BULLETIN

ALPS Extends Deadline — Lifts Alaska Restriction

The ALPS Board of Directors voted on August 7th to lift the minimum of 500 participating attorneys as a condition of Alaska membership. In addition, the required capital contribution has been retained at the $1,000 per attorney level until the fund reaches $3,500,000 or October 15, 1987, whichever comes first.

See related story on Page 15

Attorney Competence & Malpractice

Starts Page 14

$2.50

The Alaska BAR RAG

AUGUST, 1987 — Dignitas, Semper Dignitas — VOLUME 11, NUMBER 3

A thinking man's guide to computers

By Stephen Nebel

Part 1 of 3 parts

Synopsis: Computer architecture can be roughly divided into three areas: Hardware, Operating Systems and Languages, and Applications Programs. The content of this first article reviews the progress in hardware. In essence, the focus is on what we refer to today as the Chip, and on how the development of the Chip facilitated practical implementation of computer theory and technology. Part II will discuss operating systems and the architecture of program execution. Part III will cover application programs such as word processing and database, and how the professional can make effective use of them.

Basically, a computer is really nothing more than an elaborate collection of electrical switches. Moreover, the switches themselves, individually, are not complex. They have an on position, and an off position.

They're like light switches, to use an example we're all familiar with. If a light switch is on, the bulb glows. If the switch is off, the bulb is dark. A light switch is a perfect example of a digital phenomenon. In a digital world, there are only two states, on and off, one or zero. There are no shadings of grey, as with analog or wave-form phenomena. A digital world is thus largely free of ambiguity, and for this reason most modern computers are engineered on a digital, rather than analog foundation. Think of it this way: Engineering is digital; Love is analog.

Now the important thing to understand from this beginning point is that most computer technology is simply additive from this simple digital switching principle. In a true sense, there are no leaps of faith required to comprehend the function of a computer. Go deep enough into the machine, and bit by bit you can trace the logic up to the highest level of operator interaction.

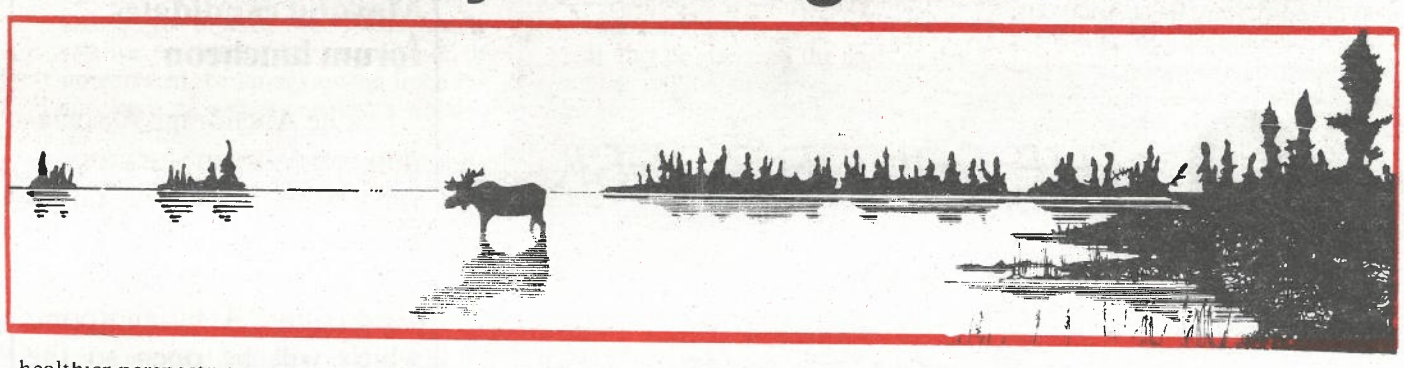
This is not to say that it doesn't get complex. In fact, with a smoothly written word processing program, for example, the complexity is such that the "graininess" of the millions of underlying digital

Continued on page 24

In a rut?

So are the moose, and you can get them close

By Michael J. Schneider



Creativity is required to effectively practice any area of the law.

Nevertheless, it is very difficult to maintain a creative edge in the face of a busy practice. Many attorneys get their batteries recharged by vacationing in far away and exotic places.

The Alaskan economy being what it is, many of us this year are considering taking our R&R in exotic places closer to home: Spenard, Wasilla, Indian . . .! With this trend in mind and with one of Alaska's most beautiful seasons upon us, this article will tell you about a cheap, readily available, and uniquely Alaskan form of recreation guaranteed to get you out of your office to return with a crisper, healthier perspective on your cases, your staff, and other matters of personal concern.

No matter where you practice law in Alaska you are close to significant populations of big game and predators. Seeing wildlife is always exciting. Unfortunately, most of us catch a glimpse of a moose, deer, coyote or bear only occasionally and usually from a considerable distance.

I'll explain in this article how you, **without any talent or prior experience** can see a lot of wildlife right up close. It's easy.

You will see a lot of wildlife and you will see those animals up close if you can make them look for you. They are much

Continued on page 27

SPECIAL MEETING OF THE ANCHORAGE BAR ASSOCIATION

To discuss whether or not Judge Robert Bork should be confirmed as a Justice of the United States Supreme Court.

DATE: Wednesday, September 16, 1987
TIME: 5:00 p.m. to 7:30 p.m.
PLACE: Anchorage Hilton Hotel
Alaska Room

SPEAKERS
For confirmation: **WAYNE A. ROSS**
Against confirmation: **CORNELIUS R. KENNELLY**

MODERATOR
HON. RALPH E. MOODY

Alaska Bar Association
P.O. Box 100279
Anchorage, Alaska 99510

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FROM THE PRESIDENT

Bob Wagstaff

It is with pleasure that I write the first column for the *Bar Rag* during my term as President.

This is the third year that I have been on the Board of Governors of the Alaska Bar Association. During that time I have participated in the Board's strong positive stands with its applicants, members, and in the courts in disciplinary and admission matters. The Alaska Bar Association is healthier now than it ever has been because of the vitality of its membership and the dedication and commitment of the Board of Governors to a strong, independent Bar. I intend to see that that tradition is continued.

One of the more perplexing and thorny issues that has come before the Board of Governors in the last several years is to attempt to define the practice of law. "Why bother?", one might legitimately ask. Indeed, that was my first impression. The issue first arose from a Supreme Court request. Many persons who do not have law degrees and are not licensed are performing legal acts that affect others' rights. There seem to be two general positions on this issue. The first is that the Bar Association should be as expansive as possible in allowing what may admittedly be the practice of law in order to attempt to recognize history. The second view is that the drafting of documents or the performing of acts that affect another's legal rights by anyone needs to be carefully regulated in the same manner and for the same reasons that the practice of medicine is regulated. In the Board of Governors' view, the practice of law needs to be controlled, and the performing of legal acts for others by persons who are not licensed attorneys cannot be endorsed.

An example is sometimes used of a close relative drafting a legal document. The drafting of any document, be it a long-term installment contract for land or personalty or a will is a very important event for the person affected. The unlicensed practice of law on another cannot be endorsed simply because the participants are related by blood. The medical profession cannot allow a person to remove the appendix of another simply because they are related. While not everything that an attorney does rises to the level of surgery, many things do, particularly in the view of the people affected. Since this issue first arose, comments of some agencies affected have strengthened my views. For example, many state agencies wish their employees to be free to in essence practice law. In the words of the Limited Entry Commission:

> Ours is a unique niche of the law, and most attorneys have never practiced limited entry law. As a result, to hire a typical attorney to appear before us will require extra legal fees for research while the attorney becomes familiar with our statute, regulations and body of law. Additionally, since many of our cases are heard at remote locations with no local attorneys available, applicants would be forced to either incur substantial costs to transport themselves and their witnesses to the lawyer's location for investigation, preparation and hearing or incur additional legal fees and costs for traveling time, overnight stays, etc. if the lawyer were brought to them. Because many of the rural people who appear before us cannot afford an attorney, they would be forced to represent themselves if they can't have a relative, friend or other non-attorney represent them. If left to their own devices, many would face insurmountable difficulties due to a lack of language skills, education, and familiarity with our procedures.

In many cases, particularly with rural residents, a Limited Entry Permit is the most valuable, if not the only, asset owned. Possession determines whether a particular family will be able to fish salmon commercially until the end of time. To allow an unlicensed and uncontrolled relative to practice as a lawyer in such a determination cannot be accepted regardless of the administrative inconvenience.

Those state agencies which have objected to the Board of Governors recommended policy have done so without really understanding the policy. Life will continue and the sun will rise if a licensed lawyer is required to supervise and accept responsibility for agency employees which are engaged in the practice of law, exactly as attorneys supervise law clerks and paralegals and are responsible for their acts. For example, it has been suggested that Human Rights Commission investigators could no longer advise upon and compromise cases or prepare legally binding documents for signature. The answer is that such actions are practicing law and they accordingly must at least be supervised by an attorney. The Human Rights Commission general counsel will have the responsibility as well as the authority to allow investigators to continue on as they are, but subject to the supervision of a trained and licensed attorney. Such a course seems only reasonable.

The Alaska Supreme Court's opinion on rehearing in the *Buckalew* case and its recent decision on court appointed attorney' fees in the *DeLisio* case are encouraging. In the former the Court agreed not to adopt disciplinary rules without the advice and consent of the Bar Association and in the latter recognized that while attorneys have the duty to take appointments, they are entitled to just compensation for their work. This was the position argued by amicus Anchorage Bar Association in the *Wood* case several years ago. Both decisions recognize the importance of a strong and independent Bar and do much to strengthen relations between lawyers and the courts in Alaska.

THE EDITOR'S DESK

James M. Bendell

In this issue we feature the topic of attorney malpractice. Attorneys are facing the financial crunch encountered long ago by physicians as malpractice insurance rates continue to rise. Fortunately, there exists a built-in cap for lawyers at some point due to the fact that we simply do not have the power to inflict as much harm upon another human being as a physician does. For example, nothing an attorney could do will leave a person in a coma, although excessive billing practices may come close.

Like all of you, I received the ALPS literature some time ago and put it in the pile on my desk where all other catalogs and promotional literature are stored (along with L.L. Bean catalogs, useless legal periodicals, and advertising for Mediterranean cruises featuring ten minutes of legal instruction per day). I only bothered to examine the ALPS material because I had to put together this issue of the Bar Rag and felt that it would be embarrassing to be writing on a subject for which I had done no preparation at all. To my surprise, I found the ALPS literature interesting and I was instantly hooked after discussing the matter at great length with Keith Brown, who is always so well informed on insurance issues.

ALPS makes sense and I encourage all of you to join. The concept of utilizing the Liability Risk Retention Act of 1986 to provide all of us with a stable source of insurance protection seems the only way out of the current market instability we face.

Finally, for all of you who do join ALPS, let's be careful out there!

Mayoral candidates forum luncheon

The Anchorage Association of Women Lawyers is sponsoring a mayoral candidate forum on September 15, 1987 at the Anchorage Westward Hilton, Aleutian Room, which will be open to the public. It will begin at 11:30 a.m. and run until 1:30 p.m. The cost will be $15.00.

Due to the limited seating, AAWL requests that you R.S.V.P. by Friday, September 11, 1987. AAWL encourages you to submit along with your R.S.V.P., written questions to the candidates, indicating to which candidate the question is addressed. R.S.V.P. to Joan Rohlf, 510 L Street, Suite 700, Anchorage, AK 99501 or call 276-5121.

The Alaska Bar Rag

Board of Governors
Alaska Bar Association
1987-1988

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President Wagstaff has established the following schedule of Board meetings during his 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 Board representative at least three weeks before the Board meeting.

September 2 and 3, 1987
November 5 and 6, 1987
January 7 and 8, 1988
March 17 and 18, 1988
June 6-8, 1988 (Kodiak)

Editor in Chief ..... **James M. Bendell**
Associate Editors ..... **Patrick Rumley**
Charles W. Ray, Jr.
Editor Emeritus ..... **Harry Branson**
Contributing Writers ..... **Mickale Carter**
Mary K. Hughes
Philip Matricardi
Edward Reasor
Michael J. Schneider
Donna C. Willard
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 99503 or at (907) 279-0752.

Brown, Savell receive Bar honors

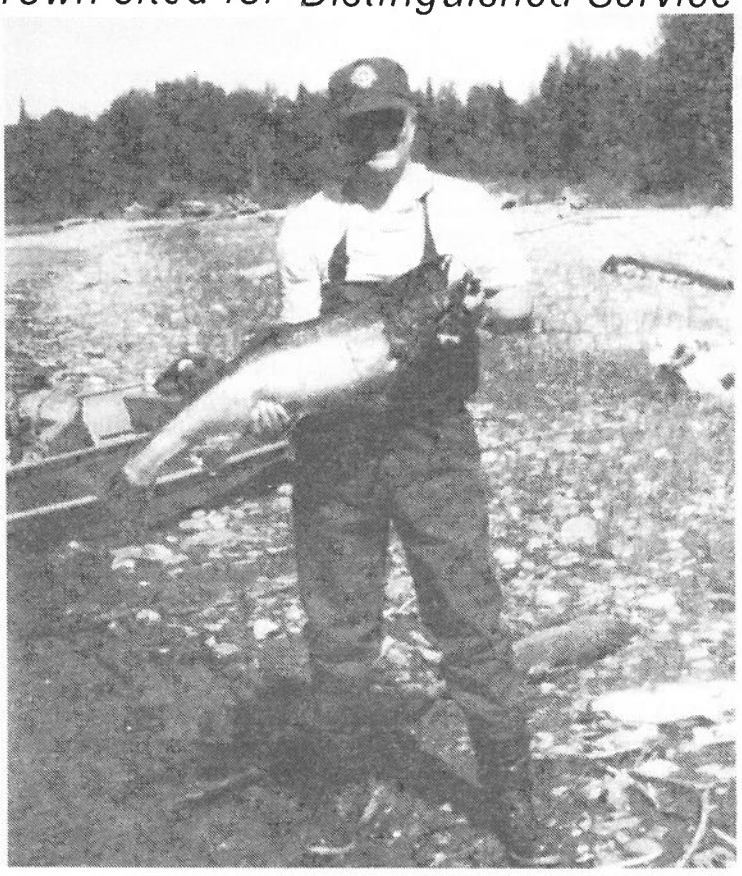
Savell wins Professionalism Award

Judge Richard D. Savell

Richard D. Savell is the recipient of the Alaska Bar Association's lst Annual Professionalism Award which was presented at the 1987 Annual Convention in Fairbanks. The award recognizes an attorney who exemplifies the attributes of a true professional attorney, whose conduct is always consistent with the highest standards and who displays appropriate courtesy and respect for clients and fellow attorneys.

Savell has been in the private practice of law in Fairbanks for 14 years and has been a member of the Alaska Bar Association Board of Governors and president of the Tanana Valley Bar Association. Savell has recently been appointed as a Superior Court Judge for the 4th Judicial District.

Brown cited for Distinguished Service



Keith Brown

Keith Brown, an attorney with Hagans, Brown, Gibbs and Moran, has been awarded the Alaska Bar Association Board of Governors Distinguished Service Award. The award, presented at the 1987 Alaska Bar Association convention in Fairbanks, is an annual award, given to an attorney in recognition of his outstanding service to the membership of the Bar Association. Brown is currently chair of the Lawyers Professional Liability Insurance Committee and has taken an active role in finding liability insurance alternatives for attorneys.

Brown was born and raised in Juneau. He received his law degree from Stanford University in 1968 and since that time has practiced law in Alaska. Brown has served as a member of the Board of Governors of the Alaska Bar Association and as President of the Association. He is very active in the American Bar Association and is currently a state delegate to the ABA House of Delegates.

If you have news of Bar activities in your city (or town), send it to the Bar Rag, c/o the Alaska Bar Association, 310 K Street, Suite 602, Anchorage, Alaska 99501.

The Alaska Public Offices Commission is recruiting for the position of Executive Director. This is a partially exempt position based in Anchorage.

Under the general policy direction of the Alaska Public Offices Commission, the Executive Director plans, supervises and coordinates assigned activities, which include Commission authority for overseeing election campaign disclosure and administering conflict of interest and lobbying laws. A high degree of management and communications skills and the ability to relate to a varied constituency is needed. This position also requires decision making free of political bias.

Graduation from an accredited college, graduate degree or equivalent, and three years of professional administrative experience is required. Other combinations of training and experience will be considered for comparability.

The salary for this position is now under review by the Alaska Public Offices Commission. The current minimum salary $4,687 per month. This position is now classified as a Range 24 but is subject to the review now underway.

A resume or official State of Alaska application form must be postmarked no later than

August 31, 1987

to Diana DeSimone, Director, Division of Personnel, P.O. Box C, Juneau, AK 99811-0201.

APPLICATION MATERIALS AND NAMES OF APPLICANTS WILL BE SUBJECT TO PUBLIC DISCLOSURE.

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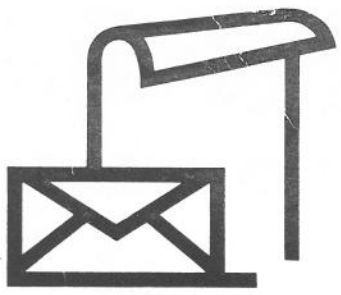


IN THE MAIL

Body parts...

The court's security "expose" published in the May *Bar Rag* and generously quoted in other media served no public interest and is prejudicial to the interests of the practicing lawyer and the judges selected from among our ranks. Instead the article was a cheap shot successfully designed to capture public attention through the exploitation of the circumstances which lead to the McKay mistrial. I intend to offer no defense of what incurred in Fairbanks and certainly do not agree with Judge Greene's initial assessment (which I suspect she now regrets) that it was just one of those things that happens with no one at fault.

I do not know whether the author of this article has had the sad experience of appearing in one or more of the many courts outside of Alaska which feature complete security systems. The first such experience I had was several years ago in Los Angeles. It was not a pleasant experience. I was accosted by uniformed guards in the outermost area of the court lobby, ordered to deliver my briefcase for a thorough search, and then interrogated at some length. Fortunately a thoughtful member of the Los Angeles federal bar to whom I shall be forever indebted intervened on my behalf after I had committed the unforgiveable sin of suggesting to the uniformed guard that the system of which he was a part sucks.

No, Mr. Editor I do not want maximum security in our court system, and I despair at the circumstances and events which have engendered the establishment of such systems in more populous areas.

I personally hold that the third floor security system is a pain in the neck and an unnecessary trapping of power. I am not surprised it is so easily defeated because I cannot believe that the class of humanity which it is designed to protect takes it (or for that matter should take it) any more seriously than the rest of us.

I suppose the reason I am moved to write this, my first letter to the editor, is that I have always considered the Bar Rag an "organ" of the Alaska Bar Association. My assumption was that it was an organ analogous to the eyes, ears and mouth of the organized bar. I now suspect it may be an organ located elsewhere upon our body politic.

Kenneth D. Jensen
JENSEN, HARRIS & ROTH

...The Editor replies

No doubt the organ you are referring to is the brain, repository of all knowledge and font of wisdom.

Best Regards,
Jim Bendell

The Court replies

I was pleased to see the several articles on court rules in the recent issue of the *Bar Rag*. The article on I.O.L.T.A. was informative and the Carter article will hopefully acquaint attorneys with the rules amendment process and the notebook available in all state law libraries which contains local orders issued by the presiding judges.

I also thought the Batchelor article was extremely helpful in pointing out the potential pitfalls of taking depositions without using court reporters. I would urge attorneys to carefully review her article as well as my November 25, 1986 letter to the Bar which pointed out many of the same potential problems.

However, the article, written by a representative of the court reporter's association, was somewhat one-sided. Civil Rule 30.1 sets out a procedure which like any other procedure is certainly not applicable to all cases. However, properly employed, the new rule can lead to lower costs in some cases and, especially in rural areas, can allow depositions to be taken which would otherwise be financially impractical. I also note that the comments on the new rule which I have received from attorneys do not support the article title's reference to the rule as a "potential time bomb." Several attorneys have made relatively minor suggestions for changes in the rule. However, at least as many have expressed enthusiasm for the procedure.

My major complaint about the *Bar Rag* issue concerns two comments in your article. First, you stated that proposed rules changes are only "sometimes" circulated to the Bar for comment. While this may have been true in the past, it is certainly not now. Virtually all proposed amendments are circulated for comment in my monthly letter to the Bar. Incidentally, while very few attorneys comment on most proposals, the comments I do receive are generally extremely helpful. All comments are passed on to the supreme court.

Second, you complained about "the experimental 'guinea pig' approach toward implementing drastic rule changes such as deposition taking and fast track calendaring." This is a complete mischaracterization of the process by which rules amendments are adopted. While, unlike most rules amendments, the "fasttrack" rule was developed by the Third Judicial District, I do know that it is based on functioning and successful programs in several other jurisdictions. Also, the rule was adopted only after intensive review and modifications by attorneys, third district judges and the supreme court.

As to the deposition rule, it was exhaustively studied by the court system and the Civil Rules Committee for several years before it was adopted. Drafts of the rule were circulated for comment to both attorneys and court reporters. Further, the audio-visual rule is based on a uniform rule adopted in 1978 and a rule which has been in effect in Montana for several years. The change relating to filing depositions with the court only when they will be used in the proceedings conforms to the federal practice in Alaska.

In conclusion, it might be more comforting to both attorneys and judges never to make major changes in court procedures. However, given the overwhelming number of cases which the courts must consider, and the current fiscal position of the state, it is imperative that new procedures be considered to streamline the judicial process. These procedures, such as the "fasttrack" and audio-visual deposition rules, that have been adopted by the court have been extensively studied, have received review by attorneys as well as judges and have been based on functioning rules in other jurisdictions.

Very truly yours,
William T. Cotton
Court Rules Attorney

Shortest divorce?

I recently read in the May issue of the *Alaska Bar Rag*, in the section "In The Mail" a letter from R.E. Baumgartner concerning George Grigsby. Mr. Baumgartner, a member of the Alaska Bar since June 1929, in his last paragraph of his letter stated that he had material on the "shortest divorce case in Alaska History." I do not know the circumstances nor the facts surrounding the case referred to by Mr. Baumgartner, but I do believe that Judge Hanson probably holds the record for the shortest divorce proceeding in Court. Back when there was a Bar Fee Schedule for legal services, a non-contested divorce cost $300. Judge Hanson, who was anxious to catch a plane back to Kenai, asked me if I would mind if he took over the proceedings when I and my client appeared before him for the divorce proceedings. I, of course, had no objection. Judge Hanson then proceeded to ask the plaintiff if he was a resident and inhabitant of the State of Alaska and had been for the preceding year; my client responded "yes." Judge Hanson then asked if he was legally married to the defendant. My client once again responded in the affirmative. Judge Hanson then asked him if he could continue living together with the defendant as husband and wife. My client responded "no." Whereupon Judge Hanson said, "proof sufficient, divorce granted," and excused us, rushing from the bench to catch his plane. The whole proceeding was under three minutes. As my client and I walked out of the courtroom I heard my client mutter under his breath "Jesus Christ, $300 for two yeses and a no."

Sincerely yours,
Richard B. Collins

Suspect language

New Civil Rule 90.2 on Settlement with Minors has a perceptual flaw: The requirement that the petition for approval must set forth amount of applicable liability. Insurance is irrelevant to the worth of the settlement except in the instance when the settlement amount is less than the case otherwise would have been worth because of an impecunious defendant coupled with inadequate limits or a total lack of insurance. If, for example, the defendant is Arco or General Motors, the existence of liability insurance or not is totally irrelevant. Apart from the fact that it is irrelevant the inclusion of the provision in the manner 90.2 does is a grave admission of a flaw in our tort system. It says that the issue is not what the case is worth but whether there is a defendant (*i.e.,* the insurer) from which money can be extracted. It's a pity that this Rule includes that suspect language.

Very truly yours,
Lloyd B. Ericsson

Dicta

The other day I was reading *Miller v. State*, (Ct. App., July 24, 1987, Opin. No. 728). I had to laugh:

> We are satisfied that Miller's reliance on *Conway* is misplaced...The language in *Conway* which Miller relies upon is clearly *dicta*,...We are satisfied that we should not follow the *dicta* in *Conway*.

That sounded OK for a second. But then the translation clicked in and the giggles started. This was appellate lingo for:

> Only a chump would believe that! We had our fingers crossed. We didn't know what we were saying! We didn't mean it. We didn't think it through. WE WERE WRONG.

But, those sound bad in English. So, they go to the Latin-*Dicta*. Things always sound smarter in Latin.

Author Unknown

Opinion

Rule 30.1 Deposition work

By Douglas L. Gregg

Earlier in this decade the court system circulated the bar, seeking comments on rule changes that would allow attorneys to take their own depositions on video, audio, or both. The idea was intriguing. Often, the costs of traditional court reporter depositions ($3.50 per page) will exceed the client's pocketbook. Lawyers often decline reasonably good cases for such reasons. It may seem hard for some people to believe, but access to the courts is denied to many people for lack of, say, $1,500 in anticipated costs.

I mailed in my comments, heard nothing for nearly a year, and finally called Anchorage to speak with the then rules attorney. He said that the bar was divided in its opinion concerning the adoption of a rule that would allow attorneys to take their own depositions electronically, without a reporter. He said that, generally, small firms supported liberalization while the larger firms were negative.

The sole practitioner and the smaller firms have always sought ways to offset the natural advantages that accompany size, spending power, and influence. This proposed discovery tool seemed to many of us a step in the right direction. Eventually, it was approved.

I bought a video camera several years ago and have done about fifteen of my depositions with it. Ordinarily, the client's cost is substantially reduced, as a complete official transcript is rarely required. Instead of a transcript, I can have a dub prepared for opposing counsel for only $12.00. In my experience, an actual transcript has been needed of only three of these depositions. In these three a partial transcript was all that was needed. This was easily prepared from the standard audio cassette. (It is my practice to use an ordinary cassette recorder as a backup to the video.)

In January of this year, the rules were further amended to require a log of the proceedings — similar to that kept by in-court clerks. One result of this requirement is that someone other than the attorney must keep it. (One cannot take a deposition efficiently and keep a decent log at the same time.) I use the investigator/notary who has his office in my building. His charge ($40.00 per hour) is passed on to the client. On the other hand, a traditional deposition running a full hour can easily cost $200.00 — just for the original.

I like having someone else to swear the witness, make the required statement, and keep the log. My operator also monitors the camera viewer to see that we are getting a good deposition. The $40.00 per hour is well spent.

Despite some nostalgia for the "good old days," there is much to be said for innovations that increase access to the court system by cutting costs so dramatically. If the court system can abide audio recordings of actual trials, as it has done since Statehood, citizens ought to be allowed to access modern technology for depositions and do so at reasonable cost. Like everything else, it comes down to a question of economics. Time marches on.

SOLID FOUNDATIONS

IOLTA withstands court review

By Mary K. Hughes

In the July 1, 1987, ABA Journal, an article appeared on IOLTA featuring *Cone v. The State Bar of Florida,* litigation in which the Eleventh Circuit U.S. Court of Appeals agreed to review a constitutional challenge to the Florida IOLTA (Interest on Lawyers Trust Accounts) program.

A Tampa, Florida, widow sued her lawyers, the Florida Bar Association and the Florida Bar Foundation, alleging that she should have received $2.25 interest on a trust amount of $13.75 and that taking the $2.25 of interest violated her rights under the Fifth and Fourteenth Amendments and the Federal Civil Rights Statute, 42 U.S.C. § 1983.

The lawsuit sought the return of at least $5 million that has accumulated since 1981 in Florida's IOLTA program and $15 million in punitive damages. On June 19, 1987, the Eleventh Circuit Court of Appeals held for the State Bar of Florida and found that in order for a client to demonstrate a constitutionally cognizable property interest in an IOLTA trust account, the client must demonstrate he had a specific and legitimate claim of entitlement to the interest generated by the corpus held for him in his attorney's participating IOLTA trust account and that the client did not have a claim of entitlement to such interest due to the economics of running an interest producing demand account and the restrictions that federal banking law places upon such accounts.

Once again, the concept of an IOLTA program which 41 states and the District of Columbia have adopted has withstood judicial scrutiny. Obviously, certiorari review of the Eleventh Circuit Court of Appeals opinion by the United States Supreme Court may be sought.

Information on the Alaska IOLTA program is available through the Alaska Bar Foundation at the office of the Alaska Bar Association, 310 "K" Street, Suite 602. The Alaska program has been in effect since March 15, 1987, and was the subject of Washington's Supreme Court Justice Robert Utter's remarks at the annual meeting held in Fairbanks in June. Private consultation regarding IOLTA is available by calling Mary Hughes.

Discipline imposed

Attorney A received a written private admonition for representing seller against buyer after the attorney had represented both parties in drafting the sale agreements.

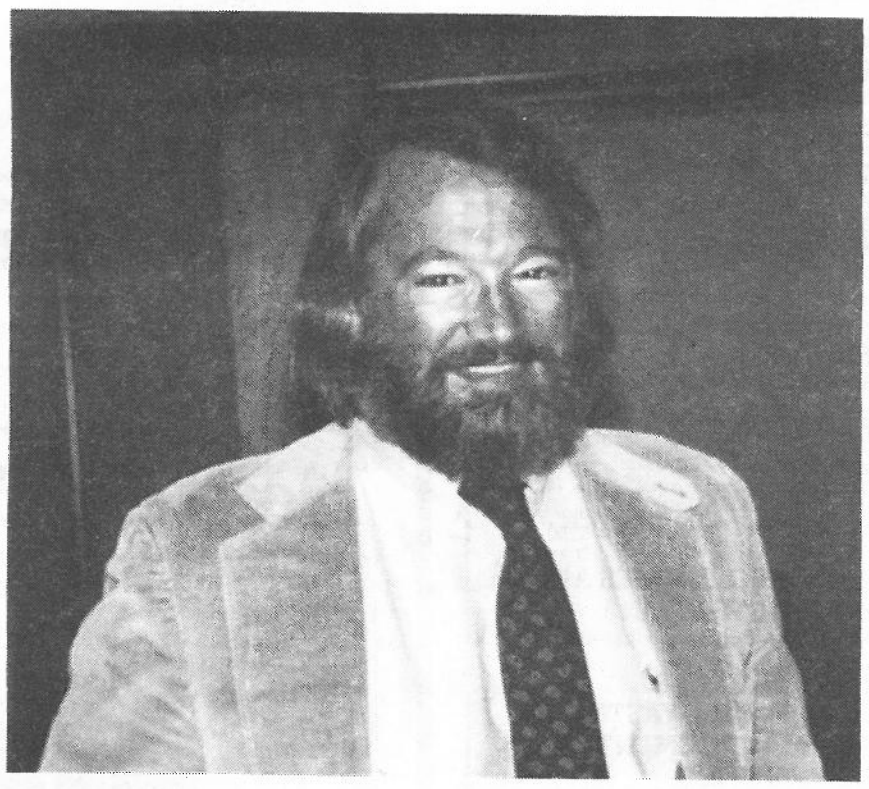
Attorney A received a written private admonition for failing to obtain the consent of one of the partners in a three-man partnership to the disbursement of partnership money from his trust account for the payment of partnership debts. Attorney A had assumed that consent had been given but had no written or oral authorization for the disbursement.

Melchor P. Evans was reinstated to the practice of law in Alaska by the Alaska Supreme Court effective July 1, 1987. Mr. Evans' application for reinstatement was unopposed by the Bar Association.

Wagstaff's legal roots go back

Profile

By Mickale C. Carter



Bob Wagstaff, president of the Alaska Bar Association, was born November 5, 1941, "one month and two days before Pearl Harbor." A graduate from Dartmouth (1963), he took his law degree at the University of Kansas in 1966.

Bob's father and his father's father were attorneys in Kansas; and although Bob's grandfather died before Bob was born, Bob's career has been shaped by his memory.

Bob's grandfather died in 1938. He was a small town lawyer whose hero was Abraham Lincoln; he tried many cases in Kasas doing pro bono and criminal work. "He had trouble with money, both charging and collecting," Bob remembers, and was Alf Landon's campaign manager when he ran for president against Franklin D. Roosevelt.

Bob has an eclectic practice with offices in Anchorage, Dillingham and Juneau. He's had an office at Dillingham for 12 years, to service Native corporation work in that region; and shares expenses with Doug Pope (who is in the Juneau office) and Don Clocksin, in the Anchorage office.

It was not until after Bob had graduated from law school while he was working in the Attorney General's office in Kansas representing the state in eminent domain actions, that he realized that he actually *wanted* to be a lawyer. Motivation for the law grew from an incident that arose while Bob was having his assigned state car filled with gas. The state employee who was putting the gas in the car was a black man, about 50 years old. When he found out that Bob's name was Wagstaff, he asked Bob if he was an attorney. He then told Bob that his mother had told him that if he ever got into trouble, "Go see lawyer Wagstaff."

Bob was deeply moved that his grandfather had inspired such a memory. Bob had heard stories about his grandfather throughout his childhood from his family and Mr. Landon, with whom he would sometimes have lunch in Topeka, so he knew that his grandfather was a great man. However, he had not up to that moment realized his grandfather's impact on the people whom he served. Bob vowed that he would endeavor to some day be as revered as was his grandfather.

Bob believes that he has been called to the profession to right wrongs. He has, as he says, "Jousted at windmills and hit a few." He believes that there is justice in the legal system, defining justice as "the right thing happening."

Bob has been a practicing attorney for 21 years. During the first ten years of his practice, he says, he thought that there was always justice, i.e., if you were 'right,' you won. Since then, Bob has conceded that it is possible to be right and still lose, but he still has faith in the legal system even when he loses.

The problem is not with the system, Wagstaff said. Injustices occur because the system requires interacting with people; it is thus merely human.

When Bob decided that he wanted to leave Kansas, he initially wanted to go to South America. He knew Jim Gilmore, who had spent some time in Mexico City, and talked to him about his experiences there. When Bob spoke with him, Gilmore was living in Alaska employed by Hughes, Thorsness & Lowe, then a seven-attorney firm. It was Gilmore who talked Bob into coming to Alaska, describing Alaska as a frontier with little legal history. Young Bob Wagstaff would have the opportunity to set legal precedent, Gilmore convinced his colleague.

In 1967 Bob travelled to Fairbanks to work as an Assistant District Attorney, joining others who would later rise to note. While at the D.A.'s office, he worked with Steve Cowper, Jerry VanHoomissen, Jim Blair, Jay Hodges, and the person who he believes taught him how to be a lawyer, the late Fred Crane.

After more than two decades at the bar, Wagstaff says that cases in which significant issues have been decided have been the most important to him.

He has argued successfully two cases before the U.S. Supreme Court. One was on Petition for Writ of Certiorari, a criminal action, *Davis v. Alaska,* 415 U.S. 308 (1974). At issue was the rub between the Sixth Amendment right of confrontation of the accused and society's interest in preserving the confidentiality of a juvenile's record. Bob persuaded the Court with his argument that the right of confrontation necessarily requires meaningful cross-examination. The Clerk of the U.S. Supreme Court informed Bob that he had the longest hair of anyone who had argued before the high court in this century.

The second case was an appeal from the Alaska Supreme Court, *Hicklin v. Orbeck,* 437 U.S. 518 (1978). The Alaska Supreme Court had found that Alaska's local hire law was constitutional. Bob, however, successfully argued that Alaska's local hire law was in violation of the privileges and immunities clause of the U.S. Constitution.

Bob ran for president of the Alaska Bar because he felt that he would be in a better position to carry out his goals of fair treatment for attorneys and a strong Bar Association. In addition, he enjoys chairing meetings. It annoys him to be at meetings which are not organized or have no agenda. Also, Bob seeks out variety in his chosen profession. He views being president of the Alaska Bar Association as a new experience and a great honor.

As president of the Alaska Bar Association, Bob said he is committed to keeping the Board of Governors strong and independent. He believes that it is important that the Bar Association regulate itself, acknowledging that such regulation is subject to Supreme Court approval.

One of the continuous threats to self-regulation by the Bar Association is the attempt by certain state agencies to allow only certain attorneys to practice before them, he said. Any attorney licensed to practice in the State of Alaska should be allowed to practice in any forum in representing his clients, Bob believes; if these agencies are allowed to limit the attorneys who can practice before them, it will greatly weaken the Bar. As he says, "Part of being a lawyer is if you do your job right, someone is not going to like you."

Bob also is committed to maintaining the present good relationship between the Bar Association and the Supreme Court. He is ever mindful of the delicate balance and aware of the problems that can result when there is conflict between the Bar and the Supreme Court. The "Bar Fight" of the summer of 1964, he said, is an example of how bad a relationship can become. He described it as a "dispute between the Bar Association and the Supreme Court as to who was calling the shots." The Supreme Court seized Bar Association funds, at gunpoint, and the Bar Association lobbied against a Supreme Court Justice who was consequently defeated at this retention election.

(The dispute arose "when the high court reorganized the bar association and placed it under the jurisdiction of the Court," said the *Anchorage Times* of the incident in July, 1964. The court also removed nine attorneys from the bar's board of governors.)

Bob thinks that attorneys must be eternally vigilant so that being a lawyer means something. He believes that lawyers must be permitted to represent unpopular ideas and unpopular people and keep practicing law. He believes that attorneys should be proud of their chosen profession — that attorneys should "walk proud, walk tall."

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THE LUNCH CIRCUIT

By Philip Matricardi

"OUT — sushi; IN — Thai food."

That's what I read in the *Woolsack* two years ago. Nineteen eighty-six came and went. No Thai food in Anchorage. I began to despair that it would ever arrive. Then, one after another, three Thai restaurants opened in town this year. One of them, Thai Cuisine, opened downtown two blocks from the state courthouse.

Some folks probably mourn the passing of Rizzuto & Martell. R & M used to be where Thai Cuisine is now. Thai Cuisine is an improvement.

Of three Thai restaurants new to Anchorage, Thai Cuisine is the priciest. Lunch for two can easily exceed $25. It is also the most spacious, and the menu offers the greatest variety. For example, appetizers at Sawaddi down southtown on Dimond Boulevard run about one dollar less than at Thai Cuisine. Yet Thai Cuisine offers 78 different dishes compared with about two dozen at Sawaddi.

Thai Cuisine offers more than two dozen seafood dishes. Most take too long to prepare to be practical for lunch. One that doesn't is Yum Pra Muk. Listed as a salad, Yum Pra Muk combines cold squid with onion, green chili, and a very spicy lime sauce. It flames the senses. Real fine for those of us who crave truly alarming tastes.

At Thai Cuisine the menu warns the unwary with stars. The scale begins with mild dishes that have no stars at all, for example, Shea-Poo, one of five special lunches, which is a combination of roast duck and honey roast pork.

Rating one star is a Moslem chicken curry, Kang Karie, offered for lunch with Thai spring rolls. Twice as spicy and considerably warmer is another lunchtime curry called Kang Kiew Warn — a green curried chicken with bamboo shoots, also served with Thai spring rolls.

Six items boast three stars, including Yum Pra Muk, the squid salad. In fact three of the hottest dishes offered are salads.

Thai Cuisine prepares great appetizers. Two that are one-star slightly spicy are beef sa-te and fish cake. The sa-te is served with peanut sauce and cucumber salad. The fish cake happens to be my personal favorite. Also, fun are the fresh corn cakes which include ground pork and garlic and are served with sweet chili sauce.

Thai Cuisine offers California wines, Michelob, Coors and Heineken, but the best beverages are the Thai iced coffee and Thai iced tea. Ask about dessert. The offerings vary. One I found tasty was a seaweed flan. You had to be there.

(Ten years ago Philip Matricardi wrote essays for the *Woolsack*, published by the students of University of San Diego School of Law. He can be heard talking about food Saturday mornings on *Weekend Edition* on KSKA FM 91.1, listener supported radio for Southcentral Alaska.)

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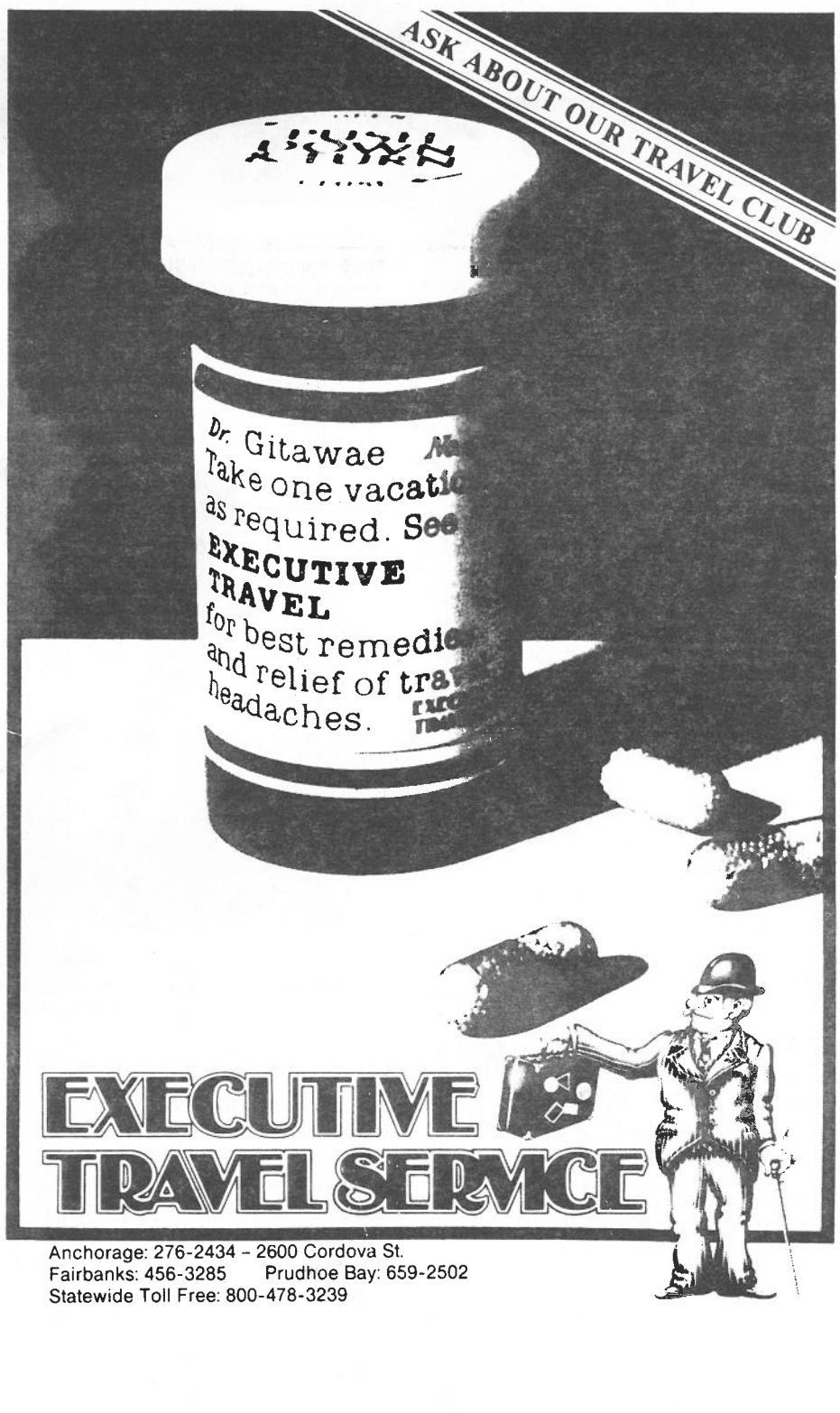

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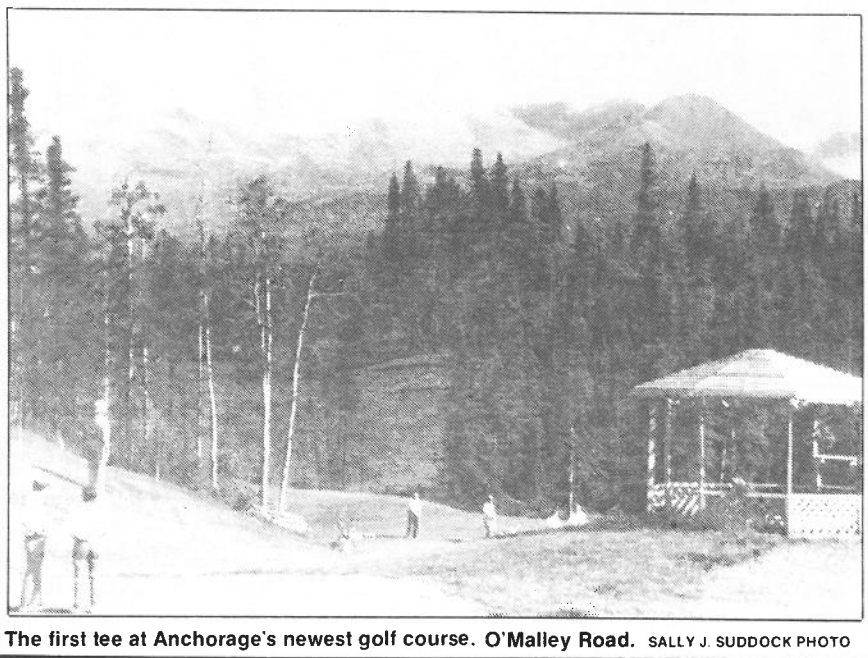


The first tee at Anchorage's newest golf course. O'Malley Road. SALLY J. SUDDOCK PHOTO

THE MOVIE MOUTHPIECE

Edward Reason

Good summer fun

"Witches"

The reason nearly every man in the Alaska Bar Association will love Jack Nicholson in Warner Brothers' new release, "The Witches of Eastwick," is because he simultaneously has as lovers the beauties Alexandra (Cher), Jane (Susan Sarandon) and Sukie (Michelle Pfeiffer), and he does it as a man (devil?) somewhat overaged and a bit overweight.

That said and done, let me hasten to add that regardless of what you have read of this production, it is first and foremost a women's film. By that I mean it is a movie that three good women friends, co-workers, high school chums, or sister-in-laws should attend. Leave the husbands and boy friends at home.

I watched "The Witches of Eastwick" twice, both times by myself (the second to better appreciate the camera angles and special effects of the tennis game) and in one theatre here in the East the audience was predominantly women. They howled, they screamed, they even beat the backs of empty chairs in front of them.

The sequence that seemed to involve the loudest and continuous enjoyment was the one where Cher, after a fantastic lunch at the home of Nicholson (a splendid mansion he bought cheap because they used to burn witches in it), now in the bedroom, temporarily rejects a bold, open-handed invitation for recreational sex.

The women's cheers and jeers were a bit loud for me to get the exact quote, but widow Cher (who makes a living sculpturing pot-bellied female ceramics) walks to the side of the inviting bed, looks down at the grossed-out Nicholson (devil) who has had the audacity to switch to a pure silk robe and says: "No, I think you are the rudest, most conceited, uneducated, poorly travelled, physically repulsive, unpleasant man I have ever met." But then she does bed him — and with passion.

So in a nutshell, director George Miller and screenwriter Michael Cristofe: have taken a moderately well-written but boring novel by John Updike and made a beautiful movie out of it.

Nicholson should be nominated for an Academy Award as the devil in modern times, with money, who pursues a widow (Cher), a divorcee who could have no children so her husband left her (Susan Sarandon), and a woman whose husband left her because she had too many children (Michelle Pfeiffer). He succeeds with each in a different fashion, ultimately so well that all three move into the mansion — at times together.

His object is to have children by each. Theirs is to live a life of more excitement than humdrum small Northeast patriotism and down home living allows.

Of the three seduction scenes (none obscene), the strongest visually is the moving camera of cinematographer Vilmos Zsigmond, when Nicholson ("Daryl Van Horne") in the film, arrives on the doorstep of plain Alexandra, the music teacher. She has been teaching Sousa marches, and even her own practice on more exotic pieces lacks passion. She wears a school teacher's bun, glasses, outdated pearl earrings, a plain white blouse and looks like the girl you would introduce to your divorced father. Looks are so deceiving..

Remember the magazine perfume ad where the couple kisses at the piano, with the one who had been playing (sometimes it was a violin) so overcome with passion that the music stopped in mid-flight?

Daryl Van Horne (Jack Nicholson) is a charismatic stranger who arrives in a small town and charms (left to right) Alexandra Medford (Cher): Jane Spofford (Susan Sarandon) and Sukie Ridgemont (Michelle Pfeiffer) in Warner Brothers' "The Witches of Eastwick."

The seduction of Susan Sarandon is even better. Go watch it. All I can tell you is that the next day we find her in a bathing suit at the mansion, sipping mint juleps, long reddish hair, make up, gorgeous, the kind of girl you bring home for yourself — let your divorced father find his own!

Sukie (Michelle Pfeiffer) is the girl next door who gets pregnant if you look cross-eyed at her. Her seduction is soft and gentle, full of wisdom and cunning. She wants to be seduced. She even tells him she will get pregnant. She always gets pregnant. What she wants to know, as they float about in his inside swimming pool, is how is he going to do it?

I told you that this is really a women's film and it is. Another sequence that groups of women love (again, leave husband home first time around) is the Thursday weekly martini party that the three girls always have to thrash out their problems. They don't sip martinis, they drink them by the pitcher and then they discuss men, of course.

Cher states the widow's view that "divorce is a beginning, not an ending. Have another martini." But it's the tranquilizing effect of the martini, not the words, that temporarily solves the hurts of a woman whose husband ran because she had no children (Sarandon) and one whose husband ran because there just was no peace and quiet around a full house of kids (Pfeiffer).

Women do in fact meet on occasion for a martini and they do in fact, after one or two, opine that men are jerks. Cher again: "I don't think men are the answer to everything" and then the musician Sarandon, after a moment's thought, responds: "Then why do we always end up talking about them?" And talk they do, about what they want (intelligence and a small behind, nice eyes to a huge penis).

Nicholson, as the devil, visits the town of Eastwick to prove that women are in touch with different things. That women really are the only source of power in the universe. See the movie and agree or disagree.

When you have, stop me in the courtroom corridor and I'll explain the fantastic tennis sequence. (Nicholson and the girls playing doubles but the ball spins stationary in midair, is hit to the moon, etc.) It involves high-speed tungsten film (5294), multiple cameras and zoom lenses, but watch the game first.

"Harry and the Hendersons" Family Fun Time

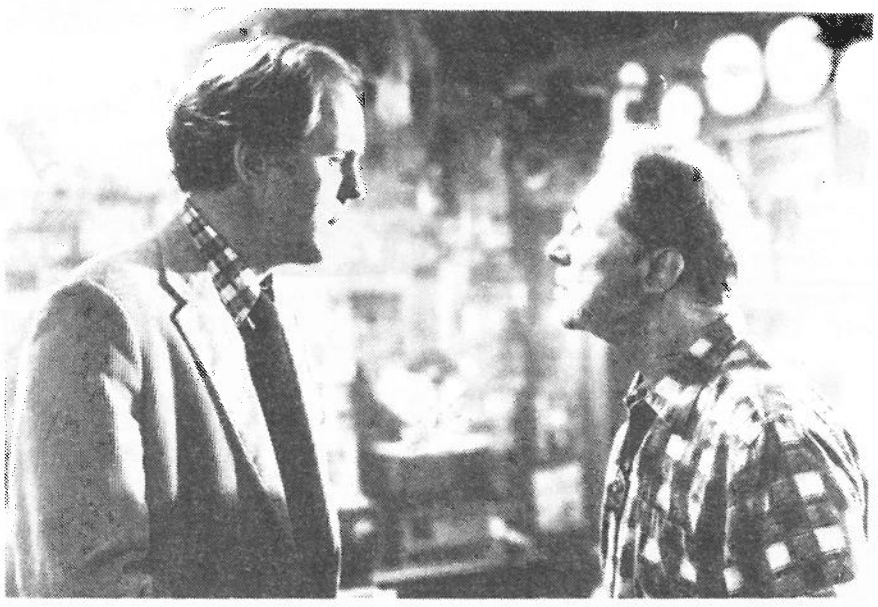
For those of you who are tired of the women's movement and/or women's films, I can recommend as a good family film "Harry and the Hendersons." Hunter and gun shop owner (John Lithgow) and his wife (Melinda Dillon) return from a camping vacation in the Northwest with the kids. Their car accidentally hits Harry (Kevin Peter Hall) — Big Foot — the missing link between man the ape and man.

Sasquatch is revived, taken home to Seattle, and well...sort of adopted.

You guessed it. This is a comedy, with the family loving Big Foot (who smells); a fierce hunter (David Sucket) who wants to kill and mount him; an aging scientist-anthropologist (Don Ameche) who has devoted his life to the study of Big Foot but never seen him; and assorted characters (from extras in Seattle to trained character actors) who turn this delightful summer farce into a fast-paced combination of crazy antics and screwball situations, coupled with a contemporary fairy tale that middle class Americans are all right guys.

There's one good line. Ameche, the scientist, in trying to explain that Big Foot might in fact exist in the beauty of the great Northwest: "Have you ever seen a baby pigeon?," he asks the Seattle businessman (yes, all parks have pigeons). Both mom and pop agree that in fact they have not (nor have I).

"Nevertheless, they must exist," Ameche continues, "because we continue to get the adult pigeons in our parks."



George Henderson (John Lithgow. left) confers with "anthropologist" Dr. Wrightwood (Don Ameche). an expert who has almost given up his dream of finding a Harry in Amblin Entertainment's/Universal Studios' "Harry and the Hendersons."

De Lisio opinion

The Court rules on indigent defense

THE SUPREME COURT
OF THE STATE OF ALASKA

STEPHEN S. DeLISIO, Appellant,
v.
ALASKA SUPERIOR COURT, Appellee.

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Palmer, Mark C. Rowland, Judge.

Appearances: Kirsten Tinglum, Douglas B. Baily, Baily & Mason, Anchorage, for Appellant. Susan D. Cox, Assistant Attorney General, Harold M. Brown, Attorney General, Juneau, for Appellee.

Before: Rabinowitz, Chief Justice, Burke, Compton, and Moore, Justices. [Matthews, Justice, not participating].

BURKE, Justice.
RABINOWTIZ, Chief Justice, dissenting.

In this appeal we have been called upon to reconsider the question of whether a private attorney may be compelled to represent an indigent criminal defendant without just compensation. We now conclude that Article I, section 18 of the Alaska Constitution requires a negative answer to this important question. While we strongly affirm the attorney's time-honored ethical obligation to provide cost-free representation to those in need and the corresponding obligation to accept court appointment on similar terms, Alaska's constitution will not permit the state to deny reasonable compensation to an attorney who is appointed to assist the state in discharging its constitutional burden.

I

Stephen DeLisio, an attorney in private practice in Anchorage, was in 1984 appointed by superior court judge Beverly Cutler to represent Stephen Ningeok, an indigent charged with sexual abuse of a minor.[1] DeLisio refused the appointment. At a non-jury hearing before the Honorable Mark C. Rowland, then Presiding Judge of the Third Judicial District, DeLisio's appointment was confirmed and he was ordered to commence representation by a specified date or be jailed for contempt until such time as he undertook the representation. We stayed the contempt citation pending DeLisio's motion for reconsideration and another attorney was appointed to represent Ningeok. On reconsideration, the contempt was reaffirmed. This appeal followed.

II

Initially, we reject DeLisio's contention that he is incompetent to represent a criminal defendant. At the contempt hearing before Judge Rowland, DeLisio stated that he had not handled a criminal case of any magnitude for at least fifteen years. He acknowledged, however, that he had served as a court-appointed criminal defense attorney from 1962 to 1963, had worked as a prosecutor for a year and a half, and had handled occasional criminal appointments between 1965 and 1967 or 1968. While criminal practice and procedure has undoubtedly changed since DeLisio was active in the criminal bar, the assertion that an attorney with DeLisio's trial experience is unable to provide adequate representation is at best disingenuous and need not be seriously considered.[2]

DeLisio's assertion that he should have been afforded a jury trial on the contempt citation is similarly without merit. While it is true that a jury trial may be required when considering a criminal contempt, incarceration, *per se*, does not make the contempt criminal. *See E.L.L. v. State,* 572 P.2d 786, 789 (Alaska 1977). "[T]here is no right to a jury trial in a civil contempt proceeding when the sole purpose of the proceeding is to compel the contemnor to perform some act that he or she is capable of performing." *Pharr v. Fairbanks North Star Borough,* 638 P.2d 666, 668 (Alaska 1981). *See also Gwynn v. Gwynn,* 530 P.2d 1131 (Alaska 1975).

Here, the record amply demonstrates the nonpunitive, coercive nature of the sanction. In denying DeLisio's request for a jury trial Judge Rowland explained:

> The Superior Court did not and does not now intend to punish Mr. DeLisio for his refusal to undertake the responsibilities of representation...The responsibilities he was ordered to undertake have been assumed by another. If the Supreme Court dissolves its stay or upholds the Superior Court's order appointing Mr. DeLisio, Mr. DeLisio will be appointed to another case, and will be incarcerated only if he refuses to follow this Court's lawful order and only until he agrees to do so.
>
> The Court's order of incarceration was purely coercive and in the nature of a civil contempt. No element of punishment was intended. Under the circumstances Mr. DeLisio is not entitled to a jury trial.

We agree. DeLisio was not wrongfully denied a jury trial.

III

DeLisio next argues that requiring an attorney to represent an indigent defendant without reasonable compensation is a taking of private property for a public use under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, section 18[3] of the Alaska Constitution. We have rejected this argument on two prior occasions. In *Jackson v. State,* 413 P.2d 488, 490 (Alaska 1966), we held that

> an attorney appointed to represent an indigent prisoner in a criminal matter has no constitutional right to receive compensation for his services. He has a right to compensation only to the extent that a statute or court rule may so provide.

Id. at 490. In *Wood v. Superior Court,* 690 P.2d 1225 (Alaska 1984), we reaffirmed that ruling, stating that

> an order requiring an attorney to represent a criminal defendant [does not] necessarily take that attorney's private property without just compensation. . . . It may be that in some extreme cases an assignment would cripple an attorney's practice and thus rise to the level of a taking. But Wood has not shown that this is an extreme case.

Id. at 1229 (citations omitted). We are now persuaded that our prior rulings are in error.

Alaska's "takings clause"[4] prohibits the taking of private property for a public purpose without just compensation. The underlying intent of the clause is to ensure that individuals are not unfairly burdened by disproportionately bearing the cost of projects intended to benefit the public generally. *State v. Hammer,* 550 P.2d 820, 826 (Alaska 1976); *see also* L. Tribe, *American Constitutional Law,* § 9-4, at 463-65 (1978).[5] In order to effectively fulfill this purpose, a liberal construction of the clause in favor of the private property owner is required. *E.g., Alsop v. State,* 586 P.2d 1236, 1239 & n.7 (Alaska 1978).

With these general principles in mind, an examination of the several justifications for denying compensation is in order. We note initially that the great weight of authority favors the denial of compensation. *See e.g., Williamson v. Vardeman,* 674 F.2d 1211, 1214-15 (8th Cir. 1982), and cases cited therein.

First, it is averred that the appropriation of an attorney's service can raise no issue under the takings clause because the practice of law is a privilege conferred by the state rather than a protected property interest. *See, e.g., Ruckenbrod v. Mullins,* 133 P.2d 325, 330-31 (Utah 1943). Assuming, *arguendo,* that we are here concerned with appropriation of "the practice of law" as opposed to appropriation of an individual's labor, the argument nonetheless is unconvincing. In *Frontier Saloon v. Alcoholic Beverage Control Bd.,* 524 P.2d 657 (Alaska 1974), we noted that

> It has long been recognized that an interest in a lawful business is a species of property entitled to the protection of due process. This interest may not be viewed as merely a privilege subject to withdrawal or denial at the whim of the state. Neither may this interest be dismissed as *de minimis.* A license to engage in a business enterprise is of considerable value to one who holds it.

Id. at 659-60 (citations & footnotes omitted). We have recognized that membership in the state bar entitling one to engage in the practice of law deserves the same protection. *In re Butterfield,* 581 P.2d 1109, 1110-12 (Alaska 1978); *Application of Peterson,* 459 P.2d 703, 710 (Alaska 1969); *In re MacKay,* 416 P.2d 823, 850 (Alaska 1966), *cert. denied,* 384 U.S. 1003, 16 L. Ed. 2d 1016. Thus, a license to practice law is not a mere privilege, granted or revoked at the whim of the state, but is a substantial interest protected by the due process clause of the Alaska Constitution.[6]

Notwithstanding the above, however, we reject the basic premise that it is the practice of law which is at issue. No one has argued that DeLisio would have had taken from him his ability to practice law. Rather, DeLisio would have had taken from him his labor. Thus, whether a license to practice law is a "mere privilege" or a "substantial property right" is irrelevant to the issue at hand.

A related argument is that personal services, such as those provided by attorneys, are not "property" within the meaning of the takings clause. *See generally,* D. Shapiro, *The Enigma of the Lawyer's Duty to Serve,* 55 N.Y.U. L. Rev. 735, 771-77 (1980). Whatever the merit of this argument under the Federal Constitution, we reject it as it applies to the Alaska Constitution. We see no language in our takings clause to indicate that services should be excluded from the section's protections, and are unaware of any constitutional convention history indicating such exclusive intent. Consequently, we perceive no reasoned basis for excluding such services.

Indeed, excluding personal services from the clause's provisions is manifestly unreasonable. It has long been recognized that "[l]abor is property. The laborer ha[s] the same right to sell his labor, and to contract with reference thereto, as any other property owner." *Coffeyville Vitrified Brick & Tile v. Perry,* 76 P. 848, 850 (Kan. 1904). This axiom applies with no less force to an attorney's services than it does to any other labor. As early as 1854 the Supreme Court of Indiana stated that

> To the attorney, his profession is his means of livelihood. His legal knowledge is his capital stock. His professional services are no more at the mercy of the public, as to remuneration, than are the goods of the merchant, or the crops of the farmer, or the waves of the mechanic.

Webb v. Baird, 6 Ind. 13, 17 (1854) *quoted in State ex. rel. Scott v. Roper,* 688 S.W. 2d 757, 762 (Mo. 1985) (en banc). We accept this characterization and, accordingly, hold that an attorney's services are "property" within the meaning of Article I, § 18.

A second argument is that the traditional/historical position of the attorney as an "officer of the court" requires the provision of free services when demanded. As we stated in *Jackson:*

> The requirement of the attorneys' oath and Canon 4 reflect a tradition deeply rooted in the common law — that an attorney is an officer of the court assisting the court in the administration of justice, and that as such he has an obligation when called upon by the court to render his services for indigents in criminal cases without payment of a fee except as may be provided by statute or rule of court.

413 P.2d at 490. We are now convinced, however, that the attorney may not be denied reasonable compensation solely on the basis of this tradition. As previously noted, and as our dissenting colleague argues, there is a long standing tradition in the United States of compulsory representation of indigent defendants without full compensation. However, this practice is neither as traditional nor as venerable as had been previously supposed. More importantly, we believe that tradition alone, regardless of its venerability, cannot validate an otherwise unconstitutional practice.

In holding that the court does not have authority to appoint counsel in civil cases, the Supreme Court of Missouri recently performed an exhaustive analysis of the historical foundation for uncompensated appointment of counsel. *State ex rel. Scott v. Roper,* 688 S.W.2d 757 (Mo. 1985) (en banc). That court's opinion dispels many assumptions which have been frequently repeated in cases addressing this issue.[7]

The court first discussed the doctrine often attributed to the common law of England that lawyers are officers of the court. *Id.* at 761. English "attorneys" were indeed treated as officers of the court, but the English "attorney" resembled a court clerk whose primary functions were ministerial. *Id.* at 765. The court had direct control over these officers and granted them important privileges, such as exemption from suit in another court, serving in the militia and being compelled to hold another office. *Id.* at 766.

These privileges are not now available to the American attorney and have been unavailable for some time. The Indiana Supreme Court determined over a century ago that the role of attorneys in the United States is not comparable to that of English attorneys:

> The legal profession having been thus properly stripped of all its odious distinctions and peculiar emoluments, the public can no longer demand of that class of citizens any gratuitous services which would not be demandable of every other class.

Webb v. Baird, 6 Ind. at 16-17, *quoted in Scott,* 688 S.W.2d at 761-62.

English serjeants-at-law may have been called upon to perform gratuitous services, but their role is also unmatched in current U.S. practice. Their elite position was akin to that of a public office holder. *Scott,* 688 S.W.2d at 766. The role of the English barrister, on the other hand, appears to have been similar to that of today's trial attorney. Barristers have never been treated as officers of the court and it is doubtful whether they could be compelled to represent a party. *Id.* at 765-66.

The Missouri court also discredits the rationale that lawyers have a traditional professional obligation to provide gratuitous service. *Id.* at 763. Prior to 1969, the Code of Professional Responsibility did not even mention pro bono representation. *Id.; see also, Proceedings of the Second National Conference on Legal Services & the Public,* December 7 & 8, 1979, at 21 (1981). The American Bar Association recently rejected a proposed provision for mandatory pro bono representation. *Id.* Currently, the Model Rules of Professional Responsibility merely encourage such service. *See* Rule 6.1. Thus, the history of court appointment of attorneys is hardly as clear or as consistent as is sometimes indicated and cannot by itself justify the practice advocated.

Related to this argument is the assertion that attorneys are not entitled to compensation for their court appointments because the license to practice carries with it certain conditions, one of which is the obligation to represent indigent criminal defendants gratuitously. By accepting the license to practice, it is argued, the attorney implicitly accepts these conditions. Again in *Jackson* we stated that

> An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order. Thus, the lawyer has consented to, and assumed, this obligation and when he is called upon to fulfill it, he cannot contend that it is a "taking of his services."

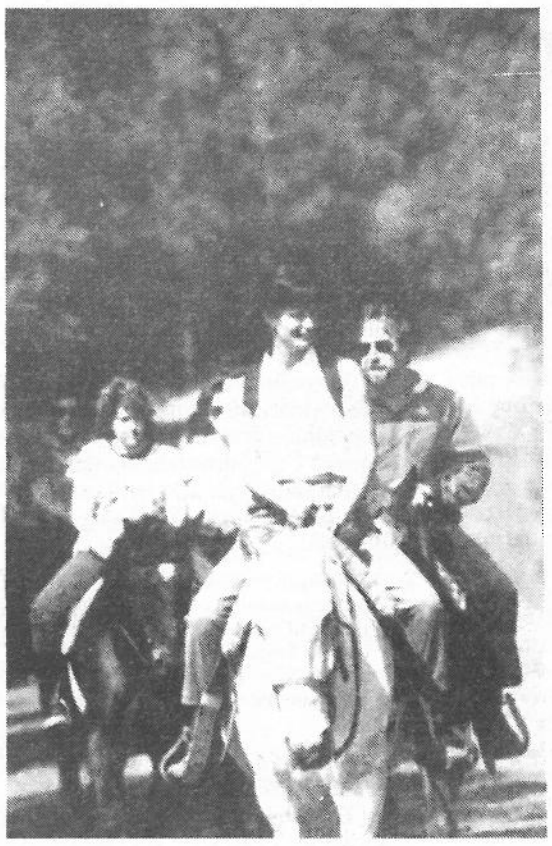
413 P.2d at 490, (quoting *United States v. Dillon,* 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied,* 382 U.S. 978, 15 L. Ed. 2d 469 (1966)).

The Supreme Court of Utah, in rejecting the same argument, stated that

> While the right of personal liberty and the right to earn a livelihood in any lawful calling are subject to the licensing power of the state, a state cannot impose restrictions on the acceptance of the license which will deprive the licensee of his constitutional rights. If states have the power to impose the duty to render gratuitous services on the license of an attorney, that power must be based on more than the mere right of the state to license.

Ruckenbrod, 133 P.2d at 327 (citation omitted). We agree. Imposing upon the attorney as a condition to practice a requirement which would demand the rendering of personal services without just compensation would in itself be an impermissible infringe-

Continued on page 3?



Bar people go horseback riding at Wynfromere Farms.

The 1987 Alaska Bar Association convention in June brought a full house for the welcoming luncheon. From left to right at the head table are: Robert Hickerson, director, Alaska Legal Services: Dana Fabe, public defender and new board member: Dan Callahan, president, Tanana Valley Bar; Juanita Helms, Mayor, Fairbanks North Star Borough; Ralph Beistline, bar president; Bob Wagstaff, president-elect: Pat Kennedy, assistant attorney general and board member and Paul Barrett, Fairbanks attorney and board member.

Canoes, steeds dancing, cruises and good company greet Fairbanks convention goers

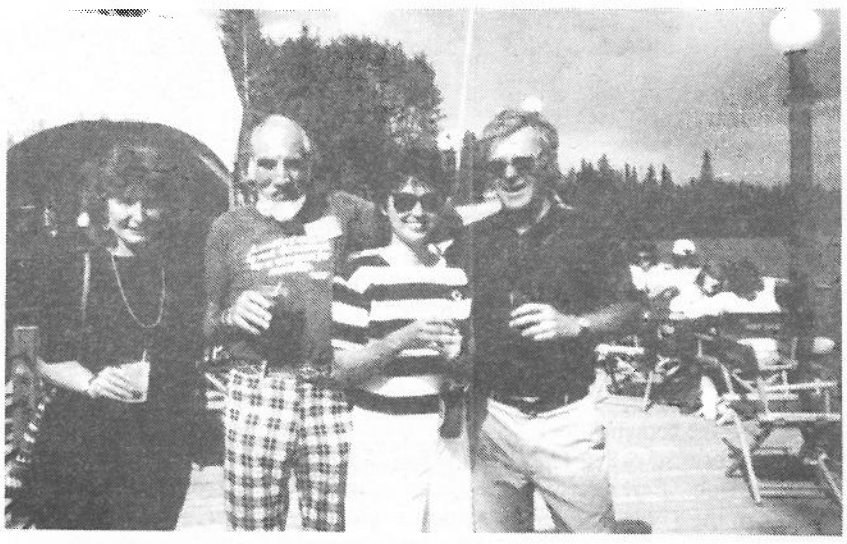
Niesje Steinkruger and husband Roger Brunner (the "cheerleader and the Nerd") talk with new board member Ardith Lynch at 50's night at "The Center."

Then President-Elect Robert H. Wagstaff gets some conversation with Past President Harry Branson.

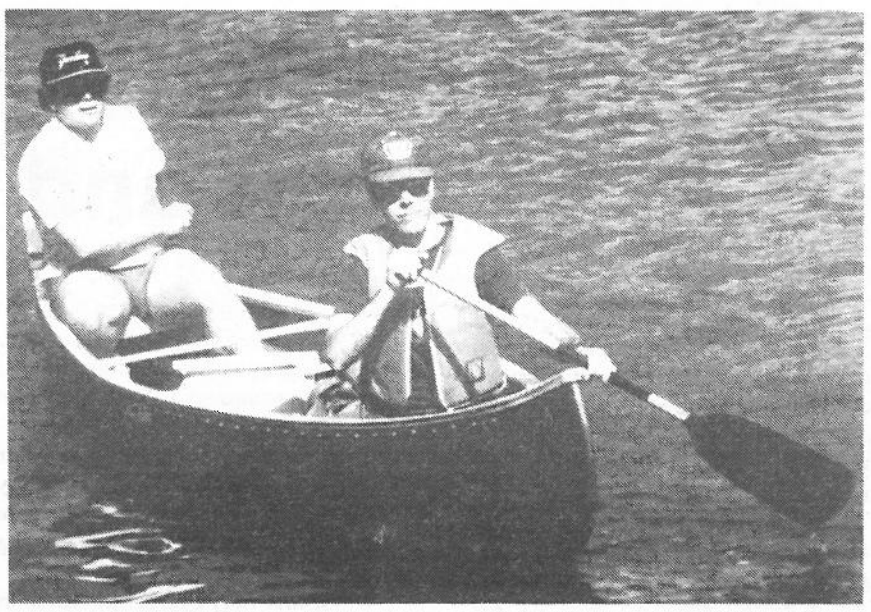
Stan and Doris Ditus share ride on the bus.

(Left to right) President Ralph Beistline, Gov. Steve Cowper and Rep. Max Gruenberg (D-Anchorage) work at signing a bill at the convention.

After the banquet, the bar staff is still smiling. From left are: Virginia Ulmer, executive secretary: Mary Lou Burris, fee arbitration assistant: Linda Norstrand, assistant director: Deborah O'Regan, executive director: and Karen Gleason, accounting clerk.



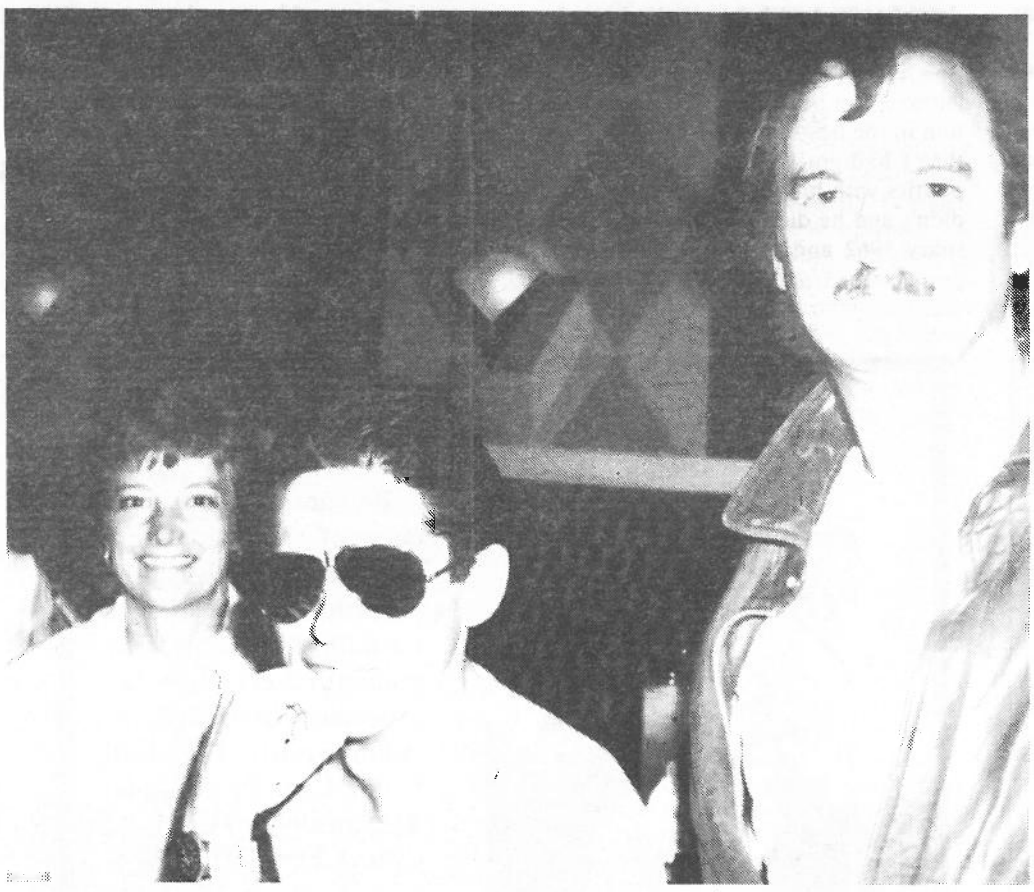
Mr. and Mrs. Warren Christianson (left) and Mr. and Mrs. Bob Ely share the sun at the Pump House restaurant's Chena River deck.



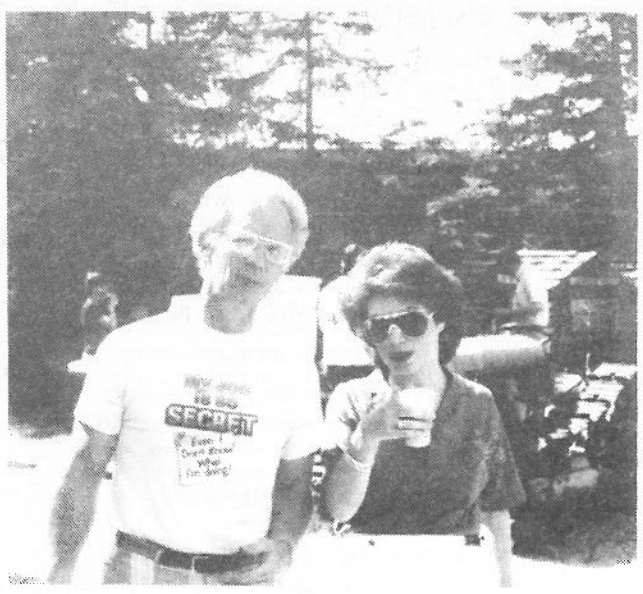
Canoe race organizers Jim Cannon and Roger Brunner paddle with determination.

Hal Brown, Marla Greenstein and Harry Branson socialize on the Pump House deck.

Bob Ely, John Reese and Fate Putnam take off paddling.



Decked out in 50's rags. Barb Schuhmann, Bob Groseclose and President Ralph Beistline (right), cut up at 50's night at "The Center."

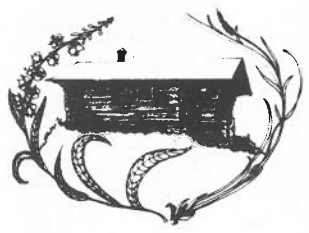


Hospitality host regular Leroy Cook (Information Services, Inc.) chats with Margot Savell (wife of Judge Richard Savell) at the salmon bake.

Recuperating at the Pump House after the canoe race are (l to r) Ken Eggers, secretary of the board; Larry Weeks, president-elect; Cheri Bowers, and Hal Brown, former president of the bar.

Millie Link and baby Lydia pose with Alaska Salmon Bake owner Rick Winther.

HISTORICAL BAR



Davis and Cooper remembered

By Russ Arnett

When I was in the basement storage room of the Anchorage Court Library I saw hanging on the wall large, framed portraits of two of the first Superior Court judges in Anchorage, Edward V. Davis and J. Earl Cooper.

After statehood there was doubt, which included Governor (Bill) Egan, that Alaska could afford a judiciary. The statehood legislation provided that the United States District Court for the Territory of Alaska would continue to function after statehood during transition and try cases normally within the jurisdiction of state courts.

The lawyers tried everything, including litigation, to force Alaska to establish trial courts and finally succeeded. In Anchorage, the first Superior Court Judges were Ed Davis, Earl Cooper and James Fitzgerald. The salary was $16,000 per year. This was $1,000 more than the Territorial District Court judges had received.

As judges, Ed Davis and Earl Cooper were mostly opposites. Davis was conservative, having handled mostly insurance defense and business clients. Cooper was an extremely liberal judge, having been an old-style, New Deal liberal office holder. Earl Cooper was a cut up off the bench, while Ed Davis was always respectable and sober. Ed even had a laugh which was conservative — two chuckles. One similarity was that they were both generally easy on criminal defendants. Judge Davis once gave a suspended sentence in a homicide case and Wendell Kay, who had already filed a notice of appeal, immediately walked down the hall to the Supreme Court and withdrew it.

I represented a G.I. who robbed a cab driver at gunpoint and then bloodied the cab driver's skull with the pistol. Judge Cooper, notwithstanding the fact of his background as U.S. Attorney in Anchorage, gave him a suspended sentence. I personally do not think of their leniency as a weakness. Their sympathy for the defendants was genuine. I am sure both believed they were not endangering society.

I first met Earl Cooper in Nome in 1952 where he was serving on the Territorial bench. Because Eisenhower was elected President and Earl was a Democrat, he was never confirmed. He returned to Anchorage and entered private practice.

He was elected Territorial senator and I covered his office for him during the 1955 session. Later, we had offices across the hall from each other. His practice was very low pressure; he had a wall plaque of two guys slouching in their chairs entitled "We've got to get organized."

One certainty of this period would be that he would have coffee each morning with the lawyers and politicians at the Oyster Loaf restaurant, which was across from the Anchorage courthouse. As a neophyte I looked forward to the conversations as the high point of my day. The lawyers would come directly from court and discuss the latest misfortune visited upon them. The art and practice of lawyer conversation in Anchorage has sadly declined.

Earl told a variety of jokes and his best involved a staged English accent. One involved two old colonials from India, one of whom asked "What became of old Smedley?"

"Didn't you hear. He was cashiered out of the Army."

"Whatever for?"

"He buggered a sheep."

"Really? (pause) Male or female?"

"Female of course. Nothing queer about old Smedley."

There was a massive cement block church in Fairview at the time called The Church of the Open Door. Earl referred to it as The Church of the Three-Quarter Open Door.

Someone mentioned Red China was considering placing all male and female workers, even if married, in separated dormitories. I asked how they could maintain population growth with this obstacle. Earl said "Oh, it's that little building in between."

He had played the lead in the play "Harvey" with the Anchorage Little Theater which was a big hit. I saw him play Darrow in "Inherit the Wind" which was also a hit. George Grigsby would refer to Earl's acting ability before juries when Earl was U.S. Attorney.

Earl Cooper was at his best at the founding convention of the Alaska Bar Association in Ketchikan in the late 1950's. Lawyers throughout the Territory at that time had a personal bond with each other.

To house the new Superior Court judges, the Territorial courtroom in the old Federal Building in Anchorage was split down the middle and a third courtroom was created in the basement. Judge Cooper ended up in the basement. One day after he had been on the Superior Court bench for a couple years, I was sitting in court with the jury awaiting his entrance but he did not arrive. I next saw him in the hospital. I have wished since that I had cracked a joke or discussed politics with him during that visit but I didn't and he didn't. He retired in February 1962 and from his illness never recovered.

Ed Davis and Bill Renfrew came to Anchorage together and practiced as Davis and Renfrew from 1939 to 1951, when John Hughes became a partner. This was the biggest firm in town. Their style of practice and personalities were opposite but they always got on well. They had a successful practice during the military construction boom years of World War II and the Cold War. They augmented their regular law practice income with profits from a gold mine. Ed was particularly systematic and efficient. I remember asking him for a file or some document and telling him I didn't need it right then. He got up and obtained what I asked for, saying "If we do it now, it's done." He operated the same as a judge. He usually decided matters brought before him on the spot and in a rational way without a lot of dinking around. He treated the bar with more courtesy and consideration than is generally the case today and was particularly friendly in chambers.

I had a contested divorce against him involving a couple with seven kids. Attorneys in those days considered they had an obligation to actively promote reconciliation. He told the couple that he particularly liked Hawaii, though few Alaskans went there then, and encouraged them to vacation there. He talked pleasantly to both spouses. I thought it showed considerable class. Later, on my first trip to Hawaii, he let our family use his condo.

He wore an old G.I. parka in winter on his walks about Anchorage. He continued to wear the parka in winter after retirement when he would return to Anchorage from Hawaii as a *pro tem* judge. This is my last recollection of him.

If you are concerned about your own use of drugs or alcohol, or by a partner or associate, or a fellow attorney or judge, or a family member's, then simply call the Alaska Bar Association and tell them you need information about the Substance Abuse Program.

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The Bar office will give you the names of three attorneys who have special training in evaluation and referral. You choose one to call.

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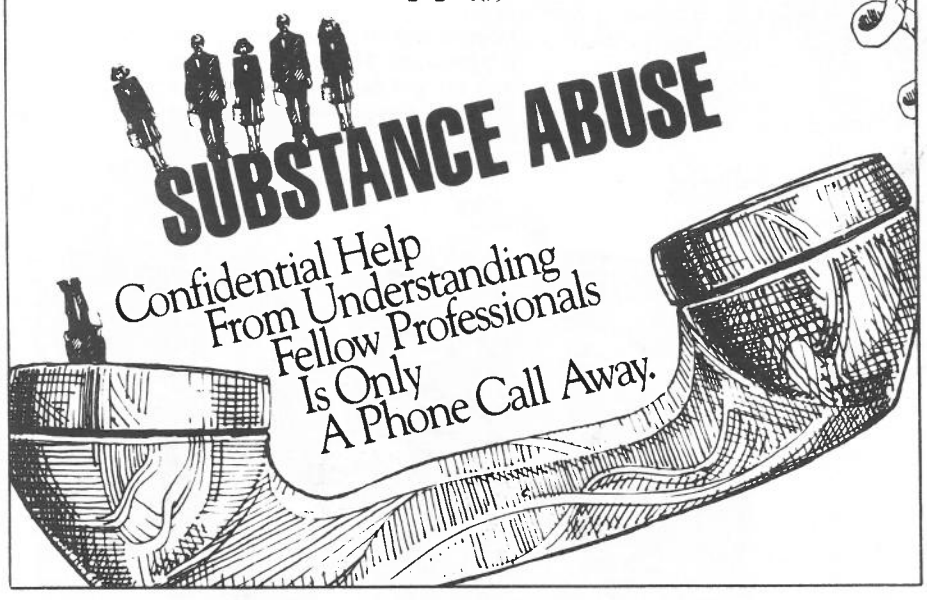

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The manual is an imprinted, three-ring, vinyl-clad notebook, complete with laminated tabbing, and holds 500 pages worth of topic outlines plus a comprehensive Guide to Legal Resources. The manual will be upgraded on a regular basis and new sections may be added.

Cost of the manual is $60. To order a copy send a check, payable to the Alaska Bar Association, for $60.00 to Alaska Bar Association, P.O. Box 100279, Anchorage, Alaska 99510.

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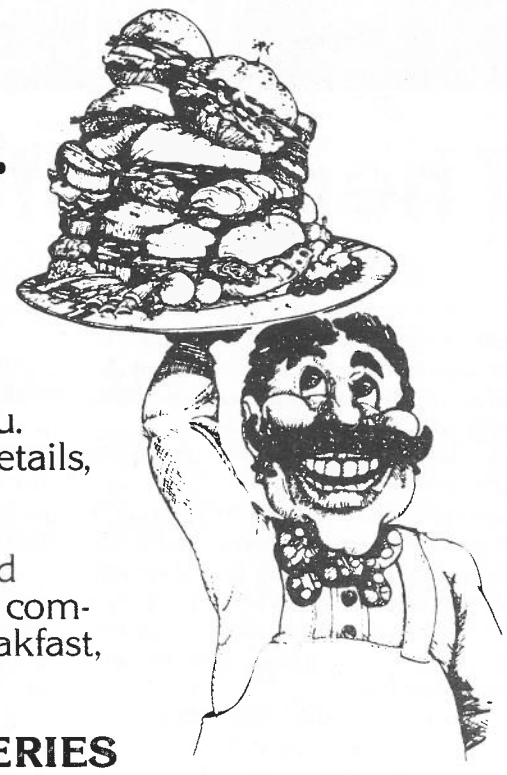

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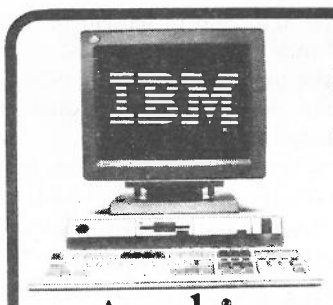

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Attorney Competence & Malpractice

There is life after malpractice

By Mickale Carter

Most attorneys are reluctant to sue other attorneys. This likely accounts for the apparent absence of attorneys in the Anchorage area who specialize in bringing attorney malpractice claims.

However, there appears to be no reluctance on the part of Anchorage attorneys to refer a client to a litigation attorney when that attorney feels that his client's previous attorney has fallen well below minimum requirements. Peter Galbraith believes that this concern for the rights of clients speaks well for the Anchorage Bar.

According to Galbraith, more often than not, the client doesn't know what he should expect from his attorney. Only when he finally changes attorneys and the new attorney reviews his records is the questionable representation discovered. Frequently, the discovering attorney's practice may be limited to a specialized area of the law, i.e., commercial, bankruptcy, probate, etc. If the representation is sufficiently questionable, he may inform his client of his concerns and refer the client to a litigation attorney such as Peter Galbraith. Galbraith has handled only two attorney malpractice cases — one settled after successful appeal to the Alaska Supreme Court and one settled after a successful jury trial in February.

Before he proceeds, Galbraith gathers the informal opinions of three Alaska lawyers; the attorney who referred the case, his own, and the opinion of an Anchorage practitioner who is willing to serve as an expert witness. While it is difficult to articulate the standard an attorney malpractice case must meet to be filed in court, Galbraith indicated the attorney's conduct is usually "shocking" to the average practitioner who has familiarity with the subject area involved in the case.

It should be noted before proceeding, that not all Anchorage attorneys willing to file actions against their fellow attorneys share Galbraith's philosophy. There are frivolous claims filed. Attorneys should remember that just because a claim is brought doesn t necessarily mean that he did anything wrong.

According to Matthew Peterson, who has represented attorneys in 25 to 30 legal malpractice actions, often attorneys are sued simply because the client didn't get the result he wanted. He hopes that somehow by suing his attorney he will get, in essence, a second chance to prevail. Also, emotions often run high. The plaintiff, who once trusted and relied upon the attorney, feels betrayed. It should not be surprising that often the underlying transaction in legal malpractice claims was a divorce.

Client information

Peterson believes that many malpractice claims can be avoided by keeping the client informed. Also, the attorney should be realistic about the potential outcome and not give the client false hopes. If the bad result comes from out of the blue, the client may well think it is the attorney's fault.

Peterson stated that attorneys can avoid creating false hopes in their clients if they keep in mind that they are both advocate and counselor.

As an advocate, they must zealously represent their client. Zealousness sometimes results in tunnel vision. However, in his role as a counselor, the attorney is required to view the situation from a neutral position informing the client of possible outcomes with a realistic assessment of the chances for each.

When Peterson is retained to represent an attorney in a malpractice claim, he requests that his colleague/client gather all documents in his office which pertain to the claim and familiarize himself thoroughly with those documents. These include the client's file, phone message carbons, billing records, time cards, calendars, etc. Peterson also gets a copy of the court file and has all hearings transcribed. The goal is to recreate the events, over what is often a long period of time, as accurately and as completely as possible.

Peterson encourages this recreation of the past early on in the litigation. If it turns out that there was malpractice, an early settlement may be the most practical course of action. If there has not been malpractice, detailed record keeping is the best defense.

Peterson, like Galbraith, believes that in nearly every case, it is essential to have a local practitioner as expert. The selection of the expert is very important. That expert should, of course, go through the attorney s records and evaluate the case. In addition to expressing an opinion on whether the attorney's conduct met the standard of care, the expert must also be able to explain the area of law and the minimum standards of performance so that it is comprehensible to the jury.

Peterson believes that attorneys make good clients. They, of course, are upset about being sued but are willing to let Peterson do his job. He often consults them in educating himself in the area of law at issue. Attorneys also, because they are attorneys, make good strategy suggestions. However, Peterson has never experienced the sued attorney trying to run the show.

Settle or not?

Before taking the case to trial, Peterson determines the settlement value of the case. In doing so, he considers not only the chances of prevailing at trial but also litigation costs. In addition to the normal costs and attorneys fees, the cost of going to trial in a legal malpractice case includes the cost of the sued attorney's time away from his practice. Also, the calculus must include the cost to the attorney's reputation.

Sometimes the bad feelings of the ex-client get in the way of settlement. The plaintiff may be more interested in proving the attorney wrong or getting even, than in recovering monetary compensation.

Where settlement negotiations fail, the case, of course, must go to trial. In order to prevail at trial, the plaintiff must prove that the attorney fell below the standard of practice in this community. He must also prove that had that attorney met the minimum standard that the result would have been different.

This second requirement often results in a "trial within a trial." The underlying circumstances are recreated for the jury. If, for example, the underlying circumstance was a division of property after a divorce, the jury must decide whether the judge would have divided the property differently had the attorney's conduct met the minimum standard.

Galbraith and Peterson agree that the attorney as defendant does *not* already have two strikes against him as often perceived by attorneys. Both believe that the jury evaluates the attorney as it would any professional.

Malpractice & ethical misconduct: two views

By Patrick Rumley
and Sigurd E. Murphy

DR 6-101 Failing to Act Competently.

(a) A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him.

The Code of Professional Responsibility is of central importance to every lawyer practicing in this and all American jurisdictions. Certainly it reflects the commonly shared standard of practice of jurists in the Western hemisphere. DR 6-101 and its accompanying Ethical Considerations offer the lawyer simple directions as to what client matters to handle and how to handle them.

Put most simply; if you accep. a case, you had better know what you are doing or learn quickly, then attend to your work without delay. Though a simple directive, there is confusion about just what constitutes failure to comply with the directive . . . and where malpractice and ethical misconduct part company.

Sure, we lawyers know it when we see it, we say. But when was the last time you spent an amenable hour with a member of the judiciary learning their perspective on the subject?

To better define malpractice and its close relatives, ethical misconduct, the authors have interviewed Alaska State Superior Court Judge Karen Hunt and U.S. District Court Chief Judge James Fitzgerald in their Anchorage chambers. Both have reflected on the nature and extent of malpractice and ethical misconduct. Both provided thoughtful insight on the subject, which insight fortifies the brief essay set out below.

Defining and Distinguishing Malpractice and Ethical Misconduct

Lay persons and probably many lawyers consider legal malpractice and ethical misconduct to be one and the same thing. The Code of Professional Responsibility includes malpractice or incompetent practice as a subset of ethical misconduct. Judges Hunt and Fitzgerald draw a clear distinction between the two.

"You can be an ethical attorney and still be an unprofessional jerk."

Judge Hunt offers a practical definition of malpractice as "doing something, or failing to do something which the best interests of a client require." She emphasized that the "best interest" of a client can only be determined subjectively, based upon the peculiar needs and circumstances (financial, age, family) of each client.

Judge Fitzgerald states this definition more objectively i.e., malpractice occurs when a lawyer fails to meet the standards of a legal professional. Both judges distinguish unethical conduct from malpractice by the presence of deceitful or misleading conduct.

An example proffered by Judge Hunt is that of a lawyer misrepresenting that discovery documents cannot be found when they are actually available. According to her definition, that is not malpractice, but is unethical conduct. It may be in the interests of a client to withhold information damaging to his/her case; therefore, not malpractice according to Judge Hunt's definition. Nevertheless, such conduct is unethical, unprofessional and not sanctioned by the Bar Association.

"Poor or careless discovery practices can invite disaster."

Judge Fitzgerald makes a subtle distinction between malfeasance of practice and careless office procedures. He sees failure to meet the statute of limitations as the most common example of malpractice in his courtroom. He suggests one cause for failure to comply with the statutes may be lack of proper research of the statute or of defining correctly which jurisdiction's statute is applicable. This constitutes malfeasance or nonfeasance. He sees mistakes or careless office procedures as a different breed of cat, even though it may result in similar liability of the lawyer. One constitutes direct liability, the other vicarious due to failure of a law firm's employees. To allow the latter to occur is careless or bad judgment. To allow the former to occur is malpractice.

Judge Hunt differentiates between the lawyer who avoids malpractice and unethical conduct from the lawyer "professional" who performs taking extra care to fine-hone skills and to fastidiously observe professional courtesies before bench and bar alike. In her words "You can be an ethical attorney and still be an unprofessional jerk." Ethical Consideration (EC) 6-5 reminds us that we should all strive to retain or attain this "professional" standards to which Judge Hunt refers. It states as follows:

> A lawyer should have pride in his professional endeavors. His obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty.

Presuming that a lawyer understands well the boundaries of malpractice and unethical conduct, prudence recommends that the aim be well beyond the mark to avoid the issue altogether.

Malpractice and Careless Practice Judges See

Good basic case preparation is identified by both Judges Hunt and Fitzgerald as the primary preventative of malpractice. "Unpreparedness is the greatest

Continued on page 17

Attorney Competence & Malpractice

Malpractice: the state of affairs

Shortly after Keith Brown submitted the following story to the Bar Rag, the ALPS Board of Directors, meeting in Denver, voted to relieve Alaska of the requirement that a minimum of 500 attorneys participate immediately for continued membership in the company. Despite Alaska's poor loss experience neither the actuary nor the reinsurance market attached great significance to the requirement. Further, Alaska attorneys responded, on a per capita basis, at a rate exceeded only by the West Virginia and Idaho Bars.

The Board also voted to extend the period for making the surplus contribution at the reduced entry level figure of $1,000. This is of particular importance to Alaska attorneys whose initial contribution would have increased to $2,200 otherwise. This extension to join the program is of limited duration. The "window" closes at the time the surplus reaches $3,500,000 and no later than October 15, 1987. At that time the figure will increase to $2,200, and possibly more after the 1st of January, 1988.

At current levels of surplus contribution growth there should be room for approximately 105 more Alaska attorneys in the initial program. This cannot be guaranteed if attorneys in the other states respond more quickly than we do. Act now and call 1-800-FOR-ALPS for more information.

By Keith Brown

Alaska lawyers renewing their professional liability insurance policies will continue to see high premiums for both primary and excess coverage for the foreseeable future.

In November, 1985, the Alaska Bar Association's Professional Liability Insurance Committee chronicled the sharp rise in malpractice premiums between 1982 and 1985. In the three years from 1982–1985, the base premium for a $1,000 deductible, rose from $1,000 annually to $3,200. In today's market, that same coverage is $5,800 for a lawyer with eight or more years of professional experience.

In June, 1986, Fremont Indemnity, which had previously been a major primary carrier, pulled out of the Alaska legal malpractice market. The departure of Fremont left only four players in what was becoming a rapidly dwindling field: National Union Fire Insurance Company, Underwriters at Lloyd's, North Atlantic Casualty & Surety Insurance Company and Shand, Morahan (presumably through Evanston Insurance Company or Imperial Insurance Company).

Current Rates and Availability

National Union, which enjoys the reputation of being a conservatively managed company, has not shown any inclination to market its product on a cash-flow underwriting basis as so many insurers did in the late 1970's and early 1980's. National Union continues to occupy the dominant position in the Alaska's malpractice insurance market. While certain policies may be placed with Underwriters at Lloyd's and North Atlantic as well, perhaps through Shand, Morahan from time to time, there is no indication that the product is available at a lower price elsewhere.

For the immediate future, the only good news is that National Union apparently plans no premium increases before year end. With careful planning, the prudent practitioner may be able to reduce the impact of past premium increases slightly. For example, the small practitioner specializing in domestic relations, in certain types of collections, small real estate transactions and other areas which involve a relatively small, fixed exposure could perhaps manage with $500,000 in total coverage. National Union offers a $500,000 policy with a $1,000 deductible for an $1,100 annual premium for the newly admitted attorney.

Because all lawyer malpractice policies now being issued in Alaska (as well as nationwide) are on a claims-made form, the premiums escalate with experience. The same attorney in his or her fifth year of practice could expect a premium of $2,700 per year and in the eighth year, $4,200 annually. Additional savings may be realized by increasing the amount of the deductible from $1,000 to $10,000. Thus, the same attorney would have an initial premium of $900 annually and at eight years' experience would look at a $3,600 premium. Premium financing is available through Borg Warner Acceptance Company and TIFCO Premiums, Inc.

For the experienced attorney seeking greater coverage, the news is grim indeed. One million dollars coverage, with a $1,000 deductible, bears an annual premium of $5,000. Increasing the deductible to $10,000 reduces the premium to $4,400 yearly. In contrast, you will note that for only a $200 additional premium, the first-year attorney who had opted for the $500,000 program could have obtained an additional $500,000 in primary coverage. According to Bayly, Martin & Fay personnel in Anchorage, the typical deductible selected by most firms is either $5,000 or $10,000.

At current rate levels, $2,000,000 in primary coverage with a $10,000 deductible can be obtained for an annual premium of approximately $5,200. As a rule of thumb, excess insurance coverage over $2,000,000 is available at a rate of $4,000 per attorney per million dollars of coverage. On that basis, an experienced sole practitioner might expect an annual premium of approximately $17,200 for $5,000,000 in coverage! Currently, National Union imposes no surcharge for particular areas of specialization; nor, according to Bayly, Martin & Fay, does National Union surcharge its policyholders for SEC practice. However, practitioners specializing in real estate matters or in plaintiffs personal injury work can expect surcharges ranging from 5 to 30 percent of the annual premium if they have a recent history of prior claims. Typically, and depending upon the facts of each claim, such a surcharge stands an excellent chance of being reduced or eliminated the following policy year.

Overhead factors being what they are, an annual premium of $17,000 per attorney for $5,000,000 in coverage has staggering implications. While the state's largest firm has been able to take advantage of the ALAS (Attorney's Liability Assurance Society) program, which is available to firms with over forty members, its smaller counterparts have either paid up or, in many cases, reduced the level of their coverage. The dramatic increase in premiums for liability coverage will ultimately afford less protection to lawyers and the public they serve.

From an historical perspective, members of the bar should be aware that the Professional Liability Insurance Committee worked for more than year with risk consultant Duke Nordlinger Stern in an effort to interest other carriers in entering the Alaska market. Our hope was that with increased competition we would see falling prices, at least over a period of time. Stern's efforts were commenced at the height of the capacity crunch in the reinsurance market. Premiums were then at an all-time high and the market for lawyer malpractice insurance had never been tighter. Indeed, for approximately three months, no coverage was available to members of the Wyoming Bar Association. Ironically, Wyoming's claims experience has historically been better than Alaska's.

The concept of a multi-state insurance captive was first pursued by members of the Jack Rabbit Bar Association (South Dakota, North Dakota and other states having a proliferation of this species of big game) in 1985. The group adopted the acronym "ALPS" for Attorney's Liability Protection Society and retained McNeary Consulting Services to conduct a feasibility study. As a part of that study, McNeary developed a membership survey which they circulated in West Virginia, Delaware, South Dakota, Kansas, Montana, Nevada and Wyoming. Studies of a similar nature were conducted in North Dakota and Idaho by those state bar associations using a similar form. Survey results were also obtained from Nevada's bar which used a nearly identical form. During the formative stages of ALPS, the Alaska Bar Association's Professional Liability Insurance Committee began to explore the ALPS alternative. Our work began in the fall of 1985 and continued through 1986.

In May, 1986, the Alaska Bar Association conducted its own legal malpractice survey in an effort to develop more information about the prevailing rates and to assist in the marketing of a few insurance program for our bar. Although prepared by members of the Professional Liability Insurance Committee, the poll was designed to be used in connection with the results obtained by McNeary Insurance Consulting Services in other states.

The Alaska Bar's Lawyers' Professional Liability Insurance Committee also considered the possibility of a locally fronted program with virtually all of the policy being reinsured. For a variety of reasons, including the relatively small size of our bar, Alaska's claims experience and a distinct lack of interest on the part of the reinsurance market, our efforts did not bear fruit. In early 1986, the American Bar Association, principally through the Standing Committee on Lawyers' Professional Liability, began to explore possible solutions to the worsening malpractice crisis. The options to be explored included ABA investment in professional liability carriers and reinsurers as well as the possible creation of a carrier wholly owned by the American Bar Association. It was predicted at that time that any response by the American Bar would require at least two years to come on line. As of this writing, the American Bar has not developed or sponsored a program which would provide legal malpractice insurance at a lower premium or ensure its continued avail-

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Attorney Competence & Malpractice

• Malpractice: how ALPS can help

Continued from page 15

ability in times of reduced market capacity. For Alaska lawyers, the only reasonable alternative to the present insurance market is participation in the Attorney's Liability Protection Society.

The ALPS Alternative

The results of the Alaska Bar Association's legal malpractice survey and claims statistics furnished by the Alaska Division of Insurance, INAPRO and Fremont Indemnity were interesting, but not particularly surprising in light of past reports. Because of the Alaska Bar's participation in ALPS, our survey results were reviewed by the actuarial firm of Milliman & Robertson, Inc. of San Francisco, as well as by McNeary Insurance Consulting Services. As a consequence of that review, the premium rates established by ALPS are uniformly higher than for any other member state. They are, however, competitive with those presently being offered by existing carriers in Alaska.

The Attorney's Liability Protection Society, Inc. is organized as a Nevada mutual insurance company designed to qualify as a risk retention group under the Liability Risk Retention Act of 1986. ALPS has been organized to provide professional liability insurance to members of the bars of West Virginia, Montana, Kansas, Nevada, South Dakota, Wyoming, Delaware, North Dakota, Idaho and Alaska. It is sponsored by the bar associations of each of those states. Underwriting sevices are being provided by Fred S. James & Company, principally through its New York, San Francisco and Spokane offices. Corporate legal advice has been provided by Barger & Wolen of Los Angeles. ALPS' capitalization program is nearly two-thirds complete; ALPS expects to begin offering policies in the fall of this year when its capitalization goal of $3,500,000 has been met. It is contemplated that all policies issued by ALPS will be reinsured in excess of the first $100,000 of each policy. ALPS (with the assistance of Sullivan Payne Company's New York office) has received quotations from major reinsurers in both the domestic and foreign markets and is confident of negotiating limits of up to $5,000,000 on a favorable long-term basis. The prospective reinsurers are highly rated, stable companies whose product should ensure rate stability.

As most of you know, the immediate inducement to early commitment to the ALPS capitalization project consisted of the issuance of contribution certificates at a reduced price of $1,000 per potential insured attorney which was to increase to $2,200 on August 1, 1987. This deadline was changed by recent action of the ALPS Board of Directors. The required capital contribution has been retained at the $1,000 per attorney level until the fund reaches $3,500,000 or October 15, 1987, whichever comes first.

Alaska's representative on the ALPS Board of Directors, Mike Thompson of Ketchikan, who also serves on the Alaska Bar Association's Board of Governors, and I had both communicated our concerns to ALPS regarding the August 1 deadline. It is extremely difficult to conduct business as usual during the summer months in Alaska. This is particularly true in Anchorage, where summer seems much wetter and cooler than normal. The difficulty of taking advantage of the price break by August 1 was compounded in the case of medium to larger firms where presumably vacation-inspired absenteeism may be proportionally greater.

Because of Alaska's claims history and its higher projected premiums, the ALPS Board of Directors initially imposed a quota of 500 subscription certificates were not purchased by members of the Alaska Bar by that date, ALPS had the option of returning the subscription monies obtained from Alaska and excluding Alaska from the program. The ALPS Board of Directors voted, on August 7, to eliminate the 500 attorney minimum requirement for Alaska to participate in the program. Actuaries have assured the Board that Alaska will not have a substantial effect on ALPS' surplus or financial condition even if the Alaska participation is substantially less. We have nearly 300 Alaska attorneys participating at this time, indicating broad support.

Alaska has been both handicapped and blessed in one other respect. Because ALPS subscriptions are being solicited on a direct-mail basis, the degree of market penetrations, particularly among medium to large size firms, seems reduced when viewed in comparison with other jurisdictions. For example, Idaho's largest law firm is actively participating as an ALPS subscriber whereas its Alaska counterpart is not. While direct mail solicitation brings a break in premium levels of approximately five percent, it also removes the purchaser of insurance from the closer contacts enjoyed by traditionally marketed programs.

In reviewing the list of Alaska subscribers which is available as of this writing, it is apparent that the program was attractive on a statewide basis with major subscriptions coming from the interior, southcentral and southeastern Alaska. Nonetheless, the subscriptions typically come from single practitioners and smaller firms. Many of the firms with which I am familiar waited until the August 1 deadline to submit their capital contributions. It seems apparent that ALPS has thus far failed to garner the participation from the medium sized firms which would virtually guarantee the availability of ALPS as an insurance alternative by January 1, 1988. As of this writing, Alaska's capital contribution is in excess of $295,000 and is exceeded in total amount only by West Virginia and Idaho. We are more than holding our own on a pro rata basis.

The ALPS program was presented to the Alaska Bar Association in Fairbanks by ALPS President Bob Minto; his presentation was extremely well received, as was a later presentation to the Anchorage Bar Association. Nonetheless, when those efforts are measured against the results obtained in Idaho, Alaska falls short. Following a similar presentation and a cocktail party for the Idaho State Bar Association, $270,000 was pledged.

The ALPS program is well-conceived, well-designed and extremely well-managed. It is premised upon an unshakable commitment to avoid cash-flow underwriting practices at the expense of future capacity impairment. Thus, when interest rates rise and insurance companies seek to generate as much cash flow as possible to maximize investment income, ALPS will not be following the lemming-like flight of its competitors. ALPS' management fully expects that when such market cycles are encountered, ALPS subscribers may well switch their coverage to other insurers but when the market tightens, as it always has, ALPS will be available to its members at the fairest possible price, administered and managed by lawyers and insurance professionals committed to the interests of the profession.

Our requests to ALPS to extend the August 1 deadline for Alaska subscribers until October 15 or until the capitalization goal is met was granted. I believe that such an extension will permit adequate marketing by Fred S. James personnel and provide more realistic opportunity for adequate capital contribution from Alaska. ALPS represents the only reasonable alternative to the current marketplace for most association members.

Only the passage of time will provide an adequate assessment of the Alaska Bar Association's commitment to ALPS. The concept of a multi-state, lawyer-owned captive is both intriguing and achievable. ALPS' rates are competitive in virtually every state in which it will market policies and most attorneys familiar with its formation and operation predict that it will succeed. Whether ALPS will retain a commitment to continued Alaska participation in its program remains to be seen. With efforts underway by a number of affiliated interest groups to establish similar programs, the eyes of the nation's lawyers will be focused on ALPS' performance with a good deal more interest than that previously generated by its smaller counterparts. While at least 23 states are now considering captive or bar-related mutuals, for Alaska lawyers the future is now. There are no quick fixes and no promises of falling premiums.

For Alaska lawyers, the short-term picture is reasonably clear. Premium rates will remain high and if claims continue to be filed against attorneys at the rate now being experienced, it is possible that rates may increase. The ALPS program can be available to serve as a more stable source of insurance if its capitalization requirements are met in Alaska. The ALPS program offers a more stable source of insurance, and its rates at the present are extremely competitive. It represents our best prospect for rate stability and market competition ultimately leading to lower rates from traditional insurers.

CLE CALENDAR

Date	Topic	Location
September 19 Full Day	Translating from "Legalese to Plain English"	Anchorage Hilton
September 25, 26 2 Full Days	Computers in the Law Office	Anchorage Hilton
October 24, 25, 31, November 1 2 Weekends	Trial Advocacy Program	Alaska Courthouse
October 30 Full Day	Women Litigators	Anchorage Hilton
November 13 Full Day	Admiralty Law Seminar	Anchorage Hilton
November 6 Full Day	Business Evaluation Seminar	Anchorage Hilton

NOTE: Will and Trust Drafting seminar originally scheduled for October 9 has been postponed until January/February, 1988.

Attorneys to return to the classroom

Attorneys who remember fondly their high school days and who want to get back into the classroom are being offered a "golden opportunity" during the month of October.

As part of the Alaska Bar-School Partnership Program, the Alaska Bar Association and the Alaska Department of Education will sponsor a week of lawyer/teacher training in law-related education.

Under the auspices of the American Bar Association, workshops will be offered for lawyers and teachers in the Anchorage, Mat-Su, and Kenai areas.

Charlotte Anderson and Mabel McKinney-Browning of the Special Committee on Youth Education for Citizenship of the American Bar Association will be the workshop presenters. Both are well-known nationally for their expertise in law-related education. They promise to stimulate participants with "tried and true" methods and approaches for bringing the sometimes dry "ins" and "outs" of the legal system into the classroom. They will also help to identify issues and activities guaranteed to catch the attention of even the most disinterested teenager.

The training is very timely, offering attorneys a way to help celebrate the bicentennial of the U.S. Constitution by supporting teachers in their efforts to convey the fundamental role of law in a democracy. The workshops will be conducted as follows:

Anchorage — October 6 & 8 (3:00–5:00 p.m.)
Mat-Su — October 7 — 1:00 p.m.
Kenai — October 9 — 9:00 a.m.

For additional information on the location and details of the training, contact Deborah O'Regan at bar offices.

Attorney Competence & Malpractice

• Views from the bench

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source of malpractice I see in the courtroom," said Judge Hunt. "Without question, it is also, by the way, the greatest cause I see for people losing. It can range from simply not understanding the facts of the case to not having discovered the facts of the case. It includes not having researched the law so that you know your client's rights and responsibilities in the transaction or the incident under scrutiny." Judge Hunt is particularly incensed hearing the expression "the case isn't worth it." "There is a basic level of preparation, investigation, and research necessary for every case regardless of whether the value is $10,000 or $1,000,000." According to Judge Hunt, insufficient basic preparation for a case is inexcusable — if the case isn't worth that basic effort, then an attorney should not take it.

Judge Hunt related this to another tendency of some lawyers — over or undervaluating a case. Plaintiff's overvaluating a case can discourage acceptance of a reasonable settlement offer because of unrealistic expectations. This can lead to a high legal fee-to-recovery ratio. On the other hand, a defendant undervaluating a case can result in high defense fees regardless of the judgment.

Judge Hunt also has seen cases where the lawyer becomes so emotionally involved that most objectivity is lost, warping the judgment necessary to evaluate evidentially exigencies at trial. "Outrage at the perceived harm to the client is no substitute for astute evidenciary presentation," Judge Hunt advises.

Judge Fitzgerald shares the same concern that cases be properly researched at the preliminary stage to avoid the statute of limitations or other serious pitfalls. He especially noted the need to focus on proper parties to the action and proper substantive law to apply i.e. state or federal, statutory or regulatory. "Poor or careless discovery practices can invite disaster as well. Ignorance of the rules often contributes to poor results," he added.

Role of Judiciary When Malpractice or Ethical Misconduct Occurs

What is a judge to do when malpractice, ethical misconduct or shoddy work occurs in the courtroom? In the case of malpractice, precious little can or should be done, say both judges. In the case of ethical misconduct, the problem should be referred by the judge to the Bar Association for disciplinary handling.

Judge Hunt notes that lay persons are often frustrated and confused by the distinction. They expect that the Bar Association will police malpractice and ethical misconduct alike. During Judge Hunt's tenure as an official of the Bar Association prior to her judgeship, she saw disappointed clients filing ethics claims when they felt malpractice had occurred. It was difficult for them to understand that civil litigation was the proper avenue for redress.

The question of how to respond to malpractice by an attorney is inextricably connected to how confident a judge can be that malpractice has, in fact, occurred. Both judges interviewed are very reluctant to intervene absent some act or omission of counsel which would be viewed by a reasonable person as malpractice.

Both judges scrupulously avoid substituting their judgment for that of counsel arguing before them; tactical considerations may enter into an attorney's decision to file or not file a particular motion. An objection to a piece of evidence may not be made in the hope that the evidence may lead to other evidence more favorable to a client.

Judge Hunt points out that the parties are entitled to expect neutrality from the bench. If a judge were to intervene at each suspicion of error by counsel, the parties may be placed at an unfair disadvantage. Judge Fitzgerald generally believes that judges should rarely intervene in the litigation process i.e. when non-relevant issues are impeding the progress of the case or the case is languishing in discovery limbo.

Nevertheless, there are times when judges must do something. When faced with the extraordinary situation of a lawyer's incapacity to completely carry a case forward, both judges have intervened to advise that competent counsel should be associated with or the case should be transferred. In one instance, Judge Fitzgerald remembers calling a lawyer into chambers to help him confront the reality of his inability to withstand the stress of trial practice. To the judge's knowledge that lawyer took the hint and has not practiced in court since.

Both judges emphasized, though, that such intervention is rare and should occur only in the most compelling of circumstances.

"Attorneys who appear in my courtroom are usually well prepared."

Profile of an Overstressed Lawyer

The judges part company over whether there exists a profile of the lawyer that stumbles into malpractice or ethical misconduct. Judge Fitzgerald finds no correlation between age, family responsibility, etc. and the tendency to lose control of the practice.

"Some lawyers are just always prepared and can be counted on to submit exemplary work," he said. Judge Hunt, on the other hand, sees the lawyer in the 30- to 40-year age bracket with between 7–14 years experience, increased family and civic demands and other personal concerns as prone to a kind of burn-out or stress overload leading to malpractice or misconduct. Perhaps, surprisingly, neither judge felt the youthful or elderly lawyer as particularly susceptible to the problem.

Some Sage Advice and Kudos to the Bar

We asked the judges what aspect of legal practice they would most like to see improved. Both Judge Hunt and Judge Fitzgerald prefaced their response with general praise for the professional level at which this Bar practices.

Judge Hunt: "Attorneys who appear in my courtroom are usually well prepared, understand their case and the law and impress me with their professionalism. Their example makes the exception that much more glaring." According to Judge Fitzgerald "the overall quality of practice is at least as good or better than territorial days when I began my career."

Judge Hunt instructs attorneys to focus more on the central factual and legal issues, economize in their briefing verbiage, and get to the point in their direct and cross examination at trial. Judge Fitzgerald encourages attorneys to tackle all "relevant issues," including the tough ones where little law is available as a guide. He indicated a tendency of some attorneys to address only the issues that are clear-cut, and laden with much precedent, regardless of their relative significance to the case.

Overall, it seems the Bar had much to be proud of.

Conclusion

Malpractice and ethical misconduct are or should be of concern to every lawyer. It is important that the high standards of the profession be maintained by all who accept the responsibilities attendant to the practice of law. Complex issues are raised in defining instances of malpractice or misconduct where they occur. There are simplistic rules in determining the standard of care of the profession. The best prescription is the attorney's vigilance and diligence in remembering the simple statement of the Code in DR 6-101 and EC 6-5 and in honoring the trust of the client.

ALPS gets response

Q/A

Early response to the Attorneys Liability Protection Society's (ALPS) appeal for Surplus Contributions is excellent! Within five working days after the Offering Circular was mailed — funds had been received from eligible attorneys in all 10 states.

In the meantime, the ALPS Hotline (1-800-FOR-ALPS) continues to ring off the wall for a myriad of ALPS-related questions. Among the most frequently asked are:

Q My current Professional Liability Policy expires in a few days. Should I non-renew it in anticipation of insuring with ALPS?

A No! Though everyone is optimistic about ALPS ultimate success — no one can predict the precise date when ALPS can issue its first policy. Further, lack of continuity of previous coverage may jeopardize the Prior Acts coverage benefit of an ALPS policy.

Q If I become an investor/insured of ALPS, have I assumed any liability to ALPS? To any third party?

A No.

Q Can I secure a *firm premium quotation* from ALPS without submitting my Surplus Contribution?

A No. *However* — you may call the ALPS hotline (1-800-FOR-ALPS) and secure an *indication* of what your premium will be. Final rates are subject to final approval of the Nevada Commissioner of Insurance and *may* be influenced by the final cost of reinsurance.

Q Our firm has its principal office in an ALPS state — but also has an office in a non-ALPS state. Can all the attorneys in our firm be insured in ALPS?

A Yes — subject to review and approval of the ALPS Board of Directors.

Bar-School Steering Committee plans major get-together Oct. 5.

The fledgling Alaska Bar-School Partnership Program will take a significant step toward "institutionalization" when the Steering Committee meets in Anchorage October 5.

Mabel McKinney-Browning and Charlotte Anderson, staff of the American Bar Association's Special Committee on Youth Education for Citizenship, will lead some of the state's "best and brightest" attorneys and educators in developing a Partnership Program which will work in Alaska.

Representing the Bar half of the partnership as part of this auspicious group are Alaska Bar Association representatives, Deborah O'Regan, Co-Director of the Program with Marjorie Gorsuch of the Department of Education, Bob Wagstaff, and Phil Voland. Anchorage Bar Association members include Paul Kelly, Karen Hunt, and Stanley Howitt. Mat-Su Bar will be represented by David Zwink, Jean Schanen, and J. Randall Luffberry. The Kenai Bar Association representative is Joe Kashi.

The all-day workshop, to be held in the Alaska Bar Association Conference Room, will include an awareness session with sample strategies for law-related education; an overview of programs across the country; discussion of resources and resource people; and a planning session for state and local programs.

Alaska's Bar-School Partnership Program has already distinguished itself by having "the most dedicated" Bar-School Partnership participant. Stanley Howitt and David Zwink volunteered to represent Alaskan attorneys at the ABA's *Institute on Bar-School Partnership Programs for the Bicentennial and Beyond* which was held in Chicago in June. Vacation plans found Stan scheduled to be in Hawaii the weekend of the Institute. Stan, not daunted by the idea of jetting back and forth across the Pacific, attended the Institute because he was so strongly committed to the concept of lawyers in the classroom!

Attorney Competence & Malpractice

Bar has videos

Following are course videotape and materials updates to the CLE Directory published last September. The February issue of the *Bar Rag* contained information on programs held September 1986 through January 1987.

Domestic Issues Seminars March/April 1987

This program consists of a series of three seminars held during the spring of 1987 on domestic issues. Each seminar is approximately 1½ to 2 hours in length and is accompanied by course materials.

Child Support — Covers the establishment and enforcement of child support orders, both administratively and through the courts, and defense of such actions.

Domestic Violence — Covers four issues: 1) special problems that may arise in working with battered clients, 2) advising clients on their rights under the state's domestic violence law, 3) the Anchorage court system's procedure for handling domestic violence petitions, and 4) providing the client with legal protection from domestic violence during and after a divorce proceeding.

Estate Planning and *Guardianships/Conservatorships* — These two topics were covered in the final seminar in the series. An overview of estate planning law was given with specific discussion of will drafting, probate, transfer of Alaska Native corporation stock, tax aspects of living trusts for minors, living wills and durable powers of attorney. The guardianships/conservatorships seminar provided a "nuts and bolts" approach to the appointment process with emphasis on identifying potential problems.

Course Materials (each program) ..... $ 5.00
Videotape (2 hours each program) ..... $ 5.00

Business Torts April 1987

This seminar is a general course on business torts covering interference with contractual relations, interference with prospective economic advantage, business disparagement, Civil RICO and damages in business torts.

Book (86 pages) $25.00
Videotape (6 hours) $10.00

The Legal Framework of Subsistence Regulation in Alaska April 1987

This is a seminar which provides fundamental information about the statutes, treaties and agreements which govern the harvest and consumption of subsistence resources in Alaska. The program is of particular interest to attorneys and other professionals wishing to develop a working knowledge of the laws regulating subsistence.

Book (150 pages) $25.00
Videotape (6 hours) $10.00

Off The Record May 1987

Judges and court personnel from the Third Judicial District, the Court of Appeals and the Alaska Supreme Court present a program about the practical day-to-day problems which fact both judges and attorneys in trial practice. The afternoon session is on the Fast Track System, how it works, the results so far and suggestions for improvement.

Course materials ..... $ 5.00
Videotape (6 hours) $10.00

Commercial Bankruptcy Law May 1987

This day and a half seminar is a program on basic bankruptcy law featuring guest lecturer Robert J. Rosenberg, luncheon speaker Richard L. Doege, and local faculty. Topics covered include preferences, local motion practice, leases, relief from stay and adequate protection, cash collateral use, offsets, cram down, and lender liability.

Book (195 pages) $25.00
Videotape (9 hours) $15.00

Taming of the Shrews? Environmental Issues in Agency Review of Development Activities June 1987

This seminar is a unique program based on a case scenerio or "play." The "play," a hypothetical coal mining project, investigates how environmental issues are raised in a development project and aodressed by State and Federal agencies, environmental interests, and industry groups. The presentation would also be of interest to those not involved in the coal industry but in other development projects faced with similar issues.

Book (160 pages) $25.00
Videotape (6 hours) $10.00

1987 Tax Conference August 1987

This two-day seminar offers an intense analysis of new tax planning and compliance challenges by some of the leading authorities in the field: Gary C. Randall, John M. Samuels, Melvin C. Thomas, Jr., and Jonathan B. Blattmachr.

Book (2 Volumes — 575 pages) $25.00
Videotape (12 hours) $10.00

For vioeotape rental and course materials purchase information, contact the bar office at 272-7469.

Computer seminar scheduled for September

The Economics of Law Practice Section of the Alaska Bar Association is pleased to sponsor a two-day seminar on "Computers in the Law Office" on Friday and Saturday, September 25 and 26 at the Anchorage Hilton Hotel. This seminar will be of interest to anyone who has struggled with understanding computers and how they can make our lives more efficient at home and work, and who have experienced the frustration of trying to make the promises fit a real-world environment.

This seminar will hopefully demystify what computers can really do for you and your law office. Top experts in the field of computers and the law office will present a seminar focused on these magnificent machines and programs and how they can help to manage the law office in ways otherwise impossible.

Thomas H. Gonser, Executive Director and Chief Operating Officer of the American Bar Association, will keynote the seminar with "The Future is Now" and participate as a faculty member on a number of other topics. Gonser was a primary force behind the establishment of ABA/net, a telecommunications network for the legal community. He has authored numerous articles and lectures frequently on systems management for legal organizations, the use of computers to evaluate litigation, productivity and the legal profession and automating the law practice.

Another expert, C. Rudy Engholm, currently serves as a member of the governing board of the Economics of Law Practice Section of the American Bar Association. He is also a board member of the ABA Legal Technology Advisory Council (LTAC) which sets criteria and tests and reviews applications software for law firms through a national testing center. Engholm is a frequent lecturer on computer applications for professional organizations and currently is Vice President and General Counsel for Creative Solutions, Inc., a major supplier of specialized microcomputer tax and accounting software.

Phil J. Shuey is President and Chief Executive Officer of Critique Consultants Corporation, a consulting firm in information management and word and data processing for the legal profession. He is Chairman of the Facilities and Technology Division and the Impact of Technology Committee of the Economics of Law Practice Section of the American Bar Association. An author and lecturer of national prominence, Shuey has spoken before numberous organizations, bar associations, institutes and universities.

The following local faculty will also take part in the program: James K. Brinker, Campbell, Brinker, Beardsley & Copeland; Keith Brown, Hagans, Brown, Gibbs & Moran; Ted Burton, Boise, Idaho; Leroy Cook, Information Services, Inc., Linda Durr, Durr Secretarial Service, Cynthia S. Fellows, Pleiades Research, Inc.; MerriAnne Hansen, Hartig, Rhodes, Norman, Mahoney & Edwards; Steven C. Horn, System Support Services; John R. Lohff, Attorney at Law; Edward T. Noonan, Attorney at Law; and John Wunsch, Hughes, Thorsness, Gantz, Powell & Brundin.

A number of topics will use as visual aids interactive displays of computer screens to show what these machines and programs can do. Program topics include productivity aids, data base management systems, litigation support programs, time and billing packages, accounting systems, financial analysis, management, conflict, word processing, telecommunications, on-line research, and how to locate and contract with consultants and vendors.

Exhibitors will be on hand to display law office systems, software and computing services.

Brochures, outlining the program and registration details have been sent to bar members. Please contact the bar office for further information.

We the People — On the role of the judiciary

... from the Federalist Papers

No. 80: Hamilton

To judge with accuracy of the proper extent of the federal judicature it will be necessary to consider, in the first place, what are its proper objects.

It seems scarcely to admit of controversy that the judiciary authority of the Union ought to extend to these several descriptions of cases: 1st, to all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation; 2nd, to all those which concern the execution of the provisions expressly contained in the articles of Union; 3rd, to all those in which the United States are a party; 4th, to all those which involve the PEACE of the CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations or to that between the States themselves; 5th, to all those which originate on the high seas, and are of admiralty or maritime jurisdiction; and lastly, to all those in which the State tribunals cannot be supposed to be impartial and unbiased.

The first point depends upon this obvious consideration, that there ought always to be a constitutional method of giving efficacy to constitutional provisions. What, for instance, would avail restrictions on the authority of the State legislatures, without some constitutional mode of enforcing the observance of them? The States, by the plan of the convention, are prohibited from doing a variety of things, some of which are incompatible with the interests of the Union and others with the principles of good government. The imposition of duties on imported articles and the emission of paper money are specimens of each kind. No man of sense will believe that such prohibitions would be scrupulously regarded without some effectual power in the government to restrain or correct the infractions of them. This power must either be a direct negative on the State laws, or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of Union. There is no third course that I can imagine. The latter appears to have been thought by the convention preferable to the former, and I presume will be most agreeable to the States.

As to the second point, it is impossible, by any argument or comment, to make it clearer than it is in itself. If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed.

Still less need be said in regard to the third point Controversies between the nation and its members or citizens can only be properly referred to the national tribunals. Any other plan would be contrary to reason, to precedent, and to decorum.

The fourth point rests on this plain proposition, that the peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith than to the security of the public tranquillity. A distinction may perhaps be imagined between cases arising upon treaties and the laws of nations and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal jurisdiction, the latter for that of the States. But it is at least problematical whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations in a treaty or the general law of nations. And a still greater objection to the distinction would result from the immense difficulty, if not impossibility, of a practical discrimination between the cases of one complexion and those of the other. So great a proportion of the cases in which foreigners are parties involve national questions that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals.

The power of determining causes between two States, between one State and the citizens of another, and between the citizens of different States, is perhaps not less essential to the peace of the Union than that which has been just examined. History gives us a horrid picture of the dissensions and private wars which distracted and desolated Germany prior to the institution of the IMPERIAL CHAMBER by Maximilian towards the close of the fifteenth century, and informs us, at the same time, of the vast influence of that institution in appeasing the disorders and establishing the tranquillity of the empire. This was a court invested with authority to decide finally all differences among the members of the Germanic body.

A method of terminating territorial disputes between the States, under the authority of the federal head, was not unattended to, even in the imperfect system by which they have been hitherto held together. But there are many other sources, besides interfering claims of boundary, from which bickerings and animosities may spring up among the members of the Union. To some of these we have been witnesses in the course of our past experience. It will readily be conjectured that I allude to the fraudulent laws which have been passed in too many of the States. And though the proposed Constitution establishes particular guards against the repetition of those instances which have heretofore made their appearance, yet it is warrantable to apprehend that the spirit which produced them will assume new shapes that could not be foreseen nor specifically provided against. Whatever practices may have a tendency to disturb the harmony between the States are proper objects of federal superintendence and control.

It may be esteemed the basis of the Union that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." And if it be a just principle that every government *ought to possess the means of executing its own provisions by its own authority* it will follow that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.

The fifth point will demand little animadversion. The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend on the laws of nations and so commonly affect the rights of foreigners that they fall within the considerations which are relative to the public peace. The most important part of them are, by the present Confederation, submitted to federal jurisdiction.

The reasonableness of the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial speaks for itself. No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens. And it ought to have the same operation in regard to some cases between the citizens of the same State. Claims to land under grants of different States, founded upon adverse pretensions of boundary, are of this description. The courts of neither of the granting States could be expected to be unbiased. The laws may have even prejudged the question and tied the courts down to decisions in favor of the grants of the State to which they belonged. And even where this had not been done, it would be natural that the judges, as men, should feel a strong predilection to the claims of their own government.

Having thus laid down and discussed the principles which ought to regulate the constitution of the federal judiciary we will proceed to test, by these principles, the particular powers of which, according to the plan of the convention, it is to be

Continued on page 30

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BAR PEOPLE

Members move, travel

Raymond M. Funk, former assistant P.D., has been named as the Probate Master in Fairbanks to replace Carol Davis, who retired in May...**Ken Covell** is now an assistant public defender in Barrow...The **Tanana Valley Bar Association** held its annual Christmas party on June 26. It was "well attended and a good time was had by all."

Thomas W. Findley & Philip M. Pallenberg have formed the partnership of Findley and Pallenberg...**Richard W. Garnett III** is presently residing in Phoenix, Arizona...**Peter A. Galbraith & Patrick H. Owen** have formed the firm of Galbraith & Owen...**Art Robson** and **Alan Schon** have formed the firm of Robson & Schon. **Julie Simon,** formerly counsel with Chugach Electric, has moved to Washington, D.C....**Connie Sipe** is living in Anchorage and taking a computer course at UAA this summer...**Richard Burnham** has opened his own law office in Juneau.

Linda Wingenbach is directing attorney for Micronesian Legal Services in the Marshall Islands...**Will Woodell** is employed with Zieglar, Cloudy, King & Peterson in Ketchikan...**Richard D. Thaler** has relocated to Woodinville, Washington...**John M. Miller** is now in Dillingham...**Jeffrey K. Rubin** has moved from Barrow to Sitka...**Craig Erickson** and **Susan Kery** were married on August 8.

More (little) People

Kathleen Barron and her husband had a baby boy August 12; he was 7 pounds, 2 ounces...**Judge Ashman** and his wife recently welcomed their second girl...while **David Zwink** and his wife had a son this month...**Mark Worcester** and his wife, **April Cook**, had a girl, Fiona Rose...and Pro Bono Coordinator **Seth Eames** and his wife had a baby boy, Alexander Garrison, on August 11th...**Tonja** and **Mark Woelber** welcomed the arrival of their third son, Brett, on July 31...**Joan Clover** gave birth to 7 lb., 7 oz. Michael Vincent on July 21.

We can see that it's true that August is the most common month for birthdays.

Another merger in Anchorage

Another law firm merger in Anchorage has brought us Boyko, Davis, Dennis, Baldwin & Breeze. Edgar Paul Boyko, Paul L. Davis, Elliott T. Dennis and C.R. Baldwin merged with Robert A. Breeze in July. (Breeze also is a partner in Holden, Hackney and Breeze, an advertising, marketing and public relations consulting firm).

Boyko, Dennis, Davis, Ronald D. Flansburg and Kathryn Robb will operate out of offices at 733 W. Fourth Ave., Anchorage. Breeze and Robert L. Breckberg will operate offices at 921 W. Sixth Ave., Anchorage; C.R. Baldwin and Blaine Gillman will office at P.O. Box 4210, Kenai; and Miller, Blyko & Bell, of San Diego, will be an affiliate office. John W. Breeze is of counsel.

Faculty advisor Judge Henry Keene, Jr., of the Superior Court in Ketchikan, Alaska, was winner of the General Jurisdiction "Casper Weinberger Look-Alike Contest" during National Judicial College spring course sessions in Reno, Nev. The winner of the "John DeLorean Look-Alike Contest" declined to be photographed, said the National Judicial College Newsletter issue of Spring, 1987.

--Courtesy, National Judicial College Newsletter

Governor announces new appointments

Gov. Steve Cowper has appointed **Peter Ashman** of Wasilla as District Court judge for the Third Judicial District (Palmer), a position he has held in an acting capacity since September 1986.

Ashman, 35, is a University of Virginia law school graduate who since 1983, has worked for the Alaska Public Defender Agency as a staff and supervising attorney.

An Alaskan since 1980, Ashman supervised statewide Native land claim cases for Alaska Legal Services and served as a district court magistrate in Dillingham for more than two years.

Ashman received his bachelor's degree from the University of Maryland and practiced insurance and maritime law in Baltimore. He is a former congressional intern and is a member of the Alaska Bar Association.

The Alaska Judicial Council submitted two names to the Governor to consider for this judgeship. The other was Fairbanks Assistant District Attorney Mark Wood.

Ashman and his wife, Kay, have two daughters and live in Wasilla.

Cowper also appointed former Anchorage attorney **Robert Evans** to legislative liaison. Evans, 40, was Cowper's assistant director of legislative relations during the seven months preceding the August move, working with contract lobbyist George Sullivan. As the governor's chief liaison to the legislature, Evans will oversee preparation and advocacy of the administration's legislative package.

Before moving to Juneau in January, Evans was an assistant public defender in Anchorage and had previously worked with that agency in Kotzebue. He is a former assistant attorney general and was in private practice in Homer following graduation from Gonzaga University School of Law in 1979.

Philip J. McCarthy, Jr., of the Office of Public Advocacy, Anchorage, was appointed to the Juvenile Justice and Family Services Advisory Committee.

Fairbanks convention a success

Fairbanks has done it again. The local bar association was the perfect host for the 1987 Alaska Bar Association Convention. The Tanana Valley Bar Association and Juanita Helms, Major of the Fairbanks North Star Borough, welcomed everyone to Fairbanks at Thursday's luncheon.

Thursday's CLE programs by Frank Rothschild (Opening and Closing Argument), and Barb Schuhmann and Jim DeWitt were very well received. Both the content and the delivery was excellent. A big thanks goes to Frank, Barb and Jim.

The Center did indeed rock on Thursday evening with most everyone dressed appropriately for the "Back in the 50's Night." The food was great and the band managed to coax a number of bar members and guests out on to the dance floor to relive those 50's and 60's dances.

Friday morning began with the annual business meeting. The most emotion-packed issue was where to hold the 1988 convention. Kodiak won out and bar staff will be visiting the island to scope out facilities and logistics. Chief Justice Jay Rabinowitz spoke to a packed luncheon crowd on Friday.

Friday afternoon and Saturday morning James W. McElhaney captivated his audience with his energetic presentation on "Evidence for Advocates." McElhaney was quite taken with Alaska, too, and indicated a desire to join us again in the future.

The food aboard the riverboat "Discovery" was something! (Oh, those desserts!) Everyone had a great time visiting with friends, new acquaintances and convention guests.

Saturday afternoon was spent at Alaskaland. As expected, the Salmon Bake was great and continues to be one of the best buys for the money in Fairbanks. The highlight of the afternoon had to be the swamping of the canoe by board members Ken Eggers and Mike Thompson...BEFORE THEY LEFT THE DOCK! Their third canoe partner, newly elected board member Ardith Lynch, wasn't yet in the canoe, but gamefully climbed in once the canoe was uprighted.

The convention concluded with a banquet at the Travelers Inn. Ralph Beistline, outgoing President, presented Dick Savell with the Professionalism Award and Keith Brown with the Distinguished Service Award. Guest speaker Dan R. White was a hit. Rumor has it that one member of the bench, head on table, was doubled over in laughter during White's comments.

Is it really true that some members of the bar at the convention were ready to promote President Ralph Beistline as Johnny Carson's replacement?

Successful Bar Examinees June, 1987

Kathleen A. Anamosa	Kenneth F. Hobbs	Kathryn J. Robb
Bruce P. Babbitt	Michael W. Holman	Alice Rafferty Robertson
Douglas J. Barker	Nelson E. Hubbell	Constance J. Sathre
Morgan B. Christen	Cheryl M. Jones	Fern L. Shepard
Paul F. Cronin	Kathy J. Keck	Francis W. Slater
Deborah J. Cronkite	Jean E. Kizer	Margaret M. Smith
Allen R. Dykstra	Susan J. Lee	Terri K. Spigelmyer
Holly A. Eager	Joseph N. Levesque	Gillian K. Stephenson
Bruce E. Falconer	Beth A. Lori	Scott A. Sterling
Morris K. Fortmann, Jr.	Anne K. Lynch	Dana R. Stoker
Barbara L. Franklin	Amy A. McFarlane	Paula A. Tarleton
Rosa J. Garner	Holly R. McLean	Robin A. Taylor
Donna J. Goldsmith	Marjorie A. Mock	Darryl L. Thompson
Richard C. Hacker	Susan D. Murto	Terry A. Venneberg
Ellen M. Hamilton	William C. Pace	Nancy S. Wainwright
Mark T. Handley	Susan A. Parkes	Bruce B. Weyhrauch
James J. Hanlon	David W. Pease	James C. Wolf
Bonnie E. Harris	Robert J. Preston	Mary-Ellen Zalewski
Robert M. Herz	Deborah H. Randall	
James W. Hill, Jr.	Crandon H. Randell	

Legal Services elects officers

The board of directors of Alaska Legal Services Corporation elected new officers at its annual meeting held May 30, 1987 in Anchorage, Alaska.

Maryann Foley, an attorney director from Anchorage, was elected president; Will Schendel, an attorney director from Fairbanks, was re-elected vice-president; and Michael Smith, a lay representative from Fairbanks, was elected to the combined office of secretary-treasurer.

Alaska Legal Services Corp. will hold its next quarterly meeting on Saturday, September 26, in Anchorage.

25-YEAR PINS NOW AVAILABLE

The Alaska Bar Association has 25-year pins now available to any bar member who has been a member of the association for 25 years or more. The pins are available at no charge by simply writing the Alaska Bar Association at P.O. Box 100279, Anchorage, AK 99510, or calling (907) 272-7469.

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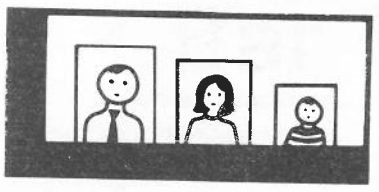

FAMILY LAW

Life as a family law mediator

By Drew Peterson

Having decided to become a Family Law Mediator, I find that the most often asked question about my new business, especially from my lawyer friends and colleagues, is "what is family mediation, anyways?

It is a good question and I must confess to having been somewhat appalled at my own ignorance (upon deciding that I needed more education in the field earlier this year) to discover that family law mediation as it has developed and become standardized in the last few years, is considerably different than even I had thought it to be. And that was true even though I have maintained an interest in the field for years now and thought I was well informed on the subject.

Such ignorance in large part is due to the newness of the field of family mediation as a structured discipline, together with the recent developments in the field as family mediation has been in transition between being a new innovative approach to an old problem and an established and structured discipline.

In this and future articles in the Bar Rag, I will attempt to share the highlights of my re-education, as well as informing my fellow attorneys of new developments in the field of family law mediation. Topics will include Standards for Family Mediators (this issue), common misconceptions about family mediation, certification procedures (or the lack thereof) for family mediators, the ongoing debate betwen the legal and mental health profession as to which is best able to do family mediation, statistical evaluations of family mediation, and the like.

I will also attempt to include a few good family law war stories from time to time (yours are invited!) which those in the know realize surpass any other such stories. Am I alone in thinking the Bar Rag needs more story telling about all our trials and tribulations? I even miss a certain new Judge's formerly bad taste, and wish I could see it again. (But, please don't tell my old pal WHITTAKER that I said anything nice about that fraties person!)

•

Standards of Practice for Mediators of Family Disputes

With the growth of family mediation around the country during the late 1970s and early 1980s, two different professional organizations recognized the need to establish standards of practice for mediators, to develop parameters of reasonable conduct for individuals involved in family and divorce mediators. The first such group was the Association of Family and Conciliation Courts, which held three symposiums on the subject of divorce mediation standards and ethics, in December, 1982; May, 1983; and May, 1984. The end result of the process, which included input from representatives of 30 different professional organizations in the legal, arbitration, mental health and counseling fields, were the Association's "Model Standards of Practice for Family and Divorce Mediation" of May, 1984.

Families gathered at Anchorage's Point Campbell for a company picnic outing in August sun. Sally J Suddock Photo

The Model Standards are common sensical, defining mediation as "...a family-centered conflict resolution process in which an impartial third party assists participants to negotiate a consensual and informed settlement (of family legal disputes)." The Model Standards speak to issues of impartiality, neutrality, confidentiality, fee procedures, mutual financial disclosure, considerations for the best interests of the children, mediator training, continuing education, and the like.

At about the same time that the Association of Family and Conciliation Courts was holding its symposiums concerning mediation, the Family Law Section of the American Bar Association was also getting into the act. Its final product took the form of "Standards of Practice for Family Mediators," adopted in principal by the Family Law Section of the ABA on July 29, 1983. Such Section Standards were subject to minor amendments limiting their application to attorney mediators only, and approved as the "ABA Standards of Practice for Lawyer Mediators in Family Disputes" by the ABA House of Delegates at its annual meeting on August 8, 1984.

The ABA Standards define in their most basic form the duties of an Attorney-Mediator. The ABA Standards can be found in the Family Law Reporter at § 521:0001 (Practice Aid No. 21). The earlier version of the ABA Family Law Section Standards can be found in the Winter 1984 issue of the Family Law Quarterly, (Vol. XVII, No. 4), which journal issue is almost exclusively dedicated to articles concerning family mediation.

Structured along familiar lines of rules of ethics and ethical considerations, the ABA Standards define the following basic duties for an attorney family mediator:

I. The mediator has a duty to define and describe the process of mediation and its cost before the parties reach an agreement to mediate.

II. The mediator shall not voluntarily disclose information obtained through the mediation process without the prior consent of both participants.

III. The mediator has a duty to be impartial.

IV. The mediator has a duty to ensure that the that the mediation participants make decisions based upon sufficient information and knowledge.

V. The mediator has a duty to suspend or terminate mediation whenever continuation of the process would harm one or more of the participants.

VI. The mediator has a continuing duty to advise each of the mediation participants to obtain legal review prior to reaching any agreement.

With the adoption of Standards of Practice, it is the belief of this writer that the field on Family Mediation has matured from an innovative approach to family disputes into a true professional discipline, based upon the experience of many qualified and trained professionals working in the field over a number of years. It certainly remains true that not all cases are appropriate for mediation, but it is believed that when it does work that mediation provides a more satisfactory, less traumatic, and less expensive alternative to resolving complicated family law disputes that does the traditional litigation approach.

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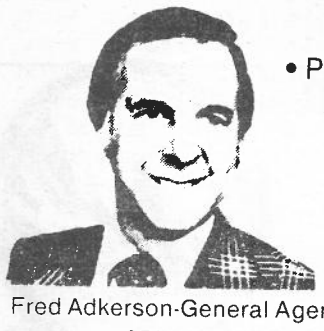

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Other venues

Hong Kong's gaining more overseas lawyers

Hong Kong's status as a leading regional and international center for commerce and banking has created a new demand for sophisticated legal services beyond the range of legal work in a self-sufficient community, says Hong Kong's Attorney General, Michael Thomas.

The new demands were for lawyers to advise on regional loan syndication, project finance, bond issues, cross-border large-scale construction plans, technology transfer and multi-national corporate deals, he said.

Thomas, who was speaking at a Rotary Club luncheon meeting in late June, said the territory had responded to the new demands in three ways.

First, some of the long-established firms rapidly expanded, recruited overseas staff, formed associations with overseas law firms, and learned their way through the new problems that their clients brought to them.

Second, barristers and solicitors from England and Wales whose qualifications gave them the right to practice here, arrived in Hong Kong to take advantage of the expanding market for legal services.

There are now branch offices of 22 major law firms from the city of London, able to undertake all forms of Hong Kong work but chiefly bidding for commercial work. In addition, some 90 to 100 Queen's Counsels come to Hong Kong each year to handle complex and specialist disputes.

The third response came from foreign lawyers, but they were not qualified to practice as barristers and solicitors in Hong Kong.

The first overseas law firms appeared in the early seventies and at the last count there were 20 of them, mostly from the United States and Canada, but including others from West Germany, the Netherlands, Sweden and the Phillipines. These firms have engaged about 70 lawyers.

Thomas said there were now well over 100 lawyers working in Hong Kong who lacked the qualifications required by the laws of Hong Kong to practice here as barristers or solicitors.

"So they cannot appear for clients in the courts of Hong Kong or convey title to real estate in Hong Kong to deal with probate of wills or offer for sale advice on Hong Kong law. But they are busy chiefly handling commercial work in the region," he explained.

U.N. group has Alaska Chapter

The United Nations Association of the United States of America (UNA/USA) now has an Alaska chapter in formation. This dynamic organization would like to obtain the support of Alaskan attorneys.

Planned activities for the 1987-88 calendar year include:

October 22, 1987 (United Nations Day) The Second Annual Kenai Peninsula Model Security Council, and the Alaska Pacific University United Nations Day Celebration.

February 5-6, 1987 The Sixth Annual Alaska Model United Nations held at the University of Alaska, Anchorage, Arts Center.

March, 1988 Alaska Pacific University and University of Alaska, Fairbanks, United Nations Clubs travel to the National Collegiate Model United Nations in New York City.

June 1988 Alaska Pacific University United Nations Club represents Alaska at the European International Model United Nations held at The Hague, Netherlands.

Recognized for excellence, the Alaska Chapter of the UNA/USA is being considered as the host for the featured National Model United Nations for High School Students during the Summer of 1989.

The Alaska Model United Nations program has provided students from throughout the state with the opportunity to learn the skills of diplomacy, leadership, and conflict resolution while tackling the complex issues that confront our world. These students are tomorrow's leaders.

The UNA/USA Alaska Chapter could use your support. If interested, please write John McKee, Director, UNA/USA Alaska Chapter, Alaska Pacific University, 4101 University Drive, Anchorage, AK 99508. Please feel free to call John McKee, or Kathryn Barth, at 564-8292 for more information.

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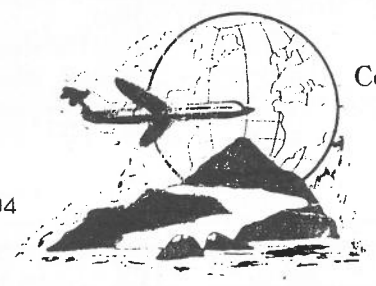

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A view of Anchorage's new Fifth Avenue Center shopping mall and its "people" sculptures. Jay Schweitzer photo courtesy Alaska Journal of Commerce

Commerce Clearing House reports tax changes

Rules governing attorney's fee awards in federal tax cases have been sharply altered by the 1986 Tax Reform Act in two key areas — calculation of the fee, and the burden of proof standard, notes tax and business law publisher Commerce Clearing House.

Effective for fee payments made after September 30, 1986, in civil actions or proceedings that began after 1985, the $25,000 cap is eliminated and replaced by a $75-an-hour limitation, unless the court determines a higher rate is justified.

To make this determination, the court may look to an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys to deal with the particular issues involved in the case.

The Act also replaces the standard that required the taxpayer to prove the government's position was unreasonable before the taxpayer could be awarded attorney's fees with the "substantially justified standard," CCH said.

In order to prevail, taxpayers must establish that the position of the U.S. in the civil proceeding was not substantially justified and the taxpayers must have substantially prevailed with respect to the most significant issue or set of issues presented. The position of the U.S. for this purpose includes any pre-litigation administrative action or inaction by the IRS upon which the court proceeding is based.

Reasonable Litigation Costs

Only reasonable litigation costs may be recovered by the taxpayer. In addition, a taxpayer may recover costs of a third party incurred on behalf of the taxpayer. Reasonable litigation costs include reasonable court costs and the reasonable expenses of expert witnesses in connection with the civil proceeding.

The court may apply prevailing market rates to determine what constitutes reasonable expenses of expert witnesses and the reasonable costs of any study, analysis, engineering, report, test or project necessary for the preparation of the taxpayer's case.

However, no expert witnesses are to be compensated at a rate higher than the highest rate of compensation for expert witnesses paid by the U.S. government.

Exhaustion of Administrative Remedies

A taxpayer must exhaust all administrative remedies available to him before seeking to recover litigation costs in a civil tax proceeding.

In order for a taxpayer to be considered as having exhausted all IRS remedies the taxpayer must: (1) request, in writing, an Appeals Office conference; (2) participate at the conference; and (3) agree to extend the time for an assessment of tax if it is necessary to provide the Appeals Office with a reasonable time period to consider the taxpayer's tax matter.

A taxpayer is *not* required to pursue the administrative remedies if:

(1) the IRS notifies him that to do is unnecessary;

(2) the taxpayer does not receive a preliminary notice of deficiency prior to the issuance of a statutory notice of deficiency; or

(3) the IRS fails to grant the taxpayer a conference with the Appeals officer within six months after the taxpayer has filed a refund claim.

Delay in Proceedings

The Tax Court may deny awards of court costs and attorney's fees to a prevailing party who unreasonably protracts the proceeding. This provision is in addition to an award of damages that may be assessed by the court against the taxpayer if the suit was brought or maintained primarily for delay or the taxpayer's position in the proceedings is frivolous or groundless, CCH said.

The Alaska Public Offices Commission is recruiting for the position of Executive Director. This is a partially exempt position based in Anchorage.

Under the general policy direction of the Alaska Public Offices Commission, the Executive Director plans, supervises and coordinates assigned activities, which include Commision authority for overseeing election campaign disclosure and administering conflict of interest and lobbying laws. A high degree of management and communications skills and the ability to relate to a varied constituency is needed. This position also requires decision making free of political bias.

Graduation from an accredited college, graduate degree or equivalent, and three years of professional administrative experience is required. Other combinations of training and experience will be considered for comparability.

The salary for this position is now under review by the Alaska Public Offices Commission. The current minimum salary $4,687 per month. This position is now classified as a Range 24 but is subject to the review now underway.

A resume or official State of Alaska application form must be postmarked no later than August 31, 1987, to Diana DeSimone, Director, Division of Personnel, P.O. Box C, Juneau, AK 99811-0201.

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events that occur each second and thereby create the phenomenon itself of word processing, seem to merge together. Sometimes it seems as if the action on the screen does in fact flow like a wave rolling shorewards. This illusion is even more pronounced in the many video arcade games. All the while, however, the computer is performing nothing more than a series of small discreet steps. The key to the illusion of simultaneity is the tremendous speed at which the computer performs its individual instructions, combined with the labyrinthine complexity of its circuitry.

Electrical engineers have always had to fight the twin problems of size and heat in the design of electrical circuitry. Computer architects inherited a more invidious problem: The circuitry required to translate a high speed stream of 0s and is into meaningful patterns, difficult enough to design, was initially impossible to build.

To grasp the elegance of the solution which made the word processor on your secretary's desk possible (or perhaps even the one on your own desk), it may help to have a keener sense of the original problem. To convey this sense, I'm going to start with a sort of conceptual montage here.

"Sometimes it seems as if the action on the screen does in fact flow like a wave rolling shorewards."

Imagine a rectangular surface, vertical, covered with light bulbs in regular rows and columns. Imagine that there are 200 rows on this billboard, and that there are 640 columns. Simple multiplication tells us that the billboard is populated by 132,000 lightbulbs. Now, just to make it poetic and interesting, imagine that our rectangular surface is huge, 200 feet high and 273 feet across, and every night appears on the side of a valley, and that every night we can sit out on the veranda at our place on the other side of the valley, in a sort of perpetual summer balminess, at the dawn of the computer age. We can, moreover, sip gin and tonic and amuse ourselves by throwing the switches on the rather largish panel at the edge of the veranda. Each switch corresponds to a light on the billboard out across the valley in the night. The switch panel is also 200 rows deep, and 640 columns across. There are, of course, lots of switches on the panel.

The first night, we stand at the rail, looking out across the distance. We throw a switch on our panel down at row 73, and across at column 230. Out across there in the dark, towards the center of the looming monolithic rectangle across the valley, a sharp point of light winks on and glows steadily. We turn the switch off. The point disappears.

We turn it back on. The point reappears. Being reasonably clever and intelligent people, and, let's admit it, somewhat bored, we quickly realize that we can draw out letters simply by turning on the switches in certain patterns. The edge quickly goes off the joy of discovery, however, as we find out just how tedious this can be. It takes 43 points of light just to draw a decent capital A. Vanna White could process letters faster, not to mention words.

Moreover, while we can maybe bite the bullet on flipping the individual switches on to write the patterns, this being an essentially creative exercise, flipping the individual switches off again just to clear the patterns, an essentially mechanical exercise, chaffs at our sense of elegance. Out of this creeping discontent comes the idea for our first technological advance, which we vow to work on all day tomorrow and have ready to fly by the time darkness has come round again.

The idea is this: While we still have to turn the switches on individually as part of the creative process, why don't we equip each one with an electro-mechanical override? We could then connect all 132,000 of these relays to a single power switch, then with a single flip of this switch we can flip all the others off and clear the whole slate.

Keeping with the dreamlike atmosphere here, we have unlimited supplies of wire and electro-mechanical devices. Working like fiends, we get everything wired up and set just as the sun goes down on the second evening.

With painstaking meticulousness, we flip switches on the big panel as the night deepens until at last we have a remarkable likeness of Max Headroom glowing on the big board across the valley. At midnight, the big moment comes. We assemble at the end of the veranda, and a lucky designee trips the clear screen toggle.

A sharp, almost explosive crackle rips the air. Then silence. Across the valley, Max glows on undisturbed in the night. As a light breeze sweeps the pungent ozone smell and the light black flakes of disintegrated insulation off into the evening air, we have learned our first lesson in complex circuitry. We should've maybe beefed up the conductor wire on that main switch a little. It was like plugging 132,000 toasters into a single outlet with 10,000 or 20,000 of those plug branching things you can get at Pak 'n Pack.

But, hey, no problem, we've got all the copper conductor of any gauge we need. We rewire the main loop with some heavy stuff this time, quarter-inch conductor bars, and just as the pink of dawn begins to nose curiously over the east horizon, we trip the main toggle again. With a sound like 132,000 BBs dropped simultaneously on a hardwood floor, the relays trip, and across the valley the big rectangle goes blank. Success. And after only one life-threatening catastrophe.

As so often happens in these sort of affairs, the initial achievement raises the gate on a virtual flood of succeeding inspirations. If we can clear the screen with a single switch, why can't we wire up a switch that will just toggle on selected primary switches to form, say, the letter "A"? Then instead of having to turn every one of those wretched little things on individually, we can just flip this one. 'Gimme an A!' Click. 'A'.

Not apparently needing much sleep, we work all through the second day to wire up an assortment of letters. Things are getting a little cluttered, but we assume that we can invent first, tidy up later. That night is our grandest display yet. We can write the whole alphabet out there. Of course, the letters are still positionally locked in whatever coordinates they were wired to, but we'll fix that. There is one minor fly in the ointment. The "G" got cross-wired so it looks more like a treble clef. But, a pair of wire cutters, a little solder, no problem. Like characters in a Greek drama, we fail to understand this seemingly innocuous little slip-up for the harbinger that it is.

On the third day, unfortunately, the project begins to bog down. It's the matter of readdressing the letters to various positions on the screen. There's more complexity here than we thought. If allocate a 14×8 dot pattern for each of our letters, we've got 2,000 possible character positions on the screen, consisting of 80 columns and 25 rows. We initially consider an individual switch for each letter/position. However, just with the upper case letters, this would add 52,000 switches to our increasingly byzantine machine. On the spot we invent the word "kludge"[2], and reject this scheme.

We finally opt for a more logically convoluted, but less hardware intensive scheme. We've got a master bank of switches with three banks of toggles. On the first bank we indicate the letter we want, on the second the row coordinate, on the third the column coordinate. Of course, there's several layers of translation circuitry to get these instructions converted to an actual letter out there. We've got to convert the decimal numbering scheme on our control panel to binary so the low level circuitry will understand which coordinates to target on the big screen. Additionally, we need to encode our character set so the system will understand which character to place out at the designated coordinates.

But the design, though complex, isn't really that bad. In a way, of course, it's kind of like a Hell edition of the New York Times crossword puzzle. But our system is a digital machine, after all, and you can work it out bit by logical bit. "If this, then that. If this and this and this, then that. If this and not that, then this, and etc. and etc."

The actual assembly though, is rapidly getting to be a nightmare. It's getting so you can't even get your hands in there anymore.[3] Of course, we can fabricate all the printed circuits we can conceive of. Still, the thing is starting to look like Medusa with a bad perm.

Through heroic efforts, we push the convention engineering techniques at our disposal to the limits, and we get it wired up. By this time, everybody's got all sorts of band-aids and swatches of mercurochrome on their hands. Not only is there not a lot of room in there to maneuver, but after the thing is on for awhile in our test runs, it gets *hot*. Those relays can be power-hungry little devils.

"The sheer number of components virtually assures that something gets screwed up during the assembly process. It's like Murphy's Law with a couple of jet booster rockets strapped onto it."

That evening though, the results are more tantalizing than ever. With relative ease we can spell out whole sentences. A flip of the clear screen switch clears the board. We've wired in a set of special characters that allow us to draw boxes and lines, so we can create things that look like this:

```
— NOW PLAYING —
GODZILLA AND MS. PACMAN
In:
"WHO'S COMING TO DINNER?"
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It's fun as hell. Moreover, even as we play with the switches, new ideas are going off all around like strings of firecrackers. We could maybe transcend our simple character based scheme and implement word or sentence based processing. Or hell, even a paragraph or page-based orientation. We could fix up some real fancy editing functions, like making sentences push automatically to the right margin, then word-wrap. We could create permanent storage devices, so you could work on a document one day, then retrieve it the next and edit it, and . . . and . . . no more retyping! No more White-Out!

But, there is trouble brewing in paradise. After devoting the fourth day to completion of the entire set of schematics, we work straight on through the night in the early stages of fabrication. By the middle of the fifth day, we are locked in a death struggle with the invidious concept once known the "Tyranny of Numbers."[4] The sheer number of components virtually ensures that something gets screwed up during the assembly process. It's like Murphy's Law with a couple of jet booster rockets strapped onto it.

Moreover, the thing is turning into a monster of size and weight. We've had to shore up the veranda with 4x4 posts. And the heat. In the evening, stare over the top the thing, and the stars flicker and dance in the billowing thermal waves coming up off the top of the thing.

By the end of the sixth day, it's obvious that it's hopeless. Look at the thing, all 15 tons of it. We've even had to ditch the lawn chairs to make room for it. Wires are strewn all over. It's a mess. We've lost control of the project. Maybe the old Underwood wasn't so bad after all. We crack our last bottle of Tangeray for some assistance in contemplating just what it was that went wrong.

And so, on the seventh day, we are not so much resting as we are unemployed. It has become apparent that our imaginations, striding along in ten league boots, have far outpaced the realities achievable with the technologies we command.

But still. . . . We could do it, but. . . . Hmm . . . It's the switches, basically. Yes, the switches. We need to make them smaller, a lot smaller, and we need to make them faster, a lot faster. The electromagnetic relays we struggled with are obviously out. So are vacuum tubes. Ideally, we need the tiniest possible physical device that can control the wispy traces of low voltage current needed for the intermediate logic steps. Ideally, these things need not generate any more current that do our own brains when we've thinking about them. And lastly, we've just got to finesse that damn assembly problem somehow.

Right. But how to do it. . . .

Well, I hope that gives you enough of a feel for the problem so that you'll now be able to understand the significance of the events that constitute the hardware revolution. The 200 X 640 pattern of the imaginary billboard was not chosen randomly, by the way. It's the pixel[5] pattern of the screen of an IBM PC in 80 column text mode.

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The initial flyer at building a computing engine is pretty clearly attributable to Charles Babbage, a 19th Century English inventor. Babbage, although he correctly intuited the logical structure such a machine would have, with input, output, calculating, and storage devices, had a worse time than even we did in the paragraphs above. Babbage, constrained to the technologies of his day, attempted to implement *his* theories in an entirely mechanical system. Babbage died a frustrated and embittered man.

"The early prototype computers operated with electromagnetic relays to control the flow of logic steps that go into an actual calculation."

For our purposes, progress in computers didn't attain its current state of continual acceleration until the Second World War, and it is there that we will pick up the story, in medias res. The War itself provided much of the impetus for development of the modern computer, this in a very direct way inasmuch as calculation of the ballistics of shell trajectories were one of the first practical uses the new systems were put to.

The early prototype computers operated with electromagnetic relays to control the flow of logic steps that go into an actual calculation. Not surprisingly, the first of the computers originated in Bell Laboratories, shortly before the war.[6] Development of the nation-wide phone system had given Bell substantial experience with electromagnetic relays, the switching device used in these early machines.

Electromagnetic relays are fairly simple devices. We used electromagnetic relays in our own failed project. One pair of wires coming into the device controls an electromagnet. The electromagnet typically is mounted beneath a spring loaded arm. The other pair of wires in the unit are connected, respectively, to a contact point at the end of the arm, and a contact point on the base, just below the arm.

When the current to the electromagnet is off, the pressure exerted by the spring keeps the contact points separated and no current flows through the second pair of wires. Turn the current to the electromagnet on, and the resulting magnetic field pulls the arm downward, bringing the contact points together and closing the circuit. Current then flows through the second pair of wires.

For our purposes, that is, building a modern computer, there are a number of problems with this type of switch. First of all, there are moving parts. As we try to accelerate the speed of our system, we would have to cope with problems like inertial loading. An example of inertia loading is valve float in a high performance racing engine. Valve float develops when the engine is driven so fast that the lob on the cam shoves the valves open with such force that the resulting momentum drives the valves right up into the valve springs and off the cam. The individual valves "float" momentarily before the springs fully absorb the momentum and then drive the valves back into the closed position. This generally impairs engine performance.

This is probably the least of the problems we would have to deal with. With physically moving parts, we're back into "toaster" physics. In other words, the minimum electrical usage in our system is going to be substantial no matter what we do because we're moving physical parts around. This in turn is going to generate a rather severe heat problem and thereby limit the complexity of the system we can build.[7] As you'll understand below, the only moving parts we want involved in all our intermediate processing steps are electrons. When we get the answer we want, then we'll transfer the answer to system components with enough voltage to blast the answer out against the screen, or to a printer, or to a disk drive.

Additionally, a system made of electromechanical switching devices is going to be physically big. In turn, some of the circuit paths are going to be pretty long, ten or twenty feet or so. As fast as electrical current travels, its still going to take twenty times as long to travel a 20 foot wire as it does a one foot wire. The significance of this factor stands out better when we start thinking in terms of the time frames appropriate to a modern computer, say, billionths of a second. How far can an electrical impulse, traveling at the speed of light, travel in a billionth of a second? 11.78 inches.

Lastly, we're still faced with the Green Monster: The Tyranny of Numbers. Until we find the way to more or less directly transform our grand ideas into electrical circuitry, we're going to fail. The economics and practical difficulties inherent in a piece-by-piece assembly will defeat us. To give you a little preview of the future, which, as some advertisement or the other says is Now, here's an example of the circuit density which made possible the IBM PC. The central processor in the PC is an Intel 8088. This chip consists of 22,000 components on a quarter inch square piece of silicon.[8] These days, in quantity purchases, the 8088 goes for about 10 bucks.

In November of 1945, 200% over budget, and, well, after the war is already over, we leap into the First Generation[9] of true computers, with the advent of ENIAC.[10]

Among other advances, and most relevant to the thread we are pursuing here, ENIAC employed vacuum tubes, and not electromagnetic relays, as its principle switching devices.

Here's the deal[11] on how a vacuum tube can be made to behave as a switch. The basic principle involved is the Edison effect. The Edison Effect is this: Heat a wire filament up to incandescence, and hot electrons will boil away from the surface. And what is an electrical current if not a stream of electrons? So far, so good.

Next, put a metal plate, at a lower temperature, next to the filament. The plate will collect the electrons streaming from the filament, and a completed circuit is formed. Conceptually, that gets us halfway.

Now, between the plate and the filament, put a grid of perforated metal.[12] Lastly, connect a couple of wires to this grid so we can place a charge on the grid when we want.

With the device completed, we first put an electrical current on the primary circuit. Our filament goes incandescent, and electrons boil off, traverse the holes in the grid, and are absorbed into the plate. In short, we've got a completed electrical circuit, and current is flowing.

We go to our secondary circuit, the one that includes the intermediary grid in its loop, and apply a current that results in a negative charge being placed on the grid. Remember, the perforated grid is positioned between the hot filament (which is emitting electrons) and the plate (which is absorbing electrons). And here is the key: The negative charge on the grid repels the electrons boiling away from the filament, and the flow of current through the primary circuit *instantly*[13] stops. We drop the negative charge to the grid. The repelling effect disappears, and the electrons once again flow through the holes in the grid, and the flow of current through the primary circuit *instantly* resumes.

Once again, the basic concept of our switching device is the same: We have the device itself and four wires leading into it. Two are for the primary circuit, here containing the filament and the plate. Two are for the secondary, or bias, circuit, here containing the grid — which can block electron flow, or allow electrons to pass, depending on its charge.

However, the vacuum tube represents a substantial advance over the electromagnetic relay. Namely, we've now got *fully electronic* execution. No more dragging around waiting for a five-hundredth of a second while some relay closes before we can perform our next logic step. This thing is *fast.* In fact, you can turn the bias current on and off a million times a second, and primary current stops and starts an exact million times a second with no problem. It's like trying to get rid of your kid brother when you wanted to go to the movies with your friends.

In short, with the vacuum tube, we've made a major advance in speed. Unfortunately, several of the other problem areas persist, such as size and heat. Those tubes are fast. They're also bulky and power-hungry. ENIAC was eight feet high, eighty feet long, and weighed thirty tons. It consumed 174,000 watts of power.[14]

"The transistor exploited properties of certain materials known as semi-conductors."

Moreover, the economics of assembly, when compared to the purchase price of the 8088 mentioned above, were brutal. ENIAC cost approximately $500,000 to build.

Our next major event occurs in 1948 with the invention of the junction transistor. The transistor exploited properties of certain materials known as semiconductors. A semiconductor is "[A] substance, such as germanium or silicon, whose conductivity . . . is improved by minute additions of certain substances or by the application of . . . voltage. . . ."[15]

A junction transistor consists of a positively doped area of silicon sandwiched between two negatively doped areas. This is known as a N-P-N transistor. The first negatively doped area is called the "source." This is equivalent to the filament in our vacuum tube. The second negatively doped area is called the "drain." This is equivalent to the plate in our vacuum tube. In other words, electrical current flows from the source and, literally, down the drain.

Between the source and the drain, is the positively doped area known as the "gate." This gate is equivalent to the grid in the center of the vacuum tube. (The grid in turn is functionally equivalent to the electromagnet in our electromagnetic relay. In other words, it's a circuit that regulates the on/off state of another circuit.)

As you may have divined by this point, functionally, it's the same old story. Apply a charge to positively doped "gate," and, per our Webster's definition, this application of current changes the gate from a non-conductor to a conductor. Current then instantly begins to flow from the source to the drain. Drop the current to the gate, the current flowing from the source to the drain instantly stops.

However, while the functional attributes of the device remain the same, we are now into "solid state" electronics. Instead of a bulky, hot, fragile, power-hungry tube, we have a minute, rugged, cool, bit of semi-conductor doped here and there with various carefully calculated amounts of impurities.

The first transistorized computers began to appear in the late 1950s and early 1961s, thereby ushering what is known as the Second Generation. The computers of the Second Generation were smaller, ran cooler, and were more powerful than their vacuum tube predecessors. In fact, the computers of the Second Generation were everything a modern computer is, except for the method of manufacturing the circuitry. In short, individual transistors were still produced and assembled individually, and the Tyranny of Numbers, or the interconnectivity problem, as it was also still held the industry back.

The solution that finally ended the reign of the Tyranny of Numbers was the integrated circuit. The integrated circuit was the invention of two men working independently of each other, Jack Kilby, of Texas Instruments, and Robert Noyce, of Fairchild Semiconductor.

The idea of the integrated circuit grew more or less directly from the discovery that silicon could serve as a "universal material" for the fabrication of electrical components. Now, when I said at the beginning of this article that a computer is nothing more than an elaborate set of electrical switches, well, I was lying. But no, wait, before you head for the exits, hear me out.

A computer in fact does contain other typical electrical devices, such as capacitors and resistors. However, my lie was a White Lie inasmuch all other electrical components in the system are subordinated to the switching function. It's the switching function that embodies the logic of program execution. And after all, it's the logical architecture of the system that we care about ultimately, because it's this logical architecture that ultimately manifests itself up there on the screen as our word processor, or spreadsheet, or whatever.

As I mentioned, the idea that silicon could serve as a "universal material" occurred to both Kilby and Noyce at the same time. Of course, as always, there were the initial technical difficulties. Silicon was an unpredictable and difficult material to work with. The first transistors, in fact, had been fabricated from

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germanium. But gradually, and after a fashion, and with a lot of fiddling around, Kilby[6] succeeded in fabricating each of the basic circuit devices, resisters, capacitors, and such, by selectively doping areas on a piece of silicon. And the shining vision of the future gleamed tantalizingly through the admitted crudeness of the prototypes.

In Reid's words, "The more Kilby thought about it, the more appealing this notion became. If all the parts were integrated on a single slice of silicon, you wouldn't have to wire anything together. Connections could be laid down internally within the semiconductor chip; no matter how complex the circuit, nobody would have to solder anything together. The numbers barrier would disappear."[7]

The only thing that remained was to test the concept in a practical device. The device chosen was a phase-shift oscillator. A phase shift oscillator uses all four of the standard circuit components: resistors, capacitors, distributed capacitors, and transistors. A phase shift oscillator, placed in a direct current circuit, will cause the normally steady state current to oscillate. This in turn will make the normally straight line in which d.c. appears on the screen of an oscilloscope, appear instead as a sine wave.

Working through August and into September of 1958, Kilby readied his phase-shift oscillator for a test in front of the Texas Instruments brass. I will let Reid carry the ball here for a bit.

"On September 12, 1958, Jack Kilby's oscillator-on-a-chip, half an inch long and narrower than a toothpick, was finally ready. A group of Texas Instruments executives gathered in Kilby's area in the lab to see if this tiny and wholly new species of circuit would really work. Conceptually, of course, Kilby knew it would; he had thought the thing through so often, there couldn't be a flaw. Or could there? After all, nobody had ever done anything like this before. Kilby was strangely nervous as he hooked up the wires from the battery to his small monolithic circuit, and from the circuit to the oscilloscope. He fiddled with the dials on the oscilloscope. He checked the connections. He looked up at Adcock, who gave him a here-goes-nothin' shrug. He checked the connections again. He took a deep breath. He pushed the switch. Immediately a bright green snake of light started undulating across the screen in a perfect, unending sine wave. The integrated circuit, the answer to the tyranny of numbers, had worked. The men in the room looked at the sine wave, looked at Kilby, looked at the chip, looked at the sine wave again. Then everybody broke into broad smiles. A new era in electronics had been born."[8]

To be more explicit, the breakthrough represented by the integrated circuit is this: Once you have the *blueprint,* you virtually have the finished product. The design from the print is photoimposed on a slice of highly pure silicon, then with successive doping and chemical masking procedures, you build all the components and all the interconnections simultaneously. In short, the production of the modern integrated chip is like taking a snapshot of the Mona Lisa, as opposed to getting yourself some canvas, some paints, and some brushes and starting from that beginning point.[9]

I hope I have fulfilled my initial promise to you and that you now have a sense of what the Chip is and does, and what all the hoopla in the popular press over the last decade or so has been all about.

A final note on the state of the art today. There are essentially three ways to accelerate a computer's speed: (A) Alter the logical architecture to achieve greater efficiencies, (B) Shorten the paths the current has to travel, and/or (C) Use faster switching devices.[20]

The latter two techniques are essentially hardware stratagems. Keeping the lengths of the circuit paths short basically involves common sense design decisions, like Seymour Cray's in the design of the Cray-1.[21]

Finding faster and faster switches goes to the heart of physics. The faster the switch, the less is the effect of a phenomenon called "propagation delay." Propagation delay is the measure of the time required for a semiconductor switch to go from off to on, or vice versa, after the burst of current hits the gate. For the transistors in a microcomputer like the IBM PC propagation delay is about one half a millionth of a second.[22] When we compare this time span, with the distance an electrical impulse can travel in a billionth of a second, 11.78 inches, with the size of the 8088 chip, one quarter inch square, it is obvious that propagation delay is one of the major speed limiting factors in a modern personal computer.

Here, however, is the current state of the art. The current speed record is held by transistors made from a semiconductor called gallium arsenide. Transistors made from gallium arsenide can be made to switch back and forth between clean on and off states 230 billion times a second. If we think of the computer as a servant, which it essentially is, this puts new meaning into the term "alacrity."

Though gallium arsenide technology is currently limited to use in large-scale systems, it is probably only a matter of time before it migrates downward to microcomputers and winds up, eventually, on your desk.

Next issue: The Architecture of Program Execution.

Stephen Nebel is an attorney up here in Fairbanks who has basically drifted over the line from practicing law to full-time computer consulting. You can reach him at Office Automation, Inc., P.O. Box 2550, Fairbanks, Alaska 99707 (907) 479-7671.

[4] There is an excellent discussion of this problem in *The Chip,* cited in footnote 1.

[5] Just as "Bit" is short for "Binary Digit," "Pixel" is short for "Picture Element." In short, one of the dots that characters are built of.

[6] Bell labs had completed the Model I "complex number calculator" by October of 1939. Like our machine at the point where we gave up on it, the Model I was all "hard-wired." See Stan Augarten, *Bit by Bit: An Illustrated History of Computers* (Ticknor & Fields, N.Y., 1984), 102. In short, unlike a modern computer, the Model I had only those capabilities that were built into it. You couldn't, for instance, load a word processing program and write a letter, then load a spreadsheet program and balance your checkbook.

[7] "(T)here was just no point in building a machine that would melt to shards as soon as the power was turned on." Reid, *The Chip,* 17.

[8] This is an example of LSI, or large scale integration. Of course, in the ten years of development since the introduction of the 8088, circuit demsities have increased substantially. The 80286, successor chip to the 8088, puts 135,000 components in the same area. This circuit density is known as VLSI, or very large scale integration. The 80386, successor chip to the 80286, and the chip that powers the Compaq 386, packs 250,000 components into a quarter inch square. The 80486, you guessed it, successor chip to the 80386, and due out in 1990, will put an incredible 1.25 million components into this quarter inch space. See *InfoWorld,* June 15, 1987, p. 6. The 80486 will have a computational capacity of 20 million instructions per second, roughly equivalent to an IBM Sierra Mainframe.

[9] As frequently is the case with these sort of generational delineations, there is some caviling as to where the boundaries actually lie. By some definitions, ENIAC precedes the first generation inasmuch as it was not a stored program computer. However, Augarten says "(E)NIAC kicked off the computer industry." And that's good enough for me. Augarten, *Bit by Bit,* 124. In any case, it is undisputable that ENIAC was a vacuum tube, and not an electromagnetic relay computer.

[10] "Electrical Numerator, Integrator, Analyzer and Computer."

[11] Use of the term "deal" courtesy of The Honorable Jay Hodges of the Fairbanks bench, with whom I've spent many enjoyable and interesting hours designing and implementing a database system to track judicial time spent.

[12] Did you ever look at the vacuum tubes of a radio back when you were a kid and wonder what the fence was in the middle? Well, this is what it was.

[13] Inasmuch as I'm going to some effort in this article to imbue you with a somewhat specialized sense of time, I should probably qualify my term here. By "instantly" I mean somewhere in the near vicinity of the speed of light.

[14] Augarten, *Bit by Bit,* 125.

[15] *Webster's New World Dictionary of Computer Terms,* 225-226.

[16] I do not mean to slight Noyce here. But for economies of space, I'll limit the telling of the story to Kilby's side of it.

[17] Reid, *The Chip,* 65.

[18] *Ibid.,* 67.

[19] There is an excellent, well-illustrated discussion of the fabrication process in *Computer Basics* (Alexandria, Virginia: Time-Life, 1986), 79 ff. The page cite begins a chapter called "Masterpieces of Miniaturization."

[20] *Speed and Power,* 33.

[21] See fn 3.

[22] Reid, *The Chip,* 153.

[6] "After you become reconciled to the nanosecond," Robert Noyce has observed, "Computer operations are conceptually fairly simple." Quoted by T.R. Reid in *The Chip* (New York: Simon & Schuster, 1985), 21. Robert Noyce, with Jack Kilby, was one of the co-inventors of the integrated circuit. Reid's book gives an excellent account of the hardware revolution. Additionally, he writes with a fine sense of humor.

[7] "(A)ny hardware and/or software system that has been . . . improvised from various mismatched parts. . . ." *Webster's New World Dictionary of Computer Terms* (New York: Simon & Schuster, 1983), 143.

[8] Even in these modern days of the integrated circuit, physical assembly problems like this are still with us. Witness this account of the design of the Cray-1 supercomputer. "There was an equally down-to-earth reason for the less than three-foot-wide inner chamber. Theoretically, the ideal shape for the Cray-1 would have been a compact sphere. But human technicians would not have been able to reach inside to solder the 100,000 plus connections in its 60 miles of wiring. The next-best shape, Cray reasoned, would be a hollow cylinder with a gap just wide enough to accommodate a small person. Local women — whom Cray called the "assembler girls" — were hired for the painstaking, six-month-long task of hand-wiring the computer. 'We chose a cylinder as small as we could make it and get anybody to work inside'." *Speed and Power* (Alexandria, Virginia: Time-Life Books, 1987), 39.

Verdict and settlement reporting summaries

Following are brief summaries of the Verdict and Settlement Reporting Forms submitted to the Alaska Bar Association. Copies of the forms may be purchased for $.50 per form. Please refer to Alaska Bar Rag Volume and Number and the number of the summary below when ordering. For more information, please call the Bar office at 272-7469.

1. *Kevin F. Stoddard v. Daniel L. Knauss, deceased, and Nathaniel Knauss, Personal Representative for the Estate of Daniel Knauss* (1JU-85-2700 Civ). Personal injury action arising from head-on collision. Liability was not a significant issue. Plaintiff suffered minor contusions and abrasions to his elbows, knees, a saddle deformity of the nose, and nasal septum deformation obstructing at least 50% of right nasal airway. **Special damages:** $7,500+. **Plaintiff's demand:** $30,000 (final offer of judgment). **Defendant's offer:** $20,000 (final offer of judgment). **Negotiated cash settlement:** $20,000.

2. *Susan Boyle v. Bill Ray, Jr., City and Borough of Juneau* (1JU-87-114 Civ). Slip and fall by Plaintiff as she exited the City Borough offices after entering the work area of artist Bill Ray, Jr., who was completing a mural on the side of the municipal building. Mural preservatives had been inadvertently sprayed on the sidewalk. Fracture of lower arm and wrist; no permanent injuries. **Special damages:** $3,600. **Plaintiff's demand:** $10,500. **Defendant's offer:** $3,600 (pre-filing offer). **Negotiated cash settlement:** $10,500.

3. *Marianne Perkins v. City Cab Co., Mack Nakamura* (1JU-86-833 Civ). Plaintiff's vehicle was rear ended by vehicle belonging to Nakamura, who was cited and subsequently convicted of driving too fast for conditions. Whiplash injuries to upper spine and neck, causing cervical strain and aggravating pre-existing degenerative disc disease and osteoarthritis; permanent damage to ligaments in neck. **Special damages:** $9,000. **Plaintiff's demand:** $44,000 (pre-filing demand). **Defendant s offer:** $30,000 (final offer of judgement). **Negotiated cash settlement:** $40,000.

• How to call the deer

Continued from page 1

better able to seek and find you than you are to seek and find them. You just have to talk to them. Game-calling is one of the oldest aboriginal arts but, until recently, it has been the exclusive province of the highly sophisticated naturalist or hunter. I have been successfully calling game for a number of years. Absolutely anyone can do it. It's easy and it's a helluva lot of fun. Read on.

Alaska-Yukon moose
(Alces Alces Gigas)

Moose are easy to call, but generally only during the "rut" or breeding season. The heighth of the rut occurs during a 10-day period centered on October 1. Moose can effectively be called as early as the first week in September and as late as the first part of November. It's best to try calling early in the morning and late in the evening. An exceptionally cold night always makes for a morning of productive calling. Testosterone levels go up as the temperature goes down, making the bulls more aggressive and vocal. Around Anchorage you can easily call bull moose in Kincaid Park, on Fort Richardson, and in Chugach Park, beyond the ends of Upper 0'Malley and Upper Huffman roads. Bulls can be found at almost any elevation, but they prefer to do most of their breeding and fighting at approximately the 2,500 foot level.

Bulls spend a great deal of time breaking and raking brush with their antlers. They locate each other and exhibit aggressive behavior through this activity. Bull moose can be attracted by simply duplicating this noise. All you have to do is obtain a shoulder blade from your local butcher shop or friendly moose hunter. This lightweight implement, when rubbed against a Spruce tree, perfectly duplicates the sound of moose antlers rubbing against trees and brush. Make the noise periodically while breaking sticks and you are sure to get a look at a bull.

More sophisticated moose callers use their voices to duplicate sounds made by bulls and cows during the rut. Believe me, this is easy! You can do it whether you have ever seen a moose or not. There is a great tape put out by the International Moose Federation, 4414 E. 6th, Anchorage, Alaska 99508; 907-338- 1971. It,s entitled "The World Of Moose And The Art Of Moose Calling." You can obtain the tape as part of a membership in the International Moose Federation for $25. Separately, the tape sells for $15 plus $1.50 for postage and handling. The tapes can also be secured at Alaska Archery, 1227 E. 75th Avenue, Anchorage, Alaska, 907-344-1227. Another excellent instructional cassette is entitled "Moose Callin'." It can be obtained from Quaker Boy, Inc., 6426 W. Quaker Street, Orchard Park, New York 14127; 800-544-1600. A few days of practicing with these instructional materials and you will have bull moose photos for all your friends outside.

I might point out here that Quaker Boy, Inc. is well known for producing instructional tapes and calls for wild turkey calling. Alaska has no wild turkeys. Still, I have always thought it would be great fun to get one of these tapes, practice for a while, and then meet spurious deposition objections with a deep throated gobble. Just a thought!

Sitka blacktail deer
(Odocoileus Hemionus Sitkensis)

Deer inhabit the islands of the Kodiak archipelago, the Islands of Prince William Sound, and the Alaska Panhandle. They are very easy to call. The only exception might be in an area where they have been or are being heavily hunted. Deer can be called at any time of the year; but bucks, particularly larger bucks, respond to calling much more readily during the rut. The Sitka blacktail deer rut usually lasts for a week or two and takes place in mid-November. The animals respond in a variety of ways. I have had a number of deer literally bound right up to me upon hearing the call. More frequently they sneak quietly toward the caller. Larger bucks often move downwind prior to coming in close. A recipe for deer calling success follows:

1. Locate a brushy area that provides you with a narrow cone of vision. The cover will give the animal a sense of security and will keep you from gawking around, an activity sure to be noticed by the deer, much to detriment of your calling efforts.
2. Sit down for approximately 10 minutes after locating your spot and hold perfectlv still.
3. When the waiting or "settling down" period is over, call for 20 minutes in the manner described below. If you don t see any animals, move at least a 1/4 mile away and repeat the procedure.

There are a number of companies manufacturing deer calls. Lohman makes a call that can be purchased at most sporting goods stores in Anchorage, Kodiak, and the various cities in Southeast Alaska. A predator call can also be used to call deer.

I make my own deer call. If anybody is interested, give me a call and I will be happy to explain how this is done. I use all deer calls in the same manner. They all work. I blow the call twice. Each tone rises and falls in intensity. Each tone lasts a little over a second and has a one or two second period in between. I then wait four minutes and repeat the procedure. I call every four minutes for approximately 20 minutes. *Use a watch* to time calling intervals. All animals have a tremendous ability to pinpoint the origins of sound. Call as little as possible, not as much as possible: they know where you are.

Roosevelt (Olympic) elk
(Cervus Elaphus Roosevelti)

These magnificent animals can be found on Afognak Island and Raspberry Island in the Kodiak archipelago and Etolin Island just south of Wrangell. Bull elk can be called during the rut. The elk rut lasts one or two weeks and takes place in mid-September.

Elk callers use a variety of manufactured elk calls and their voices to call in these aggressive animals. The best instructional tape that I have heard is entitled "Introduction To Elk Talk" by Wilderness Sound Productions, Ltd., 1105 Main Street, Springfield, Oregon 97477. Neighborhood Video at the corner of Huffman and the Old Seward Highway in Anchorage has a number of VHS tapes that demonstrate elk calling and discuss elk habits and habitat.

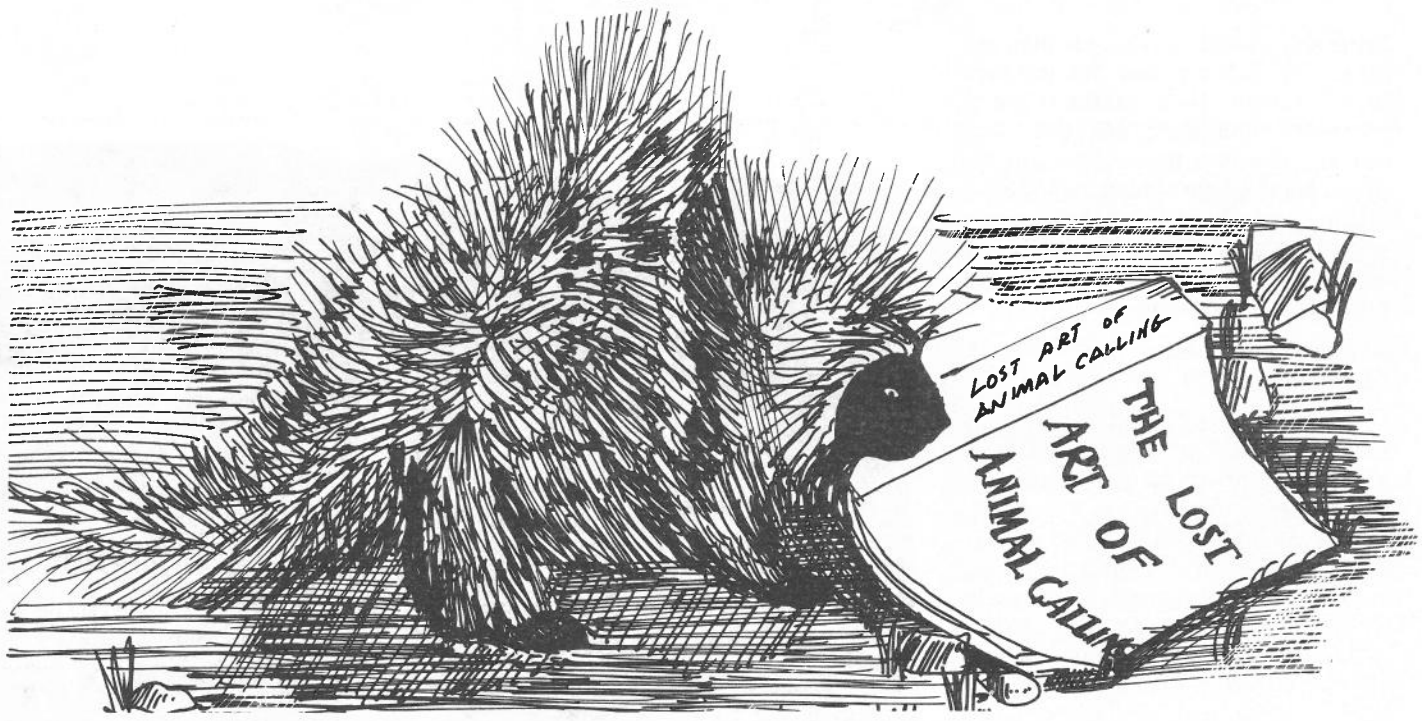
Predators

Just about every meat-eating bird or critter can be called in by duplicating the sound of a rabbit in distress. Predator calls can be obtained for a few dollars at almost any sporting goods store anywhere in Alaska. All you have to do is buy one of these predator calls and obtain an instruction tape. A few days of practicing and you will be able to successfully call in fox, eagles, owls, and coyotes. Bear and lynx can be called, but are generally thought to be rather difficult calling subjects. The best instructional tape that I have found is done by Larry D. Jones. Contact Wilderness Sound Productions, Ltd., 2549 N. 31st Street, Springfield, Oregon 97477 and ask for their tape entitled "Predator Calling Tips."

Continued on page 28

• How to call the game

Continued from page 27



General rules for game calling and observation

Your success at game calling and observation will be greatly increased by following the recommendations in the next paragraphs.

Wild animals have a sense of smell that is incomprehensible to humans. Attempt to stay downwind at all times. Before you go calling, try to take a shower. Use an unscented soap product. Do not use deodorants, mouth washes, etc. When I am out in the bush for a few days and a shower is not available, I keep my hunting or calling clothes in a plastic trash sack with spruce boughs or other local flora. I keep these clothes away from the tent and take them on and off as I leave and return to camp. That way I don't walk around the woods smelling like this morning's bacon and eggs or last night's liver and onions. It can also be helpful to stand in the smoke of a small fire made from whatever brush you find in the area that you are calling in. While my hunting companions usually find this all very entertaining, I usually see more animals than they do. If you are really interested is some of the more esoteric approaches to masking human odor, give me a call.

Cover your face. There is nothing in the woods that is quite like a human face. There is also nothing in my experience that tends to scare animals faster, except maybe human odor. Use a camouflage face mask, a mosquito net, or paint your face up as if you were about to star in a Chuck Norris movie. It may seem a little stupid at the moment, but it really makes a difference.

Wear quiet clothing. Wool is the best. Soft synthetic piles are good. Nylon is terrible.

Be quiet! Try not to sound like a herd of John Deer tractors moving through the woods. Haste makes waste and makes for poor success at animal observation. Take a break from your hurried lifestyle. Save your discussions about what you are seeing (or not seeing) for camp or the drive home. Remember all the time you spend talking for a living and enjoy the contrasting experience.

Hold still! The importance of holding still (with the possible exception of moose calling) cannot be overemphasized. Most of us don't even know what it is to hold still. When you are sitting behind your desk you are usually *not* holding still. The desk is holding still. Stumps hold still. Rocks hold still. When you are calling animals, try to act like a rock.

Caveat

Some people do not like being in the bush during rifle hunting season. Hunter density is not high in Alaska. The vast majority of those who enjoy hunting love the outdoors and the animals they pursue and will do nothing to diminish your outdoor experience. Nevertheless, no endeavor is without its small percentage of idiot participants. See *Nicholas v. Moore.* 570 P.2d 174, (Alaska 1977). You can easily determine whether or not there is an open hunting season in the area that you wish to visit by calling your local office of the Alaska Department of Fish and Game. Most moose seasons, for instance, close by the 20th of September. You can have all kinds of fun calling moose and not have to worry about danger or competition from hunters.

T.W. Patch and I managed to call in a nine-foot brown bear sow and two cubs while bowhunting for Blacktail deer close to Waterfall Lake on Afognak Island. This experience illustrates the very important point that almost anything might come to the call of a wild animal. Brown bear frequently prey upon rutting moose, elk, and deer. Some would suggest that it would be prudent to take a weapon along on your calling outings.

Rutting animals can be extremely aggressive. Members of the deer family can frequently be called in to within a few feet. Best not to leave yourself without a tree to climb, something to hide behind, or an escape route. . . .

Conclusion

Help restore your creative edge by getting out of the rut you re in and getting into the bush to observe and appreciate the rut that Alaska's critters are enjoying in the fall. You will have a lot of fun seeing animals and exploring your own aboriginal roots.

Quotables

From a contempt hearing in *McGoldrick v. Moses,* Case No. A85-574, Judge Kleinfeld presiding:

"...With regard to the fee, Dr. Reinbold also misunderstands his civil rights. The civil rights with regard to attendance of witnesses are that parties to a lawsuit have the civil right to compel attendance of witnesses. The witnesses do not have a civil right to refuse to attend.

As far as the fee is concerned, a witness has a monopoly; he is a monopolist. He has a monopoly on information. A treating physician, an eyewitness is the only person who can testify to the particular things that he knows. A treating physician is a particularly powerful monopolist with regard to information. Because of the great power that a witness has to — as a monopoly on information, the Congress of the United States and in state courts all over the United States and the state legislatures or the supreme courts by rule have always limited the fees that witnesses are entitled to charge because otherwise witnesses could be expected to charge monopoly prices for the information that they control. The Congress of the United States has limited the fee to $30 per day. It is not for a judge to say whether Congress is reasonable in setting that price for the witness' testimony. The Congress of the United States has the power to regulate the witness' fees in that manner. I make no finding with regard to the reasonablenes of $30 per day because it is not within the power of a judge to decide whether Congress is reasonable in setting that as the amount. That is it. That's the amount. The Congress of the United States has drawn no distinction between physicians and any other witnesses in setting that amount. (Pause)

I therefore find (pause) as follows: this cause having come on for hearing on the order directing William B. Reinbold, M.D. to appear and show cause why he should not be adjudged in contempt of this Court, and the Court having heard the argument of counsel and having afforded a hearing to William B. Reinbold, M.D., and having heard the testimony of Dr. Reinbold and of Mr. McGoldrick, and it appearing to the Court that William B. Reinbold, M.D., is in contempt of this Court because of his failure and refusal to obey the subpoena duces tecum duly commanding him to attend and give his testimony and produce documents on the 23rd day of July, 1986 at Anchorage, Alaska, it is ordered that the United States Marshal in and for the District of Alaska is hereby directed to arrest and take into custody the person of William B. Reinbold, M.D.

From *Delisio v. Alaska Superior Court,* Opinion No. 3200:

"...We thus conclude that requiring an attorney to represent an indigent criminal defendant for only nominal compensation unfairly burdens the attorney by disproportionately placing the cost of a program intended to benefit the public upon the attorney rather than upon the citizenry as a whole. As such, the appropriation of the attorney's labor is a "taking" under the provisions of Alaska Constitution article I, section 18..."

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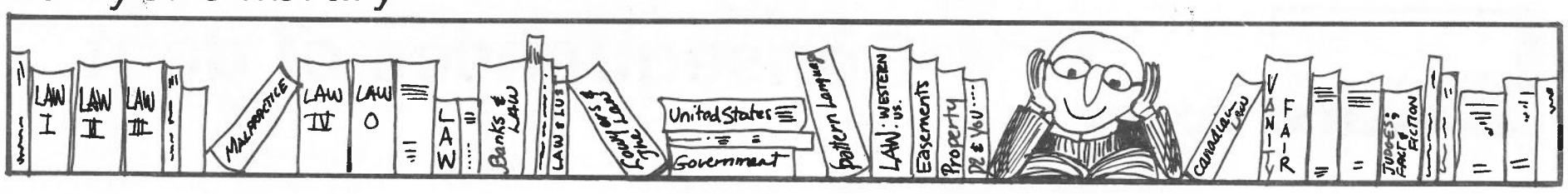

Taking the work out of cite checks

In what is believed to be the first software review ever published by a law journal, the second issue of the *High Technology Law Journal,* released today, evaluates two citechecking programs. Although The Harvard Law Review Association has issued certificates indicating that both programs correctly implement Harvard's *"Bluebook"* citation rules, the software review in *High Technology Law Journal* reports that both programs often make mistakes, sometimes serious, in checking legal citations.

The software review concludes that although both programs should save any law firm more money than they cost, "any law office or journal that relied entirely on either program to check citations would be extremely embarrassed after the first document left the office."

The *High Technology Law Journal* is a student-edited publication of Boalt Hall School of Law at the University of California, Berkeley.

The software review compares *The Cite Checker,* by Legal Software, Inc., of Palo Alto, CA ($99), with *CITERITE,* from JURISoft, Inc., Cambridge, MA ($395). The review is written by Mark J. Welch, a member of *High Technology Law Journal* and a former reporter and associate news editor for *Infoworld* and *BYTE* magazines.

Checking citations in legal documents to insure that they conform to the rules set down in the *Harvard Bluebook* is one of the least pleasant tasks of preparing legal materials. Because computers are relatively quick and excel at hideously boring tasks, the promise of citechecking by computer offers a welcome way to avoid that tedium.

The review first evaluates the accuracy and scope of both programs. While *The Cite Checker* only checks case citations for accuracy, *CITERITE* checks cases, statutes, services, constitutions, books, most law reviews, and some legislative, executive and administrative materials.

The Cite Checker is not very "smart," writes Welch: although the program "found more than half of the genuine errors in case citations, it also issued incorrect error messages for more than half of the correct case citations." *The Cite Checker* also periodically "crashed" when examining even relatively short legal documents.

Although *CITERITE* was less "awkward," Welch writes that it still made citation mistakes. *CITERITE* can read documents formatted by nine popular word processing programs and can check on-screen citations from within these programs. (*The Cite Checker* does not have a similar capability.) However, *The Cite Checker* is "better for checking case citations in final draft documents," Welch writes, because it does not require that a backslash symbol ("\"), be placed before every citation, as *CiteRite* does.

Welch also speculates as to the characteristics of an ideal citechecking program — "a lawyer's dream." The citechecking program of the future will be able to look up a case on a database service like LEXIS or WestLaw, cite to it correctly, and warn the author if the case has been overruled or criticized in a particular jurisdiction. The "ideal" program would also "flag certain key words and phrases that threaten to haunt every legal writer" such as "find a case" and "someone must have said this."

Subscription information to the law journal is available by contacting University of California Press, Journals Department, Berkeley, CA 94720. (415) 642-4191.

Trademark law guide published

Trademark Law: A Practitioner's Guide, by Siegrun D. Kane, has just been published by Practising Law Institute.

Succinctly written and practice oriented, the guide is a tool for attorneys and lay professionals involved in trademark work. The author takes the reader from fundamental definitions to the most recent developments in the law on subjects such as incontestability, dilution, protection via Customs and ITC proceedings, gray market goods, survey evidence, and application requirements for foreign corporations. Footnoted to relevant cases, statutes, rules, and commentators, the book also contains simplified forms for trademark applications, affidavits, renewals, and assignments. The text covers not only trademark fundamentals for the beginning attorney, but also stresses practice pointers for the advanced practitioner.

Kane is a partner in the New York City law firm of Kane, Dalsimer, Kane, Sullivan, and Kurucz, and has specialized in trademark, copyright, and unfair competition law for 24 years. A frequent lecturer for PLI and other national continuing legal education organizations, she received her J.D. from Harvard University and B.A. from Mount Holyoke College.

This 417-page text, available on 10-day approval, is priced at $85.

For further information, or to receive PLI's 1987 Catalog of Books and Video/Audio Cassettes, contact June E. McDonald, Sales Manager, Practising Law Institute, Dept. AG, 810 Seventh Avenue, New York, New York 10019, (212) 765-5700.

Bankruptcy book explains process

Bankruptcy Reorganization, by Martin J. Bienenstock, also has been recently published by Practising Law Institute.

This work follows a Chapter 11 case from first day to last. Critically analyzing the vast bankruptcy law relating to troubled businesses, the text stresses practical applications. Practitioners will find the book invaluable whether they advise debtors or creditors, says the institute. The footnotes are scholarly and extensive, providing useful authorities and advice, together with alternate views on all key issues.

The advanced bankruptcy attorney will benefit from the text's new ideas and theories as well as its readily accessible compilations of authorities on all major issues. Beginners who use the treatise will understand business bankruptcy at a very sophisticated level.

Bienenstock is a member of the law firm of Weil, Gotshal & Manges and practices in its Business Reorganization Department, where he focuses on the restructuring of troubled companies in and out of Chapter 11 as well as the formulation of secured lending and leveraged buyout transactions.

Mr. Bienenstock received his undergraduate degree in finance and marketing from the Wharton School at the University of Pennsylvania in 1974, and graduated from the University of Michigan Law School in 1977. He frequently speaks at programs arranged by the American Bar Association, the New York State Bar Association, the Practising Law Institute, and other institutions.

This 1001-page text, available on 10-day approval, is priced at $125.

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PRACTICAL POINTERS

Tax law

Consequences of debt

by Stephen E. Greer

The Supreme Court in the case of *U.S. v. Kirby*, 284 U.S. 1 (1938) enunciated the principle that income will occur as a result of debt relief. In this case income resulted when a corporation purchased its own bonds at less than face value. This principle later became part of the Internal Revenue Code. IRC 61(a)(12) states gross income includes discharge (cancellation) of indebtedness.

In a nonjudicial foreclosure the lender takes back the property and is precluded from getting a deficiency judgment against the debtor. A nonjudicial foreclosure is considered a sale or exchange for tax purposes and the gain is measured by the difference between the balance of loan and adjusted basis of the property. The Supreme Court held in the case of *Comr. v. Tufts*, 461 U.S. 300 (1983) the fair market value of property is irrelevant in this calculation. The balance of the loan is the outstanding principal balance of the loan and does not include accrued interest.

In a judicial foreclosure the creditor not only gets back the property but also could get a deficiency judgment against the debtor. In a judicial foreclosure gain from a sale or exchange results to the extent the sales price at the foreclosure sale is more than the adjusted basis of the property. The excess of the loan over the sales price results in income if this amount is not paid by the debtor. Also the creditor is entitled to a deficiency judgment in an amount equal to the excess of the loan over the sales price.

IRC 108 eliminates or at least mitigates the income tax consequences of debt relief by stating gross income does not result from discharge of indebtedness if the discharge *occurs in* a bankruptcy case.

The following example illustrates the tax consequences of a judicial foreclosure.

loan = $7,500
fmv = $6,000
basis = $5,000
bid price = fmv of property
gain on sale = $6,000-$5,000 or $1,000 and the income resulting from cancellation of indebtedness is $1,500 (the amount subject to a deficiency judgment) if this is written off by the creditor. Treasury Reg. 1.1001-2 ex. 8.

If this were a nonjudicial foreclosure there would be a gain on the sale = $2,500.

If this foreclosure were to occur in a bankruptcy proceeding, there would be gain of $1,000, and the income tax consequences of this amount would not be eliminated by IRC 108 because the amount received in a foreclosure sale is considered gain from a sale or exchange as distinguished from income resulting from debt relief, *Estate of Jerrold Delman*, 73 TC 3 (1979). On the other hand, the $1,500 income resulting from cancellation of indebtedness will be eliminated by virtue of IRC 108.

Although IRC 108 doesn't eliminate the tax consequences of the $1,000 gain, the interaction of the Bankruptcy Code with the IRC eliminates the concern for the $1,000 gain. When an individual files bankruptcy, a separate taxable entity, distinct from the individual, is created. This entity is the bankruptcy estate. IRC 1398 states income generated from assets in the bankruptcy estate is the tax concern of the bankruptcy estate and not that of the individual debtor. When one of these assets is foreclosed upon while the asset is part of the bankruptcy estate gain from a sale or exchange results. The income tax consequences of the gain would be that of the bankruptcy estate and not that of the individual. If there isn't any money or property left in the estate (because it was all foreclosed upon) to satisfy the tax liability, then for all practical purposes this income tax liability is discharged because theunpaid tax is treated as an unpaid administrative expense under Bankruptcy Code Section 503(b)(1)(B)(i). Therefore, you should file a bankruptcy petition before the foreclosure occurs and at a minimum before it is concluded. It also might be wise to have the trustee get a determination from the bankruptcy judge that the gain is the responsibility of the bankruptcy estate pursuant to Bankruptcy Code Section 505. This determination will bind the IRS.

One point deserves mention. IRC 1038 spells out the tax consequences when a creditor who sold the property to the debtor reduces the debt which he is owed. IRC 1038 treats the amount that the debtor no longer has to pay, not as debt relief, but merely as a price reduction by the seller.

We have concerned ourselves thus far with the tax consequences of a foreclosure and have seen that with proper planning the tax can become that of the bankruptcy estate and not become the tax liability of the debtor. What happens when the debtor has an existing tax liability which he has not paid and then files bankruptcy? Is the tax liability owed to the IRS discharged? The answer depends on the year the tax liability was incurred and the year you file bankruptcy.

Section 523 of the Bankruptcy Code lists those items which are not discharged in a bankruptcy filing. Among those items listed are taxes listed in Section 507 of the Bankruptcy Code. Section 507 states noncorporate taxes are not discharged in a bankruptcy filing when the due date of the return, including extensions, if used, is less than three years prior to the date the petition in bankruptcy is filed.

For example, assume a petition is filed on April 16, 1987. Tax liabilities for 1983 and years prior to 1983 could be discharged because the due date of the return is April 15, 1984, which is more than three years from April 16, 1987. Tax liabilities for years 1984 to 1987 would not be discharged because the filing date of these returns is less than three years prior to the date the petition was filed.

Even though a tax liability may be for a tax year outside this three-year period there are exceptions where these taxes will not be discharged. Before revealing these rules it is important to note this three-year period mentioned in the Bankruptcy Code is not an arbitrary period. IRC 6501 prescribes the general rule that an additional tax liability must be assessed by the IRS within three years after the due date of the return. If the IRS doesn't assess additional taxes within this limitation period they are precluded from doing so in the future. There are exceptions to this three-year period. For instance, if the tax return was never filed then the time period within which taxes can be assessed can be indefinite. By the same token, the Bankruptcy Code states if the taxpayer never filed a return for a particular year he can not get the tax liability for the year discharged even if it is more than three years from the date the bankruptcy petition was filed. Also the three-year period is not applicable where a tax return was not timely filed.

Most importantly, the three-year period is not applicable when the IRS commences an audit of the taxpayer within the three-year period and the taxes have not been assessed at the time of the filing of the petition or were only recently assessed. The Bankruptcy Code states before a tax liability can be discharged it must have been assessed at least 240 days before the bankruptcy petition is filed.

For instance, assume an individual invested in a tax sheltered limited partnership. He filed his 1983 return on or before April 1984 and claims deductions as a result of his investment in the tax shelter. The IRS prior to three years from this filing date mails a notice of a final partnership administrative adjustment to the tax matters partner or secure an extension of the limitation period from the tax matters partner. If an additional tax liability is subsequently assessed by the IRS, the IRS then has 240 days to collect this tax. After the requisite 240 days has passed, the taxpayer can file bankruptcy and get these taxes discharged.

Thus far was have spoken of bankruptcies in terms of a Chapter 7 filing. Individuals additionally have a Chapter 13 and Chapter 11 option. A Chapter 13 filing lets a wage earner pay over to a bankruptcy trustee for further distribution to creditors, his disposable income over and beyond his necessary living expenses.

Immediately upon filing the Chapter 13 plan and while the plan is in effect (three to five years) creditors, including the IRS, are precluded from taking any action against the debtor. Furthermore, interest stops running on any accrued liability once the Chapter 13 petition is filed. Most importantly from the standpoint of taxes, if the debtor has a nondischargeable tax, the debtor can force the IRS into a payoff arrangement that might be easier to swallow than the payoff arrangement the IRS has proposed.

For example, the benefits of a Chapter 13 filing can be used when a taxpayer owes payroll taxes. Payroll taxes are specifically mentioned as being nondischargeable in a Chapter 7 bankruptcy filing. Once this tax liability has been assessed, the matter is turned over to the IRS for collection. The collection department will immediately levy against assets which can be attached and also in many instances will want a significant portion of the debtor's wages. By filing a Chapter 13 petition, the debtor can prevent the IRS form taking his assets and can also force the IRS into a payoff arrangement where only a "reasonable" portion of his wages will be paid over to the IRS.

An additional benefit is that Chapter 13 provides a "hardship discharge." Normally when a plan is filed it must provide for a full payment of taxes. The plan is approved by the Court and the debtor makes payments to the trustee. The debtor will receive a regular discharge once the plan is completed, i.e., and he makes all payments contemplated by the plan. If, however, the debtor fails to make all the payments due to circumstances beyond his control, and the debtor has paid the IRS under the plan the amount of money the IRS would have received had the estate been liquidated (typically nothing) and modification of the plan is not practicable, the Bankruptcy Judge can give the debtor a "hardship discharge" which relieves him of any further payment to the IRS. This can include payments for payroll taxes. In Chapter 11 cases, the debtor must pay nondischargeable tax claims over a period not exceeding six years from the date the taxes were assessed, and must pay the IRS interest in an amount sufficient to insure the deferred payments have a present value, as of the date of the plan, equal to the amount of the claim.

(Steve Greer, LL.M. Taxation, is with Wohlforth, Flint & Gruening.)

• We the People; Hamilton

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composed. It is to comprehend "all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State or the citizens thereof and foreign states, citizens, and subjects." This constitutes the entire mass of the judicial authority of the Union. Let us now review it in detail. It is, then, to extend:

First. To all cases in law and equity, *arising under the Constitution* and *the laws of the United States.* This corresponds to the two first classes of causes which have been enumerated, as proper for the jurisdiction of the United States. It has been asked what is meant by "cases arising under the Constitution," in contradistinction from those "arising under the laws of the United States"? The difference has been already explained. All the restrictions upon the authority of the State legislatures furnish examples of it. They are not, for instance, to emit paper money; but the interdiction results from the Constitution and will have no connection with any law of the United States. Should paper money, notwithstanding, be emitted, the controversies concerning it would be cases arising under the Constitution and not the laws of the United States, in the ordinary signification of the terms. This may serve as a sample of the whole.

It has also been asked, what need of the word "equity"? What equitable causes can grow out of the Constitution and laws of the United States? There is hardly a subject of litigation between individuals which may not involve those ingredients of *fraud, accident, trust,* or *hardship,* which would render the matter an object of equitable rather than of legal jurisdiction, as the distinction is known and established in several of the States. It is the peculiar province, for instance, of a court of equity to relieve against what are called hard bargains: these are contracts in which, though there may have been no direct fraud or deceit sufficient to invalidate them in a court of law, yet there may have been some undue and unconscionable advantage taken of the necessities or misfortunes of one of the parties which a court of equity would not tolerate. In such cases, where foreigners were concerned on either side, it would be impossible for the federal judicatories to do justice without an equitable as well as a legal jurisdiction. Agreements to convey

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• De Lisio opinion

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ment of Alaska's due process clause and, thus, may not serve as the basis for avoiding the provisions of the takings clause.

Finally, it is urged that denial of compensation is justified because the duty to render gratuitous representation is nothing more than a generalized duty to aid the state, a duty owed by all citizens equally. Thus, it is argued, the state is under no obligation to provide compensation for the provision of the service. We cannot agree. It is certainly true, however, that there are services which all citizens are obliged to render without compensation. For example, it has long been held that absent statute there is no right to compensation for compelled jury service. *Maricopa County v. Corp.,* 39 P.2d 351 (Ariz. 1934). The appropriation of such a service will not constitutionally require compensation for several reasons, most notably because such services are broad-based, applying to the citizenry as a whole rather than to any discrete or identifiable class of persons. The service appropriated in the present action, by contrast, is not one which may be provided by the citizenry in general, but only by a specifically identifiable class of persons.

B

After considering and rejecting these various arguments, we are persuaded that a court appointment compelling an attorney to represent an indigent criminal defendant is a taking of property for which just compensation is required. First, as discussed above, the attorney's service is undeniably property within the meaning of the takings clause. Second, the appropriation of that property is taking. We have indicated that a taking will be accomplished when the state deprives the owner of the economic advantages of ownership. *Grant v. State,* 560 P.2d 36, 39 (Alaska 1977); *City of Anchorage v. Nesbett,* 530 P.2d 1324, 1335 (Alaska 1975); *Stewart & Grindle, Inc. v. State,* 524 P.2d 1242, 1246 (Alaska 1974). When the court appropriates an attorney's labor, the court has prevented the attorney from selling that labor on the open market and has thus denied to the attorney the economic benefit of that labor. Finally, the taking is accomplished for a public use. Counsel is appointed not out of a desire to benefit any individual defendant, but to ensure that all defendants are treated equally before the law, that all defendants will receive a fair trial before an impartial tribunal. *See Gideon v. Wainwright,* 372 U.S. 335, 344, 9 L. Ed. 2d 799, 805 (1963). Because the appointment thus benefits all persons equally, the cost of providing such representation must be equally borne rather than shunted to specific persons or specifically identified classes of persons.

We thus conclude that requiring an attorney to represent an indigent criminal defendant for only nominal compensation unfairly burdens the attorney by disproportionately placing the cost of a program intended to benefit the public upon the attorney rather than upon the citizenry as a whole. As such, the appropriation of the attorney's labor is a "taking" under the provisions of Alaska Const. art. I, § 18.

IV

Having so decided, we are faced with determining the measure of the mandated compensation. In other contexts we have indicated that just compensation is measured by the fair market value of the property appropriated, or the "price in money that the property could be sold for on the open market under fair conditions between an owner willing to sell and a purchaser willing to buy with a reasonable time allowed to find a purchaser." *State v. 7,026 Acres,* 466 P.2d 364, 356 (Alaska 1970) (real property); *see also Stroh v. Alaska State Housing Authority,* 459 P.2d 480, 486 (Alaska 1969) (personal property). Thus, a determination of "market value" differs from "market price" in that "market value" includes elements of "intelligence," "knowledge" and "willingness" in ascertaining the actual worth of the property. Market price, on the other hand, indicates only the price which the property could command in an imperfect market. *Dash v. State,* 491 P.2d 1069, 1075 (Alaska 1971).

We see no reason for a different rule in the present action. We emphasize, however, that the measure of value will not necessarily reflect any specific attorney's normal rate of compensation, but rather will reflect the compensation received by the average competent attorney operating on the open market.[8]

V

Model Rule of Professional Conduct 6.1 (1983) provides that:

> A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.[9]

The Model Rules thus express a policy favoring public service and affirming the profession's ethical obligation to ensure representation of those in need. We cannot emphasize too strongly our support for this position. Attorneys *should* be willing to undertake pro bono representation. We applaud those attorneys who voluntarily accept this obligation and deeply regret that there are those who refuse to do so. Yet we are reluctantly persuaded that this ethical obligation, important as it is cannot justify the practice of compelled gratuitous representation.

Because of the disposition above, we need not consider DeLisio's other arguments. To the extent that our holding today is inconsistent with our prior decisions, those decisions are overruled. The judgment of the trial court is REVERSED.

The public defender agency was unable to represent Ningeok because of a conflict of interest.

DeLisio has practiced law in Alaska for many years and is an experienced trial attorney.

Alaska Constitution Art. I, § 18 provides that:

> Private property shall not be taken or damaged for public use without just compensation.

We have held that the term "damages" affords the property owner broader protection than that conferred by the Fifth Amendment of the Federal Constitution. *See State v. Doyle,* 735 P.2d 733, 736 (Alaska 1987); *State v. Hammer,* 550 P.2d 820, 823-34. Consequently, we need not consider DeLisio's federal constitutional claims.

See supra note 3.

Professor Tribe describes the compensation requirement of the takings clause as an attempt to limit arbitrary sacrifice of the few to the many.

Alaska Const. art. I, § 7 provides.

> No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treament in the course of legislative and executive investigations shall not be infringed.

We recognize that the Missouri decision was rendered in a case involving a civil, rather than a criminal, appointment. However, the historical analysis contained in *Scott* applies as well to criminal appointments.

We need not at this time decide whether former Administrative Rule 12 provided "market value" compensation for DeLisio's services. Because another attorney was appointed to represent Ningeok, DeLisio performed no services meriting compensation.

There is no counterpart of Rule 6.1 in our state disciplinary code. Ethical consideration (EC) 2-25, however, states that "[t]he basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer. . . . Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer. . . ." EC 8-9 states that "[t]he advancement of our legal system is of vital importance in maintaining the rule of law and . . . lawyers should encourage, and should aid in making, needed changes and improvements." EC 8-3 states that "[t]hose persons unable to pay for legal services should be provided needed services." *See also* Model Rule 6.2 ("A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause.").

RABINOWITZ, Chief Justice, dissenting.

I dissent from the majority's conclusion that *Jackson v. State,* 413 P.2d 488 (Alaska 1966), and *Wood v. Superior Court,* 690 P.2d 1225 (Alaska 1984), were erroneously decided. In my view, these precedents correctly held that an attorney appointed to represent an indigent defendant in a criminal prosecution has no constitutional right to receive compensation for his services except in very limited circumstances.

We identified the authority for imposing this obligation on attorneys in part in *Jackson* where we said:

> [T]he foundation of the assigned counsel system is a time-honored and traditional obligation of the bar to defend the indigent, without compensation, if called upon. However, it has not been the practice in Alaska to require counsel to serve without some compensation, even though the amount that is allowed is not comparable to what counsel would receive from a client able to pay.[1]

Jackson, 413 P.2d at 491 (footnote omitted).

In *Wood,* we reaffirmed the court's authority to appoint counsel to represent indigent defendants in criminal proceedings. In so holding we said:

> Wood first argues that courts do not have legal authority "to coerce one class of persons to involuntarily provide services to a second class of persons when no contractural [sic] or tortious relationship exists between them." We rejected a similar argument in *Jackson* and see no reason to reverse now. Lawyers have traditionally been responsible for representing indigent clients, and courts have traditionally supervised the terms and conditions of this representation.[2]

690 P.2d at 1228. We also reaffirmed the constitutionality of imposing the obligation on appointed attorneys to represent indigent criminal defendants without payment of full compensation, stating in part:

> Nor does an order requiring an attorney to represent a criminal defendant necessarily take the attorney's private property without just compensation. *Jackson's* holding on this issue is consistent with the "vast majority" of federal and state courts decisions. *It may be that in some extreme cases an assignment would cripple an attorney's practice and thus rise to the level of a taking.* But Wood has not shown that this is an extreme case.

Id. at 1229 (citations omitted and emphasis added). We further amplified our position in holding that although "[a] court may require an attorney to represent an indigent defendant without compensation, . . . requiring an attorney to pay defense *expenses* out of his or her pocket takes the attorney's private property."[3] *Id.* at 1230 (citations omitted and emphasis added).

I reject DeLisio's argument that "the traditional rationale for the system compelling legal services for inadequate compensation is not viable." There unquestionably exists in this country a tradition of compulsory representation of indigent defendants without full compensation, a tradition which is reflected in numerous court decisions dating back to the mid-1800's.[4] Of perhaps greater significance is the fact that the court rules for the district courts of the Territory of Alaska embodied this tradition and the court rules adopted shortly after statehood continued it.[5] Specifically, the court rules in force before statehood allowed the trial judge, in his discretion, after the termination of the trial of a criminal case where an attorney was appointed to defend an indigent, to "make an allowance to such attorney as nominal compensation for his services. . . ." *See* Rule 25(b), *supra* note 5, *quoted and explained in Jackson,* 413 P.2d at 491.

This tradition and practice suggest that the framers of our constitution contemplated that this court would have the rule-making authority, pursuant to article IV, section 15, to appoint attorneys to represent indigent defendants in criminal proceedings. Thus, I am not persuaded that we should disavow our rationales in *Jackson* and *Wood* that lawyers have traditionally been responsible for representing indigent criminal defendants and that courts have traditionally supervised the terms and conditions of appointed attorneys' representation of indigent defendants.

Nor am I persuaded by DeLisio's arguments that judicially compelled representation of an indigent without adequate compensation constitutes a taking of the appointed attorney's property in violation of the United States and Alaska Constitutions.[6] Essentially the same arguments which are now advanced by DeLisio were explicitly rejected in *Wood,* wherein we said simply that "an order requiring an attorney to represent a criminal defendant [does not] necessarily take that attorney's private property without just compensation," and noted that this holding was consistent with the "vast majority" of federal and state court decisions.[7] 690P.2d at 1229; *see also* note 4, *supra.*

It bears repeating here that we have not failed to acknowledge that in some extreme cases an assignment would cripple an attorney's practice and thus rise to the level of a taking.[8] *Wood,* 690 P.2d at 1229. Our prior decisions recognize a constitutional violation where the appointment imposes upon an individual lawyer a unique hardship but none where the obligation to serve is equitably imposed upon all members of the bar.

It remains my view that the rationale of *Jackson* and *Wood* that the traditional obligation of attorneys to represent indigent defendants furnishes adequate justification for rejection of a claim of an unconstitutional taking like that made by DeLisio here. Of crucial significance is the pivotal role played by appointed counsel in fulfilling the obligation of Alaska's criminal justice system to accord indigent defendants their right to legal representation. I therefore dissent from the majority's holding that requiring an attorney to represent an indigent defendant for less than full compensation violates article I, section 18 of the Alaska Constitution.[9]

De Lisio Footnotes

In writing for the court in *Jackson,* Justice Dimond additionally explained that an attorney implicitly accepted this obligation, upon taking the oath of admission to the bar:

> The requirement of the attorneys' oath and Canon [of Professional Ethics] 4 reflect a tradition deeply rooted in the common law — that an attorney is an officer of the court assisting the court in the administration of justice, and that as such he has an obligation when called upon by the court to render his services for indigents in criminal cases without payment of a fee except as may be provided by statute or rule of court. This principle is so firmly established in the history of the courts and the legal profession that it may be said to be a condition under which lawyers are licensed to practice as officers of the court. . . . "[T]he lawyer has consented to, and assumed, this obligation and when he is called upon to fulfill it, he cannot contend that it is a 'taking of his services'."

413 P.2d at 490 (footnotes omitted) (in part quoting United States v. Dillon, 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied,* 382 U.S. 978, 15 L. Ed. 2d 469 (1966).

We responded to Wood's argument that courts do not have the power to issue orders appointing counsel to represent indigent criminal defendants by pointing out that article IV, section 15 of the Alaska Constitution gives us authority to make and promulgate "rules governing the administration of all courts" and "rules governing practice and procedure in civil and criminal cases in all courts." *See* 690 P.2d at 1228.

We explained that

> the cost of hiring a replacement attorney can justly be called an "expense" for which an incompetent attorney must be compensated, and we see nothing in the superior court's order or in the handling of this case to suggest that attorneys who ethically must hire replacements are in fact reimbursed for this kind of expense. If an attorney can demonstrate that he or she cannot ethically take a case to which he or she has been assigned, forcing that attorney to hire a replacement is unconstitutional.
>
> Attorneys who can competently handle a case they are assigned are in a quite different position. If they arrange to hire a replacement . . . the added expense of hiring a replacement should be borne by the attorney, not the taxpayers. We hold that if an attorney is competent to handle the criminal case to which he or she is assigned, the fact that the attorney hires

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THE JUDGES' CORNER

New Jersey Bar (also) takes a look at courts

Have state court administrators become a force separate from the judges and lawyers whose work they are supposed to support? This is one of the subjects of a new study, "Relationships of Attorneys, Judges, and Administrators in State Court Administration," released by the Institute of Judicial Administration (IJA), an independent national court organization at New York University School of Law. The study was prepared for the New Jersey State Bar Association (NJSBA) at the request of its Board of Trustees, who had been invited by Chief Justice Robert N. Wilentz to develop a philosophy of judicial administration for the state bar.

The report was adopted by the NJSBA Board of Trustees and released to the public on June 19, 1987. In announcing the report, the author, IJA Consulting Director Barbara Flicker, said, "the time has come to examine the impact of centralized state court administration on local practitioners and court managers, as well as its impact on the judges at the trial and intermediate appellate levels. Greater participation by judges and lawyers in decisions to modify court procedures, control case management, and introduce experimental court programs should be considered."

As a precursor to designing a judicial administration program and philosophy, IJA conducted a survey of 2,000 randomly selected attorneys, sending questionnaires to 1,000 NJSBA members and 1,000 trial bar members. The questionnaires sought the lawyers' views on specific justice administration standards and goals, civil and criminal case management proposals, and bench-bar programs. In a concluding page of open-ended questions, it asked for their comments on the major problem areas and strengths in judicial administration in the state, the best solutions to the problems, and what the bar's role in the administration of justice should be.

IJA received 750 responses to the questionnaire. The individual comments in reply to the open-ended questions by the respondents cover more than 150 single-spaced pages in an attachment to the final report. These answers were supplemented by interviews and correspondence with an additional 200 county and state bar leaders, judges and court administrators.

The results of the survey indicated a deep sense of discontent on the part of the attorneys concerning their relationship with court managers. The problems most frequently cited by the respondents were a lack of understanding of their professional needs by the court administrators and excessive emphasis by the state on clearing court calendars.

The most striking phenomenon observed was the care with which the respondents separated their criticism of the state court administrators from their more favorable comments concerning the judges and local court administrators. The implications of these findings will be pursued by IJA in a paper on the respective roles of judges, lawyers, and court administrators, based on studies in this and other juridisdictions.

The principal recommendations that emerged from the study were that the bar should become an equal partner in the judicial system and that they should form a comprehensive educational program on principles and issues of court administration.

Report says judges should "leave"

The Institute of Judicial Administration (IJA), an independent national court organization at New York University School of Law, announced the release of its most recent study, which advocates the institution of sabbaticals for judges.

The study was prepared for the Committee on Judicial Sabbaticals of both the New YorK State Association of Supreme Court Justices and the ABA Judicial Administration Division's National Conference of State Trial Judges. The chairperson of both committees is New York State Supreme Court Justice Rose L. Rubin.

The study traces the religious and historical origins of the sabbatical, beginning with the familiar biblical description of the creation which concludes with "and on the seventh day He rested," through its incorporation into Christian theology, the adoption of Sunday as the secular day of rest, and the widespread acceptance by educators of the academic sabbatical year for research and travel.

Despite the popular assumption that universities, colleges, and schools benefit from granting paid leaves of absence to full-time qualified faculty (and staff) members, usually after six years, no equivalent understanding has developed with respect to judges. While 96% of all universities offer faculty sabbaticals, *not one* state authorizes the granting of a paid leave of absence to judges.

The author of the study, IJA Consulting Director Barbara Flicker said, "both judges and teachers are expected to be dispensers of wisdom, possessors of vast stores of knowledge, and skilled communicators, capable of analyzing and synthesizing quantities of information. But judges have an even greater responsibility; they also must resolve controversies that directly affect personal freedom, private property rights, and public welfare."

The report recommends adopting legislation that would make fully qualified judges eligible for sabbatical leave for one year at half pay, or six months at full pay, after six years of continuous full-time service.

Eligible judges would apply to their presiding judge, who would evaluate the sabbatical program proposed by the judge and the impact of granting the leave on the court's caseload. Applications would not be approved automatically, but would be referred to the chief justice for final determination. Sabbaticals would be granted to judges for a period of rest and regeneration and would provide an opportunity for judicial education as teachers or students, research and study independently or as part of a funded program, membership on a state or national commisssion to reform the courts or the law, travel to other jurisdictions to observe and compare practices and procedures, and many other beneficial and enriching activities.

Some industries have adopted paid sabbattical leaves for executives and workers as part of the employment benefit package, to encourage advanced education or travel to study new techniques and technology. Exchange programs also have been combined with the sabbatical concept.

Mrs. Flicker noted that an increasing number of judges are leaving the courts and well-qualified lawyers are declining judicial appointments in favor of better paid and less stressful private practice. Sabbaticals are proposed not as a substitute for higher salaries for judges but as a means of making judicial service more spiritually and intellectually rewarding.

• De Lisio footnotes

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replacement counsel does not convert the order assigning the attorney to the case into a taking.

Id. at 1231 (footnote omitted).

I find this holding dispositive of DeLisio's claim that the appointed attorney must be compensated for the usual costs and expenses incurred in defending an indigent accused.

The following jurisdictions have recognized, in the years noted parenthetically, the general rule that assigned counsel for an indigent defendant has no right to compensation by the public in the absence of a statute or court rule: Alabama (1873), Alaska (1966), Arkansas (1876), California (1860), Florida (1972), Georgia (1873), Illinois (1857), Kansas (1868), Kentucky (1946), Louisiana (1891), Michigan (1850), Mississippi (1881), Missouri (1869), Montana (1874), Nevada (1879), New Jersey (1961), New York (1879), North Carolina (1967), Pennsylvania (1879), Tennessee (1871), Utah (1911), Washington (1892), West Virginia (1900). *See* Annotation, *Right of Attorney Appointed by Court for Indigent Accused to, and Court's Power to Award, Compensation by Public, in Absence of Statute or Court Rule,* 21 A.L.R.3d 819, 823–24 (1968 & Supp. 1986); United States v. Dillon, 346 F.2d at 637; Weiner v. Fulton County, 148 S.E.2d 143, 146 (Ga. App.), *cert. denied,* 385 U.S. 958, 17 L. Ed. 2d 304 (1966).

Rule 25(b), Amended Uniform Rules of the District Court for the District of Alaska (effective October 1, 1957), provided:

> In any criminal case where the court shall appoint an attorney to defend a poor person who has neither money nor property wherewith to employ counsel, the judge may, in his discretion, after the termination of said trial, make an allowance to such attorney as *nominal compensation* for his services therein, to be paid out of Fund "C". Said allowance, unless otherwise ordered by the court or judge, shall be (1) in misdemeanor cases, $50.00; (2) in felony cases less than capital, $150.00; (3) in capital cases, $250.00.

[Emphasis added]. Former Administrative Rule 15 (adopted October 9, 1959) also provided:

> (a) *Criminal.* Attorneys appointed by the court to represent indigent persons shall be paid for this service according to the following schedule:
>
> (1) Representation on plea of guilty and sentencing — $75.00.
>
> (2) Representation on plea of not guilty and trial — $75.00 for each day or fraction thereof spent in court.
>
> (b) *Other.* Attorneys appointed by the court to represent indigent persons in situations other than as provided for in (a) shall be paid a fee established by the court, commensurate with the time and legal problems involved.

The "takings clause" of the fifth amendment to the United States Constitution provides: ". . . nor shall private property be taken for public use, without just compensation."

Article I, section 18 of the Alaska Constitution provides: "Private property shall not be taken or damaged for public use without just compensation." Similarly, article I, section 1 provides in part that "all persons have a natural right to . . . the enjoyment of the rewards of their own industry."

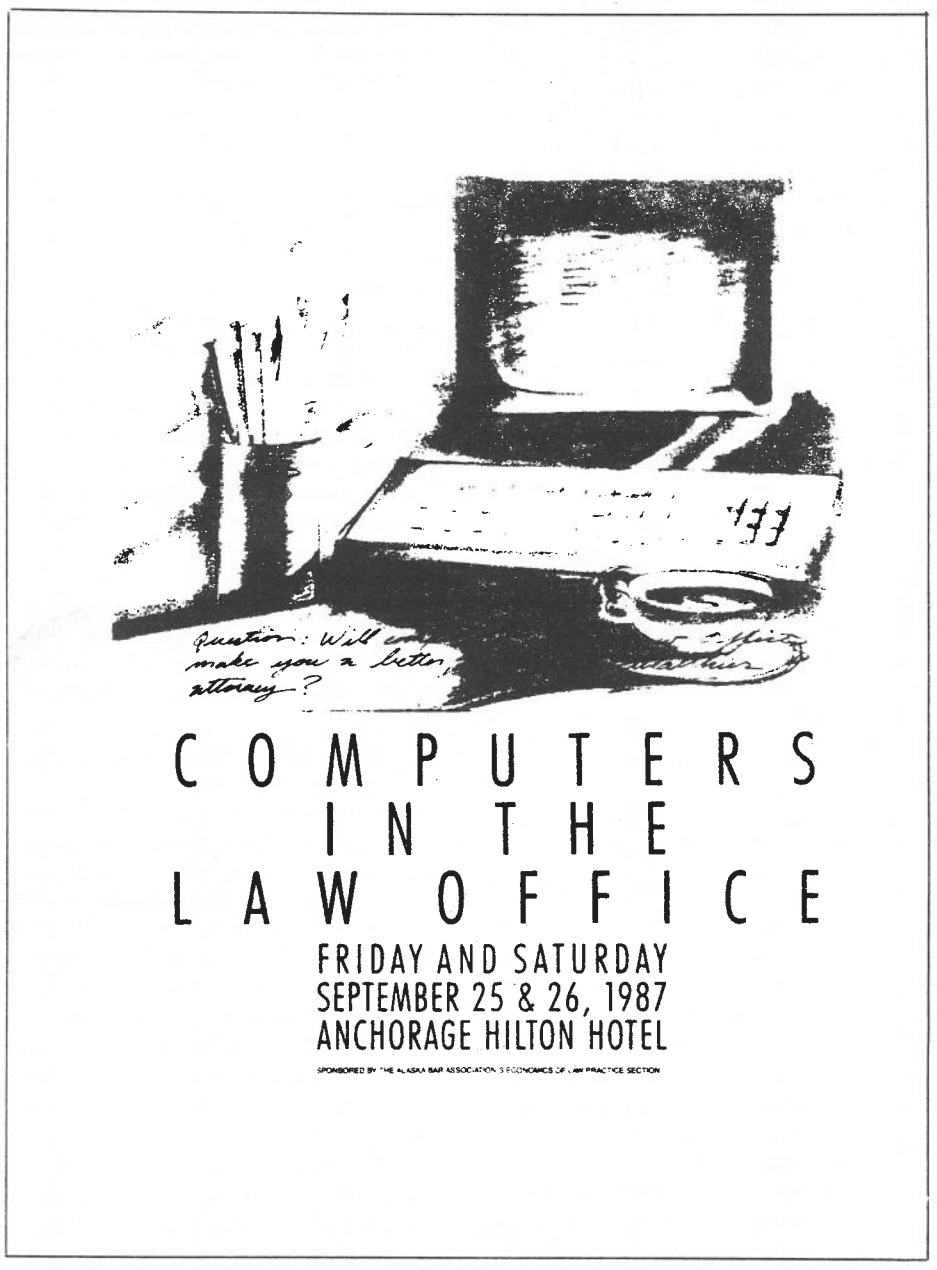
In Williamson v. Vardeman, 674 F.2d 1211, 1214–15 (8th Cir. 1982) (citations omitted), the court noted that:

> The vast majority of federal and state courts which have addressed the due process issue have decided that requiring counsel to serve without compensation is not an unconstitutional taking of property without just compensation. These courts reason that compulsion of service is not a taking because there is a preexisting duty to provide such service. The source of this duty is a lawyer's status as an officer of the court.

Like Wood, DeLisio has made no showing that taking the assignment in question here would have the consequences of crippling his practice.

Implicit in our recognition in *Wood* that in unusual circumstances an appointment could result in a taking in the constitutional sense is our rejection of both the notion that the practice of law is merely an unprotected privilege and the view that an attorney's services are personal services as distinguished from a protected property interest.

I concur in the majority's views that DeLisio has shown neither that he is incompetent to represent a criminal defendant nor that he was wrongfully denied a jury trial.



Chapter minutes

TVBA discusses issues of great moment

TANANA VALLEY BAR ASSOCIATION MINUTES
April 24, 1987

President Dan Callahan called the meeting to order by rapping on the podium which illicited a like response from most of the members present.

The only guest was Major Craig Reinold, senior attorney with the Judge Advocate General's office at Ft. Wainwright.

Law Day was a major topic of discussion throughout the meeting. Dan Callahan still needs one person at the one-mile turnaround for the Race Judicata. Ron Smith announced that there would be a walking division in the race. He has entry forms and you may enter free if you sign up by April 24, 1987. However, if you want a t-shirt, it costs $5.00. Ron asked again for another volunteer to accept registration and pass out t-shirts at Ryan Junior High, Thursday, 5:00 to 7:00. Dave Call wanted to know if there were categories other than running and walking and Ron Smith handed him an entry form so that he could see for himself. Ron announced that we had a city ambulance to chase and photographers should be present. Last year the Race Judicata ambulance chase made U.S.A. Today and now he is looking for worldwide coverage.

President Callahan announced that Judge Kleinfeld's speech would be next Friday and encouraged attendance. The meeting is open to the public and members are encouraged to bring friends and guests. There was no explanation for the difference between friends and guests.

Ron Smith announced that there were buttons, balloons and brochures for Law Day and wanted everyone to take some home so that he wouldn't have to cart them back to the City Attorney's office.

Dick Savell asked for a report from Fleur Roberts about the copy machine's missing memory. Fleur, once her attention was attracted, reported that there hadn't been much progress as the memory technician had been upset concerning a recent tragedy.

Dave Call asked for a report from Judge Zimmerman and Dick Savell about their recent interviews with Governor Cowper. Both Savell and Judge Zimmerman had several things to say which are not repeatable in a family publication such as this. However, Judge Zimmerman did report that Governor Cowper said he would make a decision as soon as he felt comfortable. Judge Zimmerman said he then sent Governor Cowper a bottle of bourbon, some down booties, and a rubber ducky for the jacuzzi in hopes that comfort would strike soon.

Allie Closuit commented on the new low in food service, which probably had something to do with having Easter ham and some kind of Chinese sweet and sour sauce. Dan Callahan tried to refer this to the standing committee on food. Only Burke was present and he was sitting down. Judge Connolly is the other member of the committee and he hasn't been attending lately so he doesn't know how bad it is. Someone mentioned the Regency Hotel as a potential lunch spot which compelled Bob Groseclose to comment "Shades of Hitler's bunker." Madsen, in his best Hitlerian voice, stated "What's wrong with that."

Having drawn attention to herself, Allie Closuit was appointed to the food committee. Savell commented that we would probably be eating dog food and then went into a diatribe about how much IAMS dog food cost. Savell is not willing to pay $38.00 for a bag of the world's best dog food for his pooch, but rather feeds him Safeway's finest at $9.95 a bag. It was pointed out that Savell drives a Mercedes and he should treat his dog to the same type of consideration. Savell responded that he takes the dog to the vet in the Mercedes, but that doesn't mean he gets to eat it.

There being little other business to come before the meeting, Savell then wanted to talk about the attorney's room on the fourth floor. With the MacKay trial winding down, the attorney's room will now be turned back to the bar in general. After much discussion, Jim Cannon agreed to move the statutes to the attorney's room, Dave Call agreed to update two volumes, and Dick Savell agreed to acquire and pass out keys.

Bonnie Coghlan inquired about the truth and veracity of Ed Noonan's recent campaign literature. Noonan announced that the individual mentioned in the articles was actually his grandfather. Harry Davis announced that his grandfather probably killed Ed's grandfather at Atlanta. This is probably a significant historical reference, but neither Ed nor Harry would tell us what it was all about.

Roger Brunner reported that Niesje had received a rather cheap looking plant in an imitation plastic bucket, that she was moved by the thought, but that the diarrhrea should get better soon.

Ed Noonan gave a report about the upcoming bar convention. This encouraged Dick Burke to announce that once the bar convention was over he was going to need some help with the Christmas party. Dan Callahan asked for volunteers and Gene Hardy was volunteered in abstentia. Ed Noonan, by some trick of his voice, promised that if he wins the seat on the Board of Governors, he will help with the Christmas Party and if he loses he will have time to do it.

Savell, by this time wandering around the room on his new cane doing a poor imitation of Walter Brennan, did a monologue concerning Birch Horton's support of KUAC. Birch Horton sponsors the Morning Edition on KUAC and announces to the world, or at least those persons listening to KUAC at that time of the morning, that they have offices in principal cities in Alaska as well as Washington D.C.

There being no further business, the meeting was adjourned.

Respectfully submitted, etc.

Chapter minutes

... and words on the Bar Rag ...

TANANA VALLEY BAR ASSOCIATION MINUTES
July 17, 1987

The meeting was called to order by Dan Callahan, who was through with his lunch. Since there were no guests, we proceeded promptly to the reading of the minutes of the previous meeting. Halfway through the reading of the minutes, when the Secretary was right at the point about Fred Brown's letter to Mrs. Barrett, Randy Olsen interrupted to say that he has sent an apology to Ms. Barrett. This was clearly an unauthorized action. It was quickly established, through intense interrogation, and without Mr. Olsen having even the benefit of a potted plant beside him, the following misconduct:

1. He thought it was in the best interest of TVBA.
2. He believed he had such authority, flowing from his position as Vice-President, although he couldn't find a third-year law student to give him a legal opinion to that effect.
3. He didn't tell the President because he wanted to give him deniability.
4. He didn't own a shredder but he could chew real fast.
5. He couldn't recall precisely the events leading up to the writing of the letter, nor could he recall if he signed it, and suddenly he couldn't recall to whom he had addressed it.

The President was likewise subjected to intense interrogation whereupon it was quickly established that he either didn't know about it or he couldn't remember if he didn't know about it. In any case, he simply couldn't recall.

The balance of the minutes were read and approved as slightly boring.

The Secretary offered to read the minutes of the previous meeting to the previous meeting that had previously been read, but nobody wanted to hear them unless they had anything good. The Secretary pointed out that there were a few scandalous remarks about Dick Madson, which everybody wanted to hear. That portion was read and those minutes were approved as read.

Fred Brown, in his brown fedora, then entered the room and David Call pointed out to everyone who didn't know Fred that that was indeed Fred Brown in person. Actually, what he said was, "For those who haven't seen him before that's Fred Brown, in the person." Fred had been at the Travelers last week but the rest of us weren't. Fred was informed by the President that that was prearranged, but he shouldn't take it personally.

President Dan read an announcement about the Bankruptcy Seminar to be held by a Minnesota lawyer down in Delta Junction for farmers. Randy Olsen had brought the announcement to the meeting, which was incongruous in that if the farmers filed bankruptcy, the State, by which he is employed, will have to negotiate these farmland issues in the bankruptcy court. That's job security.

President Callahan announced that he had nothing else but he saw that Ralph Beistline was there so he was sure that Ralph could contribute something to the meeting.

Ralph Beistline then took the floor and announced that there had been a nice presentation ceremony in Judge Savell's chambers at a quarter to twelve to present him with the picture that was supposed to be awarded at the Bar Convention. He stated that it was a very nice ceremony and he gave his presentation speech which lasted only seven minutes. During this speech Judge Savell's secretary kept looking under the tables and chairs saying "I think he's here somewhere" but it turned out that Judge Savell had left early.

Ralph then announced that the Board of Governors was looking for a proctor for sometime in July to assist in the administration of the Bar Examination. Ralph stated that the person should have some proctoring or proctology experience. Dan Callahan volunteered. It turned out he had proctology experience because he had looked up an old friend one time.

Ralph then announced that Deborah O'Regan wanted stuff for the *Bar Rag*. All the TVBA minutes, with the exception of the March 27th minutes, are being sent to the *Bar Rag*.

Niesje Steinkruger stated that the *Bar Rag* is just too long now. She wanted a *Bar Rag* that you would be able to read in one sitting. Ralph noted that perhaps it would be best if you *could* read it in one sitting. Roger Brunner inquired if Ralph had a lisp and did he in fact mean one one "sitting."

Judge Savell noted that Harry Branson would be spinning in his grave (if he had one) because when Harry was editor it was his view that the *Alaska Bar Rag* should not be a house organ. Several nasty comments were made about that statement. Many members present noted that the *Bar Rag* just wasn't what it used to be "any more." David Call took the rather strong position that the Anchorage Bar had lost its sense of humor. Others wondered where it went, and some were questioning whether they had had it in the beginning. Beistline, in his best auctioneer fashion, said that if 28 pages were too long, how about 20. David Call wanted only seven pages and somebody else said that 20 would be fine.

Dick Madson, or maybe it was Judge Kleinfeld, or maybe it was Dick Savell, or maybe it was Judge Zimmerman (it's hard to tell them apart, they all wear glasses, except for Judge Zimmerman, but then he has a beard like Madson and Savell, so it doesn't matter anyway), wanted somebody to get Wayne Ross to write articles about guns, and Gail Fraties to write articles about his trials, maybe with a new perspective. After all, it's not really meant to be a family newspaper anyway.

Ralph said that he would take all of the concerns of the TVBA about the *Bar Rag* to the right people.

Fred Brown, by now finished with his meal, took the floor and started out by saying that he hasn't been here for a while, but the last time he was here there was a letter from somebody about teaching about the Constitution. He didn't know if we had discussed it seriously, or non-seriously, but he had some views he wished to express. He was informed that the matter had been a subject of discussion in several meetings in the recent past. An inquiry was made as to whether or not Fred would participate in the in-service program, he said he had told the folks he would be involved if he doesn't have to talk about the whole Constitution and how it applied to every teacher's everyday life. Fred had also taken the liberty to recommend to Ms. Barrett other lawyers in Fairbanks to speak on certain other areas of the Constitution.

Dick Madson said he wanted to talk about housing soldiers, as he believed it hadn't been receiving enough attention lately. There was colloquy amongst counsel as to who should make the presentation on Sixth Amendment ineffective of assistance of counsel, but no consensus was reached, although several lawyers were named.

Will Shendel meant to bring to the attention of the TVBA certain rules concerning advertisement for lawyers. Apparently, Will had decided that he was going to put together an ad to be published in the *Fairbanks Daily News Miner* and had mentioned this to another lawyer. This other lawyer had said there are rules against advertising by lawyers. So, discretion being the better part of valour, and not wishing to instigate an investigation, Shendel called the Bar Discipline Counsel and was informed that there were new proposed rules concerning advertising. In the meantime, Bar Discipline Counsel is not enforcing the old rules unless the advertisement is false and misleading, or in the instance of the

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Chapter minutes

• Bar Rag & media ... and also, dead fish

Continued from page 34

use of the particular verb "specializing." Apparently, however, you can use the verb "specializing" if you also include a disclaimer in the ad, which everyone present chanted in unison.

Poor Will then received a barrage of verbal abuse which went to the point that he wasn't taking referrals from anyone else in town and how could he be willing to take people off the streets who had just read his advertising. Judge Savell noted that it probably had to do with most of the referrals making barking noises. The Secretary inquired if large neon signs were okay and Judge Zimmerman stated that they are not regulating bad taste, just ethics. Judge Kleinfeld noted that Justice Scalia, in a recent published opinion, had stated there's no dispute about bad taste (the original was in Latin and the Secretary could not read, write or speak Latin, so you'll have to read it in English).

Niesje Steinkruger announced that an Interim Commission on Children and Youth meeting would take place in Fairbanks on August 7th and 8th. She urged everyone to come and bring the kids.

Terry Thorgaard stated he had recently received the Alaska Law Review and on reading it felt that it didn't have any articles relevant to the practice of law in Alaska. Fleur Roberts objected strenuously, noting there was an article about one of her cases and therefore it was relevant and dealt with the local practice of law. If you would like to know more about this case and how Rule 60(b) applies, please talk to Fleur or Dick Madson.

Judge Kleinfeld announced once again that a new Deputy Clerk for Fairbanks has been appointed by the U.S. District Court. The clerk is there from the hours of 8:00 to 12:00 and 1:00 to 4:30. You need not make a telephone appointment, just appear at the office at those hours. The clerk is also under strict instruction that he can't go to the bathroom in the period 4:20 p.m. to 4:30 p.m. Roger Brunner noted that if the fellow looks jaundiced, don't scare him. The Deputy Clerk's name is Tommie Mize. To check the spelling of the last name, the secretary called the office and Mr. Mize was even there and answered.

Discussion then moved back to the bar examination. Art Robson wanted to know how come they are still giving bar examinations as we are all in and there are enough of us. That statement being anticompetitive under both the federal and state statute, it was ignored. Richard Burke wanted to know why the University was administering the examination. Ralph Beistline replied because the Board of Governors used to be responsible and that was kind of a hassle. He related a few horror stories, including an instance in Sitka where the bar examiner had forgotten about the examination and was in Seattle that day. Randy Olsen wanted to know how much the University was paid. Ralph Beistline replied "very little." Judge Zimmerman wanted to know "what does 'very little' mean to the Board of Governors." Ralph Beistline replied "less than $100,000." Randy Olsen wanted to know if the University of Alaska was administering the examination, why did we need a proctor. Ralph replied because they just pass the stuff around, they don't stay to watch. There was persistent questioning from many members about the price of the contract. Ralph then replied he didn't know, but he would amend his early answer to read $1,000.00 and not $100,000.00. Then several members present wanted to know if it was $1,000.00 per applicant or $1,000.00 per month, or $1,000.00 per person who passed, but Ralph would not respond. He finally said he would get us the details next week.

Mark Andrews gained the floor to read portions of a recent press release from the Department of Justice and someone named Arnold Burns. Apparently there was a hearing before the Supreme Court, on a petition by certain prisoners on death row in Texas, who wanted the Federal Drug Administration to certify that the drugs used for lethal injections to carry out death sentences in the State of Texas, were safe and effective for their intended use and purposes. One of the Justices inquired as to whether or not it would be necessary then for the FDA to certify the electric chair as safe and effective for its intended use and purposes. Judge Rehnquist interjected that the electric chair would actually fall under the provence of the Consumer Products Safety Administration.

President Callahan announced that the meeting would be held at the Travelers Inn for next week, but then he would check into the Alaska Salmon Bake and see if we couldn't go back there after that.

Respectfully submitted, etc.

TANANA VALLEY BAR ASSOCIATION MINUTES June 19, 1987

Prior to calling the meeting to order, minutes were kept. Fleur Roberts was overheard saying, "Gee, Dick made Judge and now he doesn't come anymore." Judge Zimmerman was overheard stating, in response to the comment made about Dan Callahan's prowess in 10K runs that "I could do a 10K if I wanted to." Judge Zimmerman is running more these days, and there is rank speculation is he runs because people are chasing him.

Randy Olsen, protector of the peoples' rights, related an odd moment in his life behind the green door at Station J at the State Office Building. (Subtitled "Olsen Plays the Skin Game"). It seems that Randy was interviewing some dancers who had claims against their employers in the office of Betty Rhymes. Betty was there, along with several dancers. Randy, for some reason, was playing with his wedding band. He states emphatically that he was not trying to hide it in his pocket, he was just toying with it. Of course, the little devil popped off his finger and fell on the floor. Randy says he waited to look for it until after the meeting was over, but the story sounds much better if we say he actually got down on his hands and knees looking for the brass ring. Randy insisted that we tell the truth, but that's difficult to do in the TVBA minutes (where truth is like justice, often sought but seldom achieved).

Olsen then commented that he had paid his dues for the entire year so he could vote on any issues that came up at the meeting.

For some reason, Randy was on a roll. He then offered the group his recipe for dead fish. The recipe goes like this:

RANDY OLSEN'S RECIPE FOR DEAD FISH

First you kill a fish.

If the tail section is brown and firm it's OK.

Then you put butter on it. Then lots of garlic salt until it tastes like garlic (this helps avoid the fishy taste).

Then you put lemon pepper on the fish, kachunk, kachunk, kachunk, and then maybe some more.

Serve with a side of boiled rice and French cut green beans.

If you think about it, chop nuts and place on one or more of beans, rice, and fish.

This stuff is so good, the kids will ask for more. (Apparently, the fish is to be cooked on a barbeque, but Randy, excited about the way it had tasted, forgot to put that part in. If you don't cook it, though, the kids might not ask for more.)

The minutes of this week were read and approved as read.

Last week's minutes were partially read and there were no changes.

Discussion moved to the Christmas party to be held on July 3rd. Vice President Olsen, who hadn't done much this year, said he would make up the notice and send it to everyone else.

Dick Burke gave a short medical report on his hand. Actually, it wasn't short, but he did receive lots of murmurs of sympathy.

Dan Callahan said something about a water bond, which apparently wasn't very important, because I didn't get the rest of it in the minutes.

Mac Gibson announced that Ray Funk was the new Probate Master. Under intense questioning, he refused to reveal who the Coroner would be, but stated that an awful lot of people had applied for it.

Pat Cole, with respect to applications for the Borough's Attorney position, said there was no news and no applicants.

Dan Callahan announced that Barbara Staley wanted to come and talk to us again, but there wasn't much interest expressed.

Winston Burbank stood up and put in a plea for people to put money into IOLTA.

Judge Zimmerman, somewhat out of order, gave a legislative report on Senate Bill 1 which will allow blind and deaf people on juries. Dick Madson, among many others, stated that why not, Judges had been known for years to be not only blind and deaf, but dumb as well. Madson then proceeded to demonstrate sign language he expects most of his defendants to show the jurors who are blind or deaf after returning a verdict for conviction. It was noted that it would be a little difficult for a blind juror to take into consideration the demeanor of the witness on witness stand, but perhaps exception could be made to allow them to feel the witness while the witness testified.

Winston Burbank, back on IOLTA, delivered comments this time directed to what happens to money that is deposited in an IOLTA account. Winston presented a list of ideas, some of which were kind of related to law, but few of which were related to the clients whose money it was.

Court personnel left at this time, apparently bored with the report and saying they had to work for a living.

After Mr. Burbank's presentation was finished, and there being no further business to come before the meeting, the meeting was adjourned.

Respectfully submitted, etc.

• We the People: Hamilton

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lands claimed under the grants of different States may afford another example of the necessity of an equitable jurisdiction in the federal courts. This reasoning may not be so palpable in those States where the formal and technical distinction between LAW and EQUITY is not maintained as in this State, where it is exemplified by every day's practice.

The judiciary authority of the Union is to extend:

Second. To treaties made, or which shall be made, under the authority of the United States and to all cases affecting ambassadors, other public ministers, and consuls. These belong to the fourth class of the enumerated cases, as they have an evident connection with the preservation of the national peace.

Third. To cases of admiralty and maritime jurisdiction. These form, altogether, the fifth of the enumerated classes of causes proper for the cognizance of the national courts.

Fourth. To controversies to which the United States shall be a party. These constitute the third of those classes.

Fifth. To controversies between two or more States; between a State and citizens of another State; between citizens of different States. These belong to the fourth of those classes, and partake, in some measure, of the nature of the last.

Sixth. To cases between the citizens of the same State, *claiming lands under grants of different States.* These fall within the last class, and *are the only instances in which the proposed Constitution directly contemplates the cognizance of disputes between the citizens of the same State.*

Seventh. To cases between a State and the citizens thereof, and foreign States, citizens, or subjects. These have been already explained to belong to the fourth of the enumerated classes and have been shown to be, in a peculiar manner, the proper subjects of the national judicature.

From this review of the particular powers of the federal judiciary, as marked out in the Constitution, it appears that they are all comformable to the principles which ought to have governed the structure of that department and which were necessary to the perfection of the system. If some partial inconveniences should appear to be connected with the incorporation of any of them into the plan it ought to be recollected that the national legislature will have ample authority to make such *exceptions* and to prescribe such regulations as will be calculated to obviate or remove these inconveniences. The possibility of particular mischiefs can never be viewed, by a well-informed mind, as a solid objection to a general principle which is calculated to avoid general mischiefs and to obtain general advantages.

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