Comment on Ethics Opinion — Page 12

Judge Van *does* retire — Page 8

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The Alaska BAR RAG

VOLUME II, NUMBER 1 — Dignitas, Semper Dignitas — FEBRUARY, 1987

Bar joins lawyer-owned insurance company

By Ralph R. Beistline

Most attorneys who have practiced for any length of time are aware of the periodic fluctuations in the cost and availability of professional liability insurance. That problem has never been more apparent than during 1985 and 1986. During those years, many Alaska attorneys with no prior claims experience have been billed for premiums which doubled or tripled the amount they paid the previous year. In some of those cases, the coverage afforded was a fraction of what it had been previously.

In the past two years, it has not been uncommon for offices with any claims experience to find that it was difficult or impossible to get coverage at all.

Private companies have entered and left the Alaska market at will, depending on a number of different economic circumstances.

The number of attorneys who currently practice in Alaska without liability coverage or with inadequate liability coverage is on the rise. Not only does this present a problem for the attorney, but it presents a potentially significant problem to the Alaska public who use those attorneys' services. The public should not be left without recourse after the loss of important rights due to an error or omission by the professionals upon whom they relied.

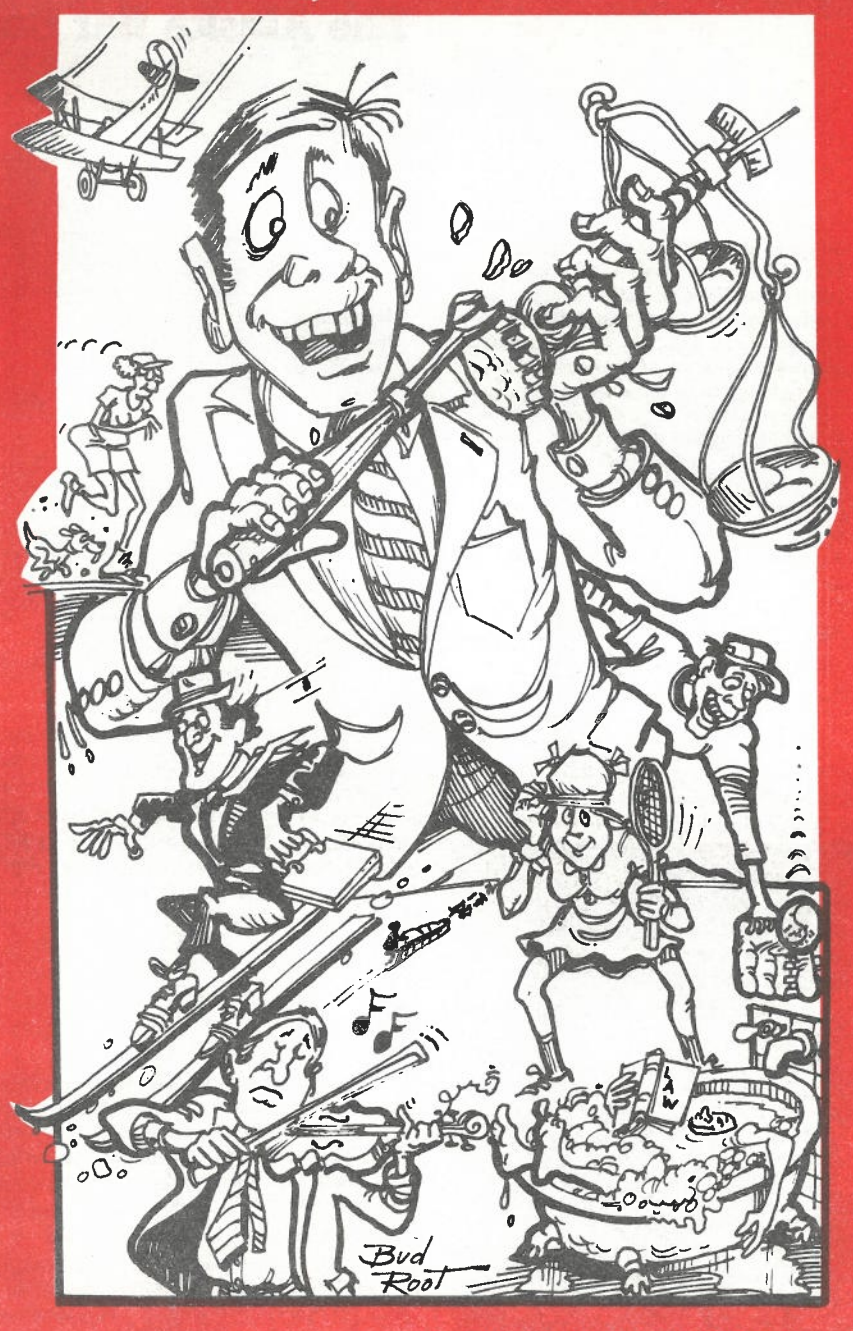
For these reasons, the Alaska Bar Association, through the efforts of its Insurance Committee chaired by Keith Brown and through the efforts of others, including Board member Mike Thompson, has been working to form a lawyer-owned insurance company to provide coverage to Alaska lawyers. The ultimate goal is to increase the availability of coverage to Alaska lawyers at rates that are predictable and which avoid wild fluctuations based largely on investment policies and interest rates over which we now have no control.

The Alaska Bar Association has been joined in that effort by several other states. Eight states, including Alaska, Delaware, Kansas, Montana, Nevada, North Dakota, South Dakota, West Virginia, and Wyoming are committed to the formation of a lawyer-owned company. At least three other states, including Idaho, Nebraska, ano New Mexico are expected to make a similar decision and join in this effort.

A corporation called Attorney's Liability Protection Society (ALPS), has been created to handle the formation functions. It will be converted into the insurance company providing coverage in all of these states, as soon as a situs jurisdiction has been selected and the company approved by the appropriate regulatory authorities.

Continued on page 4

Nonbillable Pursuits



See attorneys at play — Pages 17 & 18.

IOLTA arrives

By Mary K. Hughes

IOLTA! The Alaska IOLTA (Interest On Lawyers Trust Accounts) program is on its way. The Alaska Supreme Court adopted amendments to DR 9-102 on November 20, 1986, effective March 15, 1987. Thus, the IOLTA program is established for the State of Alaska.

Beginning March 15, 1987, lawyers and law firms may place client trust money, previously held in commingled, noninterest-bearing checking accounts, into interest-bearing NOW accounts. The interest earned on each account will be paid periodically to the Alaska Bar Foundation (ABF). Designated by the judges of the Alaska Supreme Court as the organization to administer the IOLTA program, ABF will use the interest income to make grants to nonprofit providers of legal services to the poor. ABF is launching a major campaign for recruitment of financial institutions and lawyers to participate in the IOLTA program.

Continued on page 4

Board of Governors petition for rehearing in Buckalew

When the Supreme Court rejected the Board of Governors recommendation for a five year suspension with disbarment reinstatement requirements for Robert J. Buckalew, it adopted the newly formulated ABA standards for attorney discipline. These standards overruled six previous Alaska discipline cases and have been criticized as bringing presumptive sentencing to the attorney discipline process. These new rules were adopted without notice or opportunity to comment by the affected parties, including the Board of Governors. Accordingly, the Board of Governors voted unanimously to petition the Supreme Court for rehearing asserting that:

[T]he court's opinion reflects no solicitation of views concerning the desirability of the ABA Standards from either the Board of Governors of the Alaska Bar Association or the Bar's membership. A key factor in the settlement of *Alaska Bar Association, et al. v. Buell A. Nesbett, et al.*, U.S. District Court No. A-42-64, was the principle that bar rules would be promulgated by the Board of Governors and reviewed and adopted by this court.

The court's *sua sponte* adoption of the ABA Standards without promulgation or comment by the Board of Governors and comment by the membership of the Bar is contrary to this long established principle.

Because of the importance of this issue, the Board of Governors has requested oral argument. The full text of the Petition for Rehearing is set out on page 27.

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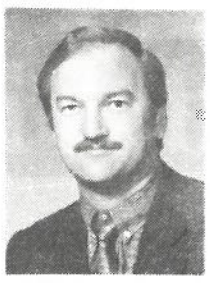

FROM THE PRESIDENT

R. Beistline

I was in an airplane again last week. I can't recall where I had been, but I do know I was headed home. Again, this gave me the perfect opportunity to complete this article.

I had heard of the recent reports of UFO sightings by pilots of Japan Airlines, and was therefore scanning the skies in hope that I might discover something really exciting to report to you, or at least receive some type of inspiration for this article. Sure enough, it worked.

From my window I could clearly see the Big Dipper — eight stars of gold on a field of blue — and the thought naturally sprung to mind that I had now completed eight star-studded months as president of this venerable organization. I mentioned this to my colleague (fellow attorney) who was seated next to me. He was half asleep at the time, having just completed a nationwide deposition trip, but did offer a polite response: "Okay, but what have ya done?" My answer to this query provided me with the text for this article.

I reminded my traveling companion that we now have an IOLTA (interest on lawyers' trust accounts) program that will become operational in March 1987. (More details concerning this program can be seen in the article on this subject by Mary Hughes.)

Although, I am sure that he was excited about my explanation, it was at this point that I recall losing eye contact with my inquisitor. I was sure, though, that he wanted to know more.

I proceeded to explain the Bar Association's response to the recent insurance crisis and detailed our efforts to develop a malpractice program for Alaskan attorneys that would provide reliable malpractice insurance at reasonable rates for all qualified Alaskan attorneys (see my article on this subject for more details). Although, I had not regained eye contact at this point, I could tell by the manner in which his head bobbed that my colleague wanted to know more.

I next explained how smoothly our disciplinary program was now handled, and proudly reported that our backlog was miniscule.

I also spoke of the Bar Association's efforts to define the practice of law, reported on changes we had made to Bar Rule 31 concerning trustee counsel, and noted that our CLE program was self-supporting and one of the best in the country.

I continued to explain that, once again, the Bar Association had finished the year in the black; that we were solvent, well staffed and happy. Further, I informed him that the upcoming Fairbanks convention promises to be one of the best ever, both in terms of education and entertainment. This news caused my colleague to shift position momentarily, and generated guttural sounds of appreciation.

I was just about to explain the new wave of professionalism that was sweeping the state this year when the plane began its descent. As the wheels touched ground, my colleague moved for the first time in several minutes, and I momentarily regained eye contact. I could tell by the glaze in his eyes that my comments had caused a great deal of thought and reflection.

As we stood to depart and everyone grabbed at overhead packages and coats, the fellow behind me tapped me on the shoulder, introduced himself as a doctor, told me he had enjoyed my comments and asked if I had heard the joke about the doctor, the lawyer and the priest who had found themselves surrounded by sharks. I knew that the punch line had something to do with the sharks coming to the aid of the lawyer "out of professional courtesy," so I told him I had heard the joke. He seemed determined, however, to tell it again. Before he could speak, though, I told him of a speech I had recently read by the dean of the University of Puget Sound School of Law in which he had reminded his audience that while doctors were drawing blood from General George Washington to cure his cold, lawyers were writing the Constitution. My colleague laughed and added something about lawyers not burying their mistakes. By this time the doors had opened and we were able to depart.

Leaving the airport I exchanged farewells with my colleague. He said he liked the "George Washington thing" and asked when I was going to take over as president of the Bar Association. His closing comment was "I hope you guys do something this year."

As I began to clear the ice and snow from my car windows, I reflected on my colleague's closing remarks. In retrospect, I'm not sure that I ever fully established eye contact.

THE EDITOR'S DESK

James M. Bendell

In preparing for this issue I screened out a poem concerning Governor Cowper written by one of our attorneys on the right side of the political spectrum. I thought this move consistent with my policy of making this publication non-political. The resultant dispute with one of our former writers on the other side of the spectrum was chronicled in detail in the last issue on the letters to the editor page. With the current issue, we reprint the only letter we received complaining about this paper's policy. Nevertheless, I would like to take this opportunity to more fully explain my position.

The Bar Rag is not a newspaper which survives on voluntary subscriptions. Rather, all members of the Alaska Bar must subscribe to and subsidize this publication. The primary purpose of this publication is to circulate legal news among the members of the State's bar who are spread over thousands of square miles and who often come into infrequent contact with each other. It is also hoped that we present this news in a relatively entertaining and enjoyable format. I do not believe it is an appropriate purpose of this newspaper to force members of the bar to subsidize a political soapbox for members of the bar with whom they disagree. I believe this policy overrides any argument that dissenting members of the bar may write replies to views with which they disagree. That is, even shy persons have First Amendment rights. I believe my views are implicitly supported by the decision of the U.S. Court of Appeals for the Third Circuit in *Galda v. Rutgers University*, 772 F.2d 1060 (CA 3 1985). In that case, the court addressed a First Amendment challenge to the practice of Rutgers Law School assessing a refundable $3.50 student fee for support of the New Jersey Public Interest Research Group, an activist organization which also provided legal experience for law students. Below is an excerpt from the court's decision:

> Preliminarily, it is helpful to briefly review the nature of the constitutional right at stake. Plaintiffs assert that they may not be compelled to contribute to an organization which espouses and promotes ideological causes they oppose. The contours of this right are still in the developmental stage.
>
> . . .
>
> In short, what *Abood* [vs. Detroit Board of Education, 431 U.S. 209 (1977)] holds objectionable is the "compulsory subsidation of ideological activity" by those who object to it, 431 U.S. 237. Commentators have debated the basis supporting this right. It may be a broad concept of "individual freedom of mind," *Wooley v. Maynard*, 430 U.S. 714, or a ban on coerced affirmation of distasteful views, or a right not to be subjected to a limitation on freedom of conscience, or perhaps a right to maintain silence in the face of governmental pronouncement. We resist the temptation to expound on these absorbing theories because whatever the source or underlying rationale, the Supreme Court's precedence established to our satisfaction that plaintiffs have presented a valid constitutional interest for consideration.

The Alaska Bar Rag

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1986–1987

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President Beistline has established the following schedule of Board meetings during his term as president. If you wish to include an item on the agenda of any Board meeting, you should contact the Bar office or your Board representative at least three weeks before the Board meeting.

September 4, 5 & 6, 1986
November 6, 7 & 8, 1986
January 8, 9 & 10, 1986
March 19, 20 & 21, 1987
June 1, 2 & 3, 1987—Fairbanks

LAWYERS AT PLAY

Alaska Bar hobbies from A to Z **Pages 17 & 18**

IN THE MAIL

Bankruptcy update

On October 27, 1986, Congress passed an amendment to the bankruptcy law entitled The Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 (P.L. 99-554).

The law authorized, but did not fund, additional bankruptcy judges. None was authorized for Alaska. It also established (except for two states in the South) a United States Trustee system. The United States Trustee will be part of the Justice Department. There are twenty-two U.S. Trustee Regions, and ours is in the Northwest along with Washington State, Oregon, Idaho and Montana (exclusive of Yellowstone National Park). The system for our region is supposed to be implemented within two years.

A new chapter, Chapter 12, was created for family farmers. A "family farmer" can be an individual or corporation. Chapter 12 is fashioned after Chapter 13 which concerns the adjustment of debts of an individual with regular income.

Filing fees which are now effective are:

Chapter 7 or 13	$90.00
Chapter 9 (municipalities)	$300.00
Chapter 11 (not a railroad case)	$500.00
Chapter 11 (railroad cases)	$1,000.00
Chapter 12	$200.00

There will be a fee of $.25 for each copy of a notice that the court has to send after the first 50 notices.

When a debtor converts from one chapter to another having a higher fee, the debtor must pay that additional filing fee with the conversion. The only exception is that now a debtor must pay $400 when a Chapter 7 or 13 is converted to a Chapter 11.

Under the 1978 Bankruptcy Reform Action, the debtor had to appear at an initial meeting of his creditors (§ 341 meeting) and a discharge hearing under § 524 of the Bankruptcy Code. Under the 1986 amendments, the Court may enter an order discharging the debtor without an appearance except where there is a reaffirmation agreement.

Finally, under the 1978 Act, child support was not dischargeable if it was included in an agreement between the debtor and a spouse. There was a gap in the law which literally permitted child support to be discharged if it was ordered by the Court, but not subject to a written agreement between the parents. This was corrected with the 1986 Act and now child support ordered by a court is not dischargeable.

Very truly yours,
Herbert A. Ross

Care Share Survey

On behalf of the Lawyer Parents Network, I would like to thank you very much for the unexpectedly large and colorful space the Bar Association devoted to the "Care Share" survey of babysitting needs that appeared on the last page of the November 1986 issue of the Alaska Bar Rag.

Perhaps due to the intervening holidays, we have only received a few completed surveys to date. We would like to encourage all lawyer parents with unmet babysitting needs to submit the survey. They can also contact me at 279-6591 during lunch or at 345-6267 after business hours.

Once again, thank you for your enthusiastic support. There are many lawyer parents in our Bar who we believe will benefit from sharing the information compiled through the "Care Share" survey.

Sincerely yours,
Francine Harbour

P.S. Thanks also for the report from the Cincinnati Bar concerning day care.

Havelock Vote

I'm afraid I must side with John Havelock in the censorship vs. good taste debate. If there is any publication that ought to provide an open forum for *any* point of view, it is the Bar Rag. As lawyers, we have taken an oath to uphold constitutional guarantees of freedom of expression; our own publication ought to live up to that ideal. I did not know Wendell particularly well, but his reputation as one of Alaska's preeminent civil libertarians makes me believe that he would be righteously offended that John's expression of an idea was censored over a question of "taste." I also imagine he would laugh himself silly at the idea that an imaginary conversation with a dead person poses a substantial risk of embarrassment to the dead person.

I would also be interested to know how you distinguish between the memory of Wendell Kay and the memory of George Grigsby, who was portrayed in Russ Arnett's column as a hopeless drunk. Is it that you found Russ's column to be more funny, or less likely to be taken as factual? Or is it that George doesn't have as many friends and relatives left around who might be offended at the characterization? I think you will find taste to be a fickle and demanding mistress.

I certainly do not need to be protected from hearing any idea that John Havelock has to offer, nor do I need your assistance in deciding what is in good taste and what is not. The Bar Rag should be an open forum for the expression of ideas, no matter how controversial or silly. You don't have to worry about selling papers, so you are not constrained by the normal editor's fear of public reaction. You also will have a hard time finding volunteers to spend the substantial amount of time necessary to write a piece for the Rag, if they are concerned that their efforts will wind up in your round file.

Frankly, Jim I think you owe John an apology, and you owe it to him and the rest of us to run his column as he submitted it, with no qualifications or conditions. If Steve DeLiso has anything to say in response, I am sure you will hear from him.

Sincerely,
Paul H. Grant

The Same Old Story

As someone who patiently sat
Waiting out his adolescence
Through endlessly interconnecting matinees,
I know what you mean when you say,
"I have this weakness for dames in distress."

But that is about all that I know
As I watch Richard Blaine, standing in the rain
On the bottom step of a wagon-lit
With a crumpled piece of paper in his fist
And a look on his face that says it all.

As time goes by,
Ilsa Lund will come back to him
Backlit as usual, offering familiar cues.
She will be accompanied
By an understanding husband; and,
She will be almost twenty-two.

You must remember this:
Time stopped on Sam's watch.
It was December. Nightmiddle.
Nineteen hundred and forty one.
What time? Which watch?
What time is it for you?

You will always have Paris.

Harry Branson

Trial site standards

The following standards for "additional trial sites" are approved pursuant to Criminal Rule 18(c):

1. A community approved as an additional trial site must have an adequate facility available to house a jury trial.
   a. The facility must have a room large enough to serve as a courtroom. The room must be able to accommodate placement of a sufficient number of chairs for court personnel (judge, in-court clerk, bailiff), the jury (seven for district court and thirteen for superior court), participants in the trial (prosecutor, defense attorney, defendant), public spectators (including space to accommodate the jury venire), and the witness box.
   b. The facility must have an area where the judge, counsel and defendant may confer (and be electronically recorded) out of the presence and hearing of the jury. This area should be a separate room large enough for jury deliberation; however, the jury may deliberate in the courtroom if it will be available.
   c. The facility must be adequate in other respects to house a jury trial, including having adequate acoustics (to permit an adequate record to be recorded), typing facilities and, if the trial site is proposed as a year-round site, adequate heating and inside toilet facilities.
2. A community approved as an additional trial site location must also have adequate community support facilities to service the trial participants.
   a. Adequate housing must be available in the community to house trial participants and must be arranged in such a way to permit the bailiff to maintain security of the jurors from outside influence.
   b. A facility must be available in the community to feed the participants in the trial three meals a day.
   c. There must be adequate transportation to and from the community.
3. In considering whether to approve an additional trial site, the Administrative Director may also consider:
   a. whether jury trials have been held in the community previously;
   b. whether facilities and resources are available to ensure a defendant not released by the court remains in custody;
   c. the strength of a desire of the community to hold local jury trials;
   d. the financial impact on the court system of holding jury trials in the community; and
   e. any factor affecting a defendant's right to a fair trial.
4. A community may be approved as an additional trial site for misdemeanors, but not felonies, if these standards are satisfied for a 6-person jury trial, but not 12-person jury trial. A community may be approved as an additional trial site for only a portion of the year if these standards are satisfied only for that portion of the year.

Dated: December 4, 1986

Approved by Supreme Court

Arthur Snowden
Administrative Director
Chief Justice Rabinowitz
Justice Burke
Justice Matthews
Justice Compton
Justice Moore

SOLID FOUNDATIONS

• IOLTA explained

Continued from page 1

The purpose of the Alaska IOLTA program, to provide funds for the delivery of legal services to the poor, is similar to the programs developed in many other states, as well as Canada and Australia. It serves as a single convenient way for lawyers to help raise monies needed for legal services for the poor.

Although involvement in the program is completely voluntary, all attorneys are strongly urged by the Alaska Bar Foundation and the Alaska Bar Association to participate.

DR 9-102 has been amended to read:

DR 9-102. Preserving Identity of Funds and Property of a Client

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable *insured depository accounts* maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay services charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

For purposes of this Rule, "insured depository accounts" shall mean government insured accounts at a regulated financial institution on which withdrawals or transfers can be made on demand, subject only to any notice period which the institution is required to reserve by law or regulation.

(B) A lawyer shall

(1) Promptly notify a client of the receipt of his funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

(C) *A lawyer or law firm may elect to establish and maintain an interest bearing insured depository account into which may be deposited funds of clients which are nominal in amount or are expected to be held for a short period of time, but only in compliance with the following provisions:*

(1) *No earnings from such account shall be made available to the lawyer or law firm and the lawyer or law firm shall have no right or claim to such earnings.*

(2) *Only funds of clients which are nominal in amount or are expected to be held for a short period time may be deposited in such account. Funds which reasonably may be expected to generate in excess of $100.00 interest may not be deposited in such account.*

(3) *The depository institution shall be directed by the lawyer or law firm establishing such account:*

(a) *To remit earnings from such account, net of any service charges or fees, as computed in accordance with the institution's standard accounting practice to the Alaska Bar Foundation, Inc., at least quarter-annually; and*

(b) *To transmit with each remittance of earnings a statement showing the name of the lawyer or law firm on whose account the remittance is sent and the rate of interest applied, with a copy of such statement to such lawyer or law firm.*

(5) *The lawyer or law firm shall review the account at reasonable intervals to determine if changed circumstances required further action with respect to the funds of any client.*

The Alaska IOLTA program will allow lawyers to deposit certain client trust funds so that these monies may be pooled to generate interest which can be channeled to the ABF which will make grants to legal service providers for the poor. The Alaska program only makes use of interest from client trust deposits generally now maintained in noninterest-bearing accounts. Included will be those client funds which on an individual basis are expected to be held for such short duration or are so small in amount that they could not as a practical matter produce interest for the client if held in a separate interest-bearing account. Funds which reasonably may be expected to generate in excess of $100 interest to the client may not be deposited in an IOLTA account.

The IOLTA program is an excellent opportunity for all Alaska lawyers to assist in public service activities. The program is a painless way for the profession to enhance its *pro bono publico* work. IOLTA is especially appropriate due to the Legal Profession's enhanced awareness of its social obligations and due to the reductions in funding of various programs providing legal assistance to the poor in the State of Alaska.

The success of similar interest on trust accounts programs in other countries and changes in American banking practices which reduce the practical and legal problems in generating earnings on client trust accounts, made this concept workable in the United States in the late 1970's. Client deposits small in amount or short in duration had comprised a substantial sum of money on deposit, interest free, in financial institutions. Those funds are now available to generate interest income that can be directed into programs for the benefit of society in general.

The Alaska Bar Foundation and the Alaska Bar Association urge all Alaskan lawyers to research the IOLTA program and support it from its inception.

IOLTA

Continued from page 1

A board has been appointed, which includes a director from each of the states. Its current plan is to capitalize the company with voluntary investments from attorneys in each state. In order to be eligible for coverage by the company, a lawyer will be required to contribute $1,000 as their capital share. That contribution will not guarantee coverage. However, it is anticipated that most applying lawyers will be eligible for coverage by the company.

Rates will be computed for each participating state based upon the claims experience in that state. It is hoped that these rates will be lower than what is currently available in Alaska. ALPS plans to provide coverage on a claims-made basis with coverage for prior acts available in most cases. The policy language currently planned should be at least as broad as the language currently available in the commercial insurance market.

The solicitations for investment in the company will begin in early 1987. If investments are aoequate, policies should be available in July of 1987. However, the company will not begin operation until it has received investments in an amount of 3½ million to 5 million dollars. That means a minimum of 500 lawyers in Alaska will have to invest in order to meet Alaska's proportionate share of the capital contribution.

I believe that a lawyer-owned company is extremely important to our profession and to the members of the public who use our services. If we miss the opportunity to form this company, after all of the effort that has been put forth and all the expense that has been incurred, we have no one to blame but ourselves for the "insurance crisis" which periodically rears its ugly head.

I strongly urge every member of the Alaska Bar Association who has the resources to do so, to invest in this lawyer-owned company as soon as the opportunity presents itself. Based on what I have learned about the company's potential, I believe that the benefits over the years from that investment to you and to your clients will be substantially greater than the original cost.

Applicants for judicial council executive director

Twenty-seven persons have applied for the position of Executive Director of the Alaska Judicial Council. The list includes 17 persons from within the State of Alaska and 9 applicants from Outside. Alaska applicants include former Attorney General Hal Brown of Juneau, Daniel T. Saluri, and Mark I. Wood of Fairbanks, and James K. Brinker, William T. Cotton, Thomas H. Dahl, Mark A. Ertischek, Frank Flavin, Karla L. Forsythe, Marla N. Greenstein, John F. McGee, Richard L. McVeigh, Thomas S. Obermeyer, Michael Reese, Norman P. Resnick, Bruce F. Sherman, Jr., John W. Sivertsen, Jr., and Valerie Tehan of Anchorage. The $66,816 position became available when former Director Francis L. Bremson resigned last month to become Circuit Executive for the Ninth Federal Circuit. Bremson had held the position for four years.

The director is responsible for managing Alaska's judicial selection and evaluation systems and for conducting research regarding the administration of justice.

The Judicial Council intends to review applications during February and March and to conduct interviews in April, according to Council spokesperson Teresa W. Carns. "We hope to have a new director on board in the spring," she said.

The list of applicants for the position is as follows:

Harold M. Brown, Juneau, Alaska
James K. Brinker, Anchorage, Alaska
William T. Cotton, Anchorage, Alaska
Thomas H. Dahl, Austin, Texas
James C. Dunlap, Austin, Texas
Mark A. Ertischek, Anchorage, Alaska
Frank Flavin, Anchorage, Alaska
Karla L. Forsythe, Anchorage, Alaska
R. Roger Fries, Stafford, Virginia
Marla N. Greenstein, Anchorage, Alaska
Jeffery A. Kuhn, Reno/Sparks, Nevada
Peter M. Manikas, Chicago, Illinois
John F. McGee, Anchorage, Alaska
Richard L. McVeigh, Anchorage, Alaska
Azike A. Ntephe, Chicago, Illinois
Thomas S. Obermeyer, Anchorage, Alaska
Robert Ostrow, Raleigh, North Carolina
Charles R. Pengilly, Eugene, Oregon
Michael Reese, Anchorage, Alaska
Norman P. Resnick, Anchorage, Alaska
Daniel T. Saluri, Fairbanks, Alaska
Robert W. Schrader, Cheyenne, Wyoming
Virginia Shane, Winnemucca, Nevada
Bruce F. Sherman, Jr., Anchorage, Alaska
John W. Sivertsen, Jr., Anchorage, Alaska
Valerie Tehan, Anchorage, Alaska
Mark I. Wood, Fairbanks, Alaska

9 apply for Fairbanks Superior Court

Candidates for the seat are:

Gary Foster: Mr. Foster is 34 years old, an Alaska resident for 16 years and engaged in the practice of law for 8 years. He is a 1978 graduate of Willamette University Law School. He is currently an Assistant Attorney General in Fairbanks.

Paul R. Lyle: Mr. Lyle is 33 years old, an Alaska resident for 5 years and engaged in the practice of law for 7 years. He is a 1978 graduate of Temple University Law School. He is an Assistant Attorney General in Fairbanks.

Dick L. Madson: Mr. Madson is 51 years old, an Alaska resident for 18 years and engaged in the practice of law for 19 years. He is a 1966 graduate of William Mitchell College of Law. He is a sole practitioner in Fairbanks.

Richard D. Savell: Mr. Savell is 40 years old, an Alaska resident for 14 years and engaged in the practice of law for 14 years. He is a 1972 graduate of Columbia Law School. He is in private practice in Fairbanks.

D. Rebecca Snow: Ms. Snow is 42 years old, an Alaska resident for 15 years and engaged in the practice of law for 15 years. She is a 1971 graduate of University of California, Berkeley Law School. She is an Assistant Attorney General in Fairbanks.

Niesje J. Steinkruger: Ms. Steinkruger is 35 years old, an Alaska resident for 11 years and engaged in the practice of law for 11 years. She is a 1975 graduate of the University of Nebraska Law School. She is an assistant public defender in Fairbanks.

Patrick J. Travers: Mr. Travers is 34 years old, an Alaska resident for 7 years and engaged in the practice of law for 10 years. He is a 1976 graduate of Harvard Law School. He is currently an assistant general counsel for the National Oceanic and Atmospheric Administration in Washington, D.C.

Larry C. Zervos: Mr. Zervos is 40 years old, an Alaska resident for 8 years and engaged in the practice of law for 9 years. He is a 1977 graduate of Puget Sound Law School. He is in private practice in Fairbanks.

Christopher E. Zimmerman: Judge Zimmerman is 37 years old, an Alaska resident for 12 years and engaged in the practice of law for 12 years. He is a 1974 graduate of Dickinson Law School. He is currently a district court judge in Fairbanks.

Board solicits nominations for award

The Board of Governors of the Alaska Bar Association is soliciting nominations for its Professionalism Award. This is an award presented annually by the Bar Association to one or more individuals who exemplify the attributes of a true professional attorney. This would include professionalism as it relates to lawyers dealings with one another; as it relates to the lawyer client relationship; and as it relates to the lawyer's contribution to the profession.

This award will be presented at the Annual Convention of the Alaska Bar Association in Fairbanks, June 4 through 6.

Members are encouraged to nominate individuals who they feel meet these criteria and to supply the Board with reasons supporting their nominations.

Letters should be addressed to the Board of Governors at the Alaska Bar Association, P.O. Box 100279, Anchorage, AK 99510.

Written fee agreements now required by fee arbitration rules

New fee arbitration rules will go into effect on March 15, 1987. The current rules have been effective since 1974 so some changes were needed.

Of greatest interest to most attorneys is Rule 35(b) and (c) requiring written fee agreements. 35(b) provides that when a client has not been previously or regularly represented, the basis or rate of the fee should be communicated in writing to the client before or within a reasonable time after representation is commenced. If the client later requests a fee arbitration, and there was no written fee agreement, the attorney must prove the basis or rate of fee by clear and convincing evidence.

Rule 35(c) provides that contingency fee agreements will be in writing and clearly state the method by which the fee is to be calculated, including the percentage that will accrue to the attorney in the event of settlement, trial, or appeal; the expenses that will be deducted from the recovery; and whether the expenses will be deducted before the fee is calculated.

The new rule is not a drastic change from fee arbitration decision precedent. The arbitrators have consistently held that in the absence of a written fee agreement, the clients understanding of the fee prevails. (See Fee Arbitration Decisions 84-14, 83-51, 82-44 and 80-60.)

Another notable change in the rules requires an attorney who files suit for fees to serve on the client a Notice of Client's Right to Arbitrate stating:

> You are notified that you have a right to file a Petition for Arbitration of Fee Dispute and stay this civil action by completing the enclosed form and sending it to the Alaska Bar Association, P.O. Box 100279, Anchorage, AK 99510. If you do not file the Petition for Arbitration of Fee Dispute within thirty (30) days after your receipt of this notice, you will waive your right to arbitration.

Fee Arbitration forms will be available from the clerks' offices or the Alaska Bar Association.

Fee Arbitrators are always needed and if anyone would like to gain valuable experience as an arbitrator, please contact Deborah O'Regan, Executive Director.

THE LUNCH CIRCUIT

By Philip Matricardi

AKAI HANA means red flower in Japanese. A restaurant by that name nestles in an alley less than two blocks south of the state courthouse in Anchorage.

It so happens that Akai Hana houses one of the better sushi bars in town, and the best bargain sushi lunch. For less than $7 one can order the Lunch Sushi Special which includes miso soup, four pieces of nigiri-style sushi (*maguro, hamachi, ebi* — that's tuna, yellowtail and shrimp — plus one other that varies from day to day), one tekka maki (that's a tuna roll), and a hand roll.

For $9.75 Akai Hana offers *chirashi*, scattered sushi. *Chirashi-zushi* can easily be prepared, given the right ingredients. It resembles most an Occidental rice salad, with fresh raw seafood scattered with vegetables over sushi rice.

Akamai sushi mavens will seek out the sushi bar to order ala carte.

The selections at Akai Hana are as fresh as any place else in town, yet variety is lacking compared to, say, Daruma or Tempura Kitchen. Those places are a bit far away for lunch, however, if one needs to return to court that afternoon. Prices per item are lower at Akai Hana, too. Squid, octopus, mackeral, tamago (omelet), and salmon are only $2.75 a pair. Tuna, yellowtail, geoduck clam, shrimp, flying fish roe, smelt eggs, cockle, salmon eggs, and scallops run $3 the pair. Fresh-water eel is $3.25; uni (sea urchin) is $3.50. Those prices are about 50 cents lower than the competition.

Missing from Akai Hana's sushi menu are *katsuo* (bonito), *tai* (sea bream or Pacific snapper), and *komochi kombu* (kelp on which herring have spawned their eggs) which are available at Daruma; and *shako* (mantis shrimp), *anago* (sea eel), and *kohada* (gizzard shad), which can be found at Tempura Kitchen.

Nevertheless at these prices and this close to court, Akai Hana's friendly sushi bar fills up quickly for lunch. The rest of the menu features a good variety of food at friendly prices. For $6 to $7 apiece, one can try one of the "JUMBO PLATTERS" — terrific teriyaki chicken with a California Roll (sushi rice rolled up in seaweed with avodaco and crab) or tempura, deep-fried cod, fried pork cutlet, beef teriyaki, salmon teriyaki, or halibut teriyaki, all with California Roll, soup, salad, and rice.

For slightly more, Akai Hana packs box lunches. All the lunch boxes include soup, salad, rice and gyoza (a meat-filled dumpling reminiscent of pot stickers or ravioli) and one of the Jumbo Platter items.

About the only Japanese foods you might expect to find here, but won't, are noodle dishes, the ramens and udons. For that fare you can find your way to Kumagoro.

To reach Akai Hana from court, go around or through the Hotel Captain Cook, cross Fifth Avenue, slip into the center of the block between "I" and "K" streets.

There used to be a restaurant at this site called Tokyo Garden. Tokyo Garden folded when service declined to the point that one never knew what to expect, but you could bet that it wouldn't be what you ordered. From the ruins of that garden now grows a most excellent and charming little red flower.

Schaible retires for relaxation

By Dennis E. Cook

Alaska's new attorney general will apply her wealth of knowledge about government, law and Alaska to the challenges facing the new administration.

Can you imagine 400 grown-up people in a rather elegant setting led by a Native leader from Barrow. singing "Amazing Grace" to a woman they thought was retiring? It happened at the Big Banquet and it wasn't even on the program. But it sure was fun!

About a week before the Big Banquet, Grace said that she had no interest in being attorney general: she loved being on the Board of Regents, she did not want to move to Juneau, her plans were set — to "retire" from the law firm, remain available a year to help cover for Barbara Schuhmann's sabbatical, then resume long-term travels.

Steve Cowper had stopped by our office several times between the primary and general election. He and Grace spent hours talking. Steve asked her help on personnel aspects of transition. This was supposedly the subject of their appointment on November 28.

The Big Banquet was the Distinguished Citizen Award Banquet, an annual tradition of the Midnight Sun Council of the Boy Scouts of America. Each year the council honors a citizen for contributions to the community at a banquet designed to fill the Gold Room of the Travelers Inn. Grace was selected by the past honorees last spring. Since Bob Groseclose and I are both Eagle Scouts and Grace's partners, we got to be co-chairmen. The December 4 banquet timing was perfect: while the entire community honored Grace, the law firm could join in to recognize her legal career as she retired.

Given all this, we wanted the Big Banquet to be the best ever. Grace is not one to seek honors, but was obviously pleased to be Distinguished Citizen. We could tell, because she began buying plane tickets for her brother, her sister, her nephew, their spouses, several out-of-state special friends. She was really taking this thing seriously!

Grace returned to the University of Alaska for her senior year a fashion plate.

One thing Grace has is good friends. Bob and I enlisted them to the banquet committee. We planned a program. Grace is a patron, friend and traveling companion of Nancy Taylor Stonington (they do things like watching polar bears migrate in Churchill), so I called Nancy to ask her to be the banquet speaker. Nancy protested that she was an artist, not a speaker, but for her friend Grace she'd do it. Other friends developed a slide show, arranged displays, sold tickets and undertook many details. The law firm debated on an appropriate retirement gift and, with Nancy's help, decided to give Grace all of the nearly 40 Stonington prints which she did not already have as a climax to the evening.

After her meeting with Governor-elect Cowper on November 28, Grace dropped by my parent's 50th Anniversary reception. She took me aside to tell me somewhat sheepishly that despite her previous thoughts on the A.G. position, "Skip, Steve was very persuasive." Although she hadn't consented, she was obviously enjoying the courtship! First she wanted to consult with partners and family. Knowing her partners, I figured we'd say, "Grace, if you want it, go for it," and suspected her family would do the same. My thought was to make the Big Announcement at the Big Banquet if she accepted. We had only from Friday until the banquet on Wednesday to make decisions and arrange such an announcement.

By Monday afternoon it was all done except for Grace actually telling Steve she accepted. He was not available; he was to call back. Sometime Tuesday afternoon he called, she accepted and I asked Steve about announcing by conference phone in the banquet hall. He "graciously" ("Gracious" is a nickname for Grace) agreed to return to his office at 8:15 and wait for the anticipated call at the conclusion of the banquet program.

For those few who knew what was not printed on the banquet program, the evening was more fun than we could have hoped. Grace was resplendent in a special new gown; family and friends were excited. As people remarked what a nice way this was to mark the end of a successful career, I had to smile and think "Just wait 'til the end!"

The banquet reflected visually and in audio Grace's remarkable interests and accomplishments. Hence a display case sampling her polar bear sculptures in jade, soapstone, ceramic, crystal and a table loaded with exquisite embroidery, cross-stitch and needlepoint which we have seen in production during partners' meetings and noon hours in the office. Hence, the string quartet under Lesley Salisbury, playing classics as the crowd gathered and enjoyed the displays. (Opera would have been more appropriate, as Grace's schedule is constructed around KUAC's 1:00 p.m. Saturday broadcast, but Bob Groseclose is definitely not an opera buff and we were working by consensus.) Hence her good friends Bucki Wright acting as emcee and Rev. Jean Dementi giving the invocation. (Not even of Grace's denomination, but Grace does not set narrow limits on friends.)

At the outset we served a main course in Berg/Schaible history through family slides narrated by Lee Salisbury, next door neighbor. These excerpts summarize a remarkable life:

> "Once upon a time in Juneau Alaska, a Norwegian couple, Hans and Mandis Berg, started a family. Their children were named Clifford and Sylvia and Grace. It is their baby, Grace, whom we are honoring tonight. The pictures you are about to see show this remarkable lady at many ages and stages of her life.
>
> Grace's love for dogs started at an early age. Here she is at the age of 8 at Salmon Creek Dam with two of her best friends. One year later Grace entered the world of work — at age 9 she decided she would make money selling potato chips door to door. At age 14 Grace was attending high school and demonstrating cookware to housewives on a part-time basis. While a senior in high school, she applied for a job during the summer as a secretary to the Operations Manager of the Forest Service. Grace polished her skills from high school with dictation and shorthand and got the job. In the fall of '44 she was offered a job as secretary to Superintendent of Schools and worked there for a short time. As secretary of records for the BIA she also ran the library for GI's and typed letters home for them. By 1945 she was a full-time Ed Specialist with BIA and helped to place Native children in boarding schools. During all of this time Grace was saving her pennies to attend college.
>
> Again Grace was to take 2 years off working one year for the president of the U of A and the second year for the Director of the FHA in Juneau saving money for additional university study. Finally in the fall of 1951, she headed out to graduate school at George Washington University and again got corralled into working. This time, the job was assistant secretary to the Office of Human Research. She ended up having to have a complete background check. Relatives and friends back in Juneau and Fairbanks were beginning to wonder what sweet, little Grace Berg was up to? She really just ran the typing pool and helped with Russian translations. She also did a major field study on Russian officers and physical warfare profiles.

Grace's partners presented nearly 40 Stonington prints to complete her collection upon her "retirement."

> Finally the money gathered and applications were in the mail. She had just received a letter from Northwestern University accepting her application, but Dr. Bunnell was visiting in Juneau and spoke so convincingly to Grace that she enrolled at the University of Alaska the fall of 1945. Dean Duckering desperately needed a secretary and was willing to pay Grace 90 cents an hour to do the job. Grace was used to the higher wages of BIA and not impressed. They settled on $1.25 per hour and he promised her the job would last 2 weeks at the most. She worked for Dean Duckering for 2 years. In 1947-48 Grace took a year outside at George Washington University. Grace returned to the U of A for her senior year. In 1949 she completed her degree in history and political science.
>
> During the summer of 1953 Grace worked on her thesis on Alaska Legislative History (1920–1932) entitled "The Era of Neglect." Because of this important thesis work, Grace began working for the legislature in 1953-54 with the Alaska Council of Legislative Research. This perked her interest in law and in 1955 after her MA in history at George Washington University she entered Yale University as a law student.
>
> In 1959 with her degree in law completed, she returned to Fairbanks to practice and to marry Dr. Arthur Schaible. Her law career as clerk, associate and eventually senior partner of Schaible, Staley, DeLisio & Cook was punctuated with many far flung and colorful trips to exotic places.

Continued on page 7

in Juneau A.G.'s office

Their honeymoon in 1959 was spent at Arthur's childhood home in Southwest Africa. Here's Grace in Giza outside Cairo enjoying a camel ride. Other wonderful trips followed: Moscow and Lenin's Tomb in 1960; Acapulco for an exciting fishing trip in 1962; Isle of Capri in 1964 and in 1979 the first of many cruises on the Vista Fjord Norwegian.

Skip Cook mans the mike as Gov. Steve Cowper announces Grace Berg Schaible's appointment to a crowd of 400 gathered to honor her as distinguished citizen.

Grace and Arthur raised Great Pyrenees dogs. From 1974-83, after Arthur passed away, Grace was general corporate counsel for the Arctic Slope Regional Corporation and director and officer of the University of Alaska Alumni Association.

> Just as Arthur served as member of the U of A Board of Regents, so Grace, a loyal alumni and an outstanding graduate of that school continues that work today. So the Juneau girl who started working at the age of 9 hasn't slowed down since and we Fairbankans are the richer for it. Keep working Grace we need you and appreciate you."

Those of us who knew what was coming had to chuckle at that last comment.

Nancy Stonington gathered comments from many Alaskans with various insights into Grace and wove these into her own personal assessment. She described an enthusiast who loves life and people and art and music and being good at what she does. Dolores Dineen wrote and read a special poem; Jake Adams of Arctic Slope Regional Corporation told how Grace trod where no white woman has ever entered in Inupiat society; Ralph Beistline was hilarious on behalf of the Alaska Bar Association; we partners presented our Stoningtons.

Then Govenor Cowper was on the line. After greetings and compliments, he alluded to the notion that Grace was retiring, then dispelled that notion and announced ". . . she has consented to serve as my Attorney General." The crowd was instantly on its feet joyfully applauding Amazing Grace longly and loudly. The Big Banquet could not have gone better.

Arctic Slope Regional Corporation presented Grace with an etched fossil ivory in honor of her long service as corporate counsel.

Fanfare behind, Christmas cruise to Antarctica accomplished, cases closed, memos dictated, house leased, house purchased, Grace is off to Juneau. Characteristically, she will slip in quietly, but her presence will soon be felt and appreciated as she applies her wealth of knowledge and ability to the tasks at hand.

Dennis E. Cook is a partner in the law firm of Schaible, Staley, DeLisio & Cook, Inc.

History Wanted

A statewide survey is underway to locate the manuscript collections of Alaska of former members of the United States House of Representatives, including territorial delegates. Information from this survey will result in a national guide to research collections of present and former members of the House of Representatives to celebrate the Bicentennial of the United State Congress. Those Alaskans included in the survey are:

Frank H. Waskey	Anthony J. Dimond
Thomas Cale	Edward L. Bartlett
James Wickersham	Nicholas Begich
Charles A. Sulzer	Howard W. Pollock
George B. Grigsby	Ralph Julian Rivers
Dan A. Sutherland	Donald Young

Major archival repositories around the state of Alaska have already been contacted. If you know of any other collections in private or public custody in the state of Alaska, please contact:

Dr. Virginia Newton
Deputy State Archivist
Alaska State Archives
Department of Administration
P.O. Box C-0207
Juneau, Alaska 99811
Tel. (907) 465-2270

Deadline on reporting information for the survey is March 31, 1987.

Judge Van adjourns his court

By Kris Capps

Judge Gerald Van Hoomissen never has minced words and he isn't about to start now, on the eve of his retirement from the Fairbanks Superior Court bench.

"I've never held a job this long," he said, of the past 16 years. "I've enjoyed it, but I've held it long enough."

His departure has been hastened somewhat by serious health problems, which will require him to move to a warmer climate. It's not an easy move for a man who wanted to move to Alaska from the time he was "a foot high."

"I have real qualms about leaving Alaska," he said. "You can't beat this country."

Van Hoomissen, known as "Judge Van" around the courthouse, has been an outspoken, sometimes blistering voice in the Fairbanks judiciary. He has told more than one defendant, charged with a crime involving alcohol, that the defendant is a fine person when he's sober and a "flaming idiot" when he's drunk.

Defendants frequently find religion when jailed, and Van Hoomissen once told a defendant he figured he had converted more heathens than his brother, who is a priest.

Another time, he told an attorney he didn't trust him farther than he could throw a piano from the bench where he sat.

"I've been accused of being too blunt," Van Hoomissen said. "Not justifiably, mind you. But you don't sit up there and let everything go to pieces."

Supreme Court Chief Justice Jay Rabinowitz said he will always have one clear image of Van Hoomissen — "The door flying open. The shouts."

"My fondest memories are of him busting a gut as he comes through the door, at full voice," Rabinowitz said. "He'd do credit to the Metropolitan Opera."

That usually happens the day opinions from the Court of Appeals or the Alaska Supreme Court are released.

"He's a great leveler," Rabinowitz said. "It's usually along the lines of 'How can you turkeys decide. . .' "

Van Hoomissen dismisses any talk of the Court of Appeals with a disdainful wave of his hand. He once told a new judge that although the newcomer would do his best, cases would be appealed and sometimes his decisions would be reversed.

"Just remember, those judges up there in the Supreme Court are human too, and they could be wrong," he advised.

"No trial judge likes to be told he was wrong," said Supreme Court Justice and longtime friend Edmond Burke. "Especially if his name is Van Hoomissen."

"But he really cares about what he's doing," Burke said. "He has a lot of good, common sense and it's served him pretty well."

Rabinowitz described Van Hoomissen as sensitive and "very good at understanding human behavior."

Some Fairbanks attorneys say Van Hoomissen shoots from the hip. Others say he says out loud the same things other people are thinking.

The judge admits to making mistakes, but he's always done what he thinks is right.

"You just don't go in there with the idea that you don't give a d_____ how it comes out," he said.

Van Hoomissen, 52, is also a carpenter, a repairman, and a craftsman. Some of those skills have come in handy while presiding over jury trials in the Bush.

Attorney Larry Zervos's first felony trial was in front of Van Hoomissen in Tok. The toilets in the courthouse were overflowing that day. Zervos remembers walking into the bathroom and seeing Van Hoomissen in the crawlspace under the bathroom floor, banging on pipes with a wrench.

The Hon. Gerald Van Hoomissen, 1985

In the late 1960s, Van Hoomissen conducted Barrow's first jury trial. He thought the courtroom inadequate, so he moved the trial to a nearby bingo hall. When an impartial jury could not be selected out of the potential jurors called, Van Hoomissen sent then-Alaska State Trooper Al Rowe out to bring in people off the street.

"He always had a good, common-sense approach," said defense attorney Dick Madson.

Today, Van Hoomissen's second-floor courtroom is across the hall from Court Administrator Charles "Mac" Gibson's office, so Gibson sees him several times a day during court recesses.

"I think he's quit smoking 750 times since I've been here," Gibson said. Van Hoomissen denies that and says it's been many more times than that.

He and Judge James Blair play cribbage together during lunch hours and Van Hoomissen keeps a running tab on his desk of who is ahead that week. And he vehemently denies claims that he once lost 27 games in a row to Burke.

His fourth-floor office is bare now. The moose antlers are gone, along with the dozens of photographs of his family and his Alaskan hunts. Memories of the past 22 years in Alaska are packed away in boxes.

Van Hoomissen grew up in Oregon and went to law school because, he says, he had nothing else to do. But he got bored during the last year, so he quit and bought a service station. Business was so good, he couldn't keep up with it.

"That lasted about five months," he said. "Then, I couldn't wait to get back to law school."

After law school, he became a clerk for an Oregon judge, who threatened to fire him if he didn't take the bar exam.

"I filed late for it and took it," Van Hoomissen said.

Although Van Hoomissen's father was also a lawyer, his family reacted with "absolute disbelief" when Van Hoomissen followed suit. When he told his father he had passed the bar, his father replied, "You must think you're pretty smart, don't you?"

Thirty years ago, Van Hoomissen married Wanda, a woman he met five years earlier skiing at Mount Hood. He went into private practice, but yearned to head to Alaska.

Twenty-two years ago, he visted on vacation. Two months later, he quit his Oregon law firm and moved north. He and Wanda decided they would move to Alaska, he would learn to fly, and they'd buy a ranch. They never got the ranch, but Van Hoomissen did get his pilot's license. He complains now that he has to make an appointment to use his own airplane, since two of his sons are also pilots.

While waiting for a job in Anchorage with the U.S. Attorney's office, Van Hoomissen worked in Kenai, wiring homes and building an addition on a grocery store. After a stint with the U.S. Attorney, he became district attorney in Fairbanks.

"That was the best move I ever made," he said.

A year later, he quit and went into private practice. A short time after that, he applied for a judgeship and was selected.

Longtime Fairbanks attorney Warren Taylor, appeared in Van Hoomissen's first case and Van Hoomissen remembers it as infuriating.

"He just got me madder than h_____," the judge said. "I came out of there and I said, I'm not gonna take that stuff from that guy. Judge (Everett) Hepp came over to me, put his arm around my shoulder and said, 'A judge can't afford to lose his temper.' Well, then Taylor went next door into Hepp's court and a few minutes later, Hepp came storming out of his courtroom, and I walked over to him and put my arm around his shoulder and I told him, 'A judge cannot afford to lose his temper.' "

Van Hoomissen said he pefers presiding over civil cases, because he finds he has to work harder on them. Cases that trouble him most involve family matters.

"You never get the case over with," he said "You never forget about it. That's the toughest part of the job."

Over the years, he has seen judges' discretion whittled away by the Alaska State Legislature and he complains that judges now have too many "hoops to jump through."

He laments a tight budget that restricts handling of cases in the Bush and worries that rural Alaskans have lost confidence in the justice system.

"Right now, it's about as impressive as a bag of fog," he said.

Years ago, Van Hoomissen was known as "the flying judge" for his insistence on trying rural cases in rural communities.

"He was constantly ordering me into Bush areas," said District Attorney Harry Davis.

Davis recalled one case in which nobody involved wanted to fly into the Bush to try the case — except Van Hoomissen. Everybody did anyway. Unfortunately, when they got there, they discovered they had forgotten to bring along the defendant.

"Boy, he blew up and wanted to fine me," Davis said.

Van Hoomissen and his wife raised six children in Fairbanks.

Burke, a longtime friend, said staying at the Van Hoomissen house was like staying with the New York Rangers.

"There were three hockey games going on every day, it was quite a show," he said.

The judge's only regret about moving to the Last Frontier is that the move meant leaving extended family behind.

"I came from a ghetto in Portland," Van Hoomissen said. "All the Van Hoomissens lived there. Anybody who left was a flaming idiot."

Van Hoomissen was the youngest of four children. "They got quality and stopped," he said jokingly.

Both his brothers are priests. His sister, a retired nurse, was a member of the first hospital unit to enter Europe after the Invasion of Normandy.

Many years ago, he and his wife reached an agreement. "If we had six kids, I'd get a trip to Africa, a safari," he said. "If we had less than six kids, she'd get a trip to Europe."

Neither ever collected, he said, because they found out "with six kids, we couldn't afford to go anywhere."

Their destination now is a spot about 55 miles east of Portland. Van Hoomissen said it has the "best steelhead stream in the state" nearby, deer in his backyard, and elk in nearby mountains. There's also a golf course practically in the front yard.

The warmer climate is necessary for his illness, a painful disease that attacks the joints.

Thelma Adamson has been Van Hoomissen's in-court clerk for 16 years and they know each other so well she says she can clear her throat and he knows what she is thinking. "I just dread it," she said of the judge's departure.

Others watch his departure with regret as well. As one attorney said, "Judge Van is the Fairbanks bench."

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THE MOVIE MOUTHPIECE

Edward Reasor

"Private attorneys and pool hustlers don't retire"

I confess to a certain feeling of envy when I read in the local papers that some chief of police or fire captain or assistant administrator of some court is retiring after twenty years of work. Always it is the public sector. It seems that private members of the bar and the medical profession cannot in fact retire after twenty years in harness. If you believe the plaudits of the recently made "The Color of Money," neither can pool hustlers.

It all started back in 1951, in black and white no less, when young actor Paul Newman was but a mere 35, playing the role of Eddie, a man with a mean cue who was unable to love any woman completely, even the reasonably attractive Piper Laurie. Newman really hadn't been in that many great movies before "The Hustler" ("Somebody Up There Likes Me," "Exodus" and "Cat on a Hot Tin Roof" come to mind). His portrayal of Fast Eddie Felson, sports jacket, cigarette dangling from his mouth, was a marked contract to Minnesota Fats as portrayed by Jackie Gleason, almost but not quite as bitter and arrogant an approach as his manager-owner George C. Scott. In the end Newman beats Minnesota and then retires from the game to the chagrin of his greedy mentor. Private sector, remember? There are no government jobs as a pool hustler.

So in 1986, in living, breathing color, Newman now a vibrant 61 (at the time of the filming), with a full 47 movies under his belt, still stands at the bar (and the pool table), this time a wiser, more loving, streetwise individual. He isn't drawing retirement. What Paul Newman alias Fast Eddie Felson does now, 25 years later, is patiently instruct and befriend Tom Cruise, the new pool hustler on the block. The question obviously is: Does he now take advantage of a younger man with natural pool ability as happened to him in his youth? Touchstone Pictures in poster advertisements doesn't quite let the cat out of the bag but the promotion does announce: "The Hustler isn't what he used to be. But he has the next best thing: a kid who is."

RON PHILLIPS

"Fast Eddie" Felson (Paul Newman, left) takes young hot-shot Vincent Lauria (Tom Cruise, right) under his wing in "The Color of Money."

Touchstone Pictures

"The Color of Money" is one of those rare attorney-put-together financed films that fly. Disney's Touchstone Pictures distributed the film but the owning partners are "Silver Screen Partners II," a limited partnership that shouldn't have any tax write-offs at all. This is a great movie that will do exceptionally well at the box office. The screenplay by Richard Price follows the low-life style and language of the original "Hustler" novel and film written by now deceased Walter Tevis, and the direction by New Yorker Martin Scorsese is a blend of story, action, melodrama, and pool shots with an all-encompassing theory that where one learns to play pool is generally not a pleasant place.

Cruise's screen opposite is an attractive Mary Elizabeth Mastrantonio, a relatively new actress who is the brains behind the pool natural. She's able to see quite early that her man has talent — wasted talent that buys few steaks and no comfortable car. Newman works on her. She should stop fighting him and help to gently coerce Cruise into losing a few games now and then so that they can set someone up for a big bet. In short, teach the boy-man Cruise how to hustle. "Pool excellence (the money-making kind) is not about excellent pool," Newman muses, "It's being a student of human moves." Newman is now a liquor salesman but he can appreciate Cruise's eye and stroke, because that's exactly what he had at the same age. Fast Eddie is the first to admit, however, that the fine art of hustling, which involves traveling from city to city, playing on occasion in legitimate tournaments, is indeed a young man's game. Still, pool and liquor commissions haven't been all that hard: Fast Eddie does drive a Cadillac and possess a pocketful of money, but if pool is in your blood, or at least the hustle of pool, as it is in both the old Newman and the young Cruise, then "the best is the guy with the most."

Few movies today have memorable dialogue. "The Color of Money" has several. Any spectator should enjoy:

- Newman to Mastrantonio who isn't yet reigning the kid hustler in: "We got a racehorse here. You make him feel good. I'll teach him how to run."
- Newman to Cruise who is a show off in the game room, instead of a country boy who can win: "Money won is twice as sweet as money earned."
- Mastrantonio to Cruise, who just can't seem to understand that going into a pool hall and clearing the table on the first shot will get him few opponents and even less money: "You win one more game and you're going to be humping your fist for a very long time."
- Newman after watching Cruise do his stuff at the local pool hall: "Watching that kid today was like watching home movies."

Cinematographer Michael Balhaus calls his work in "The Color of Money" "a psychological drama ... it's not just a simple story." He shot the whole film from beginning to end in a mere 45 days, four Chicago pool rooms provided the principal location, with three Chicago hotels, a steakhouse, and a full day's shooting at the Resorts International Hotel in Atlantic City for the climactic pool tournament ending. The basic lighting is low-hanging fluorescent lights with color-controlled bulbs over each pool table for contrast. A good number of actual pool shots were taken from a portable dolly, some on a circular track which surrounded the pool tables. About ten percent of the shots are tracking or moving shots taken from the camera's point of view. How else could you watch a pool match?

According to cinematographer Balhaus, Paul Newman is in fact the better pool player (having played in his own home for several years) but Cruise did take professional lessons before filming began. My fond hope is that the Academy of Motion Pictures votes Newman also the better actor. He was truly disappointed when he did not win the Best Actor award for the "The Verdict." Perhaps this time around. The National Board of Review, the oldest award movie committee in America, selected Paul Newman as best actor for "The Color of Money" for 1986. Oscar nominations were scheduled for February 11 and the awards ceremony is March 30. See you at the latter.

PRACTICAL POINTERS

New tax reform notes

Tax law

Final regulations issued by the Internal Revenue Service (IRS) on September 3, 1986 require that all receipts of cash in excess of $10,000 be reported to the IRS. The term "cash" means the coin and currency of the United States or any other country. "Cash," for this purpose, does not include bank checks, travelers checks, bank drafts or wire transfers. The regulation provides that cash receipts in excess of $10,000 for a single transaction (or two or more related transactions), received in the course of a trade or business, should be reported in an informational return to the IRS.

The IRS denied a request that the legal profession be exempt from this reporting requirement stating that legislative history "makes no provision for an exception of this type."

Related Transaction

The term "related transaction" applies to any transaction conducted between a recipient and payor within a 24-hour period, or during a longer period if the recipient "knows or has reason to know" that each transaction is connected. For example, if an attorney contracts with a client for a fee to be based on an hourly rate, separate monthly bills of $8,500 and $4,000 paid in cash in succeeding months would be considered "related" and be required to be aggregated for reporting to the IRS.

Multiple Cash Receipts

Multiple cash receipts, such as in the preceding example, may require different treatment depending on the amount of the initial and subsequent cash receipts, as follows:

1. If the initial cash receipt exceeds $10,000 and any subsequent cash receipt exceeds $10,000, the recipient must report each cash receipt that exceeds $10,000. The cash receipts must be reported separately unless they are received less than 15 days apart. In that case, the recipient may elect to make a single report including all of the cash receipts.
2. If only the initial cash receipt exceeds $10,000 and subsequent aggregated cash receipts do not, then only the initial cash receipt must be reported.
3. If the initial cash receipt does not exceed $10,000, reporting is not required until total cash receipts made within one year of the initial cash receipt exceed $10,000.

Agent Reporting

A person or firm acting as an agent must report cash receipts in excess of $10,000 unless the funds are used to transact the business of the principal within 15 days of receipt. In that case, provided that the name, address, and tax identification number of the principal are disclosed to the third party recipient, the agent need not report the initial cash receipt to the IRS. This provision will apply to amounts attorneys hold in their trust accounts pending the outcome of litigation.

Time and Manner of Reporting

The reports required must be filed with the IRS by the 15th day after the date the cash is received. (In the case of several cash receipts which are aggregated, the report is required within 15 days of the cash receipt that causes the aggregate amount to exceed $10,000.) The report must be made on Form 8300 to the address shown in the instructions to the form.

A person required to make a report to the IRS must keep a copy of each report filed for five years from the date of filing.

Additionally, annual statements must be furnished to each person identified in the Form 8300 filed with the IRS. These statements must contain:

1. The name and address of the person filing the Form 8300;
2. The aggregate amount of cash receipts reported on the Form 8300; and
3. A legend stating that the information contained in the statement is being reported to the IRS.

These statements must be furnished to the "identified person" by January 31 of the year following the calendar year of the cash receipts.

Effective Date

These final regulations apply to cash payments received after December 31, 1984.

Penalties

Penalties will be assessed for each failure to file a Form 8300, or statement to the identified persons, in the amount of $50 for each failure up to a maximum yearly amount of $100,000 per category of failures. This means that a maximum of $100,000 may be assessed for failures to file Form 8300 and an additional $100,000 may be assessed for failure to file statements to identified persons. We do anticipate some leniency with regard to payments received between December 31, 1984 and the issuance of the Regulations.

Conclusion

If you have received affected cash receipts for which Forms 8300 have not been filed, we suggest that you report these transactions immediately.

— courtesy, Price Waterhouse, Anchorage

Discipline actions taken

Written Private Admonitions

Attorney A received a written private admonition for a violation of DR 2-106(A) which prohibits charging an illegal or clearly excessive fee. The attorney represented a client in a personal injury suit. The fee agreement provided that Attorney A would receive a ⅓ contingent fee if the client prevailed. If the client did not prevail the attorney would be compensated at $100.00 per hour.

Attorney B received a written private admonition for neglecting a legal matter entrusted to him. After an out of state client sent Attorney B his files and documentation for evaluation for a workers compensation claim, Attorney B did not respond to the client for nearly three years, when he informed the client that he would not take the case.

Attorney C received a written private admonition for neglect of a legal matter entrusted to him. The neglect involved a lengthy delay in obtaining a resentencing for his client after the sentence was vacated and remanded by the Court of Appeals.

Attorney D received a written private admonition for disclosing the existence of a confidential children's court order to a third party. The lawyer signed a letter prepared by the client which was addressed to the client's spouse. The lawyer realized that contact with the spouse was prohibited and stopped the letter from being sent to the client. However, a copy of the letter went to the spouse's supervisor who was not involved in the proceeding.

Attorney D received a written private admonition for two violations of DR 5-105. While representing the wife in a divorce, he helped the unrepresented husband and then, after he was disqualified by the court from representing the wife, he entered an appearance for the husband. The counsel disqualification case of *Aleut v. McGarvey*, 573 P.2d 473 (Alaska 1978) provides important guidance for avoiding these problems.

Attorney F received a written private admonition for failing to advise a client of the status of a court case to afford the client the opportunity to make reasoned choices about it. The lawyer also failed to provide an accounting to the client concerning the retainer given to the lawyer. While it appeared that the lawyer had earned the fee, the failure to account to the client was improper.

Attorney G received a written private admonition for certifying to the court that he attempted to resolve the dispute prior to requesting oral argument on his motion on shortened time in compliance with Civil Rule 77(d) when in fact he had not done so. Attorney G's inexperience and other mitigating factors prevented a harsher sanction.

Private Reprimands by Disciplinary Board

Attorney A received a private reprimand from the Disciplinary Board for neglect in failing to file the documents necessary to finish a divorce case as well as the failure to respond to the many inquiries of the Bar Association to the attorney concerning the complaint. Attorney A was also reprimanded for the failure to timely respond to a grievance filed by another client.

Attorney B received a private reprimand from the Disciplinary Board for conduct prejudicial to the administration of justice in violation of DR 1-102(A)(5) and for intentionally violating an established rule of procedure in violation of DR 7-106Z(C)(7).

CLE video tapes available

Following are course videotape and materials updates to the CLE Directory published last September.

Wrongful Discharge: Rights and Remedies in the Workplace
September 1986

This seminar, sponsored by the Employment Law Section, presents an opportunity for lawyers, personnel administrators, employers and managers to recognize wrongful termination issues, and learn practical tips useful in evaluating, settling or litigating a wrongful termination claim. A sample case is studied from evaluation through discovery, pre-trial motion practice, settlement and trial.

Book (175 pages)	$25.00
Videotape (6 hours)	$10.00

Effective Discovery Techniques
November 1986

This ABA VideoLaw Seminar provides a basic understanding of how to handle all aspects of discovery except those covered in the companion program, "Taking and Defending Depositions." This program is designed for the attorney with little experience in litigation.

Book (500 pages)	$20.00
Videotape (3 hours)	$10.00

Taking and Defending Depositions
October 1986

This ABA VideoLaw Seminar is designed specifically to teach the new or relatively inexperienced attorney fundamental skills. The program includes demonstrations, lectures and panel discussions about both offensive and defensive strategies in oral discovery.

Book (500 pages)	$20.00
Videotape (3 hours)	$10.00

Bridge-the-Gap
November 1986

This day and a half seminar is designed to "bridge-the-gap" between the theory of law school and the practice of law. The program includes practical information on areas such as Alaska courtroom procedure, Alaska real estate procedures, unique procedural aspects of probate cases, handling a divorce case, whether and how to incorporate a business, formation of a close corporation, basic considerations in setting up a law practice, effective use of a secretary's skills and the legal aspects of handling someone's affairs after death. An embossed, three-ring, vinyl binder of over 500 pages of tabbed material is available.

Manual (500 pages)	$60.00
Videotape (10 hours)	$10.00

Litigation Before Alaska Administrative Agencies
January 1987

This seminar is designed to familiarize attorneys with important considerations in litigating disputes before administrative agencies, concentrates on procedural aspects common to all Alaska litigation, and compares actual litigation procedures employed by the Alaska Dept. of Revenue, the Commercial Fisheries Entry Commission, and the Alaska Public Utilities Commission.

Book (300 pages)	$25.00
Videotape (6 hours)	$10.00

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

JOE RUDD SCHOLARSHIPS 1987-1988
Rocky Mountain Mineral Law Foundation

At the time of his death in an airplane accident in December of 1978, Joe Rudd was acknowleged as the preeminent natural resources attorney in the State of Alaska and was well-known nationally for his expertise. In recognition thereof, his family and friends and the Rocky Mountain Mineral Law Foundation have established the Joe Rudd Scholarship. The first scholarship grants were awarded for the academic year commencing in the fall of 1980.

1. Purpose. The purpose of these scholarships is to encourage the study of natural resources law by well-qualified law school students who have the potential to make a significant contribution to the field of natural resources law.

2. Eligibility. Second year, third year and graduate law school students are eligible to receive the scholarship; provided, however, that first year law school students who can demonstrate a commitment to study natural resources law are also eligible to receive the scholarship.

3. Field of Study. In order to be eligible, a law school student must be undertaking the study of natural resources law.

4. Law Schools. The scholarship can be used in connection with a program sponsored by one of the law schools which is a Governing Member of the Rocky Mountain Mineral Law Foundation:

University of Alberta
Arizona State University
University of Arizona
Brigham Young University
University of Calgary
University of California—Davis
University of California—Hastings
University of Colorado
Creighton University
University of Denver
Gonzaga University
University of Idaho
University of Kansas
Lewis and Clark College—Northwestern
University of Montana
University of Nebraska
University of New Mexico
University of North Dakota
University of Oklahoma
University of the Pacific—McGeorge
University of South Dakota
Stanford University
University of Texas
University of Tulsa
University of Utah
University of Washington
University of Wyoming

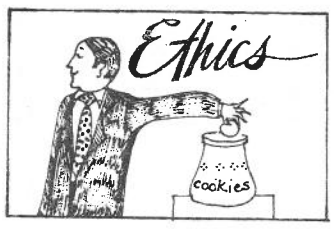
5. Amount of Grants—$2,500-$5,000. These scholarships are to be awarded on an annual basis. Several scholarships are awarded each year, and it is estimated that the amount of these grants will be between **$2,500 and $5,000 per year.**

6. Criteria for Selection. The following criteria will be used to determine the recipients of the scholarships: (a) potential to make a significant contribution to the field of natural resources law; (b) academic ability; (c) leadership ability; and (d) financial need.

This scholarship is open to all governing member law students. Though some preference is given to Alaska residents and students, many past scholarship recipients have had no Alaska connection.

For further details and Application Forms, contact:
Mr. Harris Saxon, Guess & Rudd
510 L Street, Suite 700
Anchorage, Alaska 99501
or
Rocky Mountain Mineral Law Foundation
Porter Administration Building
7039 East 18th Avenue
Denver, Colorado 80220
(303) 321-8100

DEADLINE FOR SUBMITTAL: April 1, 1987



Ethics opinions proposed,

In the last issue of the Bar Rag, the following draft ethics opinion was intended for review and comment by members of the Alaska bar. It has not been adopted.

Comments on the opinion should be sent to Bar offices.

ALASKA BAR ASSOCIATION

Re: Legal Ethics In Interstate Child Custody And Parental Kidnapping Cases — Attorney Disclosure Of The Whereabouts Of Client And/Or Child

A. INTRODUCTION

Inquiry has been made to this Committee concerning the ethical obligations of an attorney when a parent conceals a child from the other parent, yet communicates his or her whereabouts to counsel, following which the attorney is called upon to reveal this vital information. It is the opinion of this Committee that while the attorney's first instinct may be to protect the confidences of his or her client by asserting Canon 4 of the Code of Professional Responsibility (A Lawyer Should Preserve the Confidences and Secrets of A Client), a line of cases, several disciplinary rules, some specific rules of civil procedure and the Uniform Child Custody Jurisdiction Act (UCCJA) command the contrary result, namely, disclosure of the client's address and/or the address of the client's child.

B. CHILD SNATCHING TORT SUITS — ATTORNEYS AS DEFENDANTS

A significant number of state and federal courts have recently recognized actions in tort against parents who wrongfully abduct, retain, or conceal their children, as well as against persons who either aid in the initial wrongful act or assist in the effectuation of a concealment scheme which frustrates the right of access between the left-behind parent and child. If parents and their accomplices can be sued for custodial interference, it stands to reason that a lawyer who counsels a client to abduct or retain a child, or otherwise aids or abets in the misconduct, may also be held liable. In *McEnvoy v. Hekikson*, 56Z P.2d 540 (Or. 1977), the Supreme Court of Oregon recognized the right of a father to sue his former wife's attorney for malpractice and negligence for conduct which allegedly resulted in the removal of plaintiff's daughter from the country in violation of his custody rights. *See also Wasserman v. Wasserman*, 671 F.2d 832 (4th. Cir. 1982) (defendant-father's lawyers are named as defendants in this custodial interference tort case).

The Committee strongly advises against counseling a client to snatch a child or condoning a client's defiance of a court order. Indeed, it seems wise to specifically counsel a client not to violate custody or visitation rights. Further, lawyers should avoid engaging in activities that could in any way contribute to a continuing infringement of custody or visitation rights. The ethical issues inherent in representing a client who abducts, retains and/or conceals a child are discussed below. It should suffice to say at this point that an attorney who participates in a willful obstruction of justice may find himself or herself embroiled in disciplinary proceedings in addition to civil actions. *See Attorney Grievance Commission of Maryland v. Leonard J. Kerpelman, 420* A.2d 940 (Md. 1980) (attorney suspended from the practice of law for two years for suggesting, planning and helping to carry out an illegal child snatch in knowing violation of a decree).

C. ETHICAL OBLIGATIONS - ATTORNEY REVEALING LOCATION OF CLIENT

The national tragedy of parental child kidnapping has increasingly placed members of the Bar in controversy when they have knowledge of, but have been asked by their client not to disclose the whereabouts of, the abducting parent/client. The aggrieved left-behind parent may fashion an action in law or equity to require such attorney to divulge the desired information, or a court may compel such disclosure to further the administration of justice, with the threat of contempt as a rod. For reasons of ethics, procedure and statute, it is the opinion of this Committee that the attorney's best course of action is to disclose the client's location or that of the child.

1. UCCJA: statutory duty to disclose

Section 9(a) of the UCCJA imposes an affirmative duty on "every party in a custody proceeding" to provide particularized information to the court. Specifically, section 9(a) of the UCCJA requires every party in a custody proceeding in the first pleading, or affidavit attached thereto, to give information under oath as to the child's past and present addresses.

While the statutory obligation applies expressly to "parties", it is the responsibility of the attorney to obtain the required information from his or her client and to supply it to the court in the initial pleading or accompanying affidavits. Moreover, in order to comply with the section 9(a) duties, the attorney should ask to be informed on a continuing basis of any information the client acquires relative to other custody proceedings concerning the subject child.

In most parental kidnapping cases, the UCCJA's pleading requirements present more serious ethical problems for the defendant's counsel, whose client has abducted and/or is concealing the child, than for the Plaintiff's counsel, whose client is generally in the forum state. In any event, both attorneys for defendant and plaintiff must bear in mind that intentional omissions of information regarding the child's address, or the filing of misinformation with the court, can prejudice the court's ability to determine the custody issues at bar, and could subject the attorney to judicial sanction or disciplinary action for obstruction of justice or fraud.

2. Attorney-client privilege and exceptions thereto

The United States Supreme Court has stated that the attorney-client privilege should only where necessary to achieve its purpose, since the privilege has the effect of withholding relevant information from the finder of fact. *See Fisher v. United States*, 425 U.S. 391, 403 (1976). As a general proposition, the attorney-client privilege will only be applied where the administration of justice will only be preserved (not frustrated) by its exercise. The privilege will not be applied where advice of counsel is sought to aid in the commission or continuation of a crime.

Applying these (and other) exceptions to the attorney-client privilege, courts in various states have ordered lawyers to disclose the location of a child in custody dispute involving concealment of the child. Some examples follow:

(1) In *Jafarian-Kerman v. Jafarian-Kerman*, 424 S.W.2d 333 (Mo. APP. 1968), a father, in violation of court order, took his child to Germany to an address unknown to the mother and to the court. Labelling the father's conduct "malicious and wanton infraction of the court's orders and a brazen obstruction of the administration of justice," the appellate court held that the address of the defendant-father in letters to his counsel was not a privileged communication, and thus the lower court had erred in declining to require defendant's attorney to disclose by his testimony information as to the defendant's precise whereabouts. 424 S.W.2d at 339-340.

(2) The question on appeal in the case of *Matter of Jacqueline F.*, 47 N.Y.2d 215, 391 N.E.2d 967 (N.Y. 1979) involved the "circumstances under which an attorney may be compelled on pain of contempt to disclose the address of his client notwithstanding a claim that such information was the subject of a privileged communication. 391 N.E.2d at 968. The highest court of New York held that the attorney-client privilege must yield to the best interests of the child. The court stated that the client apparently kept her address secret for one purpose — "to thwart the mandate of the court's judgment awarding custody of Jacqueline." 391 N.E.2d at 972. The court found that during the very litigation in which she and her attorney have participated, since this would impede the proper administration of justice and subject the child to an ordeal contrary to the court's judgment rendered in the best interests of the child. ID. at 972.

(3) In the case of *Falkenhainer v. Falkenhainer*, 97 N.Y.S.2d 467 (N.Y. Sup. Ct. 1950). the court granted plaintiff's motion for an order directing the attorneys representing the defendant to disclose the whereabouts and present address of the defendant and child. The court reasoned that to deny the desired relief would aid and abet in the frustration of the court's order. Further, the court found that the statutory attorney-client privilege did not protect defense counsel from divulging his client's address, since concealment of client's place of abode was not a confidential communication essential to the attorney's counsel or advice.

(4) In *Waldmann v. Waldmann*, 358 N.E.2d 521 (Ohio 1976), the court held that the attorney-client privilege did not shield the address of a client's child. It was ruled that the child's address was not a privileged communication, because there was nothing in the record to indicate that appellant represented appellee's son.

(5) In *Dike v. Dike*, 448 P.2d 490 (Wash. 1968), a mother deliberately violated a court's temporary custody order by forcibly removing her child from the child's custodial home. The appellate court held that the client's address was not protected by the attorney-client privilege, based upon a determination that. the benefits of the privilege were outweighed by "society's interest in protecting the present and future victims of the client." 442 P.2d at 498.

3. American Bar Association's Code

The American Bar Association's MODEL CODE OF PROFESSIONAL RESPONSIBILITY recognizes the attorney-client privilege in Canon 4, "A Lawyer Should Preserve Confidences and Secrets of a Client." However, the exceptions to the attorney-client privilege, discussed above, are reflected in an Ethical Consideration and in the Disciplinary Rules accompanying Canon 4, which should be reviewed by every lawyer involved in any child custody/concealment/disclosure case. The applicable provisions are as follows:

Ethical Consideration 4-2

The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information...when permitted by Disciplinary Rule or when required by law...

Disciplinary Rule 4-101(c)

A lawyer may reveal:

* * *

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent a crime.

The attorney who represents a parent in a custody/concealment case should also be attentive to various other provisions in the Model Code of Professional Responsibility and analogous provisions in his or her state professional code and/or Supreme Court Rules. *See e.g.*, Canon l (A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession) and accompanying Disciplinary Rule 1-102(A) (A lawyer shall not: (l) violate a disciplinary rule; (4) engage in conduct involving dishonesty, fraud deceit, or misrepresentation; (5) engage in conduct that is prejudicial to the administration of justice; or (6) engage in any other conduct that adversely reflects on fitness to practice law).

A Maryland attorney was suspended from practicing law because of violations of these disciplinary rules, as well as Disciplinary Rule 7-102(A)(7) (A lawyer shall not counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent), and Disciplinary Rule 7-106(A) (A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding...). *See Attorney Grievance Commission of Maryland v. Leonard Kerpelman*, supra. In addition, the attorney should read Disciplinary Rules 7-102(A)(3), (5) and (7) (A lawyer shall not: conceal or knowingly fall to disclose that which he is required by law to reveal; assist his client in conduct that the lawyer knows to be illegal or fraudulent). It should also be recalled that Disciplinary Rule 2-110(B)(1)(b) provides for permissive withdrawal from a case when a client personally seeks to pursue an illegal course of conduct.

D. CONCLUDING REMARKS

This Committee has taken this opportunity to address the present issue of the legal ethics of an attorney in disclosure of the whereabouts of a client in recognition of the significance of the attorney-client privilege and the tragedy of child kidnapping in which it can be involved. It is the opinion of this Committee that the privilege must yield to the best interest of the child and that any privilege must not shield a litigant s whereabouts, since to do so would impede the proper administration of justice and submit the child to a painful experience contrary to the court's ruling rendered in the best interests of the child.

Adopted by the Alaska Bar Association Ethics Committee on August 26, 1986.

ALASKA BAR ASSOCIATION ETHICS OPINION NO. 86-3

RE: Referral of Client's Identity to a Credit Bureau is Impermissible

A lawyer has proposed that when a client owes a delinquent fee of under $1,500, rather than refer the account to a collection agency, the lawyer intends to report the client to a credit bureau. The credit bureau would disseminate that information whenever it received an authorized request about the client's credit status. By impairing the client's ability to obtain credit, it is hoped that the client will pay the account.

The Committee's foremost concern is that referral of the client's delinquent status to a credit bureau is at best an indirect method of collecting the unpaid fee. The only direct effect is to sully the client's credit rating. The Committee concludes that the probability of collection by such indirect methods as referral to a credit bureau is too small to justify its use. Referral to the credit bureau may intimidate and embarrass a client without ever resulting in payment of the fee or even direct efforts to collect the fee. This kind of activity is not befitting of the legal profession. It is directly contrary to EC 2-23, which requires attorneys to avoid public conflict over fees whenever possible. It may lead to the infliction of needless harm. EC 7-9, EC 7-10.

The disclosure of a client's name and delinquent fee amount with the intention that this information be used freely by third parties may constitute an unauthorized disclosure of a client "secret". DR 4-101(A), (B). Since the credit bureau will not be collecting the fee for the attorney, the exception allowing disclosure contrained in DR 4-101(C)(4) is unavailable.

The Committee believes the referral of any client information to a credit bureau should not be permitted in Alaska, except with the knowing consent of the client. DR 4-101(C)(1).

Adopted by the Alaska Bar Association Ethics Committee on August 26, 1986.

APPROVED BY THE BOARD OF GOVERNORS ON SEPTEMBER 5,1986

adopted by Committee, Board

ALASKA BAR ASSOCIATION
ETHICS OPINION NO. 86-4

RE: Attorney's Duty When Dispute Arises Concerning the Rights of Third Parties to Client Funds in the Possession of Attorney, and Vacating Opinion No. 80-1 in part . . .

The Committee has been asked about, or has been involved in, several situations recently involving disputes concerning the rights of third parties to client funds in the hands of the client's attorney. All the situations faced by the Committee have dealt with disputes between the client and a third party over entitlement to the funds. Disputes could also arise, however, between two third parties. These situations involve potentially grave ethical, legal, and practical consequences for the attorney, as illustrated by some of the situations in which the Committee has been involved.

The Committee has recently been asked about, or involved, in the following four situations:

(1) The client suffered significant personal injury in an accident, was treated at a hospital, and incurred substantial medical expenses. The client paid the hospital for only a portion of the amount due on discharge. The client gave the hospital a specific assignment, on a standard hospital form, assigning client's proceeds from settlement or judgment to the hospital in the amount of the balance due.

Thereafter, the client retained the attorney to represent the client's interests in litigation as against possible responsible defendants. Settlement was reached after approximately one year of litigation. Settlement terms included payment of three installments of settlement funds over a two-year period. On specific written instruction from client, attorney disbursed the first two installments of settlement proceeds belonging to client to other assignees. Thereafter, the hospital notified the attorney of the existence of the signed assignment form. Attorney then contacted client to inquire of client as to how proceeds were to be distributed, advising client as to client's liability for unpaid hospital bills. The client specifically instructed the attorney to pay the final settlement proceeds directly to the client, and not to pay the hospital bill, notwithstanding the specific assignment.

(2) Client changed attorneys in the middle of a proceeding. The client apparently agreed to an attorney's lien to secure compensation to the first attorney, and the first attorney filed a claim of lien in the court file in accord with AS 34.35.430. The second attorney subsequently settled the client's case. The client requested payment of the full amount of the settlement proceeds from the second attorney. The second attorney turned over the funds to the client, in accord with the client's request. Litigation brought by the first attorney against the second attorney for failure to recognize the attorney's lien is presently pending.

(3) An attorney representing a tort defendant had retained money in his trust account for the purpose of funding a settlement with the plaintiff. Settlement negotiations had taken place, and draft settlement agreements had been prepared. At this point, the client was arrested on a felony charge in another jurisdiction, and requested that his attorney send him the funds which were intended to fund the settlement, so that the client could retain counsel to defend himself against the criminal charge. The attorney sent the funds to the client in accord with the client's request, so that the client could retain counsel. Subsequently, a dispute arose as to whether or not there was a settlement, and whether the funds should have been retained by the attorney in trust to fund the settlement rather than returned to the client. This matter became the subject of an extended investigation by the Alaska Bar Association.

(4) Attorney represents client in a personal injury action. Prior to settlement, client assigned a portion of the settlement proceeds to a third party as down payment on a house. The attorney has a letter of assignment in his file. The client has left Alaska, is in default on his house payments, and foreclosure is likely. The client may have a cause of action against the seller arising out of the transaction. The personal injury case has settled, and attorney is holding the proceeds of the settlement. The client has instructed the attorney to ignore the assignment and pay all funds to the client. If the attorney recognizes the assignment, client will receive nothing.

The foregoing are actual situations presently existing, and illustrate the problems in this area and the need for careful consideration by an attorney when faced with competing demands for funds in the attorney's possession. Generally, the entitlement to these funds is determined as a matter of law, rather than as a matter of ethics. The ethical question is whether or not the attorney must follow the direction given by the client as to the disbursal of funds. The purpose of this opinion is to provide some guidance to the attorney faced with this type of problem.

It is the opinion of the Committee that if a dispute arises concerning the rights of third parties to the client's funds, the attorney must segregate the amount in dispute until the dispute is resolved. If it is impossible to resolve the dispute amicably, then the attorney may pay the funds into the court, and request that the court determine the legal entitlement to the funds.

DR9-102(B)(4), provides:

A lawyer shall promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

Model Rule of Professional Conduct 1.15 provides:

Rule 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

The Comment to Model Rule 1.15 provides, in part:

Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

The operative factor under both the Code and Model Rules is that the client be "entitled" to the funds. Neither the Code nor Model Rules, however, provide any guidelines an attorney can use to determine whether or not a client is "entitled" to receive funds or property in the attorney's possession. The American Bar Association has addressed the issue of when a client is entitled to funds or properties under DR9-102(8)(4). The ABA has suggested that when there is a conflict between an attorney and a client about who is entitled to funds in an attorney's possession, and when this conflict is not quickly and amicably resolved, an attorney may properly file an action for the adjudication of the rights of all claimants. (ABA Informal Opinion 137 August 10, 1976).

Judicial resolutions of these disputes is sometimes necessary. If the attorney is legally incorrect in disbursing funds in accord with the client's request, the attorney may end paying twice. For example, an attorney may be liable for conversion when the attorney disburses funds to a client with the knowledge of the existence of a lien on the funds. (*e.g., Unigard Insurance Co. v. Tremont*, 37 Conn. Super. 596, 430 A.2d 30 (1981); *In Re Cassidy*, 89 Ill.2d 145, 432 N.E.2d 274 (1982))

A related issue is the lawyer's duty to third-party creditors of client regarding client's funds. This issue has not directly been addressed by the ABA Code or the ABA Model Rules. The cases and ethics opinions on this issue, usually involving outstanding medical expenses, have varied. For instance, Alaska Opinion 80-1 (1980) held that an attorney did not violate any ethical obligation by forwarding funds received to the client knowing that the client had outstanding medical bills. A slightly different position was taken in Delaware Opinion 1981-3 (Apr. 21, 1981), which held that an attorney should try to persuade the client to pay medical expenses, but may not force the client to do so. A third position was adopted in South Carolina Opinion 81-14 (1981). Under this Opinion, an attorney should request permission from the client to pay outstanding medical expenses. Furthermore, if the client refuses permission, the attorney will hold the funds for a short designated period of time without disbursal. *See also In Re Cassidy*, 89 Ill.2d 145, 432 N.E.2d 274 (1982) (not improper for lawyer to delay disbursement of funds to client when lawyer reasonably believed client's creditors had superior claim to funds).

The Greater Cleveland Bar Association has recently issued an opinion in a case in which a woman had hired an attorney to draft a prenuptial agreement for her, dealing with her real property. The agreement was signed, and the parties were married. Subsequently, the husband retained the attorney to prepare a deed to convey to the wife a 1/2 interest in his residential real property, the marital home. The deed was executed, witnessed, and notarized. The husband subsequently called and instructed the attorney not to record the deed until given further instructions. Fifteen months later, the husband demanded that the attorney give him the deed. The attorney was unable to contact the wife, and anticipated litigation from the wife if he turned the deed over to the husband. In this situation, the Greater Cleveland Bar Association indicated that the attorney's course becomes a mandatory one of disclosure, notice, and hopefully consent by both husband and wife to the disposition of the deed. If consent is not possible, then agreed upon arbitration or judicial intervention must be obtained. (Greater Cleveland Bar Association Professional Ethics Committee, Opinion 85-2, December 13, 1985, reported in ABA/BNA Lawyers Manual and Professional Conduct, January 8, 1986, at page 1121)

With respect to situation (1), involving the hospital bills, the Committee has been asked the following questions:

Query A: Has hospital established sufficient grounds to enforce a lien for payment pursuant to AS 34.35.450 — 34.35.480?

Query B: Should attorney pay the hospital bill pursuant to assignment or subscribe to the wishes of the client and forward final settlement proceeds to client directly?

Query C: Is attorney personally liable to either hospital or client for opting to pay one, and not the other?

Query D: Is written instruction from client directing direct payment to client sufficient to protect attorney from personal liability under the statute?

Whether or not a lien for payment has been established is a question of law, upon which the Committee cannot issue an opinion. If the attorney unilaterally makes an incorrect decision to pay either the hospital or the client, the attorney may very well be held personally liable for failure to pay the other. Written instruction from the client will probably not absolve the attorney from liability for failure to recognize a valid lien or assignment.

If there were no dispute as to the client's "entitlement" to the funds, the attorney would be ethically obligated to pay the funds to the client upon demand. If there is a dispute over whether or not the client is "entitled" to the funds, then it is necessary that the dispute be resolved.

The question of whether a client is "entitled" to funds in the possession of an attorney is most often a question of law, which will often require findings to be made which are based on disputed facts. If the attorney has any doubt as to whether the client is entitled to the funds, or the attorney reasonably anticipates potential personal liability in a situation where there is a dispute over the client's funds, then the attorney should ascertain if the dispute can be resolved amicably between the claimants to the funds. If the claimants cannot agree, then the attorney may seek judicial resolution of the dispute.

The same reasoning applies to situation (4), except that the legal question deals with failure to recognize a valid assignment only, without the additional problem of possible failure to recognize a statutory lien. The attorney here should also first ascertain whether the dispute can be amicably resolved between the conflicting claimants. Failing that, then the attorney may seek judicial resolution of the dispute.

Based on the foregoing, that portion of Alaska Ethics Opinion No. 80-1 which deals with the ethical responsibility of an attorney to pay known medical bills (Question 1 and its answer). is vacated.

Adopted by the Alaska Bar Association Ethics Committee this 4th day of November, 1986.

APPROVED BY THE
BOARD OF GOVERNORS
ON NOVEMBER 7, 1986.

ALASKA BAR ASSOCIATION
ETHICS OPINION NO. 86-5

RE: Withdrawal of an Attorney When the Attorney is a Potential Witness in the Case He is Handling

The Alaska Public Defender Agency (the "Agency") has requested that the Committee clarify under what circumstances it is necessary for an attorney employed by the Agency to withdraw from the representation of a criminal defendant in circumstances where the Agency attorney will or may be called as a witness.

Statement of Facts

The Agency represents defendant in several cases in which defendant is charged with various unrelated felonies and misdemeanors. Defendant failed to appear for hearings in several of these cases and as a result was charged with both felony and misdemeanor violations of AS 12.30.060 (sometimes referred to herein as the "violations of conditions" cases). The Agency has

Continued on page 24

Ninth Circuit Poll Results

Listed below are the results of the 9th Circuit Judicial Conference advisory poll. The results have been certified by the Association's Bar Polls and Elections Committee, and was presented to the Board of Governors at its January 8 & 9, 1987 meeting. The results are only advisory to the Board and the Board's recommendation is only advisory to Alaska U.S. District Court Chief Judge James Fitzgerald.

Both the Board and Judge Fitzgerald usually follow the will of the majority.

Gary A. Zipkin	**147***
Julie Werner-Simon	**130**
Allison Mendel	**86**
Leon T. Vance	**74**
John P. Griffin	**15**

**Has been appointed by U.S. District Court Chief Judge James Fitzgerald*

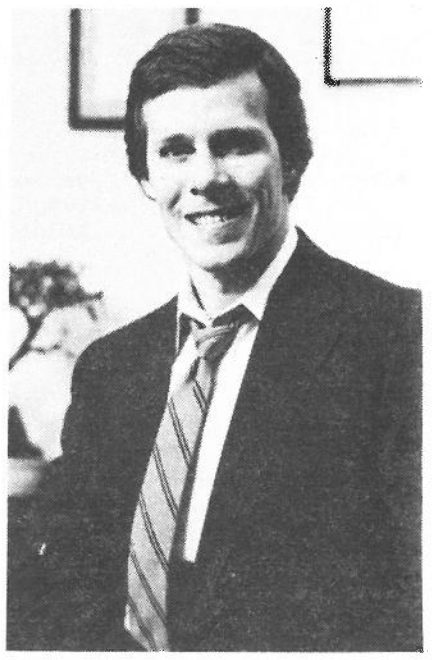
Fairbanks Convention

Banquet speaker to provide rare view of lawyers and the law

His business card read "Attorney, Author, Raconteur."

For those of you who don't have your dictionaries at hand, according to Webster raconteur is "one skilled in the narration of anecdotes or stories; one given to telling anecdotes." Our Executive Director, Deborah O'Regan, had the pleasure of seeing Dan White speak at a luncheon during last summer's American Bar Association meeting and was convinced that his brand of humor "would be particularly appropriate for this June's bar association convention in Fairbanks."

An invitation was extended and enthusiastically accepted by Dan White to be the featured speaker at the convention banquet, Saturday, June 6. The following article on Dan White is excerpted from an article on "Novel Lawyers" which appeared in the July/August 1986 issue of the "District Lawyer," a publication of the District of Columbia Bar, and is reprinted with their permission. The author is John Greenya, a Washington, D.C. lawyer.



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Dan White

Of all the books written by and about lawyers in the last few years, hardly any created more of a stir than a seemingly whimsical little volume written by Daniel White, a young associate at Hogan and Hartson. Much to White's surprise, it changed both his life and his profession.

"I worked at Hogan and Hartson for two years, eleven months, and four days — offhand. When the book came out, I gave the firm notice as to what I'd been up to, and then I went on a year's leave of absence." He never went back. "The benefit of that arrangement from my point of view was that I was on the firm's health insurance but I wasn't working there; the benefit from their point of view was that I wasn't working there."

White could have gone back after the year was up. No one at Hogan & Hartson told him not to. But he knew that all the attention given the book had almost certainly precluded him from ever becoming a partner. "I don't think you have to do much to doom your chances at a partnership in a big firm. The competition is such that they are virtually looking for reasons *not* to make someone a partner. So I think that if two or three senior people thought that was a frivolous or objectionable way to be spending one's spare time, that would have been enough. Having written that book meant that some people would forever think of me as a loose cannon."

The book that caused all this upheaval is *The Official Lawyers' Handbook*, the idea for which had come to White in 1982 from college friends of his who had written *The Official MBA Handbook*. In fact, they acted as his agents on the book, which was published by Simon and Schuster. During the nine months or so that he worked on the book (evenings and weekends: "I went underground socially.") White told various people at the firm what sort of book he was writing, and several of his fellow young associates read it in draft form and gave him advice. But few people expect a young person's first book attempt, no matter what the subject, to make much of a splash.

"Their book had sold fairly well, and relying upon the fact that there are more lawyers out there than MBA grads, I figured my book would meet with comparable success. It was number one on the D.C. best-seller list, and number five nationally. It sold about 100,000 copies in its first few months of publication, and about 150,000 over all."

What annoyed the purists was the book's clearly irreverent tone toward the law, or at least toward its stuffier parts and practitioners. White was well aware of its potential for "annoyance." No one who read it prior to publication tried to talk me out of it, but a couple of people said they required a guarantee of anonymity. Others, though, were happy to have their names in the "Acknowledgments" section. Indeed one fellow who is now a partner at Hogan is pictured in it. As a matter of fact, the people pictured in it were very well-credentialed: I think there are two editors-in-chief, a Supreme Court clerk, and a professor.

How did writing this kind of book affect White's legal career? "On the positive side, I now get speaking engagements. I'll be going to Hawaii to speak to the Washington State Bar Association this November, and I've spoken to the Virginia Bar Association, various law schools and other bar associations. On the down side, I suppose, at a large, conservative firm I would be seen as an unreliable commodity. But a smaller, more flexible firm would probably be more tolerant of one perceived as having a colorful personality."

Nonetheless, since his first book, Dan White has been spending most of his time as a writer. He wrote *White's Law Dictionary* in 1985, which was brought out by Warner Books, and now has just about finished another book on the law which, while ostensibly humorous, is intended to be a helpful primer for legal services.

"We joke about calling it 'The Screwee's Handbook.' It's kind of a guide for lay people — light, anecdotal, very practical. It's a layman's guide to the law which we are calling *What Lawyers Do, And How To Keep Them From Doing It To You*. It'll be light, but it'll be 80 percent serious. It will offer real information. I've spent about a year and a half on it, getting experts, including various professors and U.S. Attor-

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Convention CLE takes shape

James W. McElhaney

Evidence for Advocates.

James W. McElhaney will provide convention attendees with a dynamic new CLE program on "Evidence for Advocates." The program, which takes place at the Travelers Inn in Fairbanks on Friday afternoon, June 5, and Saturday morning, June 6, *is worth the price of the convention registration alone!!* The program is sponsored by the Professional Education Group, Inc., of Hopkins, Minnesota, which brought Irving Younger to Alaska last January for one of the most well-attended Alaska CLE seminars ever.

"Evidence for Advocates" provides a bold, straight forward and memorable approach to the law of evidence. The program combines the practical, analytical and theoretical aspects of the law and shows how to use them to be a more effective advocate.

The program begins with "The Open Door Theory of Relevance" which provides the understanding necessary to respond to what happens during trial and the specific rules that let an attorney put his theory of the case to work. McElhaney then focuses on character and impeachment. His twenty simple rules will untangle the common law and make sense of the Federal rules' requirements for attacking witnesses and their testimony.

Foundations and objections are next, as McElhaney provides an authoritative explanation of the rules of evidence, revealing the most effective way to use them to lay the proper foundation for evidence. The hearsay component of the program provides a sensible and fresh approach to understanding hearsay that reveals a rule that actually works in the heat of trial. Each of the 12 basic exceptions are covered as well as the fundamentals of privileges and judicial notice.

The seminar concludes with a practical and refreshing view of expert testimony that will allow attorneys to take advantage of the new techniques permitted by the changing rules of evidence.

James W. McElhaney is the Joseph C. Hostetler Professor of Trial Practice and Advocacy at Case Western Reserve University School of Law, Cleveland, Ohio, one of the nation's first endowed chairs in Trial Advocacy. He is the author of the West Publishing Company casebook, *Effective Litigation: Trials, Problems and Materials (1974)*. He is former Editor-in-Chief of the American Bar Association's *Litigation* journal, and contributes a column entitled "Trial Notebook" which focuses on basic trial skills. A collection of those articles is the feature of his latest book, *Trial Notebook*, which continues to break all ABA records as a runaway bestseller.

McElhaney has served as the Chairman of both the Section on Trial Advocacy and the Section on Evidence of the Association of American Law Schools and is a faculty member of the National Institute for Trial Advocacy in Boulder, Colorado.

McElhaney is featured on the NITA/ABA tape series *Training The Advocate* and *Training The Advocate: The Pretrial Stage*.

Deed of Trust Foreclosures
(Thursday, June 4)

The present state of the real estate market and pending Supreme Court decisions should spark a good deal of interest in this seminar scheduled for Thursday afternoon, June 4. Fairbanks' attorneys Barb Schuhmann and Jim DeWitt are coordinating a program on how to avoid problems in judicial and non-judicial foreclosures. The course will include a review of recent Supreme Court decisions.

Opening and Closing Arguments
(Thursday, June 4)

The Alaska Bar Association welcomes back Frank Rothschild, former Anchorage assistant district attorney, to its Fairbanks' convention. Frank will present a program on Opening and Closing Arguments.

TVBA Plans Convention Kickoff Event

The Tanana Valley Bar Association is offering a special convention kick-off event on Wednesday, June 3. Ed Noonan and company have planned a stopover in Denali National Park with whitewater rafting on the Nenana River, a campfire cookout, and TVBA's unique brand of hospitality. Double rooms at McKinley Chalet Resort are offered at an extra special rate of $58.50 per night. Watch for details.

Section Meetings
(Thursday, June 4)

Section meetings are planned for Thursday morning, June 4, beginning at 10 a.m. At the current time the following sections have indicated they will hold their annual meetings at the convention: Administrative Law, Alaska Native Law, Employment Law, Real Estate Law and Tort Law. Watch for agenda information in the convention brochure.

Annual Business Meeting

Plan to attend the bar's annual business meeting on Friday morning, June 5. The meeting agenda will include consideration of submitted resolutions, a report from the Lawyers Professional Liability Insurance Committee and a presentation on the recently approved Interest on Lawyer Trust Accounts (IOLTA) plan.

Special Events

Further highlights of the convention include a "Back in the 50's Night" event at The Center on Thursday evening. The Center is a multimillion dollar complex of restaurants, nightclub, bowling alley, movie theater and roller rink. Special events planned for the evening include a bowling tournament for kids as well as adults, prizes, and dancing. If you still have that poodle skirt, saddle shoes, hoola hoop, or enough hair to sweep into a ducktail, we encourage you to dress for the occasion. You may just win a prize for most authentic 50's dress (or should it be costume). Eat, bowl, see a movie or dance the night away in the Roof, The Center's nightclub. It's the perfect setup for both kids and adults to have a great time.

A delightful riverboat cruise on the Chena is planned aboard the "Discovery," Friday evening, June 5. Eats, music and special activities are being planned by Dick Savell and Niesje Steinkruger. This is always a popular event, so plan to be aboard the "Discovery" on Friday evening.

Luncheons are planned for all three days of the convention. Thursday's luncheon is a special welcome to the bar by the TVBA and local dignitaries. Friday's luncheon will hopefully feature Justice Jay A. Rabinowitz who has been invited by President Ralph Beistline to be guest speaker. Saturday's luncheon takes on a

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Fairbanks Convention Fairbanks Convention Fairbanks Convention

• White speaks

neys, and so on to read the various chapters. It'll be out next year."

In effect, Dan White has become a writer who practices law occasionally. He has had "an independent contractor association with a spin-off from Hogan and Hartson called Ross, Dixon, and Masback," where he does mostly commercial litigation. He has found that instead of being able to practice law on a regular basis of, say, two days a week, his law work comes in spurts of several months, but is often interrupted by his writing schedule or the editing and production schedule demands of his new book.

In conversation, White apparently finds it hard to be serious for too long. Shortly after mentioning that he did not want to name the local federal court judge for whom he once clerked "because I wouldn't want him to be embarrassed by any association with my first book," White then recalls that he used to tell interviewers that the main reason he left the law was "to meet women. No mystique could be less socially exciting than that of a lawyer. So I would have to say that based upon that alone, a writer's mystique is greater than that of a lawyer."

• Convention program

historical flavor at Alaskaland with a salmon bake and a special program by the Tanana Valley Bar Association. Additional entertainment at the Palace Saloon is scheduled for 2 p.m.

Saturday afternoon is devoted to races and family recreation at Alaskaland. A 10K footrace is scheduled as well as an inflatable canoe race on the Chena.

The TVBA is taking on extra responsibility in providing a number of events for kids. An outing to Chuck E. Cheese's and horseback riding is planned for Thursday afternoon followed by activities at The Center Thursday evening.

Special Group Airfares Arranged

The bar's travel agent, Executive Travel/Vacations Unlimited, has reserved blocks of seats at group airfare rates on selected flights to Fairbanks on Alaska Airlines. Seats have been reserved on flight #395 leaving Anchorage at 4:50 p.m. on Wednesday, June 3, and on Flight #89 leaving Anchorage at 7:00 a.m. on Thursday, June 4. Seats have also been reserved on Sunday's return flight #82 leaving Fairbanks at 11:30 a.m. (Of course, schedules are subject to change.) An ultra supersaver group rate of $144 roundtrip to Fairbanks is available (30-day advance purchase and change restrictions are being negotiated). The standard group rate without restrictions of $166 roundtrip is also available. Please call Executive Travel/Vacations Unlimited at 276-2434 to make your airline reservations and take advantage of the considerable savings of a group airfare rate.

LAWYERS AT PLAY

Alaska Bar hobbies from A to Z

Last issue, the Editor got the idea to feature attorneys and their hobbies (for pleasure or profit; their "other lives," so to speak). Appeals for news leads and tips went out to the populace and sub-Bars.

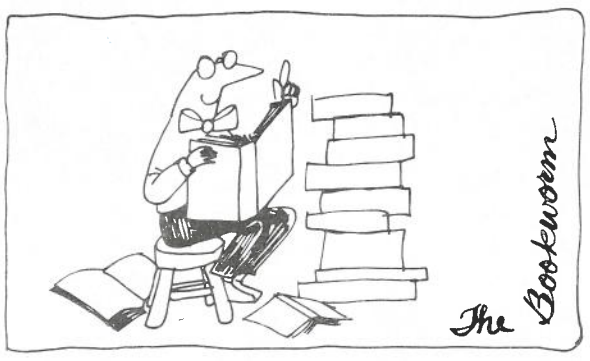
Various Bar Rag editorial repositories received the goods, in various sizes and shapes, from sources ranging from letterhead in the mail to cocktail napkins and anonymous phone calls from fictitious personages. We were looking for unusual pursuits, and by way of spinoffs are hoping that attorneys overlooked by spies in their areas will find themselves at some future time in the Bar Rag's "People" section, to provide editorial fodder additional to change of address notices and word of Alaska lawyers who have Headed South or Switched Allegiances.

Seeing a real nightmare in compilation, the Editor was smart enough to assign the rewrite to one of his staff consulting writers, who is not an attorney (to maintain a modicum of real newspaper objectivity).

He wanted small graphic drawings to go with the piece, and thought using a format something like "Attorneys at Play from A to Z" should be the assigned angle.

Bar Rag readers as a result will notice that the writer really was reaching to fill in some letters of the alphabet.

We covered more than 75 attorneys in this sweep. Read about them below.



A

There aren't many places more extreme on the globe than Alaska, but Fairbanks' Grace Schaible has found one. She's reported to be an avid Antarcticophile. (With her appointment as attorney general and attendant relocation to Juneau, Fairbanks' Mrs. Schaible may be a little closer to her chosen paradise in distance, but she'll be job bound for the near term.)

Also a gazer of far-way places is Supreme Court Justice Jay Rabinowitz, whose avowed interest in astronomy has him reaching for the stars. And Anchorage's Bob Wagstaff is a well-known aficionado of aerobatics (performing breathtaking stunts with aircraft); he's also the National Aerobatics Association president. And although just about any lawyer in modern times could be classified as an actor in front of the Court and Jury, there are members of the bar who pursue the fine art of performing on stage. Richard Collins, of Anchorage, is so inclined.

John Bradbury collects fine art; and artist Ed Nolte, of Juneau, is a respected painter of still life compositions.

B

"B," among other things, is for baseball, which pretty well describes the playtime pastimes of most attorneys in Valdez, according to bar sources in that Prince William Sound town. Among the more esoteric hobbies, George Hayes, of Anchorage is a scholar in Biblical studies. "Bragging," is also an avocation of the Kodiak Bar, according to an operative on the emerald isle. The bookworm of the legal community is John Burns, who collects old books and magazines. (Long nights in Fairbanks.)

C D E

"C" stands for endeavors in the musical performing arts. Charles Eastaugh, of Fairbanks, is a classical music expert. William Tull, of Anchorage, is a clarinetist in a Dixieland band, and Mike Jungreis plays the cello. (Not to be confused with "Jell-O™," referenced below under "J".)

•

The Bar Association's mini-survey of member dalliance also has indicated that a number of lawyers may be going to the dogs. Heavy into dog mushing are Myron Angstman (featured in the Bar Rag last year) and H. Connor and Margaret A. Thomas, of Nome. And Antoinette M. Tadolini shows dogs in Anchorage and elsewhere. Angstman, of Bethel, has competed in the 1,049-mile Iditarod race from Anchorage to Nome; his office runs on dog time.

•

Not many attorney hobbies and diversions begin with "E," but for starters, try "egghead." That might describe Julie Clark, of Anchorage, who is an active member of MENSA, the organization for individuals with exceptional IQ's. Add to Ms. Clark, Jeffrey Mayhook, who's an English professor at the University of Alaska, Anchorage, when he's not practicing the law.

F

Fishing and flying are popular hobbies with Alaska's bar, especially on the Kenai Peninsula, where a majority of members reportedly pursue one or both of these outdoor activities. And Arthur S. Robinson, of the Kenai Peninsula Bar, is a commercial fisherman in his spare time. J. Randall Luffberry, of the Matanuska Bar, is an avid pilot. Colette G. Thompson, of the Kenai bar, raises ferrets.

"Food," is a serious hobby with Anchorage's Philip Matricardi (the Bar Rag's restaurant reviewer). He also is the dining and gourmet cooking expert heard regularly on Anchorage public radio station KSKA. Down in Juneau, Avrum Gross is a WKF (well known fiddler), specializing in bluegrass. (He also plays a mean game of bridge.)

G

Gee, it was hard to come up with hobbies and leisure pursuits beginning with the letter "G." Golf came readily to mind, and sure enough, there's Gil Johnson, of Anchorage, who's a duffer on the links (that's golf, not gold). (See "Jell-O" below). Guns are the passion of Wayne Anthony Ross, of Anchorage, a collector who's also a director of the National Rifle Association. And, the bar has another scholar in Richard Garnett, III, a reader of ancient Greek (and other languages) in Anchorage.

H I

Hats off to Dick Madson, of Fairbanks, who's a collector of a different kind. (The hat you take off may well end up in his assortment of chapeau.) Ethan Windahl, of Anchorage, breeds horses, and James Ginotti, of the Matanuska Bar, raises man's favorite beast of burden in the lush, green grasslands of the Valley.

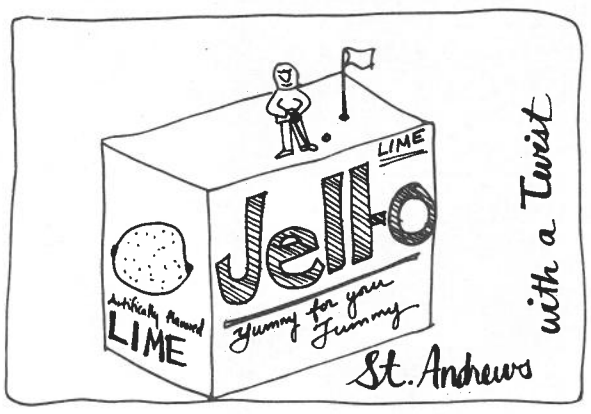
•

Ice fishing is popular wherever there are lakes in Alaska, but Nome's Jon R. Larson and Bryan Timbers are probably among few attorneys in the world who jig for crab in the Bering Sea. They're part of the Northwest Bar. There are icemen among us in the person of hockey players. (Read about them in a related article.)

Continued on page 18

Lawyers at Play

Hobbies even for V, X, and Z



J

Here it is. "Jell-O." By now, you've probably guessed that Kotzebue lawyers help host crazies from all over for the annual Kotzebue (Winter) Golf Classic, wherein (uncooked) green Jell-O is used to fashion greens on the ice. There are a couple other "J's," as well. Try "jockey," as in "disc jockey." In Kodiak, D. Todd Littlefield is a DJ on the local public broadcasting station semi-monthly, with rock 'n roll and a feature called "Women Who Are Stronger Than Dirt." Mike Roebuck and R. Scott Taylor spin old country, old jazz and reggae music on KOTZ in Kotzebue. And Ray Funk, of Fairbanks, is a jazz expert in Tanana Valley Bar country.

KL

The local lions Club in Kodiak would not be the same without L. Ben Hancock, who serves as president of that august service organization. As part of his duties as chair, he has organized such events as the Buskin River Raft Race, and Rat Roulette for the Kodiak King Crab Festival.

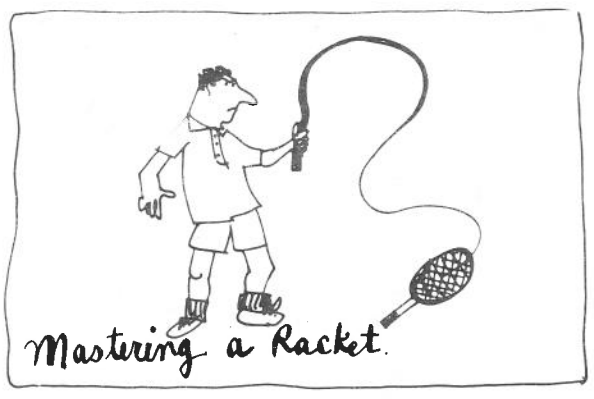
M

Mark Moderow, of Anchorage, is a mountaineer, as is John Duggan of the same town. Anchorage's bar also has a national marathoner in Peter Lekish.

•

N

Even a novelist lurks in the Alaska bar's midst — Eric Olson, of Anchorage. At least two serious netmen have been seen taking training in distant clinics expressly designed to improve mastery of the rackets. Anchorage's John Suddock and Eric Sanders, rackets in hand, have become veterans of California tennis camps.

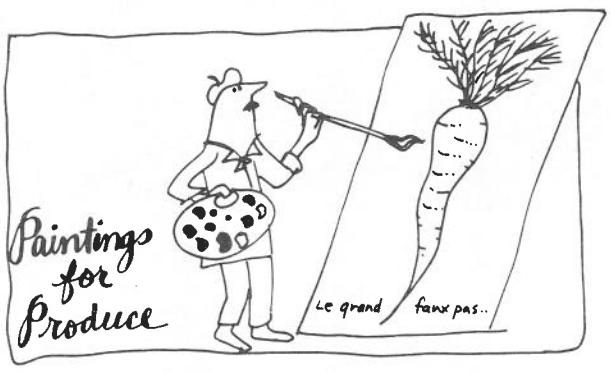


O

Orators can be found in any law office or courtroom in Alaska; or at least most attorneys would like to think they're capable of great speeches to the masses. Two owe their careers to the skill, though: Steven Cowper, late of Juneau, but hailing from Fairbanks; and Dave Walsh, who orates from tops of mountains in a mayoralty race in a city that shall remain nameless, to avoid all appearances of partiality. And the (Winter) Olympics absorb much free time of Shelby Nuenke-Davison and Tony Smith (both with roots in Anchorage), members of the Anchorage Organizing Committee for the 1994 Winter Olympics.

PQ

Painting is a pastime of Judge Joseph Brewer, of Anchorage; Lee Glass, of Seattle, is a physician and attorney. Greg Razo and Mike Wall are pinball addicts in Kodiak; and the island of crabs, balmy weather, and homey harbors also offers George Vogt as its ranking bar association poker player. And Joseph L. Kashi is a photographer of the first order. William C. Callow is an anchor for a barbershop quartet in Anchorage.



RS

Radio has attracted bar members all over the state, in addition to those mentioned elsewhere in this hobby report. Warren C. Christianson and Denton J. Pearson are able volunteers for KCAW in Sitka. Hugh Fleisher has a show on KSKA, Anchorage. Carol Johnson, of Anchorage, is known for her hobby of "road traveling"; and John G. Davies and William F. Tull, of the Mat-Su bar, have taken to travel of a different sort. They crew on a rowing team.

•

Barbershops aren't the only place singers can be found in the bar. Mark Bledsoe, of Anchorage, enjoys singing classical music. The Anchorage Symphony is a special cause for Hoyt Cole, a benefactor to the art. Another Anchorage attorney, Jacob Allmaras, enjoys skeet shooting and is a champion.

TU

Overwhelmingly winning the "balloting" for the most popular leisure pastime among attorneys is "travel." A few attorneys (mostly from Anchorage) provide a representative sample of where the bar's been: Carol A. Johnson — South Africa; J. Michael Moxness — Nepal; Judge Elaine M. Andrews — Afghanistan; Brant McGee — Burma; Kelly C. Fisher — Bali; William Grant Callow — Scandinavia; Lee Holen — Belize; and Eric M. Jensen — Mexico (reportedly "every chance he gets"). Rounding out the "T's" is Allen Bailey, of Anchorage, who is a model train collector.

Only one reported hobby could be pigeonholed in the "U" category: Deborah O'Regan is an underwater diver.

VW

What else? Video. (Not the kind that quarters are fed into). John Coyne is a familiar television commercial face around Anchorage parts. Jeff Lowenfels, Mr. Green Thumb, has a television program on KAKM-TV in Anchorage (and also writes a column for the newspaper). Ernest P. Worrell books, stickers, greeting cards and sundry gimcrackery proliferation in the Anchorage office of Bar Rag Editor Jim Bendell, KnowWhatIMean? (He's even in Worrell's Fan Club.)

Anchorage's Floyd Smith is an accomplished woodworker, as is James Gorton, Jr., who specializes in rebuilding furniture.

XY

How about xenogamy? That's the pollination of plants. The Alaska Bar has its share of plantophiles. Anchorage's Roger Holmes grows orchids. Anchorage's Burton Biss dabbles in farming, as do Mark Weaver and Thomas Edgar Williams, of the Mat-Su.

•

Is there any question that "Y" stands for the Yukon Quest, the long-distance sled dog race extending 1,000 miles from Fairbanks to Whitehorse, Y.T.? Dave Monson, (also a veteran of the Iditarod) was in third place four days into the race as the Bar Rag went to press. The Manley musher was just 20 minutes behind the leader(!)

We had to work to find a "Z" for bar member sidelines, but found zymology in the dictionary. For the uninitiated, zymologists use the age-old process of fermentation to produce beverages. The Bar Rag's own Chuck Ray, of Anchorage, brews beer at home.

Z

Lawyers at Play

Hockey heroes take to ice

By John Reinan

Where can you find a prosecutor sweating to advance the cause of a man who gets accused criminals out of jail?

Where can you see a family lawyer adopt fisticuffs as a means of mediating disputes?

Where can an attorney curse a judge without drawing a contempt citation?

On the hockey rink, of course.

A growing number of Alaska attorneys are finding satisfaction in the speedy, rough-and-tumble sport of ice hockey. What attracts these otherwise intelligent professionals to a sport that features armored squads of stick-wielding aggressors crashing into each other at speeds of more than twenty miles an hour?

Some grew up with the game in the Midwest or on the East Coast, where it has long been popular.

"I've been playing since the days of leather helmets," said Minnesota-born Bill Ingaldson. Ingaldson, an assistant district attorney in Anchorage, plays on a team of lawyers sponsored by Fred's Bail Bonding.

Others mention exercise and camaraderie as attractions of the sport.

"There are limited opportunities for outdoor exercise in the winter," said Brian Bjorkquist of Hughes Thorsness Gantz Powell & Brundin. "I've found hockey to be a great way to stay in shape during a time of the year when it's tempting to stay inside too much. And it's fun to rehash the game later."

Richard Maki of Hellen Partnow & Condon is the player-coach of Fred's Bail Bonding. Maki suggests that there are other aspects of the game to enjoy.

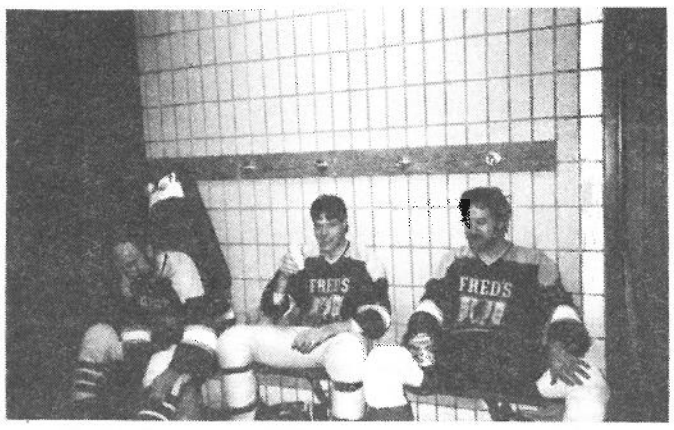
"Some players claim they're in it for the exercise," said Maki, "but given the beer they drink after the games you have to wonder."

Maki's team is the premier lawyers' hockey team in the state. The team won the title in its Anchorage city league last year and has taken two out of three series against a lawyers' squad from Fairbanks.

The secret of his coaching success, says Maki, is "never raising my voice and never calling anyone on the team a fathead."

Another Anchorage lawyers' team, the No Stars, recently finished second in its league, losing the championship game in overtime. The No Stars are sponsored by Hughes, Thorsness.

The Godfather of barrister hockey in the state is retired Acting District Court Judge Gene Williams of Anchorage. Williams has been playing here since 1955.



Photos clockwise from top left:

Fred's Bail Bonding team photo: Front row, L-R: Jack Duggan, John Bodick, Cam Rader, Dale Baxter, Richard Foley, Clark Stirling. Back row, L-R: Frank Flavin, Brian Bjorkquist, Rich Maki, Jim Wilkens, Tom Matthews, John Reinan, Bill Ingaldson.

Shaking heads after a win over the Alaska Railroad team.

L-R: Richard Foley, Jack Duggan, Rich Maki and Brian Bjorkquist check out the action from the bench between shifts.

So this is why they play! L-R: Frank Flavin, Bill Ingaldson, Jack Duggan relax after the game.

"We had a team in the old Rec League," said Williams. "Phil Byrne, Bob Perry and Frank Nosek all played."

Later, said Williams, "we persuaded Chancy Croft to play goalie for us. Too bad he played goalie — if he'd played another position, he might still be playing today. Stan Ditus played a few games for us as goalie, too."

Williams also sold hockey equipment in the early days because, he said, there was no other place in Anchorage to get it.

"I should have gone into it full-time," he said with a laugh. "It beats practicing law."

Other well-known pucksters include Judges John Mason and David Stewart of Anchorage and Jay Hodges of Fairbanks, who is noted for his flamboyant goaltending. Frank Flavin, executive director of the Judicial Conduct Commission, has played in international tournaments all over the world. He has also made several appearances in Snoopy's Summer Tournament, an event sponsored by Charles Schulz, creator of the comic strip *Peanuts*.

A regular Saturday afternoon scrimmage at Central Junior High in Anchorage attracts many newcomers to the game and serves as a training ground for entry into the city leagues.

With the continuing influx of new players into the game, lawyers' hockey in Alaska seems certain to flourish. And if enough of them continue in the sport, they may even be able to rid it of unnecessary roughness.

After all, would *you* start a fight in front of a dozen potential plaintiff's attorneys?

John Reinan, a paralegal for Hellen Partnow & Condon, plays for Fred's Bail Bonding. He wrote this story with a broken hand suffered in action on the rink.

Lawyers at Play

Wagstaff pursues ARESTI

By Mickale C. Carter

Bob Wagstaff learned to fly while going to law school in the mid 60's. Perhaps that is where his conviction that flying and the practice of law are inseparable originated. He began practicing law in Alaska in 1968 and has established an office in Anchorage and one in Dillingham to which he flies regularly.

He holds an Airline Transport Pilot License. Although he has owned 15 airplanes, he presently owns only 4; a Beechcraft Barron twin engine; a Cessna 185; and two Pitts Specials.

Bob gave his wife, Patti, her first flying lesson in 1979. Shortly thereafter, she became interested in aerobatic flying. The two Pitts Specials are aerobatic aircraft. Bob is quite modest with regard to his own aerobatic accomplishments. He prefers talking about his wife. After only three years of aerobatic flying, Patti was selected to be on the 1986 United States Women s Aerobatic Team.

He and his wife have devoted the last three summers to flying in aerobatic competitions across the country. There are 40 regional aerobatic competitions plus the International Aerobatic Club (IAC), International Aerobatic Championships. From the winners of the International Aerobatic Championships are selected the five men and the five women who make up the U.S. Aerobatic Team. This team competes in the World Aerobatic Championship. The 1986 championship was held in England. The U.S. team took second place honors in both the men's and the women's team and individual titles. The first place honors in both the men's and women s team were taken by the Soviets. The men's individual champion was a Czechoslovakian. The women's individual champion was a Soviet. The World Aerobatic Championship is held every two years. The trophy for this competition is called the Aresti. The next Championship competition will be in 1988 in Red Deer, Alberta.

Bob admits that his summers can get a little hectic. He continues to practice law, traveling back and forth between Anchorage and the location of the aerobatic competitions. When queried as to how he juggles his law practice, he stated, "I couldn't do it without Federal Express and telephone credit cards." Keeping up with his active law practice requires arranging his schedule in advance. He additionally works evenings and when he is not at a show, he works weekends.

Bob recalled a particularly grueling schedule of last summer. He flew his plane to St. Louis on Sunday from a show in Illinois. He left the plane in St. Louis and flew on a commercial airline to Anchorage Sunday evening. He worked in Anchorage until Thursday when he flew all night to St. Louis. He then retrieved his plane and flew it to Dallas for the three day air show. That Sunday evening he returned to Anchorage.

Bob is the president of the United States Aerobatics Foundation. He is in charge of administration and fund raising for the U.S. Aerobatic Team, for the World Championship to be held in 1988. Bob's goal as president of the U.S. Aerobatics Foundation, is "to get the Aresti Trophy back from the Russians." The primary sponsor for the U.S. Aerobatics Team for the last eight years has been Hilton International. It cost about $500,000 for the U.S. team to go to England for the World Championship. That amount does not include much of the cost which is borne by the individual contestants.

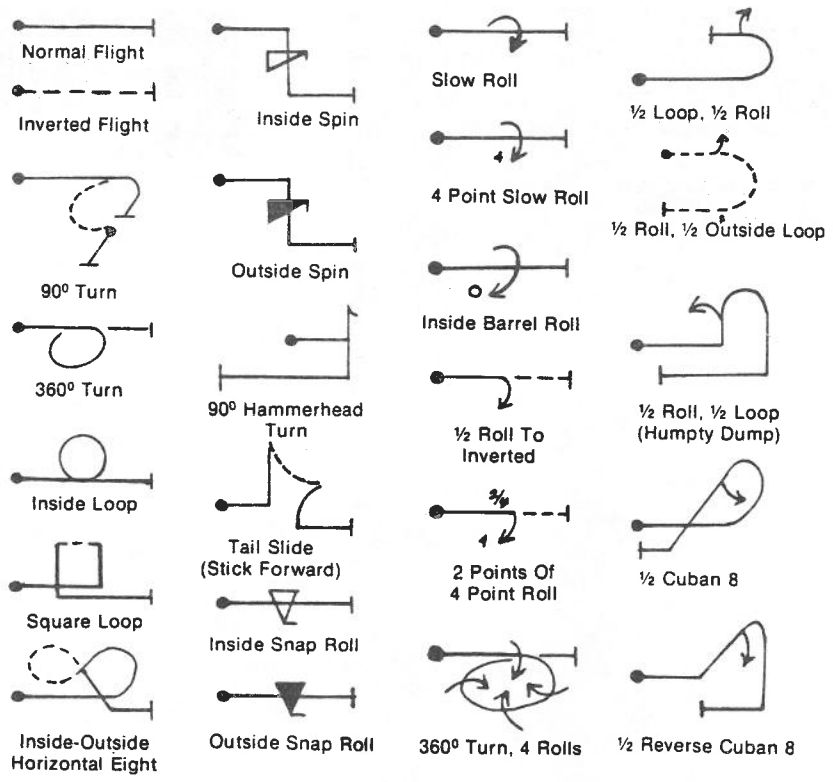
Bob likened aerobatic flying to competitive figure skating. The flights are graded by a team of five judges. They are scored from 0 to 10 based upon such factors as precision of lines and angles, symmetry of figures, and other factors described in the IAC's Official Contest Rules.

The most advanced of the contestants flies four flights. The first is known as "Compulsory." These maneuvers are predetermined each year. Every pilot flies the same maneuvers. Each pilot then flies what is known as a "Free Program." This program is determined by the individual pilot with the requirement that five types of maneuvers must be displayed. For the "Unknown Program", the pilot receives the description of the competition's sequence only hours before his flight. He is permitted to only mentally practice the sequence.

Finally, the pilot flies a "Four Minutes Free Program." This finale is free style. The pilot may do anything he chooses. Whereas the previous three sequences are judged only on precision, the finale is additionally judged for originality, execution, and versatility.

Prior to his flight, each pilot provides the judges with graphic representations of his competition sequence. These graphic representations are known as the Aresti key. *See* diagram 1. The system of graphic depiction of the maneuvers was devised by J. L. Aresti of Spain. Each maneuver is assigned a difficulty quotient, or K Factor, based on the difficulty involved in performing the maneuvers. The judges in turn score the maneuvers on a scale from 0 to 10. The K Factor and score are multiplied to derive the points for that maneuver. A computer then adjusts the totals to account for bias.

The pilot is judged not only on the precision of his maneuver, but on how well his sequence is positioned within an imaginary box. This box is an area of 3,300 feet long by 3,300 feet wide with the top at 3,500 feet. The bottom of the box varies according to the competition category. For the novice, the base is 1,500 feet, for the most experienced it is 328 feet.



BASIC ARESTI KEY

Alaska Bar Association Board of Governor's Elections

Third Judicial District

The candidates:

John W. Abbott
Russell S. Babcock
Dana Fabe
Harold W. Tobey
Lynn M. Allingham
Joseph M. Charter
Paul D. Kelly

Combined Second & Fourth Judicial Districts

The candidates:

Richard Erlich
Ardith Lynch
Edward T. Noonan

Alaska Legal Services Board of Directors' Elections

First Judicial District

The candidates for the Regular Board seat are:

Sarah J. Felix
Mary E. Guss
Patrick J. Gullufsen
Richard D. Monkman

NOTE: Only one person, N. Deliza Spangler was nominated to the alternate's seat. Therefore, Ms. Spangler's name will be submitted to the Board of Governors for its consideration for the First Judicial District ALSC alternate position.

Fourth Judicial District

The candidates for the Regular Board seat are:

Richard J. Ray
Geoffrey B. Wildridge

NOTE: Only one person, Mason Damrau, was nominated to the alternate's seat. Therefore, Mr. Damrau's name will be submitted to the Board of Governors for its consideration for the Fourth Judicial District ALSC alternate position.

Special Report

Alaska Bar Continuing Education

According to the Bylaws of the Alaska Bar Association, one of the purposes of the Alaska Bar is to "encourage continuing legal education for the membership." Linda Nordstrand, the CLE Director, and the Continuing Legal Education Committee, chaired by Maryann E. Foley, are responsible for presenting legal education seminars to the membership. 70% of the CLE Director's time is designated for CLE functions, i.e., scheduling, coordinating, and administering all of the CLE seminars. The remaining 30% of the CLE Director's time involves administrative functions not directly related to CLE.

Following is a summary of some questions that are frequently asked about the Bar's Continuing Legal Education program.

Q. What is the function of the CLE Committee?

A. The CLE Committee meets annually in the fall. They review the previous year's experience, how the programs did attendance-wise and financially, and what worked and what didn't work. Upcoming programs and suggestions for programs are discussed. The position of CLE Committee chair is extremely important as the CLE Director is in constant contact with the chair on CLE program issues, suggestions and problems. Maryann Foley, the CLE chair, has provided a great deal of guidance and has been of enormous assistance to the bar staff.

Q. Does the CLE Committee have a curriculum?

A. If curriculum is defined as a predetermined schedule of seminars that are repeated on a periodic basis—no. However, some programs such as Off the Record and Trial Advocacy are repeated as need dictates. Some of the larger states do operate on the basis of a curriculum, especially those that have mandatory CLE or must offer a certain number of ethics hours to meet minimum requirements.

Q. How are CLE program topics selected and scheduled?

A. According to the association's bylaws and standing policies, each substantive law section is responsible for organizing a CLE program at least once every two years. Depending on changes in the law, current issues or whatever, sections may be asked to sponsor programs more frequently. Other topics are suggested by the state and federal courts, by various committees, or by bar members themselves. Judges Fitzgerald and Serdahely, as well as Justice Rabinowitz, are aware of the bar's CLE programming efforts and also make suggestions from time to time.

Q. How does the bar's CLE programming compare to that of other bar associations Outside?

A. The CLE Director belongs to a national organization, the Association of Continuing Legal Education Administrators, which meets twice yearly. It is very helpful to meet and exchange information with CLE directors of other state bar associations, particularly those that have approximately the same size bar membership as Alaska. Given the size of the bar, Alaska's location relative to the lower 48, the fact that there are no local law school resources on which to draw, and the expense of putting on programs in Alaska—CLE does very well in Alaska. The bar's programs compare favorably with programs sponsored Outside, given the factors mentioned above.

Q. Other bar associations have a publications program. Is this something the Alaska Bar could do?

A. It would be a substantial effort on the part of volunteers and would probably have to be coordinated by a publications committee of some sort. Other bar associations have the resources to offer some very fine publications in addition to those provided in connection with CLE programs. It would be wonderful to be able to provide desk references on this topic or that topic, but at present the bar association does not have the resources to support a full-scale publications program. However, the bar invites individuals or groups to suggest particular projects.

Q. What is involved in planning a CLE Seminar?

A. According to a schedule that is maintained by the CLE Director, sections are periodically informed that they are on the calendar to plan a CLE program for a particular timeframe, e.g., fall, winter, spring. The sections are contacted as much as ten to twelve months in advance, since the objective is to schedule the CLE calendar twelve months in advance with at least tentative program dates.

Q. What is the section's responsibility in planning a CLE seminar?

A. The sections select the topic, refine the course content, decide who the speakers will be and are generally in control of the program schedule. The CLE Director provides whatever assistance the section may require to accomplish these tasks. Frequently the most difficult task is selecting and refining the topic and then getting started on the planning. Once the program topics and speakers have been selected it is a matter of making sure the speakers know exactly what is expected of them and ensuring that the course objectives are met. By serving on a CLE planning committee section members gain the satisfaction of knowing they have sponsored an quality program that has met the educational needs of the bar membership.

Q. How is course quality ensured?

A. A CLE handbook is available for use by the section planning committees. It guides the sections through the tasks that need to be accomplished in planning a seminar, from selecting a topic to making sure course materials are available. The CLE Director also is involved in the initial planning sessions, when topics are being discussed. It is occasionally difficult to select topics or to ascertain the degree to which a topic should be covered, i.e., advanced, intermediate or basic. The sections consider current "hot" topics, the impact of recent legislation or statutes, topics that haven't been presented recently, and the level of experience of the attorneys that will be encouraged to attend. Section program committees also need to take great care in selecting faculty who have an expertise in the area of law and are good public speakers.

Q. How are seminars priced?

A. Basically, an educated guess is made of the probable attendance. Estimated costs are figured and the registration fee set accordingly. Brochures, postage and room charges are generally fixed items for day long programs. Variable factors can include different course formats, such as half days or breakfast seminars, expenses for speakers, honorariums, lunches, and voluminous course materials to copy or purchase. Typically some seminars make a little and some lose a little, so by year end it balances out. 1986 was an excellent year which allowed the bar to upgrade its videotaping equipment.

Q. What affects attendance at CLE programs?

A. The most important factor is the program topic and subtopics. Seminars where the topic is directly beneficial to an attorney's practice will have the best attendance. Speakers and program format are secondary, but also important factors. For example, the ethics seminar in the fall of 1985 was not well attended, although it was an excellent program with an excellent speaker—the topic was just not perceived as being directly beneficial to the attorney's practice. Also, most attorneys look for very specific information, even with ethics issues, and that seminar may have been a bit too basic.

Q. How important is program format?

A. The Evidence Mini-Seminars were very successful, but too many were scheduled over too long a time period—six seminars in five months. The breakfast format was very popular, however, and is one that will probably be used again in the future if appropriate to the topic. Also, splitting programs over several days will be avoided, such as the two consecutive Thursdays for the Family in Crisis seminar. That seminar was cancelled due to insufficient pre-registration and will be rescheduled as a short series of mini-seminars.

Q. What were some of the more successful programs in 1986?

A. 1986 started off with an excellent program by Irving Younger. This was a program where the speaker was probably more of a draw than the topic. He is something of a legend. The Evidence Mini-Seminars were popular. The Exploding the Myths seminar on law practice was very interesting, and the Wrongful Discharge seminar was extremely well done. A year long effort on the part of many volunteers culminated in the Bridge-the-Gap program and an excellent manual. 1986 was a very good year.

Q. What is the opinion of CLE in Fairbanks and Juneau and other locations?

A. It is to be expected that they desire as much "live" CLE as possible. The Board is very aware of this desire and has mandated that the bar staff do whatever it can to provide "live" CLE where feasible. Obviously there are some topics which would have little or no interest in Fairbanks or Juneau but could support a CLE here in Anchorage. Therefore the bar association needs to know from the local bars what kinds of programs would be worthwhile to present in their locations. Last year both Juneau and Fairbanks sponsored some local CLE programs and this is very encouraging.

Q. How does the videotape library work?

A. Most of the bar sponsored programs are videotaped. Some cannot be videotaped such as the program featuring Irving Younger. At least two sets of tapes are maintained for each program, sometimes more depending on demand. As soon as a live program concludes, copies of the tapes go to Fairbanks and Juneau for video replays if pre-registration is sufficient. Once the tapes are returned they are then offered to bar members on a waiting list basis. It can be quite a wait. The Wrongful Discharge seminar had an extensive waiting list and although four copies are available there is still some delay. Bar members are allowed to keep the tapes for up to two weeks. If they are not returned within that time a letter is sent reminding them that other bar members are waiting to see the tapes. If that doesn't work, a phone call usually does. A CLE directory is published periodically which lists the tapes and materials that are available and any fees.

Q. Is the tuition credit option plan used very much?

A. A tuition credit of up to 50% of the registration fee is available to those bar members who travel to a live seminar via commercial transportation. There have probably been three dozen instances where it has been used since the Board approved the option. The tuition credit option probably doesn't significantly reduce the expense of attending a live seminar in Anchorage, but it is an indication of the Board's sensitivity to the difficulty outstate attorneys have in attending live CLE.

Q. What are some of the more common comments from bar members about CLE programs?

A. There are several: the seminar was too basic or the seminar was too advanced, the seminar presentation was not what was advertised in the brochure or (same seminar) the seminar was exactly as expected. Others are that the advertised schedule was not adhered to—fortunately that doesn't happen too often—or that materials were not available prior to the seminar.

Q. Why aren't the materials available in advance of the seminar?

A. Seminars are coordinated by volunteer committees, composed of very busy attorneys. Although deadlines are established so that were the materials turned in on time they could be sent to registrants in advance of the seminar, this typically does not happen for all same the reasons that any deadline is missed. It is especially difficult if materials are coming from several sources. The bar staff is well aware of the importance bar members place on materials and it would be helpful in many cases if they had the opportunity to review them in advance of the seminar. This year the Hawaii seminar materials will be sent to registrants in advance. Archibald Cox, Bob Wagstaff and David Mannheimer promised that they would get the materials turned in early enough.

Q. Is mandatory CLE a possibility in Alaska?

A. Although the survey conducted last spring indicated an even split on that question, the general consensus is that it is not going to happen in Alaska any time soon. The Board has discussed the issue but has not come close to supporting such a rule. The trend Outside is toward mandatory CLE. It is expected that by the end of 1987 over half the states will have mandatory requirements of some sort. Because requirements can vary widely from state to state there is an attempt being made to standardize requirements or at least provide a central clearinghouse for the accreditation procedures.

Q. Does the bar association keep track of attendance and credits earned for attorneys?

A. Yes, a computer program was initiated last January to keep such information—mostly as a means to do some statistical analyses. It is not a perfect system, however. There still needs to be some refinements. At the present time, the system keeps track of attendance of attorneys at programs held in Anchorage, and some but not all of the CLE programs attended by Fairbanks or Juneau attorneys—it depends on whether there is a group showing or not. The system does not keep track of those attorneys who rent the videotapes on an individual basis. If Alaska had mandatory CLE, credit and attendance information would need to be maintained not only for Alaska bar members but for members from other mandatory bars who are practicing in Alaska.

Q. What do bar members think of the quality of the videotaped CLE programs?

A. Mediocre at best. The bar association did take a good look at its video equipment and techniques as a result of the CLE survey on videotapes. At the November Board meeting, the bar staff requested and the Board approved, the purchase of new camera equipment and a new sound system. The equipment should arrive sometime in February. A professional quality videotape medium for taping and duplicating will also be used. Bar members should see a "significant improvement." Hopefully that will be the case.

Q. Do many attorneys attend the Hawaii seminars every year?

A. Right now registration is about 60 which is where it usually is this time of the year. Last year over 100 registered. This year's program on Appellate Advocacy should be a good one. Archibald Cox is a name most everyone will recognize from the Watergate days. Bob Wagstaff and David Mannheimer have met several times and have devised some worthwhile tasks for the workshop on the fourth day. Cox is very knowledgeable about the topic and is excited about meeting some Alaskan attorneys, especially in Hawaii. A point of note: the Board hasn't met in Hawaii for a number of years—someone responded to the CLE survey thinking that they still met there. The Hawaii program is completely funded by registration fees. Registrants pay their own hotel and air expenses.

Q. Have you thought of other locations?

A. Yes, especially the Mexican Riviera—Acapulco, Puerto Vallerta or similar location. The dollar would certainly go farther, but the program would lose some of the Hawaii regulars. The composition of the group would certainly change. A change in location would have to be approved by the CLE Committee.

Q. Can Alaska take advantage of the satellite CLE programs offered in the lower 48?

A. It would be wonderful to tap into that system—even if the programs were shown at 5 or 6 in the morning. Currently the "footprints" of the two satellites now showing these programs don't reach Alaska—they may just touch Southeast Alaska. Joe Skrha, a member of the CLE Committee, is into satellites and he is keeping the committee abreast of the latest developments in this area. It appears that sometime in the future the bar may be able to take advantage of satellite programming.

Q. Was the bar response to any one particular program surprising?

A. Yes, the response to the ABA VideoLaw seminars was overwhelming. A registration of about 75 was anticipated, but almost twice that many attended each seminar. The response in Fairbanks and Juneau was also outstanding. So many attorneys registered in the last two days prior to the seminars that there weren't enough course books. It meant scrambling for additional space and materials at the last minute. Hopefully not too many attorneys were disappointed by not having their materials at the time they attended the seminars.

Q. What CLE program effort could be considered the "high point" of 1986?

A. Bridge-the-Gap was a wonderfully done project. Although seminar attendance was not quite what was expected, it was a tremendous cooperative effort by attorneys, legal secretaries and legal assistants that resulted in a very good seminar and an excellent manual. Comparing the Bridge-the-Gap manual to those from other bar associations, our volunteers did an outstanding job. It was wonderful to see a year long project finally come together and result in a worthwhile product. Without volunteers from the bar membership there wouldn't be a CLE program. The bar association staff appreciates the time and effort those volunteers have devoted to meeting the educational commitment of the bar.

Additional questions or comments about CLE may be directed to Linda Nordstrand, CLE Director, or Maryann E. Foley, CLE Chairperson.

CLE Calendar

Date	Topic	Location
March 9–15	Appellate Advocacy	Kauai, Hawaii
March 31 Mini-Seminar	Domestic Issues: Child Support	Captain Cook
April 7 Min-Seminar	Domestic Issues: Domestic Violence	Captain Cook
April 9 Full Day	Business Torts	Hilton
April 21 Mini-Seminar	Domestic Issues: Wills, Trusts & Estates/ Guardianships and Conservatorships	Captain Cook
April 24 Full Day	Subsistence Issues	Egan
May 9 Full Day	Off the Record/Fast Track System	Egan
May 15 & 16 1½ Days	Bankruptcy Law	Captain Cook
June 4, 5 & 6	Fairbanks Convention CLE Evidence for Advocates Deed of Trust Foreclosures Opening and Closing Argument	Travelers Inn

• Ethic opinions adopted

Continued from page 13

been appointed to represent defendant in defending the AS 12.30.060 misdemeanor charges. It is anticipated that the Agency will be appointed to represent the defendant in defending the felony charges.

The Agency attorney assigned to represent defendant was informed by the District Attorney's Office that the Agency attorney will not be called to testify at the Grand Jury proceedings, but may be called as a witness at defendant's trial.

The Agency attorney assigned to defendant's underlying cases is a potential witness at trial with regard to the events which transpired during the various hearings at which defendant failed to appear and the Agency attorney attended. The arguments which defendant will raise in defense of the violations of conditions charges may relate to the notice defendant had of the various hearings defendant failed to attend and the contacts the Agency had with the District Attorney's Office with regard to these hearings.

The Agency has asked the Committee to determine:

1. Whether the Agency is required to withdraw from representing defendant in the violations of conditions cases at which Agency attorneys are likely to be called as witnesses;

2. Whether the Agency is required to withdraw from the underlying criminal cases out of which the violation of conditions charges arose;

3. Whether the Agency is required to withdraw from representing defendant in a separate criminal case in which there are presently no violation of conditions charges, but in which such charges are potential and the Agency's attorneys are potential witnesses with regard to these charges;

4. Whether the Agency is required to withdraw from an appeal on which the briefing and argument are concluded and the court's opinion is pending.

Conclusions

1. The Agency is required to withdraw from representation of defendant in cases in which Agency attorneys will or are likely to be called as witnesses;

2. The Agency is not required to withdraw from the underlying criminal cases out of which the violation of conditions charges arose;

3. The Agency is not required to withdraw from other cases in which there are no pending violation of conditions charges;

4. The Agency is not required to withdraw from an appeal on which briefing and argument are concluded.

1. *Whether the Agency is Required to Withdraw from Representing Defendant in the Violation of Conditions Cases at Which Its Attorneys May be Called as Witnesses.*

The Agency has indicated to the Committee that the defenses which defendant will most likely raise with regard to the violation of conditions charges will relate to the notice defendant was given as to future dates and times of hearings. Such notice would have been given at the hearings attended by the Agency attorney but not by defendant, or received by the Agency attorney through contacts with the District Attorney's Office. The Agency attorney may be a witness on behalf of defendant in support of his lack of notice defenses or on behalf of the prosecution in support of its position.

Canon 5 of the *Code of Professional Responsibility* provides that a "lawyer should exercise independent professional judgment on behalf of a client." In order to safeguard this independent professional judgment, the lawyer is required to withdraw from the representation of a client under certain circumstances when he is a potential witness in the client's case or when his testimony may be adverse to his client.

DR-5-102(A) provides:

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

A lawyer's ability to exercise independent judgment is obviously placed in a compromising position if the lawyer's duty as an advocate becomes intermingled with his role as a witness in the same proceeding. *Williams v. District Court*, 700 P.2d 549, 553 (Colo. 1985). The duty of a lawver as an advocate is to represent his client zealously within the bounds of the law. Cannon 7, *Model Code of Professional Responsibility.* The responsibility of a witness, on the other hand, is to testify objectively to facts within the witness' knowledge. A lawyer who intermingles the functions of advocate and witness diminishes his effectiveness in both roles. *See Williams,* 700 P.2d at 5532; *Cottonwood Estates, Inc. v. Paradise Builders, Inc.,* 624 P.2d 296, 299-300 (Ariz. 1981). Any attack upon the lawyer's credibility as witness will necessarily have a detrimental impact upon the lawyer's credibility as advocate. *See also* ABA Informal Opinion 1446 (February 3, 1980); Alaska Bar Ethics Opinion No. 85-3 (August 23, 1985).

DR-5-102(B) provides:

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

DR 5-102(B) addresses the situation where a lawyer may be called to testify on behalf of the opposing party. For the withdrawal requirement of DR 5-102(B) to apply, it is only necessary that a lawyer "may" be called to testify for the opposing party. Therefore, because the District Attorney's Office has indicated that it will potentially call the Agency attorney assigned to defendant's case to testify at trial, the requirements of DR 5-102(B) are applicable.

The withdrawal requirement of DR 5-102(B), however, only applies if a lawyer's testimony is or may be prejudicial to his client. It is sufficient that the attorney's testimony be only potentially prejudicial for withdrawal to be required. Because the Agency attorney's testimony will relate to matters which are directly relevant to any defenses that defendant may raise against the AS 12.30.060 charges, the attorney's testimony is potentially prejudicial to defendant. Accordingly, the Agency attorney is required to withdraw from representation of defendant in the violation of conditions cases at which he is likely to be called as a witness.

It is clear from the provisions of DR 5-102(A) that a lawyer should withdraw from representation when he *ought* to be called as a witness for his client concerning a disputed question of fact relating to the merits of the cause, if such withdrawal would not work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case. *National Filtronics, Inc. v. Sherwood Land*, 428 So.2d 11, 14 (Ala. 1983). The decisive question is not whether the lawyer will be called as a witness, but whether he *ought* to be called. *People ex. rel. Younger v. Superior Court of San Bernadino County*, 86 Cal. App.3d 180, 150 Cal. Rptr. 156 (1978). It is also clear from the provisions of DR 5-102(B) that a lawyer should withdraw when the testimony will be adverse to the client.

2. *Whether the Agency is Required to Withdraw from the Underlying Criminal Cases Out of Which the Violation of Conditions Charges Arose.*

There is no indication that the Agency attorney assigned to represent defendant will be called to testify in the underlying criminal cases out of which the AS 12.30.060 charges against defendant arose. Accordingly, the Agency attorney assigned to defendant's case is not required to withdraw from representing defendant in defending the underlying criminal cases out of which the violation of conditions charges against defendant arose.

3. *Whether the Agency is Required to Withdraw from Representing Defendant in a Separate Criminal Case in Which There are Presently No Violation of Conditions Charges But in Which Such Charges are Potential and the Agency's Attorneys are Potential Witnesses with Regard to These Charges.*

For the same reasons stated in response to the Agency's second question, the Agency is not; required to withdraw from representation of the defendant in a separate criminal trial. At present there are no violations of conditions charges. There is therefore insufficient likelihood that the Agency attorney assigned to represent defendant will be called to testify. Moreover, the Agency has presented no facts to the Committee which suggest that the Agency attorney assigned to defendant's case will be called to testify in the criminal case at issue.

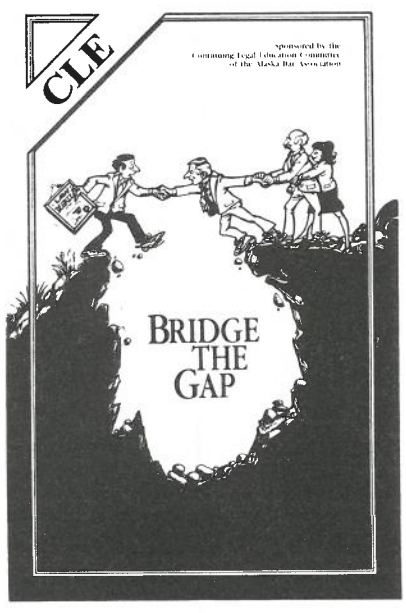
4. *Whether the Agency is Required to Withdraw from an Appeal on Which the Briefing and Argument are Concluded and the Court's Opinion is Pending.*

Regardless of whether the appeal at issue involved the defense of defendant with regard to AS 12.30.060 charges or the underlying criminal case out of which the AS 12.30.060 charges arose, no withdrawal is required. Withdrawal of the Agency attorney assigned to defendant's case would be required if the Agency attorney was a potential witness in defendant's defense. At this late stage in defendant's case, where the court's opinion is awaited on appeal, there is no likelihood that the Agency attorney will be called to testify. Moreover, at this stage, even if withdrawal were relevant because of potential testimony, the withdrawal would arguably cause substantial hardship upon defendant. Accordingly, withdrawal is not required.

Adopted by the Alaska Bar Association Ethics Commmittee this 4th day of November, 1986.

APPROVED BY THE
BOARD OF GOVERNORS
ON NOVEMBER 7, 1986.

BRIDGE-THE GAP MANUALS NOW AVAILABLE!



By the time the *Bar Rag* goes to press, the long-awaited Bridge-The-Gap seminar, held November 14 and 15, will be history. The day and a half program covered basic "how to" procedures in a number of areas: Administrative Procedures, Real Estate Law, Professional Responsibility, Clerk to Court, Law Office Economics, Inner Workings of the Law Office, Business Organizations, Family Law, Bankruptcy and Probate.

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

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

ALASKA BAR ASSOCIATION
1986-87 Operating Budgets

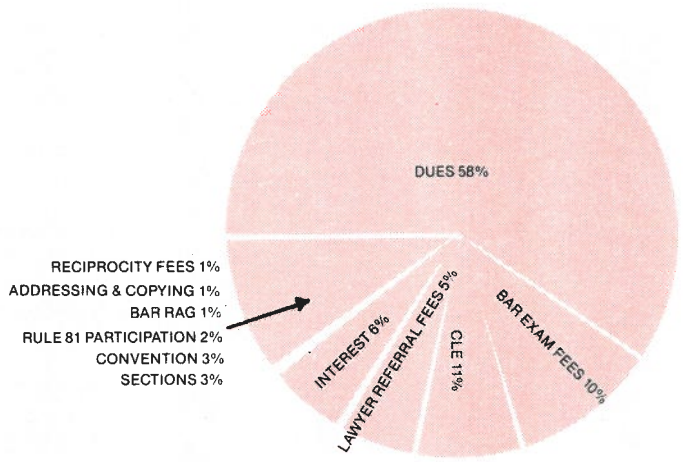
Proportionate share of expenses, revenues

REVENUES

	1986 Association Finances Earned 1986	%	1987 Association Budget Projected 1987	%
Dues	$ 656,565	(58)	$ 676,000	(61)
Bar Exam Fees	109,075	(10)	103,500	(9)
Reciprocity Fees	16,000	(1)	16,000	(1)
CLE	122,549	(11)	70,000	(6)
Addressing & Copying	13,349	(1)	13,000	(1)
Rule 81 Participation	23,500	(2)	25,000	(2)
Interest	67,691	(6)	56,000	(5)
Lawyer Referral Fees	53,361	(5)	43,600	(4)
Bar Rag	16,451	(1)	16,000	(1)
Convention	33,635	(3)	40,000	(4)
LEXIS Service	400		15,600	
LEXIS — Use, Training	0		0	
Unrealized Loss — Securities	4,162		0	
Dues Installment Service Fees	7,575		11,250	
Sections	5,780	(3)	5,000	(5)
Discipline Cost Awards	785		1,000	
State of Alaska Reimbursement	3,482		10,100	
Miscellaneous	2,702		1,000	
Penalties — Late Dues	7,225		6,000	
TOTAL	$1,135,962		$1,109,050	

*Due to rounding, numbers may not add up to 100%.

1986 REVENUES

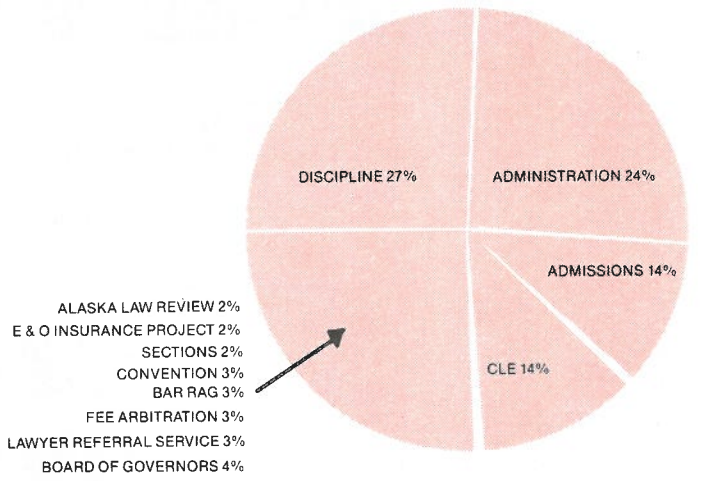


EXPENSES

EXPENSES	1986 Association Finances Expended 1986	%	1987 Association Budget Projected 1987	%
Admissions	$ 150,832	(14)	$ 164,615	~~(5)~~ 14
Board of Governors	43,766	(4)	68,710	(5)
Discipline	286,714	(27)	291,144	(25)
Administration	251,004	(24)	268,649	(23)
Lawyer Referral Service	31,715	(3)	35,476	(3)
CLE	144,126	(14)	132,177	(11)
Fee Arbitration	30,888	(3)	45,407	(4)
Bar Rag	36,468	(3)	40,738	(4)
Alaska Law Review	22,000	(2)	25,000	(2)
Convention	34,750	(3)	40,000	(3)
E & O Insurance Project	16,525	(2)	10,000	(3)
Local Bar Presidents Meeting	2,341		2,500	
Miscellaneous Committees	8,227		7,400	
Sections	5,122	(2)	5,000	(3)
LEXIS Service	203		13,884	
Constitutional Law Project	1,000		1,000	
Miscellaneous Litigation	0		0	
TOTAL	$1,065,681		$1,151,700	

*Due to rounding, numbers may not add up to 100%.

1986 EXPENSES



Bar asks Buckalew rehearing

IN THE SUPREME COURT
FOR THE STATE OF ALASKA

In The Disciplinary Matter
Involving
ROBERT J. BUCKALEW,
Respondent.

ABA Membership No. 7811083
ABA File No. 85.090
Supreme Court No. S1077

PETITION FOR REHEARING

The Alaska Bar Association, at the direction of its Board of Governors, petitions for rehearing of this matter decided by the court in Opinion No. 3147 dated December 30, 1986. Under Appellate Rule 506(a)(1), the Bar Association contends that, in reaching its decision, the court has overlooked, misapplied or faileo to consider a statute, decision or principle directly controlling.

ARGUMENT

I. *The Court's Sua Sponte Adoption of the ABA Standards for Imposing Lawyer Sanctions Amounts to the Adoption of Bar Rules Governing The Discipline of Attorneys Without the Participation of the Board of Governors or the Membership of the Alaska Bar Association.*

In the court's Opinion No. 3147 dated December 30, 1986, at pages 8 through 12, the court discusses the American Bar Association Standards for Imposing Lawyer Sanctions (ABA Standards). Then at page 11, the court states:

The ABA Standards and the methodology that they provide are sound. They combine clear, straight-forward guidelines which ensure a level of consistency necessary for fairness to the public and the legal system with the flexibility and creativity essential to secure justice to the disciplined lawyer. Therefore, we adopt the ABA Standards and methodology as the appropriate model for determining sanctions for lawyer misconduct in this state. (footnote omitted)

The conclusion which the Board has drawn from this opinion is that hearing committees and the Disciplinary Board must make their recommendations for sanctions in light of the now mandatory guidelines and considerations set forth in the ABA Standards. In effect, the ABA Standards amount to additions to the Rules of Disciplinary Enforcement, Part II of the Alaska Bar Rules, in that they directly affect the type of discipline which can be imposed under Alaska Bar Rule 16.

However, the court's opinion reflects no solicitation or consideration of views concerning the desirability of the ABA Standards from either the Board ot Governors of the Alaska Bar Association or the Bar's membership. A key factor in the settlement of *Alaska Bar Association et. al. v. Buell A. Nesbett et. al.*, U.S. District Court No. A-42-64 was the principle that bar rules would be promulgated by the Board of Governors and reviewed and adopted by this court. Attached to this petition are copies from the Bar Association's files in A-42-64 of the stipulation for dismissal dated December 18, 1964 (Exhibit A) and a joint communication from the court and Bar Association to the membership dated December 24, 1964 (Exhibit B). Both documents evidence the importance of the Board's participation in the bar rule making process. Of particular note is the statement contained in the last paragraph of the first page of the joint communication (Exhibit B):

. . . We feel the proposed rules can be made to work; if not, the Board can always suggest new rules, or modification of these rules . . .

The court's *sua sponte* adoption of the ABA Standards without promulgation or comment by the Board of Governors and comment by the membership of the Bar is contrary to this long established principle.

The Bar Association therefore requests that the court vacate its Opinion No. 3147 in this matter and request the input of the Board of Governors and membership of the Bar Association concerning the desirability of these standards for the discipline of attorneys practicing in Alaska.

II. *The Court Has Not Shown a Disparity in the Imposition of Disciplinary Sanctions to Justify Overruling Previous Case Law By. Substituting Standards Which Amount to Presumptive Sentencing in Disciplinary Matters.*

Footnote 14 appearing on pages 11-12 of Opinion No. 3147 provides:

We recognize that the ABA Standards and its methodology are not entirely consistent with our previous decisions in this area. *See Minor* 658 P.2d 781; *Simpson*, 645 P.2d 1223; *Stump*, 621 P.2d 263; *Preston*, 616 P.2d 1, *In Re Webb*, 602 P.2d 408 (Alaska 1979); *In re Cornelius*, 520 P.2d 76 (Alaska 1974). To the extent that they conflict, the ABA Standards will hereafter control.

In this single footnote, the court has overruled 12 years of case law in the matter of sanctions in attorney discipline matters to the extent that this case law is inconsistent with the ABA Standards and, yet, nowhere in the court's Opinion No. 3147 is there any discussion of the failure of the analysis in these cases to provide consistent or appropriate discipline. Rather, the court says at page 8:

We followed this approach because no comprehensive standards or guidelines existed to help us determine appropriate sanctions.

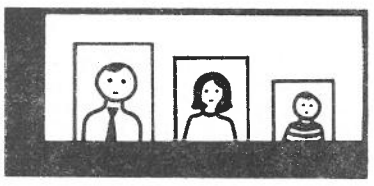
Prior to adopting the ABA Standards as the law in this jurisdiction for imposing lawyer sanctions, the court should satisfy itself that the existing case law provides an inefficient or unsatisfactory method for determining appropriate sanctions and has actually resulted in the imposition of disparate sanctions in previous disciplinary matters. Significantly, the primary argument in the respondent's briefing to this court is the reasonableness of the five year suspension stipulated to by the parties in comparison with the sanctions previously imposed for similar conduct. (Respondent's brief at 18-30, 32)

The Board does not dispute the necessity for careful, reasoned analysis of the facts and circumstances involved in each disciplinary matter in order to arrive at an appropriate sanction. The Board strongly objects to the imposition of standards which it believes amounts to presumptive sentencing in lawyer disciplinary matters. The hallmark of a sound functioning disciplinary system is the ability to tailor the sanction to fit the circumstances of the offense and the offender. The discretion of the hearing committee and the Disciplinary Board in making recommendations and the court in imposing sanctions is highly dependent upon this individualized analysis. "Black letter rules" such as the ABA Standards, which suggest that various sanctions "are generally appropriate" if certain listed factors are mechanically met, do serious damage to this process and deprive hearing committees and the Disciplinary Board of discretion in their recommendations concerning attorney discipline matters.

Presumptive sentencing in Alaska criminal law followed a perception, if not a finding, that certain classes of criminals received more favorable consioeration in sentencing than others. The Alaska Judicial Council studies of the late 1970's and early 1980's which found those sentencing disparities were no doubt instrumental in the enactment of presumptive sentencing by the legislature. Here, however, no such parallel exists. It is this court which has done the "sentencing" of lawyers at its level of jurisdiction in line with the published decisions referenced by the court in footnote 14 of its opinion. The wholesale overruling of these decisions in the name of mandatory uniformity where no disparate results have been shown does no service to the attorney discipline process.

A subcommittee of the Board of Governors considered the ABA Standards and reported to the Board during its November 6-7, 1986 meeting. At the conclusion of the Board's discussion on this matter, the Board indicated that adoption of the ABA Standards was not appropriate but the Standards could be used as voluntary

• Continued on page 29



BAR PEOPLE

Mark J. Barnes relocated to Arlington, VA . . . **Bruce E. Horton** is now associated with the Law offices of Richard Wollenberg . . . **John W. Flynn** has moved to Kirland, WA . . . **Charles F. Loyd, Jr.** is now in Cantwell . . . **Scott J. Sidell** is now working for the civil division of the Attorney General's Office . . . **Karen L. Russell** and **Robin C.G. Wilcox** are now partners in the firm of Russell & Wilcox, P.C.

Catherine M. Easter is now working for the Public Defender Agency in Anchorage . . . **Douglas S. Miller** is working at the Office of Public Advocacy . . . **Sidney K. Billingslea** is now working for the Public Defender Agency in Kenai . . . **Linda M. Cerro** and **Robert W. Landau** have moved to West Sayville, N.Y. . . . **Judge Gerald J. Van Hoomissen,** who recently retired, is now living in Welches, Oregon.

Connie Bastian, formerly Workers' Compensation Hearing Officer with the Alaska Workers' Compensation Board in Anchorage, has relocated to San Francisco . . . **Michael A. Budzinski** has become a member of the firm of Stone, Waller & Jenicek . . . **Warren C. Christianson** of Sitka is now in solo practice . . . **David S. Case** has opened his own law offices in Anchorage . . . **Larry S. Cohn** has relocated to Homer.

Jeffrey W. Cole is now working for the Municipality of Anchorage . . . **Pamela J. Cravez** is currently working for the Office of Public Advocacy . . . **March C. Choate** is now with the firm of Clark, Walther & Flannigan . . . **Cory R. Borgeson** and **Patrick B. Cole** have become associated with the Fairbanks office of Birch, Horton, et. al . . . **Monte Engel** is now working for the City of Barrow . . . **John G. Gissberg** is now working at the U.S. Embassy in Tokyo . . . **Alexis Gabay** is now associated with Yerbich & Associates.

Marsha Hammack has relocated to Portland, OR . . . **Kimberly J. Heuter** formerly of the Anchorage office, is now working for the Barrow office of Alaska Legal Services . . . **John J. Burns** has become associated with the firm of Gerard R. LaParle . . . **Melinda J. McGee** has moved from Anchorage to Whittier . . . **Denise D. Wike** has relocated to Anchorage from Juneau . . . The firm of Camarot, Sandberg & Hunter has changed its name to **Camarot, Sandberg & Smith.**

Stephen M. White has relocated from Cordova to Seattle . . . Ross & Gingras, P.C. is now the law firm of **Ross, Gingras, Bailey & Miner** . . . Sharyn A. Campbell, James K. Brinker, Mary Ellen Beardsley and Rebecca Copeland are partners in the firm of **Campbell, Brinker, Beardsley & Copeland** . . . **Robert A. Bassett** is now practicing law in Albuquerque, N.M. . . . **James D. Babb** has now opened his own law office . . . **Mark Barnes** has recently relocated from Anchorage to Washington, D.C. . . . **Janet L. Crepps,** formerly of the Public Defender's Agency, is now practicing with Gilmore & Feldman . . . **Susan Behlke Foley** has opened her own law office . . . **Mary C. Geddes** is now with the Office of Public Advocacy.

Robert Landau and **Linda M. Cerro** in January departed for a year of travelling in Southeast Asia, China, U.S.S.R. and Africa. "Prior to our departure, we will move back to Anchorage from Juneau, where I have spent the past three and a half years as Deputy Commissioner of Labor, while Linda has worked in the Attorney General's office and in private practice. Following our return from travelling in early 1988, we both expect to return to the practice of law in Anchorage," said Bob.

Kathleen McGuire and **Marie Sansone** are currently in deepest darkest Africa (Timbucktu). Alleged date of return is May 1 . . . **Betsy Sheley** and **Clark Nichols** had a baby daughter, Julia Reed Nichols in January . . . **Brigette Siff** is going on a trip to Europe in March. Upon return she will be leaving the Public Defender's office to relocate to New Hampshire . . . **Debra A. Braga** and **Gary Burger** will be married on May 9, 1987. They will be living in Seattle, Washington . . . **Ken Goldman**, Assistant District Attorney in Fairbanks, and his wife Ginny, had a baby daughter, Hannah Rose in September. This is number four . . .

Wickersham joins Jack White Company

Kirk Wickersham, attorney at law, has joined Jack White Company where he will handle a broad range of legal matters for the company and will be responsible for analyzing and structuring syndications for Jack White Equities, the company's investment division. He will also continue in private practice to the general public on a limited basis.

Wickersham, who is also an associate broker with the firm, is experienced in real estate law. In addition to his law degree, he holds a masters degree in planning. He has represented major developers in Alaska and other western states, prepared plans and development regulations for many Alaskan communities, taught planning and zoning law and real estate law.

He has written six books, including the Real Estate Commission Contracts Manual and the State Housing Loan Program Handbook. He is experienced in securities law and has represented limited partnership syndicators in several states.

Wickersham earned his B.A. degree in political science from the University of Alaska, his law degree from Yale Law School and his Masters of Urban and Regional Planning from University of Colorado.

Jack White Company is Alaska's oldest full service real estate company. The company was founded in 1953 and has specialized divisions handling residential and commercial properties, leasing, property management and investments.

Perkins Coie signs 10-year, $4 million lease for space

The Anchorage office of Perkins Coie law firm announced the signing of a 10-year lease in the newly constructed Resolution Plaza building.

Valued at over $4 million, the lease is for 19,270 sq. ft. of office space encompassing both the third and fourth floors of the building, making Perkins Coie the Plaza's largest tenant. According to John Morrison, broker with Brayton Co. representing Resolution Plaza, it is the largest new office lease signed with a private company in 1986.

The office is scheduled for completion June 1 and Perkins Coie will move into the 1029 W. Third Ave. location during that month.

"We think this is the time to expand, not to shrink back," said Bruce Bookman, managing partner of Perkins Coie and 19-year resident of Alaska. "People can make great strides in this economy and we anticipate many of our clients will do so."

Bookman added that the 10-year commitment was indicative of the law firm's optimism and conviction. "We are very optimistic about our long-term commitment to Alaska. We believe the demand for legal services will continue to grow even during this present economic downturn," said Bookman.

Perkins Coie, the largest law firm in the Pacific Northwest, first opened an Anchorage office in 1977 with one attorney and 800 sq. ft. of office space at 510 L St. The next year, another attorney was added.

Today, Perkins Coie's Anchorage office has 39 employees (including 16 attorneys and 4 legal assistants), and approximately 10,000 sq. ft. of office space. Bookman projects the office will expand to 25 lawyers and will probably require additional office space within the next 10 years.

"Competition among attorneys is not that dependent on the number of attorneys, but rather the demand for high quality work and specialized knowledge," said Bookman, who is also commissioner of the Judicial Conduct Commission and chairman of the Alaska Bar Association's Bankruptcy Section. "As business becomes more sophisticated in Alaska, businesses will have to become a lot better at being competitive."

Bookman pointed out that like many other professions such as doctors, attorneys are becoming more specialized and choosing specific fields of endeavor.

At first, the majority of Perkins Coie's work in Anchorage originated out of Seattle, but now almost all of the work originates in Alaska. The firm's practice in Alaska includes labor law, business law, bankruptcy, real estate, and is noted nationally for defense of aviation product liability.

Perkins Coie is based in Seattle and is over 60 years old. In a September 1986 National Law Journal survey of 250 law firms, Perkins Coie was ranked 80th in size nationwide.

Resolution Plaza, a six-story structured scheduled for completion next month, is owned by the Resolution Plaza Partnership. Hoffman Construction is the general contractor and McKinley Architects designed the building.

Young Lawyers Report Activities

New Officers Elected.

In November the Young Lawyers Section of the Anchorage Bar Association (the BARRISTERS) elected new officers. The newly elected officers are Bob Owens (Groh, Eggers & Price) — President; Jim Torgerson (Bogle & Gates) — Vice President; Shelley Ditus (Ditus & Ditus) — Secretary/Treasurer, Lynn Allingham (Guess & Rudd), Nan Thompson (Bailey & Mason) and Shelby Nunke-Davidson were elected as at-large members of the Board.

All members of the Anchorage Bar Association who are under 36 years of age or who have been practicing for less than four years are automatically members of the Barristers and all members are encouraged to contact any of the Board Members with suggestions for activities or requests for further information.

Continued on page 29

In Memorium

Wilfred C. Stump

Wilfred C. Stump, 78, a prominent Alaska attorney, died Tuesday, February 10, 1987, in Ketchikan, Alaska.

Mr. Stump was the last President of the Territorial Alaska Bar Association and the first President of the State Alaska Bar Association. At the time of his death he was President of the Ketchikan Bar Association. He practiced law in Alaska for more than 45 years.

Stump was active in the Elks Lodge serving in both local and state offices. He was president of the Alaska State Elks Association in the early 1960's.

He was an active outdoorsman, one of the founders of the Ducks Unlimited Chapter in Ketchikan. He was a cook and organizer for 7 years for the late Reub Crossett when that pioneer Ketchikan businessman began his game dinners in Ketchikan to benefit Ketchikan Children's Home.

For many years Stump hunted the Stikine River Flats near Wrangell.

He was active in the Democratic Party in Alaska in the 1940's and 1950's.

Stump was born in Mendocino, Calif., October 1, 1908. He came to Alaska with his parents in 1915 and lived in Nenana, Fairbanks, Seward, Wrangell and Hyder before going to college.

He graduated from the University of Washington Law School in 1932 and married Ruth Farmer of Seattle in 1934. The couple moved to Ketchikan on their honeymoon where Stump worked as an Assistant District Attorney.

In 1939 he began a private law practice which is being carried on by his sons, Clark W. Stump and C. Keith Stump. The senior Stump retired from the active practice of law in 1979.

In addition to his wife, Ruth, and his two sons, he is survived by daughters, Audrey, Gilbert and Pamela J. Bullock, all of Ketchikan, and by seven grandchildren and one great-grandchild.

The family asks that memorial gifts be made to the Alaska Cancer Society, St. John's Memorial Fund, or Ducks Unlimited.

In Memoriam

Peter LaBate

Peter LaBate

Peter LaBate died in his home in Sequim, Washington on December 19, 1986, after a lengthy battle with cancer. He was 65 years old. At his side was his wife, best friend and business manager, Blanche.

A native of Vermont, he attended St. Michael's College in Winooski, Vermont and subsequently studied law at Northeastern University School of Law, Boston, Mass. and at the University of Portland School of Law in Portland, Maine. He graduated in June of 1951. He came to the Alaska territory in 1952 where he was first employed as a clerk in the Anchorage law office of Helenthal, Helenthal & Cottis. After his admission to the Alaska bar, he worked as a city attorney for city of Anchorage and then went into private practice where he spent most of his professional life.

At the time of his retirement in 1977, Pete LaBate had perhaps the most successful domestic relations practice in Alaska. An instinctive courtroom tactician, he was generally recognized by the Anchorage bar as one of the finest trial lawyers in Anchorage. In 1971 and 1972, he simultaneously held the position of president of both the Anchorage and the Alaska Bar Associations. Additionally, he was an early member of what was to become the West Side Bar Association. Pete frequently presided over the round table in the back room of the Frisco Cafe and Bar on 5th Avenue, where Anchorage attorneys regularly assembled over the noon hour for bad food and good companionship.

He is remembered by his many friends and colleagues as a great wit and storyteller. He was a ebullient and feisty spirit. He believed the law to be a profession of honor and felt privileged to be a practioner. He was a great champion for his clients in the coutroom. He loved his profession and he served it well. He will be greatly missed.

We the People

On a new Union...

This year we celebrate the 200th anniversary of the U.S. Constitution. We are therefore including with each issue of the Bar Rag a sample of the Federalist Papers written by Madison, Hamilton, and Jay under the pseudonym Publius. These letters were written to promote the ratification of the new Constitution by the former thirteen colonies which were loosely affiliated under the weak Articles of Confederation.

Although these letters are in the public domain, we are greatful to the New American Library for their permission to use this text.

We include these documents of the "founding fathers" not only because of their historical value but also because they demonstrate such a refined command of the English language — a virtue highly prized by English and American politicians of the Enlightenment era.

— Editor

Alexander Hamilton

After an unequivocal experience of the inefficacy of the subsisting federal government, you are called upon to deliberate on a new Constitution for the United States of America. The subject speaks its own importance; comprehending in its consequences nothing less than the existence of the UNION, the safety and welfare of the parts of which it is composed, the fate of an empire in many respects the most interesting in the world. It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force. If there be any truth in the remark, the crisis at which we are arrived may with propriety be regarded as the era in which that decision is to be made; and a wrong election of the part we shall act may, in this view, deserve to be considered as the general misfortune of mankind.

This idea will add the inducements of philanthropy to those of patriotism, to heighten the solicitude which all considerate and good men must feel for the event. Happy will it be if our choice should be directed by a judicious estimate of our true interests, unperplexed and unbiased by considerations not connected with the public good. But this is a thing more ardently to be wished than seriously to be expected. The plan offered to our deliberations affects too many particular interests, innovates upon too many local institutions, not to involve in its discussion a variety of objects foreign to its merits, and of views, passions, and prejudices little favorable to the discovery of truth.

Among the most formidable of the obstacles which the new Constitution will have to encounter may readily be distinguished the obvious interest of a certain class of men in every State to resist all changes which may hazard a diminution of the power, emolument, and consequence of the offices they hold under the State establishments; and the perverted ambition of another class of men, who will either hope to aggrandize themselves by the confusions of their country, or will flatter themselves with fairer prospects of elevation from the subdivision of the empire into several partial confederacies than from its union under one government.

It is not, however, my design to dwell upon observations of this nature. I am well aware that it would be disingenuous to resolve indiscriminately the opposition of any set of men (merely because their situations might subject them to suspicion) into interested or ambitious views. Candor will oblige us to admit that even such men may be actuated by upright intentions; and it cannot be doubted that much of the opposition which has made its appearance, or may hereafter make its appearance, will spring from sources, blameless at least if not respectable — the honest errors of minds led astray by preconceived jealousies and fears. So numerous indeed and so powerful are the causes which serve to give a false bias to the judgment, that we, upon many occasions, see wise and good men on the wrong as well as on the right side of questions of the first magnitude to society. This circumstance, if duly attended to, would furnish a lesson of moderation to those who are ever so thoroughly persuaded of their being in the right in any controversy. And a further reason for caution, in this respect, might be drawn from the reflection that we are not always sure that those who advocate the truth are influenced by purer principles than their antagonists. Ambition, avarice, personal animosity, party opposition, and many other motives not more laudable than these, are apt to operate as well upon those who support as those who oppose the right side of a question. Were there not even these inducements to moderation, nothing could be more ill-judged than that intolerant spirit which has at all times characterized political parties. For in politics, as in religion, it is equally absurd to aim at making proselytes by fire and sword. Heresies in either can rarely be cured by persecution.

And yet, however just these sentiments will be allowed to be, we have already sufficient indications that it will happen in this as in all former cases of great national discussion. A torrent of angry and malignant passions will be let loose. To judge from the conduct of the opposite parties, we shall be led to conclude that they will mutually hope to evince the justness of their opinions, and to increase the number of their converts by the loudness of their declamations and by the bitterness of their invectives. An enlightened zeal for the energy and efficiency of government will be stigmatized as the offspring of a temper fond of despotic power and hostile to the principles of liberty. An over-scrupulous jealousy of danger to the rights of the people, which is more commonly the fault of the head than of the heart, will be represented as mere pretense and artifice, the stale bait for popularity at the expense of public good. It will be forgotten, on the one hand, that jealousy is the usual concomitant of violent love, and that the noble enthusiasm of liberty is too apt to be infected with a spirit of narrow and illiberal distrust. On the other hand, it will be equally forgotten that the vigor of government is essential to the security of liberty; that, in the contemplation of a sound and well-informed judgment, their interests can never be separated; and that a dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people than under the forbidding appearance of zeal for the firmness and efficiency of government. History will teach us that the former has been found a much more certain road to the introduction of despotism than the latter, and that of those men who have overturned the liberties of republics, the greatest number have begun their career by paying an obsequious court to the people, commencing demagogues and ending tyrants.

In the course of the preceding observations, I have had an eye, my fellow-citizens, to putting you upon your guard against all attempts, from whatever quarter, to influence your decision in a matter of the utmost moment to your welfare by any impressions other than those which may result from the evidence of truth. You will, no doubt, at the same time have collected from the general scope of them that they proceed from a source not unfriendly to the new Constitution. Yes, my countrymen, I own to you that after having given it an attentive consideration, I am clearly of opinion it is your interest to adopt it. I am convinced that this is the safest course for your liberty, your dignity, and your happiness. I affect not reserves which I do not feel. I will not amuse you with an appearance of deliberation when I have decided. I frankly acknowledge to you my convictions, and I will freely lay before you the reasons on which they are founded. The consciousness of good intentions disdains ambiguity. I shall not, however, multiply professions on this head. My motives must remain in the depository of my own breast. My arguments will be open to all and may be judged of by all. They shall at least be offered in a spirit which will not disgrace the cause of truth.

I propose, in a series of papers, to discuss the following interesting particulars:—*The utility of the UNION to your political prosperity—The insufficiency of the present Confederation to preserve that Union—The necessity of a government at least equally energetic with the one proposed, to the attainment of this object—The conformity of the proposed Constitution to the true principles of republican government—Its analogy to your own State constitution*—and lastly, *The additional security which its adoption will afford to the preservation of that species of government, to liberty, and to property.*

In the progress of this discussion I shall endeavor to give a satisfactory answer to all the objections which shall have made their appearance, that may seem to have any claim to your attention.

It may perhaps be thought superfluous to offer arguments to prove the utility of the UNION, a point, no doubt, deeply engraved on the hearts of the great body of the people in every State, and one which, it may be imagined, has no adversaries. But the fact is that we already hear it whispered in the private circles of those who oppose the new Constitution, that the thirteen States are of too great extent for any general system, and that we must of necessity resort to separate confederacies of distinct portions of the whole.* This doctrine will, in all probability, be gradually propagated, till it has votaries enough to countenance an open avowal of it. For nothing can be more evident to those who are able to take an enlarged view of the subject than the alternative of an adoption of the new Constitution or a dismemberment of the Union. It will therefore be of use to begin by examining the advantages of that Union, the certain evils, and the probable dangers, to which every State will be exposed from its dissolution. This shall accordingly constitute the subject of my next address.

PUBLIUS

*The same idea, tracing the arguments to their consequences, is held out in several of the late publications against the new Constitution.

• Young Lawyers

Continued from page 28

Essay Contest Wins Award.

The American Bar Association, Young Lawyers Division recently awarded the Anchorage Young Lawyers a Special Recognition award for service to the public through its Law Week Essay Contest involving high school students in the Anchorage area. The topic was "Should Juveniles Charged with Serious Crimes be Treated as Adults?" Cash awards were given as well as an engraved plaque to the winning school, which will move to next year's winner's school.

Volunteers are needed to work on this year's essay contest. Anyone interested in participating in this fun and rewarding project should contact Shelly Davison or Bob Owens.

Volunteers Needed.

The Anchorage Young Lawyers have several ongoing projects that have opportunities for involvement by interested lawyers. Among these are the Law Explorer program for high school students, the lawyer/doctor benefit softball game, Law Week activities, Bicentennial Celebration Committee, social committees and the reception for new admittees committee. These activities offer excellent opportunities to expand contacts with both the legal and nonlegal communities and participation promotes both your interests and those of your bar association. For more information, contact anyone of the Young Lawyer Board Members.

— Submitted by Robert P. Owens

• *Rehearing*

Continued from page 27

guidelines by hearing committees and the Disciplinary Board in determining appropriate sanctions. Thus, the Board agrees the ABA Standards have utility as voluntary guidelines only.

Conclusion

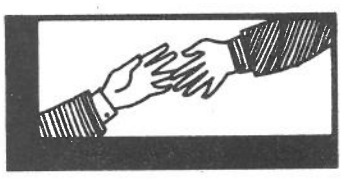
The Board of Governors of the Alaska Bar Association requests rehearing in this matter concerning the court's adoption of the ABA Standards. Rehearing should be granted because the Board did not promulgate these stanoards for adoption by the court in line with the rule making principle agreed to in *Alaska Bar Association, et. al. v. Buell Nesbett, et. al., supra,* and because the court has not shown a disparity in previous case law to justify adoption of presumptive sentencing in disciplinary matters. By vacating its Opinion No. 3147 and requesting the input of the Board and the membership, the court will be able to conclusively determine whether previous case law has failed, whether adoption of the ABA Standards is desirable, and, if so, whether those standards should be voluntary guidelines only.

DATED this 20th day of January, 1987 at Anchorage, Alaska.

ALASKA BAR ASSOCIATION
Stephen J. Van Goor
Discipline Counsel

Oral arguments were presented before the Supreme Court February 10.

PRACTICAL POINTERS



Torts

The Workers' Comp Lien: Benefits and Burdens

By Michael J. Schneider

This article will attempt to describe some of the pleasures and sorrows that attend the situation in which your client, in a third-party liability case, was injured while on the job and is thus entitled to benefits under the provisions of the Alaska Workers' Compensation Act (AS 23.30.005 et seq.).

A Few of the Rules

Your injured client is under no obligation to elect whether to receive compensation benefits or to recover damages from the third-party defendant(s) [AS 23.30.015(a)]. The obligation of the comp carrier to pay benefits under the Act *does not terminate* unless the third-party settlement was for an amount less than has been paid in compensation *and* has been made without the written consent of the employer. See AS 23.30.015(f) and (h). You and your client are obligated by AS 23.30.015(j) to advise the Alaska Workers' Compensation Board and the employer within thirty (30) days of commencing the third-party action.

The Workers' Compensation "Lien"

AS 23.30.015(g) provides in relevant part as follows:

> If the employee ... recovers damages from the third person, the employee ... shall promptly pay to the employer the total amounts paid by the employer ... insofar as the recovery is sufficient after deducting all litigation costs and expenses. Any excess recovery by the employee or representative shall be credited against any amount payable by the employer thereafter.

The Statute makes it clear that your client must pay back the comp carrier for monies expended in the context of the comp claim. The question is, how much should be repaid? In 1976, Bernie Kelly (bless his Irish soul) and Michele Minor were able to convince our Supreme Court that there was little equity in compelling an injured worker and third-party claimant to bear the financial burden of collecting the comp carrier's funds:

> If an employer/compensation carrier is not required to pay its pro rata share to recover this unanticipated return, the entire burden of the litigation would be borne by the employee. The carrier would take the benefit of both the employer's premium and the employee's litigation effort. This would result in the carrier's unjust enrichment. *Cooper v. Argonaut Insurance Companies*, 556 P.2d 525, 527 (Alaska 1976).

The Court held that proration of attorney's costs and fees was proper and that the proration must be according to the ratio between the total compensation payments made to the worker and the total recovery in the third-party action. Ibid at 527 and 528.

The rule is illustrated by the following hypothetical situation. Assume that the third-party attorney's fee is ⅓ of the gross recovery, that the client must reimburse the attorney for costs out of the client's portion of the recovery, that the gross third-party recovery was $100,000.00, that costs incurred were $10,000.00 and that the workers' comp lien at the date of recovery was $60,000.00.

Under this hypothetical, the return to the insurance company must be reduced by one-third, just as the return to the client must be reduced by the one-third contingency fee paid to the third-party attorney ([$60,000.00 divided by $100,000.00] × attorney fee of $33,333.33 = $20,000.00). This knocks the check payable to the comp carrier from $60,000.00 to $40,000.00. The carrier must suffer another reduction in its entitlement because it is obligated to pay 60% of the litigation costs (60% × $10,000.00 = $6,000.00). Your trust account must then direct a check to the carrier for $34,000.00 ($60,000.00 lien — $26,000.00 reduction).

All this works out quite nicely as an academic matter. Nevertheless, the practicalities of the situation leave a bit to be desired. It has often been observed that lack of money is the root of all evil. At about this stage in the proceedings the wisdom of this notion is beginning to settle upon the client. Your client has parted with $33,333.33 to you, an additional $10,000.00 to you to cover your litigation costs, and $34,000.00 to the comp carrier. Your client, conveniently, has forgotten or spent the $60,000.00 in comp benefits that he or she has received since the date of the injury and is beginning to wonder how it is (despite your previous, frequent, and detailed explanations) that a $100,000.00 settlement of their third-party case could result in a check to them out of trust in the amount of only $22,666.67.

The hypothetical above, while illustrating the mathematics of the *Cooper* rule, also illustrates how Plaintiff's counsel, by failing to consider the ramifications of the injured workers' rights under the comp act, can place himself and his client in a terribly unfortunate set of circumstances. Should the third-party case in the hypothetical above settle for $100,000.00? Let's make the question easier by presuming that the settlement equalled the policy limits (including all appropriate Rule 82 costs and fees) that were obtainable from a bankrupt defendant's liability policy.

It is absolutely impossible to answer this question without a prediction of what the client would have been likely to have received through the workers' compensation system. I only know of two (2) ways to figure this out. One way is to become expert in the provisions of AS 23.30.005 et seq and their application before the Board. The other way, is to get one or more opinions from experts in workers' compensation who *regularly* practice before the Board. I recommend the second approach. If, after adequate consultation, you conclude that your client is likely to receive $22,666.67 or less from the comp case in the future, then you and your client can feel secure in the result obtained in the hypothetical case.

Negotiation with the Comp Carrier

Can the client's bottom line in the hypothetical be improved by negotiation with comp carrier? Probably not. Why? Because you are out of leverage. You are being offered *all the money there is* in the third-party action. Your client is not likely to receive comp benefits in the future that will exceed his net after a settlement of the third-party case. The comp carrier has been through this drill more times than you have and will have no difficulty concluding that if it stands firm for every penny of its $34,000.00, logic and circumstances will ultimately lead you and your client to write the check. Even so, very few facts in this hypothetical need to be changed to open up a lot of possibilities for negotiation.

What if you were being offered less than "all there is"? What if liability is shaky in the third-party case? What if you intend to go to trial and attempt to secure all of your client's damages despite the risk of a complete loss? What if you don't believe any of these things but the comp carrier does or can be induced to? Remember that the comp carrier's only hope of (1) getting back *any* of its advances to your client to date, and/or (2) terminating its future advances to your client rest in a third-party settlement *and* a Compromise and Release in the comp action after negotiation with reference to the comp lien. The carrier wants out of this situation. It doesn't want to find that it will receive nothing back for its expenditures to date and incur future expense because you and your client decided to shoot for the moon and miss. Where such problems exist, the carrier may be willing to reduce its lien all the way to zero (to avoid future payments and the considerable chance that it will receive nothing after your ill-fated trial efforts).

Can your client do better still? Read on.

Cooper v. Argonaut (Part II)

The approach that follows will work under circumstances where the comp carrier has considerable future exposure. The approach relies upon the *Cooper* case cited above and the reasonable notion that "a penny saved is a penny earned." It has not yet been specifically approved by our Supreme Court.

Using the numbers in the very first hypothetical situation, assume further that the likely future compensation benefits payable to your client *after* the date of the proposed third-party settlement equal $60,000.00. You have lots to talk about now. The carrier is familiar with the *Cooper* case and is no doubt inquiring as to when it might receive its check in the anticipated amount of $34,000.00. At this point, you need to remind the carrier that a penny saved is a penny earned, that the third-party settlement has the potential, *if the carrier agrees,* of terminating the carrier's future exposure, and that the carrier's justifiable request for $34,000.00 because of *past* benefits paid must be further offset by the money you just saved (read "earned") it. The original comp lien was $60,000.00. It is subject to a reduction (under *Cooper,* Part I) of $26,000.00 and a further reduction (under *Cooper,* Part II) of $60,000.00, thus generating $26,000.00 more credits than charges. The demand to the comp carrier should be for $26,000.00.

This approach is supported by more than the creative optimism of Plaintiffs' lawyers like Bernie Kelly, Howard Trickey, and others that have discussed it with me:

> We do not think that the Legislature intended the employer's compensation carrier to secure a windfall profit at the employee's expense. Compensation premiums are based on actuarial estimates of the number of accidents of each type in a given industry. They are not usually computed with any possible recovery from third-party sources in mind because the mathematical probability of such a recovery is difficult to determine ... the recovery is an unexpected return because the premium paid by the employer is normally based on a projected injury loss *without regard to possible third-party claims. Cooper,* at 527 (emphasis added).

See also generally *Attorney's Fees Incurred By Injured Longshoreman In Successful Third-Party Negligence Action Against Vessel As Recoverable From Employer Under Longshoremen's And Harbor Workers' Compensation Act,* 46 ALR Fed. 692 and *Workmen's Compensation: Attorney's Fee Or Other Expenses Of Litigation Incurred By Employee In Action Against Third-Party Tortfeasor As Charge Against Employer's Distributive Share,* 74 ALR.3d 854. See specifically *Owens v. C&R Waste Material,* 388 A.2d 977 (N.J. 1978) and *Pagan v. Hillside Metal Products, Inc.,* 355 A.2d 690 (N.J. Super. 1976).

Assuming that the comp carrier agrees to this scenario and is willing to write the $26,000.00 check, the agreement makes sense only if it is in the client's best interest. Can this hypothetical situation be in the best interest of the client when, left in the comp system, he will receive $60,000.00 in future money over time, and under the terms of the settlement walk away with but $48,666.67 in his pocket? The answer *could be* yes. The comp system pays money over time and the proposed agreement would result in a cash settlement today. The $60,000.00 future entitlement, while assumed in this hypothetical, is rarely a given. The comp system can be perceived by injured workers to be tedious and demanding under the best of circumstances and frustrating and manipulative under the worst. Your client may simply wish to take a bird in the hand and rid himself of the administrative and bureaucratic difficulties associated with continuing to receive comp benefits.

What options are available to you and your client if the client decides that he or she is better served by remaining in the comp system? My personal view is that you are still entitled to receive an attorney's fee and costs pursuant to your fee agreement with the client. The big question is what to do with the balance. My approach would be to leave the remaining funds in my trust account, demand that the comp carrier continue making payments to my client under AS 23.30.015(f) and to advise the comp carrier that its *future* payments to my client will be reimbursed out of my trust account at the rate of $2.00 for every $3.00 spent as would appear to be proper under the *Cooper* case and AS 23.30.015(g). Why go to the trouble? The best reason is because in the real world, the $60,000.00 future comp exposure is probably an estimate. What if the carrier never actually pays out *all* of the anticipated future monies to your client and its refusal to do so is, at some point, authorized by the Board. It will be much harder to get back money from the carrier under these circumstances. In the meantime, the bulk of these monies can be deposited in an interest-bearing trust account and your client (and/or the carrier) will receive the benefit of that interest. Finally, this tedious process may bring the comp carrier back to the bargaining table and provide you and your client with another opportunity to better the client's position vis-a-vis the comp carrier.

Caveat

While our firm believes that a penny saved is a penny earned, we never exact a fee for reductions in the subrogated interest of medical pay carriers or workers' compensation carriers. Those of you following a different approach should take a careful look at AS 23.30.145 regarding Board approval of attorney's fees and AS 23.30.260 making the acceptance of any fee "in respect to a claim" for compensation a misdemeanor absent Board approval.

Summary and Conclusion

It is impossible to do an adequate job for an injured worker in pursuing that worker's third-party claim without a good understanding of the legal, political, and economic interrelationships between the workers' compensation rights and remedies and those that exist in the third-party action. Consultation with a workers' compensation expert is, in many cases, appropriate prior to settlement of the third-party claim and/or negotiation of the existing comp lien. An aggressive assessment of your client's rights under the *Cooper v. Argonaut* case may lead to greater than anticipated reductions in the lien claimed by the workers' compensation carrier and/or to a complete waiver of that lien and positive payments by the comp carrier in settlement of its future obligations.

Verdict and Settlement Reporting Summaries

Following are brief summaries of the Verdict and Settlement Reporting Forms submitted to the Alaska Bar Association. Copies of the forms may be purchased for $.10 per form. Please refer to Alaska Bar Rag Volume and Number and the number of the summary below when ordering. For more information, please call the Bar office at 272-7469.

1. *Allstate Ins. Co. v. David L. Evans, Charlie Mayo* (4FA-85-581). Vehicle accident. Court amount: $4,136.26.

2. *Allstate Ins. Co. v. James Loft* (4FA-84-317). Vehicle accident. Default Judgment: $14,337.91.

3. *Allstate Ins. Co. v. Patricia Tyler* (4FA-84-1853). Vehicle accident. Court amount: $2,985.56.

4. *Estate of John Bitter v. United States* (A86-067). Failure to diagnose heart disease. Death. Settlement: $295,000.

5. *Stanley E. Blake v. Jeff Hall* (4FA-85-429). Unlawful entry of state trooper. Court amount: $849.60 in favor of defendant.

6. *Staley E. Blake v. Ronald L. Richards.* Fight — unprovoked. Court amount: $6,167.75 for Richards.

7. *Janet Bowdidge v. Dan Andrus & Northern Oilfield Services* (4FA-85-726). Vehicle accident. Court amount: $54,885.84.

8. *Butcher v. Torrez* (3VA-85-175). Failed to yield right-of-way. Broken leg and arm. P. demand: $25,000. D. offer: $0. Verdict amount: $30,000.

9. *Button v. Alexander, et.al.* (3AN-85-1142). Defendant's left turn into plaintiff's path. Plaintiff not wearing seatbelt. Head injury. Special damages: $1,600. P. demand: $100,000 (policy limit). D. offer: $40,000. Settlement: $87,500.

10. *Chaffin v. City of Valdez* (3VA-86-89). Vehicle rear ended. Property damage. Personal injuries. P. demand: $35,000. D. offer: $30,000. Settlement: $31,500.

11. *Ronald Dees v. John Johnson & Jerry Johnson* (4FA-85-713). Assault. Court amount: $16,069.94.

12. *Clyde Haack v. Municipality of Anchorage, Anchorage Municipal Light and Power, and Anchorage Telephone Utilities* (3AN-85-8947). Trench cave-in. Knee injury. Hand injury. State of Alaska and Multivisions settled before trial. Verdict amount: $0 (verdict for defendant).

13. *Dennis Cox v. Dredge Resources, Inc. et. al.*(3AN-83-5095). Plaintiff was struck on back of hand while operating winch. Fractured left hand. Special damages: medical $7,789.22; lost earnings $18,000 (approx.). P. demand: $185,000. D. offer: $100,000. Verdict amount: $48,000 reduced by 75% for Plaintiff's comparative negligence; $12,000.

14. *Crane v. Wilkie and State* (3AN-84-6965). Rape. Psychological injuries. Special damages: about $20,000. P. demand: $175,000. D. offer: $150,000. Verdict amount: $190,750* against defendant and rapist, none against State.

15. *Fortenberry v. Placid Oil Co.* (A84-136). Faulty placement of work crew in snow avalanche zone. Brain damage. Settlement: $1,650,000; structured settlement value is $4-5,000,000.

16. *Gallagher v. Alyeska Pipeline Service Co.* (3VA-85-147). Testing a fire hose under pressure. Hose ruptured. Cervical strain and torn rotor cuff. P. demand: $180,000. D. offer: $50,000. Settlement: $153,000 plus waiver of comp. lien ($21,000).

17. *Head v. State Farm, et. al.* (3AN-85-791). Gross under-insurance. Destruction of residence. Settlement: $620,000.

18. *Hess v. Glenn & Humphrey* (3AN-85-4825). 3 Car auto accident. Leg break — abdominal injuries. Special damages: $90,000. Settlement: $315,000.

19. *Mallory v. Boget.* Defendant's vehicle backed down boat ramp. Severe knee injury. Special damages: Excess of $100,000. P. demand: $100,000 (policy limit). D. offer: policy limit. Settlement: $100,000.

20. *Matlean v. Williams* (3AN-86-5815), Vehicle accident. Soft tissue injuries. Special damages: Meds: $1600; loss of income: $6000. P. demand: $25,000 (policy limit). D. offer: $7,500. Settlement: $7,500.

21. *Neukirch v. Compton* (3AN-85-12332). Vehicle rear-ended. Lower back and leg. Settlement: $25,000.

22. *Poplin v. Rothfussen* (3VA-84-96). Dog bite. Puncture wound. P. demand: $28,000. D. offer: $9,000. Settlement: $24,000.

23. 0.S. Purget & Patricia A. Purget v. Kimberley S. Fuller & Elwood Mintkin (4F-A-84-2715). Vehicle accident. Court amount: $9,397.83.

24. *Pursell v. Markle, City of Wasilla and State of Alaska* (3PA-82-963). Drainage problem. Home abandoned, emotional distress. Special damages: Allegedly $246,000. P. demand: $250,000. D. offer: $70,000. Plaintiff accepted State of Alaska offer of $10,000 but rejected Markle & City's offer. Verdict: $0.

25. *Reed v. City of Valdez* (3VA-84-102). Wrongful discharge. Injury to reputation, lost wages. P. demand: $80,000. D. offer: $10,000. Settlement: $60,000.

26. *Roy Spaulding v. John Leith* (4FA-85-1083). Assault. Court amount: $20,230.30 plus interest and atty. fees.

27. *Spires v. Tompkins* (3KN-85-497). Rear end collison. Head and neck injuries. P. demand: $300,000 (policy limits plus Rule 82). D. offer: $75,000 now plus $6,000 per year for 20 years. Settlement: $322,500 — plus reservation of rights on balance of under insured motorist coverage.

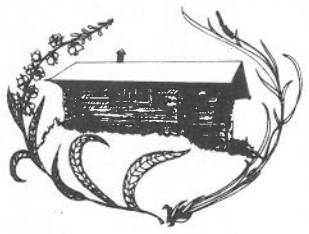
28. *United Services Automobile Assn. as subrogee for Joe J. Parker v. James E. Keyes* (4FA-85-591). Vehicle accident. Court amount: $6,273.20.

29. *Wilson v. O'Docharty* (3AN-85-14966). Vehicle accident. Neck and back. Special damage: $15,000 — comp. lien. Settlement: $15,000 from defendant; $10,000 plus waiver of comp. lien and payment of attorneys' fees.

30. *Kathleen Wright & Richard Wright, individually as natural parents of Maria Wright, Ehran Wright & Will Wight, all minor children v. Kathleen McElroy and Neda Holbert Little d/b/a The Buffalo Lodge* (4FA-84-670). D. offer: $500,000. Court amount: $662,618.09 plus 10.5% per annum.

Please send your verdict reports to the Bar office.

HISTORICAL BAR



Trial law in the 50's

By Russ Arnett

There were a number of fine trial lawyers in Anchorage in the fifties: Stan McCutcheon, Buell Nesbett, Wendell Kay, Bill Renfrew, John Rader, and Ray Plummer. All of these looked upon George Grigsby as their friend and the standard against which they would measure their own successes and failures. Why a group of egotists, which trial lawyers always are, would admire George Grigsby as they did was the mark of the man.

Though he never attended college, Grigsby, John Manders and other lawyers would discuss over strong drink the literary classics, challenging each other with arcane references or questions.

For someone who obtained his formal education in the last century, Grigsby was unfamiliar with some details of modern life. He was scheduled for trial in a case involving the operation of a diesel engine. He was incredulous that an engine could operate without spark plugs. After the heat of compression and other features of the diesel operation were explained to him and finally accepted by him, he was able to successfully try the case.

The most enjoyable time of the year for the Anchorage bar during the fifties was the annual party which celebrated the birth both of Christ and George Grigsby — not necessarily in that order. The high point of the evening, even higher than performance of the Old Crow Players, was when Grigsby spoke. He had a slow, modulated delivery with the pause used as effectively as it was ever used by Jack Benny.

One story he told involved a former law partner in Anchorage who had a bad reputation. It is pretty clear that the partner was the legal owner of a building where sin was sold. They charged him with maintaining a bawdy house against the peace and dignity of the Territory of Alaska and of the City of Anchorage. The partner discussed the charge with Grigsby. As Grigsby told the story he would say, Now, Carl, as your lawyer and not as your partner — what are the circumstances?

During a trial, the prosecutor objected to Grigsby getting too near the jury box. The prosecutor reminded Judge Dimond that he had forbidden the prosecutor from getting too near the jury. Judge Dimond responded that George Grigsby was accorded certain special privileges in his courtroom.

I saw Grigsby defend a murder case when he was in his seventies. I don't remember a lot about the case, but it fell into the category of rich but crude contractor getting terminated by sultry and dingy younger wife with his own 44 magnum. Grigsby's defense was successful but not elevating, but then how could it be? I believe the wife was later murdered in her own right.

More and more the lawyers realized that the time had come for George to retire. Lawyers still valued his companionship and advice but seldom referred paying clients to him. He was frustrated by the Federal Rules and the bulk of paper work required. He called the F.B.I. the "Federal Bureau of Criminal Investigation". The problem was that the life which he had led had not permitted the storing of acorns. Lawyers inquired about Social Security benefits and learned he had never paid in anything. He was permitted to remain in the Central Building without paying rent only because the owner was an old timer. Bea Gaines was loaned to Grigsby by Stringer and Connolly when typing was needed.

Finally George and his wife retired to California. We thought this was a great accomplishment. Some lawyers provided a monthly remittance to him. At one bar party he remarked upon the mysterious payments and then with a broad smile asked "Why did they stop?" One day at the office I received a wire from George saying in substance "Am returning to Anchorage. Make reservations at the Westward". This endangered what the bar had considered a solution. I met with Harold Butcher who was a much older friend of George's than I. I don't remember what was done specifically but the crisis was averted.

I don't recall how much longer George lived. Perhaps he gave up when he was told he could not return to Alaska and live here. On the other hand, he was able in his last days to recall the experiences of a lifetime as a lawyer and an Alaskan which his colleagues so warmly admired.

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