Circle These Dates!

Alaska Bar Association Annual Convention

1896 ONE HUNDRED YEARS 1996
ALASKA BAR ASSOCIATION

May 16-17, 1996

Hotel Captain Cook, Anchorage

INSIDE:
PROVOCATIVE ARTICLES

- **Letters**
- **Put children first**
- **Multimedia at trial**
- **Indigent eligibility**
- **Internet basics**

$2.00

The Alaska BAR RAG

VOLUME 20, NO. 1 — *Dignitas, semper dignitas* — JANUARY-FEBRUARY, 1996

ALPS has come a long way since '87

By Keith Brown

This past summer, as the ALPS Director from Alaska, I was privileged to spend some time in Big Sky, Montana along with a number of lawyers and bar executives from across the United States.

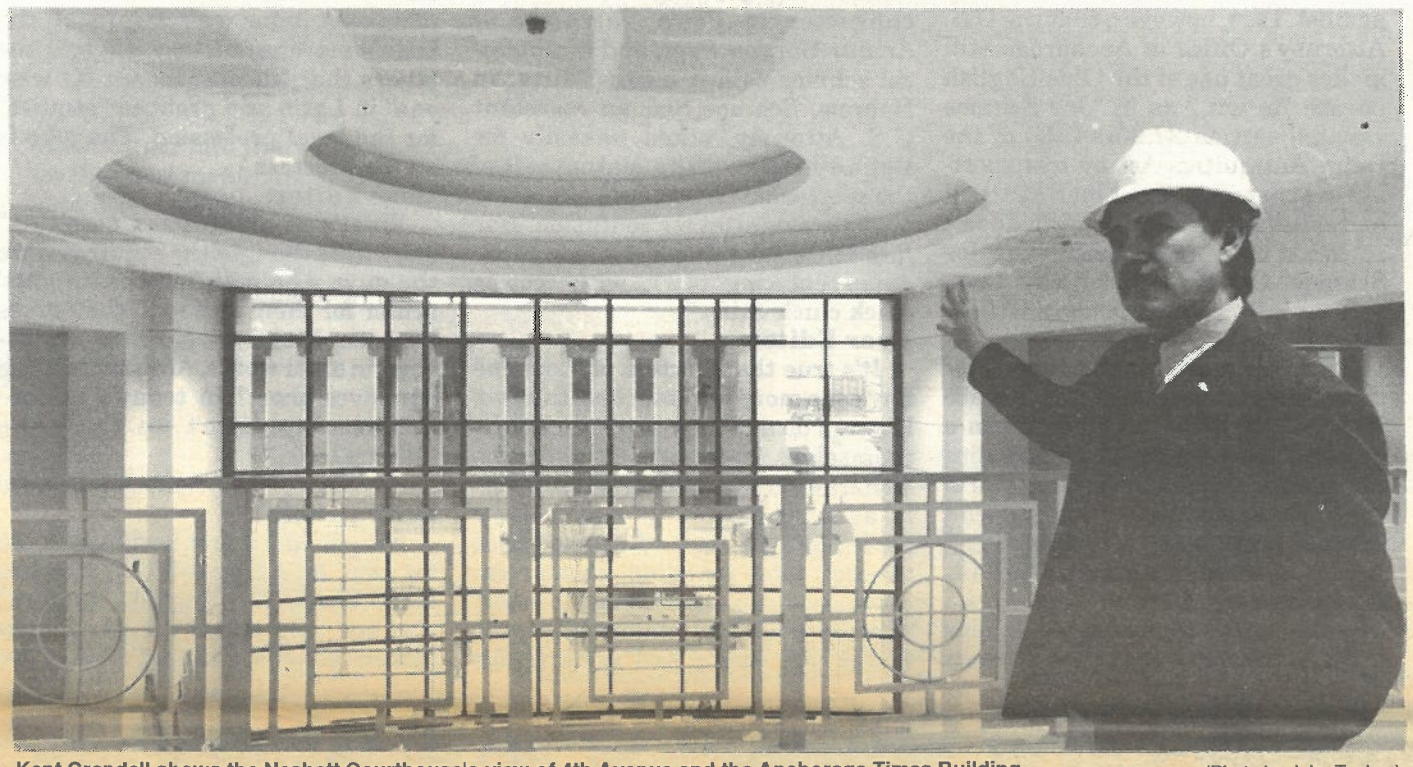
The occasion was a retreat sponsored by Attorneys Liability Protection Society (ALPS). We were invited to participate and hear management reports and updates on the progress of the company. It occurred to me as questions were asked of ALPS claims, risk management, marketing underwriting and financial managers, that ALPS is now over eight years old and many among our current members may not know how and why ALPS was stated.

The story of ALPS is one which should make Alaska Bar Association members proud. Beginning in the early 1980's, the professional liability insurance market took a capricious and disturbing turn. Many traditional insurance companies offering malpractice coverage to lawyers simply stopped writing such coverage or withdrew from smaller markets. Alaska was among a number of smaller state bars that were particularly hard hit. Lawyers who had practiced their entire career with no claims found it nearly impossible to obtain professional liability coverage. Those Alaska lawyers able to obtain coverage were at the whim of a single carrier.

When coverage was available, the lack of competition in the marketplace drove the premiums to exorbitant levels, with rate increase doubling and tripling over previous years. Lawyers from several states involved in various roles with their state bar associations began comparing notes. Some had looked into a state wide "captive" to provide insurance to their members. The smaller states found that their numbers simply didn't make it economically feasible.

Lawyers and bar leadership from the states of Montana, West Virginia, South Dakota and Kansas took the lead in trying to solve this dilemma (along with assistance of members of the Alaska Bar Association). After many long hours of effort, long distance phone calls, letters, and several meetings it was agreed to move forward with a multi-state captive insurance company to provide pro-

continued on page 2



Kent Crandall shows the Nesbett Courthouse's view of 4th Avenue and the Anchorage Times Building. (Photo by John Tuckey)

Nesbett anchors new court complex

By Barbara A. Jones

Superior and district court offices in Anchorage—including the clerk's office and small claims court—are scheduled to move to the new Nesbett Courthouse the week of May 13.

The moving date was chosen because it is the week of the Alaska Judicial Conference and Alaska Bar Convention, when no trials are scheduled, said Al Szal, Area Court Administrator.

The Court Administrator's Office is working on a plan and guidelines for litigants to file documents and other emergency business of the courts during the week of May 13. Notices and instructions will be released closer to the date of the move.

Szal, the conductor orchestrating the move, does have a comprehensive plan to coordinate the task of moving offices, equipment and files; it will take professional movers five to six days.

All district and superior court judges and chambers are moving to the new courthouse. The move also will relocate offices from the current district court building into space vacated in the old Boney Courthouse. Eventually, the court administrative staff will be moved from the Alaska Railroad annex to the old Anchorage Times building across from the new courthouse.

The Nesbett Courthouse

The Nesbett courthouse, named for one of the first Alaska Supreme Court justices, has taken 3 years to complete. At $38 million, the new state courthouse complex will feature state-of-the art security; courtrooms adapted to new technology; and a number of new amenities for the public, including juries.

As completed, the 206,000 square-foot Nesbett building will have 23 courtrooms: 12 superior court, 9 district court, and 2 high security courtrooms—all of which are equipped for media.

According to Kent Crandall, a court system architect, the new building also is designed to withstand earthquakes. The building foundation is constructed as one big slab of concrete, rather than traditional footers, so that the foundation will bridge across any ground faults. The new building also has diagonal frames; these add architectural interest and will support the building in the event of an earthquake. To allow the building to flex under motion and pressure, the structure uses rigid and soft bays. The rigid bays are two foot foundation walls interspersed with flexible bays walls embedded with plastic tubing. Elevators,
ductwork and mechanical work also are designed with safety features in the event of an earthquake.

Three Distinct Zones

The new courthouse has been zoned into three distinct areas or corridors: one for the public, a second for court staff, and a third for criminal defendants. This separation of staff, public and defendant users of the building is designed to prevent conflicts with potential jurors, enhance safety, and provide more humane treatment for criminal defendants.

The Public Corridor

Even before entering the new courthouse at the main entrance to the building on Fourth Avenue, the

continued on page 16

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

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

Editor's Column

Why you're not a doctor and other answers

The letters will apparently continue to pour in as long as millions of readers operate under the misapprehension that the *Bar Rag* has answers to the Big Questions, be they grammatical, professional, or ontological. In a continuing effort to dispel the myth, we do our best with the following queries, drawn at random from the pile in the middle of the mailroom floor.

Peter Maassen

Dear Editor:

I thought that criminal indictments, of all things, should be straightforward enough that even the most woefully uneducated schmoe could understand what he's up against. I see, however, that the U.S. Attorney's Office in Anchorage still makes great use of the Olde English phrase "to wit," as in "Joe Schmoe violated section 27.2(b)(4)(D) of the Dairy Antiquities Act by transporting the cheese, *to wit*: 1 lb. Havarti, 7 oz. Swiss, 2 lbs. American Cheddar. . . ." What does "to wit" convey to Joe Schmoe? Can't we do better?

Preferably Witless

Dear Witless:

I asked a number of schmoes for their understanding of the phrase "to wit." The first, a defendant in a prosecution under the Migratory Bird Act, identified it as the mating call of the spectacled eider. The second schmoe said, "Half wit times four?" According to Schmoe Three, who hails from New Jersey, "to wit" is simply a meaningless sequence of prepositions in search of an object. A literary schmoe told me that "To Wit" is a character in Poe's *Narrative of Arthur Gordon Pym*, and a rabbinical schmoe said it means "dirty" in Hebrew. Schmoe Six, an Assistant U.S. Attorney, opted uneasily for Definition One: "The mating call of the spectacled eider?" Because of this obvious potential for confusion, *Bar Rag* editorial rules have long mandated replacing "to wit" with "toowee cluck cluck chirp."

Dear Editor:

It's true that Doctors of Medicine have one more year of school than we lawyers do and may have earned for themselves a rung up in the professional hierarchy. Still, my *juris doctor* is as hard-earned as any college professor's Ph.D., and unlike those tweedy, pipe- smoking, insular raconteurs, I can't call myself "Doctor" in professional discourse without confusing the public and inviting the eye-rolling scorn of colleagues who know better. One question: Why not?

Doctor of Law

Dear Doc:

Professors will tell you that the difference is in the thesis. The real reason, however, is historical. While many people think that "doctor" has a Latin derivation, its real roots are in Anglo Saxon law. It comes from "dog tear," a brutal Dark Ages method of extracting confessions, usually attended by a medical person (to look after the dogs). When professional titles were being passed around during the Renaissance, it was the lawyer on the committee, alone of all the members, who was aware of the term's macabre history. He told the others that "doctor" meant "O wise one" in Latin and grabbed "esquire" for the legal profession. The joke is on the "doctors."

Dear Editor:

What's so great about "esquire," anyway? I thought the esquires were the guys who polished the knights' armor for them and held the horses between jousts — glorified stableboys, in other words. Aren't we selling ourselves short? In today's contentious society, aren't we really the knights?

Lancelot du Law

Dear Lance:

Keep holding your horses, at least for now. As a chivalry buff like you must know, the English "esquire" was one step above the gentleman and one below the knight. Most of the contemporary public believes that lawyers are not gentlemen, but few understand that we're better than gentlemen. Let's persuade them of that first before assuming our anointed places as Knights of the Law.

Dear Editor:

While you're on the subject, can you explain the protocol regarding use of "Esq." with a signature? Some lawyers use it and others don't. As a new lawyer anxious to display my professional status but equally anxious to avoid appearing pretentious, what should I do?

Esquire (or maybe not)

Dear Esquire:

As Alaskans, we're fortunate enough to be able to have it both ways, since the only other word in the dictionary that begins with "Esq" is "Esquimau." There's nothing pretentious about taking pride in your heritage, or in other people's heritage, for that matter. When your humility is questioned, point to the map.

Dear Editor:

I can't help it, but to me the term "Esquire" has always had a sort of masculine feel to it. May women use the term, too?

Gender Neutral

Dear Neut:

Actually, no. Women using the term "Esquire" are violating a number of federal laws, *toowee cluck cluck chirp*: section 21402 of the Historical Anti-Revisionism Act, section 345(b)(1) of the Sex-Specific Appellation Act, and Title X of the Professional Titles Purity Act, among others. Friends in the magazine business tell me that the feminine equivalent of "*Esquire*" may be *Cosmopolitan, Self, Shape, Harper's Bazaar, or Vogue*. Women lawyers are invited to vote with their signatures.

ALPS has come a long way since 1987

continued from page 1

fessional liability coverage to members of their respective state bars. By the time Attorneys Liability Protection Society was incorporated in 1987, Alaska was one of ten states that were instrumental in the creation of the company. The other state bars involved in the creation of ALPS included Montana, South Dakota, North Dakota, West Virginia, Kansas, Delaware, Wyoming, Idaho and Nevada.

ALPS was then and remains today, a multi-state bar association related, lawyer-owner insurance company. It was formed by lawyers for lawyers as a mutual risk retention group. Initially, ALPS was capitalized by loans from a number of sources, including the Kansas Bar Association. The loan was quickly and promptly repaid with interest. ALPS has remained debt-free ever since.

Dan Callaghan of West Virginia was the first chairman of the board and Bob Minto, a lawyer from Missoula, Montana, was the president. The company was formed under Nevada law and headquartered in Minto's home town of Missoula. A lawyer from each participating state was named to the Board of Directors; Alaska's first director was Mike Thompson of Ketchikan and when Mike was appointed to the bench I followed as the board member from Alaska.

ALPS has grown to become a force to be reckoned with in the Industry. The ALPS insurance, risk management, finance and investment professionals and their aggressive marketing team have built a company of solid financial strength. In 1988 the company had assets of $3.5 million, surplus of $2.64 million, policy holders surplus equity to over $9.0 million and policies numbering over 1,400. ALPS has 167 policies covering nearly 400 lawyers in Alaska alone.

ALPS now writes in Vermont, South Carolina and the Virgin Islands, as well. While there appears to be a great deal of diversity between Alaska and the Virgin Islands, or Kansas and West Virginia, the similarity in the 13 bar jurisdictions is in the number of lawyers with similar problems in each.

ALPS' status as a lawyer-owned and operated insurer is focused exclusively on professional liability insurance for lawyers, has allowed the company to avoid the catastrophic financial impact of hurricanes, floods, hall and tornadoes that befail multiline insurance carriers offering professional liability coverage as only one of its many products.

ALPS assures stable, competitive and fair professional liability insurance in a changing marketplace. Even lawyers not insured with ALPS have benefited immensely from its formation because it has pressured commercial insurers to keep rates competitive. ALPS has been the only professional liability carrier in Alaska to support the bar membership in good times and bad. The current professional liability arena is experiencing some changes. In some cases, the pricing of professional liability coverages have come in lower than ALPS. We have seen this game played before! It is a predictable strategy by insurance companies to "buy" business with unreasonable or predatory pricing. This is a short term approach not devised with the bar's best interests in mind. ALPS and other NABRICO (National Association of Bar-Related Insurance Companies) companies have a wealth of actuarial experience with which to assess the risk involved including the frequency and severity of claims on a state by state basis. Similar information was developed by our bar associations lawyer malpractice insurance committee in the 1980's No responsible lawyer-owned company will engage in cash underwriting practices and ignore solid actuarial data. Since today's market features claims made liability forms, it is always possible for companies seeking to generate quick cash to price their products lower for the short run. Will they be there when you need them? Our past history suggests that cash-flow underwriting means a relative short-term presence in the state.

ALPS' commitment to its insureds and the Alaska Bar membership goes far beyond having the lowest priced legal malpractice coverage. Certainly ALPS wants to provide a competitively priced product; however, it must be a price that will ensure long term stability in Alaska. ALPS takes great pride in providing superior Claims, Risk Management and other policyholders services and believes it is this service that makes them the best "value" in the business.

As Alaska lawyers, you can take pride in your part in starting ALPS. As responsible practitioners who are presumable interested in maintaining a long term relationship with an established insurer, I hope that you will examine today's market with some care and ask the questions that should be asked: Where were you five years ago? What kind of risk management service do you provide? Are you sponsored by or endorsed by any state bar association? How are your claims going to be adjusted? Where is your company going to be two years from now?

Just as the occasion of ALPS' anniversary was the cause for some reflection and celebration in Big Sky, perhaps this reminder that ALPS is

continued on page 3

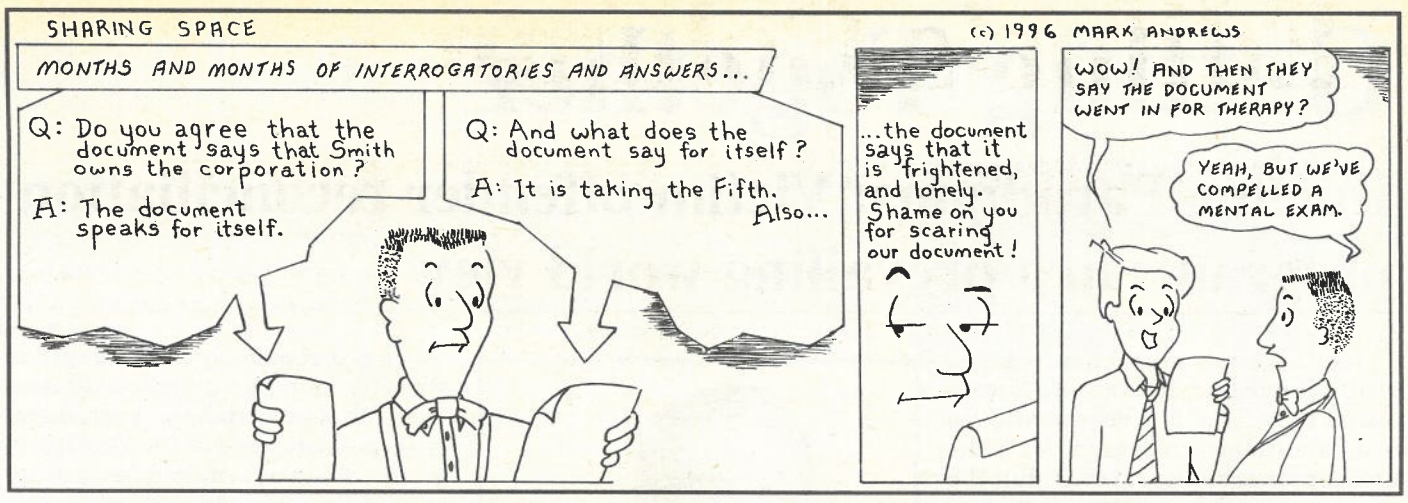
The Alaska BAR RAG

The *Alaska Bar Rag* is published bimonthly by the Alaska Bar Association, 510 L Street, Suite 602, Anchorage, Alaska 99501 (272-7469).

ALPS

continued from page 2

a lawyer-owned and operated company committed solely to serving its profession can promote a move rigorous examination of the forces that drive today's short term market. ALPS is your company; it exists to serve its lawyer policyholders. If you have any comments, recommendations or questions concerning the ALPS program, please take the time to communicate them to us. We want to continue to serve you better than anyone else.



Letters from the Bar

Library money

In Venable Vermont's article, "What Do We Get For Our Bar Dues?" in the November-December, 1995 Bar Rag, one of the items listed is "accounting for law library copies."

The Anchorage Bar Association operates the copiers in the State Law Library, and performs the accounting for the copier system. One-half of the proceeds less expenses from this copier system is used to purchase books and other materials for the State Law Library. The Alaska Bar Association's involvement is limited to maintaining an account for purchases of law library materials from copier revenues. The Alaska Bar Association also receives a share of the copier system proceeds.

In fact, the Anchorage Bar Association copier system is a source of revenue which partially supports the activities of the Alaska Bar Association. Accounting for the law library copiers is not a cost which is paid by Alaska Bar dues.

—Kenneth P. Jacobus
Treasurer, Anchorage Bar Association

Answers editor's wish

In response to the "Editor's Column" plea for pictures *(Bar Rag. Nov.-Dec., 1995),* I submit one picture of a new attorney going it alone. It was difficult, given the "monthly retainer in the high six figures language" to know if you were serious about the general content on doing business in Hong Kong. If you do business with Hong Kong people I would be interested to hear more about it.

I would also be happy to hear from all my old classmates and friends.

Thank you for giving me the opportunity to promote myself.

—Loren K. Stanton
Attorney at Law

Which Davila?

RE: *Davila v. Davila,* Op. 4301; *Davila v. Davila,* Op. 4305

Dear Supreme Court Justices:
(An open letter)

I noticed you have issued two opinions with the same case name, on the same day, covering the same areas of law. One is the second appeal of it, so there are now *Davila I, Davila II* and the third opinion which, for short, I will refer to as "No, the other *Davila.*" One of the December 29 opinions even cites *Davila v. Davila* as authority.

I can see this scene in a trial court 50 years from now, after most of us have gone to our "final reward" (the few in this business who are getting one). Two divorce lawyers are in court, the chairs are comfortable, classical music to fit the mood which each attorney must be in to do his/her best is piped into discrete sectors of the courtroom, the heating system works and the following exchange takes place:

COURT: Do you have any authority for that, counsel?

COUNSEL: Yeah, you betcha, Your Honor, *Davila v. Davila.*

COURT: Which one?

COUNSEL: The one decided December 29, 1995.

COURT: Which one?

COUNSEL: The divorce case... that dealt with alimony and property division — *Davila, Davila,* Your Honor, *Davila.*

COURT: Which one?

COUNSEL: (Turning to opposing counsel) Are my lips moving?

That's it. No more divorce cases for me; too confusing.

—Thomas R. Wickwire

Hey, Bar Association

I'll tell you what you can do for me. Can you keep the courthouse open for my clients? Can you resurrect the notion of bush justice?

Really, the timing was perfect. Here was Venable Vermont, whom I'd voted for (besides of course that great name) because he'd actually tried a case or two outside Anchorage, writing the first of a series on what our Bar Ass'n really does for us. At the top of the list was attorney discipline. My copy of the *Bar Rag* arrived on November 27, the same day the *Anchorage Daily News* featured a story of one of our own on page one of Metro merrily practicing away, despite a guilty verdict in a federal (felony) mail fraud trial concluded six months earlier down in San Francisco. Oops.

Number 3 on the list was CLE. I had recently succumbed to lapse in moral courage and watched a video the Bar liked so much it sent it out at $20 a head: How to Survive Tough Times. It was the worst one I can remember, making those John Strait ethics flicks seem positively fascinating by comparison. What I remember most, though, is Vince Vitale telling us that we'd better learn new ways of helping our clients, because it is already hard to get court time and it is going to get a lot harder. Since the State Long Range Financial Planning Commission Report showed up practically the same day, recommending unspecified cuts of $40 million, $30 million and $30 million in the next three years, I didn't hesitate to believe him.

Consider my experience in the last year. One judge, who in the past had not hesitated to emphasize stability and continuity in deciding child custody, refused to even hold a hearing on interim custody, sounding like the late Chief Justice Berger in bemoaning his caseload! (Why is it you can get weeks for a tort or contract trial and yet have to beg for more than one day when a child's future is at stake?) Another judge, sent to Dillingham on a Monday to resolve a typical 100 case trial schedule, blithely announced that he had to be back in Anchorage no later than Wednesday for personal reasons. (Tell Al to send another judge!) A third judge found himself scheduled to be in the middle of an Anchorage trial at the same time he was supposed to be out here, and administration seemed unable to help. My clients have been told to bring their witnesses into Anchorage to try their civil cases, on their own nickel, or try them on the telephone, a thoroughly unsatisfying alternative. Meanwhile Alaska Legal Services has folded its tent for most of the bush, and reduced services drastically even for urban clients. What can our Bar Association do for me?—how about helping make sure I have a place to work, and enough judges to get the job done?

I really have no complaint with the Bar Association (and especially its CLE program), or with judges for that matter. But does anyone remember the days of the bush justice conferences and other efforts to bring dispute resolutions to rural Alaska? We need more efforts towards tribal courts, or more presence of the state courts, or both. We need to speak up for funding for the courts, and make sure they spend it wisely. Legislators must be reminded of the real cost of "three strikes" and similar criminal justice "reform," (death penalty proponents, are you listening?) both to Corrections and to the Court system, as more and more defendants exercise their right to a jury trial. Alaska Legal Services needs more money and a renewed commitment to the bush. And either the courts need to get out of the child custody business or they need to be willing to take the time to do it right.

While most of these may not be quite the business of the Bar Association, clearly some help is needed, and it's a lot more important to me than that overpriced health insurance package or dubious car rental discounts. We seek professionalism through our discipline, admissions and legal education programs, but if the state court system fails, all of this goes for naught. With the budget battles ahead, we need to be together on this. We've got the new court house; now let's make sure the doors stay open for everyone.

—Fred Torrisi
Practices in Dillingham

Professional opportunities in emerging democracies

The Central and Eastern European Law Initiative (CEELI) - a public service project of the American Bar Association - is seeking experienced attorneys to serve as legal advisors in Central and Eastern Europe and the former Soviet Union to advance the rule of law and legal reform process presently underway in this region.

The CEELI positions focus on a wide range of practice areas - constitutional law, criminal, media, non-profit, and commercial law. In an effort to support the development and reform of indigenous legal institutions, CEELI is working to assist in judicial restructuring, strengthening lawyers' associations, reforming legal education and combatting organized crime and corruption. CEELI also encourages public advocacy and grass-roots activism by supporting NGOs and institutions including Judicial Training Centers in Bulgaria, Estonia and Latvia, and an Environmental Public Advocacy Center in Ukraine.

Positions are presently available in countries ranging from Lithuania to Kazakhstan to provide assistance in small and medium enterprise devel-

continued on page 5

Getting Together

Dueling Paradigms: Victim-offender reconciliation programs in a prevailing world view

I can't get over my antipathy to the word "paradigm." It is such a snooty word. "Paradigm" has its nose way up in the air. It simply means model, in the broader sense of a world view. But the word paradigm has been adopted by the academic world as a classier way to talk about our changing models for looking at the world. It is also perhaps a way to insure that the majority of people will have no idea what we are talking about.

Drew Peterson

The subject of paradigms comes up a lot in the mediation literature. Mediation, at its best, involves such a shift to a new way of thinking about the world. But old ideas die hard, and therein lies the thrill and intrigue of paradigm shifts. A recent article in the *Mediation Quarterly*, entitled "Justice Paradigm Shift? Value and Visions in the Reform Process," by Howard Zehr (Volume 12, Number 3; Spring 1995) discusses such dueling paradigms in the context of victim-offender reconciliation programs (VORPs). I found the article of particular interest in view of my own involvement with Alaska's fist VORP program: the juvenile offender-victim mediation program run by the Anchorage Community Dispute Resolution Center.

The premise of Howard Zehr's article is that we have to be very careful or the old criminal justice paradigm will co-opt and subvert alternative processes such as victim-offender mediation. Change advocates must be wary, he asserts, that their well intended reforms not go astray. We need to be cautious about imposing our visions and values on others, lest they backfire and make things worse instead of better.

Retributive Justice

According to Zehr, the essentials of the current criminal justice paradigm, which he calls "retributive justice," can be summarized as follows:

(1) crimes violates the state and its laws; justice focuses on (2) establishing blame (guilt) and (3) administering pain (punishment); justice is sought through (4) a conflict between adversaries in which (5) offender is pined against state, (6) rules and intentions outweigh outcomes, and (7) one side wins while the other side loses.

Zehr argues that many of the failures of current criminal justice — its punitiveness, neglect of victims, and lack of true offender accountability, to name a few — can be traced directly to the implications of this retributive paradigm. Its punitive and hierarchical values can tend to overwhelm the alternative programs, such as the VORP programs, that claim to embody more experiential and participant-oriented values.

Restorative Justice

In contrast to the retributive paradigm of the current criminal justice system, Zehr defines the "restorative justice" paradigm of the VORP programs as follows:

> (1) crime violates people and relationships; justice focuses on (2) identifying needs and obligations and (3) making things right; justice is sought through (4) dialog and mutual agreements in which (5) victims and offenders are given central roles; and justice is judged by the extent to which (6) responsibilities are assumed and needs are met and (7) healing (of individuals and relationships) is encouraged.

Such a restorative model of justice emphasizes the fundamental reality of crime: that it represents a violation of people and their relationships. The proper response then, should heal and restore.

Anchorage's recently established VORP program has been very successful. Initially sponsored by the Social Work Department of UAA, in conjunction with the McLaughlin Youth Center and Alaska Victims for Justice, the Anchorage VORP program has been as smashing success at creating the kinder and gender accountability in juvenile criminal cases which Zehr calls restorative justice. Same criticisms are starting to be heard, however, about the concept of applying such "touchy-feely" methods to criminal law.

The danger in this battle of world views is that older, better established way of thinking about justice will overwhelm and subvert the new paradigm. New methods, such as the VORP programs, can then be merely turned into tools of the same old retributive process. Zehr cites many examples of where just this has happened in the world of criminal justice, beginning with early Quaker promoters of penitentiaries. Such early penal thinkers had themselves bean imprisoned as men of conscience. Because of their personal integrity they were not treated as badly as were other prisoners and they found their incarceration to be an opportunity for contemplation. Unfortunately, what was liberating for them became oppressive and dehumanizing for others.

In more recent times, determinate sentence, intended to avoid discrimination in sentencing, have instead made the system more punitive. Sentences have became longer and longer, while the inherent rationale for treating prisoners humanely has been eliminated. Many observers worry that so-called intermediate punishments, such as house arrest, electronic monitoring, and even community service, offer new technologies of punishment that will widen and strengthen the net of social control. Zehr is aft-aid that even the VORP programs could become so subverted as to be meaningless, while becoming a new instrument for punishment and control.

The solution for the VORP organizations, according to Zehr, is for such organizations to explicitly articulate their unique values and mission. This will insure that such missions are not co-opted through contact with the dominant retributive paradigm of criminal justice. Zehr suggests three types of statements.

1. A vision statement, articulating a basic understanding of justice.

2. A mission statement that succinctly summarizes the purposes of the organization, and

3. An aspiration statement that suggests guidelines far implementing the organization's purposes and for the relationships among staff, board members, and clients that will support these purposes.

Such statements of the organization's vision and goals are not mere rhetoric but can help to maintain the new restorative justice paradigm in clear focus. By so doing, VORP programs can avoid being co-opted by the prevailing retributive justice model.

In this view of dueling paradigms, the challenge is to see to it that the old ways of thinking not overwhelm newer and more holistic models of thinking about the world. Howard Zehr provides valuable insight into the problem, by insisting that we recognize the battle and bring it front and center where we can deal with it openly and honestly. Otherwise exciting and successful new approaches like victim-offender reconciliation programs can become converted into simply new ways of providing retribution and punishment.

Solid Foundations

IOLTA revenue and expense comparison

In 1995, Trustees Sandra Saville and John Conway resigned from the Board of Trustees of the Alaska Bar Foundation. Sandi, a solo practitioner, was an advocate for innovative approaches to both IOLTA funding and grant disbursement. A shareholder of Atkinson, Conway & Gagnon, Inc., John insured that the Trustees were ever mindful of their duties and responsibilities to the IOLTA firms, the Foundation donors, and the IOLTA grant recipients. Both worked diligently for eleven years to strengthen the Foundation and to initiate a vibrant IOLTA program. During their

Mary Hughes

tenure on the Board, more than $1,000,000 of IOLTA funds were disbursed to provide legal services to disadvantaged Alaskans. The Board will miss Sandi and John. Their tireless devotion enabled the Foundation to prosper.

Attorneys Eric Sanders and Leroy Barker will occupy the sears vacated by Sandi and John. Eric, a partner in Young, Sanders & Feldman, has practiced law in Alaska for 20 years. A director of Robertson, Monagle & Eastaugh, P. C., Leroy has been an Alaskan lawyer for 33 years. The Trustees elected Eric and Leroy to the Board of Trustees to provide continuity as the Foundation initiates a membership program, A Foundation membership program will allow trustee election by the members, as well as an ability, on an annual basis, to meet as a body to discuss Foundation issues. The membership program is expected to be developed in 1996. By the Spring of 1997, it is the hope of the Trustees that an annual meeting of the membership may be held in conjunction with the annual meeting of the Alaska Bar Association.

While organizational issues occupied some time in 1995, the Trustees were very much involved in supporting the continued federal funding for legal services through Legal Services Corporation, as were several members of the Alaska Bar Association. The Congressional lobbying took various forms and proved to be a long, involved, and frustrating process. The Congressional debate stressed the different environment that the legal services community will, of necessity, be facing and further emphasized the importance of Alaska's IOLTA funding of the Alaska Pro Bono Program.

The Trustees look forward to 1996. The development of a membership program will be challenging but, with the continued support of the members of the Alaska Bar Association, the challenge will be rewarding to all.

Professional opportunities in emerging democracies

continued from page 3

opment, the International War Crimes Tribunal, anti-organized crime and corruption projects, judicial reforms, bar development, and legislative drafting initiatives. Most terms range from three months to one year. Although this is a public service, pro bono project, CEELI provides a generous benefits package which covers travel, housing, general living, and business expenses.

For additional information, please contact Ms. Deborah Nolind, ABA/CEELI, Liaison and Legal Specialist Program, 740 15th Street, NW, 8th Floor, Washington, DC 20005-1009 at (202) 662-1967 or fax (202) 662-1957.

JOB ANNOUNCEMENT
Staff Attorney

Alaska Legal Services Corporation is seeking a full-time entry level staff attorney for its Juneau office. Background working in cross-cultural situations desired. Duties: general civil practice including Native law issues; work with community groups and in community legal education; regular travel to small communities and rural villages. Must be admitted to practice law in Alaska or admitted to practice in another state and eligible for a two-year Alaska waiver.

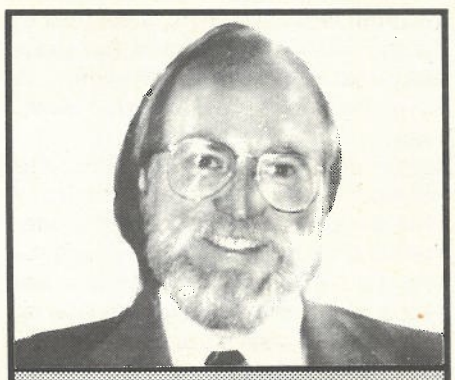
Two-year commitment required. Salary $26,523 - $37,132 DOE. Benefits provided. Non-smoking office. Send resume, writing sample, and references by January 31 to:

Carol H. Daniel, Chief Counsel
Alaska Legal Services Corporation
1016 West Sixth Avenue, Suite 200
Anchorage, Alaska 99501
AA/EOE

Torts

Supreme Court issues big accident decision

On January 5, 1996, the supreme court issued its Opinion No. 4306 in a case styled *Martin D. Victor, III; Patricia Victor v. State Farm Fire and Casualty Company*. This one is worth reading, particularly since recent conflicting decisions[1] from the U S. District Court for the District of Alaska have caused carriers to take the questionable position that UM/UIM motorist coverage is *not* truly excess to other sources of recovery, as would otherwise seem to be dictated by AS 28.20.445(a) and (b) (effective January 1, 1991).



Michael Schneider

The Certified Question

The Ninth Circuit Court of Appeals, consistent with its newly announced philosophy of getting out of the declaratory judgment business (*see* Earl Sutherland's article in the last issue of the *Bar Rag*), certified the following question to the Alaska Supreme Court:

> Under Alaska's Mandatory Motor Vehicle Insurance Act, may the insurer reduce its policy limit for uninsured and underinsured motorist coverage by the amount of any payment the insured receives from or on behalf of a joint tort feasor when the policy limit is lower than the amount of the insured's compensable damages attributable to the fault of the uninsured or underinsured motorist?

The Short Answer.

No.

The Facts.

Plaintiff incurred $300,000 in damages as a result of a chain of events set in motion by an uninsured driver. Plaintiff was also struck in the rear by an insured driver who was 25 percent at fault and whose insurance paid $50,000, the limits of its liability coverage, to plaintiff. State Farm paid $10,000 in first-party medical payments coverage to plaintiff and, in face of plaintiff's demand for the $100,000 uninsured motorist limit on plaintiff's State Farm policy, offered no more than $40,000.[2] State Farm's position, quite obviously, was that its $100,000 U/M policy limit should be eroded by the $50,000 received from the insured driver, as well as the $10,000 paid to plaintiff under plaintiff's medical payments coverage with State Farm. Plaintiff argued that the offsets and reductions, totalling $60,000, should be from plaintiff's $300,000 in damages and not from the $100,000 policy limit. *See* opinion, pages 2 and 3.

It is important to note at the offset that the court limited its holding to an interpretation of the underlying policy; the decision is not derived from an interpretation of Alaska's Mandatory Motor Vehicle Insurance Act. Nevertheless, the policy in question was issued by one of Alaska's major carriers and language in other carriers' policies is very similar. The court's decision is therefore likely to have broad and immediate impact on a number of existing coverage disputes.

The State Farm policy had a paragraph number 7 that provided:

> If the damages are caused by an *uninsured motor vehicle*, any amount payable under this coverage shall be reduced by any amount paid or payable to or for the insured by or for any *person* or organization who is or may be held legally liable for *bodily injury* to the *insured* or *property damage*.

In essence, plaintiff argued that the reduction demanded by this paragraph was from "the damages" of $300,000. State Farm argued that the reduction was from its "U" limits. Plaintiff prevailed.

The Implications

Everyone involved in the legislative process that led to the passage of amendments to AS 28.20.445 by the 1990 legislature believed that uninsured and underinsured motorist benefits were truly excess, as of January 1, 1991. Relying on *Tumbleson*, the industry has taken an oversight in the legislative process (the failure to expressly repeal AS 28.20.445(h) and AS 28.22.211) and used it as a reason to deny or limit coverage in uninsured and underinsured motorist cases. Our supreme court is likely to confront the issue of the implied repeal of AS 28.20.445(h) and AS 28.22.211 soon.[3] In the meantime, Victor v. State Farm provides the authority for resolving many of these claims.

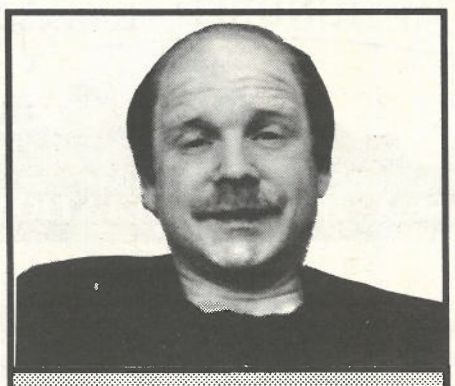
1 *See Colonial Ins. Co. of California v. Tumbleson,* U.S. District Court No. A94-184 CV (JKS), and *Kvasnikoff v. Allstate Insurance Co.,* U.S. District Court No. A94-0318 (HRH).

2 The dollar amounts used herein are changed slightly from those in the opinion.

3 The *Tumbleson* and *Kvasnikoff* decisions have been consolidated before the Ninth Circuit and a motion to certify the questions presented by those cases to the Alaska Supreme Court is pending before a panel of the Ninth Circuit. At least one judge of that panel authored the line of decisions that is moving the federal court out of the declaratory judgment business. It can thus be both hoped and predicted that the motion to certify the question to the Alaska Supreme Court will be granted and that the Supreme Court will pass upon the issue in the foreseeable future.

Tales from the Interior

Crack shot



William Satterburg

As in any vocation, the old timers like to have fun with the new kids. I remember the first court hearing that I was to argue in Superior Court. My supervisor, Gary Vancil, had advised me that it involved a motion for a continuance in a condemnation case. He suggested that I become familiar with the case in the event that the judge had any questions.

The case was several volumes long at that point. I decided to go home and prepare that evening. I read the entire case file. I even did an extensive memo of law. I carried all the files to the courtroom. And I appeared before the judge. Surprisingly, I won the motion. After all, it was unopposed. It was at that point in time that I realized that the new kid on the block has a certain degree of risk with respect to the old timers.

I did not remember the lesson that well.

Three months later, I was assigned to a particularly thorny condemnation case involving the acquisition of a certain piece of property located at Shaw Creek, Alaska. The owner of the property was an irascible elderly lady named Billie. Her attorney at the time had essentially abandoned any concept of settling the case, and indicated to me in a fit of exasperation that he would authorize me to drive to Shaw Creek and see if I could negotiate a settlement directly. I explained to him

As a courtesy, the attorney warned me that his client was somewhat unpredictable and given to fits of temper.

that the Code of Ethics required me to deal with his client through himself, whereupon he assured me that he could waive this provision of the Code of Ethics and, in this case, not only was he *waiving* the Code of Ethics, but *insisting* that I deal directly with his client. Perhaps I could talk some sense into her regarding the settlement. As an afterthought, he mentioned that the only thing she hated worse than state workers was attorneys.

Armed with this information, and aware that he had informed his client that I would be coming down to visit, I departed for the mouth of Shaw Creek, approximately 20 miles the Fairbanks side of Delta. The location, alone, should have alerted me that I was dealing with a different type of person. Shaw Creek is close to Delta, and Delta is near Tok. And as we are now all aware, Tok is a different thing, entirely.

As a courtesy, the attorney warned me that his client was somewhat unpredictable and given to fits of temper. He suggested that I use a high degree of discretion in dealing with her, and be sensitive to various subtle warning signs which might develop, similar to how one determines when a grizzly bear is about to attack.

Needless to say, my drive to Shaw Creek was consumed by the possibility of this being my first and last field trip for the State of Alaska. This was especially distressing, recognizing that I had yet to take any field trips for the State of Alaska, let alone enjoy such established concepts as extended per diem, travel authorizations, and parading about the coveted title of Assistant Attorney General.

When I arrived at Shaw Creek, all was quiet. I crossed the road to a small, innocuous yellow house, which was the owner's original home. It was quiet and looked vacant from outside. Weeds grew in the driveway, blowing to and fro in the wind. It was clearly apparent that the house had been unoccupied for quite some time. Yet this was the description of the residence in the Dept. of Transportation negotiator's report. Where was my victim?

As I climbed back up to the highway, I heard someone yelling at me from a rather nicely appointed house on the other side of the right of way.

"Over here, young man!," the voice beckoned.

I saw an elderly looking lady waving at me from the porch, and concluded that it must be Billie. The description matched, although the house was definitely not the run-down, decrepit dwelling that had been referenced in the negotiator's report. At some time this person had come into some real money. (Like condemnation funds.)

I approached the dwelling cautiously, keeping my hands at all times where they could be seen, just like they tell you to do on television. I remembered the attorney's admonishment not to make any sudden movements, and felt that the best approach was a cautious, conciliatory one. Surprisingly, she appeared to be a sweet little old lady, wearing conservative clothes, and not the tobacco-spitting type which I had seen elsewhere, a'la Grace Lowe. Had people been mistaken about her character?

As I drew closer, I saw a friendly smile cross her face. Then it slowly turned into something more like a smile of victory, the same leer I get just before I set the hook on a red salmon I'm snagging. I began to slow my approach. At the same time, she stooped down and reached behind a cabinet located on the porch. She pulled out the biggest rifle I had ever seen in my life. Although I was later to learn that the rifle was, in fact, a .22 caliber single-shot rifle which was missing a trigger guard, I can say without hesitation that the rifle at that time was definitely the largest-bore weapon that I had ever seen. I didn't even have time to run as she shouldered the weapon and pointed it in my general direction. Until then, I never realized just how personal a condemnation case could be and only knew through third parties the perils of condemnation practice. (The story of Ross Kopperud, who had huddled terrified under a blanket in the back of Ron Jaeger's Ford pickup truck in Fairbanks as Jeager and Vancil drove Ross to the airport, was already legendary. At the time, condemnee Grace Lowe had threatened to kill Ross for bulldozing her house in Hamilton Acres. Okay. True. Maybe the house had been bulldozed. But Ross had a court order. So why not shoot the judge instead?)

Needless to say, all of these thoughts raced through my mind as I saw my end approaching. I made a command decision and realized that to run would only betray my fear and lack of manhood. Besides, I was frozen in my tracks. Someone had glued my feet to the ground. And I was also beginning to have a severe problem with voluntary bladder control.

The gun was pointed at me. It discharged. Just as I was getting ready to break into a wild run, my feet having suddenly been pried from the ground, a cute little squirrel dropped dead in front of me, approximately 10 feet away. A hole was neatly drilled through the side of its head. The lady set the rifle down on the porch, and apologized to me for startling me. At that moment, she struck me sort of like the sweet little grandmother in the poster who was famous for expressing herself via nonverbal communication.

"I've been trying to get that little S.O.B. for the last three weeks," she announced. "That'll be the last time he ever gets into my insulation," she proudly proclaimed. For some reason, I felt he was destined for the stew pot.

I was requested to come to the house, which I promptly did. I asked why the rifle did not have a trigger guard on it. She explained that it interfered with her ability to get a grip. After all, trigger guards are merely a safety mechanism, regardless. Something lawyers get rich over.

I entered her home, and spent the next two hours visiting casually with her, enjoying some fantastic cookies and milk, sharing stories about Alaska, arrogant right-of-way agents, and ubiquitous slime-bag attorneys. Eventually, I announced that I had to return back to Fairbanks. I had a schedule to keep. Disappointed in losing her visitor, Billie nevertheless recognized that work had to be done, and produced a copy of the right-of-way negotiation document which would transfer title to the State of Alaska. Indicating to me that I was a "nice young man" and that she appreciated my dropping down to visit with her and had wished that someone had done so earlier, she signed the document. The lawsuit was over! We parted company, and I left Shaw Creek, Alaska, still wondering to this day if worker's comp would have covered my visit.

But then again, I was a young attorney, and clearly expendable. This was a lesson which I would use later in life on other young upstarts, as well.

The floating court

40 years ago, they handled it all

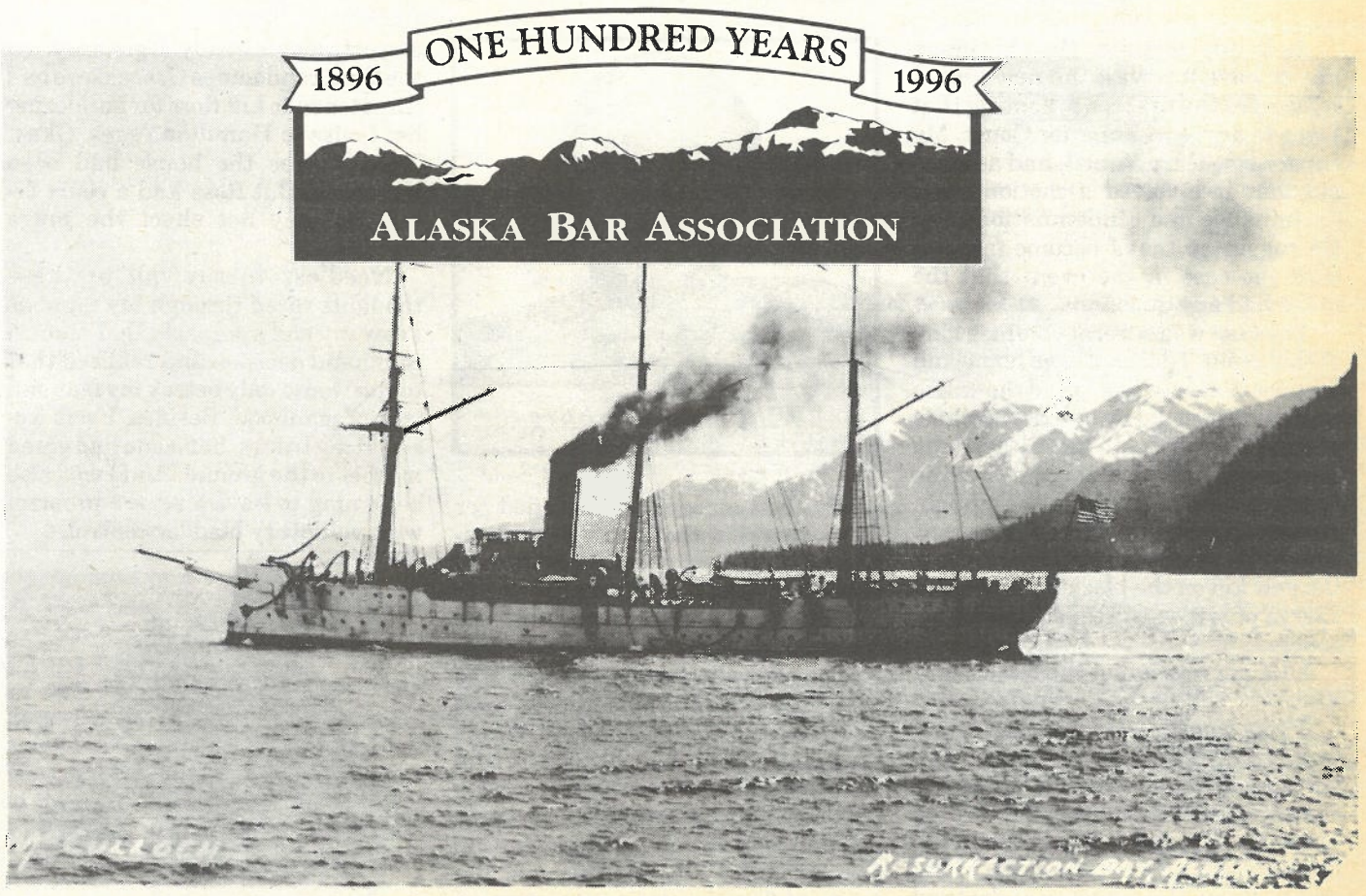
Abraham Lincoln was, in his words, "following the circuit" for six months each year during much of his 25-year law practice. The judge, lawyers, and sometimes litigants would travel together between the circuit courts of the neighboring counties. The lawyers slept two in a bed. All, including some of the defendants in criminal cases, ate together. In the evening the lawyers would joke and tell stories, like this one:

Lincoln and his youthful partner, Herndon, were journeying with two prostitutes to a circuit court. One of the prostitutes later said that Lincoln had them laughing the whole time, though he said nothing off color, "which is more than I can say for Billy Herndon," she added.

The group would arrive at the court and a litigant would come forward and retain a lawyer. They would converse and proceed to trial. (I personally would prefer this procedure to the way law is presently practiced. Litigation would be more fun, less costly, more promptly resolved, and probably no less just in result than under present methods).

The Alaskan version of "following the circuit" was our "floating court." This term was coined during the period when the District Judge—with a clerk, U.S. Marshal, court reporter, U.S. Attorney and defense counsel—would travel aboard a U.S. Coast Guard cutter from Kodiak through the Aleutians, either dispensing justice or dispensing with justice, depending on the importance one gives to procedural norms.

Probably the last true floating court occurred in 1949 when the Coast Guard cutter *Northwind* departed Kodiak for the Aleutians. Aboard were Territorial District Judge Kehoe and his wife, Assistant U.S. Attorney Ralph Moody and his wife, a court clerk, and defense counsel. There was an auspicious beginning when the slot machine at the Kodiak Naval Base stuck and would pay off without inserting a coin. Judge Kehoe, (whose paintings are excellent) would paint from the bridge. A Japanese sailor who killed another sailor was arraigned. Perhaps the end of the floating court was forecast when the group, on completing their work, decided to fly back instead of staying with the vessel. Later the District Judge would travel from Anchorage to Kodiak two or three times a year by air with a "floating court."



***USRC McCulloch*, also known as the "Floating Court," sails in Resurrection Bay, circa 1913.** (Photo courtesy of Anchorage Museum of History and Art.)

I first arrived at Kodiak in 1956 with the floating court. Kodiak's legal needs were then served by one lawyer, along with a disbarred lawyer from back East. Because the disbarred lawyer was not permitted to actually try cases, he introduced himself to me when I arrived at the airport. He was Irish and would take a drink. He told me he had a case set for trial and asked me to associate with him. He had filed an answer. I suppose he planned to split the fee and sit with me at counsel table and feed me questions. I showed proper outrage to his proposal. Later his client came to me and retained me directly. The trial was to start that afternoon.

Judge McCarrey was the Territorial District Judge. The action was on a promissory note for legal services. One of the lawyer plaintiffs had left town and I did not realize how bad his local reputation was until later. Judge McCarrey allowed me to amend the answer to allege that the legal services were negligently performed. I do not remember how we typed the amended answer, if we did.

Kodiak had no courtroom, so we tried the case at the Elks Club. They shut down the bar while court was in session, and we spread out the jury instructions on the bar to go over them. (Incidentally, a bar is an ideal piece of furniture for this process. Judge McCarrey was a Mormon but he expressed no objection to this use of the bar.)

The jury interrupted their deliberations to ask if they could find a verdict for damages *against* the attorneys, and this is what the jury did.

The jurors knew the litigants far better than I. Perhaps they wished to right old wrongs. To have a jury trial—with no pretrial preparation—concluded, with so favorable an outcome, on the same day one is retained, causes one to think well of the floating court system.

As a point of interest, after the disbarred lawyer died, his widow came to me with his will. It did not conform to the Statue of Wills and could not be probated, although he had assured her there would be no problems.

•

As far as I know, the chief of police of Kodiak was completely honest. He was from the mid-Atlantic area and retained what sounded to me like a New Jersey accent. He was an Archie Bunker look-alike as well as think-alike. Because there was no city prosecutor, he would often present the charges himself to the court. The offense of driving while intoxicated was always referred to by him as "driving underneat the influence." Nobody could cure him of this.

•

One of the court clerks told me she once was in Kodiak with the floating court and encountered a woman at the top of the stairs in the hotel talking to a man. The woman was stark naked. What surprised the court clerk most was that neither man nor woman showed the slightest interest when she walked by.

•

Alaska being a territory at the time, order was maintained by U.S. Marshals and Deputy Marshals as well as by city police. No weak or timid Deputy Marshal would survive long in Kodiak. The fishermen drank a lot and fought a lot. The Deputy Marshal in Kodiak, also my friend, not only survived but flourished. When one knock on the head would have adequately subdued the errant fishermen, he would knock twice or three times. One night when he was in a fishermen's bar someone turned out the lights and the fun began. The Deputy Marshal soon was on the floor, and the fishermen returned the kicks and punches they had received from him through the years, in spades.

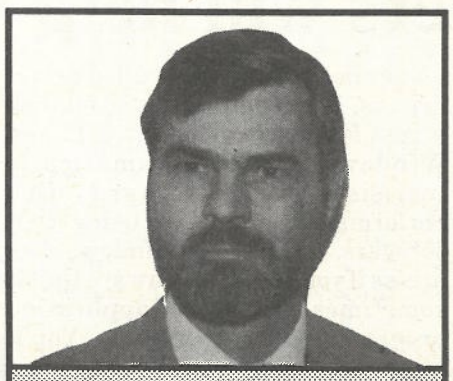
What's Happening at the 1996 Convention

Help us celebrate our 100th Anniversary! The Alaska Bar Association marks its 100th Anniversary this year, and our convention program reviews the history of the Alaska Bar and Judiciary. Come join us Thursday and Friday, May 16 - 17, 1996 at the Hotel Captain Cook and the Alaska Center for the Performing Arts. Watch for the convention brochure in March!

- Meet **nationally known law office management expert Jay Foonberg** as he shares with Bar members "What Clients Really Want and How to Give It to Them," and later discusses "Quality of Life and Practicing Law: Balancing Family, Profession & Self."
- They're back! **Professors Arenella and Chermerinsky** return once more to give us the latest on "Recent U.S. Supreme Court Opinions."
- Take a look back in time during our **Historian's Committee program**. Learn about the 1964 Court Bar Fight, the Origins of the Alaska Civil Code and hear about Alaska's colorful Federal Territorial Judges.
- Join **U.S. Court of Appeals Senior Circuit Judge Robert Boochever** as he reflects on Alaska Territorial events and their impact on Alaska law today.
- Experience **MOVIE MAGIC**: The award-winning American Bar Association program, **"Movie Magic: How the Masters Try Cases,"** will be presented following our President's Reception on Thursday, May 16th. Join us in the Discovery Theater of the Alaska Center for the Performing Arts for this unqiue presentation. Featured are clips from films such as "To Kill A Mockingbird," "My Cousin Vinnie," Judgement at Nuremburg," and "Miracle on 34th Street" demonstrating litigation tactics. A panel of local judges and attorneys will critique the clips and discuss courtroom strategy.

Bankruptcy Briefs

Inadequate adequate protection



Thomas Yerbich

One tenet inherent in the Bankruptcy Code is the concept that the rights of secured creditors, while violate, are entitled to a degree of protection from when those rights are suspended or modified. Among those protective devices is adequate protection provided when the bankruptcy estate is permitted to retain and utilize the collateral of a secured creditor.

While the Code requires that the interest of the secured creditor be adequately protected, what constitutes adequate protection in a particular case is committed to the broad discretion of the bankruptcy judge, determined from all the facts and circumstances. Unfortunately (contrary to the viewpoint of some members of the bench and the bar), upon investiture, bankruptcy judges are not issued a crystal ball that permits an infallible view into the future. In determining what constitutes adequate protection is determined, for the most part, on the basis of certain assumptions that all parties, including the judge, know may be incorrect - they just do not know in which direction or how far. Ever lurking in the background is the question "what now brown cow?" in the event that subsequent events prove the erroneous assumptions are detrimental to the creditor and adequate protection proves inadequate. The remedy is found in BC § 507(b), which grants a "superpriority" administrative expense status to the deficiency. Section 507(b) is, however, less than a model of legislative clarity, having been referred to as "a prism in a fog" [In re Callister, 15 BR 521 (Bank.Ut 1981)]. Hopefully, the following will cut through some of that fog and focus the diffused light emanating from the prism.

To trigger the superpriority provisions of § 507(b), a creditor must satisfy several requirements. First, adequate protection must have been previously provided. Second, that protection must ultimately prove to be inadequate. Third, the creditor must have a claim allowable under § 507(a) (1) [which in turn requires the creditor have an administrative expense claim under § 503(b)]. And fourth, the claim must have arisen from either the automatic stay under § 362; the use, sale, or lease of collateral under § 363; or the granting of a lien under § 364. [Ford Motor Credit Co. v. Dobbins, 35 F3d 860 (CA4 1994)]

The first prong is met when the creditor has sought and the court has either provided adequate protection or found that the creditor is otherwise adequately protected. If the creditor does not seek adequate protection, superpriority under § 507(b) is unavailable. [Practice Notes: (1) Adequate protection need not necessarily be that specifically mentioned in BC § 361. E.g., adequate protection may be provided by the existence of an equity cushion. [In re Mellor, 734 F2d 1396 (CA9 1984)] (2) A creditor who believes itself to be adequately protected by an equity cushion should nonetheless seek a determination by the court on the issue. If there is, in fact, no equity cushion, a failure by the creditor to seek a judicial determination will be fatal to making a subsequent § 507(b) claim.]

The fourth prong is likewise usually a mechanical, straightforward test. About the only potential wrinkle here is where the deficiency emanates from some action not connected with §§ 362, 363, or 364, e.g., actions by the creditor such as delay in requesting relief. There is, however, a split of authority on whether it makes a difference where adequate protection results from a contested motion determined by the court or upon a stipulated submission. This author agrees with In re California Devices, Inc., 126 BR 82 (Bank.ND.Cal 1991) that it makes no difference; § 507(b) does not differentiate between consensual and contested adequate protection orders. [California Devices contains an excellent discussion of the divergent case law on this issue.]

The second prong, inadequacy of the adequate protection provided requires at the outset a discussion of the purpose of adequate protection. The interest of a secured creditor in its collateral is the right to have the collateral available to satisfy the obligation owed by the debtor to the creditor; adequate protection is to protect against diminution in the value of the creditor's interest in that collateral as it existed at the commencement of the case. [United Savings & Loan Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 US 365 (1988)1. Thus, before a creditor is entitled to the benefits of § 507(b), the collateral securing the obligation owed the creditor must diminish in value by an amount exceeding the adequate protection provided. [In re Carpet Center Leasing Co., 991 F2d 682 (CA11 1993), rehrg & hrg en bane denied, 4 F3d 940, cert denied, 114 S.Ct. 1069 (1994)]

In general, the amount of the claim entitled to superpriority is the difference between the amount of the secured claim at the time the petition is filed and the value of the creditor's interest in the collateral at the time the collateral is surrendered or its use terminated, less the amount or value of adequate protection received by the creditor. [In re J.F.K. Acquisition Group, Inc., 166 BR 207 (Bank.EDNY 1994)1 [Note: Many cases referred to the date of the adequate protection order as the initial date. However, in the view of the author, Timbers of Inwood clearly establishes the correct initial date is the date the petition is filed.] It is also important to note that it is the decline in the value of the creditor's interest at the commencement of the case that is protected; a creditor is not protected to the extent the claim may increase until it exceeds the value of the collateral. Thus, post-petition interest and/or attorneys' fees/costs, which certainly erode any equity cushion that may exist, does not fall within the purview of § 507(b) [See In re Delta Resources, Inc., 54 F3d 722 (CA11 1995); cf. In re Ralar Distributors, Inc., 166 BR 3 (Bank.D.Mass 1994) aff'd 182 BR 81 (D.Mass 1995), aff'd 69 F3d 1200 (CA1 1995)]

To the extent adequate protection provided pendente lite exceeds any "deficiency" resulting from a diminution in value, it is applied to reduce the debt, not as additional compensation. [In re 354 East 66th Street Realty Corp., 177 BR 776 (Bank.ED.NY 1995)] As long as the collateral securing the obligation is of sufficient value to satisfy the secured claim (determined as of the petition date), the protected interest of the creditor has not been diminished and the creditor is not entitled to a superpriority claim under § 507(b); to hold otherwise would effectively provide a secured creditor with a windfall beyond the interest to be protected by adequate protection payments under § 361. In short, if the creditor has a secured claim of $100,000 at the time the petition is filed and the collateral securing that claim has a value of at least $100,000 when the collateral is surrendered or the stay or use terminated, the protected interest has not been diminished.

To illustrate the discussion to this point, assume the creditor's secured claim, at the § 362 (d) relief from stay hearing is determined to be $100,000, the court finds the collateral to be deteriorating and, pursuant to an adequate protection order, the debtor makes adequate protection payments of $20,000. The collateral declines in value to $75,000. The creditor's potential § 507(b) claim is $5,000 [($100,000 § $75,000) § $5,000]

On the other hand, assume the facts as above except that the court finds that the property is not deteriorating in value and declines to order the debtor to make adequate protection payments (tantamount to determining that the creditor is adequately protected). The creditor's potential § 507(b) claim is $25,000 [$100,000 § $75,000]. Thus, even an under secured creditor faced with the Timbers situation (no demonstrated deterioration in value), may be entitled to the benefit of § 507(b)

The third prong also can get somewhat convoluted. The fact the collateral diminishes in value, standing alone is insufficient to entitle the creditor to the benefits of § 507(b) The creditor must have an administrative expense claim.

Where the collateral is used to generate funds for the operation of the debtor's business, that test is generally met. [In re Carpet Center Leasing Co., Inc., supra] Thus, in cases where the collateral is consumed such as use of rents and profits, proceeds from the disposition of inventory, or credit is obtained by the estate by subordinating the creditor's lien, presumptively, because the proceeds are used to pay "the actual, necessary costs and expenses of preserving the estate," the requirements of § 503(b) are met. However, a mere "potential" benefit, not actually realized, such as an opportunity to sell the collateral but the collateral is not sold, does not qualify the creditor to a superpriority administrative claim under § 507(b). [Ford Motor Co. v. Dobbins, supra]

In a chapter 11 case, § 507(b) can have an impact either where a plan is proposed for confirmation or if the case is converted. Where § 507(b) is applicable, the secured creditor has an administrative expense claim. As such, under BC § 1129 (a) (9) (A) the creditor is entitled to be paid immediately upon the effective date of the plan. This may render a plan unfeasible and, therefore, incapable of confirmation. [In re Winston XXIV, Ltd. Partnership, 153 BR 322 (Bank.D.Kan. 1993)] In the case of a conversion, unfortunately for the secured creditor, BC § 726 trumps § 507(b) and a chapter 11 superpriority claim does not carryover into a superseding chapter 7. [In re Binos's, Inc., 182 BR 784 (Bank.ND.I11 1995); In re Lochmiller Industries, Inc., 178 BR 241 (Bank.SD.Cal 1995)]

1996 Spring CLE Calendar

✔ Mark your calendars! Below is a list of upcoming CLE programs offered by the Alaska Bar Association. We look forward to seeing you at our programs!

DATE/CLEs	TITLE	CITY/LOCATION
#01 January 17 1.75 cles	New Eminent Domain Rules	Anchorage Hotel Captain Cook
#02 February 8 2.75 cles	Finding the Firest Before They Start: Legal and Tax Issues for Non-Profit Corporations	Anchorage Hotel Captain Cook
#03 February 13 1.5 cles	Off The Record with the Court Administration	Anchorage Hotel Captain Cook
#11 February 23 3.75 cles	Lawyers Helping Lawyers: Assisting Lawyers (Substance Abuse Training)	Anchorage Anch. Hilton Hotel
#88 March 14 3.0 cles	Mandatory Ethics for Applicants	Anchorage Hotel Captain Cook
#05 March 20 3.25 cles	3rd Annual Workers Comp Update	Anchorage Hotel Captain Cook
#88 March 26 3.0 cles	Mandatory Ethics for Applicants	Juneau Centennial Hall
#06 March 28 Full Day	Family Law Advocacy Training with Lynne Gold-Bikin	Anchorage Hotel Captain Cook
#88 March 29 3.0 cles	Mandatory Ethics for Applicants	Fairbanks Westmark Hotel
#16 April 10 6.0 cles	Children & Divorce	Fairbanks Westmark Hotel
#14 April 12 2.75 cles	International Law Issues	Anchorage Sheraton Hotel
#09 April 16 2.75 cles	Real Estate Issues in Divorce	Anchorage Hotel Captain Cook

HI-TECH IN THE LAW OFFICE

Optimizing existing computers will help your practice

By Joseph L. Kashi

Lawyers are using increasingly powerful programs running under a variety of demanding operating systems like Windows 95 and OS/2 and our older computer systems may not have enough horsepower.

We'll discuss some simple ways that you can optimize your computer to run more efficiently and make the best use of what you already own.

The performance of your computer with modern operating systems obviously depends upon the installed CPU and system board, DRAM memory and hard disk. However, you can, within limits, substantially improve the performance, or at least the stability, of your computer by upgrading inefficient operating system software and hardware bottlenecks like slow hard disks.

Upgrade your operating software

MS-DOS 6.22 seems to be substantially more useful than earlier DOS versions and includes quite adequate, fast memory management and hard disk optimization techniques. If you're a DOS or Windows 3.1 user, then upgrading older DOS versions to DOS 6.22 is both effective and inexpensive. Use the latest version of Himem.sys; it doesn't drain as much overall system performance compared to some other memory managers. You will find, for example, that older versions of QEMM significantly decreased computer system performance. If you're a DOS user running an older memory management program, then a QEMM or DOS upgrade can greatly improve system performance. You'll find the DOS memory management program loaded through your config.sys

Many DOS/Windows 3.1 systems will work faster and more reliably when you increase the amount of available RAM under the traditional DOS 640K boundary. Do this by first determining if any programs loaded in your config.sys and autoexec.bat files are unnecessary, then deleting those superfluous load commands. Run the memory optimization process that comes with your memory management software. This program is called Memmaker in DOS 6.22 and Optimize in QEMM.

Consider upgrading to more modern operating systems. Windows 95 often runs Windows 3.1 programs faster than MS-DOS and Windows 3.1. IBM's OS/2 (my personal choice) runs both Windows 3.1 and DOS application programs effectively and OS/2's DOS performance is often significantly faster than DOS itself. In both OS/2 and Windows 95, you'll frequently have the ability to tailor the operating system to the optimum requirements of a program.

Increase hard disk performance

Hard disk performance is frequently a bottleneck that affects overall system performance more than the basic speed of the CPU processor. Many desktop and network hard disks run much slower than their true potential. Although the ultimate mechanical and electronic performance of your existing hard disk is essentially fixed by its design, you can often increase its useful data transfer rate. Delete any junk files, run DOS 6.22 Scandisk, and then defragment your file structure with a disk optimizing program like DeFrag shipped with DOS 6.22 or the defragmenter shipped with *Norton Utilities*.

These programs require you to follow the directions very carefully lest you scramble data irretrievably. Regular DOS defragmenting programs work well with DOS, Windows 3.1, and possibly with OS/2 systems using standard DOS FAT file tables. Don't try to defragment a Windows 95 hard disk yet. I'd wait until new Windows 95 defragmenting programs have been on the market for a while and are thoroughly proven.

Some operating systems, and some hard disk controller boards, let you access hard disk data much faster using special programs called device drivers. For example, the 32 bit disk access feature in Windows 3.11 and Windows 95 can dramatically increase effective hard disk performance simply by using that software. Use 32 bit Windows disk access if you can, but be aware that it sometimes results in application program incompatibilities. You'll have to determine this experimentally if you run into a problem.

Hard disk controllers, whether a separate card or a controller built into your system board, often ship with equivalent free disk acceleration software. Try it; it often increases effective performance markedly. I found, for example, that the effective speed of an IBM EIDE hard disk improved 300% when I used the free device driver software that came with my EIDE hard disk controller. Make sure that you have a bootable disk with the correct operating system version for your A: drive. If the software drivers don't work, they may cause the computer to hang on boot up. In that case, you'll need to boot from the A: drive floppy disk and manually edit out the offending program from your start up files. Keep a copy of the old config.sys and autoexec.bat programs, too, using names like config.sav or autoexec.sav.

Pentium and 486 computers shipped within the last year or so typically include more modern, faster EIDE hard disks. Except for very fast SCSI drives in very high end systems, EIDE hard disks are the fastest, most reliable and least expensive drives that you'll find. A fast 850-1,000 megabyte EIDE drive often costs less than $300 retail.

If your computer is otherwise satisfactory but you need a faster or larger hard disk, then by all means upgrade to EIDE *if* your computer system can handle the larger capacities and newer access methods of most EIDE drives. Many computers cannot. In that case, you can still use an EIDE drive but will be limited to 540 MB or smaller drives and to lower performance modes. Have a knowledgeable technician check your system before you buy that huge hard disk; don't assume that simply putting an EIDE drive into an older computer will make it run faster.

EIDE drives have several optional high speed modes compared to earlier IDE hard disks. Generally, the best EIDE performance, and the greatest degree of user control, occurs when the hard disk controller is integrated directly on to the basic system board. Sometimes, though, a computer manufacturer sets the hard disk controller to run slower than its ultimate potential in order to maximize compatibility.

A technically sophisticated user can experiment with system BIOS hard disk controller settings, EIDE modes and transfer rates, often improving hard disk performance. Be very careful, though! First read the system board manual thoroughly and write down all of the initial BIOS settings that work. If you set the system BIOS incorrectly, it may not boot or may run slower. You may need to undo your changes or revert to the default settings to get a hung system to work again. If you are not sure about what you doing here, DON'T EVEN TRY.

Finally, run a disk cache program like Smartdrive or its OS/2 or Windows 95 equivalent. Use excess DRAM memory to increase the size of your disk cache. Disk caching greatly improves hard disk performance. For daily desktop usage, a disk cache using about one megabyte DRAM should be nearly optimum.

If you administer a Novell network, by the way, consider using the purge command on your file servers regularly. You'll reclaim space used by apparently deleted but actually hidden files and will substantially improve network disk performance. You can't manually defragment a Novell network hard drive, by the way. Don't even try. Novell Netware file servers automatically optimize disk access and manual defragmenting may destroy massive amounts of data and the system itself. Too many people overlook the massive number of files that are retained on a file server long after any need. Lawyers tend to keep thousands of old letters, pleadings, and E-mail messages. Get rid of them if you can. They greatly impede a file server's performance.

Add DRAM to your system

Windows and OS/2 work much better when you add DRAM memory because they can keep more of your operating system and application programs immediately available and don't access the much slower hard disk nearly as often. Ideally, you should have at least 8 megabytes (MB) DRAM for Windows 3.1, 16 MB for Windows 95 and OS/2 WARP, and even more for Windows NT. This is another fairly inexpensive upgrade. Remember, though, that the mechanical and electronic connections for standard DRAM strips changed in mid-1994 and older 30 pin DRAM SIMM strips won't work with newer computers using the 72 pin strips. Adding a lot of 30 pin RAM to an older 386 or 486 system board may be false economy compared to the cost of buying a new system board with DRAM modules that might be reusable with future system board upgrades. Don't load up on unneeded DRAM, though. We may soon see yet another DRAM change in the future as Pentium systems use more DIMM dual memory modules rather than 72 pin SIMM single memory modules.

Get a faster video card

As a practical matter, a DOS user is barely affected by the speed of a VGA video card: You won't notice any difference when running standard DOS character mode programs. Video performance matters only when you're using a graphical environment like Windows or OS/2. Even then, marginally faster video performance doesn't really have much effect upon your computing unless you're an engineer working with really huge Autocad files or unless you're doing 3-D animation. However, you'll perceive that your computer is running faster if your video seems to quickly change windows and reformat graphical word processing documents, and that's often important to user satisfaction. There are many excellent Super VGA video cards available and they're getting faster and less expensive all of the time. If

continued on page 11

HI-TECH IN THE LAW OFFICE

CD-ROMs turn trials into eye-opening events

By Sally J. Suddock

Not only is computer technology revolutionizing the way attorneys communicate, conduct research, and manage their offices, the litigation tools available to your desktop are changing the courtroom, as well.

No longer is it necessary to lug piles of file boxes on a handcart to the courthouse. No longer is it necessary to rely on the imagination and visualization abilities of the jury to describe the horror of an accident or criminal scene. And no longer, perhaps, must an attorney struggle to keep the jury alert and focused on the evidence and complex testimony presented at trial.

Your computer is here to help, and an Alaska company that specializes in computerized litigation support is finding increased interest from law firms that are buried in paper and looking for the courtroom edge.

Document Technology, Inc. (DTI) recently assisted the Alaska Court System in preparing two courtrooms for digital litigation support in the new Anchorage courthouse that opens this year. With a combination of CD-ROM technology, a bar-coding pen, and software applications, attorneys can reconstruct a "virtual" case at their fingertips for all the courtroom to see.

Ellen Tingley, DTI's general manager, sees this new technology as "a revolution for the practice of law."

It starts with paper, of course. Transcripts. Correspondence. Bookie receipts. Secret documents from the CIA. Depositions. Grisly or descriptive photos. You get the picture. In the case of the *Exxon Valdez* trial, where a system like Tingley's was used, the paper piled so high that some day Alaska can start the world's pre-eminent Museum of Accidents at Sea. Think of it. People, greenies, oil giants, and tourists would come from the world around to be fascinated by the havoc Mother Nature and mankind have wrought with marine mishaps. With the *Exxon Valdez* having more paper than them all, probably. You could put all that stuff (except the torn-asunder hull, of course) in a few boxes of CD-ROM's.

U.S. District Court Judge James Singleton has wholeheartedly endorsed this new technology--for ease of trial and its potential to bring down the cost of trial litigation. Anchorage attorneys Clay Young and Mike Flanigan may never go back to a paper trial again.

Tingley's DTI is where one might go to reduce the paperwork to the CD-ROM medium, and service bureaus like hers are springing up all over the country. (You could do it in-house, but it's a full-time, costly proposition to do so.)

Now imagine yourself trying to recreate the captain that night on the bridge...and the aftermath of the grounding on Bligh Reef. With a software program such as Trial-Link Express by inVzn™, you can draw the jury a literal picture of the event, blending documents, photos, animation, and even sound. You can even draw on the screen like John Madden. A computer techie could go wild with this software, even producing a full-length, movie-quality documentary for the jury. (This could yet occur. The technology also was used in the O.J. Trial of the Century.) Practitioners like Joe Kashi could probably learn quickly to assemble the CD-ROM document and images, himself. The software, in the Windows platform, runs about $1,000.

Most attorneys, though, find a service bureau like Tingley's to scan and digitize documents, photos and other evidence. Once reduced to the CD-ROM, software such as WinVzn assists the lawyer in reviewing and organizing all the documentation for a case at the desktop. At desktop preparation or in the courtroom, a scanning pen calls up the evidence in a wink.

Today's multi-media presentation capabilities will really impress the jury and opposing counsel, improve the clarity of evidence provided at trial, and leave you room in the filing cabinet for the next case.

Tingley believes that the cost of

converting your documents to CD-ROM (from whence point magic can be made) also is less than a paper-trail trial. Using a service bureau like DTI drives down the copying cost. She estimates that optical scanning of an average trial material--from input, output and archiving--averages $.95 per page, compared with $2.09 per page in copying costs. With bar-code documentation and Bates numbering, your files may be easier to find than ever; a compact disk can capture 15,000 to 20,000 pieces of paper.

If you're in trial or facing file cabinet overload, check out the amazing possibilities for document imaging. Tingley is so enthusiastic about the service she offers that she'll loan you a video or run a demo right in your office. We were so enthused about this technology that we convinced her to advertise in the *Bar Rag*. You'll find more details on DTI and her phone number in this issue.

Next issue: The new lifestyle of working at home.

Optimizing existing computers

continued from page 10

you want to upgrade your video hardware, be sure that it includes (1) hardware acceleration features and driver softwareparticularly adapted to whichever version of Windows or OS/2 that you're using; (2) a maximum non-interlaced resolution of at least 1024 X 768; and (3) a refresh rate at maximum resolution of 72 Hz or faster. Although not foolproof, I suggest that you read some good comparative reviews in a hardware-oriented magazine like *PC Magazine* and base your decision upon those reviews.

Be sure that you buy the type of video card best suited to your computer: VL local bus and PCI video cards are the fastest but they must be installed in special high-speed expansion slots. Avoid older style ISA video cards unless your computer can't use a VL or PCI card.-

Software drivers adapt a video card to a specific operating system, and the quality of driver software available for a video card often affects performance more than the hardware itself. For example, an ATI MACH 32 took about 40-60 seconds to complete some OS/2 video benchmarks using ATI's own software. When I substituted the comparable 8514A software that ships as part of OS/2 WARP, my 90 Mhz Pentium computer took only 2-3 seconds to complete the same tests, a 2000% improvement. I didn't need benchmark programs to notice a software performance improvement that big.

Windows 95 and OS/2 WARP include all of the necessary software for most major types of video cards while Windows 3.1 includes asmaller selection. However, nearly every video card supplies the manufacturer's own driver software. Usually, video drivers supplied as part of the basic operating system are stable, although not always the fastest. Try manufacturer-supplied drivers as well and see what works best and most stably.

When changing video cards in a Windows or OS/2 system, be very careful. Because these programs use the video card software as part of the operating system itself, you can't simply change to a totally new type of video card. The system usually hangs. You'll need to follow each manufacturer's video procedure step by step, usually first resetting the system to basic VGA, rebooting, and then installing higher resolution software.

Upgrading a system board

Installing a faster system board is sometimes justified, particularly when 90MHz Pentium boards are selling for around $500-$600 wholesale including the CPU chip. This isn't a job for the amateur technician, though. Upgrading your system board makes sense IF your hard disk is already large enough and fast enough and IF you are already using the now¬standard 72 pin DRAM SIMM strips. If you need to buy new DRAM and install a new hard disk, then buying a new basic computer while reusing a good monitor may be more cost-effective and have a longer useful life.

However, the useful life of older 386 or early 486 computers can often be prolonged by installing a faster 486 upgrade board. These generic 486 upgrade boards often use existing 30 pin SIMM DRAM memory, generally operate between 50 and 100 Mhz and usually cost less than $150 wholesale. They're the most useful way to resuscitate older computers for another few years of life support until you're ready to buy brand new systems.

Pumping up Ethernet networks

10Base-T Ethernet is the most common network operating system installed in small to medium law offices. Ethernet connections between each desktop computer and the file server are routed through intermediate amplifying hubs. These are usually simple hubs costing a few hundred dollars each and each connecting eight to 16 computers. (Because this article looks at inexpensive ways to improve performance, we won't even discuss more advanced switching hubs. The cheapest costs thousands of dollars for just eight or 12 desktop connections.)

If you have too many desktop computers connected to an amplifying hub, then desktop computers often interfere excessively with each other, greatly slowing down the entire system. The solution is to "segment" your Ethernet network by splitting the network into several smaller networks. You can do this by getting a few inexpensive eight or twelve port hubs, connecting fewer desktop computers to each hub, and wiring each hub directly into the file server with separate network cards. Because each hub services a reduced number of desktop computers and has its own high speed connection to the file server, there is much less interference with each desktop computer's network traffic.

If you're hungry for more desktop computing horsepower to tame today's demanding new operating systems and office suites, you don't always need to buy a new computer or network. In fact, tuning up your existing systems can provide the performance you need with little or no cost and much less hassle.

HI-TECH

SLED: Access to the Internet and the World Wide Web

By Sharon M. West

You can hardly open a newspaper or journal these days without encountering another story about the wonders of the Internet or the World Wide Web. Individuals wishing to "surf the Net" or "crawl the Web" are often confused about how to find the Internet or worry about the cost of accessing the Web.

In Alaska, thanks to a joint project of the Alaska State Library and the Rasmuson Library, University of Alaska Fairbanks, anyone can access the Internet free-of-charge IF they have a computer and modem.

The gateway by which you can access the Internet and its legal resources is SLED, the Statewide Library Electronic Doorway, available since early 1994.

Internet explained

The Internet does not exist as a single entity; rather, it is a series of connections that links together thousands of computer hosts that contain information accessible to those who use those connections to access the computer hosts. Various tools have been developed which try to organize the resources on the Internet—something almost *impossible to do due to the chaotic* nature of Internet development.

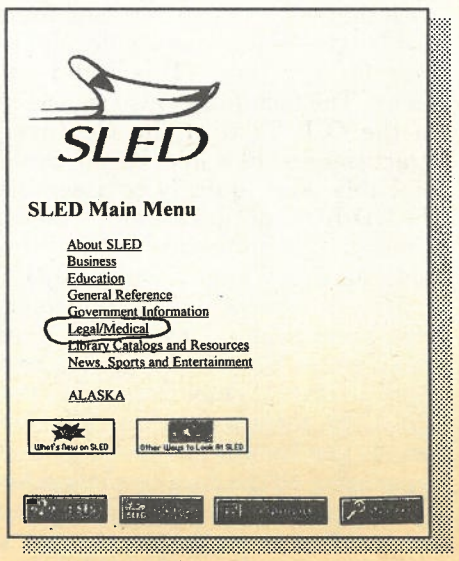
The latest attempt is the World Wide Web, a.k.a. "the Web", "W3", or "WWW". Like the Internet, the Web is not a single entity or location and is built upon the idea of a graphical user interface. Aside from its pictorial nature, the real value of the Web lies in its ability to "link" to other information. In the Web, clicking on a word, phrase, picture or button automatically links you to that item—even if it is located on a totally different computer in a different geographic location.

The Web is the first Internet tool that works somewhat the way humans think—randomly and leaping from one related idea to another. Each time you click on a link, you will be redirected to another "home page"—an electronic table of contents that outlines what's available at that location. Each home page has a unique address called a URL, or universal resource locator. URL's are the Web's version of telephone numbers—each one is unique and they start with the initials *http*. SLED, which was originally text-based, is now a Web home page and uses the Web technology to link information together.

Riding our SLED

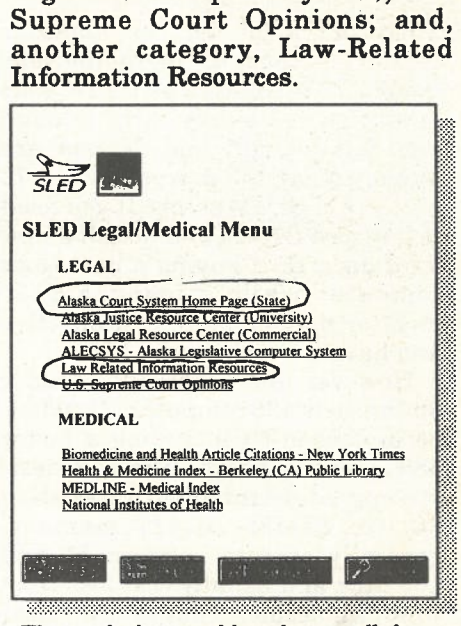
SLED is accessible via the University of Alaska Computer Network (if you have an account on one of the University's academic machines) or through AlaskaNet, the data network run by ATT Alascom. You may also access SLED through your local library's dial-in capability if one exists.

Not everyone has the computing or technical ability to use the graphical mode (you will need either a network connection or a SLIP/PPP connection), you can still SLED and all its Web capabilities by using the text version of the Web. Instead of having full graphics, the links will be highlighted and you can tab to them and select your link by pressing return. You will then be redirected to the home page you have selected.



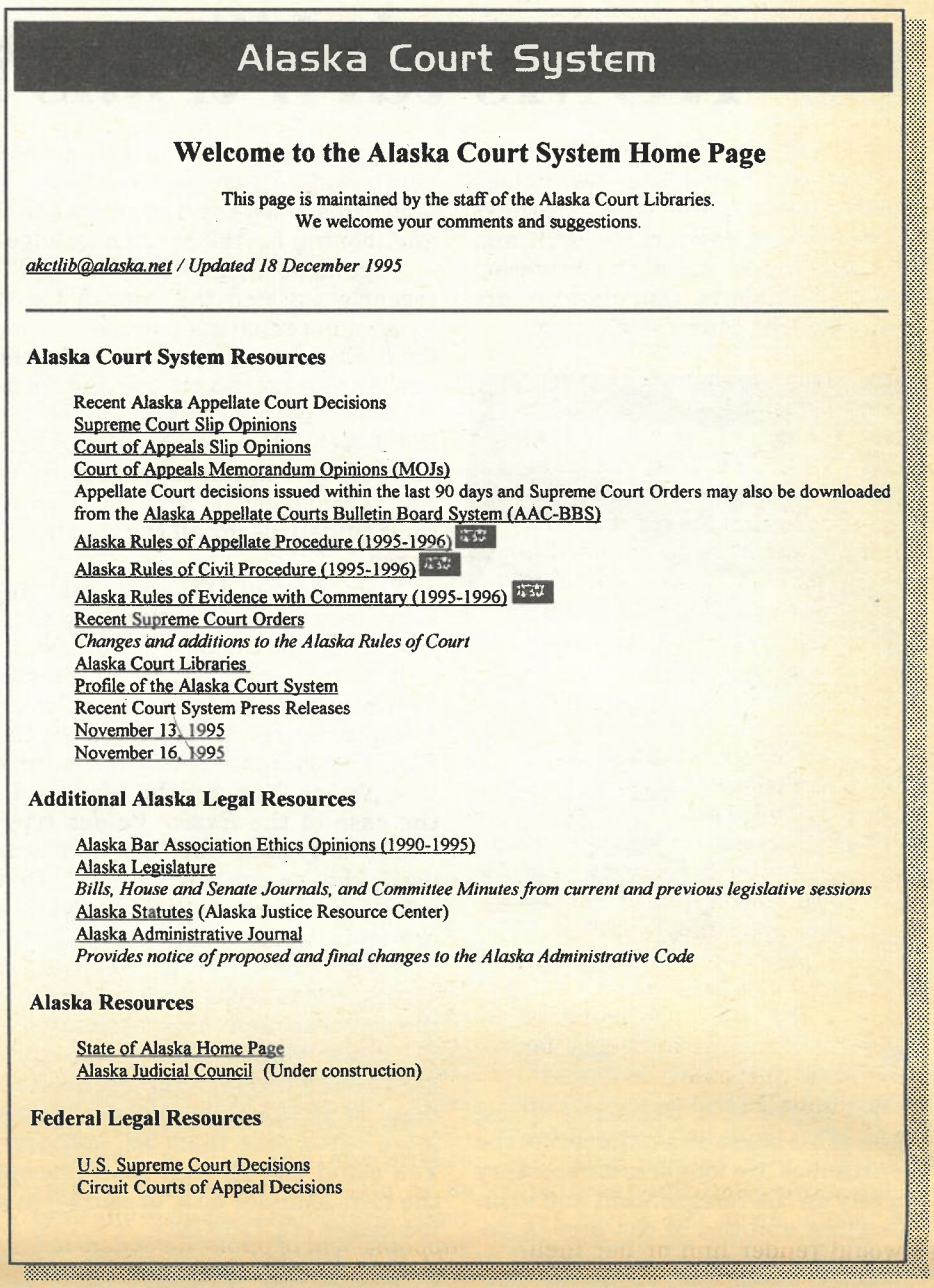
SLED's first stop.

Whether you access SLED through a graphical program like Netscape (its URL is http://sled.alaska.edu) or via text version of the graphical mode, your opening screen will present you with categories of information—Medical and Legal being one of the choices. From this category, you have access to the Alaska Court System Home Page; the Alaska Justice Resource Center; the Alaska Legal Resource Center; ALECSYS (Alaska Legislative Computer System); U.S. Supreme Court Opinions; and, another category, Law-Related Information Resources.



The main law and legal menu link.

These sources have been gathered together and presented as first options for legal sources because they are reliable, easy-to-use, and have been evaluated by a group of librarians as containing high quality information. As we shall see below, you are not restricted only to these sources, but they are good places to start.



The court system home page is one link to even more information.

For example, if you have not used the Alaska Court System Home Page (http://www.alaska.net/~akctlib/homepage.htm), you will find that it contains, among many other sources, Alaska Appellate Court Decisions, Alaska Rules of Civil Procedure (1995-96) and Alaska Rules of Appellate Procedure (1995-1996), as well as the Alaska Bar Association Ethics Opinions (1990-1995), the Alaska Administrative Journal, and links to the Alaska Home Page, the Web home page of the State of Alaska.

Clicking or selecting the category "Law-Related Information Sources in the main Legal/Medical menu" yields a gold mine of information. Through this resource, you can access the Directory of Legal Academia, the home pages of many U.S. law schools, the National Indian Policy Center, publications such as the U.S. Government Manual, and international law resources such as the United Nations Criminal Justice Information Network and the International Law home page from Tufts University, Fletcher School of Diplomacy.

Searching the 'Net

After you have explored all the choices given to you by the SLED menu and you want to know more, you can search the Internet by selecting SEARCH at the bottom of your opening screen. You will be given the choice of using two search tools: *Lycos* or the *Web Crawler*. Each claims to have indexed a high percentage of what is on the Net. You may use either search tool depending on your particular preference. Both search using key words, so the search terms you input must all be in the document in order for you to retrieve it.

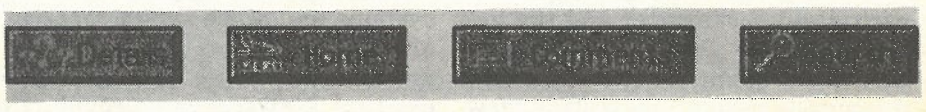
For example, using *Lycos*, I searched "alaska statehood compact" and found that 15,586 documents matched at least one search term. When matching for all three terms, only 112 documents were found. *Lycos*, using a method of assessing the relevance of the documents retrieved, then displays the hits with the most relevant documents first. In this case, my first named hit was the Alaska Statehood Act followed by 9 other hits. If I wished, I could have reviewed all 112 hits.

How to connect

To access SLED using AlaskaNet, set your telecommunications software with the following configurations: data bits=8; parity=none; stop bits=1; baud rate=1200, 2400, or 9600; emulation=VT100. If after dialing into AlaskaNet, you receive garbage on the screen, type the letter "o". You should see a welcome message and will be asked to log on. Type: sled and press the return key. You will be prompted by a password. Type sled and press the return key. After being connected to SLED, you will receive a login prompt. Type: sled and press the return key. You're now IN! To find the AlaskaNet number for your local community, look in the telephone book under AlaskaNet or Alascom.

For further information or assistance, call the SLED help desk at 1-800-478-4667 or, in Fairbanks, call 474-6310.

The author is director of libraries and information technology at the Elmer E. Rasmuson Library, University of Alaska Fairbanks.



The choices at the bottom of the SLED main menus.

The Public Laws

Benefits of changing pace

The State of Alaska Legislative Audit Division recently released an audit of the indigent defense appointment process. The draft audit report was dated May 22, 1995, but remained confidential pending responses of agencies. Agency responses were provided by the Department of Administration on August 31, 1995, and by the Alaska Court System on August 29, 1995. A "rebuttal" was furnished by the Legislative Audit Division on September 13, 1995. Together, these documents make up the final audit report. The report affects a significant segment of the bar. According to the report, OPA and public defender funds go to 89 staff and 70 contract attorneys (roughly 6% of the bar).

The audit makes six specific findings and recommendations. These are:

1. The Alaska Court System ("ACS") in partnership with the Department of Administration should develop public counsel eligibility criteria and screening procedures which can be uniformly and consistently applied.

2. The Department of Administration working in concert with ACS should request statute and regulation amendments to define indigency for public counsel purposes.

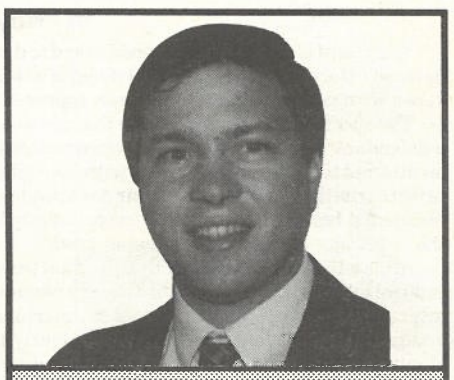
3. The Public Defender Agency and Office of Public Advocacy should follow the Administrative Rule 12 requiring notification to the Court of a change in a client's financial status that would render him or her ineligible for public counsel services.

4. ACS should impose Criminal Rule 39 fees for all public counsel cases including post conviction relief, sentence modifications, and probation revocation issues. ACS should reassess defendant eligibility for public counsel in instances where legal representation is requested for issues subsequent to conviction.

5. Alaska Statute § 18.85.120, Criminal Rule 39 and Appellate Rule 209 should be amended to permit the court to enter judgment for costs against a defendant represented by public counsel regardless of whether the defendant is convicted.

6. ACS should establish policies to insure that at time of sentencing the court takes a formal action on Criminal Rule 39 judgments.

The main thrust of the audit report's conclusions appears to be that indigent counsel appointments have gone



Scott Brandt-Erichsen

awry because there is no consistent standard for indigency, and, as a result, many people are receiving court-appointed counsel who may have sufficient means to pay for private counsel. The audit report concludes:

> *"We have determined that the eligibility screening process, as employed by the Alaska Court System for public defender services, severely lacks scope and depth. Based on our court room observations, file review, and discussions with judges, magistrates, district attorneys, and pretrial service coordinators, it is apparent to us that the eligibility screening process for criminal defendants is not standardized, is not uniformly applied, varies widely between judicial districts, and even within a district, and has resulted in the appointment of public defenders to defendants who clearly had resources to retain their own counsel.*
> *Audit Report, at 9.*

The affected agencies quibbled about some details, but generally agreed with the audit report conclusion. One agency wrote:

> *The Department of Administration (DOA) believes the auditors have correctly concluded that the court appointment system has no uniform standards, criteria, or consistency.*
> *Audit Report, page 21.*

Another wrote:

> *"The court system agrees that the development of a system of written indigency standards has the potential to improve the current system."*
> *Audit report, at 34.*

If I read correctly, all parties seem to agree that the procedure used to provide indigent defense counsel could be tightened so that only the "truly needy" are served. There are many methods by which this could be achieved, some good, some bad. Apart from selection of a breaking point, a "poverty line" for indigent defense services, the meat of the issue is eligibility criteria.

In fashioning a revised system, I would suggest that the powers that be look to other private and public program eligibility models which evaluate financial resources and need. It stands to reason that a public sector process designed to determine whether an individual has the capacity to pay for goods or services could learn something from the private sector and the wealth of experience of financial institutions and the credit industry. Even within other state agencies, a number of models are available.

A thorough review process is used if one is applying for an Alaska Housing Finance Corporation loan or social service benefits such as aid to families with dependent children, housing/rental assistance or day care assistance. Further, ongoing reporting requirements apply to many such social service entitlements. Even the permanent fund dividend applications require a certain amount of information to be provided by the applicant for a public benefit.

I know of no justifiable reason why the eligibility requirements for court-appointment of counsel should be subject to less scrutiny than those for permanent fund dividend eligibility, aid to families with dependent children, day care assistance, or any entitlement to benefits of a financial nature. I am certain that the masses would be scandalized if the loose standards for indigent defense were applied to these programs.

If the objective is to verify indigent status, then application for public counsel services could include items similar to those sought on a mortgage application (e.g., copies of the three most recent tax returns, most recent pay stub, bank account balances, lists of assets and liabilities, etc.) . A written application for indigent defense services signed under penalty of perjury would provide a better verification tool and could deter some spurious requests for indigent defense counsel. Further, charging a potentially indigent defendant the cost of a credit report (often only $15-$20, and less than $100 at most financial institutions) would not appear to be unreasonable. Follow-up, such as some ongoing reporting requirement, would be helpful too. It is doubtful that any fifth amendment issue would be involved.

There is a valid criticism that extensive paperwork requirements may require substantial staff to review applications. One would imagine that the staff requirements could be reduced through use of the latest available computer technology and standardized, "fill in the bubble with a number 2 pencil," computer-read forms to compile the relevant data.

There is no constitutional requirement that criminal defense be a blank check for those who merely claim indigency. Those who cannot pay are entitled to counsel, but the prerequisite is that they must be unable to pay. The burden should be on the defendant to demonstrate inability to pay, not on the state to establish the contrary. Remember, it is your money which is being spent.

NEWS FROM THE BAR

McGee Disbarred for Theft of Client Trust Money; Morrill Suspended for Abandoning Practice; Bennett Censured for False Billing; Other Attorneys Disciplined

The Alaska Supreme Court on November 6, 1995 disbarred former Anchorage attorney John F. McGee. Personal problems led McGee in May 1995 to leave for Canada, where he is a citizen. At the time, he had open files for fourteen clients. He did not notify any of them that he was leaving Alaska, did not discuss their money or property that he held, and made no arrangements for transfer of their files. While examining the abandonment of his practice, the Bar learned that McGee could not account for over $65,000 in client trust funds, with over $60,000 belonging to one client alone. McGee admitted that he converted the $60,000 and other funds to his own use, entered a stipulation for interim suspension (which the Supreme Court ordered on July 26), and, following further investigation by Bar Counsel, entered a final stipulation for disbarment. The stipulation and related documents may be examined at the Bar Association office in Anchorage.

Mr. McGee has returned to Anchorage to face criminal charges arising from his misappropriation. Questions about the criminal proceedings may be directed to the Alaska Office of Special Prosecutions and Appeals.

•

Attorney Leslie Morrill, formerly of Anchorage, is suspended from practice under an order issued November 6, 1995 by the Supreme Court. Morrill engaged in several types of misconduct. In one case, she accepted a fee deposit but failed to do the work, then failed to respond to her client's requests for information. In another case Morrill failed to make discovery and failed to appear for trial, resulting in entry of default against her client. In a third case Morrill, to hide her suspension from practice for nonpayment of dues, attempted to appear in bankruptcy court under a trade name; she also violated court orders and failed to file necessary documents, resulting in the dismissal of her client's bankruptcy petition. Though notified of the charges against her, Morrill left Alaska and failed to respond in the disciplinary investigation or in formal proceedings brought against her, which is a separate ground for discipline.

After entering Morrill's default on the merits, the Hearing Committee recommended that Morrill be disbarred. On automatic review, the Disciplinary Board of the Bar rejected that recommendation and recommended that Morrill be suspended for five years less one day. Bar Counsel appealed the reduced sanction to the Supreme Court, which affirmed the Board's decision and entered the suspension order. The public proceedings file may be reviewed at the Bar Association office.

•

The Supreme Court on October 30, 1995 issued a public censure to Anchorage attorney Wilfred D. Bennett for making false statements in bills to clients. Under a stipulation with Bar Counsel, Bennett admitted that he altered billing records for two corporate clients to make it appear that services were provided by attorneys other than those who actually did the work. The clients had authorized only Bennett or designated associates to work on their files. Bennett assigned unauthorized associates to do research and writing. He then adjusted the time and charges so that neither client was overbilled for the work. (The clients had no complaint about the value or quality of the work.) Members of Bennett's firm discovered the practice and notified one of the clients, who directed Bennett to inform Bar Counsel.

Bar Counsel found a violation of ARPC 8.4(c), which prohibits conduct involving dishonesty, fraud, deceit or misrepresentation. Bar Counsel and Bennett originally entered a stipulation for discipline by suspension for 90 days, which the Disciplinary Board found excessive. On the Board's recommendation, Bar Counsel and Bennett entered a stipulation for censure, which both the Board and the Supreme Court approved. The stipulation and related documents can be reviewed at the Bar Association office.

•

Attorney X received a private reprimand from the Disciplinary Board for neglect. The attorney represented an elderly widow, who was the personal representative of her husband's estate. After the widow entered a nursing home and began to decline mentally, the attorney was asked to arrange a guardianship for his client. Periodically over a period of three years the widow's relatives and their lawyer contacted Attorney X attempting, initially, to get the guardianship set up and, later, to obtain the widow's file. The lawyer took no action for the client, did not return telephone calls or answer letters, and did not return the file until the relatives and their lawyer took concerted action. Although the probate estate had been open for several years before the widow entered the nursing home, the lack of a competent personal representative thereafter frustrated resolution of outstanding claims against the estate.

Aggravating factors included the widow's vulnerability due to her age and her location in a remote village, and the lawyer's prior discipline for conflict of interest.

•

Attorney X received a written private admonition for communicating with an opposing party known to be represented by counsel. Attorney X represented Wife in a divorce. The court ordered Husband to pay some of her attorney fees. Husband telephoned Attorney X, supposedly to find out where to send the check. Husband and the attorney discussed this, which was permissible. However, after acknowledging that it was improper to expand the discussion, Attorney X spent about ten minutes discussing the bad relationship between the parties' lawyers. Husband tape recorded the whole thing.

Bar Counsel found a violation of ARPC 4.2, but a technical and harmless one because it did not appear that Attorney X attempted to overreach Husband in any way. Upon the approval of an Area Discipline Division Member, Bar Counsel offered and Attorney X accepted a private admonition.

ALASKA BAR ASSOCIATION ETHICS OPINION 95-5

Undisclosed tape recording of conversations with potential witnesses in criminal cases

The Board of Governors has been asked to determine whether it is ethically proper for a criminal defense attorney, or the criminal defense attorney's agent, to surreptitiously tape record interviews with potential witnesses when representing a person accused of a criminal offense.

The specific facts presented are that the attorney and her investigator, appointed to represent a defendant in a criminal matter, were accused of misconduct, including misrepresentations and an attempt to suborn perjury, by a witness contacted during the course of the defense investigation prior to trial. But for the Alaska Bar Association's prior ethics opinions, defense counsel would have instructed her investigator to surreptitiously tape-record the interview to independently verify the substance of the conversation at trial.

After a thorough review of the question presented, the Board concludes that criminal defense counsel retained or appointed to defend a person accused of a crime may surreptitiously tape record interviews with potential witnesses in the criminal cases *provided* the attorney or the investigator acting at the direction of the attorney clearly informs the potential witness of the interviewer's identity and specific association with the accused.[1]

DISCUSSION

The traditional prohibition against surreptitious tape recording of conversations by attorneys began when the American Bar Association adopted ABA Formal Opinion No. 337 on August 10, 1974. This ethics opinion prohibited surreptitious tape recordings of witness interviews by all lawyers except prosecutors. In the past, the Alaska Bar Association relied on this opinion to forbid all lawyers from surreptitiously recording conversations with witnesses except prosecutors.[2]

The Board now concludes that ABA Formal opinion No. 337 no longer justifies a prohibition against surreptitiously recording interviews of potential witnesses by defense counsel in criminal cases for two reasons. First, it seems unfair that law enforcement agencies can routinely record conversations with witnesses surreptitiously but agents of the defense cannot. Second, witnesses with testimony relevant to an alleged crime have a reduced expectation of privacy that their conversations will not be recorded by prosecutors or by defense counsel.

1. AUTHORIZING SURREPTITIOUS RECORDING BY PROSECUTORS BUT NOT DEFENSE COUNSEL IS FUNDAMENTALLY UNFAIR

At the outset, it is important to recognize that American Bar Association Formal Opinion No. 337 authorized use of an investigative tool by the prosecution that it expressly withheld from counsel for the accused. The opinion provided that "[w]ith certain exceptions...no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation."

The exception referred to in Formal Opinion No. 337 authorized the Attorney General for the United States and the principle prosecuting attorney of a state or local government in "extraordinary circumstances," or law enforcement acting at their direction, to make surreptitious tape recordings for use in criminal proceedings.

Notwithstanding the limitation to "extraordinary circumstances," it is now commonplace for law enforcement authorities to use surreptitious tape recordings as an investigative tool. Indeed, a growing number of jurisdictions have recognized the inconsistency, both logically and in terms of basic fairness, in permitting a prosecutor to surreptitiously tape record interviews with witnesses, while prohibiting defense counsel from doing the same.

As a result, these jurisdictions have determined that, at least in the criminal justice context, an exception must also be made to permit defense counsel to surreptitiously tape record witness interviews. See Opinion 90-02, Committee on Rules of Professional Conduct for the State of Arizona (March 16, 1990) (providing that recording of witness conversations by criminal defense attorneys or their agents is ethically permissible either for the purpose of protecting against perjury or for the purpose of obtaining impeachment material should the testimony of the witness be different at trial); Kentucky Bar Association Ethics Opinion No. E-279 (January 1984) (concluding that it is ethically proper for an attorney representing a person accused in a criminal case to secretly record witnesses in the criminal proceeding); Board of Professional Responsibility for the Supreme Court of Tennessee, Formal Ethics Opinion No. 86- F-14(a) July 18, 1986) (concluding that there is no ethical impropriety in secretly recording potentially adverse witnesses in criminal cases for the purpose of providing a means of impeachment in a criminal trial provided that one party to the conversation consents to the recording).[3]

The Board finds reasoning offered by the Committee on Rules of Professional Conduct for the State of Arizona to be particularly persuasive.

> If there are no legal restrictions against one-party consensual recording, and law enforcement agents are additionally allowed to engage in such activities, then the criminal defense lawyer, in fulfilling his or her legal and ethical duties to zealously represent a client, must equally be permitted to develop important impeachment evidence through this method. The importance of preventing persons from twisting the truth may, depending on the circumstances, be necessary to effective representation of a criminally accused client.

Opinion 90-02 at 5-6.

The Arizona Committee concluded:

> [T]he recording of witness conversations by criminal defense attorneys or their agents, with the consent of only one party to the conversation, may be ethically permissible either for the purpose of protecting against perjury or for the purpose of obtaining impeachment material should the testimony of the witness be different at trial.

Id.

In Alaska, law enforcement agencies regularly use surreptitious tape recordings in criminal investigations. *See Palmer v. State,* 604 P.2d 1106 (Alaska 1978) (holding that a suspect under arrest need not be warned that his or her conversations or actions are being videotaped); *City and Borough of Juneau v. Quinto,* 684 P.2d 127 (Alaska 1984) (holding that police officers may surreptitiously tape record conversations with citizens during investigatory stops and arrests); *Stephan v. State,* 711 P.2d 1156 (Alaska 1985) (holding that unexcused failure to tape record custodial interrogations violates the due process provisions of the Alaska Constitution).

The rationale for each of these holdings is that Alaska citizens do not have a reasonable expectation of privacy that their conversations will not be recorded in the context of criminal investigations conducted by Alaska law enforcement.

II. ALASKA NO LONGER RECOGNIZES AN EXPECTATION OF PRIVACY THAT CONVERSATIONS OF WITNESSES IN CRIMINAL CASES WILL NOT BE SURREPTITIOUSLY RECORDED

This same analysis now applies to defense counsel and his or her investigator. AS 12.61.120(c), enacted by the Alaska Legislature in 1991, provides:

> If a person representing the defendant, including the defendant's attorney or a person specified by the court under (b) of this section [defendants not represented by counsel], contacts the victim of an offense with which the defendant is charged, the person shall clearly inform the victim
> (1) of the person's identity and specific association with the defendant;
> (2) that the victim does not have to talk to the person unless the victim wishes; and
> (3) that the victim may have a prosecuting attorney or other person present during the interview.

A complaining witness who agrees to speak with a defense investigator after receiving the advisement prescribed by AS 12.61.120(c) has no more legitimate expectation of privacy than the citizen dealing with a police investigator. He or she knows or should know that the details of the complaint will be aired in a public forum.

The witness in a criminal case is similarly situated. Once a defense investigator and the client are identified, the witness knows or should know that the matter under discussion is of public concern and will be decided in a forum open to the public. The witness has absolutely no expectation of privacy and, of course, knows or should know that he or she is subject to subpoena. Only accuracy is served by the surreptitious recording of a witness' statement. Both the tone and the content of

continued on page 15

NEWS FROM THE BAR

continued from page 14

the investigator's questions are preserved along with the witnesses own words.

Any danger that defense counsel might take a witness' statements out of context to gain an unfair advantage in criminal litigation is foreclosed by *Lowery v. State,* 762 P.2d 457, 468 (Alaska App. 1988) (holding that if defense counsel uses an investigator's report to impeach a witness at trial, the prosecutor may request and defense counsel is required to disclose the entire report (or recording) to the state.) See also Alaska Rule of Evidence 613(b) (2) ("In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request shall be shown or disclosed to opposing counsel.")

CONCLUSION

The practicalities of the present day criminal justice system are inconsistent with any continued prohibition against surreptitious recordation of potential witnesses by defense counsel. Because it is now common practice for law enforcement agencies to surreptitiously record interviews and/or conversations in criminal investigations, the Board believes that is unfair to permit investigators of law enforcement agencies and their agents to use this investigative tool without allowing investigators for the defense.

Moreover, the Board believes that a potential witness in a criminal case no longer has a reasonable expectation of privacy that his or her comments about matters related to the prosecution or defense of the case will not be surreptitiously recorded.

For all of these reasons, the Board concludes that the recording of witness interviews by criminal defense counsel or their agents does not violate Alaska Disciplinary Rules,, provided the attorney or the investigator acting at the direction of the attorney informs the witness of the interviewer's identity and specific association with the accused.[4]

Adopted by the Board of Governors on March 17, 1995.

[1]Under most circumstances, the tape recording of a conversation is legal so long as one party to the conversation consents. See AS 42.20.300(b). Under this opinion, law enforcement attorneys and their agents retain the exclusive right to surreptitiously record interviews without disclosing their agent's association with law enforcement pursuant to *State. v. Glass,* 583 P.2d 872 (Alaska 1978), modified, 596 P.2d 10 (Alaska 1979).

[2]Alaska Bar Association Ethics Opinion No. 78-1 adopted American Bar Association Formal Opinion No. 337. Alaska Bar Association Ethics Opinion No. 83-2 endorsed Ethics Opinion No. 78-1 without analysis. Alaska Bar Association Ethics Opinion No. 91-4 held that an attorney acting in a personal capacity as a party to a family law matter could not surreptitiously record conversations with the other party to the dispute. Finally, Alaska Bar Association Ethics Opinion No. 92-2 held that an attorney could not ethically use a transcript of a telephone conversation which another attorney had surreptitiously recorded.

[3]At least one court has found the disparity between prosecutors and defense counsel to constitute a violation of equal protection provisions of the Constitution. *Kirk v. State,* 526 S.2d 223, 227 (Louisiana 1988).

[4]Removing the blanket prohibition from tape recording by criminal defense practitioners does not eliminate all ethical restrictions on the practice. There may be circumstances in which a secret recording of a conversation violates specific provisions of the Rules of Professional Conduct. For example, the prohibition in Rule 4.1 against "making false statements of material fact" would apply if a lawyer were asked by the other party to a conversation whether the conversation were being recorded. Under those circumstances, the criminal defense attorney could not ethically deny the recording. Similarly, the prohibition in Rule 8.4 against conduct involving "dishonesty, fraud, deceit or misrepresentation" would prohibit a criminal defense attorney from using a recorded statement in a misleading way. Moreover, the Board does not intend by this opinion to authorize surreptitious recordings of conversations with either opposing counsel or the accused.

ALASKA BAR ASSOCIATION
ETHICS OPINION NO. 95-6
Attorney's Right To Withhold A Client's File Unless The Client Pays For Copying Files

The Committee has been asked to give an opinion as to whether it is proper for an attorney to refuse to return a client's file unless the client pays the copying charges.

It is the opinion of the Committee that the client's files may not be withheld if prejudice would result to the client.

It is fundamental to the attorney-client relationship that the lawyer must disclose to the client the basis on which the client is to be billed for both professional time and any other charges, including photocopy expenses. This disclosure should be made at the outset of the representation. [Rule 1.5(b).] Unless the lawyer's fee agreement specifically sets forth the understanding of the parties regarding copy charges, the lawyer may not charge the client for copying the file.

The circumstance in which this question will arise is typically when the relationship between lawyer and client has ended. In that event, the interests of lawyer and client may be diverging. The client may be dissatisfied with the lawyer's work and may have discharged him or her, and be seeking new counsel. The lawyer who has been discharged, rightly or wrongly, may feel threatened and may not have been paid. Under these circumstances, the client's interests must be paramount.

Pursuant to Rule 1.15, the lawyer has an obligation to hold property of a client separately. Such property must be identified and appropriately safeguarded. Further, the client's property must be promptly returned upon request. It is the Committee's opinion that the client's original files are the property of the client. Accordingly, a lawyer must make available to his or her client all papers and property to which the client is entitled, and may not make receipt of them contingent upon payment for copying. *See* Pa. Ethics Op. 89-76 (1989) (files of client).

A lawyer may not charge the client for making a copy of the original documents for his or her own purposes. There are circumstances in which the lawyer who has been discharged may wish to retain copies of all or some part of the client's file. A lawyer may not charge for the duplication costs of a client's file if the duplication is to protect the attorney from a malpractice or related claim or to provide forms for a research bank. In those instances, the copies are made not for the client's benefit, but for the lawyer's. The Committee believes it is improper to charge the client for such costs. *See* Philadelphia Bar Ops. 80-32, 86-154 (111386) (1984) (ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT § 901:7510 at 50 (1984)); Virginia Bar Op. 1171 (21389) (1989) (BNA MANUAL § 901:8749 at 25 (1989)).

Further, Rule 1.16(d) governs the lawyer's obligations to the client upon termination of the representation:

> (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect the client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, *surrendering papers and property to which the client is entitled,* and refunding any advance payment of fee that has not been earned. *The lawyer may retain papers relating to the client to the extent permitted by other law.*

Alaska R. Professional Conduct 1.16(d) (emphasis added).

The comment to the model rules provides insight as well:

> **Assisting the Client Upon Withdrawal**
>
> Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law.

Thus, a lawyer must surrender the client's papers and other property *unless* the lawyer is permitted by law to retain the papers as a matter of law.

Alaska law provides for a statutory attorney's lien. A.S. 34.35.430 provides:

> **Attorney's Lien.** (a) An attorney has a lien for compensation, whether specifically agreed upon or implied, as provided in this section.
>
> (1) First, upon the papers of the clients that have come into the possession of the attorney in the course of the professional employment;
>
> . . . .

In *Miller v. Paul,* 615 P.2d 615 (Alaska 1980) , the Alaska Supreme Court shed some light on the balancing required between the attorney's right to compensation and the client's need for the file. The facts were as follows. Attorney Miller was retained by Mary Paul to represent her in the probate of her husband's estate and in prosecuting a wrongful death action. A written fee agreement was executed providing for a contingent fee for services in the wrongful death claim. Apparently due to a possible conflict of interest on Miller's part, Mary Paul terminated Miller's services. Miller then submitted a billing for his services rendered. Miller filed a notice of attorney's lien covering both a retaining lien on papers in his possession and a charging lien on any recovery ultimately received by Paul. Paul substituted counsel, McMurtray, who moved for an order requiring Miller to turn over the files to him. The superior court granted the motion, indicating that Miller was adequately protected by the charging lien. 615 P.2d at 617.

> Paul contends that Miller's statutory and contractual liens must give way to an attorney's ethical duty not to prejudice a client's case by withholding access to relevant materials in the attorney's possession. Attorneys must conform to high ethical standards regardless of whether statutory rights permit contrary conduct. . . . [A] question is presented as to whether ethical considerations require that a lawyer return the client's files. Paul had the right under the contract to fire her attorney without cause. An attorney should have the right to some protection, assuring payment of reasonable fees earned. A balancing of those interests is required in determining what security should be required for relinquishment of the attorney's retaining lien.
>
> If the client does not initiate the withdrawal, or if there is just cause for the client to discharge the attorney, ethical considerations mandate return of the files. Even where the client terminates the relationship without just cause, the court must consider the value of the files to the client's case in determining the adequacy of the security to be requested. . . . . Economic duress may not be utilized to prevent a client from exercising the right to terminate the relationship with the attorney.

Id. at 619-20.

The Committee recognizes that an attorney's right to assert a lien to secure payment of his or her right to a professional fee is primarily a question of law. While the court in *Miller* was not specifically concerned with copying charges, the considerations appear to be the same. The lawyer who has not been paid for his or her services is entitled to assert a lien against the file. However, the lawyer's interest in getting paid must be subordinate to the rights of the client. A lawyer may not prejudice a client's rights by withholding property of the client which is essential to the client's case.

In summary, the question of whether it is proper for a lawyer to refuse to return a client's file unless the client pays for the copying charges is fraught with potential conflicts. The circumstances in which this question will arise are typically when the relationship between the lawyer and client has ended. In that event, the interests of lawyer and client may be diverging. Regardless of the reason for the lawyer's discharge, the client's interests must be paramount. If the lawyer's fee agreement expressly provides the client will pay copying charges, the Committee believes it is acceptable for the client to be charged for copying the file if it is to benefit the client's interests. However, the client should not be charged for photocopying the client's file if duplication is for the lawyer's benefit rather than the client's. Assuming the law permits a lawyer to assert a lien for fees, care must be taken to assure that imposition of the lien will not prejudice important rights or interests of the client. The client's interests must always be paramount.

Approved by the Alaska Bar Association Ethics Committee on September 7, 1995.

Adopted by the Board of Governors on October 20, 1995.

ALASKA BAR ASSOCIATION
ETHICS OPINION 95-7
Communication With a Represented Party By An Attorney Acting Pro Se

The Committee was asked to decide whether an attorney litigant who is acting pro se may properly communicate about the matter in litigation directly with a represented party without the consent of opposing counsel. The question was posed by family law practitioners who occasionally deal with attorneys who are, for example, handling their own divorce or child custody proceedings. The issue is raised, for example, where an unrepresented attorney who is party to a divorce proceeding communicates directly with his or her represented spouse about the divorce, without the consent of opposing counsel.

It is the opinion of the Committee that such an unauthorized, direct communication with a represented party would violate Alaska Rule of Professional Conduct 4.2, notwithstanding that the communicating attorney is a party to the litigation. Under the broad parameters of the rule, such unauthorized communication would also be improper if the matter were not in litigation.

Rule 4.2 provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party or person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.[1]

This rule prohibits certain kinds of unauthorized communications with a party or person who is represented by another lawyer. The rule specifically bars communications directed to another lawyer's client that concern the subject matter of the other lawyer's attorney-client relationship, unless the other lawyer consents or the communications are otherwise authorized by law.

At issue is whether Rule 4.2 prohibits such unauthorized communications by an attorney who is acting on his or her own behalf, rather than representing a client. In effect, we consider whether the general rule must yield when the communicating attorney is an interested party. This straightforward issue has produced conflicting rulings in state courts elsewhere. *Compare Sandstrom v. Sandstrom,* 880 P.2d 103 (Wyo. 1994) (applying Rule 4.2 to an attorney representing himself in litigation against his ex-wife) *and In re Segall,* 509 N.E.2d 988 (Ill. 1987) (ruling that an attorney who is a party to litigation represents himself in communications with other parties and thus is subject to the rule) *with Pinsky v. Statewide Grievance Committee,* 578 A.2d 1075 (Conn. 1990) (ruling the communications of an attorney litigant who is not representing a client are not governed by Rule 4.2).

In *Sandstrom,* the Supreme Court of Wyoming rejected a pro se attorney litigant's argument "that, because he was a party to the action, he had an absolute right to contact the wife, who was the opposing party." 880 P.2d at 108. The Court considered both the *Segall* and *Pinsky* rulings cited above. The Court rejected the Supreme Court of Connecticut's ruling in *Pinsky,* stating:

> The Illinois Supreme Court reached the opposite conclusion and held: "An attorney who is himself a party to the litigation represents himself when he contacts an opposing party." *In Re Segall,* 509 N.E.2d 988, 990 (1987).
>
> We agree with the Illinois Supreme Court's rationale. The rule is designed to protect litigants represented by counsel from direct contacts by opposing counsel. A party, having employed counsel to act as an intermediary between himself and opposing counsel, does not lose the protection of the rule merely because opposing counsel is also a party to the litigation.
>
> 509 N.E.2d at 990.

Sandstrom, 880 P.2d at 108-09.

In the Committee's opinion, the Wyoming and Illinois courts have adopted the better rule.[2] Both Courts and the Committee construe Rule 4.2 to apply to pro se attorney litigants notwithstanding their status as parties. This resolution is indicated by examining the purposes of Rule 4.2. The Committee recently summarized the rule's policy bases as including:

> preventing an attorney from taking unfair advantage of a represented party by application of the attorney's superior knowledge and skill [*Complaint of Korea Shipping Corp.,* 621 F. Supp. 164, 167 (D. Alaska 1985)]; avoidance of disputes regarding conversations which could force an attorney to become a witness; protecting a client from making inadvertent disclosures of privileged information or from being subjected to unjust pressures; helping settle disputes by channelling them through dispassionate experts; preventing situations giving rise to the conflict between the lawyer's duty to advance a client's interests and the duty not to overreach an unprotected party; and providing parties with a rule that most of them would choose to follow in any event. Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interests,* 127 Pennsylvania Law Review 683, 686-87 (1978-79).

continued on page 16

NEWS FROM THE BAR

continued from page 15

Alaska Bar Association Ethics Opinion 94-1. *See also*, 2. G. Hazard & W. Hodes, *The Law of Lawyering* § 4.2:101 (2d ed. 1991). We further noted the rule's additional purpose of protecting the other party's attorney-client relationship, and preventing one attorney from impairing opposing counsel's performance. Ethics Opinion 94-1, citing *Obeles v. State Bar*, 108 Cal. Rptr. 359, 510 P.2d 719, 722-23 (1973).

In light of these reasons, Rule 4.2 can be seen to protect the interests of the communicating attorney and his or her client, the opposing party, and the opposing counsel.[3] The rule protects the communicating attorney (who may be acting on his or her own behalf, or on behalf of a client) from potential conflicts of interest and ethical dilemmas. The rule protects the opposing party from overreaching by a skilled or knowledgeable lawyer. (Realistically, of course, the opposing party may be more highly skilled or knowledgeable than the communicating attorney. It is equally plausible that the other party is an attorney. Even so, these possibilities do not eliminate the prophylactic value of Rule 4.2.)

The rule also protects both the opposing party and opposing counsel from the risk of inadvertent disclosures of confidential or privileged information, and from interference with their attorney-client relationship. And by prohibiting only *unauthorized* communications, the rule guards against such interference without unduly burdening the communicating attorney. That is, attorneys who want to communicate with represented parties may freely seek authorization to do so from opposing counsel.[4]

On balance, in the Committee's view, these reasons also support applying Rule 4.2 to attorneys acting on their own behalf. The communicating attorney's status as a party does not diminish the interests of opposing parties and opposing counsel. To the contrary, the need to protect opposing parties from undue pressure and overreaching is stronger when the communicating lawyer is an interested party.

To be sure, the Comment to the rule observes that "parties to a matter may communicate directly with each other and a lawyer having independent justification for communication with the other party is permitted to do so." This Comment applies generally. But in the special situation where the communicating party is a lawyer acting as such on his or her own behalf, different concerns govern. In the Committee's opinion, in such circumstances the communicating attorney's personal interest in communicating directly with an opposing party without the opposing counsel's consent cannot override the interests of the opposing party and his or her counsel.[5]

Approved by the Alaska Bar Association Ethics Committee on September 7, 1995.

Adopted by the Board of Governors on October 20, 1995.

1 Rule 4.2 is substantially identical to its predecessor, DR 7-104(A)(1), and some of the authorities discussed in this opinion relate to that disciplinary rule.

2 *See also, In re Mettler*, 748 P.2d 1010, 1010-11 n. 2 (Or. 1988) (indicating that Oregon has amended DR 7-104(A)(1), effective June 1, 1986, by adding the sentence: "This prohibition includes a lawyer representing the lawyer's own interests.")

3 Of course, the rules are also generally intended to safeguard the courts and society's interests in the legal system.

4 Under the rules, a lawyer representing a client should "inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party." Rule 1.4, Comment.

5 Ethics Opinion 94-1 addresses the application of Rule 4.2 to attorney communications with government agencies. In the discussing this Comment in that context, we stated:

> With regard to attorneys, it is the committee's opinion that the Comment interprets Rule 4.2 to authorize direct contact regarding a matter in controversy with a government officer or agency, without consent from the agency's attorney, when the contacting attorney is a "party" to the controversy, and is not acting in a representative capacity.

Opinion 94-1 (emphasis added). The Committee draws the same distinction here, interpreting Rule 4.2 to bar unauthorized communications by party-attorneys only when they are acting as attorneys in a pro se or other representative capacity. (In other words, in the Committee's opinion, an attorney who retains independent counsel and who does not act as an attorney in a given matter would not be subject to Rule 4.2 with respect to communications concerning that matter.)

In the final summary of Opinion 94-1, we also stated that "An attorney who is a party to litigation has the same rights as any other party . . . ." To the extent that this remark is inconsistent with the present Opinion, it is hereby revoked. An attorney who acts as an attorney and who is a party to litigation remains subject to the ethical constraints applicable to all attorneys acting as such.

Nesbett will anchor new court system campus

continued from page 1

design suggests Alaskan images. The exterior landscaping features curvilinear patterns to reflect Alaska's flowing streams and will also feature Southeast Alaska totem poles. Upon entering the courthouse, the public can access the clerk's office on the main floor, which has been redesigned and better organized to be more user-friendly. Civil, criminal, small claims, and records all will be in the same area. Computers will be available for the public to conduct case and file searches.

Next, the public can access the jury assembly room on the second floor via the sweeping staircase or the elevators. The second floor mezzanine looks out over the first floor atrium, which will feature foil and acrylic kayaks, suspended to follow the circular patterns of the atrium ceiling.

The jury assembly area will move from the dismal, dark basement of the Boney building to the second floor of the new courthouse. The light and airy assembly area seats 275 in the northwest corner of the new building, overlooking Cook Inlet.

This area is divided into "airport" seating, a work area with tables and outlets to accommodate laptop computers, and a TV lounge with vending machines and phones. The Alaska Bar Association is donating artifacts—including robes, gavels and documents—for a museum-type display of Alaska's 100-year legal history. The public can view stained-glass panels of Alaska scenes on high, narrow curved windows on the third through fifth floors.

The courtroom floor plans on the second through fifth floors are identical, with four courtrooms on each floor. District courtrooms will be on the lower floors; superior courtrooms will be on the upper floors. Architect Crandall says the beautiful cherry wood, gray and beige walls are intended to create a somber yet theatrical effect in the courtrooms, which also are equipped with acoustic wall panels and circular lighting.

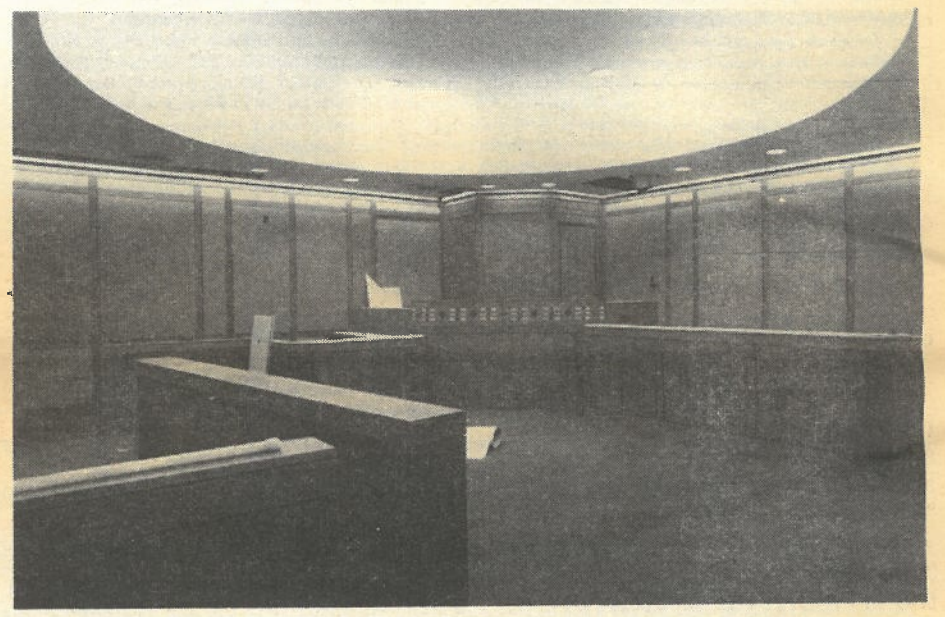
Although the new courtrooms are smaller than those currently used in the Boney Courthouse, more space is available for litigants, the jury, clerk and judge. (Less space is available for the public.) The jury and witness boxes are all handicap accessible. Interestingly, each courtroom has five doors: Separate doors for the judge, jury, clerk, public, and criminal defendants. Two courtrooms on each floor have holding cells for criminal defendants.

The Court Staff Corridor

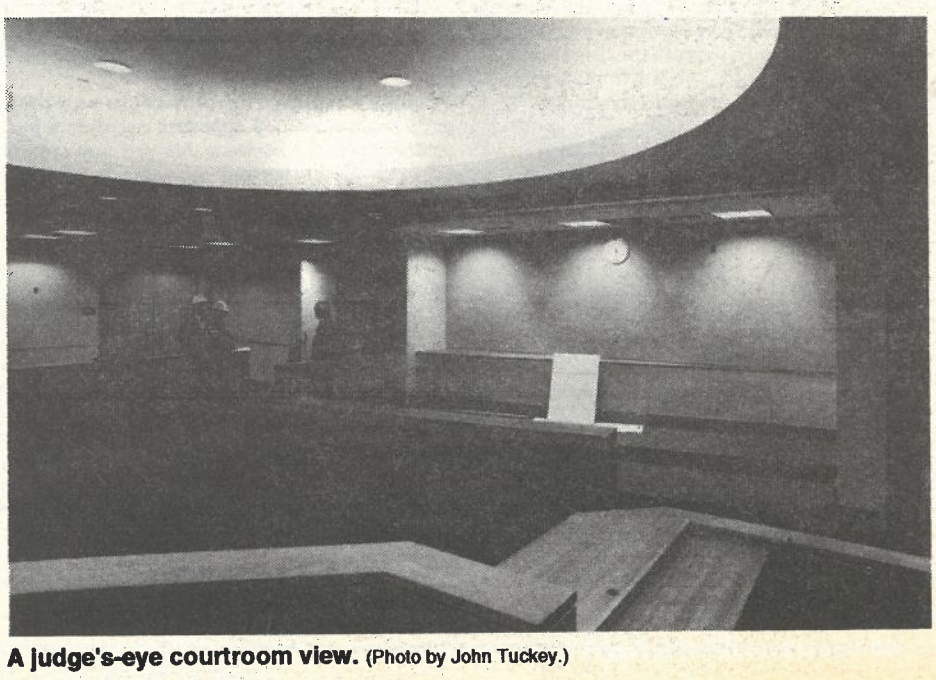
The court staff will access the courthouse through the back of the building, where each entry will be secured with a key card device and cameras. The judges' chambers also are smaller, but each chamber features a secretary and clerk's office. There is one communications room on each floor for photocopying and faxing, and separate staff areas include jury deliberation rooms with coffee bars.

Criminal Defendants' Corridor

The third corridor is a new sallyport for criminal defendants. Essentially, prisoners will never go outside when they are being transported to the new courthouse. Crandall explained that this is a safe, secure means for transporting individuals attending court hearings and trials. Separate, secure areas will be used for criminal defendants, with access to separate restrooms, holding cells, and elevators. The holding area also includes a high-security ceiling, so that criminal defendants cannot escape by climbing into other areas of the building. Two high-security courtrooms also will be available.



A view of the bench in a Nesbett courtroom. (Photo by John Tuckey.)



A judge's-eye courtroom view. (Photo by John Tuckey.)

High-Tech Features

While the new Nesbett Courthouse will be completed in mid-February, the high-security, phone and computer networks will not. These features were the last to be designed, to take advantage of the latest technology. When completed in May, the courtrooms will be equipped to accommodate multi-media CD-ROM presentation systems like those used in the Exxon Valdez and O.J. Simpson trials. Each party, the judge and jurors can access computer monitors and have the ability to control physical evidence by reviewing or enlarging documents.

The air-handling system in the new courthouse has been designed to take up less space, with less noise, to minimize interference with courtroom proceedings. Motion sensors in the offices will automatically switch lights on or off when people enter or exit the room. Other corridor lights are linked to a computer system that turns off lights at scheduled times.

More Plans for '96

The new Nesbett Courthouse, even with its 23 courtrooms, will not accommodate all of the trial courts. Completing the Third Judicial District shuffle will be series of modifications and renovations to adjacent structures:

- The four standing masters will move from the old district court building to the second floor of the Boney Courthouse.
- Some of the space vacated by the district and superior court clerks will be allocated to a new traffic division courtroom and domestic violence courtroom, which will be relocated to the first floor of the Boney Courthouse.
- Magistrates also will move to the Boney.
- The law library will remain in the Boney building, and will eventually expand into space now used by the clerk's offices.

There will be some remodeling in 1996 in the Boney building to accommodate these new functions, primarily the new courtrooms.

- The 1996 plan also involves the demolition of the old district courthouse. Built in 1962, the building was structurally damaged in the 1964 earthquake. A landscaped park or plaza will be built in its place, framing a new entrance to the Boney Courthouse.
- The Alaska Court of Appeals and Supreme Court judges and appellate clerk's offices will remain on the fourth and fifth floors of the Boney building.
- The Court administrative staff, which is currently located in the Railroad Annex, will be moved to the Anchorage Times Building, also to be remodeled this year.

Retrospective: Chief Justice Daniel A. Moore, Jr.

By Daniel Patrick O'Tierney

Daniel A. Moore, Jr. retired from the bench a few months ago without much fanfare, as was his wont. An active member of the Alaska Bar for the past 33 years, he first came to Alaska in 1954. He took a summer job on Barter Island in the Beaufort Sea with Western Electric installing radar sites for the DEW line. A native of the Chicago suburb of Oak Park, he had just completed his third year as an undergraduate at the University of Notre Dame.

He is the second of nine children from — you guessed it — an Irish Catholic family, and he graduated from Notre Dame in 1955. Immediately following, the 22-year-old Danny Moore returned to Alaska with Western Electric to work on the White Alice satellite project. His assignment took him to Kotzebue, Fairbanks, Kenai and Homer. In fact, as Moore recalls, "I was one of the first to lodge at the Bayview Motel when it opened in Homer in 1956."

About to be drafted, he activated his reserve status in the Marine Corps and was shipped off to California. But he did not leave Alaska behind. "During a 30-day leave, I even returned to Alaska to participate in an historic event: the vote on Statehood," Moore recalls. After two years of military service, Danny was admitted to the University of Denver Law School which was on the quarter (as opposed to semester) system. He graduated after "two years and a quarter" in 1961 and passed the Colorado Bar exam. Moore said he then "drove an old beat-up Ford to Anchorage. I always knew I would go back to Alaska; I was glad I made it."

While previously working in Alaska with Western Electric, Danny had met another young Irishman, attorney Jim Delaney. On return as a young lawyer himself, Moore said "I bunked at Delaney's folks' house, which was located on the corner of Third Avenue and K Street — where the law library is located now." At that time, Alaska maintained a six-month residency requirement for eligibility to take the Alaska Bar exam. Judge James Kalaramides, the secretary of the Bar Association for admissions, took issue with Moore's contention that he was already domiciled in Alaska for the purpose of eligibility. After some negotiation, Moore took and passed the exam and was admitted to practice in September, 1962.

He landed his first job as a magistrate-judge on the Anchorage City Court located on the corner of Sixth Avenue and C Street. One of his biggest cases involved the prosecution of numerous bartenders for football pool gambling. During the trial, several hundred people packed the courtroom. Burt Bliss was the prosecutor; Wendell Kay represented the defendants.

Shortly after Ray Plummer was appointed to the U.S District Court bench in 1963, 30-year-old Moore joined the firm of Delaney Wiles. The former Plummer, Delaney & Wiles soon became Delaney Wiles & Moore. And the rest, as they say, is history.

Moore went on to practice with the firm for nearly 20 years, most of them as managing partner. Even in the early days, insurance defense work was a part of the practice. Speaking of those days, Moore recalls that Judge Ed Davis (the first Presiding Judge of the Third Judicial District, formerly of Davis Hughes & Thorsness) set three of his cases for trial in the same week, *seriatim*. "Fortunately," recalls Moore, "I settled the first case before we picked a jury; settled the second one after we picked a jury; and settled the third one the next day." Those WERE the days.

On one of those nights in 1964, bachelor Danny Moore met Pat Crawford at the "Women's Night Out" Tuesday dance at Pal Joey's (today doing business as The Irish Setter). They were married that year-of-the-earthquake by Bishop Flanagan at Holy Family Cathedral in Anchorage.

At that time, the Alaska Bar was small in number and according to Moore " your word was good, no need to reduce everything to writing; practitioners were civil and respectful." Moore's former law firm has earned its measure of respect over the years. In the 30 years since Ray Plummer went to the Federal bench in 1963, seven more members of the firm have become members of Alaska's judiciary. In 1981, Daniel A. Moore, Jr. was appointed to the Superior Court. His secretary at the law firm, Sophie Veker, went with him and remained his assistant until retirement — a total of 28 years.

Judge Moore was appointed a Justice of the Alaska Supreme Court in 1983. On the trial bench, of course, a judge individually decides issues. As a member of an appellate court, there are several other jurists involved in the decision-making or, as Chief Justice Moore opines: "it is like a partnership or a marriage where no one member invited any of the others to join." Nothwithstanding the individual differences of the jurists with whom he served, Moore found "the level of colleagueship and civility to be remarkable, and the Supreme Court during my tenure served the public well."

Moore is particularly proud of his establishment of the local Inns of Court. The Inns provide an opportunity for younger members of the Bar to meet and learn from seasoned lawyers in a manner reminiscent of his own experience in Alaska in a different era. He also believes that the new discovery and disclosure rules adopted during his tenure as Chief Justice "will do more to help civil practitioners than they realize."

For now, he and Pat have relocated to Portland, Oregon. "We will simply be enjoying a few months off before we make any future plans," he said, "although I do expect to be present for the dedication of the new courthouse in May." Thereafter, he may make himself available to administer arbitrations or mediation in Alaska on a limited basis. (Reportedly, former Justice Moore jested with former Judge Justin Ripley about renaming the latter's practice along the lines of "Just Moore Resolutions".)

Daniel A. Moore, Jr.

When asked about life as a retired judge, Danny responds in MacArthuresque terms: "Retired judges never die or fade away, they simply lose their appeal." To be sure, if Daniel A. Moore, Jr. were a professional baseball player, we should be retiring his number. Since he is not, we can only acknowledge and thank him for his contribution to the legal profession and to the State of Alaska. He will be missed.

The author served as Justice Moore's law clerk during his first year on The Alaska Supreme Court, 1983-84.

PROPOSED ADDITION TO BAR RULE 26
DEFINING "CONVICTION" AND CONVICTED"
FOR PURPOSES OF THE RULE

The proposed addition to Bar Rule 26 would provide a definition of the words "conviction" and "convicted" for the purposes of the Rule. At present, there is no definition for these words in the bar rule itself and bar counsel has been using the definition of "judgment of conviction" found in Criminal rule 32(b)(1): "[t]he judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence."

The proposed addition would permit bar counsel to seek the interim suspension of attorneys who have entered pleas of guilty or no contest to a felony or had a finding of guilty to a felony entered against them. It would protect the public, the legal profession and the courts by preventing these attorneys from practicing before they are sentenced.

Rule 26. Criminal Conviction; Interim Suspension.

* * *

(k) For the purposes of this rule, the terms "conviction" and "convicted" shall mean the entry of a plea of guilty or no contest or the return of a finding of guilty by a court or a jury against a respondent attorney for any crime.

Comments on the proposed rule are due by March 1, 1996, to Deborah O'Regan, Alaska Bar Association, P.O. Box 100279, Anchorage, Alaska 99510.

Estate Planning Corner

The QTIP trust

Steven T. O'Hara

For the married client, the so-called QTIP trust is one of the most valuable estate planning tools available. It is the only trust with the flexibility to qualify for, if desirable, the marital deduction and also allocation of the decedent's or donor's exemption from generation-skipping tax.

Recall that the starting point for calculating the federal estate tax is the gross estate. The gross estate includes the value of all property the decedent owned at the time of his death (IRC § 2033 et. seq.). After arriving at the gross estate, deductions are then made. Typical deductions include funeral expenses, administration expenses, and transfers to the decedent's spouse (IRC §§ 2053 & 2056).

The deduction for transfers to the decedent's spouse is known as the marital deduction. The marital deduction is generally available only for transfers to a surviving spouse who is a U.S. citizen (IRC §§ 2056(d) & 2056A).

"QTIP" stands for Qualified Terminable Interest Property (IRC § 2056(b)(7)(B)). As this name suggests, this type of property qualifies for the marital deduction even though the spouse's interest in the property terminates on her death and she does not have ultimate control over the property (IRC § 2056(b)(1) & (7)). In general, what is required for a trust to qualify as a QTIP trust is (1) for a QTIP election to be filed with the IRS and (2) for the trust to provide (a) that all net income must be distributed to the spouse at least as often as annually and (b) that, during the spouse's life, no one has the power to appoint any part of the trust to anyone other than the spouse (IRC § 2056(b)(7)(B)).

After subtracting the deductions from the gross estate, any remaining balance is known as the taxable estate (IRC § 2051). If the taxable estate of a decedent who died in 1995 (and who had never made a taxable gift) is $600,000 or less, no federal estate tax would be owed. Any estate tax otherwise payable would be offset by the so-called unified credit, which for 1995 sheltered up to $600,000 (IRC §§ 2001 & 2010).

By way of further background, recall that the generation-skipping tax is designed to assure that a transfer tax is paid at each generation. The federal government would like to see, for example, a tax paid when grandparent dies, when child dies, as well as when grandchild dies. The generation-skipping tax tries to catch those transfers that would avoid payment of a transfer tax on the death of the middle generation, the child in our example.

Each of us has a $1 million GST exemption, which shelters up to $1 million in generation-skipping transfers (IRC § 2631). In contrast to the unified credit against gift and estate taxes, which applies automatically against taxable gifts and on death, the GST exemption applies, in general, only when allocated by the transferor or his personal representative (IRC § 2632).

Consider a married couple, domiciled in Alaska, both U.S. citizens. They have no debts and neither has ever made a taxable gift. Their assets are all in Alaska and total $1.9 million. Approximately $1 million is in the wife's separate name, and the balance is in the husband's separate name. They have three children, ages 17, 15 and 12.

Suppose the wife died in 1995 with a will or living trust that does not waste her unified credit. In other words, her will or living trust gives the unified credit equivalent amount to a trust that is available to her surviving spouse, but which will not be included in his gross estate on his death. This trust is often called a "bypass trust," since it bypasses the surviving spouse's gross estate.

In drafting her estate plan, the wife wanted her property in excess of the bypass trust to qualify, if desirable after her death, for the marital deduction. The marital deduction is not always desirable. The marital deduction generally results in tax deferral, rather than tax avoidance, since the property for which the deduction is taken is includable in the surviving spouse's gross estate (IRC § 2033, 2041 & 2044). In appropriate circumstances, the decedent's personal representative may decide not to claim the marital deduction in order to capture the lowest marginal estate tax brackets.

In drafting her estate plan, the wife had, in general, three alternatives for her property in excess of the bypass trust: (1) give the $400,000 to her spouse outright, (2) place the $400,000 in a QTIP trust, or (3) place the $400,000 in a so-called general power of appointment trust. A general power of appointment trust is one in which the spouse has, in general, the unrestricted power to appoint the trust property to whomever he wishes, including himself or his estate (IRC § 2056(b)(5)).

If the wife gives the $400,000 to her husband outright or through a general power of appointment trust, she would be wasting $400,000 of her $1 million GST exemption and could be subjecting assets unnecessarily to the generation-skipping tax. Only the QTIP trust alternative avoids this result.

If the wife gives the $400,000 to her husband outright, he now has $1,300,000 in his separate name. Suppose he dies in 2001 with these assets still in his name and, under his will or living trust, he creates a separate trust for each of his children. Suppose a total of $223,000 is owed in estate taxes on the husband's death, leaving $359,000 for each child's trust. Each trust is available for the needs of the child for whom the trust is named, and also the child's descendants, and may be terminated after the child reaches age 35. If the child for whom the trust is named dies before the trust's termination, the remaining property in the trust goes to the child's then living descendants.

Since the husband died owning property in excess of his $1 million GST exemption, his personal representative was unable to allocate the husband's GST exemption in such a way so as to shelter all of the property in the children's trusts from generation-skipping tax. So if a distribution is ever made out of a child's trust to a descendant of that child, the distribution could be subject to the generation-skipping tax, which under current law could be as high as 55% (IRC §§ 2621, 2622 & 2641).

This same result would occur if the wife gives the $400,000 to her husband through a general power of appointment trust, since the husband would then be considered to be the owner and transferor of the trust for estate and generation-skipping tax purposes (IRC §§ 2041 & 2652(a)(1)(A)).

This exposure to the generation-skipping tax could have been avoided. With each having a $1 million GST exemption, the husband and wife had more than enough exemption to shelter their combined assets of $1.9 million.

If the wife had given the $400,000 to her husband through a QTIP trust, her personal representative could have allocated the wife's remaining (otherwise unused) GST exemption to that trust, totally sheltering it from the generation-skipping tax (IRC § 2652(a)(3)). Moreover, the husband would not be considered the owner or transferor of the QTIP trust for generation-skipping purposes (Id.). So his $1 million GST exemption would be more than adequate to shelter the $900,000 of assets in his name for generation-skipping tax purposes.

In addition, a trust for which a QTIP election may be made is a handy vehicle when it comes to postmortem estate planning. If no or only a partial marital deduction turns out to be advisable, then no or only a partial QTIP election is filed with the IRS. This type of postmortem estate planning is possible with outright bequests and general power of appointment trusts through the use of disclaimers, but generally there is at least 12 to 15 months to consider the QTIP election (assuming an extension for the estate tax return is obtained) versus nine months to consider disclaimers (IRC §§ 2056(b)(7)(B)(v), 6075(a), 6081(a), 2518(b)(2) and AS 13.11.295(b)).

As mentioned, the spouse-beneficiary does not have control over the QTIP trust, certainly not like he would have over a general power of appointment trust. But it is possible the spouse could be trustee of the QTIP trust, could have access to trust principal for his health and support, and could have the power to designate where trust principal goes after his death (other than to his estate or creditors), all without adverse transfer-tax consequences (IRC §§ 2041(b)(1), 2514(c) & 2652(a)(1)).

Married clients may also create irrevocable living trusts that qualify as QTIP trusts (IRC § 2523(f)). A pitfall for living QTIP trusts is that if the QTIP election is not filed with the IRS within the deadline for filing the client's gift tax return (generally April 15 following the year of transfer), then no QTIP election is available (IRC § 2523(f)(4)). So the opportunity to take the marital deduction on the gift tax return would be lost.

By contrast, for trusts created on the death of a client married to a U.S. citizen, the QTIP election should be allowed on a late-filed estate tax return, as long as the return is the first estate tax return filed (Treas. Reg. § 20.2056(b)-7(b)(4)).

Under our facts, the husband and wife had assets of $1.9 million. Even with clients who currently have far less assets, consider recommending the QTIP trust. Predicting future values with any accuracy is impossible, and the QTIP trust may add the flexibility needed to minimize taxes.

What's New In CLE

- **Improved Quality Videotape Library**: We are now having all live CLEs professionally videographed and edited. What does this mean for you? The videotapes have improved audio and better video quality. They are more "viewable" and no longer have dead air time while a question is posed from the audience.

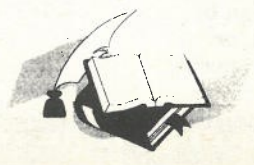
- **The Alaska Attorney's Desk Manual has a new chapter!** In 1994 and 1995 we published the Real Estate and the Employment Law Desk Manuals. Family Law is the latest one to be published. Please call the Bar office to order your copy today! Each Manual is in a 3-ring binder format. The cost is $45 plus $5 s&h.

- The **1996 CLE Calendar** was published and sent to all Bar members the week of January 8th. We distributed this to help you plan in advance which CLEs of interest to you will fit into your schedule. Updates to the calendar will be sent out periodically. Flyers for each program are mailed 4 - 6 weeks in advance of the program date.

- Are you on the **Information Super-highway**? If you are, look for Alaska Bar Association information on the Alaska Court System's Home Page. The net address is **http://www.alaska.net/~akctlib/homepage.htm**

- Look for our **updated CLE Library Catalog** in March. Use the catalog to choose courses for self-study or to earn credits for another jurisdiction.

- **Call the Bar at 272-7469 or fax us at 272-2932 for more information about all the resources in the CLE Library.**



FIVE IN THE RUNNING. The Alaska Judicial Council in early January forwarded to the Governor the names of all five applicants for a position on the Alaska Supreme Court. The candidates and their bar survey overall ratings are: Alexander O. Bryner, 4.1; Beverly W. Cutler, 3.8; Dana Fabe, 4.5; Karen L. Hunt, 3.9; and Donna C. Willard, 3.2. The Governor must choose one of the five by Feb. 23.

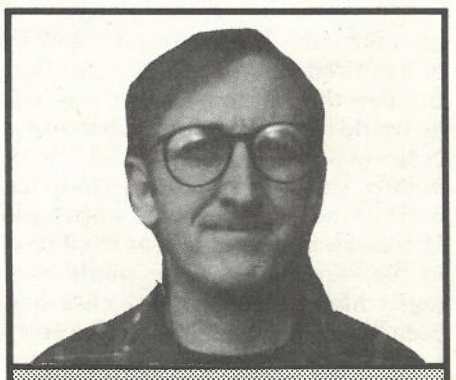
Eclectic Blues

Staying through November

November is usually a nasty month in Alaska. It's about the only time I ever think about leaving the state. A lot of the snow birds do take off before the fall darkness settles over the land.

Among those who stay through the winter are the ones who like to lean into the wind. When the real snow hits, they are out in the woods skiing or driving snow gos. During the dead time of November they have to find their fun inside. Some of these guys spend their down time cursing out neighbors who seek solace from the cold in warmer climes and have been known to get a little bushy waiting in their houses for some traveling weather.

I ran into one of these guys in Foodland this winter. He was over in the tropical fruit section, lecturing to a display of papayas. At first I thought he had downed too many of the fancy coffee drinks they sell in the bakery section. Before I could make a break



Dan Branch

for it behind a display of sun-dried tomatoes, he grabbed me.

"Pilgrim," he said, turning towards my startled face, "for two years you have leaned into the wind, qualified for the permanent fund dividend, and kept down the number of trips to Hawaii. When you do travel, you tell people you're an Alaskan, hoping they'll think the state's a sovereign nation.

"You don't own an umbrella, galoshes, or fancy rain gear. When someone in summer complains about the damp, you tell them it is Southeast sunshine. Then November comes, bringing snow mixed with rain, and a darkness that drives even sourdoughs into brightly lit malls.

"Friends disappear for weeks. On your way to report them missing, you find a postcard from Bali in the mail. 'Hi Bill,' it says, 'It's always summer here and rooms on the beach go for a nickel, American.' You tear up the card and mutter the word "slacker" under your breath all the way to McDonald's.

"You are paying your dues now, buddy. One thousand dollars alone won't buy your way out of the winter blues. The land will save you, you think, until it disappears under low clouds and funk. In desperation, you return to your faith, only to be undone by the self-deprecation of Advent.

"In the end you have only the football to sustain you until real winter arrives. The cable guy wires you to a 99-channel package. You program the Domino's Pizza number on the speed dial and watch a meaningless parade of brutality pass across the 27-inch screen.

"Then it happens. Crisp sun splashes over the screen, obscuring the Dallas game. You move cautiously out the door, seeing beauty everywhere like a recovered coma victim. Your neighbors emerge to join nature's dance. Friends you haven't seen since the leaves dropped come over for a chat. They are missing it, you tell old Fred from next door, those fools who go south in November.

"You know these things to be true," he concluded.

I smiled like a fiend and made my way casually over to the meat counter where the butcher's implements could offer me some protection. It wasn't necessary. My new friend had already turned his attention to a raft of star fruit. Your words are wasted on them, I told myself, and then wondered if it was too late to buy some permanent fund airline tickets.

Bar People

Former *Bar Rag* film reviewer **Ed Reasor** (The Movie Mouthpiece) was the co-producer for the latest made-for-TV Alaska film. The *Cold Heart of a Killer* aired on the networks in mid-January. Set on the Iditarod Trail sled dog race, the movie starred Kate Jackson and Corben Bernssen. Wasn't bad, either. Maybe Ed will write us a column on the making of a TV movie....**Jacquelyn R. Luke** has left Middleton, Timme & Luke to become general counsel for NANA Corp.; the firm has changed it name to Middleton & Timme, and Glenn E. Cravez has joined the firm of counsel....**Cynthia L. Cartledge** and **Bradley E. Meyen** have become members of Wohlforth, Argetsinger, Johnson & Brecht, and **Peter Argetsinger** has become of counsel in the firm....**Roger Brunner** has moved to The Nerland Building, 542 Fourth Ave., Suite 220, Fairbanks 99701. His phones are 456-2090 and 456-2091 (fax).

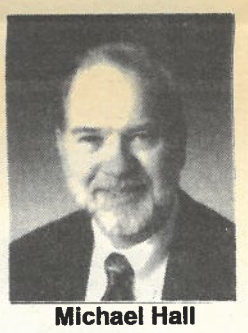
Ed Nolde, formerly of Anchorage, has left the Attorney General of Virginia to join the Attorney General of Montana, for whom he will establish and run a new bankruptcy section. He will also continue his general practice of painting, in both watercolor and oil, with an emphasis on landscapes of the northern rocky Mountains.....**Rhonda Lee Fehlen,** formerly of the law office of Giannini & Fehlen, announces the opening of her new office on November 1, 1995. Mrs. Fehlen's practice includes consumer, small business and trustee bankruptcy matters, tax dispute matters and commercial law. The business address, phone and fax are 400 D Street, Ste. 212, Anchorage, 272-2212, and 272-2214....**David S. Carter,** formerly a partner with the law firm of Hughes Thorsness Gantz Powell & Brundin, has opened the Law Offices of David S. Carter of Anchorage.....**Dan Cadra,** former magistrate in Barrow is now associate justice on the High Court for the Marshall Islands. "I am also enjoying the warm weather of the Marshall Islands while you are in Alaska are freezing!" His new office address is: High Court Republic of the Marshall Islands, P.O. Box 378, Majuro, Marshall Island 96960, (Tele.) 011-1-692-625-3201/32977 (Fax) 011-1-692-625-3323.....**Bob Libbey** says there's space to share at his office in Anchorage. The spacious historical home/office overlooks the coastal trailhead downtown.

Holland appoints new clerk

Chief Judge H. Russel Holland, of the U.S. District Court in Anchorage, has announced the selection of Michael D. Hall as the Court's Executive Officer/ Clerk of Court. He will succeed Phyllis Rhodes, who retired on Dec. 1, 1995. She served 6 1/2 years as the Clerk of the Court and a total of 22 1/2 years in various positions in the Clerk's office including 13 years as Chief Deputy Clerk.

Phyllis Rhodes

In announcing the selection, Chief Judge Holland said "Phyllis Rhodes has done a magnificent job as the Court's chief administrator and Michael Hall will be a superb successor. Mr. Hall possesses the breadth of experience in court administration that our District Court needs at this time to be able to continue the administrative leadership provided by Phyllis Rhodes."



Michael Hall

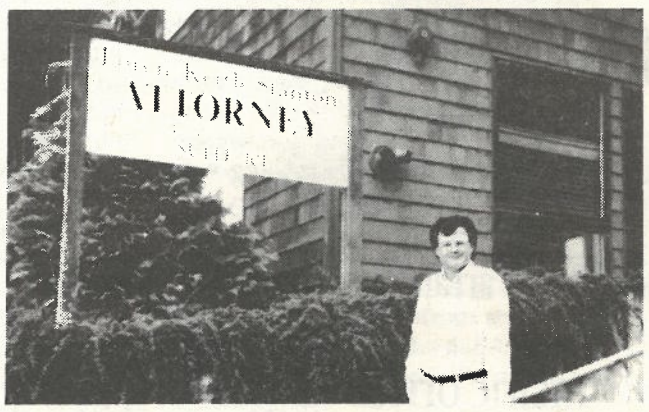
Hall, 53, has 25 years of court management experience. His prior position was with the Alaska Court System in the position of Area Court Administrator for the second judicial district. This is a position that he has held since 1981.

He was in the first graduating class from the Institute for Court Management; holds masters degrees in business administration and public administration and a doctorate degree in administration/ management.

The District of Alaska is the nation's largest district covering the entire State of Alaska. The main office is in Anchorage, with divisional offices in Fairbanks, Juneau, Ketchikan and Nome.

Stanton sends photo, press release

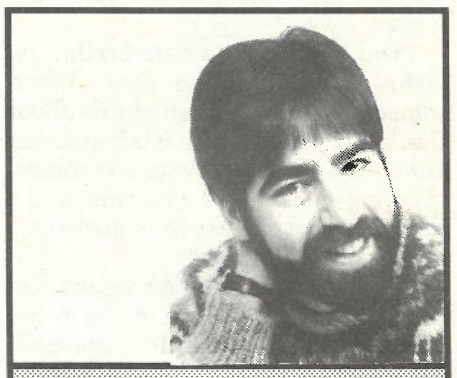
Loren Keith Stanton, a member of the Bar since May, 1995, has opened his own practice in Ketchikan. Loren graduated from Willamette University College of Law in 1986. Most recently he spent three years in Hong Kong supporting the democracy movement in the British Territory. He's returned to his birthplace, Ketchikan, after living in Philadelphia, Los Angeles, Juneau and Hong Kong over the last 10 years.



Loren would be happy to help anyone in Alaska who would like to make connections in the present legal, governmental or business community in Hong Kong, or China, where he sees many opportunities for Alaskans. Loren speaks Cantonese, the language of the Hong Kong Chinese and of the most prosperous province in China, Guangdong.

Family Law

The many hats we wear



Steve Pradell

This time each year, the number of people calling the office multiplies. Assaults and domestic violence crimes increase and Christmas visitation issues create expedited pleadings in child custody cases. Parents wait until the beginning of the year, after the holidays, to finally begin the divorce process.

With the increase in work, it is easy to become mechanical, filing all of our documents to comply with the technical rules of procedure, going through the process of representing numerous clients as quickly and efficiently as possible.

However, it is important to reflect once in a while on the many roles that we attorneys must play in the lives of our clients. Attorneys, like doctors, must have a "bedside manner" in helping clients to achieve desired results. This is especially true in the areas of criminal and domestic law, although it also applies to personal injury practice and any area where an individual needs representation. It is particularly important that when children are involved, attorneys must always focus on the best interests of the children while offering advice to the client regarding how to proceed.

For example, the first reaction of a lawyer representing a client charged with a crime which carries an 8-year presumptive sentence is to litigate. But a client's true desires may differ from the standard practice of a criminal defense attorney, who is prepared to defend the client any cost. One client came to the office accused of molesting his child. After listening carefully to the client it became apparent that he had indeed committed the crime, admitted it to the police, and desired first and foremost that his family heal from the damage done and recover as fully as possible. Shortly after hiring me to defend him, he terminated our relationship and instead hired another extremely aggressive attorney and proceeded to plan for trial. He fired that attorney and rehired me when he realized that to follow the advice of his new counsel, he would have to stop communicating entirely with his wife and child. Ultimately, the client's efforts to help his family and his openness about his offense resulted in a 5 year reduction in the sentence that he would normally have received if the case had been litigated unsuccessfully. Recently I received a very thoughtful letter from this client thanking me for my assistance, despite the fact that he is not in jail.

A similar principle applies to domestic cases. The attorneys who adopt a 'win at all costs' attitude when children are involved may neglect to focus on the most important issue: helping the family through the crises and reducing the damage done to the children to the greatest extent possible. One attorney I opposed, who went directly from a personal injury practice into a family law case, learned this lesson the hard way. He advised his client to switch schools when my client was out of town. The judge was not pleased and the children were immediately returned. He became so involved in the case that he spoke at length to my client over the phone, in violation with the ethical rules. He advised his client not to settle the case after she had agreed to do so. Immediately after the attorney was removed, the case settled. The lawyer was so involved in winning the case that he failed to be objective and could not assist his client in helping the family to resolve the crisis.

We play many roles for our clients, and wear numerous hats. We hold their hands through difficult emotional experiences and let them confide in us. We become a trusted ally, a friend, and an advisor. And yet we must remain objective in our approach to allow our judgment to be independent and ethical. Wearing all of these hats at Once and being an effective advocate is a difficult challenge. Defining our role as attorneys is helpful in deciding how to advise our clients. By redefining what it means to be an attorney as helping clients solve their legal problems, rather than simply winning cases, we can better articulate our client's desires and resolve legal problems more effectively.

1896 ONE HUNDRED YEARS 1996

ALASKA BAR ASSOCIATION

Historical Bar

The Cook Inlet Historical Society will present two panel discussions in January and February in commemoration of the 100th anniversary of the Alaska Bar Association. Hon. *James Fitgerald,* U.S. District Court; *Leroy Barker* of Robertson, Monage and Eastaugh, and *Joe Josephson,* former state senator, will discuss historic development in the history of the bar and legal practice in Alaska. The panel will be Jan. 18 at 7:30 p.m. at the Anchorage Museum of History and Art,

Hon. *Thomas Stewart,* former superior court judge, and *Grace Schaible* and *John Rader,* both former state attorneys-general, will discuss the development of the state court and legal system at 7:30 pm., Feb. 15 at the Anchorage museum.

Admission is free, and the Cook Inlet Historical Society invites you to attend and participate.