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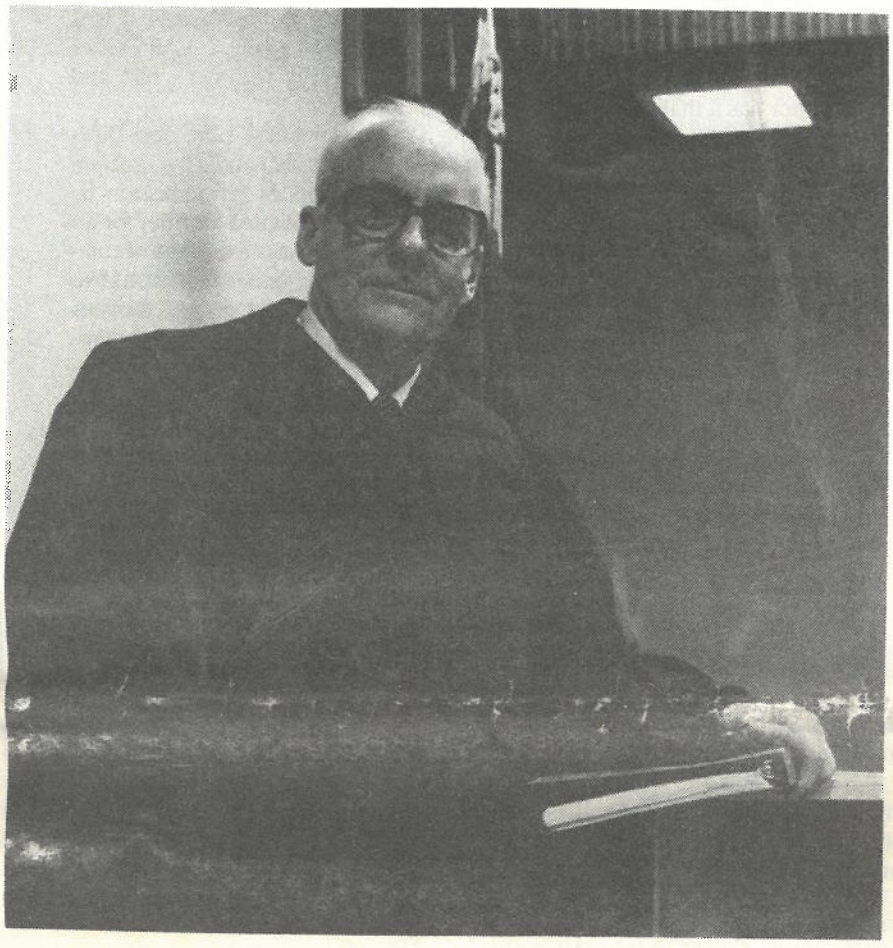
Moody retires from bench



by Yvonne Mozee

Judge Ralph Moody is in shirt sleeves. His corner office, on the third floor of Anchorage's new courthouse building, is laced with morning sunlight. Two bottles of "grouch control pills" sit among the papers, pens, books and flotsam on his desk. One or two volumes are missing from the bookshelves. An empty popcorn container indicates humanity among the statutes.

The judge, Scotch Irish in origin, Alabama born and raised, will be 70 years old next year. After almost 23 years on the Superior Court bench, he retires on January 2.

He answers questions thoughtfully, sometimes merrily. The southernness of his speech has been mellowed down. Somewhat. Excerpts from a two-hour conversation follow.

Q. What led you to become a lawyer?

A. My brother was a lawyer. He was going to college when I was going to high school. Maybe hearing him discussing it.

We lived 20 miles out of Mobile; roads weren't too good in the 20's. I took a train each morning at 7 o'clock to high school, came back at 6 at night. From about 3 in the afternoon until 5:30, I was around town on the streets in Mobile. Rather than get into trouble, I guess, I went down to the courthouse a lot, watched proceedings.

I was also selling papers—my first deal with a contract. Papers sold for 5 cents, newsboy got 3 cents, company got 2 cents. In those days (I don't guess they can do that today) they assigned corners to paperboys, wouldn't let anybody else on. I negotiated: I got 2 cents for selling and newsboy got 1 cent for letting me subcontract for him. (As I recall, you could buy a gallon of gas for 12 cents, a pack of cigarettes for 6 cents.)

Q: What has been most satisfying about your judgeship?

A: Most enjoyable may be interaction with people. Something new and something different every day.

It's challenging from the standpoint of doing your job and hopefully doing a job satisfactory to the people you deal with. By the very nature of this business you expect 50 percent to be unhappy with the result.

People, even though they may lose a case, if they think they've been fairly treated, don't resent it too much. Maybe I've misread, but I think I've left the impression with most people that I've treated them fairly. At least I myself feel that I have, and I guess that's a great satisfaction.

Reciprocity update

On Thursday, October 11, responding to a request from the Alaska Bar Association, the Alaska Supreme Court adopted an amendment to the Alaska Bar Rules providing for the admission without examination of attorney applicants under a reciprocity agreement.

The amendment will become effective January 1, 1985, and has the effect of repealing the current attorney's exam. The adopted amendment was the subject of considerable discussion by the membership of the Bar since the idea was first proposed to the membersship in a letter from Immediate Past President Mary K. Hughes in September of last year.

A proposed rule amendment was drafted by the Board in early 1984 and subsequently published and discussed by the membership at the Annual Business meeting in June of this year during the Bar Convention. During floor debate on the admission on motion proposal, the membership proposed and adopted further revisions to the reciprocity rule. The proposed rule change was then adopted by the membership and, as agreed to by the Board of Governors, was submitted to the Supreme Court as revised by the membership without further discussion or revision by the Board itself. The proposed amendment to Bar Rule 2, as approved by the membership and subsequently adopted by the Court, was published in the last issue of the *Bar Rag*.

The new rule provides that an attorney may be admitted without sitting for the Alaska Bar Exam if (s)he has 1) engaged in the active practice of law during five of the last seven years; 2) previously taken and passed a *written* bar exam; and 3) come from a jurisdiction which offers similar, "reciprocal" admission without examination to Alaskan attorneys.

General admission provisions require, in addition, that the attorney applicant seeking admission on motion be a graduate of an ABA or AALS accredited law school; be at least 18 years old; be of good moral character; and have successfully passed the Multistate Professional Responsibility Examination (MPRE).

It would appear, in addition to the nineteen (19) jurisdictions which currently have a "simple" admission on motion rule for attorney applicants, that the Alaska Supreme Court's adoption of the admission on motion rule under a reciprocity agreement means that Alaskan attorneys may seek admission to eleven (11) additional states, for a total of thirty (30) states.

It is important to note, however, unlike Alaska, that many jurisdictions have specific residency or domicile requirements and, in addition, that the actual time that must be spent by an attorney actively engaged in the practice of law prior to seeking admission ranges from three to five years.

Finally, it is also important to recognize that admission rules in every jurisdiction are undergoing rapid change and Alaskan attorneys seeking specific knowledge about a particular jurisdiction's actual admission criteria should contact that jurisdiction's admitting authority directly.

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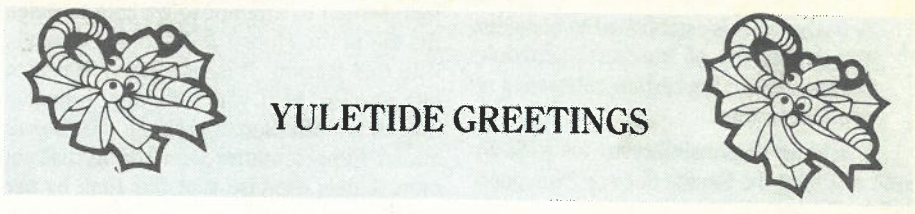

Burns Leaves Bar for Sunset Strip

The *Bar Rag's* Hollywood Reporter, Shad Rac, recently sat down backstage at the Tropicana to interview Randall Burns, the Bar's Executive Director, who has recently given notice that he will be wintering in LA attending the USC School of Cinema-Television. Randall will be doing graduate work in Cinema Production, a three-year program.

Shad: Isn't this a little sudden?
Rand: That's one way to look at it.
S: Why USC?
R: Well, George Lucas went there: I need a mentor.
S: How did YOU get in? I understand it's very competitive. Someone said they only take 35 students a year and over 1000 apply.
R: It's amazing where you can get with good looks and the right friends.
S: Right. Why film? I didn't know you had an interest in movies? I mean, you're an administrator.
R: I'm a very creative person; I just haven't had an opportunity to use those skills.
S: You mean you've felt stifled?
R: That's one way to look at it.
S: What is Cinema Production, basically?
R: Basically, it's taking lunches and cutting million dollar deals with men wearing gold chains.
S: Where's the creativity come in?
R: Getting the luncheon appointment.
S: What kinds of pics do you want to make?
R: Ones that gross over a 100 million.
S: Don't you have some "statement" you want to express in your films: modern angst, or something?
R: No, I'm just coming out of years of heavy angst and want some fluff about me.
S: We can't expect any "serious" work from you then?
R: Sure, at lunch.
S: Thanks for this talk.
R: Anytime Shad.

Shad reports from the Sunset Strip that we'll be able to see Randall (probably clad in gold chains) briefly this summer, taking lunches with local producer-types. Then, of course, it will be back to the glitter and excitement of life on the Sunset Strip.

Letters to the Editor

Editor's note: Since publication of the last Bar Rag, Congress has considered (but has not passed) the so-called Product Liability Act. The issue is expected to remain on the calendar in 1985, however. The following letters to the editor are printed to familiarize members with the issue.

•

Oppose Liability Act

The Product Liability Act (S. 44) has been reported out of the Senate Commerce Committee. The manufacturing and insurance industry coalition backing the legislation is making a full-scale effort to bring the bill to a vote in the Senate in the near future. The proponents recently have claimed that they expect both the Senate and the House to pass the legislation this Session. It is likely that they will seek to attach S. 44 to legislation, such as appropriations legislation, which the House must act upon this year, thereby short-cutting the normal procedures for passage on the House side.

Senator Hollings has described S. 44 as one of the worst bills the Commerce Committee has reported out in his eighteen years in the Senate. The following are among the many objectionable aspects of the bill:

State common law in the products field is preempted.

State product liability law is codified at the lowest common denominator of consumer protection so that plaintiff's recovery would be exceedingly difficult.

Strict liability in design and warning cases is abolished.

Punitive damages is virtually eliminated.

Employer's subrogation rights are eliminated, and the amount of worker's compensation benefits is deducted from plaintiff's recovery.

The defenses of misuse, modification and alteration and assumption of the risk are expanded.

A study panel is established to consider the desirability of "no-fault," schedule compensation for certain categories of product victims.

It is our responsibility to keep S. 44 from reaching the Senate floor or from passing the Senate. We can accomplish this only by actively voicing our opposition to the bill. Every major labor, consumer, state government, and Bar organization has joined in opposing enactment of the legislation. However, the overwhelming number of individual Americans, whose rights as product users are jeopardized by S. 44, are not part of any organized group. The Trial Bar thus must help speak for them.

The proponents of S. 44 repeatedly have contacted Members of the Senate to express support for S. 44. I urge you promptly to send letters and make phone calls to your Senators and Representatives to express your opposition to the bill. If at all possible, you should meet with your Senators and Representatives either in Washington or in your state. Congress will return from its present recess on July 23. Finally, you should encourage lawyers, union officials and members, consumer groups, and women's groups as well as your governor, state legislators, and state court judges to make similar contacts with the Members of the Senate and House.

Please let me know how you make out.

Sincerely,

David S. Shrager
President of Trial Lawyers of America

ATLA Report

Dear Members of the Bar:

I recently returned from the annual convention and Board of Governors' meeting for ATLA, and as Governor from the State of Alaska, felt it important that I contact you and alert you to some of the significant events that occurred at the meetings.

The most important and of immediate concern, and certainly one of the greatest challenges that has faced the trial bar in many years, is the pending federal products liability bill. ATLA strategy has been, for the past several years, to oppose this legislation as a needless encroachment by the federal government into areas of tort common law and as an invasion of the states' rights. Many of the members of the Board, including myself, were opposed to this tactic as we felt it was ultimately doomed to failure and believed in those states where the bill would adversely affect product liability law, such as Alaska, that the bill should be attacked on its merits, and in that context discussed with those states' representatives and senators.

With the election of Scotty Baldwin as President, and the total reorganization of ATLA's lobbying structure and executive directive, the latter philosophy has belatedly been adopted. We are, however, in enormous trouble with regard to the federal product liability legislation. The bill is presently pending in the United States Senate, having been passed out of committee and co-sponsored by Senator Ted Stevens. It may be voted on in the Senate within the next several weeks, and there is substantial doubt whether we have sufficient votes to prevail in the Senate. The bill will then have to be moved to the House for consideration, and there is an enormous effort being made by the insurance and manufacturing groups to lobby support of the bill in the House.

ATLA is at this time organizing a key-man system to attempt to be able to defeat the bill in the House, if it should come to a vote this session. It is, therefore, of critical importance tht if you have any individual influence with Senator Frank Murkowski and/or Representative Don Young that you immediately exercise it at this time by personally contacting them and urging them to vote against Senate Bill 44 (SB44), and to oppose any consideration of a product liability bill in the House and/or to vote against it on the House floor.

Already waiting in the wings is a national medical negligence bill which will substantially limit the rights of those persons injured by the medical profession. The sponsors of this legislation are awaiting the result of the product liability bill before proceeding.

Another major and threatening development occurred during convention week, which was discussed at the Board meeting on Friday, July 27th. It has been reported that the American Medical Association has gathered an enormous fund for the purposes of passing substantial limitations on medical malpractice actions and has selected Florida as their first target state. To this end, a brochure was prepared attributing the high cost of insurance and specifically the high cost of medical care to damage awards being received by injured claimants. These brochures which were accompanied by a petition for a constitutional amendment, which among other things would limit general damage awards, were distributed to every doctors office in the state. Within six days, the necessary signatures were obtained to place the constitutional amendment provision on the fall ballot some 90 days away. Interestingly, the damage limitation applies to all tort claimants and not just to those involved in medical malpractice. It has been learned that the AMA has pledged to support this effort with a campaign media blitz to the tune of $3 million dollars. It has also been learned that this same tactic will be utilized in various target states in the upcoming year.

The Florida Academy of Trial Lawyers is frantically attempting to raise sufficient funds to combat this attempted constitutional amendment, and the Board has voted to actively support their efforts by all available means. Any assistance that you could provide in this effort, I am sure would be immensely appreciated. Contact, Bill Wagner, 708 Jackson St., Tampa, Florida 33602.

Because of various commitments, I was not able to attend many of the educational sessions held at the annual meeting, many of which I have heard were outstanding. To fill in the gaps, our firm decided to obtain recorded cassettes of all of the general educational programs. These cassettes are available at our office for your use and can be checked out at no cost on a weekly basis by simply calling Carol, our office manager.

Best regards,

L. Ames Luce
ATLA Governor, State of Alaska

OPA Speaks

Dear Alaska Bar Members:

Much misunderstanding has surrounded the functions of the newly created Office of Public Advocacy. The issue of most immediate concern to lawyers, court-appointment of conflict counsel for criminal cases, has been resolved. The statute mandates that the Public Advocate is responsible for representation of all criminal defendants with whom the Public Defender Agency has a conflict of interest. Where the OPA has a conflict of interest, private counsel will provide representation under contract. I plan to contract with 6–10 Anchorage attorneys who will act as conflict counsel on a rotating basis. In multiple co-defendant cases, some or all of these attorneys may become involved in a single case. OPA will also contract with private counsel for representation of clients in rural areas where staff coverage would be too costly.

The OPA will be appointed in all guardian ad litem cases and will also be responsible for representation of wards and respondents in guardianship proceedings. Since the public guardian function is to be transferred to OPA, it will probably become necessary to contract for counsel for wards and respondents as well as for visitor services. The final area of responsibility is the representation of one party in *Flores* cases where the other party is represented by Alaska Legal Services in child custody disputes.

The OPA will assume its statutory responsibilities by increments that will initially focus on coverage of the most expensive current Court System contracts. Hopefully, we will begin representation of indigent criminal defendants in Anchorage by late November and add other areas as we establish offices and negotiate contracts.

I invite the assistance of the Bar in creating a system that will avoid the obvious conflicts in the OPA functions. Attorneys interested in contracts for criminal defendant and respondent representation should contact me at 274-1684.

Sincerely,

Brant McGee
Public Advocate

(See articles on Wood decision elsewhere in the Bar Rag.)

Bar President's Column

by Hal Brown

I am sitting in my office gazing at my fish tank after having reread the John Wood decision, wondering—as I often do—whether the Association will expect me to assume a leadership role in the matter.

Let's see. Now, incompetent attorneys cannot be compelled to represent indigent defendants, nor can they be required, on constitutional grounds, to employ competent counsel to provide a defense. On the other hand competent attorneys can be compelled to represent indigent defendants and I assume, are required, if they choose not to render the services themselves, to employ competent counsel to provide the defense no matter the expense. It's all rather confusing. I just know that the Superior Court is not going to engage in holding a competency proceeding every time an attorney says he (or she) is incompetent. It doesn't have the time; besides, who knows what competency is, anyway?

What the Court will probably do is remove from the alphabetical list all attorneys who have been admitted less than a year or more than 30. Government attorneys can't represent indigent defendants (so I hear) and neither can those who can't find the courthouse or have a note from their doctor. What has been accomplished, I guess, is that the number of eligible attorneys on the list will have been diminished, increasing disproportionately once again, the burden upon the private bar. This means that the list of eligible attorneys will still include a few notables like Steve Delisio, Bill Bryson, Jim Gilmore and Philip "Mad Dog" Weidner. It doesn't seem all that fair, though, to call upon them again and again and again . . . Gail Fraties cleverly avoided appointment by joining the District Attorney's staff and rumor has it that he is seeking judicial appointment.

Some attorneys will go to any length to avoid financial ruin. Stan Ditus has called and told me that this is not the way they would handle the problem in Kansas. He suggests that any attorney who applies for admission by reciprocity should first be required to serve as an appointed attorney for an indigent charged with First Degree Sexual Assault. That's a real test of competency. Besides, says he, if the Court has the power under Administrative Rule 26 to "tap" the State treasury for the cost of providing "proper" facilities for the transaction of the Court's business, it should have the power to "tap" the State treasury to reasonably compensate attorneys compelled to represent indigents. Interesting thought. Frankly, it's just a question of dollars.

I think most of us have always presumed that we have the duty to serve, but should we be compelled to serve without reasonable compensation? Oh well, first things first. I must plan for the nut cups to be served during the Oklahoma-Nebraska game and then I think I will attempt locating the office of Public Advocacy. Despite what Harry Branson says, nobody reads the President's column anyway. Maybe I'll appoint a committee . . .

(See other articles relating to the Wood decision elsewhere in this Bar Rag *issue.)*

SUCCESSFUL BAR EXAMINEES

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2. Iris S. Barnett
3. Philip S. Barnett
4. Jeri L. Bindinger
5. F. Christoper Bockmon
6. Julia A. B. Bockman
7. John K. Bodick
8. Joseph W. Bottini
9. Peter B. Brautigam
10. James K. Brinker
11. James S. Burling
12. Kevin D. Callahan
13. Steven J. Carney
14. David S. Carter
15. Talis J. Colberg
16. Donald S. Cooper
17. Barbara J. Coster
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19. Diane L. Daley
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24. Donald K. Ford
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26. Heather H. Grahame
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47. Duane R. Menting
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52. Margaret E. Moran
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73. Valerie A. VanBrocklin
74. Calvin P. Vance
75. L. Van Whitehead
76. Kristen M. Whitlock
77. Martin Wolff
78. Glen E. Woodworth
79. Andrew M. Zahare

Act amends bankruptcy laws

by Cary Virtue

A special panel comprised of three bankruptcy judges can now hear bankruptcy appeals in the Ninth Circuit instead of taking the case to the District Court, U.S. District Court Chief Judge James M. Fitzgerald has announced.

The District Court and all parties involved, however, must agree beforehand to take a bankruptcy appeal to the new panel, known as the Ninth Circuit Bankruptcy Appellate Panel. A consent also must be filed in writing within 30 days after entry of the appeal on the docket pursuant to Rule 8007 of the Rules of Bankruptcy Procedure.

Any appeal from the appellate panel decision will be handled by the Ninth Circuit.

"The bankruptcy appellate panel may hear and determine appeals from final judgments, orders, and decrees entered by bankruptcy judges and, with leave of this Court or the bankruptcy appellate panel, appeals from interlocutory orders and decrees entered by bankruptcy judges," Fitzgerald wrote in his order dated October 31.

Fitzgerald also ruled that the appellate panel may not hear and determine appeals from judgments, orders and decrees entered by bankruptcy judges between Dececember 25, 1982 and July 10, 1984.

The provision allowing a Bankruptcy Appellate Panel is just one of several new regulations affecting bankruptcy cases as a result of Congressional passage of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Fitzgerald said.

The act, signed by President Ronald Reagan July 10, 1984, went into effect October 8, 1984.

Highlights of the new bankruptcy amendments act include:

- Secured debts have been tightened against debtors. Under Chapter 7, debtors now must file within 30 days his/her intention to retain or surrender property after filing a bankruptcy petition. The debtor also must indicate any property claimed as exempt; any intention to redeem property; and, any intention to reaffirm debts secured by such property. Moreover, the debtor must perform the intention specified pursuant to Section 521(2)(A) within 45 days after filing a notice of intent.
- A debtor must file a schedule of current income and current expenditures. Also a debtor must file a list of creditors, schedule of assets and liabilities and a statement of financial affairs (Section 521(1)).
- Fisherman have a new fifth priority to the extent of $2,000 against a debtor fish processor (Section 507(a)(5)(B)).
- A drunk driving judgment is nondischargeable. A judgment based on a liability incurred by a debtor as a result of operating a motor vehicle while legally intoxicated is nondischargeable (Section 523(a)(9)).
- A Chapter 13 plan cannot be confirmed over the objection of the trustee or unsecured creditor who is not fully paid by the plan unless the debtor's disposable income is applied to payments under the plan. In short, the courts can order that all of a debtor's projected income over a three-year period will be applied to make payments under the plan. Within 30 days after a plan is filed, the debtor must begin paying the Chapter 13 trustee any payments proposed under the plan (Section 1325(b)(1)(B); Section 1326(a)(1)).
- Any consumer debt owed to a single creditor aggregating to more than $500 for luxury goods or services which were incurred by an individual debtor within 40 days before an order for relief is nondischargeable (Section 523(a)(2)(A)).
- The chances of a debtor recovering attorney's fees have been substantially reduced (Section 523(d)).
- Private employers cannot fire or discriminate against a person because he/she has been a bankruptcy debtor (Section 525).
- A preference is not avoidable if a debtor's consumer debts are less than $60 (Section 547(c)(7)).
- A trustee has a duty to see that a debtor carries out his/her expressed intention to redeem or surrender property securing a consumer debt. In short, the rules governing cosigners have been strengthened (Section 704(3)).
- A Chapter 11 debtor has 120 days to file a plan. An extension of that time period may be granted, but only if the request is made prior to expiration of the period.
- A fisherman only has 10 days to file a right of reclamation to recover fish from a debtor who received fish while insolvent. Also, a court can deny reclamation only if the court secures the claim by a lien (Section 546(d)(1); Section 546(d)(2)).

Delisio battles over indigent appointment

by Cary Virtue

For more information, please read the Supreme Court's Wood *opinion published elsewhere in this paper.*

Anchorage attorney Steve Delisio, hoping to bring about a "permanent solution," wants to abolish the state court system's current practice of appointing private attorneys to handle indigent cases.

The solution, Delisio said, is for the Legislature to allocate sufficient funding so the courts can hire competent, criminal trial attorneys to defend indigent cases which the Public Defender Agency cannot handle.

"The point is, if you're going to adequately compensate, there will be attorneys available to handle those (indigent) cases," said Delisio, a civil trial attorney who is appealing his appointment to defend an indigent.

In his appeal, Delisio argues that:

—It is unconstitutional to force an attorney to take an indigent case, regardless of whether he/she is qualified.

—The present system of selecting attorneys to defend indigents in Alaska is unfair, discriminatory, and places an unfair burden on private lawyers.

—Forcing attorneys to handle indigent cases without adequate compensation represents a taking of property, which is unconstitutional, unethical and immoral.

—Lawyers who are not criminal trial attorneys will probably face malpractice lawsuits when forced to defend indigents, since they generally lack criminal trial expertise.

The controversial issue pits private attorneys like Delisio against a judicial system that believes it has the right—based on 200 years of tradition—to appoint attorneys to defend poor clients.

Some assistance, however, may be on hand.

The Office of Public Advocacy, which opened in mid-November, has eight attorneys and a $2.1 million budget to handle child abuse and indigent cases. A portion of the budget will go toward hiring private attorneys when a conflict case occurs.

Supporters of the new program hope it will eliminate the need to have court-appointed attorneys.

"I'm pretty persuaded this year's budget is adequate," said Brant McGee, director of the new advocacy office. "The question is whether we'll be adequately funded to deal with increasing (work) loads."

Nonetheless, Delisio is forging ahead with his appeals case because he believes the principle of appointing attorneys is fundamentally wrong. He has retained the Anchorage law firm of Baily and Mason. And he's prepared to fight the issue all the way to the U.S. Supreme Court.

"I have one pet peeve about this whole thing," Delisio said. "The Court, like in the Wood case, implies that the reason why lawyers are resisting is because we're trying to protect our wallet. That makes me madder than hell.

"I wouldn't care if they paid me a million bucks—I still wouldn't take these cases. I don't feel I'm qualified to take them."

The issue surfaced in August when Superior Court Judge Beverly W. Cutler, in Palmer, appointed Delisio to defend an indigent accused of child molestation.

Delisio refused, saying that he wasn't qualified to handle the case. The last time he had defended a felony case was in 1966 when he was working as an assistant district attorney in Fairbanks.

For the past 20 years, Delisio said he has been "exclusively" a civil trial lawyer specializing in complex litigation that varies from commercial disputes to personal injury lawsuits.

But Presiding Superior Court Judge Mark C. Rowland rejected Delisio's request, saying that Delisio was qualified. He ordered Delisio's to take the case or face a jail sentence for contempt of court.

Alaska Supreme Court Justice Jay A. Rabinowitz handed down a last minute stay so that Delisio did not have to report to jail. He also cleared the way for an evidentiary hearing.

At press time, Delisio was still waiting for Rowland to issue a final order on his appeals case following the evidentiary hearing.

"I've asked for a final order," said Delisio's attorney, Doug Baily. "And he (Rowland) indicated that he would issue one. But I haven't seen it yet. It's in limbo. I don't know exactly where we are right now."

Delisio is attacking the court's premise that it has a constitutional right to force a private attorney to handle an indigent case regardless of compensation.

So far, the Alaska Supreme Court has denied similar challenges. In November, for example, it ruled in the Wood case that the courts have the power to compel lawyers to represent indigent clients, based on a tradition over 200 years ago.

The Supreme Court, however, said that attorneys who can prove that they are incompetent cannot be forced to represent indigent defendants.

"My reaction was that the decision was not very well thought out," Delisio said. "It's internally inconsistent."

Delisio rejects the Court's use of tradition to justify court-appointments. The legal profession, he said, has changed dramatically over the past 200 years, expanding from a small, self-governed monopoly to a diverse body open to virtually anyone who passes the bar exam.

A 47-page detailed memorandum filed by Delisio lists many cases in which judges in California, Iowa, Indiana and other states have ruled against the concept of forced court appointments over the past 100 years.

"State after state has rejected its traditional appointment system recognizing, either on constitutional or policy grounds, that the traditional system unreasonably violates attorney's rights," according to court documents filed by Delisio.

In addition, Alaska's selection process for appointing attorneys to handle indigent cases is unfair and discriminates against the private-practicing attorney, Delisio said. Those appointed can only receive up to $2,500 in compensation for felony cases.

"It has been a long-standing policy of the Court System to exclude attorneys who are public servants, the reasons for which are lost in the recesses of time," said Judge Rowland, commenting in findings of fact or Delisio's case.

That does not make sense to Delisio. Judges, public defenders, corporate attorneys and prosecutors all are officers of the court, but are not appointed to defend indigents, he said. In short, the burden for defending indigent cases which are not handled by the Publid Defender Agency is borne by private practicing attorneys.

"The system is just fundamentally wrong," Delisio said. "We're the only occupation in this nation that any branch of government has the brass to say you must render services whether you like it or not—simply because the government tells you to, whether you're compensated or not."

Forcing attorneys to defend indigents without adequate compensation represents a taking of property, which is unconstitutional and unethical, Delisio said.

"It's no question that a lawyer's time is his money and that's his income," Delisio said. "That's all he has to offer is his time. And so you're taking his property just as if you're taking his house, or the food off his table."

The threat of facing a ruinous malpractice lawsuit is another reason why it's unfair to force attorneys who do not have criminal trial expertise to defend an indigent. Civil trial attorneys, for example, cannot learn all of the ins-and-outs of criminal law and police procedures to competently defend a client within the four-month rule, he added.

"And what's the defendant going to do when he finds out that maybe he shouldn't have gone to jail in the first place? That he was perfectly innocent?" Delisio asked. "He's going to come back and sue the s--- out of that lawyer. And he's going to be right. And he's going to have big, big damages."

It's also not fair to expect an attorney to suddenly drop his current practice in order to defend a person, especially when the attorney is not guaranteed fair compensation for his time.

In fact, Delisio wonders whether a lawyer forced to defend a client will "go to the wall" to defend a client.

"Or are they going to do the absolute bare minimum they can get away with without being called on the carpet by somebody?" he asked. "And are they going to know the difference? That's the thing that worries me more than anything else. Are they going to know the difference?"

But win or lose, Delisio says he isn't giving up until he's exhausted every legal option.

"My attitude is that if it's right—do it," Delisio said, referring to his appeal. "And if you're going to lose, do it anyway. I'd much rather go down in flames than go sneaking off some place in the distance."

Cary Virtue, formerly a reporter for the Anchorage Times, *recently opened his own consulting business, Virtue Public Relations; he continues to freelance for the* Bar Rag *and other questionable publications.*

Court reverses, remands Wood

THE SUPREME COURT
OF THE
STATE OF ALASKA

JOHN WOOD,
Appellant,
v.
SUPERIOR COURT, STATE OF ALASKA, Third Judicial District,
Appellee.

File No. 7386

OPINION

[No. 2884—October 30, 1984]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Ralph E. Moody, Judge.

Appearances: John W. Wood, pro se. Robert H. Wagstaff, Anchorage, for the Anchorage Bar Association, Amicus Curiae. Elizabeth L. Shaw, Assistant Attorney General, Anchorage, Norman C. Gorsuch, Attorney General, Juneau, for the State of Alaska, Amicus Curiae.

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

RABINOWITZ, Justice.
BURKE, Chief Justice, concurring, in part, dissenting in part.
MATTHEWS, Justice, concurring.
COMPTON, Justice, dissenting, in part.

In *Jackson v. State*, 413 P.2d 488, 490 (Alaska 1966), we recognized "a tradition deeply rooted in the common law":

> [A]n attorney is an officer of the court assisting the court in the administration of justice, and . . . 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 appeal requires us to re-examine the nature of this obligation and the manner in which it may be enforced.

I

John Wood is an Anchorage attorney. On July 15, 1981, he was appointed to represent an indigent defendant charged with committing nine different offenses. Most indigent defendants are represented by the Public Defender.[1] When, as in this case, the Public Defender is unable to represent a particular defendant, the private bar is, by court rule,[2] required to cover that defendant's case. In Anchorage, the court system's administrative director had, by contract, arranged for an Anchorage firm to handle most cases in which the Public Defender was disqualified due to conflicts; but this firm, too, recognized a conflict of interest in this particular case and was unable to represent the defendant. This case, then, reached the third tier of attorneys: a list of private attorneys, compiled pursuant to a superior court order. Wood's name was on the list, and he was appointed.

Claiming that he was not competent in criminal matters and that for this reason the defendant's right to effective assistance of counsel would be impaired, Wood refused to accept the appointment. District Court Judge (now Superior Court Judge) Cutler referred the matter to Presiding Judge Moody, whose 1979 order had created the list from which Wood's name was selected. Meanwhile, Judge Cutler assigned another attorney to the case. Two weeks later, Judge Moody issued an order for Wood to show cause why he should not be held in contempt. After several hearings, during which alternatives to the existing court-appointed counsel system were discussed, Judge Moody concluded that the existing system was constitutional and stated that he did not "feel compelled to excuse [an] attorney from service on a mere assertion to the court that [the attorney] is incompetent to represent a criminal defendant." Judge Moody found Wood in contempt and ordered him to pay a $500 fine. From this decision Wood, supported by Amicus Curiae Anchorage Bar Association, now appeals.

II

The order Wood is attacking reads, in full, as follows:

ORDER

The Supreme Court has announced that, effective July 1, 1979, counsel appointed to represent defendants in criminal cases in which the Public Defender has established a conflict exists will be compensated at the rate of $40 per hour with a maximum of $1,500 in misdemeanor and $2,500 in felony matters.

The Alaska Court System expenditure transactions reflect approximately two hundred ten (210) appointments of counsel in criminal conflict cases during the calendar year of 1978.

As the Greater Anchorage telephone directory contains approximately four hundred seventy (470) names of lawyers engaged in the private practice of law,

IT IS ORDERED that a list be established which will contain the name of each lawyer above-described. The order in which the names will appear on the list will be from a drawing, and it will be the responsibility of each attorney so appointed to provide legal representation or to arrange for another attorney to provide said representation.

If, during the preceding six-month period, any lawyer has been appointed to represent a defendant in a criminal matter, and so requests, his name will appear at the end of the newly established list.

Any lawyer who has been admitted to practice in Alaska for less than one year may request and have only misdemeanor assignments for a period of not more than one year.

IT IS FURTHER ORDERED that similar lists will be established for Palmer, Kodiak, Kenai and Valdez. In the event that hardships result in small communities from the lack of adequate numbers from which to rotate assignments, with approval from this office, appointments may be made from the Anchorage list or other convenient locations.

DATED at Anchorage, Alaska, this 22nd day of June, 1979, with an effective implementation date of July 1, 1979.

/s/
Ralph E. Moody
Presiding Judge
Third Judicial District

(Emphasis added).

Analytically, one can best understand Wood's objections to this order by dividing them into two categories. One set of objections depends on the fact that under the order some attorneys are required to provide services to people they would rather not represent at rates they consider inadequate. The other set of objections concern the fact that some of the attorneys called upon to represent criminal defendants may not be competent practitioners of criminal law. We discuss these objections in turn.

III

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. Wood offers no authority for the proposition that this practice unconstitutionally encroaches on the executive or legislative domain and we can perceive none.[3]

Nor do we accept Wood's argument that courts do not have power to issue orders like the one he attacks. Article IV, section 15 of the Alaska Constitution gives this Court authority to make and promulgate "rules governing the administration of all courts" and "rules governing practice and procedure in civil and crminal cases in all courts." Under this authority, we promulgated what is now designated as Administrative Rule 12,[4] which requires the presiding judge in each of our four judicial districts to maintain lists of attorneys eligible to receive court appointments to represent indigent defendants in criminal cases. Presiding Judge Moody issued his orders pursuant to this rule, and Wood does not argue that we unconstitutionally delegated our responsibility to the judge.[5]

Nor does an order requiring an attorney to represent a criminal defendant necessarily take that 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. *See Williamson v. Vardeman*, 674 F.2d 1211, 1214-15 (8th Cir. 1982), and the cases cited therein. 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. *See People v. Randolph*, 219 N.E.2d 337 (Ill. 1966), and Annot., 18 ALR 3d 1074 (1968). But Wood has not shown that this is an extreme case. Moreover, under Administrative Rule 12(h) the court system's administrative director may, "[i]f necessary to prevent manifest injustice, . . . authorize payment of compensation or expenses in excess of the amounts [otherwise] allowed under this rule."[6]

Wood also argues that the order denies him equal protection of the law. On the record before us, we cannot agree. His claim that the list of eligible attorneys arbitrarily fails to comply with the superior court's order is based on a comparison of the names on the list with the names listed in the attorneys' section of the 1981 Anchorage telephone directory. But the list was compiled based on the 1979, not the 1981 directory, and Wood has not shown that the court system has failed to update the list. Nor has he supplied sufficient evidence for his claim that "attorneys for a privileged client such as a bank or insurance company" routinely escape their responsibilities under the order. It is also clear that these specific objections were not raised before the superior court. Thus, we need not rule on Wood's claim that the way the list was prepared and used violated his equal protection rights.[7]

The Anchorage Bar Association emphasizes that counsel in Wood's position may not receive as much compensation as would counsel working under contracts with the court system. It notes that under Administrative Rule 12 "third-level" counsel receive a maximum of $2,500 per felony, while the court system's contracts provide that attorneys working for "conflict firms" may receive up to $8,000 in unclassified felony cases and up to $3,000 in less serious felony cases. We first point out that in this case an unclassified felony is not involved. We also think that elementary economic theory explains the difference between the $3,000 limit on fees a "conflict firm" might have received in this case and the $2,500 limit on fees Wood might have received. In contracting for "second-level" representation, the court system, represented by its administrative director, quite understandably had to offer "second level" firms an incentive to enter into contracts. The administrative director apparently decided that the advantages a "second-level" firm could offer were worth the added expense. We conclude that the

[continued on page 6]

Wood decision...

$500 difference bears a fair and substantial relationship to the court system's goal of providing reliable and competent representation for individual defendants.[8] In short, if we assume for purposes of argument that all attorneys are competent in criminal law, we see no constitutional infirmities in the superior court's order.

IV

Not all attorneys, however, are competent in criminal law. We do not think that lack of experience in criminal cases will always justify an attorney's refusal to represent an indigent criminal defendant. "It would seem that any member of the bar, even without 'expertise in criminal matters,' should be able without undue burden to prepare himself to represent a defendant in a misdemeanor case, just as he could prepare himself to draw a type of contract which he had not drawn before." ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1216 (1972). In such a case an inexperienced attorney who decided to represent the defendant would not necessarily be violating Disciplinary Rule 6-101 of the Code of Professional Responsibility, which provides in pertinent part:

> A lawyer shall not . . . [h]andle 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."

Yet it is all too obvious that "in some instances an appointed lawyer who prepares diligently will nevertheless be unable to prepare himself sufficiently to be competent to represent the defendant," Informal Op. 1216, *supra*, and that in those instances the appointed lawyer should not bear primary responsibility for the case. The American Bar Association's Committee on Ethics and Professional Responsibility suggests that attorneys finding themselves in this situation should ask the court to appoint, "as associate or co-counsel, an additional lawyer who is competent to handle the matter in question." *Id.*

A rather different approach to this problem is embodied in Judge Moody's order that Wood is attacking. If an attorney decides not to represent an indigent defendant, the attorney must "arrange for another attorney to provide . . . representation." When Wood refused to take the case to which he was assigned, Judge Cutler informed him that at least two local attorneys were willing to take cases that other bar members were unable to handle. Suspecting that he would have to "pay out of my own pocket" for this alternative representation, and objecting on principle to this imposition on him, Wood refused to follow the course Judge Cutler outlined. On appeal, Wood and the Anchorage Bar Association argue that this order establishes an outmoded and constitutionally defective system. In part, we agree. If an attorney cannot practice criminal law competently, forcing that attorney to hire a replacement takes the attorney's property without just compensation.

In 1967, the American Bar Association's Project on Minimum Standards for Criminal Justice approved programs in which "[e]very lawyer licensed to practice law in the jurisdiction, experienced and active in trial practice, and familiar with the practice and procedure of the criminal courts, [is] included in the roster of attorneys from which assignments are made." ABA Standards Relating to Providing Defense Services § 2.2 (1967). The Advisory Committee's commentary noted that "it is not necessary to limit participating to those who are experts in criminal law." Experienced and active trial lawyers with "some experience" with criminal cases were deemed competent to represent criminal defendants. But we can take judicial notice that criminal procedure, to say nothing of the substantive criminal law, is more complicated than it was in 1967, and the commentary to the most recent set of ABA Standards reflects this fact. "The practice of criminal law has become highly specialized in recent years," an ABA task force has reported.

> and only lawyers experienced in trial practice, with an interest in and knowledge of criminal law and procedure, can properly be expected to serve as assigned counsel. While it is imperative that assigned counsel possess advocacy skills so that prompt and wise reactions to the exigencies of a trial may be expected, this alone is not deemed sufficient. There must also be familiarity with the practice and procedure of the criminal courts and knowledge in the art of criminal defense.

ABA Standards for Criminal Justice, § 5-2.2, at 5-27. Thus, the ABA explicitly "rejects the notion that every member of the bar admitted to practice in a jurisdiction should be required to provide representation."

Of course, the fact that the ABA believes a practice to be undesirable does not make that practice unconstitutional. Yet the passages we have just quoted establish that in some circumstances an attorney may be ethically bound to ask to be relieved of appointment to a criminal case. Forcing an inexperienced attorney to represent a criminal accused will often deny that defendant effective assistance of counsel.[9] Forcing the incompetent attorney to hire a replacement raises a less serious but still significant constitutional problem. A court may require an attorney to represent an indigent defendant without compensation, but requiring the attorney to pay defense expenses out of his or her own pocket takes the attorney's private property. *Williamson v. Vardeman*, 674 F.2d 1211, 1215–16 (8th Cir. 1982); *State v. Robinson*, 465 A.2d 1214, 1216–17 (N.H. 1983); *cf. Wolff v. Ruddy*, 617 S.W.2d 64, 67 (Mo. 1981). We think 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, they then cannot justly claim that an ethical rule has prevented them from taking the case. In such a situation 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 replacement counsel does not convert the order assigning the attorney to the case into a taking.[10]

V

We now must determine how these general considerations affect the case before us. When she decided not to excuse Wood from his appointment, Judge Cutler explained,

> I'm very sympathetic with Mr. Wood's situation, but these are (Pause) I believe they are all pretty simple misdemeanors. I don't see any reason to depart from treating him the way other persons are treated, so I don't find this is a criminal case of particular, that requires particular experience. It appears that he does have some prior experience in criminal law. . . .

Wood himself stated that he had handled some criminal cases until 1973. Judge Moody pointed out that in working for the Court System as a law clerk Wood had dealt with criminal matters. On this record we cannot say that he was not competent to practice criminal law or that indigent defendants represented by him would necessarily have received ineffective assistance of counsel.

Like Judge Moody, we specifically reject the argument, advanced by counsel for the Bar Association, that an attorney's statement that he or she is not competent to take a particular case should automatically excuse the attorney from providing representation. Unless attorneys who do not want to handle criminal cases are required to demonstrate that ethical requirements prevent them from accepting an assignment, some attorneys will inevitably avoid taking cases that they could in fact handle competently. A showing that an attorney is not competent must be made to the court. If the court determines that the attorney is in fact competent and the attorney still refuses to take the case, he or she may be held in contempt if proper procedures are followed. *See* Annot., 36 ALR 3d 1221 (1971). We now turn to the question of whether the procedures followed in this case were proper.

VI

Wood ~~contents~~ that he was denied his constitutional right to trial by jury. We agree. Before explaining why this is true, however, we are compelled to offer one observation about the nature of the proceeding in which Wood was involved. Wood's refusal to represent an indigent defendant gave the superior court an opportunity to solicit several different views on the ways in which an appointed-counsel system should work. Our review of the record reveals an informal, almost collegial inquiry, in which Wood himself played a relatively minor role and various amici were invited to expound on how criminal defendants should be represented. Very little evidence was taken and Presiding Judge Moody's conclusions seem to have been based on his own long and varied experience on the bench. The difficulties of making policy while at the same time conducting an adjudication have troubled many authorities, the United States Supreme Court among them. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 22 L.Ed.2d 709 (1969); 2 K. Davis, *Administrative Law Treatise*, § 7.25 (2d ed. 1979). Wood does not argue that the superior court denied him due process of law, and we doubt that it did. But the record shows that once the superior court had concluded that its order was valid—and the collegial inquiry had ended—its decision to hold Wood in contempt was well-nigh automatic.

Wood was entitled to a jury trial. When the superior court issued its show-cause order, Judge Cutler had already appointed another attorney to handle the case Wood had refused to take. For this reason it would have been impossible for Wood then to have accepted the appointment, and the contempt hearings' purpose, aside from helping the superior court design an appointed-counsel rule, could only have been to punish Wood for his defiance. Even if a contempt proceeding is formally classified as civil, it is "most accurately characterized as a criminal trial" if the sentence or fine threatened "is intended to punish the contemnor for prior acts." *Pharr v. Fairbanks North Star Borough*, 638 P.2d 666, 669 (Alaska 1981). *See also Gwynn v. Gwynn*, 530 P.2d 1311, 1312–13 (Alaska 1975); *Johansen v. State*, 491 P.2d 759 (Alaska 1971). According to *Baker v. City of Fairbanks*, 471 P.2d 386, 402 (Alaska 1970), the right to jury trial extends to "any offense a direct penalty for which may be incarceration in a jail or penal institution."[11] "It must also include," we said, "offenses which, even if incarceration is not a possible punishment, still connote criminal conduct in the traditional sense of the term." In a footnote we explained that "[a] heavy enough fine might also indicate criminality because it can be taken as a gauge of the ethical and social judgments of the community." 471 P.2d at 402 n.29.[12]

Judge Moody's show-cause order did not limit the potential punishment to which Wood was exposed. Had the superior court invoked Civil Rule 95(b), which allows courts to order fines of up to $500, we would have had no difficulty in rejecting Wood's jury trial claim. But it is clear from the record that the superior court was relying on the contempt power, not Civil Rule 95(b).[13] In Alaska the potential punishment, not the sentence or fine actually imposed, determines whether a person is entitled to a trial by jury. *See Baker*, 471 P.2d 386 at 401–02; *cf. State v. Browder*, 486 P.2d 925, 933–40 (Alaska 1971). Here the potential punishment was not specified, the contempt was punitive, and Wood was wrongfully denied a trial by jury.[14] The judgment against him cannot stand.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings not inconsistent with this opinion.

1. The Public Defender Agency is part of the Department of Administration. *See* AS 18.85.010–.180.

2. Administrative Rule 12.

3. This does not mean that the Legislature may not create agencies which will represent indigent criminal defendants. Indeed, a bill establishing an Office of Public Advocacy, which will among other things represent indigent defendants "who cannot be represented by the public defender agency because of a conflict of interests," went into effect on July 1, 1984. Ch. 55, SLA 1984.

The Office of Public Advocacy eliminates the need for the statutory scheme set out in AS 18.85.130(a), which now provides:

Wood decision...

Sec. 18.85.130 **Substitute defender.** (a) For cause, the court may, on its own motion or upon the application of the public defender, appoint an attorney other than the public defender to represent the indigent person at any stage of the proceedings or on appeal. The attorney shall be awarded reasonable compensation according to a schedule of fees promulgated by the supreme court and reimbursement for expenses necessarily incurred. This shall be paid by the court system.

4. Administrative Rule 12 reads in pertinent part:

> Rule 12. Appointments and Compensation of Court Appointed Attorneys in Criminal Cases.
>
> (a) The presiding judge shall designate the area court administrator and a clerk of court for each court location in his district to keep and make available to the court in each location a list of attorneys eligible to receive court appointments to represent indigent persons in criminal cases.
>
> (b) The lists of eligible attorneys shall be compiled and provided to the courts by the Alaska Bar Association.
>
> (c) The presiding judge may in his discretion order that all attorneys residing near a court location within his district be placed on the list of eligible attorneys if the presiding judge determines that the number of attorneys on the list is inadequate to provide equitable distribution of appointments among available attorneys.
>
> (d) Appointments shall be made from the list on a rotating basis as far as is practical and possible, and the court may, in departing from a strict rotation basis, take into account the complexity of the case and the level of experience required by counsel.

5. To the extent that Wood is arguing that judges lack the inherent authority to hold citizens in contempt, his argument is equally meritless. *Cf., e.g.*, Bloom v. Illinois, 391 U.S. 194, 198 n.2, 20 L.Ed.2d 522, 527 n.2 (1968) (briefly summarizing one part of the history of the contempt power); State v. Browder, 486 P.2d 925, 938–39 & n.47 (Alaska 1971) (recognizing and placing limits on "the inherent power of courts to punish summarily for contempt.")

6. Our rule does not (and should not) preclude the Legislature from appropriating money to fund compensation in excess of the amounts specified by court rule. As we said in *Jackson*, "the problem of securing funds to pay the amount now permitted by court rule, or to pay larger sums than those presently permitted, is entirely a matter for decision by the legislature." 413 P.2d at 490.

7. *See* Young v. Williams, 583 P.2d 201, 206 (Alaska 1978) (factual argument not raised below will not be considered on appeal).

8. We also note that while the court system's contracts with the "second-level" firms provide that the firms may petition the administrative director for *reimbursement of extraordinary expenditures*, the contracts do not seem to permit extraordinary compensation in excess of contractual limits. In this regard "third-level" attorneys, who may petition for extraordinary compensation under Administrative Rule 12(h), are better off than "second-level" firms.

9. However, inexperience alone does not justify a presumption of ineffectiveness. U.S. v. Cronic, ____ U.S. ____, ____ 80 L.Ed.2d 657, 672 (1984).

10. A study by the Alaska Judicial Council shows that in the years 1976–1979 defendants represented by court-appointed counsel received, on average, significantly longer sentences than did defendants represented by privately hired attorneys or by the Public Defender. Amicus suggests that this problem has been caused by the court system's decision to require most private attorneys to accept some criminal cases or arrange for alternative representation. The record does not support this assertion. Now can we see how the superior court's order, issued in the summer of 1979, could have produced these discrepancies, which occurred during the 1976–1979 period. The Anchorage Bar has called our attention to a problem which clearly deserves investigation, but the case before us is not the appropriate forum for the inquiry.

11. We note that direct criminal contempt committed in the presence of the trial judge may be dealt with summarily without a jury trial. *See* Alaska R. Civ. P. 90(a); *see also* Weaver v. Superior Court, 572 P.2d 425 (Alaska 1955). However, this exception to the general rule does not apply in the present case.

12. The Alaska Constitution's right to trial by jury extends well beyond the corresponding Federal right. Compare *Baker* with Frank v. United States. 395 U.S. 147, 23 L.Ed.2d 162 (1969).

13. *Contrast*, Tobey v. Superior Court, ____ P.2d ____, Op. No. 2806 (Alaska, March 23, 1984) (Rule 95 relied on, contempt power not mentioned).

14. The questions to be decided by the jury do not include whether Wood was competent to take the cases to which he was assigned, as that question is for judicial determination. See page 18, *supra*. Jury questions do include whether there was an order of appointment, whether Wood had knowledge of the order, whether Wood violated it, and whether some legally sufficient set of circumstances, other than his purported lack of competency, excused any violation.

BURKE, Chief Justice, concurring in part, dissenting in part.

I strongly disapprove of that part of the presiding judge's standing order permitting appointed counsel to "provide legal representation **or to arrange for another attorney to provide said representation.**" (Emphasis added.) Such language suggests that counsel can fulfill his professional obligation by simply hiring a replacement.

The responsibility for selecting and appointing counsel in cases such as this belongs exclusively to the court. The court should exercise its appointment power with due regard for the complexity of the case, the experience and circumstances of counsel, and other relevant factors. The court should not, however, delegate any part of its responsibility to counsel. Thus, the court should either enforce its order, or relieve counsel of his obligation and make a new appointment. Insofar as our opinion today approves of any other practice, I dissent.

I dissent also on the issue of Wood's right to a jury trial. I would take this opportunity to overrule our decision in *State v. Browder*, 486 P.2d 925 (Alaska 1971), to the extent that it provides that right in the instant case. The rule that I would adopt is the one advocated by the late Chief Justice Boney, in his concurring opinion in *Browder*.

Otherwise, I concur in the opinion of the court.

MATTHEWS, Justice, concurring.

It is my opinion that most skilled civil trial attorneys can provide a competent defense in most criminal cases. A trial lawyer's persuasive talents are as applicable to criminal cases as to civil cases. When a civil lawyer takes on a new case a substantial amount of research ordinarily is required, even if the case is in a field of law in which the lawyer regularly practices. Criminal case assignments will also require the attorney to do legal research. This preparation is not different in kind from what he must do to do his job adequately in any litigation he undertakes.

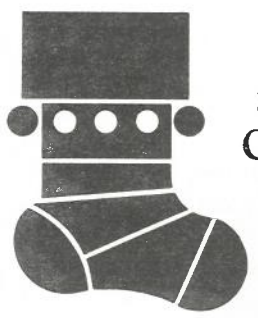
In accordance with the above, I could not state with confidence, as the majority does at page 15, that forcing an attorney inexperienced in criminal law to represent a criminal accused will often deny the accused effective assistance of counsel. My reading of the cases in which ineffective assistance has been raised indicates that inexperience has often been raised as a ground for an ineffective assistance claim, but not often successfully.[1]

Further, I would not assert as the majority does at page 14 that criminal law and procedure are now more complicated than they were in 1967. This statement seems to be founded more on nostalgia than fact. There is a natural tendency to look at the past as a more simple time. However, in a dynamic system there are always issues that are new whose implications are not yet known. The criminal law issues of the 80's may be different from those of the 60's, but that does not make them harder.[2]

Other than in the respects noted above, I concur in the majority opinion.

1. *See, e.g.*, Green v. State, 579 P.2d 14, 16 (Alaska 1978) ("The test [for ineffectiveness of counsel] is whether his performance was below what would be expected of a lawyer with experience, not whether he in fact had that experience.") Tucker v. State, 482 S.W.2d 454 (Mo. 1972) (lack of previous experience in the trial of criminal cases, as distinguished from civil cases, does not of itself demonstrate ineffective assistance); Hawkins v. State, 378 N.E.2d 819 (Ind. 1978) (inexperience does not necessarily amount to ineffective representation unless the trial, considered as a whole, is reduced to a mockery of justice, shocking to the conscience of the reviewing court); Annot., 2 A.L.R. 4th 27, 196–199 (1980).

2. The issues of the 60's were reflected in such landmark cases as Gideon v. Wainwright, 372 U.S. 335 (1963), Miranda v. Arizona, 384 U.S. 436 (1966), Escobedo v. Illinois, 378 U.S. 478 (1964), Mapp v. Ohio, 367 U.S. 643 (1961).



All My Trials

The defense's lament

by Gail Roy Fraties

"My client is a family man. You people ought to take another look at him before you prosecute for assault in the first degree. That charge is going to destroy him."

The speaker was popular defense attorney **James D. "Jim" Gilmore,** who maintains a practice with his erudite partner, **Jeffrey M. Feldman,** only two floors from the District Attorney's Office. I had dropped in for a visit, and was—by mutual agreement—being softened up for the kill. The mandatory sentence of five years for the charge in question was naturally of real concern to the client, and his attorney as well.

Put Your Hand in the Hand. . .

"You know, this guy has two little kids and has never been in trouble before in his life," Jim said. "Who's going to take care of them if you send him away?" I reminded him that his client had been somewhat less than gentle with the victim, but he continued.

"Let me tell you something—when this man called me up on the telephone he was so shaken that his six-year-old daughter noticed, and asked him if he was upset. He replied that he was, and she crawled into his lap, putting her trusting little hand in his (Jim's actual words), and said: 'Daddy, if you're afraid, I'll go with you.' "

"Jesus Christ, Jim," I replied weakly, "it's a little early in the morning for this sort of thing, isn't it?", and of course I couldn't wait to get back upstairs to repeat his startling and effective ploy. District Attorney **Victor Krumm** was unimpressed. "Tell Jim" he said with a smile, "that trusting little hand had better stay where it belongs, or his client will be in *real* trouble."

The Sperm Carrier Bank

His comment was symptomatic of the concern that the prosecution and defense bar alike, to say nothing of the police agencies and the public, have felt with the rising flood of child molest cases with which the judicial system is expected to deal. Since victims and defendants are often in the same family, additional confusion arises, prompting Anchorage prosecutor **Betsy H. Sheley** to remark on one occasion that she would like to start a defendant bank.

"Half these women want their husband killed when they find out that he's molested the kids and raise hell if we don't have enough evidence, and the other half don't want him prosecuted no matter how strong the case is. I can't please anybody," she stated with some asperity, "I think if I were to start some sort of a pool, I might be able to keep a few of these idiots in storage until their wives want to trade."

In case either of my esteemed colleagues were, by these remarks, to be subjected to the charge of having a sardonic sense of humor—I would have to reply that as all the people who deal with them are well aware, the choice is whether to laugh or cry at the horrifying human problems which comprise our daily fare.

The Moody Criteria

Of course, a lifetime of experience helps, as evidenced by a sentencing hearing conducted not too many years ago by Anchorage Superior Court Judge **Ralph E. Moody.** The defendant, although he hadn't actually injured anybody, had been exposing himself to high school girls in the Fourth Avenue Theater—and when he wasn't doing that, sneaking into produce warehouses and misconducting himself among the vegetables. His defense counsel stated that his client wasn't a bad man, he just had a severe sex problem.

"We all have severe sex problems, counsel.", replied Judge Moody in his soft Alabama drawl, "Did it ever occur to you that there is a difference between the way normal people and criminals deal with them?"

A Christmas Wish

The snow is already falling, and Christmas will be with us soon. Personally, I like to spend mine with my close friend and former partner, Juneau trial attorney **Peter M. Page,** a tidewater Virginian of the highest calibre. His household, at least when I am not there, is conducted with the decorum and good taste characteristic of Peter's entire family.

On December 25, 1982, I had finished a trial in Juneau and was rewarded not only with a stay at the Page residence, but a Christmas dinner as well. I've heard the fine old Anglican prayer Peter always says as grace many times, and can recite it from memory: "May the Lord bless us and make us thankful for these and all his mercies, and supply the wants of others, for Christ's sake, amen."

I was definitely alone in those days, and it had been decided during my visit that perhaps **Melinda** (Peter's sister) a talented actress who lives in New York with her husband, actor **Frank Hamilton,** could be prevailed upon to introduce me to one or more of her alluring show biz friends on my forthcoming visit to New York. Peter got on the long distance telephone to discuss this project, and was so carried away with Christmas greetings that he quite forgot the original purpose of the conversation.

I was lurking in the bedroom, eavesdropping as best I could, and noticed that he was about to finish the call without asking the vital question.

"PETER, WILL YOU FOR GOD'S SAKE GET TO THE PART ABOUT ME GETTING LAID?" I bellowed in my agony and frustration. There was a deathly silence, followed by Peter's footsteps advancing toward the bedroom door. We're brothers, and everything, but I make it a point not to cross Peter. Like most ex-fighter pilots, he has a quick and dangerous temper. The door swung open, and he stood for a moment gazing at me contemplatively.

"I'm really very sorry, man—I forgot myself" I began. He softened slightly, and I continued "Look, I lost my head—but what (returning to topic A) did Melinda say?"

"She said," he replied calmly, with an oblique reference to the prayer that had begun the day's festivities, "that she will have your wants in mind."

The words "for Christ's sake, amen" drifted into my own mind, but I prudently kept them to myself.

Quotable Quotes

Investigator **Larry Robinette** of the Anchorage Police Department, on firepower (discussing the recent case of a lady who killed her boyfriend with a small caliber pistol) "It's funny, Gail, these God damned perpetrators shoot somebody with a .22 and kill them instantly. We shoot *them* with a .357 mag, and they live forever."

Resolution passed last year by the Anchorage Bar Association, unanimously; "Resolved, that when the Supremes travel, they all have to use the same airplane."

Former Alaska Bar president, Fairbanks trial attorney **Andrew J. Kleinfeld,** on being chided for absorbing several Danish pastries at an early morning board meeting; "Gail, I never deprive myself of a sensual pleasure."

Anchorage trial attorney **Murphy L. Clark's** client, on being informed of the 3.7 million dollar verdict returned for her husband's wrongful death in a

[continued on page 9]

Reciprocity Update

With the above disclaimers made, what follows is a "current" listing of probable jurisdictions that provide for admission without examination (not including Alaska), with or without reciprocity provisions. The names of those jurisdictions that have a reciprocity rule are capitalized.

Arkansas
Colorado
Connecticut
Washington, D.C.
ILLINOIS
INDIANA
Iowa
Kansas
Kentucky
Massachusetts
Michigan
Minnesota
Mississippi
Missouri
MONTANA
NEBRASKA
New York
NORTH CAROLINA
North Dakota
Ohio
OKLAHOMA
PENNSYLVANIA
Rhode Island
TENNESSEE
TEXAS
Vermont
VIRGINIA
WEST VIRGINIA
Wisconsin
Wyoming

For the curious, the remaining 20 jurisdictions which require some kind of exam of attorney applicants are listed below. The names of those eight (8) states which provide for a special (usually shorter) attorney's exam are capitalized.

Alabama
Arizona
CALIFORNIA
Delaware
Florida
Georgia
Hawaii
IDAHO
Louisiana
MAINE
MARYLAND
Nevada
New Hampshire
NEW JERSEY
NEW MEXICO
OREGON
South Carolina
South Dakota
UTAH
Washington

It should be of interest to you that many of the Western States will require an examination of attorney applicants. Perhaps the Alaska Supreme Court's action in adopting reciprocal admission on motion will have a trickle down effect on its southern cousins.

Finally, it should be understood that any applicant not qualified to be admitted on motion will be considered a general applicant and must sit for the full exam. The newly adopted amendments also preclude an applicant who has previously failed an Alaska Bar Exam from seeking admission on motion.

The Bar's staff will begin development of appropriate forms and information in mid-November for distribution by mid-December. No doubt some areas of concern have been overlooked and I ask that you bear with us while we adjust to the new admission rules.

Lawyers prefer activist judges

CHICAGO—Trial lawyers overwhelmingly prefer federal judges to participate actively in settlement negotiations, rather than passively waiting for the lawyers to initiate such discussions, according to a recent survey conducted by the American Bar Association.

The survey of lawyers trying cases in four federal court districts also showed that lawyers prefer settlement negotiations to be handled by different judges from those who would hear the trial if negotiations failed. The survey was conducted by the ABA's Judicial Administration Division by mailing questionnaires to 1,886 lawyers in the Northern District of California, the Western District of Texas, the Western District of Missouri and the Northern District of Florida. A total of 1,771 lawyers responded.

"A staggering 85 percent of our respondents agree that 'involvement by federal judges in settlement discussions [is] likely to improve significantly the prospects for achieving settlement,' " says Wayne D. Brazil, a U.S. magistrate who was a professor at Hastings College of the Law when the survey was conducted. Brazil is announcing the survey results in the current edition of *The Judges' Journal*, a quarterly magazine the division publishes for its members.

The survey could have practical benefits, says Brazil, if "judges begin to develop the capacity to predict how lawyers in different situations will react to different judicial approaches to settlement."

Brazil found general support for some propositions, including the idea that "the judge who contributes most to the settlement dynamic is active rather than passive; analytical rather than emotional or coercive; learns the facts and law involved in the dispute instead of relying on superficial formulas or simplistic compromises; and, after listening and learning with an open mind, offers explicit assessments of parties' positions and specific suggestions for ways to reach solutions."

But when the lawyers were offered 13 specific techniques that judges could use to facilitate settlement, differences emerged, sometimes on regional bases, sometimes according to the practice setting of the lawyers responding and sometimes according to whether they typically represented plaintiffs or defendants.

The lawyers also disagreed about how they would like judges to behave in situations incidental to the settlement process. For example, clear pattens emerged when lawyers were asked if a judge should encourage a litigant to reconsider, when the judge believes the party is about to agree to an unfair or unreasonable settlement. While 69 percent of defense lawyers said the judge should not warn the litigant, only 36 per cent of plaintiffs lawyers agreed. Also, 59 percent of the legal aid/public interest lawyers surveyed wanted the judge to react in that situation, but only 29 percent of all the lawyers surveyed approved of judges stepping in.

Brazil examines some of the patterns established by the survey in four articles published in *The Judges' Journal*. The full survey results will be published by the division in a book later this year. Review copies of *The Judges' Journal* are available upon request from Frederic G. Melcher, editor, at 312/988-6077.

Judge Banfield honored

Banfield to be Assistant to Faulkner

Local Weather Bureau Attache Resigns To Take Up Law Study

The news came as a surprise to Banfield's law partner, H.L. Faulkner and also to the officials of the Columbia Lumber Co.

So read the headline on the July 21, 1934 Daily Alaska Empire. To celebrate the 50th anniversary of that event, Alaskans crowded the Juneau Yacht Club on the night of October 6, 1984 to join the current firm of Faulkner, Banfield, Doogan & Holmes in honoring Norman Banfield's fifty years in practice.

Herbert Faulkner had already been practicing law for about 25 years when Norman Banfield joined with him, but Norman is now the senior practicing member of the Juneau Bar and stories of his experiences bring to life territorial days and the early practice of law in Alaska. Those who attended the 1983 Alaska Bar Convention will recall legal historian Pamela Cravez's oral history and slide show at one of the luncheons in Fairbanks. The excerpt she played featured an interview with Mr. Banfield. Norman has never been one ot mince words, and his hours of reminiscing for Ms. Cravez are illuminating, outspoken and entertaining. Portions of the tapes, brought to life with slides made from early photographs, recalled the past fifty years for the gathering. Norman's former partners, Judge Robert Boochever and Avrum Gross, joined with current members of the firm in recalling some of the hard work and successes that established Norman's reputation as a leader of the Alaska Bar, and a few of the less glorious events as well.

Among those who enjoyed the festivities were Norman's wife, Millie Banfield, and the Banfield daughters, Nancy and Julie. One might have wondered whether the marriage would last 33 years from reading the first report of it in the January 25, 1951 Empire:

BANFIELD-HARSHBURGER REPORTED WED IN CALIF.

Norman Banfield, prominent Juneau attorney, and Mildred Harshburger who is with Columbia Lumber Co., were married at Las Vegas, Nev. Wednesday, January 24, according to a wire received today by Mr. and Mrs. A.F. Ghiglione. No further details were given.

Norman prepared for the practice of law by reading Blackstone & Kent's Commentaries and other venerable treatises not ordinarily included in current bar review courses, and by working with Herb Faulkner. He was tested for admission to the Bar by Bob Robertson, Grover Winn and Henry Roden. In Norman's words: "They decided I didn't do very well, but one of them said Faulkner wouldn't let me get into any trouble and I'd learn fast."

Since that time, Norman has repaid the favor by setting and demanding the highest standards, and helping keep out of trouble those who came after him in the Faulkner, Banfield firm, including former Alaska Supreme Court Justices Dimond, Conner and Boochever. Fifty years later, Norman Banfield spends most of the winter in Arizona and no longer is the first into the office in the morning and the last out at night. But even now, Norman is still in the office nearly every day between April and October, and also in January when he comes up for year-end business. By the time of the celebration in October, Norman was already three months into his second fifty years and very much enjoying it.

All My Trials

recent Ketchikan trial; "Is that good?"

Sign on the desk of appellate attorney **John A. Scukanec,** laboring in the Office of Special Prosecutions and Appeals under the benevolent tyranny of popular Anchorage attorney and judicial candidate **Peter A. Michalski;** "WHERE'S THE BREEF?"

Anchorage prosecutor and judicial candidate, **Eugene P. Murphy** (with reference to the unstinting legal advice given the more flamboyant trial attorneys in the District Attorney's Office by patient **William H. "Mick" Hawley** and his intellectual associates in O.S.P.A.); "They're the only people in the whole operation who know that a reporter is not necessarily someone who works for a newspaper."

Jim Gilmore (op.cit.) referring to defense counsel's notorious remark after the successful insanity defense of President Reagan's assailant, **John W. Hinckley:** "I've always wanted to win a big case and tell the press 'Another day, another accounts receivable.' "

ALASKA BAR ASSOCIATION
News & Notes

December, 1984

Legislative review of bar

Believe it or not, and ready or not, the Alaska Bar Association comes up for sunset review by the Alaska Legislature during the First Session of the Fourteenth Alaska Legislature. As many of you will recall, and as many more recent members of the Bar will not, the last time the Association went through this process in 1980 and 1981, it was not a totally pleasant experience.

In 1985, however, the sunset review process should not be as acrimonious as the previous review. For one thing, in 1980 and 1981, the Alaska Bar Association and the Legislature's Budget and Audit Committee were in court over the right of the Committee to do a performance audit of the Association. The Bar allowed the Committee to review its financial records, but refused auditors access to the Association's admission, discipline, and fee arbitration files. That suit was settled under an agreement endorsed by the Alaska Supreme Court which provided the legislature access to Bar records during a performance audit under strick rules of confidentiality, including a provision that any breach of confidentiality by the Legislature Auditor was contempt of court.

Randy Welker, a CPA, and head of the Legislative Budget and Audit Committee's Anchorage office, has been assigned to the Bar's audit this fall. The Committee apparently must issue its audit report by the beginning of the new legislative session in January, so the audit process has already begun. Mr. Welker has requested copies of a variety of documents and that request has been fully complied with.

It is the Board's intent to cooperate fully with both the Legislature's auditor and the Judiciary Committees in both Houses, the goal this time 'round to be a smooth, hopefully instructive process that provides the Alaska Legislature, and hence the public, with an accurate and healthy picture of the activities which the Association performs in and on behalf of the public interest. Despite the length of the process last time, and the sometimes heated exchanges that unfortunately occurred, the Association honestly benefitted from the Legislature's review of its practices during 1980-1981. At the very least, it began a process of self-examination by both Bar and Board members that has carried over since the last sunset review to affect numerous additional changes in which we do business today.

We may not come through this next sunset review unscathed, but we surely stand better prepared for this audit, and we are deservedly more confident, than during the previous sunset hearings.

Revised rules before court

During its late August meeting, the Disciplinary Board gave final approval to its extensive revisions to the Rules of Disciplinary Enforcement. On October 1st the proposed revisions were forwarded to the Alaska Supreme Court for its action. Chief Justic Rabinowitz has scheduled consideration of the proposed rewrite for November 7. The Board has asked for approval of the new discipline rules by January 1, 1985, in order that the Association can begin the new year under greatly improved discipline procedures.

The proposed rules were published in the last issue of the *Bar Rag* and, except for numerous additional claritive changes, the amendments sent to the Court are much as previously published.

CLE in Kona

Now that the winter chill is setting in, it's time to think about getting away to sunshine, blue skies, white sand and warm water! The 1985 Mid-Winter CLE in Hawaii will be held in February 28 – March 6, at the Hotel King Kamehameha in Kona, on the Big Island of Hawaii.

Round-trip airfare *to Kona from Anchorage* is a real deal at $507.

The airlines require a $25.00 deposit to reserve a seat on the flight at that price, so be sure to get your deposit in by *December 17*. If you cancel, 80% of your deposit will be returned. The fare does allow for independent return, but travel from Anchorage must be on February 28.

The program will be held at the Hotel King Kamehameha, located in Kona, the "sunny side" of the Big Island. Rates are a reasonable $55.00 per night. Two nights deposit must be made by January 28, 1985.

For those of you who'd like to make this a family affair, note that the Anchorage School District spring break is March 4-8, 1985. Since the kids will be on vacation, this is the perfect time to take them to Hawaii.

"Trail Advocacy: Techniques & Strategies", with Judge Herbert J. Stern, will be the topic for this year's program. An outstanding lecturer, Judge Stern provides detailed instruction on those techniques he believes essential for effective trail preparation and performance. Judge Stern utilizes videotapes of himself and other notable trial lawyers to exemplify his suggestions.

Hon. Herbert J. Stern, presently a United States Judge for the District of New Jersey, has built a national reputation as both a skilled trail lawyer and an accomplished teacher of trial techniques. In New York County, he served for four years as assistant district attorney. He also served as a trail attorney in the Organized Crime and Racketeering Section of the United States Department of Justice and before ascending to the bench, as United States attorney for the District of New Jersey. His reputation was established when he tried several significant cases against such notable attorneys as Edward Bennett Williams and Simon H. Rifkind. His reputation as a teacher developed while conducting trail advocacy courses at Harvard, Yale, and Columbia Law Schools. He presently serves as Co-Director of the University of Virginia Law School Trail Advocacy Institute. Judge Stern is the author of the best selling non-fiction book, "Judgement in Berlin."

Fee arbitration

Beginning July 1 of this year, the Bar's Discipline Section turned the processing and scheduling of fee arbitrations over to Administration and we have been very busy since then, as those of you who serve on the Fee Arbitration Committee already know, trying to process the backlog.

There are over 62 open arbitration requests, the oldest ones dating back to early 1983! In order to try to catch up, we asked the attorney and public members on the Fee Arb Committee to commit to at least four aribtrations between July and December of this year. We have scheduled arbitrations in Anchorage almost every Tuesday and Thursday night of every week through the end of the year. In locations outside of Anchorage, where there are far fewer pending matters, we have scheduled them so that by year's end there will be no fee disputes not arbitrated.

We started out a little too enthusiastically, and some scheduled arbitrations had to be cancelled. For that we apologize to the members of the Bar we inconvenienced; but we have our act pretty much together now and things are going more smoothly. Our current problem is that many of the citizens who filed the arbitrations last year are no longer locatable. In addition, often times an attorney member of a fee arbitration panel suddenly has something come up and wants to reschedule the arbitration.

I am attempting to insist on not rescheduling a fee arbitration because of the delay it causes. It means that the other panelists, as well as the respondent and the petitioner must all be called and advised of the cancellation, and the matter then must be rescheduled at a later date. Rescheduling does little to improve the Bar's image with its own members or the public. In addition, since many of of these matters are well over eighteen months old, to finally schedule the arbitration and then turn around and cancel it only further frustrates the petitioner and, just as often, the respondent, both of whom would like the matter settled.

Fee arbitration tend to be mini-documentaries, often very emotional and tense. All in all, once we get rid of the backlog, the Association will be well served if the matters currently being heard are those recently filed, so that the facts are still fresh in each party's mind, and the fee dispute is resolved expeditiously. That is how the system is intended to work and how it will be of most value to all concerned.

I would like to take this time to thank the members of the Bar who are serviing on the Fee Arbitration Committee for their patience and time in helping us to take care of our serious backlog problem. These arbitrations call upon all of one's skills. It requires the panelists to be sensitive, fair, understanding, well versed in mediation skills, comfortable with general civil procedure, and capable of bearing up under considerable pressure. The many public and attorney members on these Committees deserve the membership's thanks for their work in assisting the Bar's staff in processing the current backlog.

Baily elected bar delegate

There is one election the Bar conducted in May of this year, the results of which you may not yet have heard much about. Douglas B. Baily, an Anchorage attorney, was elected by the Bar's membership to a two-year seat on the American Bar Association's House of Delegates as the Alaska Bar's representative. Mr. Baily replaces former Bar President Donna Willard, who had served as the Bar's ABA delegate for the previous four years. Mr. Baily will serve as the Bar's ABA delegate through the American Bar's Annual Meeting in 1986.

Other Bar Amendments

Of less dramatic impact, but also of importance, are several other amendments recently adopted by the Court at the request of the Association.

Another amendment to the admission rules will repeal the current transferability of the previous Multistate Bar Exam (MBE) score. That rule change will become effective after administration of the upcoming February 1985 Alaska Bar Exam, to provide sufficient notice to bar applicants. This rule change, combined with the deletion of the attorney's exam, will mean that every applicant taking the Alaska Bar Exam will be sitting for all two and one-half days of the exam. The Court's action clarifies that Alaska does not administer a bifurcated exam. Alaska joins twenty-five other jurisdictions which do not provide for the substitution of MBE scores.

The Supreme Court also has approved amendments to the Bar Rules which provide for enforcement of fee arbitration awards against attorneys. Should an attorney fail, within 30 days, to pay to his or her client an award by a fee arbitration panel against the attorney, then that attorney can be suspended from the practice of law pending payment of the award.

And, finally the Court has approved amendments to Civil Rule 81 which delete the need to file a copy of the motion to participate with the Department of Revenue and provide that a fee will be paid to the Association for its administrative processing of such motions.

The fee arbitration and Civil Rule 81 changes are all effective January 1, 1985.

ALASKA BAR ASSOCIATION
News & Notes

December, 1984

Staff changes abound

Since July of this year, a lot of staff changes have taken place. Linda Nordstrand was hired in September as the Bar's Executive Secretary. She replaced Deborah Johnson, who had worked for the Association 3½ years. Johnson's husband Russell, was the Air Force serviceman who was tragically killed in August when the F-15 in which he was taking an incentive ride (awarded to him for his superior work on the planes) crashed in the mountains between Talkeetna and Denali. Debbie decided to move Outside with her two children (ages 6 and 8) to be nearer to her family.

Linda Nordstrand recently moved to Alaska from Minnesota and brings with her terrific office management and organizational skills that will help her keep on top of her role as Executive Secretary. She has previously worked for an association, so she is also sensitive to the "peculiar" needs of association members!

Jill Wilson was hired in mid-June as the Association's Receptionist/CLE Secretary and she brings to her job not only a great deal of enthusiasm and personal warmth, but an attention to detail that makes all our jobs easier.

Finally, Kelly Klemper has come to work for the Bar as the Statewide Lawyer Referral Service Receptionist, answering at least 25 calls a day from potential clients seeking the assistance of an attorney. This is one of Kelly's first office jobs, so we are doing what we can to break her in gently before overworking her.

In addition, Jeanne Bradley now spends half her day tending to the scheduling and processing of fee arbitration matters, while continuing to assist Bar Controller Geraldine Downes in keeping track of your money.

And last of all, Deborah O'Regan is now a married lady. First she bought a house with the guy and then she took him as her husband, so things must be serious. They honeymooned in the Cayman Islands, mostly scuba diving. If you are considering the Caymans this winter as a vacation spot, call Deborah for the inside scoop. She says, by the way, that the beaches were too long and too white, the water too blue, and the temperature too hot. She also spent two weeks suffering.

Juneau, Kenai subscribers wanted!

With the advent of the Referral Service's ZENITH number, and its increasing use of Alaskans in search of attorneys, the Referral Service is in the strange position of having to turn away referrals because we lack subscribers in certain areas. We are uncomfortable not being able to assist the persons calling with referrals, so I am writing to solicit subscribers in areas outside of Anchorage.

Until just recently we had no attorney subscribers from the Kenai Peninsula on the Referral Service and we receive a *lot* of calls from the Kenai. Now we have a single subscriber. In Juneau we also have a single subscriber, but that individual does not accept family law referrals, for instance, and we have a need for subscribers in that category.

The Referral Service in the last quarter July – September) received 2,074 calls (that averages out to 32 calls a day!). Believe it or not, a substantial portion of the referrals made to subscriber attorneys end up loyal, paying clients. Admittedly a portion of the referrals turn out to want free legal advice or have an impossible case they want the attorney to take on a contingency fee basis, but for the most part the Service generates real business for its subscribers while providing the public with a referral source which has panels set up to reflect the types of problems most often encountered in the practice in Alaska.

Any attorney may subscribe to the Service and I encourage anyone interested to contact this office for information. But, frankly, what we most need now are attorneys outside of Anchorage who would be willing to assist the Service in making referrals to citizens in need of legal counsel.

Disciplinary administrator reports

Disciplinary matters are being investigated and processed in a more efficient way thanks to a concerted effort by the Board of Governors to improve the process over the past year. In the third quarter report recently distributed to the Alaska Supreme Court and the Board, the Discipline Section showed an active caseload at the beginning of the quarter of 213 cases. During the quarter, 40 cases were closed or dismissed and 43 new complaint cases were opened. Although the Discipline Section ended the quarter with 216 cases, 60 of those cases were in various stages of disposition past the investigative stage:

Suspension in Effect, 4
Pending Supreme Court, 14 (includes 9 matters involving one attorney and 3 matters involving another attorney)
Pending Disciplinary Board, 0
Pending Hearing Committee, 14
Pending Private Informal Admonition, 5
Abeyance Pending Fee Arbitration, 15
Pending Conciliation, 5
Abeyance under Alaska Bar Rule II-20, 3

In addition to maintaining a relative balance with new complaints coming in, the Discipline Section has substantially reduced the backlog of pre-1983 disciplinary matters and 1983 matters as well.

Of the 216 active cases pending at the end of the third quarter, 76 contained primary allegations of neglect, 58 cases contained allegations of interference with justice, 31 cases dealt with relationship with a client, 18 cases with conflict of interest and 18 cases alleging misrepresentation or fraud.

Sitka Convention

Sitka, which enjoys the reputation of being one of Alaska's most scenic communities, will be the site of the Bar Association's 1985 Annual Convention. The Convention, to be held May 15-18 (pre-tourist season) will be headquartered at the Centennial Building, overlooking the Sitka harbor.

Bar President Harold M. Brown requested that the Bar Association make every attempt to hold the Bar Convention at the same place and time as the judges' and district attorney's conferences. *For the first time in several years, the Judicial Conference, the District Attorney's Conference and the Bar Convention will be held simultaneously.*

The three groups will be working together to plan several joint program sessions as well as combined social functions. This will provide an opportunity for members of the Bar to "mingle" with members of the judiciary and the D.A.'s office on an informal basis.

In accordance with that time-honored tradition, the hospitality suite will be sponsored by the Sitka Bar Association.

Mark your calendar and plan to join us May 15-18 in Sitka-by-the-Sea!

Appeal dismissed in Walton discipline matter before U.S. Supreme Court

Bar member Peter Walton was suspended by the Alaska Supreme Court from the practice of law beginning February 1 of this year. The suspension was for a period of eighteen months (see Alaska Supreme Court Opinion No. 2734).

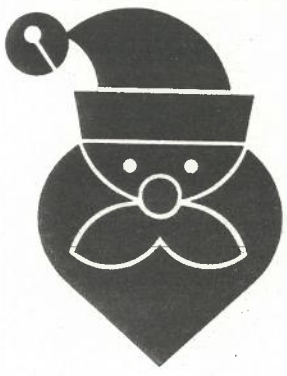
Mr. Walton appealed his suspension by the Alaska Supreme Court to the U.S. Supreme Court. In his brief before the U.S. Supreme Court, Walton's attorney, Bob Wagstaff, presented two questions to the Court:

1. Does the due process clause of the Fourteenth Amendment to the Constitution of the United States require that when fraud is alleged in attorney discipline proceedings proof must be by clear and convincing evidence.?
2. Does the equal protection clause of the Fourteenth Amendment to the Constitution of the United States require that proof be by clear and convincing evidence in attorney discipline proceedings when the standard of proof in judicial disciplinary proceedings is by clear and convincing evidence?

The current standard for attorney discipline in Alaska is preponderence of the evidence, although the Bar, in its proposed rewrite of its Discipline Rules, is suggesting the standard be amended to "clear and convincing."

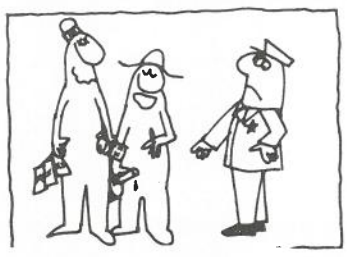
The Alaska Bar Association, through its attorneys Susan Burke and Avrum Gross, submitted its "Motion to Dismiss or Affirm" in June of this year.

On October 1, Alexander Stevas, Clerk of the U.S. Supreme Court, informed the Bar Association that the U.S. Supreme Court had dismissed the appeal "for want of a substantive federal question."



YULETIDE GREETINGS

IMPORTANT: Ethics opinions



Ethics Opinion 84-1

Re: Advice to Defendant to Refuse to Submit to a Breathalyzer Test.

This Committee has been requested to address the question of the ethical propriety of a defense attorney advising his client not to submit to a breathalyzer test when under arrest for driving while intoxicated. This Committee concludes that such a recommendation by an attorney is improper without the addition of further advice and discussion as outlined below. An attorney, however, should present legal theories which the attorney in good faith believes might challenge the validity of the statute; advise the defendant concerning the legality of prospective conduct; explain the legal consequences and judicial response to any refusal to take a breathalyzer in light of recent court decisions; and submit his professional opinion of the scope, meaning and validity of the involved laws.

I.

This request for an Ethics Committee opinion stems from the Alaska District Attorney's Office's observation that it has been encountering a growing number of cases in which defense attorneys expressly tell their clients by phone who are under arrest for driving while intoxicated not to submit to a breathalyzer test. A.S. 28.35.032(f) provides that refusal to submit to a breathalyzer test when lawfully arrested for D.W.I. constitutes a class A misdemeanor offense.

A request has been lodged for an opinion which might clarify a defense attorney's ethical responsibilities in the above context and which addresses whether or not such attorneys are in violation of Alaska Canon of Professional Responsibility DR7-102A(7) providing:

> In his representation of a client, a lawyer shall not . . . counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

II.

The Ethics Committee views this request as having great importance to both the defense bar and the state prosecutor's office. The situation is of significance to all attorneys and clients involved in the process. Nonetheless, the matter is of first impression within our state and appears guided only by the broadest of ethical considerations. Further, the present question is addressed within the reality that the subject statute (A.S. 28.35.032(f)) has been the topic of apparent constitutional issues not yet fully resolved by our Alaska State Supreme Court.[1] It is within the context of the broad (sometimes competing) ethical consideration and of the legal controversies that this Committee fashions its response.

III.

First, there are those canons of responsibility and ethical considerations which tend to limit professional conduct. It is a basic tenet of professional responsibility that a lawyer shall not violate a Disciplinary Rule. [DR1-102(A)(1)] As such any attorney should seek to maintain the integrity of his or her profession. [Canon 1] On the one hand the legal practitioner in representing his client shall not knowingly advance a claim or defense that is "unwarranted under existing law"; on the other hand the attorney may advance such a claim or defense if "it can be supported by good faith argument for an extension, modification, or reversal of existing law." [DR7-102(A)(2)] It is within this context that the lawyer is required not to counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent. [DR7-102(A)(7)]

Second, there are those ethical considerations which seem to lessen the parameters within which the attorney practices. It is commonly understood that a lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules [DR7-101(A)(1)]. The accepted rule is that within the bounds of the law it is the "duty" of a lawyer to represent his client "zealously." [EC 7-1] "The bounds of the law in a given case are often difficult to ascertain." (EC 7-2] The limits and meaning of a particular law may be made doubtful by changing constitutional interpretations, inadequately expressed statutes or opinions, and developing judicial or public attitudes. *Id.*

The actions of an attorney may depend on whether he is serving as "advocate" or "adviser" particularly where the bounds of law are not certain. [EC 7-3] The advocate may urge "any permissible construction of the law favorable to his client." [EC 7-4] The adviser should give his opinion as to what he believes would "likely be the ultimate decision of the courts." [EC 7-5] Notwithstanding a court's likely decision, a client or his attorney may, in good faith and within the framework of the law, "take steps to test the correctness of a ruling of a tribunal." [EC 7-22]

[1]The Committee notes that our Appellate Court has held A.S. 28.35.032(f) does not violate substantive due process. *See Jensen v. State*, 667 P.2d 188 (Alaska App., 1983). It may still be possible that some practitioners may wish in good faith to challenge the validity of A.S. 28.35.030 *et seq.*, and seek its modification or reversal. The merits of any such controversy shall not be addressed herein; however, the existence of such legal issues are of significance to the present ethical question.

IV.

The consequence of the above canons and considerations is that the legal professional who represents a client accused of D.W.I. may be subject to apparently competing principles. The canons require the attorney to represent his client zealously; but he must do so within the bounds of the law even though those legal parameters may be uncertain. The considerations tell the lawyer he is not to assist his client to violate the law; but he is permitted to test or challenge the law if available arguments for reversal may be made in good faith.

Counsel for an accused is "an essential component" of the administration of criminal justice. A.B.A. Standards, *Prosecution and Defense Function* (1971) § 1.1(a). However, it is within this role that possible dichotomies arise relative to this essential component. On the one hand, the protection of the client's rights may require the attorney "to resist the wishes of the judges" on some matters which may require him "to appear unyielding and uncooperative at times." *Id.* at 173. At the same time, the lawyer is not the alter ego of his client. The counselor should maintain the proper professional detachment and conduct himself according to professional standards. *Id.* at 174.

Upon the present question, the defense attorney's role in defining his component of criminal justice is a complex issue. Defense counsel may believe that the protection of his client's rights require him to appear unyielding in his challenge to the validity of A.S. 28.35.03(f) and thereby seem uncooperative if he in good faith seeks reversal of the present law. However, the lawyer must maintain his professional independence and objectivity. The counselor should not obstruct justice, and should advise his client of the likely decision of a court and practical effect if the statute is violated particularly in light of the *Jensen v. State* decision. But, as an advocate, he may present any permissible construction of the law favorable to such a good faith test of the correctness of the statute.

The attorney's role during advice and service on anticipated illegal conduct is further fraught with complexity. It is a lawyer's duty to advise his client to comply with the law, but this same attorney may advise concerning "the meaning, scope and validity of a law." ABA Standards, *Prosecution and Defense Function* (1971) § 3.7(a). The lawyer is cautioned that it is unprofessional to counsel his client in or knowingly assist his client to engage in conduct which he believes to be illegal. *Id.* § 3.7(b). Indeed, the commentary to section 3.7(b) continues to define the exact nature of its limitations. The lawyer must perform his function "within the law" and is not immune from responsibility if he "aids and abets" the commission of a crime. *Id.* at 220. However, justice requires that citizens be entitled to advice concerning the legality of prospective conduct. Therefore, an attorney properly may give his "candid opinion on the interpretation" which may be given to any provision of law, as well as his "opinion on its validity." *Id.* at 220 citing EC 7-1 to 7-3. It seems clear that the lawyer is not assisting in illegal conduct nor performing outside the law, when he advises his client on the legality of possible conduct and submits his opinion concerning the validity of the law at issue.

In the instant matter, the professional duties may partially depend on how the attorneys role is viewed. The counselor as an "adviser" should not simply tell his client to refuse a breathalyzer, but rather may discuss the likely court decision and legal consequences of such a decision, as well as his opinion on the validity of A.S. 28.35.032(f). The counselor as "advocate" should not actively aid his client in any refusal of the breathalyzer, but in representing his client's interest within the bounds of the law may in good faith test the validity of the newly enacted statute by seeking its modification or reversal. Any challenge to A.S. 28.35.032(f) may have been made more difficult by the Appellate Court's holding in *Jensen v. State.* Nonetheless, it is possible that an imaginative attorney as a zealous advocate may still in good faith believe the statute is subject to some conceivable attack.

An attorney should not simply direct his client to refuse the breathalyzer without further discussion of the nature and consequences of such a refusal. Both the Alaska Court of Appeals and the Supreme Court have held that a defendant has no constitutional right to refuse to submit to a breathalyzer exam. (*Graham v. State*, 633 P.2d 211, 214 (Alaska 1981); *Palmer v. State*, 604 P.2d 1106, 1110 (Alaska 1979); *Coleman v. State*, 658 P.2d 1364, 1365–1366 (Alaska App. 1983). A.S. 28.35.032(f) was recently upheld against constitutional challenge by the Alaska Court of Appeals. (*Jensen v. State*, 667 P.2d 188, (Alaska App., 1983).

However, the Alaska Court of Appeals has recognized the right of a defendant to a reasonable attempt to communicate the consequences of a failure to take the breathalyzer exam in order for such refusal to be admitted as evidence. (A.S. 38.35.032(e), *Williford v. State*, 653 P.2d 339, 342–343 (Alaska App. 1983))

V.

In summary, the attorney's professional responsibilities in this area include the following; to not obstruct justice; to not aid or abet through any overt assistance a refusal to submit to a breathalyzer; to not advance an unwarranted theory to the client except a claim or defense to the statute which the attorney in good faith believes is supported by an extension or reversal of existing legal theories; to not merely tell his client not to take the breathalyzer test without further advice and discussion; to represent his client zealously; to advocate permissible legal theories which the attorney believes challenge the validity of the statute; to advise the client on the legal consequences and judicial response to any refusal to take a breathalyzer; to submit advice on the scope and meaning of the statute; and to submit his interpretation or opinion on the validity of the applicable provisions of A.S. 28.35.030, *et seq.*, ch. 117 S.L.A. 1982. In other words, the attorney should not unilaterally direct his client to refuse a breath test. Rather, the decision to submit to a breathalyzer should ultimately be made by the client after receiving the attorney's advice and counsel on the subject. It is only after such a process that the attorney can fulfill both the role of advisor and advocate.

Adopted by the Alaska Bar Association Ethics Committee on October 6, 1983.
APPROVED BY THE BOARD OF GOVERNORS on January 13, 1984.

Ethics Opinion 84-2

Re: Representation of Partnership, and Subsequent Representation of Individual Partners in Partnership—Related Dispute.

The Ethics Committee has been asked to clarify whether or not an attorney for a partnership can subsequently represent one of the partners against another partner in a partnership dispute. This ordinarily cannot be done.

DR 4-101(B)(2) provides that a lawyer shall not knowingly during or after termination of the professional relationship, use a confidence or secret of a client to the disadvantage of the client.

The preservation of confidences and secrets of a client are essential to the attorney/client relationship and should be protected. Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system

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require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and the lawyer must be equally free to obtain information beyond that volunteered by his client. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client, but also encourages laymen to seek early legal assistance (EC 4-1).

An attorney represents the partnership interest of each individual partner of a partnership when he represents the entity of a parternship. A partnership is an association of two or more persons to carry on as co-owners as a business for profit. A.S. 32.05.010. If a partner has divulged his secrets and confidences to an attorney for the partnership, that confidence or secret may not by used to the disadvantage of the client. (DR 4-101(B)(2))

If there is the slightest doubt as to whether or not the acceptance of professional employment will involve a conflict of interest as between the two partners or with a former partner, or may require the use of information obtained through the services rendered to the partnership, the employment should be refused. The Alaska Supreme Court has ruled that an attorney may not represent a third party against a former client where there exists a substantial possibility that knowledge gained by the attorney in the earlier professional relationship can be used against the former client or where the subject matter of his present undertaking has a substantial relationship to that of his prior representation. The former client need show no more than that the matters embraced within the impending suit, wherein his former attorney appears on behalf of his adversary, are substantially related to the matters or cause of action, wherein the attorney previously represented the former client. *Aleut Corp. v. McGarvey*, 573 P.2d 473 (Alaska 1978) citing *T.C. Theater Corp. v. Warner Brothers Pictures*, 113 F. Supp. 265 (S.D.N.Y. 1953). See also *Gause v. Gause*, 613 P. 2d 1257 (Alaska 1980).

Therefore, an attorney for a partnership should not represent one or more of the partners against another partner in a partnership dispute where there exists a substantial possiblity that knowledge gained by him in the earlier professional relationship can be used against the former client, or where the subject matter of the present undertaking has a substantial relationship to that of the prior representation of the partnership.

Adopted by the Alaska Bar Association Ethics Committee on November 22, 1983.

APPROVED BY THE BOARD OF GOVERNORS on January 13, 1984.

Ethics Opinion 84-3

Re: Advice to Potential Witnesses in a Criminal Case.

I.

The attention of the Ethics Committee has been drawn to a brochure distributed to witnesses by the criminal division of the State Department of Law. The Committee has been asked to rule on the propriety of the following advice given by the State Prosecutor's Office to its witnesses:

1. "If you [witnesses] are willing to talk to them [defense attorneys], you should insist that someone from the District Attorney's Office be present," and

2. "Don't allow yourself to be pressured into an on the spot interview."

The Ethics Committee believes that it is improper for a prosecutor[1] to instruct a prospective witness that he should insist on the presence of the prosecuting attorney, or to otherwise interfere in any form with the means of the defense interview.

II.

Both statutory law and disciplinary rules (contained below) leave little doubt of Alaska's policy toward the principle of non-interference with defendant's means of witness interview. This implicit policy seems apparent even though no statute or rule expressly prohibits the prosecutorial conduct complained of herein. Criminal Rule 16(b)(1) requires the prosecuting attorney to disclose to the defendant relevant information, including: '[t]he names and addresses of persons known by the government to have knowledge of relevant facts and their written or recorded statements or summaries of statements." It would not conform to the spirit of this section to require prosecutors to disclose "names and addresses" of witnesses, but still allow the district attorney to advise witnesses not to be interviewed unless the prosecution is present.[2]

Further, Section DR 7-103(B) of Alaska's Code of Professional Responsibility requires the prosecutor to "make timely disclosure" to the defense of any evidence which tends to negate the accused's guilt. DR 7-109 forbids any attorney from suppressing any relevant evidence, or to "advise or cause a person to secrete himself . . . for the purpose of making him unavailable as a witness." A similar policy is expressed in DR 7-102(A)(3).[3]

The ABA Standards also suggest a parallel policy of cooperation, disclosure and non-interference. It is the responsibility of counsel to conduct discovery so as to achieve "a minimum of imposition on the time and energies" of counsel and potential witnesses. ABA Standard, Discovery and Procedure Before Trial (1970) § 1.4(b). The duty to disclose witness names and addresses is indicated in Section 2.1(i). The prosecution "should ensure that a flow of information is maintained." *Id.* § 2.2(c) Neither counsel shall "impede or oppose counsel's investigation of the case." *Id.* § 4.1 The ABA Standards more directly state that a prosecutor "should not obstruct communication" between prosecutive witnesses and defense counsel. It is unprofessional conduct to advise any person "to decline to give information to the defense." ABA Standards, Prosecution and Defense Function (1970) § 3.1(c). The commentators explain that while counsel may request the chance to be present at opposing counsel interviews, "he may not make his presence a condition of the interview." *Id.* § 3.1, commentary (c).

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III.

We do not believe that the prosecutor's conduct here is directly in violation of the above professional rules.[4] However, implicit in these ethical considerations is a policy against any interference in any form in the means of the defense interview. Witnesses may freely choose not to be interviewed by the defense. *Kines v. Butterworth* 669 F.2d 6, 9 (1st Cir. 1981). This Committee does not believe that witnesses should always be ordered to speak with the defense. The Committee does not believe that it is improper for a prosecutor to advise prospective witnesses of their rights to refuse to submit to an interview.

This is not a case wherein the prosecutor has used direct coercion, threats of prosecution or instructed the witness not to cooperate. *Webb v. Texas,* 409 U.S. 95 (6th Cir. 1973). However, at the same time, this prosecutor's statement does *not* suggest the government simply "does not care" one way or the other. *U.S. v. Nardi,* 633 F.2d 972, 977 (1st Cir. 1980).

IV.

It is the belief of this Committee that a prosecutor should not instruct a potential witness that he should "insist" on the prosecutor being present at any defense interview, or further to otherwise interfere in any form with the means of the defense interview. Rather, the prosecutor's advice on the subject of defense interviews should be limited to merely advising a witness that a witness is free to chose, whether or not, he wishes or declines to be interviewed.[5]

V.

It is not suggested that there is any direct suppression of witness access by the State's brochure. But there is a suppression of the "means by which the defense could obtain evidence." *Gregory v. U.S.,* 369 F.2d 185, 189 (D.C. Cir. 1966). The concern is the potential by the district attorney to interfere with the "right" of a defendant to interview an otherwise willing witness. But the issue need not be the form which the interference takes, but rather whether it is effective. *State v. York,* 632 P.2d 1261, 1264–65 (Or. 1981).

On the text of this brochure, the "means" of defense preparation is affected. Witnesses are property of neither side in a case. Presumably, the prosecutor, in interviewing and giving his witness a copy of the brochure, was not encumbered by the presence of defense counsel. There is no reason why the means available to the defendant should not be equal. Further, State's brochure does not seek to coerce or threaten witnesses, but merely tells them to insist on his presence. The State's choice of the lesser degree of interference, even if in good faith, it still error.

The "decision" regarding whether the interview be private is neither for the prosecutor nor the defense counsel but "rests with the witness." *Mota v. Buchanan,* 547 P.2d 517, 522 (Arizona 1976). Where the prosecutor has advised or encouraged a witness to decline to be interviewed by defense counsel unless the prosecutor is present, it has been held that such prosecutorial conduct violates both the defendant's due process rights and general standards of professional conduct. *See Gregory v. State,* 369 F.2d 185 (D.C. Cir. 1966); *State v. Williams,* 581 P.2d 1290 (N.M. 1978). It is "imperative that prosecutors and other officials maintain a posture of strict neutrality when advising witnesses of their duties and rights." *U.S. v. Rich,* 580 F.2d 929, 934 (9th Cir. 1978). "Abuses can easily result" when officials seek to provide witnesses with advice. *Id.*

In the instant situation, the Committee is of the view that absent a showing of exceptional circumstances or compelling reasons, the district attorney should not interfere in any form with the means of defense pre-trial preparation and witness interview.[6] As such, the State should decline to provide witnesses with extended advice, and rather should limit its comments to indicating the freedom of choice to grant or decline an interview.

[1]The Committee notes that the comments contained herein with regard to the prosecutor's duty could equally apply to the defense attorney's obligation.

[2]Indeed, this Criminal Rule continues to prohibit counsel from advising witnesses to refrain from discussing the case with opposing counsel . . . or "otherwise impede opposing counsel's investigation of the case." Criminal Rule 16(d)(1).

[3]An identical expression of the prosecutor's duty to cooperate with disclosure of evidence is provided in Ethical Consideration 7-13.

[4]The Committee does not wish to impugn the reputation of the prosecutor's office for distributing the brochure at issue. Indeed, the advice may have been given in good faith, and includes the statement to witnesses that it is "completely proper" and they are "encouraged" to talk to the defense.

[5]The State's brochure tells the witnesses that while they are "not legally obligated" to talk to the defense, it is "completely proper" and that they "are encouraged" to do so. Any advice on the subject should be limited to that language and the other comments deleted. Indeed, a witness could be confused when he is "encouraged" to grant an interview, but also told to "insist" on the State's presence and warned against being "pressured."

[6]It is believed in "exceptional circumstances" or for "compelling reasons" that appropriate remedies can be fashioned by counsel and the court.

Adopted by the Alaska Bar Association Ethics Committee on February 16, 1984.

APPROVED BY THE BOARD OF GOVERNORS on March 9, 1984.

Ethics Opinion 84-4

Re: Ethical Propriety of Attorney Drafting a "Surrogate Mother" Contract.

A law firm has been approached by a female client who wishes to be a surrogate mother for a childless couple. The firm has been requested to prepare, on behalf of the surrogate mother, a contract to be available for future discussions between the parties.

The law firm has asked whether it is ethically proper to prepare a contract for the surrogate mother. Assuming that the proposed contact is not illegal, the Ethics Committee concludes that no ethical rule prohibits an attorney from preparing such an agreement.

DR 7-102(A)(7) states that a lawyer shall not "counsel or assist his client in conduct thta the lawyer knows to be illegal or fraudulent." Thus, if the lawyer determines that the contract is illegal, then the lawyer must refuse to participate in drafting the contract. In this case, the law firm has concluded that the contract is not illegal, but may be found by a court to be voidable or unenforceable. The Code of Professional Responsibility does not prohibit an attorney from drafting a contract which might be held voidable or unenforceable, provided that the attorney advises the client of the particular risks involved in the particular contract that is being drafted.

Ethics Opinion No. 81-67 of the Association of the Bar of the City of New York deals with a similar situation. In that opinion, the client of the law firm was the prospective father, rather than the prospective surrogate mother. The proposed contract provided for artificial insemination of the surrogate mother by the client, and, if pregnancy and birth ensued, the surrogate mother would deliver the child to the client and his spouse, and would forfeit all rights with regard to the child. The Association of the Bar of the City of New York, also citing DR 7-102(A)(7), concluded that nothing prohibits the law firm from drafting such a contract, as long as the firm advises the client of the risks that the contract might not be enforced or might be voided by the prospective surrogate mother. This opinion also pointed out that the law firm should advise the prospective surrogate mother to seek separate

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counsel, for it appears that she may have an actual or potentially adverse interest to the firm's client, citing DR 7-104(A)(2).

The law with respect to surrogate mother contracts is nonexistent in Alaska, and nonexistent or very sparse in other jurisdictions. Additionally, this situation is fraught with many potential legal, public policy, emotional and practical problems. Regardless of whether the attorney represents the prospective father or the prospective surrogate mother, the attorney cannot represent both parties, and must advise the other party to seek separate counsel. Such an approach is mandated by DR 7-104(A)(2), which states:

> "During the course of his representation of a client a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client."

A contractual arrangement to provide for a surrogate mother is inherently a situation in which there is a reasonable possibility of a conflict developing between the parties.

Adopted by the Alaska Bar Association Ethics Committee on May 24, 1984.
APPROVED BY THE BOARD OF GOVERNORS on June 5, 1984.

Ethics Opinion 84-5

Re: Propriety of Using "Of Counsel" Designation in Letterhead to Refer to Non-admitted Attorney.

The Ethics Committee has been asked whether an Alaskan attorney ("Lawyer A") may include on his firm letterhead the name of an attorney not admitted to practice in Alaska, together with the designation as "Of Counsel." "Lawyer X," the attorney to be designated as "Of Counsel," is admitted to the bar in several jurisdictions and has lived and practiced in Guam since the mid-1940's. Recently Lawyer X purchased a condominium and made other investments in an Alaska community where he expects to maintain a part-time residence. Lawyer A was in the law firm of Lawyer X for six years, at some undesignated time in the past, but no other information is provided regarding their professional relationship.

The use of the term "Of Counsel" is generally regulated by the provisions of DR 2-102(A)(4) which provides in pertinent part that "A lawyer may be designated 'Of Counsel' on a letterhead if he has a continuing relationship with a lawyer or law firm, other than as a partner or associate." The nature of the relationship contemplated by the use of an "Of Counsel" designation is more extensively discussed in American Bar Association Formal Opinion 330 (1972), as follows:

> The lawyer who is described as being "Of Counsel" to another lawyer or law firm, must have a continuing (or semi-permanent) relationship with that lawyer or firm . . . His relationship with that lawyer or firm must not be that of a partner (or fellow member of a professional legal corporation) nor that of an employee; see DR 2-102(A)(4). His relationship with the lawyer or law firm must be a close, regular, personal relationship like, for example, the relationship of a retired or semi-retired former partner, who remains available to the firm for consulting and advice, or a retired public official who regularly and locally is available to the firm for consultation and advice; see Informal Opinion 678. While it would be misleading to refer to a lawyer who shares in the profits and losses and general responsibilities of a firm as being "Of Counsel," the lawyer who is "Of Counsel" may be compensated either on a basis of division of fees in particular cases or a basis of consultation fees, see Informal Opinion 710. He is compensated as a sui generis member of that law office, however, and not as an outside consultant. Generally speaking, the close, personal relationship indicated by the term "Of Counsel" contemplates either that the lawyer practice in the offices of the lawyer or law firm to which he is "Of Counsel" or that his relationship, for example by virtue of past partnership of a retired partner that has led to continuing close association, be so close that he is in regular and frequent, if not daily, contact with the office of the lawyer or firm; see Informal Opinion 1134. The term obviously does not apply to the relationship which is merely that of a forwarder and receiver of legal business. In short, the individual lawyer who properly may be shown to be "Of Counsel" to a lawyer or law firm is a member or component part of that law office, but his status is not that of partner or an employee (nor that of a controlling member of a professional legal corporation).

See, Massachusetts Committee on Professional Ethics, Opinion 82-10 (continuous and regular dealings involving the rendering of legal advice by one attorney to the other is required).

The relationship necessary to the use of an "Of Counsel" designation is further complicated when that designation is proposed for use with an attorney not admitted to practice in the jurisdiction. That situation was addressed by the Michigan Ethics Committee in Opinion No. 29, issued April 1, 1982. Counsel there was advised that the "Of Counsel" relationship does not allow out-of-state counsel to practice law in a jurisdiction to which he is not admitted, nor can it be used to mislead the public with regard to authorization to practice. Rather, the designation of an out-of-state attorney as "Of Counsel" is limited to legal/consulting work by the "Of Cousel" attorney in his or her own jurisdiction.

Based upon the limited information provided to the committee, it would appear to be improper for Lawyer A to refer to Lawyer X as "Of Counsel" on his firm letterhead. There is no indication thta the advice or counsel of Lawyer X is sought on a continuing and regular basis. Moreover, no representation was made that the practice of Lawyer A includes representation of clients in Guam or other jurisdictions where Lawyer X is admitted. Rather, it appears that the "Of Counsel" designation is desired because Lawyer X has a part-time residence in Alaska with investments in this state. Under these circumstances, the purpose to be accomplished by the "Of Counsel" designation is difficult to understand. It is therefore the opinion of the committee that listing Lawyer X on Lawyer A's letterhead with the "Of Counsel" designation is in violation of DR 2-102(A)(4) and will be deceptive to the public.

Adopted by the Alaska Bar Association Ethics Committee on May 24, 1984.
APPROVED BY BOARD OF GOVERNORS on June 5, 1984.

Ethics Opinion 84-6

Re: Suspended Attorney Acting as Paralegal.

The Ethics Committee has been asked to render an opinion on whether it is ethical for a law firm to hire as a paralegal a former partner who has been suspended from the practice of law, and, if so, what duties that paralegal may perform. For the reasons set forth below, the Committee concludes that a suspended attorney may be employed as a law clerk or paralegal by a licensed attorney subject to significant constraints.

During the period of suspension, a suspended attorney may not practice law. A suspended lawyer engaged in the practice of law during the period of suspension would be violation of DR 3-101(B) which states: "A lawyer shall not practice law in a jurisdiction where to do so would be violation of regulations of the profession in that jurisdiction."

A suspended attorney employed as a paralegal should have no direct relationship with a client and must not act in any capacity as a "legal counsel." *See State v. Schumacher,* 509 P.2d 116 (Kansas 1974). His compensation should reflect that he is performing only paralegal services. If a suspended attorney is to act as a paralegal, his activities must be closely controlled by and funnelled into the work product of actively practicing attorneys. Failure to provide such close scrutiny might put the employing attorney in violation of DR 3-101(A) which states: "A lawyer shall not aid a nonlawyer in the unauthorized practice of law."

The Alaska Supreme Court has had occasion to examine when the actions of a suspended attorney constitute the unauthorized practice of law. In *Matter of Robson,* 575 P.2d 771 (Alaska 1978), the Court ordered Robson to show cause why he should be held in contempt of court for violating the order suspending him from the practice of law. Robson's conduct after suspension included the following: accepting employment with a union and rendering advice on establishing a prepaid legal services plan in accordance with federal statutes, completing and filing certain IRS and Department of Labor forms for approval of the prepaid legal plan, signing his name over the words "attorney at law" on a letter, appearing at an arraignment and permitting the defendant to refer to him as an attorney, writing a letter to a union member concerning eligibility for the prepaid legal service program, editing and typing a union newsletter in which he was described as the attorney performing legal work for the union. 575 P.2d at 779. Robson claimed that he was acting in the capacity of union business agent rather than as an attorney.

The Supreme Court concluded that Robson's activities as a whole constituted the practice of law in violation of his suspension order. In reaching its conclusion, the Court reasoned that a suspended attorney "because of prior recognition as an attorney, . . . must be particularly prudent in avoiding the appearance of holding himself out as a lawyer." 575 P.2d at 781. The Court relied on *State v. Butterfield,* 111 N.W.2d 543 (Neb. 1961) for the proposition that a suspended lawyer may not perform services which a lay person might otherwise perform if those services are recognized as being within the practice of law. In Butterfield, these services included drawing deeds, mortgages and releases, making out income tax returns and advertising for such work, drafting a will and supervising its execution and drafting a power of attorney.

There is authority for the proposition that a suspended attorney can do research, write briefs and draft pleadings without engaging in the practice of law. *See Crawford v. State Bar,* 355 P.2d 490 (Cal. 1960). However, in *Crawford,* the California court held that preparation of deeds and birth certificates, and handling probate matters, escrow and real estate deals, mining claims and partnership dissolutions by a suspended attorney amounted to the practice of law even though

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these same services might have been rendered by title companies, insurance companies, brokers or other laymen. 355 P.2d at 495.

In the alternative, the Committee has been asked whether any ethical constraints prohibit a law firm from sharing office space with a suspended attorney who is acting in a business capacity other than that of paralegal. Under the facts stated, the office space is in a discreet building with one entrance. Office space may be shared without violating any ethical considerations as long as there is a separation of identity between the law office and the non-law office. This can be accomplished in a variety of ways and the Committee declines to suggest any specific method that should be used in this case. As long as it is obvious to members of the public that there is a separation of identity and activities, such an arrangement does not overstep the bounds set forth in EC 3-8.

Adopted by the Alaska Bar Association Ethics Committee on August 16, 1984.
APPROVED BY BOARD OF GOVERNORS on August 25, 1984.

Suspension of Ethics Opinion 84-7

At its regular meeting on November 9, 1984, the Board of Governors of the Alaska Bar Association suspended the effect of Ethics Opinion No. 84-7, dated August 25, 1984, relating to appearance of legal assistants before the Alaska Worker's Compensation Board, pending reconsideration of this opinion by the Alaska Bar Association Ethics Committee and the Board of Governors.

Ethics Opinion No. 84-7

Re: Use of Legal Assistant, Who is Employed by a Law Firm, in Hearings, Prehearings, Depositions, and Other Proceedings Before the Alaska Worker's Compensation Board.

Previously, the Alaska Bar Association issued Ethics Opinion No. 73-1 regarding the use of legal assistants, whether or not the use of legal assistants constituted the unauthorized practice of law. That opinion pointed out that an attorney may employ nonlawyers to do any task for him except counsel clients about law matters, engage directly in the practice of law, or appear in court or formal proceedings as part of the judicial process, as long as the attorney who takes the work vouches for it to the client and is responsible to the client. The lawyer cannot delegate his professional responsibility to the non-lawyer working in his office.

The subject of this opinion focuses on whether or not the legal assistant or paralegal may directly participate in hearings, prehearings, depositions and other proceedings before the Alaska Worker's Compensation Board.

Historically, lawyers have used the services of lay personnel to assist them in providing representation to their clients. In addition to the use of law clerks studying for entry into the profession and legal secretaries, recent years have witnessed the increasing employment by lawyers of the para-professional or paralegal. Paralegals may have received academic training in the performance of a variety of law-related tasks and work under the direction of the employer without necessarily planning on completing professional studies or bar admission.

The increased use of paralegals has been welcomed as a means of providing lower cost legal services to lower and middle income segments of the population. It also raises questions as to the proper use of lay personnel.

Ethical Consideration 3-6 of the Model Code of Professional Responsibility provides that a lawyer's delegation of tasks to a lay person is proper if the lawyer (1) "maintains a direct relationship with the client," (2) supervises the delegated work," and (3) "has complete professional responsibility for the work product." The Model Code further adds that a lawyer may not aid a non-lawyer in the unauthorized practice of law. (Disciplinary Rule 3-101(A)) The Model Code does not define the "practice of law" beyond stating that it relates to the rendition of services for others that call for professional judgment of a lawyer. EC 3.5.

The American Bar Association's Model Rules of Professional Conduct, in the comment to rule 5.5(b), state that the prohibition against aiding the unauthorized practice of law, "does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work."

The American Bar Association's leading opinion on the subject of delegation of tasks to non-lawyers is Formal Opinion 316, which was rendered on January 18, 1967. "A lawyer can employ . . . non-lawyers to do any task for him except counsel clients about law matters, engage directly in the practice of law, appear in court or appear in formal proceedings as part of the judicial process, so long as it is he who takes the work and vouches for it to the client and becomes responsible to the client."

Clearly, legal assistants or paralegals are not allowed to appear on behalf of a client in formal proceedings as part of the judicial process. The Alaska Worker's Compensation Board is a hearing in which the valuable rights of the client are at stake. The conduct of hearings requires the professional judgment of the lawyer in terms of preserving the record for appeal, the submission of evidence to the trier of fact, and legal argument. Lay personnel may not be delegated tasks that constitute the practice of law, such as giving legal advice, or representing clients before courts or other tribunals. *See The American Bar Association and Bureau of National Affairs, Inc.,* Lawyer Responsibility for Non-Lawyer Personnel, Section 21:8609. Except for purely clerical matters which a law clerk may perform, an attorney should attend pretrial, motions, and other hearings on behalf of a client. *Maru,* 13228 (State Bar Wisconsin 4-78, n.d.)

The Alaska Worker's Compensation Act, at A.S. 23.30.110(d), provides that at the hearing, the claimant and the employer may be represented by any person authorized in writing for that purpose. However, when a lawyer undertakes the representation of a client in a Worker's Compensation hearing, the lawyer must perform his professional tasks pursuant to the standards of the Code of Professional Responsibility, including the limitation that non-lawyer personnel may not conduct hearings.

Adopted by the Alaska Bar Association Ethics Committee on August 2, 1984.
APPROVED BY BOARD OF GOVERNORS on August 25, 1984.

Ethics Opinion 84-8

Re: Ex Parte Communication with Experts Retained by Opposing Counsel.

The Committee has been asked whether it is ethical for an attorney to communicate ex parte with expert witnesses or consultants retained by an adverse party.

It is the opinion of the Committee that non-deceptive ex parte attorney communications with expert witnesses or consultants retained by an adverse party are not prohibited by the Code of Professional Responsibility.

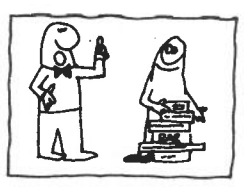
An attorney has a duty to represent his client competently, zealously and within the bounds of the law. That duty requires a lawyer to be informed regarding the nature of all possible testimony that he has reason to believe may be presented adverse to his client. The mere fact that a person has been selected or designated as a witness or consultant for an adverse party, does not change that duty or require the attorney to limit his investigative efforts to a formal discovery mode. While arising in the context of a factual witness, the following statement accurately reflects the limited ethical restraint imposed with regard to permitted witness contacts:

> Service of a subpoena on the physician by the other side does not make him unapproachable by the attorney for the [opposing party], who must ascertain the truth and bring it out in the trial and to that end may properly interview witnesses subpoenaed by the other side, if no deception is practiced by him, in order that justice may be done.

ABA Formal Opinion 127 (3/15/35)

An expert witness or consultant is obviously free to refrain from discussing his opinions or the basis for such opinions with anyone. Moreover, an attorney may, as a term of the engagement for such expert, obligate the expert to refrain from discussing his opinions regarding the subject in controversy unless previously authorized by the attorney or through applicable discovery or trial procedures. It does not appear, therefore, that additional disciplinary dissuasion is required to protect expert opinions.

Adopted by the Alaska Bar Association Ethics Committee on August 2, 1984.
APPROVED BY BOARD OF GOVERNORS on August 25, 1984.



Ethics Opinion 84-9

Re: Providing Opposing Parties with Copies of Draft Documents; Record and File Retention Requirements

The committee has been asked to determine:

1. The propriety of providing the buyer of a business with copies of draft agreements prepared by an attorney in the course of that attorney's representation of a seller, where the seller has since allegedly breached the contract; and
2. Requirements for keeping closed client files and records for more than one (1) year.

The committee concludes that an attorney may not provide an opposing party with draft documents prepared in the course of representing a client without the client's, or ex-client's, express consent. The committee further concludes that a uniform policy of discarding or destroying records after one (1) year is improper, and that retention of files, records and documents should be based on a case by case review of files and documents.

Attorney "A" was retained to represent the seller of certain property, and in the course of that representation prepared draft and final documents. The transaction was concluded and final documents signed, but the attorney apparently did not retain a copy of the final executed agreement. The attorney's files do contain copies of draft agreements prepared in the course of negotiations. Attorney "A" has now been contacted by the buyer, asserting that the seller, attorney "A's" client, or perhaps ex-client, has breached the contract and that buyer intends to sue. Buyer has asked Attorney "A" to provide buyer with a copy of the contract. Attorney "A" is unable to provide a copy of the executed final agreement, but could, if proper, provide buyer with copies of draft agreements contained in attorney "A's" files.

Alaska Canons of Professional Responsibility, DR 4-101 obligates a lawyer to

adopted in 1984 by Board

preserve the confidences and secrets of a client. This ethical obligation involves no limitation on the source of the information and it must be invoked even in the absence of a judicial proceeding, a broader application than the evidentiary rules governing the attorney/client privilege and the work/product doctrine. AK Rules of Court, ER 503 and Commentary; *see also Upjohn Company v. United States,* 49 LW 4093, Jan. 13, 1981; *Hickman v. Taylor,* 329 U.S. 495 (1947). DR 4-101(B) provides that except where expressly permitted, "a lawyer shall not knowingly during or after termination of the professional relationship to his client.

1. Reveal a confidence or secret of his client.
2. Use a confidence or secret of his client to the disadvantage of the client.
3. Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

The rule provides that a lawyer may reveal client confidences or secrets only with the consent of the client and only after a full disclosure, and in certain other circumstances not relevant to this inquiry.

The Model Rules of Professional Conduct, adopted August 2, 1983 by the American Bar Association, and under consideration in Alaska, would broaden the obligation:

> Rule 1.6 thus imposes confidentiality on information relating to the representation even if it is acquired before or after the [attorney-client] relationship existed. It does not require the client to indicate information that is to be confidential, or permit the lawyer to speculate whether particular information might be embarrassing or detrimental. ABA Model R. of P.C., Rule 1.6, commentary.

Because draft agreements may, and usually do, contain confidential information gained during the course of the attorney/client relationship, and because releasing such draft agreements may well disadvantage the client, especially given a subsequent apparent intent to file suit by the adverse party, attorney "A's" ethical obligation prevents him from releasing the documents, absent the express consent, after full disclosure, given by the present or former client.

The second inquiry, with respect to records retention, involves DR 5-105, Alaska Canons of Professional Responsibility, obligating an attorney to avoid representing clients with differing interests; DR 9-102, the attorney's obligation to preserve a client's funds and property; and DR 4-101, the obligation to preserve the confidences and secrets of a client.

Because an attorney must not accept or continue employment if the interest of another client, present or past, may impair the independent professional judgment of the attorney, the premature discarding or destruction of closed filed may prevent an attorney from being able to adequately determine whether obligations to a prospective client would be impaired by representation of a past client. DR 5-105.

DR 9-101 requires an attorney to preserve the identity of funds and property of a client. The rule requires that the attorney maintain complete records of all funds, securities and other properties of a client coming into the possession of the lawyer, and to render appropriate accounts to his client with respect to those items. While documents and drafts prepared by the attorney in the course of representing a client may not fall strictly within the definition of property, the attorney should consider the need to retain files and records for a period sufficient to be able to produce them to the client; or in connection with judicial proceedings, should that become necessary. Compliance with DR 4-101, obligating an attorney to preserve the confidences and secrets of a client, may be difficult if records, files and documents cannot be consulted where an apparent conflict of interest arises, or where requests such as the first inquiry arise.

It is unlikely that a uniform policy of destruction or discarding of records after one (1) year would satisfy these considerations in every case.

The committee recommends that the attorney consider such things as statutes of limitations, state and federal record keeping requirements, the requirements of the attorney's errors and omissions insurance policy, and a case-by-case review of files to determine appropriate retention periods. Law office management publications will provide suggestions for prudent record retention policies.

Adopted by the Alaska Bar Association Ethics Committee on August 16, 1984.

APPROVED BY THE BOARD OF GOVERNORS on August 25, 1984.

Ethics Opinion 84-10

Re: Consent to Withdraw Executed When Representation Undertaken.

The Committee has been asked to pass both upon the practice of attorneys obtaining consents to withdraw as a condition of employment by a client and their subsequent tender to the court. It is the opinion of this Committee that an attorney should not lodge with the court such a previously executed document without notice of hearing to his client under the guise of an express consent in writing to the withdrawal of the attorney. Further, a lawyer may not tender to the court such a previously executed document even following motion and notice of hearing to his client and opposing counsel. In the future, an attorney may not obtain a consent to withdraw in advance of an actual intent to withdraw.

The aspects of obtaining such a consent to withdraw are delineated by professional standards and court rules. A lawyer shall not withdraw from employment in a proceeding before a tribunal without its permission, when permission for withdrawal is required by court rules. *See* DR 2-101(A)(1). The procedure through which an attorney obtains the tribunal's consent to withdraw is provided by Alaska Civil Rule 81(d), which in pertinent part provides as follows:

> (1) An attorney who has appeared for a party in an action or proceeding may be permitted to withdraw as counsel for such party only as follows:
>
> (i) for good cause shown, upon motion and notice of hearing served upon the party in accordance with Rule 77; or
>
> (ii) where the party has other counsel ready to be substituted for the attorney who wishes to withdraw; or
>
> (iii) where the party expressly consents in open court or in writing to the withdrawal of his attorney.

On one hand, the attorney may withdraw without the express consent of his client when good cause has been shown, but only following motion and notice of hearing. On the other hand, an attorney may withdraw without motion and notice of hearing, but only upon the client's express consent in court or in writing to such a withdrawal. It is apparent that the consent pursuant to Alaska Civil Rule 81(d)(1)(iii) is contemplated to be a current consent, rther than one previously obtained. *See also,* ABA Canon 44. Therefore, the prior accord on withdrawal of counsel made between attorney and client may not be tendered to the court as an express consent in writing. The attorney and client may agree that the attorney may seek to withdraw upon the occurrence of future contingencies. However, this agreement to the attorney's withdrawal upon the occurrence of future contingencies may *not* be used within the context of Alaska Civil Rule 81(d)(1)(iii), nor does it necessarily establish good cause pursuant to Civil Rule 81(d)(1)(i). The determination of whether good cause has been established is made by the tribunal involved.

The ethical aspects of this matter are, in large part, covered by the Rules of Professional Conduct which require the lawyer to exercise full honesty toward the tribunal and mandate that the lawyer shall not proffer evidence which is false. A lawyer shall exercise full candor toward the tribunal and shall not knowingly make false statement of material fact or law, nor fail to disclose material facts, nor offer evidence which the lawyer knows is false. *See* ABA Model Code of Professional Responsibility, Rule 3.3. A lawyer shall represent his client within the bounds of the law and, in his representation, shall not conceal or fail to disclose that which is required by law, knowingly use perjured testimony or false evidence, or knowingly make a false statement of law or fact. *See* DR 7-102(A)(3-5). The lawyer, during trial, shall conduct himself in a manner which comports with honesty, good faith, and full disclosure. *See* DR 7-106(A)(B) and (C). The Rules of Evidence and Civil Procedure are designed to produce just decisions within the framework of the law. Thus, a lawyer is not justified in consciously violating such rules and should be diligent in his efforts to guard against his unintentional violation of them. The lawyer should not subscribe to or verify pleadings which he believes are not in compliance with applicable law or rules. *See* E.C. 7-25.

Therefore, based on all of the above, an attorney may *not* utilize such a previously executed consent to withdraw in proceedings under Civil Rule 81(d)(1)(iii), as it is not a current consent in writing to said withdrawal. Further, such a document should not be proferred as either a current express agreement to withdrawal nor as evidence thereof even following motion and notice of the hearing served on the client and counsel pursuant to Alaska Civil Rule 81(d)(1)(i).

The Committee is aware that the obtaining of advance consents to withdraw has been done in the past, and nothing in this Opinion is intended to operate retroactively. In the future, the obtaining of consents to withdraw in advance of actual intent to withdraw will be considered improper. An attorney may enter into a contract with a client whereby the client recognizes that the attorney has a right to withdraw from the representation upon the occurrence of future contingencies, but the withdrawal itself must be accomplished by notice and hearing, substitution, or current consent, in accord with the provisions of Alaska Civil Rule 81(d).

Adopted by the Alaska Bar Association Ethics Committee on November 1, 1984.

APPROVED BY THE BOARD OF GOVERNORS on November 9, 1984.

[continued on page 23]

Moody: 'The challenge is to be

Q: What has been most difficult . . . have you ever found sentencing difficult?

A: Any sentencing is difficult to do because you're taking away to some extent (even if it's only money) some of the basic rights we feel everyone is entitled to—with the understanding that if you violate other people's rights, you have to pay the penalty.

I don't have to make a policy as such; the policy has been established by the legislature, the people. I only have to carry out a policy. There's lots of difference. I don't feel I have the right to either feel good or bad about having to send someone to prison. I only make the decision of what is reasonable under the circumstances, what the punishment should be.

We've got the parameters (one to 15, or one to life, or a fine, or whatever it might be). A decision needs to be made. There's no use in taking two or three days. Whether right or wrong, I pride myself on being able to make decisions quickly and firmly and without any agonizing.

That's one of the big problems judges first have when they come on the bench. They equate taking time to make a decision as more important than the decision itself. I don't find I am any smarter 10 days after I hear the facts and assimilate them than I am 10 minutes after . . . but some of us take a heckuva long time.

Q: Does this answer, then, what is most challenging?

A: The challenge is to be fair as much as possible—and let people perceive that you've been fair. You can be fair and be so nasty about it that it's obscured.

Q: Would you express your opinion of the new law providing for certain presumptive sentencing?

A: I was on the criminal code revision committee. I opposed it. I personally think it's too harsh at times—and too restrictive, not giving enough flexibility to give more (punishment) at times.

My reason is I think I am in a better position to judge at the time it happens, to know what a person should get, rather than the legislature which sat four or five years ago, saying you have to do this or have to find mitigating circumstances . . . in other words you use a calculator. Trying to articulate on something that really there's no basis for articulating on, rather than articulating on the person you see in front of you.

I don't question their motive. I don't question it's nice for someone who has a problem making a decision as to what they feel is right. But I don't feel I have that problem. I don't feel most judges do.

I have to live with it. I do the best I can.

Q: Have you developed any rules of thumb over the years for a person going into a judgeship?

A: Not necessarily (relating to) being a judge, I think it (relates to) anything: Be sure you know what the job entails. With a judgeship, you're affecting somebody's ability to carry on their lives, their families. Accept the fact you're going to do that. Accept you've got certain parameters. And if you can't do it without agonizing, don't take the job.

We hear criticism about courts taking so much time to get things done. This job should be held by somebody able to assimilate information and arrive at a decision. Hopefully it's a right decision, but we know we don't always make the right decision. But the old saying has lots to it: a decision made—many times that satisfies people more than not making a decision at all, even if it's not what they want. So we ought to speed up the process.

That's one of the big problems most judges have coming onto the bench. Particularly when you're trying a case, criminal or civil, and *you* have to make the decision rather than a jury. (A jury case is not a bad case at all; you only say let's get on and they make the decision.)

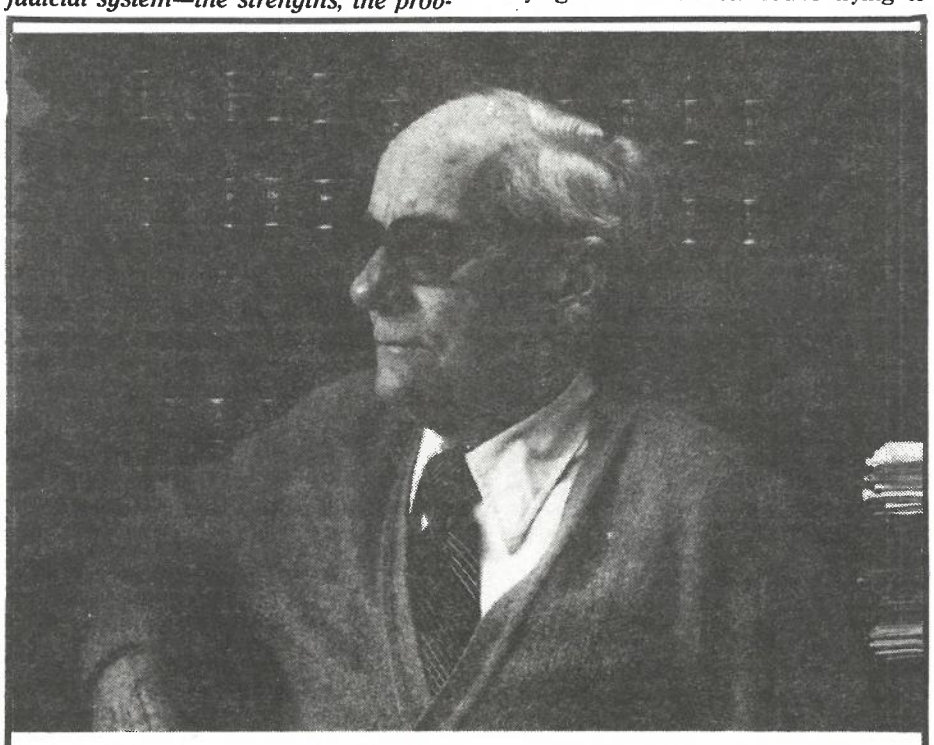
The first few months I was on the bench, I'd be in bed at night, I'd think of something, I'd get up and make notes. It was terrible. I finally decided, hey, I make my decision at the office. I don't let it interfere with my sleep. If you can't get over that pretty quick, you're going to have problems.

We have a rule: if you keep something under advisement for more than six months, you can't draw your pay. I've known judges, they're honest and sincere enough about it, they'll forego their pay because they can't make a decision. I've been on the bench almost 23 years, and never missed a pay day or even come close to it (chuckling).

Q: Are there any funny incidents you recall?

A: Almost every day. It's really a joy to work with the attorneys. I try to keep a little levity (it has to be the appropriate time in the courtroom). I don't remember any (incidents) now; I expect the attorneys remember more than I do.

Q: Would you evaluate the Alaska judicial system—the strengths, the problems? Whether anything distinguishes it from court systems outside?



Judge Ralph E. Moody, Anchorage, has had the longest tenure of any trial judge in Alaska, having served on the Superior Court bench for almost 23 years. Judge Moody was appointed Superior Court Judge on May 2, 1962. He served as Presiding Judge for the Third Judicial District from 1964 until 1969, and from 1975 until 1981.

Moody was Alaska's Attorney General from 1960 to 1962. He served in the territorial legislature from 1957 to 1958, and in the Alaska State Senate from 1958 to 1960. From 1951 until 1960, Moody was engaged in the private practice of law in Anchorage. From 1947 to 1951 he was an Assistant U.S. Attorney in Anchorage.

Moody graduated from the University of Alabama School of Law in May, 1940. He served in the military from 1940 to 1946.

He was born in Vance, Alabama, November 23, 1915.

Married—Carolyn Krebs Moody—no children.

*

Salvation Army Advisory Board, 1950 to present.

Member of the Board of Directors, Anchorage Chamber of Commerce, 1954 to 1957.

Majority Leader State Senate, 1959 to 1960.

Chairman, Alaska Legislative council, 1957 to 1959.

Board of Directors, Commonwealth North, May 1980 to present.

A: Being relatively new, relatively young, makes it much different. Theoretically we should be handling cases much faster. We shouldn't have a backlog. We shouldn't be tied into old traditions and regulations. We should be very flexible. To a certain extent I think we are. But we're getting way behind on our cases. I think we should devise ways to speed it up, both civil and criminal. There have been some speed-up procedures introduced.

Q: Any you recommend that haven't been adopted?

A: I'd rather not get into that while I'm still on the bench. Certainly I think in any system, regardless of where it is or who's running it, there's always room for improvement.

Q: If we were doing this interview after you retire, would you feel freer to suggest some speed-up mechanisms?

A: I could do it now but I plan on coming back (pro tem), and I would hope any suggestion I have would go to people here who have the power before I make them public. I don't want to get into the position of criticizing without having offered them.

Another thing: When I went on the bench 20 some years ago, for all intents and purposes you knew everybody in the city of Anchorage and everybody in the Third Judicial District.

Today it's getting so large, it's an impersonal matter to a great extent. We don't have the contact. We don't have the exchnge of ideas among all the people. It makes it much more difficult to administer any system. It's just the inability, not because nobody wants to but because it's so large.

I think to a great extent it impedes us in carrying out our duties. You're trying to assimilate too many ideas, and you're trying to adjust the system to accommodate everyone.

Q: What do you foresee in the future?

A: I think we have a fantastic future ahead of us, economic, cultural, everything. I just wish I were as young as I was when I came here. I'd love to start back over again. I can't think of any other place I'd go; Alaska has been real good to me.

Q: As far as Alaska's judicial system goes, what do you foresee?

A: The Alaska judiciary has had its cycles of, for lack of better words, conservatism and activism that all other courts have had. In other words exactly responding to the people, responding to the social needs and desires. I have seen two or three cycles. I think we're in a real transition now.

Q: From what to what?

A: (laughing) Well! I think people might take it as a criticism. Really, it's not a criticism. I think government institutions should respond to the people, don't you? Reasonably respond, I mean, not unreasonably.

But I think it can truthfully be said that when the court system was first organized, it went along on the same basis as the system in the state. I don't think our trend has been any different than what it's been in other parts of the nation. We have had the equivalent of the Warren Court in Alaska, the equivalent of the Burger Court, and the equivalent of what came before both of those. In other words, we are Americans, maybe in different time frames but not too far apart.

You know, courts like to say they are guided by a precedent and are not influenced by anyone else. But you notice every time they want someone on the court, someone says we want him as a conservative, or we don't want him because he decided cases this way or that way. People want to get people on the courts, just like they do the governor and everybody else, who have a philosophy of life that they have. When they start choosing, they're recognizing that judges are people, and that's exactly what they are.

So really, courts are not different from anyone else. Although I think courts are in a position to contribute to changes in philosophy. They can contribute, they can respond, or they can reach a—I don't know what's a happy medium—but reach a medium and go along with the changing public.

We are kidding ourselves when we say we don't respond, that we're not the public. But we're not the radical public on either end of the spectrum; we're in between. In other words, the courts have to protect society as a whole, not any special groups.

Q: I was thinking about both the transition from territorial days to statehood—if that affected the court system, and other recent changes. I know the number of attorneys has mushroomed.

A: I think there were 13 or 15 attorneys when I came in 1948. Now there are over 1,800 in Anchorage. More attorneys create more litigation. If you don't have litigation you aren't going to have attorneys—or I don't know which comes first (chuckling)! Our experience in the court system seems to be if you put a judge some place, you get lots of cases. So maybe the availability of the court system brings in litigation. I don't know. I guess it's probably a combination of both.

Q: Do you think this has affected the application of justice?

A: It has affected delivery. Any time you get more attorneys, it affects the ability to give swifter service to the public, whether criminal or civil. Another thing, with more people, cases are more complex with more scheduling problems, more people on vacations or emergencies. You have to continue cases more.

Q: You're saying that the more attorneys, the slower it goes rather than faster?!

A: To a certain extent. It is slower unless you balance. If you don't have enough judges the system doesn't work. If you don't have enough attorneys, the system doesn't work. If you get more attorneys and not enough judges, you clog up the system, particularly in criminal cases, if you don't have policemen to investigate, if you don't have district attorneys to prosecute, if you don't have counsel to defend.

It's one of the big problems in the administration of justice. When I say that, I include civil cases as well as the other. Getting the right combination so you have the quality within the system to deliver. In the final analysis, it's like opening a store: if you get too many customers, you get the merchandise all mixed up.

Q: Is there anything distinctive to the Alaska system apart from the newness? The vast territory, for instance?

A: Distances do affect the delivery of service. We send people to Unalaska, Cold Bay, Dillingham, Cordova, Valdez—Valdez recently got a judge, Palmer, Glennnallen. It takes a day to get there and you've lost a day's work, both for the attorneys and the judge.

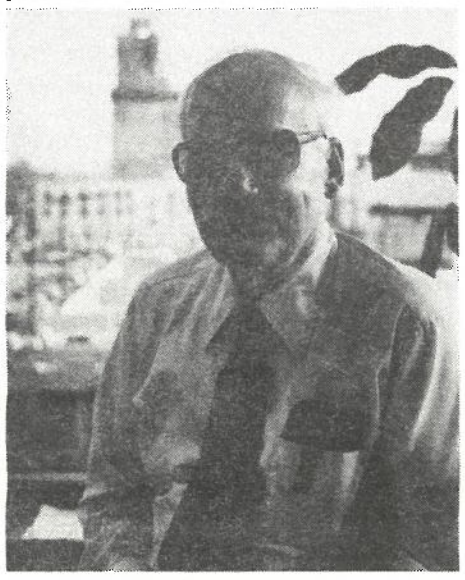
as fair as possible'

Q: Is there anything unique up here in the application of law or in the type of cases?

A: Probably Alaska has had a slightly higher crime rate over the years for the simple reason that many people up here are away from home. People tend to be restrained around people they know. We've got a much more transient population. In business dealings also. If you're dealing with someone you haven't dealt with before, that tends to create controversy. It may account for many civil lawsuits.

I'm a great believer that stability is a big factor in many things in life. If you live in the same community many years, chances are you're going to be much more stable in what you do than if you go to some other place where nobody knows you.

It probably answers many questions in regard to the nation. We have become so mobile. It's broken down the home, the stability of communities where people know each other, interact with each other, do business with each other, socialize with each other. I'm not saying it's bad but I think it's a problem.



Q: Could you outline the routine of a typical Judge Moody day?

A: We began specializing—criminal cases or civil cases—in the last few years. When I was first on the bench in 1962, we had three judges: Fitzgerald, Davis and myself. (I replaced Judge Cooper; I was the first replacement in Anchorage of a judge appointed after statehood.) In those days every time three cases came in we rotated them without regard to what type of case it was. Now we have four judges doing nothing but criminal work and some probate and children procedures. The others are on civil matters.

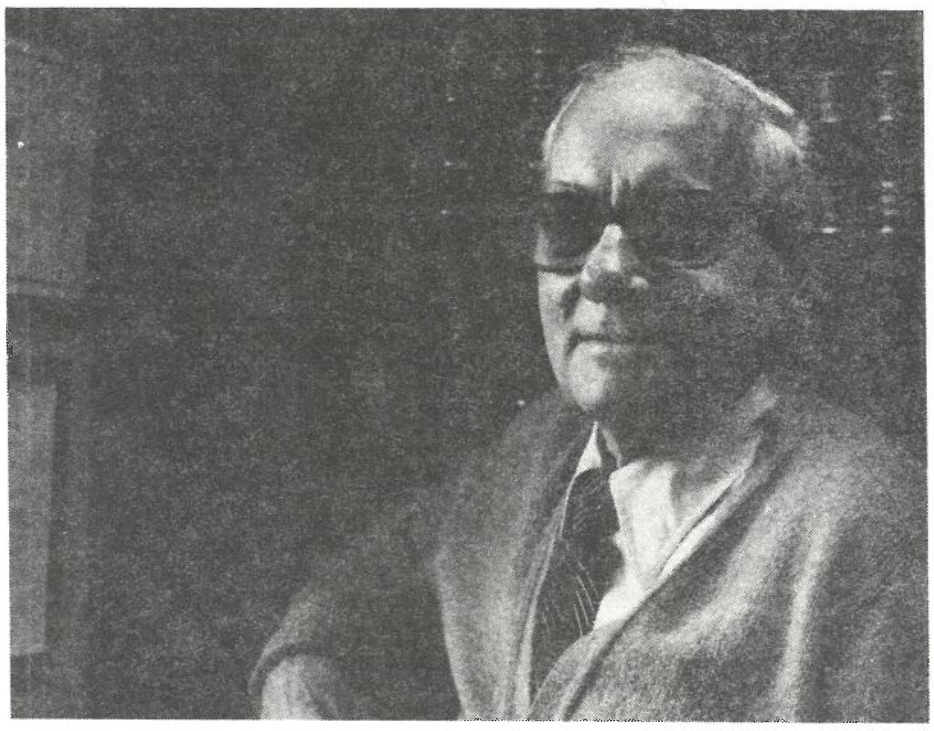
So, at least in the last few years, my days have been quite routine. I have been the calendaring judge who, with the help of the calendaring people, assigns which judges will try the cases and when. We have to estimate how long a case will take for trial, whether it's going to trial or going to settle, and hear pre-trial motions. I handle all of those. Or practically all of them; they can preempt me if they want to.

My typical morning, the first hour or hour and a half, is to handle pre-trial motions in criminal cases. (Occasionally I go all day but not very often.) Ordinarily when I finish I go into the trial of a criminal case. From 9 or 9:30 until 12 I try the case.

At 1:30 I go back in with the arraignment. I arraign all felony cases—from six to 20 people a day. I give them a copy of the indictment, tell them when they're going to trial, tell them when they've got to sign their motions, and set up hearings. And other miscellaneous matters: many bail hearings are held. Ordinarily I set aside half an hour. About half the time I run over maybe 15 minutes, but most of the time I accomplish all that. It's done at a pretty fast clip!

Then I go back at 2 on the criminal case until 4. Usually at 4 I'm handling sentencing on cases I've tried previously. We've got the pre-sentence reports which I've read on days I don't have a jury trial. All these are broken up from time to time by cases settling, not lasting as long as we expected. But if something happens, they usually have a case ready to go to trial the next day.

In the meantime I handle all probate matters as recommended by the probate master. I probably get 50 files a day to grant or deny orders on recommendation of the probate master. That takes up my extra time so I won't be idle!



Q: How do you maintain a balanced life?

A: I like to hunt and fish. The last few years I haven't done much because the roads and traffic got so bad. I kept a boat at Seward for 16 years; took off every Friday afternoon as soon as I could, fished every weekend. When hunting season came I hunted all the time. Also hunted rabbits. Usually had a dog with me.

The first moose I got was in the 50's. I killed it at 6 o'clock just before dark, half a mile off the highway, which was the regulation in those days. My wife and I were alone. I not only had to butcher and skin it, I had to carry it through the marsh in the night. My wife had to keep getting water from a creek in a little canteen; I was perspiring all the time.

In those days Blondie's Hamburger was where National Bank of Alaska is now. It was open all night. We got in about 6 o'clock in the morning, worse off than the moose, covered with blood. We came in and had hamburgers. I went to bed and didn't get up for 30 hours. I swore after that I'd never get another moose.

I belong to the Captain Cook Athletic Club. I swim half a mile every day and have since it's been open. I walk to and from work a mile each way every day. Always have a dog and give him exercise. I was raised on a farm, always got up early.

I'm an avid reader. I subscribe to *Business Week, U.S. News and World Report, Time, Newsweek, Reader's Digest.* Both Anchorage papers. Current events, history and geography. . . .

My wife and I have traveled to China, Australia, Brazil. China is really the most interesting of any of them. So much history. So much antiquity. It's amazing what they did. Particularly when you look at the Great Wall—it's hard to believe they could build it even today with helicopters. To see what they did 2,500 years ago is amazing. In the next few years we'll do quite a bit more travel. Maybe Europe this summer.

Q: Did you do legal work in the Army?

A: No. I joined the Army National Guard my first year in college, 1933, during the depression. We got $2 a drill once a week. That was big money. Everybody tried to join if they could. That dollar a week came in handy.

So I was in the National Guard all through college; graduated May 1940. In 1940 war was on the horizon, we had to go on July 1 for two weeks' training. While we were there, they passed the Mobilization Act of 1940; I was called to active duty November 1940.

When I came to Alaska after the war, I had terminated but I was still on accumulated leave. I came up with the Office of Price Administration as an investigator-attorney. I arrived April 22, 1946. Landed in Juneau first, and trained for two weeks.

I told Florence Knox (she was from Anchorage, down there training the same as I was) that I was interested in getting a job as an attorney rather than as an investigator. She said her fiance was looking for an attorney for the Corps of Engineers. He met us at the plane. "Are you still interested in that job?" I said yes, and I accepted the job that day.

Q: Anything of note in the job with the Corps?

A: Northwest Airlines was the first international airline to come through here. The Corps of Engineers had to okay it. We didn't have an airport except at Merrill Field. Big passenger planes had to come in to Elmendorf. We negotiated with Northwest; they had planes going to Japan. That was in 1947.

Probably the most interesting part . . . there was a lucrative business busing people working at Ft. Richardson (then it was located where Elmendorf now is). They had competing buses, none of them worth a darn. Usually the passengers had to get out and push them through the mud, or hitchhike in because they wouldn't run. We didn't have any paved roads (only two blocks). You can imagine getting up in the morning, getting on one of those old buses. No heat. You didn't know if you were going to get there or not.

When I first came, I stayed at the Westward Hotel for $6 a day, can you believe it? You could only stay six days, due to the boat strike. (We were investigating sales of liquor; we were authorized to buy up to three drinks a day to see whether they were violating the liquor law—which was the best job I ever had. Free drinks at government expense!)

We bought our home in 1952 and have been there ever since. We were the last house in the city limits, and now we're almost in the middle of the city, on the corner of 11th and Cordova.

Q: How was your legislative experience?

A: Very interesting. I enjoyed it immensely. I was seriously considering this past spring, retiring early and running for the legislature. But I would have sacrificed my right to come back as a judge.

The only office we had was our desk in the legislative chamber. The only place we could congregate was where we had coffee and donuts. Other than that, we stood out in the hall. We had conference rooms for committee hearings. People have gone too far in what's necessary for carrying on government, too elaborate in offices and staffs. I don't think they need them. But I guess that's a matter of perspective.

Q: What people stand out in your mind as memorable over the years?

A: Bob Bartlett, Bill Egan and Ernest Gruening. They had had a lot of experience in regard to government. It was my privilege to campaign with Bartlett in the last territorial election, to campaign with Egan and serve in his cabinet, and to know Gruening.

The combined experience in what they could show you, you couldn't get in all the books in the world. It was something you couldn't expect in a lifetime. I'm sure they meant more to me than I realize even today in carrying on government. They were honest. They knew everybody by name. They reacted on an individual basis to everyone. I think they contributed immeasurably, certainly to Alaska and to everybody they came in contact with. I don't think we have anything like it today, much as people try. Here again, you get too many people, you just can't do it. It was a fabulous experience.

Bartlett and Egan were campaigning statewide. That's how I got to know them. I was running at large in the Senate. Many times they'd come by, they had a plane, they'd say do you want to come along?

It was interesting campaigning in those days: we only had one radio station. I think it cost $10 for two minutes. We'd go down and tape our statement, then they would play it, the same thing over every two or three days.

We all got together and gave $100 to the Democratic Party. They put our picture on a poster. When they got them made up, we'd go to a bar, a cafe and ask if we could put that one big picture in the window. That's the way we advertised. We didn't have any media consultants. Didn't have any disclosure laws. Nobody had anything to gain. What did we get: $15 a day in the legislature, and per diem I think of $10. And our transportation to and from. That was at the beginning and end, not every week. We had 60-day sessions.

Q: Was your overseas experience interesting?

A: I went in as a private, went to Officer Candidate School, graduated as a Second Lieutenant. I stayed on at Signal Corps OCS (Fort Monmouth, N.J.) as personnel officer for two years. Became adjutant to the Commanding Officer and was co-commander for

[continued on page 20]

Moody...

From $75 to the bench

six months. Then I went overseas as the executive officer to a heavy construction battalion. We were attached to the Fifteenth Army, putting in heavy telephone lines. I went over as Captain and came back as Lieutenant Colonel.

We landed in France just before the days of the thousand-plane air raids on Germany. It was a tremendous experience to see and to hear a thousand planes going over with bombs. As far as you could see. It's unimaginable. We followed in a few weeks later; the devastation was tremendous; you could understand why the Germans couldn't last long.

Another unusual experience: we were transferred to the Pacific. We got on a Dutch merchant ship in Marseilles; spent 63 days on that ship—we had one day ashore at the Panama Canal and one in Hollandia, New Guinea. When we got to the Philippines, we sat there for five days with troops and equipment. Finally somebody came on board and said you shouldn't be here; you should have turned back to San Francisco. We said okay, we'll go! Oh, no, we'll send back some who have been here five or six years. That was in September; we left in December.

Q: Is there any other subject you want to address?

A: Of course I have lots of opinions but . . . every opinion I have—somebody has one opposite! It's not much use in my expressing one unless I feel I can be helpful to someone (chuckling).

I have been, fortunately, happy in every job I ever had in my life. I think that's 95 percent of life—if you're happy in your job. I've never been out of a job a day since I've been old enough to be in the market. Some of the jobs I took I didn't like! But in my career I've never had a job I didn't enjoy. I don't think I'd stay—that's too traumatic.

Q: What jobs didn't you like?

A: I worked for 50 cents a day mixing mortar and putting brick on buildings during the summertime around Mobile when I wasn't working on the farm. I worked for 15 cents an hour at college for the NYA (National Youth Administration): raking leaves, planting shrubbery, cutting grass. I waited on tables three times a day for my food. Then I usually worked three hours in the afternoon for NYA until I got my $15 (maximum for the month). At night, beginning at 8 o'clock I'd get a basket of apples, sandwiches and milk and go by the fraternity houses and sell them, from 8 to 11. I worked a good eight hours a day. This was during pre-law. I worked in law school though I wasn't supposed to. I only had the waiting on tables and, for my room, was the monitor on the floor.

Q: In those years your parents must have been unable to put you through school.

A: Dad could not read or write but my parents always encouraged us to go to college. I had $75 when I left to go to school: got it from selling a cow I raised that had been given to me by my Dad. Other than that, I worked my way through school.

Kids should have to work at college; it 's really bad if they go and have too much. Even in the depression there were some people who had money; many of them just threw their lives away. When you see people like that, you kind of appreciate that working isn't so bad after all.

My parents were from Georgia originally. I don't know whether you know what dipping turpentine is. The pine tree has sap and they have cups they hook onto the tree to get the sap; then they distill it and make turpentine and resin. Dad had a horse that he rode about 12 hours a day to be sure the people were dipping all the cups before they ran over. As I recall, the most he ever made riding was $75 a month. Later on he learned to run the turpentine still itself. He did that the last few years before he retired.

There were six children in the family; I was the youngest. One of my sisters taught me in the first grade in a country school with seven grades: one room heated by wood in the fireplace. The students had to go out and cut the wood. I think it was a wonderful experience. I don't think I would have chosen it in those days, but it turned out to be real nice. Like on the farm—I said I would never farm again. I wouldn't mind owning a farm; it's a wonderful life if you don't have to do all the work!

Action taken on fee limitations

In recent months, action at the federal court level has occurred in a case filed against the Veteran's Administration relating to the "$10 attorney's fee limitation."

The progress of this case is reviewed here to bring members of the Bar up to date.

NOTICE TO ALL VETERANS AND V.A. CLAIMANTS REGARDING HIRING OF ATTORNEYS July 18, 1984

This is to advise you that on June 12, 1984, a United States District Court issued a preliminary injunction enjoining the Veterans Administration from "enforcing or attempting to enforce in any way" the provisions of 38 U.S.C. §§3404-3405, commonly referred to as the "$10 attorney's fee limitation." *National Association of Radiation Survivors v. Walters, et al.*, C-83-1861 MHP (Northern District of California, June 12, 1984). The Court determined that the plaintiffs had a high probability of success on the merits of their claim that the $10 fee limitation violates both veterans' due process rights under the Fifth Amendment and their right to petition the government and associate freely under the First Amendment. The preliminary injunction provides that it will be effective pending trial on the merits or further court order.

The Order means THAT YOU MAY HIRE AN ATTORNEY OF YOUR CHOICE AND PAY HER/HIM ANY AMOUNT YOU AGREE UPON AND THAT THE TEN DOLLAR ATTORNEY'S FEE LIMITATION IS NOT CURRENTLY IN EFFECT. On June 20, 1984, the government appealed this decision to the United States Supreme Court. You are advised that the Supreme Court might reverse or modify the District Court's decision in whole or in part. ACCORDINGLY, ANY FEE AGREEMENT BETWEEN YOU AND AN ATTORNEY SHOULD TAKE INTO ACCOUNT THE UNCERTAINTY ARISING OUT OF THE ABOVE FACTS. A further notice will be posted in this location should the District Court's order be changed in any way.

To: Executive Director
State Bar Association

Re: *N.A.R.S. v. Walters*

Dear Sir or Madam:

On September 5, 1984 we wrote advising you of a recent lower court decision in the captioned case which held that attorneys were free from the $10.00 fee limit in veterans disability cases. We had been directed by that order to request you to promulgate the court's decision.

Please be advised that on September 27 Circuit Judge Rehnquist stayed the District Court's order pending consideration by the Supreme Court. A copy of Justice Rehnquist's Opinion and his Order is enclosed.

We believe you will wish to inform your membership that the penal provisions of 38 U.S.C. §3405 which prohibit attorney's fees in excess of $10.00 are again in effect and will be enforced.

Very truly yours,
Joseph P. Russoniello
United States Attorney

By: George Chris Stoll
Assistant United States Attorney
Oct. 9, 1984

To: Executive Director
State Bar Association

Re: Enclosed Notice in *N.A.R.S. v. U.S.A.*

Dear Sir or Madam:

The United States District Court in San Francisco has ordered the United States to publicize the attached notice. In compliance with that order we are forwarding it to you with a request that your organization disseminate it to your membership by printing a copy in your publication[s].

We wish to point out that the United States has appealed from the District Court order directly to the United States Supreme Court and we expect to shortly seek a stay of that order from Circuit Justice Rehnquist. Should we be successful we will immediately inform you.

Very truly yours,
Joseph P. Russoniello
United States Attorney

By: George Chris Stoll
Assistant United States Attorney
Civil Division
Sept. 14, 1984

Supreme Court of the United States

No. A-214

HENRY N. WALTERS, ADMINISTRATOR OF VETERANS AFFAIRS, ET AL., Appellants

v.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, ET AL.

ORDER

UPON CONSIDERATION of the application of counsel for the appellants and the responses filed thereto.

IT IS ORDERED that the order of the United States District Court for the Northern District of California, Case No. C-83-1861-MHP entered on June 12, 1984 and modified on July 20, 1984, be, and the same is hereby, stayed pending the timely docketing of an appeal in the above-captioned cause. Should such an appeal be so timely docketed, this order is to continue pending this Court's action on the jurisdictional statement. If the appeal is dismissed or the judgment of the United States District Court for the Northern District of California is affirmed, this order is to terminate automatically. In the event that jurisdiction is noted or postponed, this order is to remain in effect pending the sending down of the judgment of this Court.

/s/ William H. Rehnquist
Associate Justice of the Supreme Court of the United States

Dated this 27th day of September, 1984.

Resolution of attorney complaints

Nature of complaints: DR 1-102; Conduct prejudicial to the administration of justice
DR 7-101(A)(1); Failure to seek lawful objectives of client

Mr. B filed a complaint against his own attorney, Attorney M, and the opposing counsel, Attorney S, because of the actions they took in disposing of a case against him. Attorney M and Attorney S entered into a stipulation on the amount of damages. Attorney S agreed that Attorney M was left with the impression that he would not need to appear at trial. Once Attorney S realized that the stipulation did not cover punitive damages and attorney fees, she appeared at trial to request a default and take evidence on the issues of punitive damages. A private informal admonition was issued to Attorney S for her failure to alert Attorney M of her intended course of action, and for her failure to advise the court fully of the reasons that Attorney M was not present at trial.

Mr. B also complained against his attorney, Attorney M. Mr. B had not given his attorney authorization to enter into a settlement agreement or to stipulate to damages. Attorney M was issued a private admonition for his failure to seek permission from his client before stipulating to damages. Discipline Rule 7-101 provides that a lawyer shall not intentionally fail to seek the lawful objectives of his clients through reasonably available means permitted by law.

Nature of complaint: DR 5-101; Conflict of interest

Ms. T retained Attorney P to represent her in an employment nonretention hearing. After that representation ended, Attorney M, from the same firm as Attorney P, appeared on behalf of her former employer and its workers compensation insurance carrier to defend against her worker's compensation claim against the employer. Because of similar issues, as well as the fact that the accident took place while the nonretention proceedings were taking place and involved a dispute with the same employer, the Discipline Section determined that the cases were "substantially related" as the term is used in *Aleut v. McGarvey,* 573 P.2d 473, 474-475, (1978). The *Aleut* case also holds that "where one member of a law firm is disqualified from representing a client, all are." *Supra* at 476. A private admonition was issued to Attorney M.

Nature of complaint: Conflict of interest

Attorney V represented Mr. P and complainant, Mr. K, in a stock purchase agreement in which Mr. K agreed to sell his stock to Mr. P. Attorney V continued to be involved in negotiations between Mr. P and Mr. K after the agreement was signed. Soon after the agreement was signed, Attorney V began to ally himself with Mr. P's interests rather than keeping a more impartial role. Attorney V continued to represent Mr. P even after Mr. K retained a new attorney. He knew, at least by that point, that Mr. K's position had become hostile to that of Mr. P. He did not break off his representation of Mr. P in the stock purchase matter until after he received notice that Mr. K had filed a complaint with his office. A private informal admonition was imposed as the appropriate resolution of this case.

Nature of complaint: Interference with Justice

Attorney N knowingly permitted Ms. A, an employee in her office, to represent a criminal defendant in a case when Ms. A was not a member of the Alaska Bar Association or authorized to practice under applicable court or bar rules. It was questionable whether Ms. A could properly practice under Alaska Bar Rule IV-44, but even if she were properly an intern under the rule, she participated without supervision in a trial, which is not listed among the matters that an intern may perform. Further, there was no indication that Ms. A's appearance was sought under Alaska Civil Rule 81. A private admonition was administered to Attorney N.

Nature of complaint: DR 7-101; Failure to carry out contract of employment

Attorney J was retained in 1979 to represent Ms. T, who was a defendant in a civil lawsuit. The plaintiff's attorney brought judgment. Attorney J did not send a copy of the motions to Ms. T on the basis that he did not seem to have her current address. No response was filed to the motions; Attorney J stated that he felt that there was no defense to either motion. A private informal admonition was issued to Attorney J based on his failure to make reasonable efforts to inform his client of the pending motions against her and his failure to inform the court that he could no longer take effective action on his client's behalf because he had lost contact with her. He was advised that he should have attempted, at a minimum, to send copies of the motions by certified mail to Ms. T's last known addresses. If that attempt to locate her failed, he should have advised the court that he no longer had contact with her and sought permission to withdraw.

Nature of complaint: DR 7-104(A); Communication with client of another attorney

Attorney L closed a sales transaction directly with Attorney P's client. Attorney P was retained by Mr. S to represent him regarding the sale of real estate that he co-owned. Mr. S went on his own accord to Attorney L's office and advised her that he wanted to close the transaction as soon as possible and without further involvement of his attorney. A private informal admonition was issued to Attorney L for closing the sales transaction without consent by opposing counsel. The Discipline Section found that Attorney L should have, at a minimum, advised Attorney P that she felt that Mr. S was no longer represented by counsel and that she intended to close the transaction with Mr. S in his absence.

Lawyer posits new wave reform

by Russ Arnett

I go public if the Bar does not accept these reforms.

Several years ago I described in the Bar Rag existing but unutilized technology available for mastering the mass of paperwork presented to the judiciary. Briefs and such are often unread and, because of their excessive volume, probably much should remain unread. I first proposed that we return to the scrivener. This got nowhere. I then leapfrogged over present methods and examined the leading edge of technology.

My proprietary control program, Synchronous Computer Analysis Module (SCAM) involved components many of which were being used by the Court System. Since then Westlaw and Lexis have done as I predicted in making legal research electronically accessible.

The attorney writing a brief would give a paralegal the basic facts. The paralegal would slip the "What is the Law" (WHAA) diskette into his PC and call up the menu card. Successive menu cards appearing on the screen present fact questions to be answered. The brief is the product. It is entered from the attorney's PC through a modem into the Court System computer.

Opposing counsel and the assigned judge would be notified electronically when the brief had been entered. Security devices would be devised to protect the integrity of the computer data from the few bad apples found in every profession.

If the judge wished to read the brief, he could call it up on the PC in his chambers. Briefs and other documents could be routed between cities and courts, vertically and horizontally. In the event of an appeal, a great saving in costs would be achieved in preparing the Record of Appeal.

The practicing attorney might well ask how he would charge for a brief involving perhaps 30 minutes work by a paralegal and micro-seconds by the computer. Clearly it would not be fair to have the chargeable time based upon paralegal rates or micro-seconds. Technology should serve the attorney as well as the public. A Binary Shunt (BS) from the computer to the attorney's computerized accounts receivable ledger would base the charges on word volume and would approximate the time charges for precomputer briefs. To allay fears, the billing shunt operates even though the judge never reads the brief. The client who complains of the charges for a computer brief should be told that he pays no more, and that this system frees the attorney to attend to more important matters of the client.

I intend to copywrite SCAM, both for self interest and because of what I view as a duty to my profession. I will issue plastic cards to attorneys similar to those issued by the Anchorage Bar Association for use of the Xerox in the court library. Charges would be reasonable and possibly be reduced for attorneys in practice less than five years.

If the Bar chooses to ignore SCAM and go its own way, my computer program for laymen, "Is This Justice?", goes into networking. Store front centers called PRO PER CENTRES and located near courthouses will be franchised nationally. Laymen who are particularly litigious would receive a volume unit cost reduction.

Definitions

Modem—Contraction of "more of them" used in the South.

Kilo byte or nybble—Attorney in mid-life crisis having obsessive attraction to secretary's ear lobe.

Head crash—Sensation after night at hospitality room during bar convention.

Chip—Male chippy.

Remote terminal—Bethel airport.

Floppy or hard disks—Probably relates to jelly fish reproduction.

VDT—Disease contracted from computer technician.

Interface—Kissy-kissy.

Operating system—Technique developed for evenings during out-of-town dispositions.

Winchester—What it takes to get service on your PC.

Plotter—how to fox the opposition.

Sequential access—Lady of the night.

Bar takes position on federal judicial selection

The controversy surrounding the recommendation of Stephen Cooper to the federal bench generated, along with high emotion, a good deal of misinformation.

The following articles and reprints from *The Anchorage Times* place the issue in perspective as to the Bar's position.

August 27, 1984

The Honorable Frank H. Murkowski
United States Senate
317 Hart Building
Washington, D.C. 20510

Re: Alaska Federal Judge Appointment
Our File 990003.13

Dear Senator Murkowski:

By letter dated August 9, 1984, the delegation from Alaska recommended to the President the name of Stephen Cooper as a nominee for the newly created U.S. District Court seat in Alaska. Your nomination was forwarded to the President before the Alaska Bar Association had an opportunity to notify its membership of the new position or otherwise assist in the nomination process.

A Federal Judge is appointed for life and can have a significant impact upon the interpretation and enforcement of Federal Law. is imperative, in our opinion, that th membership of the Alaska Bar Associatic be given the opportunity to indicate the interest in the position and participate in poll in order that the delegation has chance to select their nominee from a list o. qualified candidates.

On July 23, 1984, at the swearing in ceremony for H. Russ Holland as a United States District Court Judge, for the District of Alaska, Senator Stevens had the following to say:

> . . . "It is one of the privileges that I have had to be able to participate in the selection of the judges who have been appointed since I have been in the Senate. And it is not a task that is over. WE NOW HAVE A NEW FEDERAL JUDGE IN THE BANKRUPTCY ACT, WHICH HAS JUST BEEN PASSED. ALASKA WILL GET ANOTHER FEDERAL JUDGE. THAT SAME ACT PROVIDES FOR FIVE NEW COURT OF APPEALS JUDGES. AND, WE ARE HOPEFUL THAT ONE OF THOSE WILL COME OUR WAY. SO HAVING ESTABLISHED A PARTNERSHIP REALLY WITH THE BAR IN TERMS OF REVIEWING THOSE WHO SEEK APPOINTMENTS, WE WILL SOON BE GOING THROUGH IT AGAIN.
>
> I AM REASSURED, REALLY, IN THIS PROCESS, THAT THE PROCESS DOES IN FACT COME UP WITH PEOPLE IN WHOM WE CAN ALL HAVE CONFIDENCE . . ." (Emphasis supplied.)

With the above in mind, the Alaska Bar Association respectfully requests that the nomination process be reopened and that the Bar be given time to (1) solicit the names of those interested in the position, and (2) conduct a poll similar to the one conducted earlier.

No criticism of Stephen Cooper can or should be implied from this request. It is the process of selection with which the Alaska Bar Association is concerned.

Sincerely,
ALASKA BAR ASSOCIATION

By: Harold M. Brown, President

September 12, 1984

Harold M. Brown, President
Alaska Bar Association
Post Office Box 100279
Anchorage, Alaska 99510

Dear Hal:

Thank you for the copy of the letter you sent to Senator Murkowski regarding the Delegation's recommendation to the President of Stephen Cooper for the new judgeship created in the United States District Court in Alaska.

As you know, Senator Murkowski has stated that it would be wise to begin anew the selection process for this position. It will be my goal to assist Frank in any way that I can to ensure that the Alaska Bar Association and the general public have adequate input into the selection process.

At the same time this process is being conducted, and if it does involve another advisory bar poll, then it would be my request that we solicit an advisory poll on individuals who are interested in being recommended by the Delegation to the President for appointment to the United States Court of Appeals for the Ninth Circuit.

We have no commitment that we can get an Alaskan named as one of the five new Ninth Circuit judges. I do believe, however, we have a strong position from which to seek an Alaskan appointment.

When we discussed the Ninth Circuit positions earlier it was my hope that a recommendation of possible candidates or one candidate from Alaska could be developed and forwarded to the President for his consideration. However, it soon became clear that it was impossible to develop a recommendation in a timely manner.

The President's counsel, Fred Fielding, has been informed of the Delegation's interest in a Ninth Circuit appointment. However, since it is apparent that the President will not have the opportunity to fill all five of the new judgeships this year, we still have the opportunity to recommend a qualified candidate or candidates to the President. If you and the Board of Governors are agreeable to it, it is my suggestion that we proceed as expeditiously as possible on obtaining the advice of the bar and the public on the appellate court posts, no matter what course of action is finally decided upon with regard to the District Court vacancy.

In the meantime, Mr. Fielding's office has been notified of the delay in our making a new recommendation to the President.

With best wishes,

Cordially,
Ted Stevens

Resolution

On August 23, 1984, the Board of Directors of the Anchorage Bar Association then assembled with a quorum present at a duly called meeting, resolved that the Anchorage Bar Association does hereby request Senator Frank Murkowski to reconsider and withdraw the recommendation of Stephen Cooper as a candidate for U.S. District Judge for Alaska, pending solicitation of additional candidates, the conduct of a bar poll, and solicitation of public comments in order to assure that Alaska has the most highly qualified candidate possible for position of U.S. District Judge for Alaska.

The resolution passed by a vote 8-0 in favor of the resolution and 1 abstention.

DATED this 24th day of August, 1984, at Anchorage, Alaska.

ANCHORAGE BAR ASSOCIATION
By: Richard Crabtree
Its: President

The Editor
Anchorage Times
Box 40
Anchorage, AK 99510

August 28, 1984

Dear Editor:

Your editorial entitled "Who Picks the Judges?" (August 26th) was unfortunately replete with factual inaccuracies. I wish to set the *Times* straight.

1) The Alaska Bar Association is not a private club. To begin with, the existence of an organized bar is recognized in the Alaska Constitution. The Association was statutorily created by the Legislature in the Integrated Bar Act and is an instrumentality of the State of Alaska (the University of Alaska, for example, is also an instrumentality of the State). The powers, duties, and responsibilities of the Association's governing body, its Board of Governors, are set out in Title 8 of Alaska's Statutes.

2) The Board of Governors has twelve members and, in accordance with the law, three of those members are non-attorney or "public" members. The current public members are Lew Williams, publisher of the *Ketchikan Daily News*; Andonia Harrison, current president of the Alaska Chapter of the NAACP; and Glenda Straube, a Fairbanks real estate agent.

3) Except for the approximately $6,000 it receives annually from the State of Alaska to pay for the travel and per diem of the non-attorney members on the Board, the Bar Association receives absolutely no State funds for the many activities which it performs on behalf of the public interest and at the direction of both the Legislature and the Supreme Court.

4) The Bar Association is publicly accountable for its actions. Unlike the private organizations you mentioned in your editorial, the Bar is in fact subject to periodical performance audits by the Legislature's Budget and Audit Committee. There is ongoing public scrutiny of the Bar's activities.

5) The Alaska Bar's primary duties are the admission and discipline of attorneys, and its responsibilities in those two important areas are delineated by the Alaska Supreme Court in the Bar Rules, which are a part of the Alaska Rules of Court.

6) The Bar Association is not a social club or a voluntary organization. Unlike the private groups to which you allude in your editorial, in order to practice law in this State an attorney must be a member of the Alaska Bar and is subject to regulation by both the Court and the Legislature. Not surprisingly, not all attorneys are pleased with this arrangement: the dues are very high ($310.00 per year) and the regulation stringent. For instance, complaints by the public against attorneys are investigated by the Bar. In the last two years a significant number of attorneys have either been publically censured or suspended from the practice of law by the Alaska Supreme Court as a result of Bar Association investigations.

The Bar publishes notice of the Court's disciplinary actions in newspapers throughout the State. Such notices have been carried by the *Times* and resulted in a great deal of interest by the public in the reasons why the Bar took such action against its own members. Unlike fraternal organizations, the Bar Association, when faced with proven unethical conduct by one of its members, must often recommend to the Court that it revoke the ability of that member to make a living as an attorney. Does that sound like a labor union to you?

Finally, since a *Times* reporter sat in the room during that part of the meeting wherein the Board of Governors discussed the recent flap over the hurried U.S. District Court nomination, and since those discussions were recorded, it is difficult to understand how the *Times* can start out an editorial with statements that are so patent a fabrication.

Harold M. Brown, Bar President, never once stated that he was "displeased with the selection" of Mr. Cooper, nor did Mr. Brown ever urge "the nomination be withdrawn," as your editorial states. In fact, Mr. Brown stated that he didn't even know Mr. Cooper. It was made clear by the Board during the meeting that it objected solely to the way in which the nomination process itself was handled. It matters not who the nominee is, only the manner in which Mr. Cooper was nominated.

[continued on page 23]

B-6 Sunday, August 26, 1984, The Anchorage Times
The Anchorage Times

Editorials

Who picks the judges?

THE PRESIDENT of the Alaska Bar Association is displeased with the selection of a new federal judge for Alaska and is urging that the nomination be withdrawn.

That raises the question of how come he happens to think a candidate for a judgeship should bow out because the the head of the association doesn't like him.

A judge is a public official who presides over matters that can affect the life, liberty and property of every citizen of the land. Why should an elite group such as a bar association figure in the decision as to who will judge the people?

THERE IS NO LAW that gives the bar association authority to help select judges.

Federal law says selection of federal judges is made by the president with the advice of the Senate. The president looks to the Department of Justice for nominations. The Department of Justice has its own procedure for screening potential nominees.

State law says state judges are selected by a more complicated process that involves the governor and the Alaska Judicial Council, an agency created by the constitution.

The judicial council took it upon itself to allow lawyers to tell what they think of candidates for judgeship. The council asked the state bar association to poll its members for ratings on the qualities of the candidates.

This practice has apparently led the bar association president to believe he has a vested right to say whether a candidate should or should not be a judge.

THE BAR ASSOCIATION is an exclusive organization. Membership is open only to lawyers. They pay dues into their treasury and the money is spent without accountability to a public agency.

As a private, dues-paying organization it is similar to the Knights of Columbus, Shriners, Rotary or Lions Club, Anchorage Woman's Club or any one of many professional organizations.

Some people consider the bar association the lawyers' labor union. It watches out for the best interests of the profession and its members.

There are no doubt those who would prefer to have Teamsters' Local 959 or the state board of barber examiners, rather than the bar association, pick the men and women who will judge their personal and business affairs.

By using an extraneous organization, the selection process could avoid putting the judges in a position where they might feel beholden to the attorneys who practice before them. The power structure of the state court system today has some of the earmarks of the special domain of lawyers.

It would be better if the courts were a place where the people, not lawyers, are represented on the bench.

Reprinted from The Anchorage Times

1984 Ethics opinions...

Ethics Opinion 84-11

Re: Communication by Attorney With Government Employee During and Regarding Subject Matter of Litigation Without Consent of the Government's Attorney

The Ethics Committee has been asked whether Alaska Bar Association Ethics Opinion No. 71-1, relating to communications with employees of parties, prohibits an attorney from communicating with a governmental employee in the following circumstances. The attorney, representing a public interest organization, has commenced suit against the Legislative Affairs Agency and three of its employees alleging that denial of access to the Legislative Teleconference Network violates various constitutional rights of the plaintiff. Plaintiff's counsel wishes to interview the Juneau Teleconference Manager, who is not a defendant in the lawsuit, without the consent of counsel for the defendants.

The relevant provision of the Code of Professional Responsibility is DR 7-104(A)(1) which provides as follows:

During the course of his representation of a client, a lawyer shall not:

> Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Ethics Opinion 71-1, which was based upon Canon No. 9 and interpretations of DR 7-104(A)(1), which had not yet been adopted by the Alaska Bar, interpreted the scope of those rules as follows:

> [A] lawyer is ethically permitted to communicate with employees of a governmental entity concerning a matter in controversy between the party represented by the lawyer and the governmental entity, *so long as that communication is not made with employees of the entity who may reasonably be thought of as representing the entity in matters related to the matter in controversy,* and assuming that full disclosure of the lawyer's representation and the connection of that representation and the connection of that representation to the communication is made. [Emphasis added]

The prohibition relating to communications by an attorney with a party represented by counsel have been adopted in substantially the same form in Rule 4.2 of the Model Rules of Professional Conduct adopted by the American Bar Association in 1983. The comment to Rule 4.2 supports the position stated in Opinion 71-1 and provides some additional guidance. That comment provides in part:

> In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent of that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

Rule 3.4(f), referred to in that comment provides that:

> A lawyer shall not:
>
> (f) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
>
> (i) That person is a relative or an employee or other agent of a client; and
>
> (ii) The lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving some information.

The job description of the Juneau Teleconference Manager includes:

(1) Contact with legislators.

(2) Supervises and trains Juneau Teleconference staff.

(3) Responsible for scheduling, preparation of backup materials for teleconference.

(4) Develops procedures and forms to insure efficient operation.

(5) Responsible for routine trouble reporting.

(6) Moderates audio and video teleconferences.

(7) Explains Division policy for routine questions.

(8) Responsible for community development (general publicity, scheduling, questions) in Juneau.

(9) Reports regularly to Coordinator.

In coordination with the Anchorage Teleconference Manager, the Juneau Manager has a joint responsibility for equipment repair and inventory, and moderator update and orientation. The Juneau Teleconference Manager is hired by and responsible to the Teleconference Coordinator. In turn, the Teleconference Coordinator is responsible for determining teleconference policy, supervising teleconference staff, and other matters. The Teleconference Coordinator reports regularly to the Director.

Based on the foregoing, it does not appear that the Juneau Teleconference Manager is a person who may reasonably be thought of as representing the entity in matters related to the matter in the controversy, nor would she be thought of as having managerial responsibility on behalf of the Legislative Affairs Agency or the Teleconference Network. Similarly, it would not appear, utilizing as a guideline the standards applicable under Rule 4.2 of the Model Rules of Professional Conduct, that the acts or omissions of the Juneau Teleconference Manager would be imputed to the Legislative Affairs Agency or the named defendants for purpose of civil liability or that the employee's statements would constitute an admission on the part of the organization. In fact, the answer filed by the state, while admitting certain representations made by the Juneau Teleconference Manager, specifically denies that those statements accurately reflected the Legislative Teleconference Network policies and procedures.

Based on the foregoing, it is the opinion of the Committee that plaintiff's attorney may seek to interview the Juneau Teleconference Manager without the consent of the attorney representing the named defendants, and such conduct will not violate the Code of Professional Responsibility. Conversely, it is the opinion of the Committee that the attorney for the defendants may request the Juneau Teleconference Manager to refrain from being interviewed by the attorney for plaintiff or from voluntarily giving any relevant information to plaintiff or its attorney. There is no indication that the employee's interest will be adversely affected by refraining from giving any such information and the employee's interests, if any, in the context of this litigation, would appear to be identified with the interests of the party defendants.

Whether an employee of an entity may reasonably be thought of as representing that entity in matters related to the matter in controversy is a determination that must be made based on the facts and circumstances of each particular situation. Accordingly, the result reached by the Committee is limited to the factual situation presented.

Adopted by the Alaska Bar Association Ethics Committee on November 1, 1984.

APPROVED BY THE BOARD OF GOVERNORS on November 9, 1984.

NEW ALASKA NATIVE LAW SECTION FORMED

The Board of Governors recently granted a request from Lloyd B. Miller, of Sonosky, Chambers, Sachse & Guido to authorize the formation of the Alaska Native Law Section. The new Native Law Section will provide a forum for those attorneys whose practice touches such areas as ANCSA regional and village corporations, regional non-profit corporations, Indian Reorganization Act (IRA) and traditional Native tribal and corporate entities, ANILCA subsistence issues, conflicts in jurisdictional claims between tribal governments and state and federal governments, and the Indian Child Welfare Act. Particularly in light of the current attention focused on "1991" issues and "sovereignty" issues, the Board of Governors agreed that with the new Alaska Native Law Section there will now be one central place where the interests of Section members in Alaska Native affairs may be addressed. In the past, attorneys interested in ANCSA and related matters have turned to the generalized sections on Natural Resources Law, Corporate Law, Administrative Law and Business Law.

Bar members interested in joining the new Section should so advise the Alaska Bar Association or directly contact Interim Chairperson Lloyd Miller (2550 Denali, Suite 1500, Anchorage, Alaska 99503, 338-6377). A notice will then be sent out to all interested members fixing the date and place for the first organizational meeting to elect officers and discuss future Section activities.

Bar takes position

During the recent swearing-in of now U.S. District Court Judge Holland, Senator Stevens publically announced that Alaska had been given a third U.S. District Court judgeship. As was followed in the selection of Judge Holland, Senator Stevens stated that Alaska's Congressional Delegation would again seek the involvement of the Bar Association in the solicitation of interested candidates and in the polling of its members as to each candidate's suitability for a lifetime judicial appointment. Inasmuch as the Bar had been publically apprised that the advice of its members would again be requested in filling this third federal judgeship, the Bar's expressions of concern are justified in light of the ensuing events.

The Bar Association does agree with the *Times* that a federal judge is a public official who presides over matters that can affect the life, liberty, and property of every citizen. For that very reason, and because the Association's membership possesses, whether you wish to recognize it or not, obvious firsthand and very relevant experience concerning the actions and appropriateness of its own members, the Bar would like an opportunity to provide the Delegation and the public with its opinion as to the qualifications of those being considered for the new federal judgeship.

The public can only benefit from a poll; and such a poll does not preclude the public itself—the *Times* included—from making its opinion known. The work of the Association is serious business carried out in the public interest and the *Times* is remiss in so clearly misrepresenting the Alaska Bar's organizational structure. I am always surprised when you selectively decide who should and should not have a voice.

Sincerely,
Randall P. Burns
Executive Director
Alaska Bar Association

Judge Moody Roast

Date: Thursday, December 13, 1984

Time: Cocktails (hosted) 5:30–7:30 p.m.
Dinner 7:30–8:30 p.m.
Program 8:30–on

Place: Captain Cook Hotel

Cost: $35 per person
Includes sit-down dinner of prime rib, wine at the table, gratuity, and contribution towards a gift for Judge Moody.

Harry Branson, with the Welcome and Introductions
Judge Seaborn Buckalew, as Master of Ceremonies
Justice Daniel Moore, Roaster
Chief Judge James Fitzgerald, Roaster
Stanley Ditus, Master Orator and Roaster
Gail Roy Fraties, Roaster
John Murtagh, Roaster
Gene Williams, Roaster
The Honored Guest, Judge Ralph Moody, Roastee

Reservations: Branson, Bazeley & Chisolm
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Please contact Kelly Klemper at the Bar Office with any questions you might have. Happy Holidays!