HUMOR

Thanksgiving theology, TVBA laments, and the right career move

INSIDE

Bar services, moving speech-making, local immunity, torts, and ethics issues

$2.00

The Alaska BAR RAG

JANUARY-FEBRUARY, 1993

Dignitas, semper dignitas

VOLUME 17, NO. 1

7 judges chosen to preside in courts

Chief Justice Daniel A. Moore, Jr. of the Alaska Supreme Court announces the following appointments:

Appellate Court Judge Alexander O. Bryner as Chief Judge of the Court of Appeals,

Superior Court Judge Larry R. Weeks as Presiding Judge for the First Judicial District and Superior Court Judge Larry C. Zervos as Deputy Presiding Judge.

Superior Court Judge Charles R. Tunley as Presiding Judge for the Second Judicial District and Superior Court Judge *Michael I. Jeffery* as Deputy Presiding Judge.

Superior Court Judge Richard D. Savell as Presiding Judge for the Fourth Judicial District and Superior Court Judge Ralph R. Beistline as Deputy Presiding Judge.

The appointments are effective January 1, 1993.

As Chief Judge of the Court of Appeals, Judge Bryner is responsible for supervising the administration of the court of appeals and reviewing and recommending budgets. Judge Bryner received his law degree from Stanford University Law School. Prior to his appointment to the Court of Appeals in 1980, he had served with the Alaska Public Defender Agency and engaged in private practice. He was appointed to the district court bench in Anchorage in 1975 and from 1977 to 1980 he was the United States Attorney for Alaska. Judge Bryner has served as Chief Judge for the past twelve years.

In addition to regular judicial duties, the presiding judge of each judicial district has the administrative responsibility to supervise the assignment of cases, administrative actions of judges and court personnel, keep current the business of the courts, review and recommend budgets, and review the operation of the trial courts in the district to assure adherence to statewide court objectives and policies.

Judge Weeks received his law degree from the University of Illinois. He has served as an assistant attorney general in Anchorage, as the District Attorney in Juneau and as the District Attorney in Anchorage. He returned to private practice in Juneau from 1982 until 1988 when he became Chief of Criminal Prosecutions. He was appointed to the superior court in 1990. Judge Weeks replaces retiring Superior Court Judge Thomas Schulz who has served as presiding judge for the First Judicial District since 1981.

Judge Zervos received his law degree from the University of Puget Sound School of Law. He served as assistant district attorney in Fairbanks from 1979 until 1982. After six years in private practice, Judge Zervos was appointed district court judge for Fairbanks in 1988. In 1990 he was appointed to the superior court bench in Sitka.

Judge Tunley was appointed to the superior court bench in Nome in 1980. He has served as presiding judge for most of his tenure on the bench. Judge Tunley was admitted to the Alaska Bar in 1965. After working as a law clerk in Anchorage in 1965 and as the assistant counsel to the Alaska State Housing Authority in 1966, he engaged in private practice in Anchorage until his appointment to the bench.

Judge Jeffery was appointed to the superior court bench in Barrow

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THE BUDDING LAWYER

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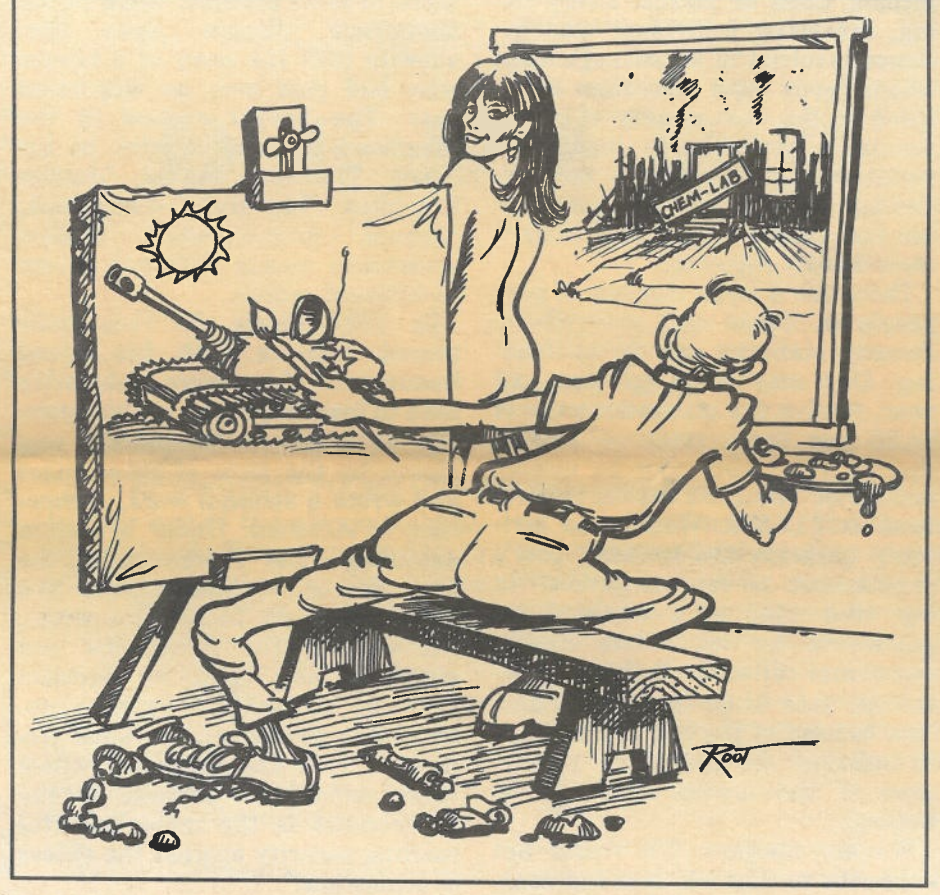

AYC wins two awards

The American Bar Association Commission on Partnership Programs has selected the Anchorage Youth Court as the recipient of the 1993 American Bar Association/Information America Public Education Project Award as well as the Outstanding Partnership Program Award.

The winning programs will be recognized during the ABA Midyear Meeting in Boston in February. Anchorage Youth Court (AYC) will receive a cash grant in the amount of $5,000, to be applied to the program or to develop a new partnership effort.

The grant was made possible by Information America, an Atlanta-based company that provides attorneys and other professionals with online databases of information needed to evaluate, close and litigate commercial transactions.

The ABA has invited an AYC representative to the presentation of the Partnership Awards at the Joint Luncheon of the National Conference of Bar Presidents/National Association of Bar Executives February 5 in Boston.

"We received more than 100 program entries from 84 law-related organizations, representing the collective efforts of 15,000 volunteers reaching more than 17 million people. Surely this reflects a tremendous commitment to our legal system," said Allan J. Tanenbaum, chairman of the ABA Standing Committee on Professionalism.

Happy Valentine's Day

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President's Column

By Barbara J. Blasco

Given that we have just started the new year, I thought something inspirational in nature might be in order. Last April, I was invited by Seth Eames, Alaska Pro Bono Coordinator, to attend the 1992 Pro Bono Conference held by the American Bar Association in Austin, Texas. The conference provides the opportunity for legal services lawyers, pro bono coordinators for state and local bar associations, and bar leaders from across the country to share ideas, experiences, strategies, and solutions for ensuring that quality legal services are available to low income people.

For me, and I think many others, the highlight of the conference was the speech given at the closing luncheon by Barbara Jordan, professor at the Lyndon B. Johnson School of Public Affairs. Her speech *is* inspirational and it had an impact on me. I urge you to take the time to read it. It is reprinted here in full from the Summer 1992 PBI Exchange.

Pro Bono Programs: Democracy's Guarantor

BY BARBARA JORDAN

I am most pleased that you are having this conference in Austin, Texas. We have here viable pro bono projects and take seriously the need for those who "have not" to have access to quality legal services. When I first went to visit the nation's capital, one of the prime sites on my agenda was the Supreme Court building. I stood on the street and looked up — somewhat awestruck. I was too young to be jaded. I was 16. The words etched onto the face of the building *loomed*, "Equality Before The Law." Equality before the law. These were the words I saw. They made me tremble with pride. You see, I was going to become a lawyer and help to transform those words into reality. I had no comprehension of how difficult such a task would be. However, had I known I would still have made the commitment. Those words represented the goal and promise of this country and I am a born believer.

As we have grown, developed and matured as a people and as a nation, we have not become more simple and less complicated. Quite the contrary. We are maturing in an information-saturated, technocratic, bureaucratic, industrialized cynicism.

Relationships destabilize and disputes break out. A traumatic search ensues for an island of calm and rationalism. Into this sea of misunderstanding steps the lawyer. Why the lawyer? Because the lawyer knows that if this experiment in democracy is going to work it will be the result of open dialogue and free debate and reasonable people deciding to be reasonable. The lawyer also knows that this process of open inquiry and debate must be open to all or a claim of fairness cannot be justified.

That is why I call *pro bono* programs democracies' guarantor. Democracy requires a universality. There are several tenets of democracy. Education is one. Justice is another. An American's entitlement to justice must not be a function of income, class or status. Every living, breathing individual who becomes involved in an entanglement which needs legal resolution is entitled to the best quality of representation available — instead of treating a person who is poverty-stricken as a pariah, let us remember that people are entitled to have their dignity respected.

There are a large number of poor people in Texas and everywhere. Poverty statistics can be misleading. One may work full-time, all year, receive the minimum wage of $4.25 per hour, total — $8,840, thereby remaining poor by income definition. The 1992 federal poverty level is $11,570. Would one seriously question the working poor's entitlement to representation? In my view that is a minimal requirement for us. Adam Smith, sometimes called the father of capitalism, said some 200 years ago: "the custom of the country renders it indecent for creditable people, even of the lowest order, to be without."

We are lawyers. We would not subscribe to that which is indecent. Nonrepresentation of those too poor to pay is indecent. We believe that all people have rights both implied and explicit. We celebrate people in their sovereignty. Such is the promise of democracy . . .

As lawyers we are not only democracy's guarantor, we are also its bulwark — a linchpin. The lawyer with his devotion to the rule of law — not just to statues and codes but that glue which adheres order to chaos and insists on civilizing.

John Adams, a lawyer, and the second president of the United States is credited with the statement, "a government of laws and not of men." The phrase is also found in the first constitution of the state of Massachusetts, a government of laws and not of men is actualized in the behavior of those who govern here. If that phrase were not a reality for us, Ronald Reagan might still be president and Oliver North might be Secretary of Defense.

The rule of law, the law and lawyers keep us from behaving as if we were a banana republic. Our system seeks to guarantee that each citizen gets justice and that justice is denied to no one. What is justice? Justice is fairness. It is the first virtue of all human institutions. It is an endemic value in our democracy. Justice Alan Dershowitz tells the story of a lawyer who had just won an important case. The lawyer rushed to the telephone to send a wire to his client. The wire stated, "Justice Prevailed." The client wired back, "Appeal immediately." Justice sometimes means different things to different people.

In 1931 Alexis de Tocqueville toured America with his friend Beaumont. They were ostensibly here to inspect prisons in this country. In truth de Tocqueville was struck by the form of government and wrote a seminal work, *Democracy in America*. Under a section subtitled, "The Profession of the Law Serves to Counterpoise the Democracy," de Tocqueville wrote, "In visiting the Americans and studying their laws, we perceive that the authority they have entrusted to members of the legal profession, and the influence which these individuals exercise in the government is the most powerful existing security against the excess of democracy."

We are protectors and defenders of American faith. We are trustees. We are pragmatists and idealists. We are proud and we are humble. We believe in people. *All* people and in their capacity to do the right and the good. Trust us. You see we are lawyers.

That's right, lawyers all.

I know there are those who feel the American dream has soured; that instead of being one nation husbanded in the common band of humanity we have become a nation of separatists highlighting our ethnic differences. I don't share the latter view. Maybe I'm naive but I still believe in the American dream.

I am not ready to give up on our experiment in democracy. It was and continues to be a bold experiment. I believe the motto "From many one" is more than empty, vacuous rhetoric. Arthur Schlesinger, Jr., has written a book entitled *The Disuniting of America: Reflections on a Multi-cultural Society*. In the foreward Schlesinger quotes de Tocqueville:

"A society formed of all the nations of the world . . . people having different languages, beliefs, opinions; in a word, a society without roots, without memories, without prejudices, without routines, without common ideas, without a national character, yet a hundred times happier than our own. What alchemy could make this miscellany into a single society?" The answer, de Tocqueville concluded, lay in the commitment of Americans to democracy and self-government. Civic participation, de Tocqueville argued in *Democracy in America,* was the great educator and the unifier.

Schlesinger wrote:

America increasingly sees itself as composed of groups more or less ineradicable in their ethnic character . . . Will the center hold? Or will the melting pot give way to the Tower of Babel?

We are lawyers. We believe in "Justice for All." It is the power of that belief which will guarantee that the center will hold.

The apostle Paul said to Timothy: "The law is good, if a man use it lawfully . . . " That is why bar association *pro bono* programs make such good sense for this Democratic Republic.

New editor anointed

With this issue, the *Bar Rag* welcomes a new editor, Michael J. Schneider, who replaces recently-elevated Judge Ralph Beistline.

Mike Schneider was admitted to practice in Alaska in 1975. Criminal defense was, initially, a large part of his practice, but for over a decade his practice has focused on plaintiff's personal injury work and insurance litigation.

He is a member, director and past president of the Alaska Academy of Trial Lawyers; a member and former state delegate of the Alaska Trial Lawyers Association; currently chairs the Alaska Action Trust; and is a charter member of the Alaska Chapter of the American Board of Trial Advocates. Notwithstanding the challenges of his practice and the pinnacle of the *Bar Rag* editorship, "all things considered, I'd rather be flying an airplane and hunting with my bow and arrows."

(For those who are concerned that his personal prejudices will be reflected in the *Bar Rag,* "only time will tell," said the editor.)

People
News
Always
Welcome

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).

The *Alaska Bar Rag* is published in January, March, May, July, September, and November.

Letters

Bar Dues/Comments

1. Change Active Dues Back to $300 per year

Roll the dues back to $300 and begin cutting the budget instead. Budget cutting possibilities include: **end subsidies for CLEs** because the Alaska Bar voted against mandatory CLEs and therefore non-CLE-taking attorneys should not have to PAY from general dues for CLEs taken by, especially, Anchorage attorneys — with higher average incomes; **reduce publication** of the Alaska Law Review to an annual basis and add advertising to the Alaska Law Review; cut 'features' out of the Bar Rag, make it quarterly, and increase advertising sales; **let California prepare and grade the bar exam** used here, which Alaska used to do, at lower cost; remove outmoded advertising restrictions from the ethical code and cut at least one half-time bar counsel; **end 'physical' bar conventions** — they cost too much for too few people: teleconference instead.

2. Increase Dues with Years of Practice

Attorneys fresh out of law school and on their own have a hard enough time making ends meet without the 50 percent increase. Follow the practice of other state bar associations, ATLA, and other groups, and lower rates for the few first years after admission to ANY bar, gradually increasing rates to reach full dues levels after 5 years.

3. Drop the Idea of Durational Practice and Age Discrimination

Durational residency requirements are disfavored in the law [remember *Zobel*?]. The Bar Association should not promote this disfavored practice of inequality and discrimination. Age-ism is another method of treating differently those who are at least equal. Older attorneys may in fact earn substantially *more* than younger ones, because of experience, making lower dues for age 70+ attorneys even less appropriate.

4. Cut the Dues for Inactive Members to $25

I also belong to Hawaii and Massachusetts Bars; each charges only $25 per year for inactives. If they can do that, so can we. Active members pay for Association activities — overhead, executive director and other staff, disciplinary proceedings and bar counsel, etc. — so inactives need to pay only nominal record-keeping costs. If an inactive later becomes active, that person will then begin paying active dues. Another $25 fee to change status [inactive to active or active to inactive] would also not seem inappropriate.

Joe Sonneman

Errata

There is an error in the "0" Balance Deed of Trust" article on page 6 of the Nov.-Dec. 1992 Bar Rag. It may not cause problems for readers. In the last column under DEED OF TRUST INTERIM PAYMENTS on lines 5 and 6, the reference to ""0" Balance" should instead read the "assumed."

Francis J. Nosek, Jr.

Wickwire protests censure

I write to express my disagreement with the criteria used to make this decision, in hope that it will play some part in improving the system. *(Ed. note: See decision, page 14).*

The reason my censure is public (more harsh) is one "aggravating factor:" I believe that my intentional violation of the rule was substantially excused by the other attorney's refusal to convey my client's settlement offer. I agreed the rule was necessary, but disagreed that my going around the lawyer to send a written settlement offer to his client after he refused to do so, was a violation of its spirit. Two factors important to me seemed insignificant to Bar Counsel and the Board: (1) a party's right to have his settlement offer conveyed and (2) the other lawyer's misrepresentation that he had not conveyed my offer to his client, when in fact he had. This means that I had intentionally, but unsuccessfully, tried to violate the rule, unsuccessfully because the other party had my letter before I sent another copy of it.

The Board's decision did not provide a satisfactory, that is fair, solution to my client's problem of not being able to get his settlement offer conveyed. Their answer: that I could have petitioned the Court to force opposing counsel to forward the offer to his client, presumably charging my client for this extra step, seemed like a way of imposing on the victim the cost of the remedy which, to me, was a failure to address the real problem.

I believe the lawyers ethics should be applied with a view to what they are intended to do, not just what they say. It was not very long ago that it was unethical for lawyers to not fix prices or to advertise. When the courts finally considered these, they found that these "ethics" had been intended to protect lawyers, not clients.

I was told there were three dissenters on this, so there must be room for difference of opinion, but not from me.

Thomas R. Wickwire

Bar Association responds

Mr. Wickwire contends that his intentional violation of DR 7-104(A)(1) should have been excused by opposing counsel's conduct. The public record in this case (which may be reviewed at the Bar Association offices) does not bear out his premise. Opposing counsel returned Wickwire's letter (which was addressed to the opposing party) and demanded that Wickwire direct all settlement offers to counsel, not the party. Wickwire's suppositions about this act (that opposing counsel had not conveyed the offer; that opposing counsel had represented that he would not convey the offer) were incorrect in fact.

Mr. Wickwire's self-help remedy compounded his error. When lawyers believe that settlement offers are not being conveyed to the opposing party, they may inform the trial court or the Bar Association, and an American Bar Association opinion permits lawyers to advise their own clients to convey the offer to the opposing party. Obedience to the rules of court (including the ethics rules) may indeed cost the client money, but the unfortunate expenses of litigation don't justify unilateral abatement of any rule.

Mr. Wickwire asserts that because he took intentional steps to counteract the opposing lawyer's misconduct he is being penalized publicly. In truth, Bar Counsel initially agreed with Wickwire about one thing: that although his misconduct was intentional, it was relatively harmless. However, Wickwire rejected Bar Counsel's offer of private discipline and demanded public proceedings. That's why the outcome is public.

Mr. Wickwire's case was first considered by a three-member hearing committee, which made its recommendation for discipline to the 12-member Disciplinary Board. It is a matter of record that three members of the Board dissented from the decision to impose discipline by public reprimand. However, the Board deliberated and voted in executive session, and provided no written explanation for the dissents. Thus the Board record does not support Wickwire's belief that the dissenters agreed with him and voted for no discipline (nor would it support an inference that the dissenters voted for a higher level of discipline). In contrast, the record of hearing committee proceedings shows that two of the three panel members voted for discipline by reprimand. The dissenter recommended a more *severe* sanction: public censure by the Alaska Supreme Court.

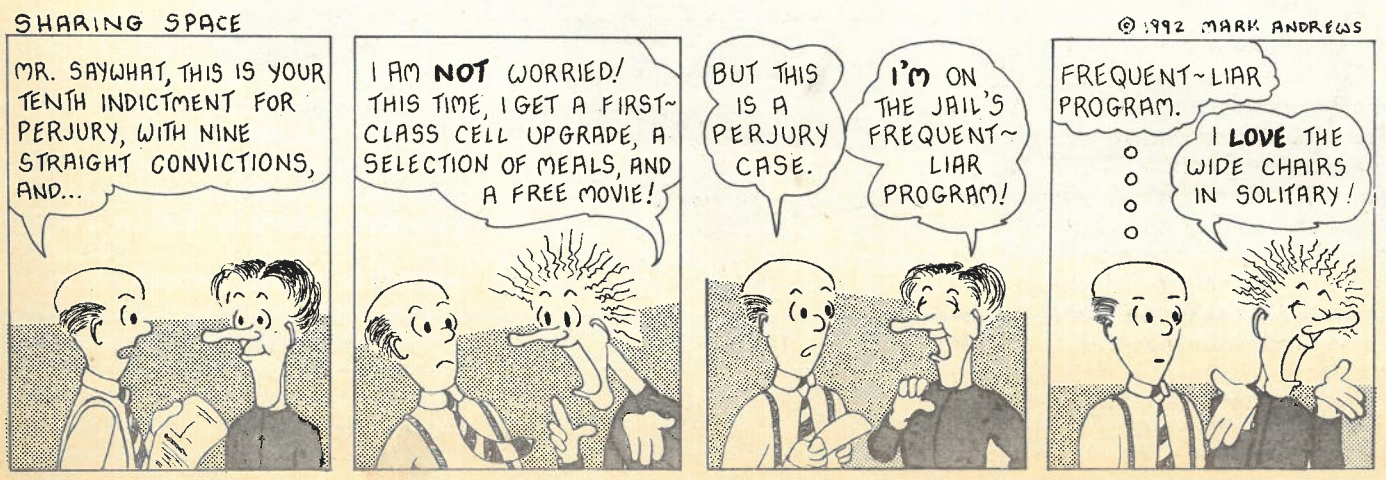
Members in Business

David R. Millen reports that he's opened a speciality men's clothing store in his spare time. D. Robertson Big Tall caters to large men (like Millen, who's 6' 3" and 280 pounds.)

D. Robertson Big Tall

Bar Rag columnist **Drew Peterson** is taking his mediation show on the road. He's presenting workshops on collaborative problem-solving and mediation skills with family counselor Dorothy Shepard under the name of Options Unlimited.

Got an enterprise fellow bar members should know about? Send information to the "Members in Business" column c/o the Bar office.



Bar Association manages varied services

Following is a synopsis of the bar association programs and services (in no particular order):

1. Admissions: The bar exam consists of 1 1/2 days of locally drafted and graded essay questions and 1 day of the Multistate Bar Exam (MBE), which is a national standardized test given in 46 states. Each essay question is graded by two lawyers who go through a process of calibration, reconciliation and rereads. The essay scores are weighted and combined with the MBE scores. About a dozen applicants each year are also admitted by reciprocity.

2. Discipline: Approximately 200 grievances against attorneys are accepted for investigation each year. Another 80 grievances are reviewed but not accepted for investigation.

3. Continuing Legal Education: Over two dozen CLE programs are presented each year, as well as at the annual convention in June. Videotaped replays are routinely scheduled in Fairbanks, Juneau and Kodiak. Members can rent videotaped programs or purchase materials from our library. We receive about 2,000 requests annually for materials or tapes.

4. Fee Arbitration: Clients can require lawyers to participate in fee arbitration when there is a dispute about the fee. About 68 petitions for fee arbitration are filed each year.

5. Lawyer Referral Service: Approximately 187 lawyers from all over the state are enrolled in 28 categories of law. In 1991 we received 10,447 lawyer referral calls.

6. Lawyer's Fund for Client Protection: $10 is collected annually from every active attorney which goes into a fund for reimbursing clients who suffered non-insured losses as the result of dishonesty by an attorney. There is currently $492,000 in the fund.

7. Attorneys Liability Protection Society (ALPS): Alaska is a member of a multi-state lawyer owned liability insurance company along with 10 other small lawyer population states.

8. Sections/Section News: Over 900 members belong to the 177 substantive law sections. Most of these hold regular monthly meetings. Barbara Armstrong puts out a monthly section newsletter which goes to all members of all sections.

9. Group Insurance: The Bar sponsors group medical, life and disability programs.

10. LEXIS: The Bar sponsors a group program for computerized legal research service.

11. Ethics Opinions: The ethics committee will provide formal ethics opinions upon request. Moreover, Bar Counsel will discuss ethical questions with any attorney who contacts the office.

12. Pro Bono Program: The Alaska Bar is a joint sponsor of the Pro Bono program through which attorneys volunteer to handle cases. Approximately 57 percent of available bar members are signed up with the program (we are the number one state in terms of percentage of participating bar membership).

13. Alaska Bar Foundation: The Bar Foundation was established by the Board of Governors. It currently administers the IOLTA program by which lawyers can place client trust money (previously held in co-mingled, non-interest bearing checking accounts) into interest bearing accounts. The interest goes to the Foundation which gives grants to support indigent legal services or the administration of justice. Our controller does the accounting work for the foundation.

14. The Alaska Bar Rag: The Association newspaper comes out bimonthly.

15. Substance Abuse Program: This program is available to provide information and referrals about substance abuse.

16. Tutoring Program: We match applicants who have failed the bar exam with attorneys who are willing to offer tutoring assistance for the next exam.

17. Law Related Education: This committee has been very active offering college credit courses for teachers and mock trials and other activities for students.

18. Alaska Law Review: This is published by contract with Duke University School of Law and is sent to all active members twice a year.

19. Committees: Other bar association committees include Bar Polls & Elections, Historians and Statute, Bylaws & Rules.

20. Car Rental Discounts: The Bar offers car rental discount programs with Avis, Hertz and Dollar.

21. Law Library Copy Machines: The Bar contracts with the court system and subcontracts with the Anchorage Bar to provide copying machines in the Anchorage Law Library.

22. Jury Instructions: We reproduce and sell copies of the civil and criminal pattern jury instructions as approved by the Alaska Court System.

23. Address and Status Changes: We spend a lot of time keeping track of our members. We estimate that every year 30 - 40 percent of the members have address or status changes. We also issue certificates of good standing upon request.

Most of these activities are further detailed in our annual report. If you have any questions or want more information, the Bar office will be pleased to assist you.

Solid Foundations

By Mary Hughes

As 1992 came to an end with holiday celebrations, we were constantly reminded of how fortunate we are. Good cheer and merriment abounded. And the Alaska Bar Foundation completed another successful year of service to the members of the Alaska Bar and the people of Alaska. In 1992, $232,000 in IOLTA funds were contributed to the Alaska Bono Program, Catholic Social Services and Anchorage Youth Court. Since its inception in 1986, IOLTA has contributed approximately $750,000 in program funding.

Despite the achievements of the Alaska IOLTA program and although attacks have not been made on the program at a local level, *Forbes* carried an extremely misleading article on the Massachusetts IOLTA program in its November 23, 1992, edition. The article implied that lawyers' clients are being taxed over $150 million dollars for seemingly outrageous activities of "radical" lawyers. The National Association of IOLTA Programs and the American Bar Association responded to the article with correct information:

> Eighty-three percent of the funds generated by IOLTA programs in the U.S. since 1986 have been used to provide civil legal services to poor citizens whose low incomes qualify them for free assistance under federal poverty guidelines. Currently, that amounts to about $100 million from IOLTA each year, which is the largest single source of funds to supplement the modest $350 million appropriated by Congress for the legal Services Corporation. Despite the IOLTA supplement and the free pro bono services provided by lawyers, surveys clearly indicate that only about 20%-25% of the civil legal needs of the low income community are being met. Put another way, 75%-80% of poor or near poor citizens who need legal help with divorces, protection from abusive spouses, eviction, consumer frauds and other non-fee-generation cases receive no legal assistance and are denied access to justice.

However, the misinformation appears to have caused some harm to the IOLTA programs involved. To avoid promulgation of inaccurate information relative to the Alaska IOLTA program, Alaska Bar members are encouraged to call the Trustees of the Alaska Bar Foundation should any questions arise. Additionally, the 1992 Annual Report will be distributed, as it was last year, to each Alaska Bar member and participating financial institutions in June.

Why I became a lawyer

With skills like this, law school wins

BY WILLIAM R. SATTERBERG, JR.

Mom and Dad always seemed to argue about what I should be. My Dad wanted me to be a scientist, my Mom wanted me to be a lawyer, and I wanted to drive tanks. You know — Shermans, Pattons, etc.

Of course, that was when I was eight years old. Yet, as I grew, my lust for tanks never ceased. Perhaps it was those plastic figurines that everybody used to buy, douse with Dad's lighter fluid, and burn in the backyard. Perhaps it is that sense of invincibility and the desire to be able to drive through people's houses and flower beds without getting in trouble. Whatever it was, I never did give up my love for tanks, although my coming of age did tend to temper that desire quite a bit — especially in the late sixties, with the Vietnam war.

You probably remember me from high school. I was the kid with the butch haircut, the freshly scrubbed cheeks, slightly stout, (well, maybe more than slightly), who had the white vinyl pencil holder in his shirt, and slide rule hooked on his belt.

While everyone else was chasing the opposite sex, in a ritual which seemed strangely familiar yet foreign to me, my hormones were still relatively under control. As such, I could not understand why kids wanted to gyrate uncontrollably on dance floors and goof up their hair, when there were other things more productive to do, like building bombs in chemistry class.

Barely into my junior year in high school, I had already mastered the intricacies of the manufacture of nitroglycerin, and knew full well the importance of ice baths. (The ice baths I was concerned about, however, had nothing to do with dance floors, although they did control the raging molecules found in nitroglycerin.)

Upon graduation from high school, I entered college at the University of Alaska in Fairbanks, intent upon continuing my bursting career in chemistry. At that time, the University in Fairbanks, had been wildly reputed by *Playboy* to be one of the nation's top party schools. (I realize that the budget analysts in Juneau are probably no happier to hear about that than they were to hear recently about the reputation of the Fairbanks Correctional Center as another leading institution in the United States).

Still, in the late sixties, faced with 40-below temperatures which were commonplace, there was little that a student at the University of Alaska could do other than study or party.

As a child, I often frustrated my mother. Interested first in biology, I used to leave my socks and shorts in the room to see what type of mold would next grow on them. There was nothing more enjoyable than to see the look on my mom's face after I had returned from a particularly invigorating day playing in the neighborhood swamp, only to pull my clothes from the hamper and re-don them the next morning before heading to school. More than once, my mother had to tackle me as I left the house for class, telling me the girls would not be impressed.

As a chemistry student at the University of Alaska, my ability to conduct a "clean" lab experiment was essentially the same. My basic philosophy was efficiency-oriented, reasoning that, as long as the interior of the glassware was clean, there was no reason to wash the exterior, or necessarily to set the experiment up in any aesthetically pleasing manner. The "pigpen of the class, my experiments became known for their rather unique and unpredictable results. I even succeeded in lighting one-half of the entire organic chemistry lab on fire once from an overheated oil bath.

My rather casual and somewhat sloppy attitude towards the practice of chemistry ultimately came to the attention of my frenzied advisor, Dr. Lokken. Sensing that there might still be some future for me, Dr. Lokken pulled me aside in my junior year, just a couple of days after the fire when the burns were no longer tender, and explained to me tat he truly felt sorry for me. Because it was he, and not I, who had been closest to the fire and had the most tender of burns, I could scarcely understand his interest in my continued lifespan. Nevertheless, in order to humor the good professor, I patiently listened to his discourse.

You must remember that I was a child of the sixties and early seventies, although I don't remember much of it. (Those of us who were, don't). What I do remember is that Dr. Lokken explained to me that science had grown out of the areas of back magic and art. I could easily understand how black magic might have something to do with science, but the involvement of art in the field of rational inquiry escaped me.

Dr. Lokken went on to explain that a truly good scientist had a sense of artistic flair and, most importantly, a feel for what was "right" with an experiment. A true scientist, he preached, was someone who would always wash the glassware and, after setting up an experiment, stand back and appreciate its true artistic beauty, long before introducing the foul smelling chemicals.

"Please, Bill, take an art class," he implored.

"An art class? How does that relate?," I questioned my guru.

"It will give you scientific appreciation, and an ability to stand back and admire your experiment and, most importantly, create a safe experiment," he explained, trying to ignite something within me, as opposed to on the lab bench.

"I'd rather work on developing a new form of nitrocellulose," I countered.

Dr. Lokken then explained rather convincingly to me, "You have two choices . . ."The rest is history.

Acknowledging the persuasive rationale to Dr. Lokken's theory of scientific practice, I wisely decided that art perhaps did have some value in my life and my career as a chemist. I promptly enrolled in *Freehand Drawing 101*. It was an open class; it was cheap; and a lot of people talked about it" All that was needed was an easel, and a box of number two charcoal.

Having taken arts and crafts in eighth grade, assigned reluctantly to the arts portion of the program, I was familiar with the concept of freehand drawing. You simply drew things, like Sherman tanks. So what else was new?

Gathering my easel and box of charcoal under my arm, I trundled off to the freehand drawing class, explaining to the professor that I was a new and budding artist who had been sent over from the chemistry department.

I was instructed to take a seat and to set up. I was told that we would have a model shortly. Always an avid learner, I selected a seat in the front row. As in the past, I figured that they would bring out the bowl of fruit, water pitcher, or maybe even select a student, who would serve as the model for today's class. If a student were to be selected, I planned to volunteer, since that was the easiest duty.

The seat, I should note, was actually a bench, similar to a weightlifter's bench with a backboard for the easel. One straddled the bench like riding a horse. I propped my easel up and arranged my nine different pieces of number two charcoal neatly in a row so that I would be able to grab them quickly when my expected flurry of creative activity began.

Preoccupied with my task, I failed to notice that the model had taken the stage, and only looked up when the professor announced that the class could begin.

I was shocked! The model was nude! The most beautiful and only nude woman I had ever seen in my life. Exactly what happened next is still fuzzy.

What I do know is that, somehow, my easel flew to the left of me, smacking flat on the floor. As I lurched to retrieve it, my nine pieces of charcoal clattered off to the right of the bench, shattering one by one on the ground. As I turned to grab the nine pieces of charcoal, only to see the last one disappearing off the bench, the bench decided to flip to the right. I flipped to the left, and landed rudely in a pile in front of the model. There was then a loud din in the classroom behind me, which sounded distantly similar to uncontrolled hysterical laughter.

Somewhat flustered, I pretended to act like nothing had happened. I lay on the floor for a few moments to compose myself and to extricate my left leg from under the bench. I then slowly got up, and reset my bench, replaced my easel, put my 18 pieces of charcoal back on the table, and ignored the rest of the class. I drew for the next 45 minutes, concentrating intently upon my work and only occasionally stealing a furtive glance at the model — when I though she wasn't looking.

Apparently, the model, who was more accustomed to this than I, took genuine interest in my work, for upon completion of the class, she strolled directly over to me from the stage without bothering with her robe, and again without me noticing.

Somewhat embarrassed about the budding quality of my art, I attempted to dissuade her from examining the drawing which I had done during the session. I explained to her that I was quite new in art, and was still preoccupied with trying to find my penholder which I had lost during the first episode. Still, she was insistent, and ultimately I succumbed.

You can imagine her appreciation, therefore, when I proudly showed her one of the nicest Sherman tanks anyone in *Freehand Drawing 101* had ever sketched. From that date forward, my career in chemistry faded, my interest in the arts grew, and in the translation, I became a lawyer.

Ironically, although my Mom was right, I think my Dad was the happiest.

GETTING TOGETHER

By Drew Peterson

Ten Principles of Conflict Management

What are the assumptions underlying the practice of law? Are there universal principles by which we attempt to manage conflict? In the complicated and paradoxical world of conflict in which we live, are there any constants? Attorneys are generally the first outside dispute resolution experts brought in by clients to provide assistance during times of crisis. What can we do to better guarantee results that are in our clients' interests?

Managing Public Disputes by Susan L. Carpenter and W.J.D. Kennedy, (Jossey-Bass Publishers, San Francisco, 1991) is written from an interesting theoretical perspective. Most of the recent books concerning conflict management are written from two points of view. Either they are written from the perspective of a mediator or other neutral facilitator, or else they are written from the general perspective of any party to a dispute. In contrast, Carpenter and Kennedy focus on the perspective of the "Manager" of public or private organizations. The manager is the individual with primary accountability for the resolution of a particular dispute. Such a manager may hire attorneys, mediators, consultants or others to help with the dispute. But ultimately it is the manager who will be held responsible for the particular outcome of the conflict.

In Chapter 3, Carpenter and Kennedy postulate 10 basic principles for the development of an effective organizational program for conflict management. Such principles are of universal application, and they are worthy of consideration by attorneys as well. The principles are:

Principle 1. Conflicts Are a Mix of Procedures, Relationships and Substance. Generally there is no one simple way to solve complicated problems. The human aspects of a dispute are often of greater significance than the substantive issues. Attempting to solve a complicated problem by technical criteria alone will often cause more conflicts than it will resolve. It is helpful to follow a structured sequence of steps in establishing a conflict management plan, carefully assessing human factors as well as technical issues. Any such structure must be sensitive to change, however, as well as being flexible enough to account for changing or overlooked aspects of the dispute as they are discovered.

Principle 2. To Find a Good Solution, You Have to Understand the Problem. The first thing to be done in analyzing any conflict is to untangle the muddle of emotions, perceptions, needs, and cross-purposes that surround the issues. Time invested in obtaining a thorough understanding of the situation pays off in greatly increased productivity when the parties meet to resolve their difficulties. By taking time for listening, cautiously probing, and cross-checking with other sources, the most important issues can be identified. The past and current dynamics among the parties can also be identified, together with what the parties need from an agreement.

Principle 3. Take Time to Plan a Strategy and Follow it Through. Rather than barging into the dispute willy-nilly, it is essential to first stop, think, and work out a strategy. A quick fix is likely to produce a "band-aid solution" that will cover the wound temporarily but not heal it. A strategy should include the following management components:

- Finding a common definition of the problem.
- Determining mutually satisfactory procedures for carrying out a negotiation.
- Identifying the issues and interests of each of the parties.
- Developing a range of options to solve the problem.
- Agreeing on a solution.
- Deciding exactly how agreements will be implemented.

Principle 4. Progress Demands Positive Working Relationships. Although accurate information is needed to understand complex disputes, that information is of little value unless people are willing to use it to solve a problem. When a conflict has become seriously polarized, even useful and accurate information is received with distrust and falls on deaf ears. Thus methods for creating and preserving working relationships cannot be emphasized enough throughout the conflict resolution process.

Principle 5. Negotiation Begins with a Constructive Definition of the Problem. The parties must agree on what the problem is before they can start resolving it. Often reaching an agreement on the central issue that should be addressed is the first problem and the first critical success of a negotiation. Whenever possible, the issue should be defined as a mutual problem to be solved, and described in positive terms.

Principle 6. Parties Should Help Design the Process and Solution. It often happens that people are so put off by being told what the decision is going to be, rather than being involved in making the decision, that they will reject it regardless of its merits. It is often tempting for those involved in trying to resolve a dispute to attempt to "sell" their solution. Much more effective, however, is to let the parties mutually solve the problem, without imposing a solution on the others.

Principle 7. Lasting Solutions are Based on Interests, Not Positions. The traditional use of positions in the negotiation process can greatly limit the range of opportunities for solutions. An alternative way to find solutions is to persuade the parties to disengage for a moment and do something that will feel unfamiliar and even uncomfortable at first, namely to talk with each other about their interests and what they need from an agreement for it to be acceptable. Most interests are reasonable and can be described when the parties get used to the process. The process of listing interests is helpful because it is uncomplicated and because talking about what the parties really need makes sense to people caught up in a conflict. It can lead to better understanding of each other's perspective and to solutions that can meet the interests or at least partial interests of both sides.

Principle 8. The Process Must Be Flexible. We also need to be careful not to commit too early to an exact design. Many elements of the problem may change as its components are analyzed and more clearly defined. Flexibility does not imply proceeding in a haphazard fashion, however. An early process plan is important, but it should be merely a preliminary blueprint to give an initial direction. The early plan should allow for continuous modification as more appropriate or specific methods are identified. Flexibility allows smooth adjustments to changed circumstances.

Principle 9. Think Through What Might Go Wrong. Because negotiation is a dynamic process, something will almost certainly go wrong at some point. Thus it is highly advisable to explore the range of problems that might arise and how to handle them when problems do occur it will then be possible to make suggestions to move the process along. It will be much easier to do so if the potential problem and options for dealing with it have been identified in advance.

Principle 10. Do No Harm, *Primum non nocere* — "first do no harm" — is a guiding ethical principle of the medical profession. It should also be a precept of conflict management. Unless sufficient thoughtful attention is given to a constructive process, important working relationships may be damaged and trust among the parties destroyed. In the temporary heat of a dispute, we often think that things cannot get any worse than they are already. In fact, however, a bad situation can usually be made even worse, if handled improperly. Above everything, we should always be careful to do no harm.

While directed initially at the perspective of managers of complex public disputes, the universal principles of *Managing Public Disputes* are of equal application to us as attorneys as they are to the managers public or private organizations. They are important principles for all of us to keep in mind, and they can help to guide us to the successful outcomes that our clients are seeking.

Ethics Opinion Withdrawn

At its regular January 8, 1993 meeting, the Board of Governors voted to *withdraw* Ethics Opinion 92-7, Preparation of a Client's Legal Pleadings in a Civil Action Without Filing an Entry of Appearance.

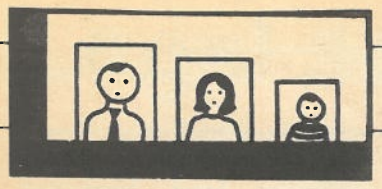
The Board determined that further analysis should be conducted concerning the disclosure requirement contained in that opinion.

Accordingly, please revise your subject matter index at page 5 and your chronological index at page 8 to reflect that this opinion is *withdrawn* and not in effect.

MOCK TRIAL COMPETITION JUDGES NEEDED

The Young Lawyers' Section of the Anchorage Bar seeks Bar members willing to help judge the 1993 Alaska State High School Mock Trial Competition, held on Friday evening and Saturday, March 5 and 6. It only takes a couple of hours to judge a round. Come don a black robe and join the fun!

For details, call Matt Regan at 274-0666.



People

Kerry Barker and **Olof Hellen** have formed the law firm of Barker & Hellen....**Woody Brooks**, formerly with Bliss Riordan, has opened his own law office in Fairbanks.....**Gabrielle LeDoux, Paul Cossman** and **Barry Kell** have formed the law firm of LeDoux, Cossman and Kell in Kodiak.....**Fred Curtner**, formerly with the P.D.'s office in Palmer, is now with the Federal Public Defender in Anchorage.

Stephen Cowper is now with Tradelink Alaska in Anchorage.....**John Dittman** has opened his own law office in Anchorage.....**Nancy Driscoll** has relocated from Ketchikan to the P.D.'s office in Barrow.....**Joseph Darnell**, formerly with Robertson, Monagle & Eastaugh, is now with the Office of the Regional Solicitor.

Patrick Gullufsen is now with the A.G.'s office in Juneau.....**Robert Goldberg** has relocated to Warrenton, Virginia.....**Peggy Roston**, formerly with Preston, Thorgrimson, is now with Pletcher, Weinig, Moser & Merringer.....**William O'Neal**, formerly with Bliss Riordan, has relocated to Phoenix, AZ.

Douglas Parkinson, formerly with the A.G.'s office, has moved to Pohnpei, Micronesia.....**Joyce Mansfield Rivers** is away from Alaska for one year obtaining an L.L.M. degree at the University of Iowa College of Law.....**John Steiner,** formerly with Davis Wright Tremaine, is now with the A.G.'s section on Transportation & Public Facilities.....**Thomas Van Flein** has relocated from L.A. to Fairbanks.....**Warren Westfall** has relocated to Salem, Oregon.....**Kathleen Weeks** was appointed to the Task Force on Regulatory Reform by Gov. Walter J. Hickel.

Gordon F. Schadt, was recently elected to the American College of Real Estate Lawyers as one of 40 new members. The organization has 800 members nationwide with 4 in Alaska. He has been Chair of the Alaska. He has been Chair of the Alaska Bar Association Real Estate Law Section from 1988 to present.

headquartered in Washington DC, annually selects as members real estate lawyers with demonstrated extensive participation in organized bar projects, writing or teaching related to real estate law; and who have had substantial experience in real estate law for at least 10 years.

Attorney General Charlie Cole on Dec. 16 appointed **Sharon Illsley** as District Attorney in Kenai. "Ms. Illsley has many years of prosecution experience in Colorado and has spent the last two years prosecuting in Kenai, where she received high marks from judges, police officers, and other attorneys," Cole said.

Illsley replaces current district attorney **Richard J. Ray,** who is transferring to the Fairbanks District Attorney's office.

1993 Annual Bar Convention

JUNE IN JUNEAU

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19

MUST GO!

ALPS

BONNIE HENKEL
Vice President, Claims Manager

TIP OF THE MONTH

A Guide to Survival in the Practice of Law

The first step in protecting yourself from a legal malpractice law suit is to become aware of the pitfalls out there and how to avoid them.

An easy place to begin is with a quick inventory of your case load and clientele. A red flag should go up for a client any time one these refrains strike a chord:

✓ Beware of clients who have been represented by everybody else in town. In weighing our responsibility to provide legal service to the public, be cautious of clients who have made the rounds of every attorney in town and have little good to say about any of them.

✓ It's not the money, it's the principal
✓ The lowest-fee shopper
✓ They already know the law
✓ Urgency and time constraints
✓ The case beyond your expertise
✓ The case too large for your practice

CLE Honor Roll 1992

We want to acknowledge the contribution of and participation by the following Bar members as faculty, program coordinators, planning committee members and/or video replay coordinators for our 1992 CLE programs. Without their hours of volunteer assistance, the Bar CLE programs would not be possible.

Ashburn, Mark E.
Barrett, Paul
Beecher, Linda
Blasco, Robert
Block, Richard L.
Boness, Frederick H.
Bookman, Bruce
Brelsford, Gregg B.
Brown, Harold M.
Brown, Keith E.
Bump, Dennis
Bundy, Robert
Burgess, Timothy M.
Caldwell, William
Callahan, Daniel L.
Carruth, Russellyn
Christian, William T.
Christianson, Cabot
Cohen, Norman A.
Cole, Cecilia I.
Conway, John M.
Cook, Gregory F.
Cox, Susan
Cragan, Paul
Croft, Chancy
Cuadra, Elizabeth
Damrau, Mason
Daniel, Carol H.
Daniel, Thomas
Devlin, Maureen
Devries, Steven D.
DeWitt, James
Eggers, Ken
Ely, Robert C.
Ennis, Deitra L.
Feldman, Jeffrey M.
Fenerty, Dennis G.
Ford, William T.
Franklin, Barbara L.
Friedman, Richard
Gissberg, John G.
Gleason, Sharon L.
Gordon, Lewis
Grover, Parry E.
Hansen, Jan
Harbour, Francine
Hickerson, Elizabeth J.
Hilton, William M.
Hitchcock, William D.
Hoge, Andrew E.
Holen, Lee
Hollis, Blaine H.
Hughes, Mary K.
Ingram, David A.
Jackson, James R., Jr.
Jamin, Matt
Janidlo, Thom F.
Jenicek, Monica
Joannides, Stephanie
Johnson, Elizabeth I.
Kashi, Joseph
Kirk, Kenneth C.
Kolkhorst, Kathryn
Landau, Robert W.
Lekisch, Peter A.
Linxwiller, James
Livsey, Connie
Malchick, Barbara
Mason, Susan Wright
McDonagh, John
McNall, William L.
McNeil, Chris E., Jr.
Mendel, Allison E.
Miller, Lloyd
Mock, Marjorie A.
Montgomery, Pamela R.
Murtagh, John M.
Nelson, Lance B.
Nye, Daniel
O'Bannon, Linda M.
O'Leary, Elizabeth S.
O'Tierney, Daniel Patrick
Ostrovsky, Jan S.
Paslay, Paul W.
Peterson, Arthur H.
Peterson, Matthew K.
Petumenos, Timothy
Picard, Anne
Platt, Janet D.
Porcello, Tasha M.
Price, Robert E.
Rankine, David
Ray, Colleen A.
Reeves, James N.
Reeves, Susan E.
Reges, Mala
Reynolds, Matthew G.
Riley, Burke
Sanders, Eric T.
Schadt, Gordon F.
Schendel, William
Schleuss, Christine, S.
Serdahely, Douglas
Seward, Steven T.
Shamburek, Steven
Smith, Aleen M.
Strout, Cynthia
Utermohle, George E.
Van Goor, Stephen J.
Vitale, Vincent P.
Volland, Phillip
Walsh, David J.
Weiner, Randall M.
Weyhrauch, Bruce B.
Wickersham, Kirk
Willard, Donna
Williams, Teresa M.
Winner, Russell L.
Wolf, David P.
Yerbich, Thomas J.

Andrews, Elaine M. (Judge)
Bryner, Alexander O. (Judge)
Carpenti, Walter L. (Judge)
Compton, Allen T. (Justice)
Fabe, Dana (Judge)
Froehlich, Peter B. (Judge)
Greene, Mary (Judge)
Holland, H. Russel (Chief Judge)
Hunt, Karen (Judge)
Matthews, Warren W. (Justice)
Michalski, Peter A. (Justice)
Moody, Ralph E. (Judge)
Moore, Daniel A. (Chief Justice)
Reese, John (Judge)
Roberts, John D. (Judge)
Ross, Herbert A. (Judge)
Singleton, James K., Jr. (Judge)
Sivertsen, John, Jr. (Magistrate)
Weeks, Larry R. (Judge)

Section Chairs
Bazzy-Garber, Kari L.
Brautigam, Peter B.
Brelsford, Gregg B.
Bundy, David H.
Carter, Mickale C.
Clover, Joan M.
Cravez, Glenn
Daniel, Thomas M.
Gleason, Sharon L.
Holen, Lee
Ingram, David A.
Kirk, Kenneth C.
Linxwiler, James D.
Manley, Robert L.
McCoy, Kevin F.
Miller, Lloyd B.
Reeves, Susan E.
Schadt, Gordon F.
Shea, Wev
Tindall, John H.

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Ballou, Gail
Damrau, Mason
Fabe, Dana (Judge)
Felix, Sarah
Hanson, Brian E.
Holen, Mary L.
Ingram, David A.
Leyba, Kenneth P.
Loescher, Joseph R.D.
Montague, Holly B.
Olson, Paul
Reeves, James
Schuhmann, Barbara L.

Outgoing Members
Raymond Funk
Dan Hensley
Mary Pinkel

All Bar Section Executive Committees and CLE Planning Committees, we regret any omissions or errors.

Estate Planning Corner

By Steven T. O'Hara

Forms and Publications

We are all dependent upon forms in our practice. All forms must be tailored to the client's particular circumstances, but as starting points, good forms serve as built-in checklists of issues. Properly used, good forms increase not only efficiency, but also effectiveness,

The temptation to fit a client into a particular form or to rely on one or two forms for all clients must be avoided. Having a large collection of form books and commentary helps, but may be prohibitively expensive.

In the estate planning area, this writer has found the two-volume treatise *Illinois Estate Planning, Will Drafting and Estate Administration Forms* to be the best and most cost-effective combination of forms and commentary.

Published by Aspen Publishers, Inc. of Rockville, MD, its authors are Roy M. Adams, David A. Herpe, and Thomas W. Abendroth. (I am partial to the authors, one of whom was a law school instructor of mine and another a classmate.)

Other excellent publications include Chase's *The Estate Planner's Portfolio: Will & Trust Forms,* a one-volume treatise published by The Chase Manhattan Bank, New York, NY; U.S. Trust's *Practical Drafting: Trust & Will Provisions,* a multi-volume treatise published by U.S. Trust, New York, NY; Westfall and Mair's *Estate Planning Law and Taxation,* 2nd Ed., a one-volume treatise published by Warren, Gorham & Lamont, Boston, MA; RIA's *Estate Planning & Taxation Coordinator*, a multi-volume treatise published by The Research Institute of America, New York, NY; and Tax Management's *Estates, Gifts, and Trusts Portfolios*, a multi-volume treatise published by The Bureau of National Affairs, Inc., Washington, DC.

This writer also relies on the periodicals *Trusts & Estates* (published by Communication Channels, Inc., Nashville, TN) and *Probate Practice Reporter* (published by Shepard's/McGraw-Hill, Inc., Colorado Springs, CO). Both are excellent, but over the years this writer has found Roy M. Adams' Question and Answer column in *Trusts & Estates* as extraordinarily instructive.

Neither the Fairbanks nor the Juneau law library appears to have any of these publications. The Anchorage law library has *Trusts & Estates* and *Estates, Gifts, and Trusts Portfolios.*

This writer would welcome letters recommending additional estate planning publications, which would be mentioned in future issues of this column.

Municipalities also enjoy legislative immunity

In the last issue, the author discussed the particulars of Alaska statutes as they apply to legislature immunity. Part II here elaborates on local government applicability.

By Paul Cragan

The exclusive remedy for a violation of federal constitutional rights by a state/municipal governmental actor is through 42 U.S.C. § 1983. *Jett v. Dallas Independent School District*, 491 U.S. 701, 1095 S. Ct. 2702, 105 L. Ed. 2d 598 (1989). A municipal official sued in his or her personal capacity is liable to the same extent as a state official and has the same immunity defenses. *Breck, supra.* A municipal official sued in his or her personal capacity is liable under § 1983 to the same extent as a state official, and has the same immunity defenses. *Breck, supra.* The state itself is not a "person" which can violate § 1983. A municipality on the other hand, is a "person" for § 1983 purposes, and thus can be liable for a federal constitutional violation. (A suit against a municipal official in his or her official capacity is a suit against the municipality).

However, there are limits on this liability. A municipality can be liable under § 1983 where the action alleged to be unconstitutional implements or executes either a policy formally adopted by the municipality, or a "custom" of the municipality which is so pervasive that it is equivalent to an informally adopted policy.

However, a municipality is not vicariously liable for the rogue act of a non-policymaking employee. Respondeat superior does not apply. In short, a municipality is liable only for its own actions. *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *City of St. Louis v. Praprotnick*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986).

For example, if a city council enacted an ordinance which cut from the budget only the positions occupied by black employees, the ordinance would be a formally adopted policy of the municipality. The city acts when the council acts, because the council has the authority to establish the final budgetary policy of the city. A terminated employee may bring a cause of action against the municipality under § 1983.

Similarly the city's chief administrator, i.e. the city manager, may have authority to make the final decision as to whether overtime work will be permitted. In that circumstance, the city acts when the manager acts because he is the final policymaker in this area. Thus if the manager authorizes overtime for white employees but due to racial animus denies it to black employees, the affected employees may bring a § 1983 cause of action against the municipality.

On the other hand, suppose that a white janitor makes racially motivated threats, comments, and physical assaults against a black co-worker while on duty. In that circumstance, the janitor does not have the authority to set policy for the municipality regarding workplace conduct. His or her conduct is a rogue act which probably violates the city's policies. Therefore, the city does not act when the janitor acts, and thus the city is not liable under § 1983. Respondeat superior does not apply. This is the "policy" prong of municipal liability. A single act can establish a policy.

However, there is an exception to this rule. Suppose that the janitor's conduct has continued for a long time. Suppose also that the official with authority to set the work rules, i.e. the city manager, department head, etc., is aware of the janitor's conduct and has condoned and/or encouraged it over time. In that case, the janitor's conduct could be regarded as a customary practice of the city which rises to the level of an informally adopted policy. A court might hold that, under the circumstances, the city does act when the janitor acts, and therefore the city could face § 1983 liability. This is the "custom" prong of municipal liability. Establishing a custom requires a series of actions.

Although a municipality is immune from punitive damages under § 1983, *City of Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 110 S.Ct. 2748, 69 L.Ed.2d 616 (1981), the U.S. Supreme Court has strongly and plainly stated that a municipality does not have immunity from compensatory damages. *Owen v. City of Independence,* 455 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980). Numerous lower federal courts have applied *Owen* broadly. However, the Supreme Court has never addressed this issue in the context of legislative conduct.

In a somewhat radical departure, however, the Fourth Circuit has applied the doctrine of legislative immunity to the municipality itself, thereby defeating all § 1983 liability for legislative conduct. *Schlitz v. Commonwealth of Virginia,* 854 F.2d 43 (4th Cir. 1988); *Drayton. supra; Nuchims v. State of West Virginia* 914 F. Supp. 248 (4th Cir. 1990); *Baker, supra.* Whether the Supreme Court would impose liability for a municipality's legislative actions is, at least arguably, an open question.

State Law

An Alaskan municipality has no inherent sovereign immunity. Thus a municipality is generally liable for damages under state law, unless it possesses some other form of statutory or common law immunity. The doctrines of legislative, qualified, and official immunity apply only to individuals and not to the corporate municipal entity. However, there are two forms of immunity which apply to municipalities.

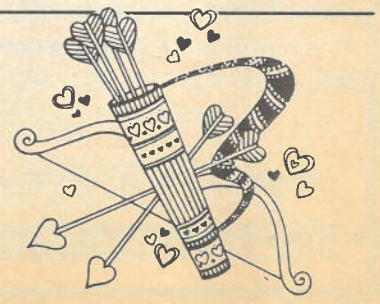
989 (11th Cir. 1987); *Aitchison v. Raffiani,* 708 F.2d 96 (3d Cir. 1983); *Baker v. Mayor and City Council of Baltimore,* 894 F.2d 679 (4th Cir. 1990); *Draughon v. City of Oldsmar*, 767 F. Supp. 1144 (M.D. Fla. 1991); *Drayton v. Mayor and Council of Rockville,* 699 F. Supp. 1155 (D. Md. 1988); *Taylor v. Cochran*, 644 F. Supp. 753 (E.D. Ark. 1986).

It is clear from these authorities that a plaintiff has an uphill battle to prove that a position elimination was not legislative. Further, a plaintiff who sues an individual city councilmember for voting on the annual budget does so at his peril. However, a plaintiff has a better chance of succeeding against the corporate municipal entity because, except in the 4th Circuit, legislative immunity does not apply to the municipality itself. The municipality's liability will be discussed below.

Judicial and Prosecutorial Immunity

The same analysis applies in litigation against judges and prosecutors. These officials have absolute immunity when performing their official functions. Problems can arise, however, when a judge or prosecutor acts outside his or her official role.

For instance, a judge who fires his or her secretary is acting administratively, not judicially. The character of the act, not the identity of the actor, controls. In that situation the judge would have only qualified immunity for a civil rights violation. *Ashelman v. Pope*, 793 F.2d 1072 (9th Cir. 1986).



Legal secretaries best trained for the job

BY EDWINA KLEMM

A law firm advertised for an experienced legal secretary. The firm's administrator received an avalanche of resumes from persons applying for the position.

After eliminating those with no legal experience, interviews were conducted with persons whom the administrator felt met the "experienced legal secretary" requirement.

The field was narrowed to two candidates, one who had worked in the Anchorage area and one who had legal experience in other states. The administrator contacted the firms listed on the applicants' resumes. Most responded only that the person had been employed by the firm for a certain period of time, but no other information was volunteered, and when questions were asked, the administrator was informed that the firm's policy was only to indicate the period of time in which the secretary had been employed there.

Which one to select? In the end, the administrator hired the person whose resume suggested that he or she was better able to meet the challenges of the position. In three months, the firm was again advertising for an experienced legal secretary. Does this sound familiar?

There is a growing need across the country for qualified legal secretaries. With that need comes an increasing awareness that there must be a standard with which to measure qualifications - one which can be applied in Alaska or in New Hampshire.

The mission statement of the National Association of Legal Secretaries (NALS) is: "We are committed to delivery of quality legal services through continuing education and increased professionalism, promoting a standard for members and recognition in the legal profession through the certification program and providing networking opportunities for members." NALS and its affiliated chapters across the country provide educational seminars, meeting speakers, and networking for nearly 15,000 members. For many years, NALS has offered nationally recognized certification for members of the legal support staff through its Professional Legal Secretary (PLS) certification program.

The trend of hiring Certified Professional Legal Secretaries is spreading throughout the country because they are a known factor. Employers are assured that applicants holding the PLS certification meet a certain level of professional training and experience, making them desirable employees. The Certified Professional Legal Secretary designation is only achieved after successfully completing a rigorous two-day examination. The seven-part PLS exam covers "Written Communications Skills and Knowledge" (grammar and word usage, punctuation, number usage, capitalization, spelling, vocabulary, composition and expression, and word division); "Ethics" (ethical considerations for the legal profession); "Legal Secretarial Procedures" (records management, office equipment and supplies, information processing, mailing and shipping services, telephone equipment and services, correspondence, and other legal secretarial procedures); "Legal Secretarial Accounting" (general banking and financial activities, accounting theory and terminology, and principles of accounting relating to a law office); "Legal Terminology, Techniques, and Procedures" (legal terminology, legal knowledge and procedures, citations, and legal bibliography and basic legal research techniques); "Exercise of Judgment" (decisions regarding judgment on appropriate actions and priorities); and "Legal Secretarial Skills" (decisions regarding preparation of legal papers based on 10 minutes of oral instructions and written materials in the examination packet).

In addition to the PLS certification for "veteran" members of your legal support staff, the National Association of Legal Secretaries since July has offered individuals at the apprentice level of the legal secretarial profession certification in the form of the Accredited Legal Secretary (ALS) designation, achieved after successfully completing a one-day, six-hour examination. The ALS exam covers the areas of "Written Communication Comprehension and Application," "Office Administration, Legal Terminology, and Accounting," and "Ethics, Human Relations, and Applied Office Procedures."

Successful completion of this exam demonstrates that the examinee has made a commitment to the legal profession and has the ability to perform business communication tasks; to maintain office records and calendars; to prioritize multiple tasks when given "real life" scenarios; to understand office equipment and related procedures; to comprehend legal terminology, legal complexities and supporting documents; to recognize accounting terms in order to solve accounting problems; and to follow law office protocol as prescribed by ethical codes. Examinees passing the exam receive a certification which is valid for five years. This certification may be extended one year for every 20 hours of continuing legal education, up to a maximum extension of three years.

There are over 3,145 individuals with the PLS certification in the U.S. Only 35 were certified in Alaska as of March, 1992. Since the first exams in July, 1992, there are 16 Accredited Legal Secretaries in the United States. There were 312 persons sitting for the September PLS exam, only 9 of those in Alaska. In September, 29 persons in the Lower 48 sat for the Accredited Legal Secretary exam.

The National Association of Legal Secretaries has two chapters in Alaska, Anchorage Legal Secretaries Association, chartered in 1955, and Tanana Valley Legal Secretaries Association, chartered in 1988. Both chapters offer a PLS study group for those persons interested in sitting for the PLS examination. Anchorage Legal Secretaries Association is forming an ALS study group to aid those desiring to enter or just entering the legal profession in achieving ALS certification.

Both chapters need your support and encouragement in providing education through seminars, meeting speakers, and networking opportunities.

How can you help? Volunteer to be a seminar speaker or to participate in a meeting program. Encourage your support staff to become members of these professional associations. Many firms pay registration fees for seminars and annual membership dues. Some even pay for the monthly membership meetings.

A growing number of firms are encouraging staff to meet the challenge and become certified as Professional Legal Secretaries, giving consideration in salary reviews and bonuses to those who have attained certification or who are sitting for the exam. There are opportunities for education and personal growth available through membership in NALS and its affiliated Alaska chapters - law firms and sole practitioners will be the beneficiaries of the increased education and professionalism gained by their legal support staff.

For more information on the PLS or ALS certifications, and for information on membership in NALS and the Alaska chapters, please contact Edwina Klemm, Certified PLS, at 276-5121, Guess & Rudd, 510 L Street, Suite 700, Anchorage, Alaska 99501-1959. The author is a board member of the National Association of Legal Secretaries, representing Alaska chapters.

Judicial Ethics Complaints

The Alaska Commission on Judicial Conduct receives confidential complaints against Alaska state court judges. Complaints can be filed by the public and can be anonymous. The Commission handles complaints of:

Bias • Improper Demeanor • Conflict of Interest • Court Delay • Misuse of Office • Disability ... and others

If you are aware of any judicial ethical misconduct, the Commission asks that you report the allegations in writing to:

Alaska Commission on Judicial Conduct
310 "K" Street, Suite #301
Anchorage, AK 99501
(907) 272-1033 • (800) 478-1033

Allegations must be specific, and refer to a court case number, if applicable.

•• The Commission does not handle complaints against lawyers, magistrates, or federal judges.
•• The Commission cannot reverse a legal decision or affect on ongoing court proceeding.

SOLICITATION OF VOLUNTEER ATTORNEYS

The court system maintains lists of attorneys who volunteer to accept court appointments. The types of appointments are listed in Administrative Rule 12(d)(2)(B). Compensation for these services is made pursuant to the guidelines in Administrative Rule 12(d)(2)(E)-(T).

Attorneys may add their names to the volunteer lists by contacting the area court administrator(s) for the appropriate judicial district(s):

First District:
Kristen Carlisle
415 Main St. Rm 318
Ketchikan, AK 99901-6399
(907) 225-9875

Second District:
Mike Hall
303 K Street
Anchorage, AK 99501-2099
(907) 264-8250

Third District:
Al Szal
303 K Street
Anchorage, AK 99501-2083
(907) 264-0415

Fourth District:
Ron Woods
604 Barnette St. Rm 202
Fairbanks, AK 99701
(907) 452-9201

Torts

By Michael Schneider

'Tis the season to be jolly

There are few things most plaintiffs' lawyers would rather find under the tree than a copy of *Sauer v. The Home Indemnity Co.*, Opinion No. 3898, November 13, 1992.

This case will be discussed below. *Sauer v. The Home Indemnity Co.: An Insurance Company That Wrongfully Refuses to Defend is Liable for The Judgment which Ensues, Even Though No Indemnity Was Due.*

Home Indemnity refused to defend or indemnify its insured against claims of residents of her trailer park that arose from leaking sewage. Home further failed to communicate to its insured its refusal to defend or its reasons for denying coverage. On behalf of Home, an adjuster proffered a nonwaiver agreement to the insured, but same was never signed. The nonwaiver agreement did not indicate any possible basis for denial of coverage. A trial of the underlying claim against the insured resulted in a judgment that exceeded $600,000. *Id.*, pp. 2-6.

In subsequent litigation attempting to collect the judgment from Home, the insured moved for summary judgment seeking a determination that Home was estopped to deny coverage because it failed to defend the insured and further failed to notify the insured of any coverage disputes. The trial court's denial of this motion was appealed to the supreme court, and the supreme court reversed.

A. Duty to Defend.

The supreme court again repeated the rule that the duty to defend is triggered where facts are alleged that would "potentially" place the claim within policy coverage. *Id.*, pp.8 & 9. The existence of competing claims or allegations that could conceivably take the case out of coverage for indemnity is irrelevant:

> "Such allegations, if proven, would have supported recovery under a negligence theory, which clearly falls within the coverage afforded by the policy. The presence of other allegations in the complaint which are not within policy coverage does not relieve Home of its duty to defend."

Id. at p. 9. In support of the quotation above, the court cited *Ferguson v. Birmingham Fire Ins. Co.*, 460 P.2d 342, 347 (Oregon 1969), where the Oregon supreme court held that a complaint containing counts based upon both covered and uncovered conduct triggered the insured's duty to defend because certain of the allegations in the complaint placed one or more claims *potentially* within coverage.

As a practical matter, there is usually a whole lot of "what iffing" going on between the insured and the insurance carrier in early stages of a dispute like this. Our supreme court once again discouraged that sort of recalcitrance:

> "Home Indemnity cannot escape its contractual duty to defend its insured merely by choosing to accept a version of the facts or an interpretation of the policy which it finds most favorable. Because the Guillory complaint alleges a claim *potentially within the policy coverage*, Home Indemnity was *precluded as a matter of law* from looking to extrinsic facts to escape its duty to defend Gross against the residents claims. *See Afcan*, 595 P.2d at 645."

(Emphasis added) *Id.* at p. 11.

B. Estoppel.

At the trial court level, the insured had argued that Home was estopped to contest coverage in the instant action because of its failure to timely notify her that it was refusing to defend and providing bases for its coverage denials. The supreme court agreed. *Id.* at pp. 11 & 12. Citing 7C John A. Appleman, *Insurance Law and Practice,* Sec. 4686 (1979) and AS 21.36.125, the court observed that notice to the insured by the insurance company "must not only be prompt, but it must 'provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim.'" The court pointed out that this was required to avoid prejudice to the insured which would otherwise result in delays that the insured would suffer undertaking its own defense or in gathering evidence essential to successfully challenge coverage denials and refusals to defend. *Id.* at p. 12. At page 12 of the opinion, the court indicated that the mere tender of a nonwaiver agreement was insufficient to satisfy duties owed to the insured when an insurer decides to deny coverage or a defense.

C. The Broader Implications of Sauer.

Pages 12 through 17 of the opinion bear careful reading. While Sauer must clearly be limited to its specific facts, which include the somewhat unusual denial of defense and indemnity without the slightest notice or explanation to the insured, the tenor of the decision can be fairly argued to foretell outcomes in much less narrow factual settings. The court's holdings include the following:

1. An insurer in doubt as to either its duty to defend or as to the scope of coverage may provide a defense unconditionally. If an unconditional defense is provided, doctrines of waiver and estoppel will probably keep the carrier from later contesting coverage. *Id.* at p. 13.

2. Such an insurer, *with the consent of its insured*, may conduct the defense conditionally under either a nonwaiver agreement or a reservation of rights letter. Where the insured allows a defense under these circumstances, the insurer preserves its option to later disclaim coverage after conducting the defense. *Id.* at p. 13, *and Afcan v. Mutual Fire. Marine & Inland Ins. Co.*, 595 P.2d 638, 642, 644-47, (Alaska 1979).

3. Where an insured refuses to accept a defense under a nonwaiver agreement or a reservation of rights, the insurer must provide an unconditional defense (and in all probability waive any coverage defenses otherwise assertable at a later date), or

a. permit the insured to reject the defense offered by the insurance company and obtain substitute counsel *at the insurer's expense.* While incurring the expense of substitute counsel, the carrier under these circumstances will retain its right to later contest coverage. *Id.*, at p. 14, and *Continental Ins. Co, v. Bayless and Roberts. Inc.*, 608 P.2d 281, 291 n. 17 (Alaska 1980). *or*

b. refuse to defend/withdraw from the defense:

(i) Where a *valid* policy defense (*e.g.*, insured's failure to cooperate or give notice) exists, the carrier still retains its right to litigate policy defenses in subsequent litigation. *Id.* at p. 14, *Continental, supra,* at p. 291, and *Davis v. Criterion Ins. Co.*, 754 P.2d 1331 (Alaska 1988) (first party to breach the insurance contract cannot then assert other rights thereunder).

(ii) Where coverage questions are involved (an assertion that one or more of the claims asserted against the insured is outside the policy coverage), the court's position is not clear (at least it's not clear to me).

4. A carrier that fails to timely give notice of its refusal to defend or withdrawal of defense and who fails to specify reasons for denying coverage in a timely and succinct manner, is liable for the entire amount of any *judgment* entered against the insured, as well as costs and attorney's fees incurred-by-the insured in defense of the underlying action. *Id.* at p. 16.

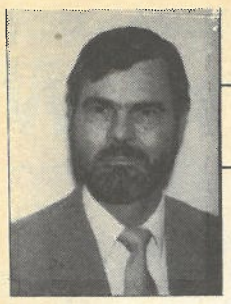
The court didn't expressly overrule *Afcan*, thus the confusion I mention in paragraph C(3)(b)(ii) above. In that case, the complaint alleged grounds for relief both within and beyond the policy coverage. The carrier breached its duty to defend and was determined to be liable for attorney's fees and costs incurred by the insured in defense of the claim. The carrier was, however, allowed to contest its obligation to indemnify. The court distinguished *Afcan* from the case at bar by pointing out that the carrier in *Afcan* clearly communicated its decision to withdraw from the defense and set forth the bases for that decision. It further pointed out that the loss in *Afcan* was determined by *settlement,* whereas the loss in *Sauer* was determined at trial. The court commented specifically on the questionable importance of the settlement/verdict distinction (thus, in my view, implying a departure from the reasoning of *Afcan*) and went on to hold that, under the peculiar facts of the case at bar, The Home was precluded from arguing coverage issues, having failed to timely notify its insured of its decision to withdraw or to explain the basis for its decision to deny coverage. *Id.* at pp. 14 & 15.

Despite the court's attempts to distinguish *Afcan*, the concluding language of this portion of the opinion is broad and to the point and suggests a departure from the leeway granted the carrier in *Afcan*:

> "Thus, an insurance company which wrongfully refuses to defend is liable for the judgment which ensues even though the facts may ultimately demonstrate that no indemnity is due."

Id. at p. 16.

Sauer seems to suggest that an insured refusing to accept a defense under a reservation is free to choose its own counsel and demand payment for the efforts of substitute counsel from the insurance company. This result was foretold many years ago in *Criterion Ins. Co. v. Velthouse,* 732 P.2d 180 (Alaska 1986), where the court mentioned with apparent approval *San Diego Navy Federal Credit Union v. Cumis Ins. Society*, 162 Cal. App. 3d, 358, 208 Cal. Rptr. 494, 506 (1984) (an insurer proceeding under a reservation of rights must allow the insured to select its own counsel at the counsel at the insurer's expense). *Velthouse* at 181, n.2. If the carrier doesn't like this outcome, then it had better come up with a *valid* policy (as opposed to coverage) defense if it wishes to later assert coverage issues. The carrier's only other choice is to roll over and provide an unconditional defense, which in all likelihood will have the practical and legal consequence of eliminating later coverage defenses and obligating the carrier for any settlement or judgment ultimately obtained. The language of *Sauer* leaves open the question of whether a carrier without a valid policy defense and/or that refuses to pay for substitute counsel can avoid liability for the ultimate judgment where that judgment is *negotiated* instead of *litigated*. Sooner or later, the supreme court will be squarely faced with this question. When it is, it will have to choose between forcing people through trial, thus making the system and the litigants pay for problems created primarily by insurance carriers, or allowing litigants to mitigate their damages and strike their own bargains, thus forcing insurance carriers to live with the implications of their coverage/defense decisions. The latter approach seems to be blessed with judicial economy and makes the industry put its money where its mouth is.



BANKRUPTCY BRIEFS

By Thomas Yerbich

Section 506(b) and merger

Interest and fees, costs and expenses allowable under § 506(b) can be substantially impacted where the claim is reduced to judgment before the petition is filed. When an obligation is reduced to judgment, the underlying obligation merges in the judgment; the obligation no longer has any legal effect and all remaining liability transfers to the judgment. The effect of merger is that the prior obligation ceases to exist and a new obligation based on the judgment comes into existence. [*Restatement (2d) Judgments,* § 18(1) (1982)] In Alaska, when judgment is entered upon a written instrument, the instrument must be filed with the court and canceled. [Rule 78(d), Alaska R.Civ.Proc.] Thus, any further proceedings are to enforce the judgment, not the canceled instrument. [*Moening v. Alaska Mutual Bank,* 751 P2d 5 (Alaska 1988)]

Consequently, a bankruptcy claim arises out of the judgment, not an agreement between the parties. The doctrine of merger has a dual impact on an oversecured creditor: (1) postpetition interest rate and (2) right to recover postpetition attorney's fees and costs. The nature and extent of this impact are to a significant degree determined by the method by which the creditor sought to enforce judicially the secured obligation.

If the obligation is secured by real property, absent an agreement to the contrary, the creditor has two options: (1) sue on the note or (2) foreclose the security. [*Id.*] If the creditor sues on the note and obtains an *in personam* judgment that is returned unsatisfied, the creditor may foreclose the security. [*Id.*; AS § 09.45.200] Moreover, a subsequent action to foreclose judicially is not barred by *res judicata*. [*Conrad v. Counsellors Investment Co.*, 751 P2d 10 (Alaska 1988)]

The same rules apply to transactions governed by the Uniform Commercial Code. Remedies under the UCC are cumulative and "the secured party may reduce the claim to judgment, foreclose, or otherwise enforce the security interest by any available procedure." [AS § 45.09.501(a); *Native Alaskan Reclamation and Pest Control, Inc. v. United Bank Alaska,* 685 P2d 1211 (Alaska 1984)] Thus, a secured party under the UCC has the option of enforcing the debt *in personam* or proceeding against the collateral; entry of judgment on the debt does not preclude employment of another procedure. (9 Anderson, *Uniform Commercial Code* § 9-501:14 (3d ed. 1985)]

Interest

Since the obligation arises out of a judgment and interest is determined at the rate specified in the law under which the claim arose, interest allowed is at the judgment interest rate, not the contract rate. AS § 09.30.070 provides that the rate of interest on judgments is 10.5 percent unless the judgment is founded on a writing specifying a different rate and the contractually specified rate is set out in the judgment. Failure to include the contract rate of interest in the judgment will result in interest under § 506(b) being allowed at the "standard" 10.5 percent judgment rate, not the contract rate.

Attorney's Fees and Costs

An award of attorney's fees and costs under § 506(b) is predicated upon the existence of a contract; if the right arises under a judgment or by statute, § 506(b), by its express language, is inoperative. Thus, the "option" selected by the creditor — sue on the obligation or judicially foreclose the security — is of substantial significance.

First, if the creditor sues on the note and obtains an *in personam* judgment without foreclosing on the security the security agreement survives entry of the judgment. While Rule 78(d) requires that the note be surrendered and canceled, Rule 78(d) does not require surrender and cancellation of the security agreement in that case. [*Moening v. Alaska Mutual Bank, supra.*] Therefore, if the security agreement itself provides for the recovery of attorney's fees and costs, it provides the operative "agreement" for application of § 506(b). Moreover, since the security agreement and note must be read together as a single agreement to determine the intent of the parties[*Id.*] or the security agreement may incorporate the provisions of the note [*In re Clark Grind & Polish,* 137 BR 172 (Bkrtcy.W.D.Pa. 1992)], an attorney's fee provision in the note may very well be part of the security agreement and survive entry of judgment on the note.

If, on the other hand, the creditor judicially forecloses the security, the security agreement also merges in the judgment. Judgment on the note and security agreement extinguishes all further contractual rights, including attorney's fee clauses, and post judgment attorney's fees and costs are not allowed except to the extent the judgment itself or otherwise applicable law permits. [*Chelios v. Kaye,* 268 CR 38 (Cal.App. 1990); *Production Credit Ass'n v. Laufenberg,* 420 NW2d 778 (Wisc.App. 1988); *Caine & Weiner v. Barker,* 713 P2d 1133 (Wash.App. 1986)] Since the claim no longer arises out of an agreement, there is nothing upon which § 506(b) can operate and the creditor is not entitled to recover fees, costs and expenses as part of the allowed secured claim. [*In re Stendardo,* 139 BR 128 (E.D.Pa. 1992); *In re McKillups,* 81 BR 454 (Bkrtcy.N.D.Ill. 1987); *see In re Schlecht,* 36 BR 236 (Bkrtcy.D.Ak. 1983); *contra, In re Clark Grind & Polish, Inc., supra; Matter of Schwartz,* 77 BR 177 (Bkrtcy.S.D.Ohio 1987)0.

The UCC provides a right to recover attorney's fees, if provided by agreement, upon the disposition (sale) of personal property subject to a security interest. [AS § 45.09.504(a)(1)] However, when a creditor elects a non-UCC remedy (*e.g.*, judicial foreclosure), the creditor does not have any greater rights than any other party employing the remedy. The limitations and attributes of the non-UCC remedy apply, not the UCC. [AS § 45.09.501(a); Uniform Commercial Code § 9-504, Official Comment 6; 9 Anderson, *Uniform Commercial Code*, §§ 9-501:13, 9-501:14 (3d ed. 1986); 1 Anderson, *Uniform Commercial Code* § 1-103:57 (3d ed. 1981)] Moreover, to the extent rights under otherwise applicable non-UCC law exist, the source is statutory, not an agreement.

There are two recognized exceptions to the doctrine of merger applicable to § 506(b) issues. First, "if a creditor has a lien upon property of the debtor and obtains a judgment against him, the creditor does not thereby lose the benefit of the lien." [*Restatement (2d) Judgments,* § 18, comment g (1982); AS § 45.09.501(e); *see* Uniform Commercial Code, § 9-501, Official Comment 6] Thus, notwithstanding entry of a judgment, the creditor remains secured. Second, contractual provisions may survive entry of a judgment if the parties clearly evidence that intent in the documents. [*In re Stendardo, supra*] [Author's Note: The viability of this second exception in Alaska is questionable in light of *Moening.* In addition, contractual provisions that "survive" entry of a judgment do so because they are explicitly or implicitly incorporated as part of the judgment under the rules governing the interpretation of judgments, they do not "survive" independently.]

The cases favoring creditors, *Schwartz* and *Clark*, both start from the rule that entry of a judgment does not extinguish the lien. However, both then appear to take the position that because the security interest survives entry of judgment, the security *agreement* also survives, *ipso facto.* This is where, in the author's opinion, *Clark* and *Schwartz* err.

The basis for the *Clark* decision is unclear: the judgment appeared to be on the note alone (a point the court ignored); if so, the *Clark* result is correct. However, if the judgment was on both the note and security agreement, the result is incorrect. The holding on the "merger survivability" issue rested on two decisions: *In re Blakeney*, 126 BR 449 (Bkrtcy.E.D.Pa. 1991) and *In re Stendardo*, 117 BR 833 (Bkrtcy.E.D.Pa. 1991). *Blakeney*, in turn, relied upon *Stendardo*; however, the Bankruptcy Court decision in *Stendardo* was overruled on appeal by the District Court [139 BR 128 (E.D.Pa. 1992)] Thus, *Clark* has been "stripped" of its underpinnings on the merger issue.

It is difficult to follow the rationale of *Schwartz.* First, the court cited three Kentucky decisions for the rule that a mortgage lien is not extinguished by the judgment; it is not extinguished until a sale occurs. From this point the reasoning gets tortuous. *Schwartz* held the right to recover expenses incurred between the entry of judgment and sale survived to permit the creditor to recover: (1) additional expenditures to protect its security interest; and (2) collect the rents and profits. Analysis of the cases cited by *Schwartz* leads to the conclusion that they are of questionable support for the penultimate holding that the security agreement was not merged into the judgment.

GESA Federal Credit Union v. Mutual Life Insurance Co., 696 P2d 607 (Wash.App. 1985) concerned the amount to be paid to redeem. The mortgage lien had been extinguished by the sale and the question was the amount to be paid by the judgment debtor to redeem the property; it had nothing to do with the mortgage or the agreement of the parties. The court noted that postsale redemption was a creature of statute and the *statute* specifically provided the requirements to be met to redeem.

Wyoming Building & Loan Ass'n v. Mills Construction Co., 269 P 45 (Wyo. 1928) involved the right of a foreclosing mortgagee to "surcharge" surplus proceeds from the foreclosure sale (otherwise payable to junior mortgagees) with taxes it paid. The case was decided on principles of subrogation, not the mortgage agreement. The court held the senior mortgagee was subrogated to the rights of the taxing authority for payments made to the taxing authority necessary to preserve the security interest of the senior mortgagee. Merger of the mortgage was not an issue in the case.

Prudence Co. v. 160 West Seventy-Third Street Corp., 183 NE 365 (N.Y. 1932) involved a receivership and the issue was the extent to which a receiver appointed in a foreclosure proceeding to collect the rents and profits had the power to alter the rents being paid by the tenants. *Prudence* did not involve the issue of merger of a mortgage in a judgment. The outcome in *Prudence* turned on the law of receivership between entry of the judgment and the foreclosure sale, not whether the mortgage terms merged in or survived a foreclosure judgment.

Conclusion

For purposes of applicability of § 506(b), when the creditor has obtained a prepetition judgment:

1. The interest rate is that specified in the judgment or the law of the jurisdiction rendering the judgment;

2. If the creditor sues on the obligation and obtains an *in personam* judgment, the security agreement survives entry of judgment and may be the operative base for § 506(b); and

3. If the creditor judicially forecloses the security, the security agreement merges in the judgment and, except (perhaps) where the documents clearly evidence an intent that provisions of the security agreement survive entry of judgment, the creditor's rights under the security agreement are extinguished.

Moses to Israel: No crabs for Thanksgiving

BY DAN BRANCH

Each Thanksgiving in Ketchikan, those charged with preparing the family holiday feast slide out of bed at 5 a.m. and head toward the kitchen. While their families sleep, these cooks hurry to get their turkeys into the oven before six.

Ketchikan cooks don't rise early to facilitate the needs of family football fans who like to schedule chow around the Detroit Lions game. They want to get dinner cooked before the annual Thanksgiving Day windstorm knocks the power out.

In our household fishing is the only activity that justifies leaving bed before 6 a.m. on a holiday. Our turkey is usually still in the ice box when Ketchikan veterans are washing dinner dishes. Friends, knowing our dangerous ways, always set some food aside for us to eat when the wind comes. We have never had to accept their charity.

In the first 3 years we lived in Ketchikan, at least one storm bringing 100-mile winds nailed the town sometime during Thanksgiving week. This year when Thanksgiving Eve arrived without a previous visit by the holiday storm, knowing cooks set their alarm clocks for 5 a.m. They should have slept in.

The Thanksgiving week storm didn't show this year. Instead it tested the roofs of Anchorage. On the day high winds were hammering the Anchorage bowl, Ketchikan enjoyed a crisp, sunny day. We had a lot of that in November this year.

Some of our weather also went south. A little panhandle rain storm wandered down to Southern California, flooded Malibu and shut down the Disneyland theme park. We enjoyed more sun and a warming trend.

The moderate weather confused garden plants. Pussywillow buds appeared and my lilac began to send out spring growth. The roses set new buds. It also confused me.

If it had been a normal November, Ketchikan residents would have spent the month holding on for the cool, clear days of January when the snowline drops to sealevel. Many home owners would have spent the weekend daylight hours taking a chain saw to windblown cedar and hemlock trees.

I expect consistency in things I cannot control. If it is November in Ketchikan it should be raining. If it is Thanksgiving week there must be high wind. November is supposed to be spent inside the house, cursing the sky and watching smoke from the wood stove being forced to the ground by excessive humidity. Invited guests to the house are supposed to complain about the rain and torture us with tales of hot weather vacations.

Nature's aberrant behavior had me worried. Were we seeing the first solid evidence of the greenhouse effect or was this a subtle communication from the higher power? Either way no one seemed to be listening.

While I puzzled over this fundamental question, a four-year-boy I know grappled with one of more significance. Born to practicing Jewish parents, the child had asked his dad why they never eat shellfish. He learned that the great and ancient prophet Moses had banned the consumption of all seafood without scales. Being of that age, the boy asked his father what Moses had against crabs and lobsters. Dad told his son to eat his salmon and be thankful he lived in this land of plenty.

After puzzling the problem for weeks, the child set out the solution on paper. With a maroon crayon, he drew the Red Sea with a strip of dry land running down the center of the seabed. In the picture, stick-figured Israelites made their way along the path while a bearded Moses watched with outstretched hands. The boy drew a ring of angry looking lobsters and cranky crabs around the prophet's feet. Several of these militant shellfish had fastened their claws on the hem of Moses' robe. Why did this child suspect revenge as the motivation behind Moses' anti-shell fish rule?

Maybe it is because we do not live in an age of majestic miracles. People no longer look to the skies for material communications from a higher power. Instead of prophets, U.N. peacekeeping forces rescue oppressed people in the modern world. Maybe that's why the young artist accepted a concrete explanation for Moses' ban on shellfish.

While technology has changed much since Moses lead the tribes out of Egypt, people have not. We continue to make the same mistakes described in Herodotus's Histories. If we haven't changed, why don't we enjoy a direct line to the metaphysical world like our ancestors?

Maybe the signs are still there but we are too busy tinkering with our machines to notice them. I think I'll turn off this computer and go for a walk.

U.S. courts need bankruptcy judges

The U.S. Court of Appeals for the Ninth Circuit is seeking applications from highly qualified candidates for 3 Bankruptcy Judge positions.

In the Western District of Washington there is one position available and it is headquartered in Seattle. However, this judge will be assigned to sit in other cities within the district as required. The position becomes available upon the successful completion of the appointment process, but not before April 1, 1993.

All applications (including any supporting documents) must be submitted by potential nominees personally and received at the Circuit Executive's Office no later than 5:00 p.m. PST on Friday, February 19, 1993.

In the Eastern District of California, there are two positions; one in Modesto and the other in Sacramento. The positions become available upon the successful completion of the appointment process, but not before January 11, 1994 (Modesto) and February 6, 1994 (Sacramento).

Al applications (including any supporting documents) must be submitted by potential nominees personally and received at the Circuit Executive's Office no later than 5:00 p.m. PST on Friday, February 5, 1993.

The basic jurisdiction of a Bankruptcy Judge is specified in title 28, United States Code, and explained in title 11, United States Code, as well as in 98 Stat, 344 P.L. 98-353, Title I, Section 120. The term of appointment to this office is 14 years. The current annual salary is $119,140, including a 3.5 percent cost-of-living adjustment.

The Court of Appeals uses an open-selection process which is confidential and competitive. Persons shall be considered without regard to race, color, sex, religion, or national origin. Qualifications for appointment include: (1) admission to practice before the highest court of at least one state or the District of Columbia; (2) membership in good standing of every other bar of which they are a member; and (3) a minimum of 5 years actual practice of law (with some substitutions authorized).

Application forms can be obtained by writing to the Office of the Circuit Executive at P.O. Box 193846, San Francisco, CA 94119-3846, Attn: Bankruptcy Judge Application or telephone (415) 744-6150 for information.

Odd Law News

Culled from the Alaska Department of Law monthly reports:

• A Nome resident was sentenced to four years for wrecking a vehicle he stole while intoxicated, the fourth such conviction in a decade. "In the defendant's sentencing argument, he said it would be cheaper for the state to buy him a car and teach him to drive than to incarcerate him for a long time."

• In Ketchikan, "the grand jury indicted more drug dealers, more child abusers, and a few thieves, but the month finished with a hectic rush when state troopers put together a case against a husband accused of murdering his wife. The man, described as jealous and greedy (his wife had money) wrapped her body in a tarp...After last month's guilty verdict of a woman who murdered her husband and wrapped him in a tarp, some officials in Ketchikan are considering a local ban on tarps."

THE ALASKA RAILROAD CORPORATION REQUESTS FOR PROPOSAL

Legal Services in Various Substantive Areas

The Alaska Railroad Corporation is soliciting proposals from interested concerns for the following:

- Legal Services in Tort and Workers' Compensation Defense (RFP 92-R-066)
- Environmental Legal Services (RFP 92-R-067)
- Labor and Employment Law Legal Services (RFP 93-R-001).

Proposals will be accepted until **4:00 p.m., February 26, 1993.** Interested concerns are requested to contact

The Alaska Railroad Corporation's
Contracts Section
327 Ship Creek Avenue
Anchorage, Alaska 99501

or telephone

A. Shereck
before 3:00 p.m. daily
at (907) 265-2612

for a copy of the RFP document in which they have an interest.

Discipline summaries

Attorney reprimanded for sending settlement offer directly to opposing party; other attorney sanctioned

Fairbanks attorney Thomas R. Wickwire received a public reprimand from the Disciplinary Board for communicating with an opposing party whom he knew was represented by counsel. Wickwire prepared a letter discussing the merits of pending litigation and proposing settlement. He addressed the letter to the opposing party, then delivered it to opposing counsel with instructions to forward the letter itself to the party. Opposing counsel returned the letter and advised Wickwire in writing that all settlement offers were to be directed to counsel, not the party. Wickwire erroneously took this to mean that counsel refused to convey the settlement offer, so he mailed the offer directly to the party himself. Although this constituted an intentional violation of DR 7-104(A)(1), there were several mitigating factors. In particular, Wickwire notified opposing counsel that he had contacted the party (a sophisticated executive) directly; thus the party was not likely to be overreached (the central concern of the disciplinary rule). The hearing committee recommended and the Disciplinary Board imposed discipline by public reprimand.

* * *

Fairbanks attorney Robert M. Beconovich received a public reprimand for neglecting a client's case. Mr. Beconovich was retained to represent the victim of an auto accident who suffered a broken leg and other injuries, plus the loss of his car. Mr. Beconovich agreed to sue the other driver. However, he did little to advance the claim, and ultimately lost it completely by failing to file suit within the statute of limitations period.

A hearing committee found a violation of DR 6-101(A)(3), which provides that once entrusted with a legal matter a lawyer shall not neglect it. The committee believed that the misconduct was isolated, not part of a pattern of neglect. The committee also found a violation of Bar Rule 15(a)(4) resulting from Mr. Beconovich's failure to answer the petition for formal hearing served on him.

The committee recommended discipline by public reprimand (by the Disciplinary Board of the Bar) and by censure (by the Alaska Supreme Court). On appeal by Mr. Beconovich, the Disciplinary Board accepted the finding of misconduct but imposed discipline by public reprimand only. The Board also ordered Mr. Beconovich to pay costs and attorney fees incurred by the Bar in the disciplinary proceeding.

TANANA VALLEY BAR

Judge to minions: The phones will stay

December 11, 1992

Richard D. Savell
PRESIDING JUDGE, FOURTH JUDICIAL DISTRICT
604 Barnette Street, Rm. 426
Fairbanks, Alaska 99701

Dear Sir:

I would like to take this opportunity to inform you that I am very impressed with the Court System's new computerized telephone system. It rivals in design and efficiency and perhaps albeit exceeds the capabilities of what I consider to be the "greatest" computerized telephone system; that of the CSED (Child Support Enforcement Division).

I relate to you my experience with your phone system this morning. I was attempting to contact Janice, the in-court clerk for Judge Kauvar, by dialing Judge Kauvar's number. After a number of rings an electronic voice answered the phone and informed me that I had arrived at the general mail box and if I wished to leave a message I should do so naming the person the message was destined for and it would automatically be delivered. The wonders of modern science astounded my feeble mind and I had felt that I had already arrived in the 21st century even though that is yet another 7 years and 20 days away.

I pressed 1 and prepared to leave my important message within the bowels of the electronic recording equipment located at 604 Barnette Street. However, much to my chagrin, the general mailbox informed me that it was full and could accept no further messages. However, technology having anticipated the full-mailbox-syndrome, informed me that among other options, if I required personal assistance at this point I could press 0.

Being one who always tries to follow instructions, if they sink into my feeble mind, I pressed 0 and expected to hear one of the always helpful, cheerful and efficient human beings who are employed by the Alaska Court System. However, the electronic voice once again responded. I was impressed by the efficiency of the system in that it could even produce personal assistance via the electronic voice and thereby save the valuable time of the ever cheerful and helpful Court System employees.

As the electronic message droned on I was awestruck by the exceedingly advanced nature of the system, rivalling and likely exceeding the capabilities of the epitome of a model electronic telephone answering system (that of the CSED). The voice informed me that I had reached the general mailbox, however, such mailbox was full but if I wished personal assistance I could dial "0".

My index finger is now quite sore, but I have not allowed my blood pressure to become elevated. I realize that this is a vast improvement over the stone-age method we used to have to contend with, of the phone continuing to ring unanswered and arriving at the likely conclusion that the intended recipient of the phone call was either busy or didn't give a good goddamn about what I had to tell them, or being addressed by a cheerful, warm human voice.

It is my observation that your system far exceeds the efficiency of that of the CSED. For there, they have spent much money on a phone system where you can eventually after punching any number of buttons, and possibly from time to time speaking to a human being who instructs you what numbers to push (oftentimes wrong), where you can leave a message - which of course, is never answered. However, your system has solved the one flaw in the CSED system in that it leaves out the very inefficient step of leaving a message that won't be answered. Rather, the new modern telephone service provides the same level of service that we used to experience. All this new efficiency no doubt at great cost and expense.

Yesterday, prior to this incident, reminiscing with Mr. Madson about times we never knew, we yearned for a yester-year where a rumpled attorney might open a window and throw up the sash, and shout to those who might be poised on the porch or the stoop, in the park or on a lawn, those young men in the oversized caps in the style sometimes worn by English race car drivers or young lads in the movie "Newsies" and say, "hey boy, run this paper over to so-and-so" with a flick of a quarter and sit back in a squeaky leather chair and then relish the puff of a good 5 cent cigar.

But alas, I guess I'll just walk over there and see if I can't run them down and figure out what's going on.

LAW OFFICE OF
KENNETH L. COVELL
Kenneth L. Covell
Attorney at Law

Superior Court
State of Alaska
FOURTH JUDICIAL DISTRICT

Chambers of
RICHARD D. SAVELL, Judge

604 BARNETTE STREET
FAIRBANKS, ALASKA
99701

December 15, 1992

Kenneth L. Covell
712 8th Avenue
Fairbanks, Alaska 99701

Dear Mr. Covell:

I am in receipt of your letter dated December 11, 1992. Your request for yester-year is:

DENIED

Sincerely,

RDS

RICHARD D. SAVELL
Presiding Judge

RDS:bjo

cc: Chairman, TVBA Committee for Telephone Reform

Minutes of the TVBA meeting of 12/11/92

'Twas two weeks before Xmas
And all through the Regency
The lawyers were running
with some sense of urgency.

The mystery meat was cooked
by the kitchen staff with care
in hopes that our members
would eat it, so there.

Before I read the minutes,
VEEP Chris in his beard
called the rabble to order
(they're a little bit weird.)

Seth Eames, he was guesting
(we, sheeplovers, were shocked and appalled)
When corrected the minutes read:
To good works "Bah humbug" Chris bawled.

Noreen gave a Treasurer's report
we're broke damn near to be
but we voted to give money
to the kids shopping spree.

My attention returned to our ruling PJ
who announced that on a recent trial day,
he thought for a moment that the court's truth alarm was peeping,
but discovered instead it was just a juror's watch beeping.

When on one side of the room there arose such a clatter
I realized at once that something was the matter.
Away from my table my eyes flew like a flash
tore past Ken Covell taking third helpings
and Noreen discussing cash

When what to my wondering eyes should appear
But Ralph Beistline holding court with little fear.
With a quick vital mind that no one could budge
I knew in a moment he must be the new Judge

He had a broad face and virtually no belly
that shook when he laughed like a bowl full of jelly.
His eyes how they twinkled, his dimples how merry
He's been out in the cold, his nose was red like a cherry.

His cute little mouth was turned down in chagrin
but his friends in the TVBA were in awe of him
the stump of a fork he held tight in his teeth
and smoke from the steam table his head it enwreathed

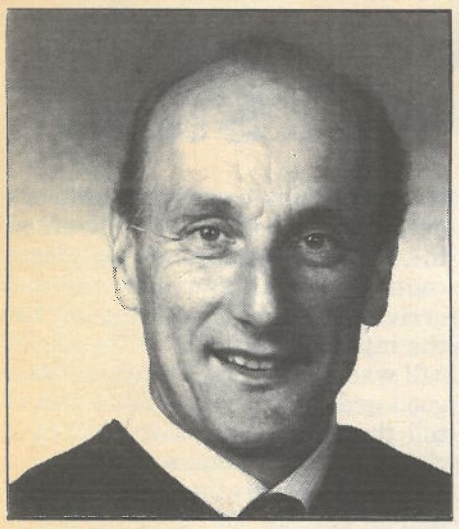
With a wink of his eye and a nod of his head
He told all attorneys you have nothing to dread
You'r in good hands now, he confidently said
You can sleep calmly now, when you all go to bed

And with this thought in mind
we all rode out of sight.
And a Happy Christmas to all
And to all a good night.

Respectfully submitted
Aly Closuit, Secretary and Dog Lady

• Moore reorganizes superior courts

APPELLATE COURT



Alexander O. Bryner

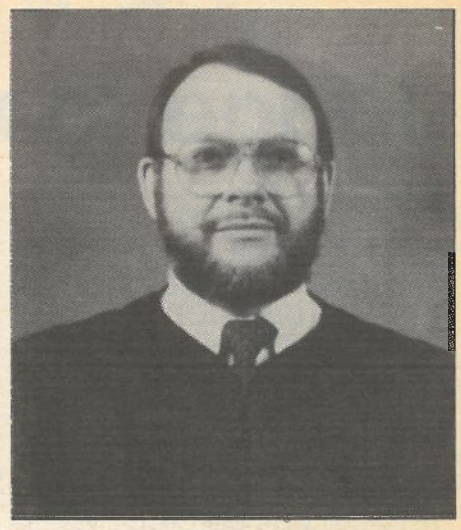
FIRST JUDICIAL DISTRICT

Larry R. Weeks

SECOND JUDICIAL DISTRICT

Charles R. Tunley

FOURTH JUDICIAL DISTRICT



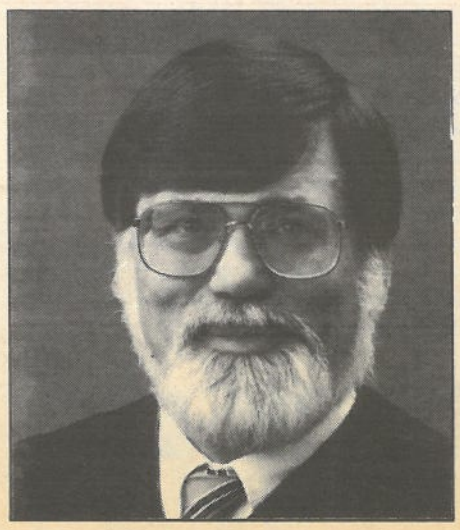
Richard D. Savell

Continued from page 1

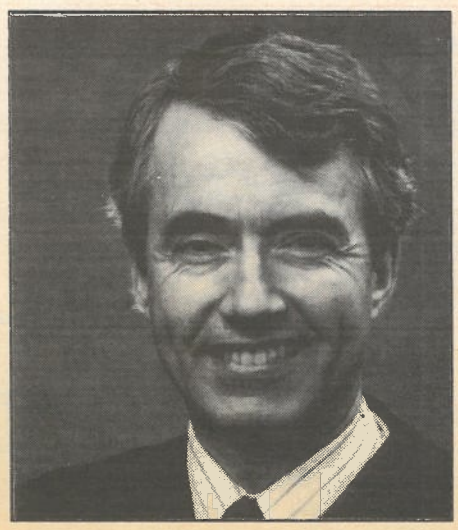
in 1982. He was the supervising attorney for the Barrow office of Alaska Legal Services Corporation from 1977 to 1982. He was president of the Conference of Alaska Judges from 1986 to 1988, served on the Governor's Review Board on Alcoholism from 1980 to 1982 and on the Mayor's Blue Ribbon Panel on Alcohol and Drug Abuse from 1985 to 1987.

Judge Savell was appointed to the superior court bench in Fairbanks in 1987. He has served as presiding judge since 1991. Judge Savell received his law degree from Columbia University. Prior to his appointment to the bench, he was engaged in private practice.

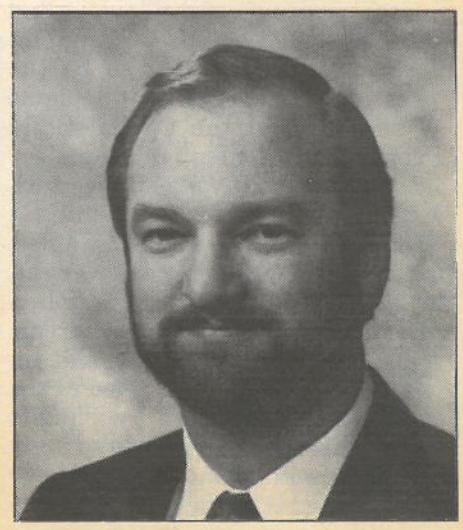
He has served as secretary of the Alaska Bar Association, president of the Tanana Valley Bar Association, a board member of the Alaska Legal Services Corp., and a



Larry C. Zervos



Michael I. Jeffery



Ralph R. Beistline

member of the American Civil Liberties Union.

Judge Beistline was appointed to the superior court bench this year. He received his law degree from the University of Puget Sound in 1974. In 1975 he joined the firm of Hughes Thorsness Gantz Powell and Brundin where he worked in the firm's Fairbanks office. Judge Beistline has served as president of the Tanana Valley Bar Association, on the Board of Governors of the Alaska Bar Association and as the editor of the Alaska Bar Rag.

Chief Justice Moore said that these judges bring to the administration a wide range of experience and excellent skills which will meet the challenge of the complex job of managing their respective judicial districts.