts to the problems of the Defense Bar lies with their handling of compensation of attorneys for the representation of indigent defendants.

Apparently, under the *Wood* decision (*Wood v. State*, 690 P.2d 1225 (Alaska 1984)), it is now permissible for the majority of the Bar, secure in their carpeted offices, high-rise views, and luxurious furnishings to refuse to represent indigent criminal defendants, while the burden of doing so falls more and more on the few practitioners who are "competent" to assume this responsibility.

Blinking at the clear spectre of "involuntary servitude," the court refuses to recognize that it is a crushing blow to a sole practitioner's practice to assume responsibility of representing a defendant in a major felony case with little or no compensation.

Query as to whether the justices and judges would be willing to work without their own checks or per diem during the periods in which such indigents were tried, or would sell their own "rosewood desks" or furnishings, or would dip into their own ample pensions in order to meet this obligation. The present "solution" of forcing a small segment of the Bar to suffer financially and absorb the cost of representing indigents is actually a result of the refusal of the court system to honestly approach the legislature for funds in its budget to meet these expenses. By foisting the burden on the members of the Criminal Defense Bar, as a means of avoiding the legislature and thus protecting more preferable areas of its budget requests, the Supreme Court is actually engaging in a "taking" of private property and accomplishes a legislative seizure of private assets with no semblance of due process or Constitutional authority to do so.

The reality is that the balance of power has been severely skewed by the economic hardships being imposed upon the criminal defense attorneys, and by the tremendous financial resources available to the State, enabling prosecutors to sustain massive investigations, grand jury proceedings, and attempts to seek a conviction quite literally at any cost, with no right of recoupment for those vindicated by a dismissal or an acquittal.

In many instances, the devastation falls squarely upon the middle class who cannot afford to refute the financial barrage, and thus have no choice but to go quietly to their cells with hardly a whimper or a protest.

### In summation

So where does this lead us?

If we truly lived in a non-integrated society, that is, a collection of parts as opposed to a whole, the powers that be could rest secure in the knowledge that their efforts were becoming more and more successful, and effective defense less so. However, the prosecution's club is a fickle one, and it can often strike in unperceived ways at unexpected targets. Witness a recent State Senator who was tried, convicted, and sentenced under the overbroad and vague provisions of a new Criminal Code which he sponsored and endorsed, after specific testimony was given in committee hearings by defense attorneys as to the precise danger presented by the "Bribery" statute.

The ongoing fiasco in Juneau with regard to Governor Sheffield is an example in point. The same prosecutorial indiscretion and enthusiasm that has destroyed so many private citizen's lives over the past few years has now been brought to bear precisely upon one of those who had an opportunity to halt the danger therefrom. And in the process, the court system, so smug in its decision in *Smith v. State*, 510 P.2d 793, 795 (Alaska 1973), (directly contrary to a recent, more enlightened decision of the Hawaii Supreme Court) that a suspected heroin dealer had no reasonable expectation of privacy to protect against the police rummaging through the intimate indicia of his life by capturing and sifting his garbage, found its own presumably "secret" grand jury notes published in the *Anchorage Daily News* by reporters following the same doctrine to its logical end.

The message is clear.

When the prosecution knocks, (or "no knocks") one can never be sure as to whose door will be the target.

And when the knock comes, the very persons who now gleefully perceive the escalated persecution of the Defense Bar as a righteous and well deserved endeavor will be the first to beat the proverbial path to the criminal defense attorney's door.

The question is, will the door still be open, will the office still be open, will the house still be standing, or will the flames have consumed one of the last bastions of freedom?

## Chief Justice Continued from page 3

MEMORANDUM TO:
Justices of the Supreme Court
Judges of the Court of Appeals
Superior Court Judges
District Court Judges
Magistrates
Clerks of Court
Area Court Administrators

FROM:
Chief Justice Jay A. Rabinowitz

SUBJECT:
Status Report Regarding Appointments

For your information, I enclose a listing of the appointments which have been made since I assumed the office of Chief Justice. Also included is a listing of the various committees which have been newly constituted.

### I.

1. **Chief Judge of the Court of Appeals.**
Alexander O. Bryner, appointed Chief Judge of the Court of Appeals.

2. **Presiding Judges.**
Thomas E. Schulz, appointed Presiding Judge for the First Judicial District.
Charles R. Tunley, appointed Presiding Judge for the Second Judicial District.
Douglas J. Serdahely, appointed Presiding Judge for the Third Judicial District.
Jay Hodges, appointed Presiding Judge for the Fourth Judicial District.

3. **Three Judge Sentencing Panel.**
Judge Brian Shortell, appointed administrative head of the panel.
Judge Rene J. Gonzalez, appointed to panel.
Judge Mary E. Greene, appointed to panel.
Judge Jay Hodges, appointed first alternate.
Judge Peter A. Michalski, appointed second alternate.

4. **Magistrate Training Judges.**
Judge Duane Craske, appointed training judge for the First Judicial District.
Magistrate Linda Hartshorn, appointed deputy training judge for the First Judicial District.
Judge Paul B. Jones, appointed training judge for the Second Judicial District.
Judges John A. Bosshard, III and Glen Anderson, appointed training judges for the Third Judicial District.
Judge Gerald Van Hoomissen appointed training judge for the Fourth Judicial District.
Magistrate Skip Slater, appointed deputy training judge for the Fourth Judicial District.

### II.

1. **Advisory Committee on Rules of Criminal Procedure.**
Jeffrey Feldman, Esq., Chairperson.
William P. Bryson, Esq.; Judge William Fuld, Judge Mary Greene; David Mannheimer, Assistant District Attorney, Susan Orlansky; Assistant Public Defender, Judge James K. Singleton.
Don Bauermeister, Reporter.

2. **Advisory Committee on Criminal Pattern Jury Instructions.**
Dana Fabe, Public Defender, Chairperson.
Leonard M. Linton, Jr., Assistant District Attorney, Judge Peter A. Michalski; John M. Murtagh, Esq.; Judge Michael N. White.
Don Bauermeister, Reporter.

3. **Advisory Committee on Rules of Civil Procedure.**
Justice Daniel A. Moore, Chairperson.
Judge Elaine Andrews; Bruce Gagnon, Esq.; Julie Garfield, Esq.; Judge Joan M. Katz; Jerry Kurtz, Jr., Esq.; John Reese, Esq.; Robert L. Richmond, Esq.; Eric Sanders, Esq.; David Thorsness, Esq.
Don Bauermeister, Reporter.

4. **Advisory Committee on Pattern Civil Jury Instructions.**
Judge Karen L. Hunt, Chairperson.
Judge Martha Beckwith; Russellyn Carruth, Esq.; James Crane, Esq.; Theodore Fleischer, Esq.; William McNall, Esq.; Judge Rodger Pegues; Jan Strandberg, Assistant Attorney General.
Don Bauermeister, Reporter.

Continued on next page

# In the Mail . . .

## Appointments

Continued from page 18

5. **Advisory Committee on Appellate Rules.**
David A. Lampen, Clerk of Appellate Courts, Chairperson.
Robert Bacon, Assistant District Attorney; Robert Eastaugh, Esq.; Susan Orlansky, Assistant Public Defender; Sandra Saville, Esq.
Don Bauermeister, Reporter.

6. **Special Advisory Committee on Civil Rule 53 and the Use of Masters.**
Justice Allen T. Compton, Chairperson.
Judge James Blair; Harry Branson, President of ABA; Judge Victor D. Carlson; Judge Walter Carpeneti; Stephanie Cole, Deputy Administrative Director; William D. Hitchcock, Standing Master; Judge Paul B. Jones.
Don Bauermeister, Reporter.

7. **Magistrate Advisory Committee.**
Judge Gerald Van Hoomissen, Chairperson.
Magistrate Lowell V. Anagick, Sr.; Carole Baekey, Judicial Education Coordinator; Magistrate Geoffrey Comfort; Magistrate George Rukovishnikoff, Jr.; Magistrate Maxine L. Savland; Magistrate Skip Slater.

8. **Sentencing Guidelines Committee.**
Judge Walter L. Carpeneti, Chairperson.
Judge Glen Anderson; Judge James Blair; Chief Judge Alexander Bryner, Judge Seaborn Buckalew; Judge Brian Shortell.
Fran Bremson, Executive Director, Alaska Judicial Council, Reporter.

9. **Rules Publishing Format Committee.**
Don Bauermeister, Chairperson.
Lynn Allingham, Esq.; Mark Asburn, Esq.; Jeffrey Feldman, Esq.; Thomas Klinkner, Esq.; John Lohff, Esq.; Aimee Ruzicka, State Law Librarian.

## Doesn't like

Continued from page 2

Judge Occhipinti would have been required to stand for election in the general elections of 1978 and 1984. Judge Lewis would have been required to stand for election in the general elections of 1976 and 1982. Judge Moody would have been required to stand for election in the general election of November, 1984.

Under Article IV, Sections 6 and 7 of the Alaska Constitution, three years after the first appointment, a judge must submit his name to the voters of the State or of his district for approval or rejection. Once approved, a superior court judge must stand for popular approval and go before the voters for reconfirmation every six years. The purpose of these provisions is to make judges responsible to the people without subjecting them to partisan politics or competitive campaigns for election or reelection. In no manner was it intended that a superior court judge, by retiring, could attain for himself a lifetime appointment and circumvention of the Constitutional Requirement for popular reconfirmation by the voters every six years.

As an Alaskan citizen and member of the Alaska Bar, I respectfully request that the Alaska Judicial Council take such actions as are necessary to enforce the cited Constitutional mandate for judicial qualification.

Yours very truly,

DITUS & DITUS R. Stanley Ditus

# Comments asked on fee changes

At its August meeting, the Board of Governors considered changes to the Rules of Fee Dispute Resolution. The "Fee Arb Rules" are Alaska Bar Rules 34-42, which are contained in Volume III of the blue plastic Rules of Court binders.

The current rules were adopted by the Alaska Supreme Court in 1974. Alaska is one of five states which have a mandatory fee arbitration program in which attorneys are required to participate if their clients request arbitration. Alaska is one of 12 jurisdictions which have public member participation in the decision-making process.

The Board meeting took place after the "press deadline," so that the decisions made by the Board cannot be fully reported here. The proposed rule changes were designed to clarify and simplify the system. Additionally, the Board of Governors was called upon to make several significant policy decisions. These topics include:

- a requirement that all fee agreements be in writing;
- a requirement that attorneys provide notice, with the summons in a civil case for the recovery of attorney fees (except for small claims actions), advising of the client's right to seek arbitration of the dispute;
- a provision waiving a client's right to arbitration if (s)he commences or participates past certain deadlines in a related civil action.
- a statute of limiations; and
- a procedure to have disputes of $2,000 or less determined by a single arbitrator, rather than the three-member panel otherwise provided;

Although the Board has already met, any comments about these proposals or the existing fee arbitration procedures are still welcome. The Bar Association currently has a backlog of fee arbitration cases which it is trying to address. The Bar has contracted with the Conflict Resolution Center to provide administrative assistance in processing and schedulilng the cases. However, the current rules are still in effect and the same group of attorneys and lay members are making the decisions. The Bar hopes that the new rules will streamline procedures to cut down on administrative problems.

# ABA Committee chairs chosen

Chairpersons for the Alaska Bar Association Substantive Law Section Executive Committees for 1985-86 are as follows:

Administrative Law—John F. Clough III; Alaska Native Law—Lloyd Benton Miller; Business Law—(open); Criminal Law—James D. Gilmore; Employment Law—Elizabeth I. Johnson; Environmental Law—Kirk Wickersham Jr.; Family Law—Karla F. Huntington and John E. Reese; Natural Resources Law—Joseph J. Perkins Jr.; Probate Law—Richard S. Thwaites Jr.; Real Estate Law—Michael W. Price; Taxation Law—David G. Shaftel; Torts Law—(open).

Chairpersons for the Alaska Bar Association Committees for 1985-86 are as follows:

Standing Committees: Bar Polls and Elections—Margaret J. Rawitz; Continuing Legal Education—Maryann E. Foley; Ethics—Kenneth P. Jacobus; Historians—Wendell P. Kay; Law Related Education—Jeffrey M. Feldman; Legal Educational Opportunities—Robert K. Hickerson; Statutes, Bylaws and Rules—John R. Lohff.

Bar Rule Committees: Client Security Fund—Sandra K. Saville.