INSIDE

NEWS FROM THE BAR

$2.00

The Alaska BAR RAG

VOLUME 18, NO. 1 — *Dignitas, semper dignitas* — JANUARY-FEBRUARY, 1994

Pausing by the Hen-House on a cold night

(with apologies to Frost!)
Whose plan was this, to live up here
Where dark combines with ice and snow
To deaden fingers, toes and ears?
Surely this wasn't *my* idea!

Don't remind me. Yes, I know:
We came for jobs, to earn some bucks
And see some sights. We've seen 'em, so
Maybe it's getting time to go.

Load our gear into the truck,
Pack some food and point her south.
In a few days, with a little luck,
We'll reach some sun, and grass and such.

But wait! That's right! We bought a house
And had some kids! I wonder how
That come about? We've lingered here
Too long to leave without some doubts

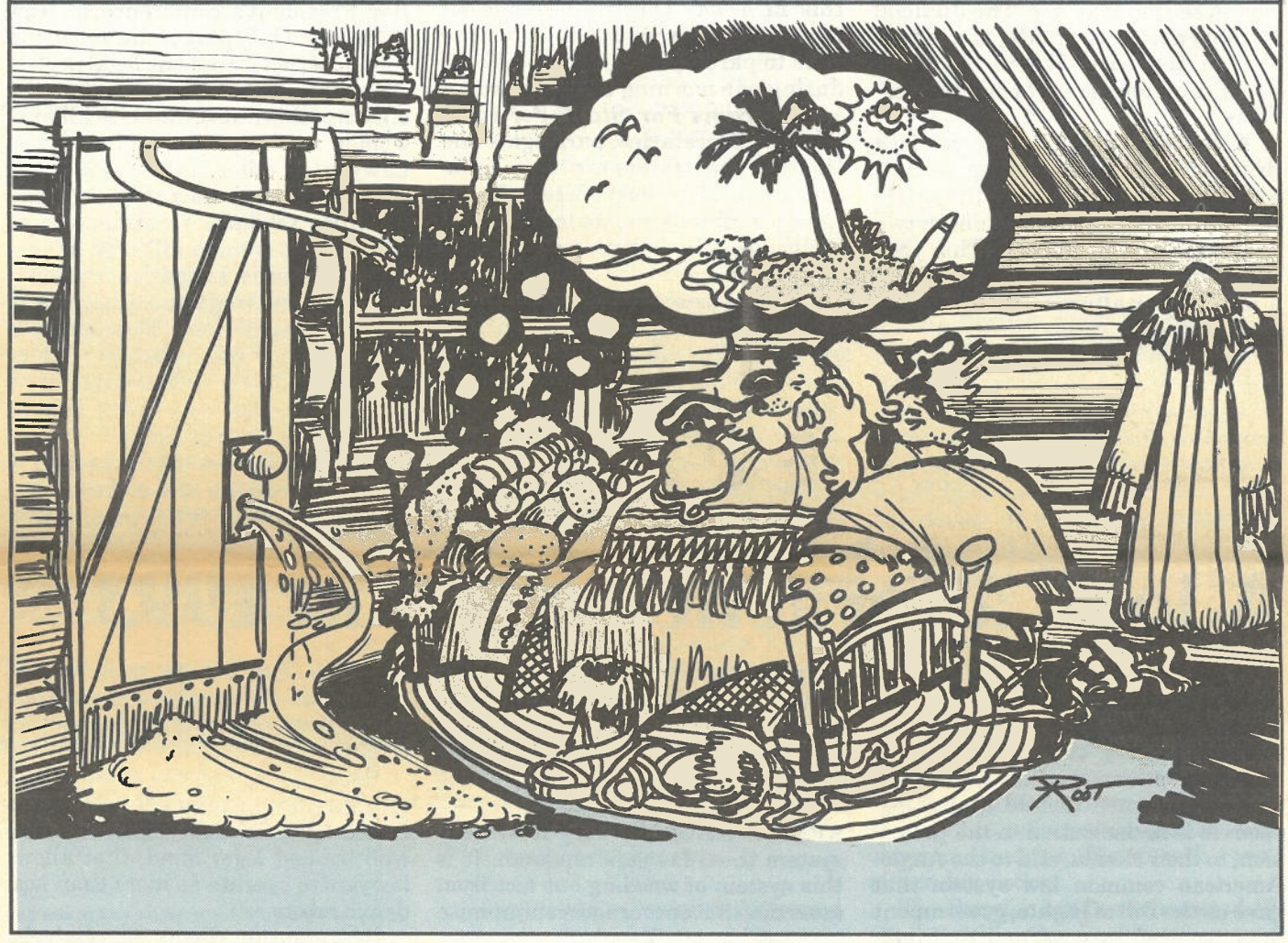
And trailing debts, without some fears
Of how we'll feed the little ones,
Of what we'll say to dry their tears,
Of where we'll be this time next year.

And so our plans have come undone,
Or time has planned for us instead
A home that hungers for the sun.
Time pays its tricks on everyone.

Enough for now. It's time for bed
And dreams of beaches, flowers, fields.
We'll talk again; we'll plan ahead;
We will be warm before we're dead.

From a Fairbanks Attorney
in the solstice doldrums!

WE WILL BE WARM BEFORE WE'RE DEAD



A picture of rural justice: Six years of progress

BY TERESA W. CARNS

Six years ago, the Alaska Judicial Council made access to justice service in rural Alaska its top research priority. At that time more than one hundred villages throughout the state lacked resident justice services beyond the presence of a Village Peace Officer (VPO) or a Village Public Safety Officer (VPSO). Relatively few have a resident magistrate or trooper. Most probation officers, state court judges, attorneys and other justice personnel worked out of hub communities, traveling to small communities as needed and as weather permitted. Many small communities felt strongly that, in order to prevent problems from escalating, they needed to respond more quickly to local disputes than was possible if they worked directly through the state's justice system. This situation has existed for decades, but in 1987, because of one of the worst economic situations in Alaska's history, no additional funds were available to respond to rural justice needs and existing programs were being cut back. The Judicial Council wanted to explore the rural justice situation in all aspects and work with rural communities, as needed, to create solutions.

By 1993, the picture had changed dramatically. Now more that one hundred tribal courts and councils provide services to residents of their communities. In the context of increasing self-governance, most regional Native non-profit corporations offer assistance to the villages in their areas to develop tribal courts or councils. In spring 1993, the eleven-year-old Village Public Safety Officer (VPSO) program became, under statue, a part of the Department of Public Safety, thus giving it more certain funding status. Also in spring 1993, Cook Inlet Region, Inc. a Native profit making corporation, took the initial steps to establish a Native justice center. In addition, in April 1993, the joint state-federal Alaska Native Commission's Governance Task Force heard testimony that state and local governments throughout Alaska worked informally, but frequently, with tribal courts and councils to resolve disputes involving families and children and criminal and quasi-criminal matters, to supervise probationers, and to assist in law enforcement.

What has changed during the past six years? Above all, local communities have taken the initiative to create their own organizations to resolve disputes. In addition an increasing num-

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WE'RE MOVING THE 1994 CONVENTION TO MAY!

The 1994 Alaska Bar Association Annual Convention will be held on Thurs., Fri., and Sat., May 5, 6, & 7, 1994 at the Hotel Captain Cook in Anchorage. The Alaska Judicial Conference will also be held during this week in Anchorage.

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President's Column

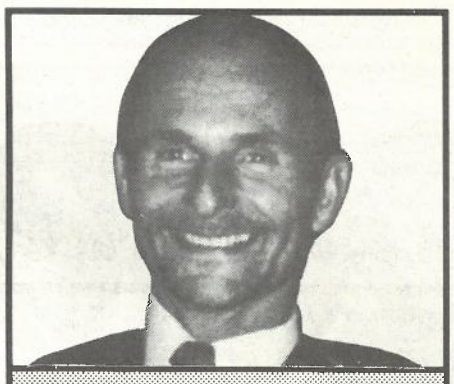
A new twist to the "old standby" convention

The Board's goal this year has been to increase services to members and at the same time improve the image of the profession. This year's convention is designed to do just that. To accomplish this we're doing a number of things we've never done before, and we're doing some things just because it's the right thing to do.

A Better Time. In past years, we've always held the convention during the first or second week in June. But this schedule meant that an Anchorage convention competed with the first warm days of sun, early king salmon, dry bike trails, green lawns and what used to be the Alaska Women's Run. This year the convention is set for May 5-7. The Judicial Conference has made the same change, too, so we'll still enjoy the benefits of concurrent bench/bar sessions.

A Better Price. Better yet is a dramatic change in pricing so that members don't have to buy the entire convention package if only one or two programs are of interest. This year members can register for as little as a morning or afternoon program on any given day.

Although there is much benefit to spending three full days mixing with colleagues from around the state, it's just not realistic to expect everyone to be able to afford the time. Interests vary, and our principal goal for a convention should be to encourage



Philip Volland

member attendance at the CLE programs that are offered. It's time to do this in a way that's affordable for those attorneys who may only have time to participate in what's offered during one morning or afternoon.

Programs For Staff. For staff? You bet. Secretaries, paralegals and legal administrators are the foundation of most of our offices. As we improve their skills, we improve our ability to deliver better services to our clients.

It's time we viewed the convention as an opportunity for the bar to offer programs for the other paraprofessionals who work with us. This year, with help from the Alaska Association of Legal Administrators and the Anchorage Legal Secretaries Association, we're offering programs specifically for office managers, legal secretaries and legal assistants.

Programs With the Public In Mind. One of the most significant changes this year will be a program offered to address an issue of important public concern. Among our civil litigation programs will be a forum on the legal issues surrounding breast cancer. This Saturday session is in partnership with the American Cancer Society, which will be having a program on medical issues related to breast cancer just a few weeks before our convention.

Breast cancer, you ask? What concern is that of lawyers? Well, I asked that question, too, when the idea was first raised with me at the National Bar President's conference in New York City. Only part of the answer to that question is that the legal profession, like every other, has felt the effects of this indiscriminate killer of women in the prime of their lives. Lawyers in other state and city bar associations are now pushing legal remedies to make treatment more available to women afflicted by this terrible disease. Litigation involving insurance coverage and other issues has also begun here. This program will be about this emerging litigation, and will also address legislative solutions which are being sought where litigation has failed.

But the other part of the answer is that this program is not just exclusively for lawyers. We're putting this program on in partnership with an American Cancer Society breast cancer awareness program that begins a few weeks before the convention.

I said in this column months ago that I felt the way to improve our image with the public was to have the Bar Association be seen as an entity that was also willing and able to do something for and with the public. A topic like breast cancer litigation offers us the opportunity to build a bridge with the public by offering our knowledge and skills to help address a problem of national concern. This program is the beginning of that effort.

And I hope it is an effort that continues. There is really no reason why each year, in each city the convention is held, that the Bar can't act in partnership with some community group to address an issue of public concern on some small part of its agenda. By doing this, we might do more for ourselves than we realize.

Programs For The Criminal Bar. A large portion of this bar practices criminal law. Yet when I looked at the agendas for Bar conventions over the last six or seven years, I couldn't find any programs designed with the criminal practitioner in mind.

I've also heard colleagues who practice criminal law say that the convention never really offered much of interest for them. Sure, we've had programs on trial techniques of interest to both the criminal law and civil law practitioner, but we've never had a program designed by and for the criminal bar. This year we do. As the result of the energies of a number of our colleagues from the criminal law section, we have an exciting program which addresses gender and cultural bias in criminal law.

When this year's convention packet comes out it may at first glance look the same. But it's not. This year there's been a real effort made at redesigning a convention to better meet the needs of members, and just as big an effort made at reaching out to the public. If we're to change the way others think of this profession, we have to begin thinking differently about what we do. And that includes the convention.

See you there.

A look at practicing law in 1993

By Robert C. Strodel

As a practicing attorney for 38 years, I do not worry when I read about young lawyers quitting the practice of law due to its adversarial nature. These men and women should quit. They seem to lack dedication to the profession, to their clients, and to the Anglo-American common law system that gave us the Bill of Rights, government by consent of the governed, and individual freedoms unequaled anywhere else in the world.

I sympathize with lawyers' discouragement over some experiences in the practice of law. There were times when I considered throwing in the towel. But the next day often brought the challenge to stand between the economic disaster of a brain-damaged baby's family and the might of organized medicine and the casualty insurance industry. This situation is truly "adversarial." Without representation by a lawyer willing to enter the fray the baby's family would become just another economic drain on society-in need of public assistance because of diminished family resources, even bankruptcy.

The chance to help victims of medical negligence or unsafe products is why I have chosen to stay with the practice of law, not run away from it. I am not in business to be loved by the public. But I do appreciate the approval and gratitude of clients who have had a reasonable result from my services.

The public will never love attorneys. A balanced view of the profession is probably the most we can hope for. It seems to me that we can attain this goal by doing the best we can with each case of problem we handle. If it takes an adversarial system to do this—and it does—so be it.

Some lawyers choose to forsake the tremendous opportunities they have to help victims and at the same time preserve the legal system. They know where the door is. Good riddance! This is a day for action, not passivity. The reason 95 percent of cases are settled without trail is the very adversary system these lawyers condemn. It is this system of weeding out fact from assertion that encourages compromise and settlement. People do not want lawyers who hide under the desk when the opponents start playing rough. They do want and need lawyers who will fight by the rules for them with integrity and courage.

Accusations that trial lawyers cause misery are inaccurate. We merely resolve problems created by the egregious conduct of others. If this causes misery again, so be it. This kind of misery goes a long way to stifle further wrongdoing. There were no safety defect recalls by manufacturers before the 1960s, when if first became possible to file a products liability lawsuit. Many of today's safer medical procedures, improved patient care, and greater emphasis on patient rights are an outgrowth of medical negligence actions.

Spirit of Lawyering

Current problems of the legal profession are many.

Most young lawyers are well trained today. Academic requirements for law school admission and public licensure have steadily increased in the past 20 years. But many lawyers lack that inborn sense of professionalism—the hallmark of a skilled and caring attorney.

Some of today's young lawyers are shallow and uncaring. They give little of themselves back to the community through charitable, civic, or political activities. The "what's in it for me" attitude too often replaces the historic involvement of lawyers in community affairs.

Some young lawyers seem to lack empathy, the very soul of human experience. It is this quality, coupled with a well trained legal mind, that allows lawyers to operate as more than academic robots.

Representing clients aggressively, however, should not be allowed to compromise civility. Personal honor, integrity, and courtesy are the very essence of lawyering. There is no greater threat to these ideals than a lawyer who becomes so engrossed in winning that he or she knowingly subverts discovery, berates opposing counsel, and sometimes even strays from the ethics of the profession.

And there is no greater boon to honor and integrity than a lawyer who maintains collegiality and civility in the adversarial climate of legal practice. As Chief Justice Charles Hughes once put it:

> The highest reward that can come to a lawyer is the esteem of his professional brethren. That esteem is won in unique conditions and proceeds from an impartial judgement of professional rivals. It cannot be purchased. It cannot be artificially created. It cannot be gained by artifice or contrivance to attract public attention. It is not measured by pecuniary gains. It is an esteem which is born in sharp contests and thrives despite conflicting interests. It is an esteem commanded solely by integrity of character and by brains and skill in the honorable performance of professional duty. No subservient "yes men" can win it. It is essentially a tribute to a rugged independence of thought and intellectual honesty

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The Alaska BAR RAG

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Judicial retention elections

By William T. Cotton

Alaska judges periodically appear on the ballot, allowing voters to decide whether to retain them in office. By law, the Alaska Judicial Council evaluates judges up for retention elections and makes recommendations to the voters. Although the next judicial retention election is not until November of 1994, the Judicial Council already has begun its evaluation process.

The Judicial Council is an independent agency created by the Alaska Constitution. The Council consists of six citizens (three lay members appointed by the Governor and three attorney members chosen by the Alaska Bar Association Board of Governors) with the chief justice of the Alaska Supreme Court as chair. In addition to evaluating judges standing for retention elections, the constitution requires the Judicial Council to nominate qualified judicial candidates to the Governor to fill judicial vacancies, and to conduct studies for the Legislature and the courts aimed at improving the administration of justice.

Twenty-five judges are slated for retention this year:

Supreme Court
Justice Allen T. Compton

Court of Appeals
Judge David Mannheimer

First Judicial District
Judge Peter Froehlich
Judge Thomas M. Jahnke
Judge Larry Weeks
Judge Larry C. Zervos

Second Judicial District
Judge Richard Erlich

Third Judicial District
Judge Elaine M. Andrews
Judge Rene. J. Gonzalez
Judge Donald Hopwood
Judge Karen L. Hunt
Judge Karl S. Johnstone
Judge Jonthan H. Link
Judge John Lohff
Judge Peter A. Michalski
Judge Gregory Motyka
Judge Sigurd E. Murphy
Judge M. Francis Neville
Judge Stephanie Rhoades
Judge Milton M. Souter
Judge Michael L. Wolverton
Judge Joan M. Woodward

Fourth Judicial District
Judge Dale O. Curda
Judge Mary E. Greene
Judge Jane F. Kauvar

The Judicial Council uses information from five main sources. In early 1994, the Council will survey approximately 2,500 attorneys, all active members of the Alaska Bar. The Council will send a very similar survey to all Alaska peace and probation officers (about 1,200 officers). Third, the Council has been conducting a survey of over 2,200 jurors who have served with the retention judges in the last few years. The surveys allow the Council and the judges to get three different perspectives of the judges' performance

Fourth, the Council aggressively seeks input from the public on the retention of judges. Jurors, witnesses, litigants, crime victims, attorneys and other interested members of the public all have differing and valuable perspectives on the judges up for retention. The Council will hold public hearings, place paid newspaper ads asking for public input, and broadcast public service announcements in the spring of 1994. Although comments about judges' performance are received throughout the judges' terms, the Council seeks out evaluations and supporting evidence in particular during the evaluation process.

The Council also assesses information from other sources. The Council reviews information submitted by the judges, including a list of several cases handled during the previous term, with names of attorneys appearing for the parties. The Council asks each attorney to evaluate the judge's work in that particular case. APOC reports, any criminal records, peremptory challenge records, appellate affirmance rates, any public disciplinary charges or sanctions, and conflict of interest statements provide added information. The Council also may meet with the judges. A Retention Consultant Committee, made up of Bar members, judges, Judicial Council members and a representative of the Alaska Peace Officers' Association advises the Council on the retention evaluation process.

The Judicial Council will make its recommendations to the voters in June or July of 1994. Judges must notify the Division of Elections that they plan to stand for retention by August 1, 1994. For those judges who decide to stand, the Council's evaluations and recommendations are printed in the Official Election Pamphlet, as required by statute. The statue also requires that the evaluations and recommendations be published in the press prior to the election.

The Bar survey for 1994 includes not only the judges standing for retention, but also pro tem judges, federal judges, and judges who will stand in 1996. The pro tem judges are included because Administrative Rule 23(b) requires that the Chief Justice use information from a Judicial Council evaluation that includes a survey of the Bar. Federal judges have asked to be included (at their own expense) so that they can benefit from the performance evaluation aspects of the survey process. Including the judges who will stand for retention in 1996 permits them to assess their performance and make any appropriate changes in the next two years.

The Judicial Council encourages all Bar members to complete the surveys, and actively participate in the retention evaluation process. Other states view Alaska as a leader in judicial performance evaluation, and comparison with other jurisdictions shows that attorneys and the public in Alaska have a much larger and more public role than in any other area. Please call or write to William T. Cotton, Executive Director, Alaska Judicial Council, 1029 W. Third Avenue, Suite 201, Anchorage, Alaska 99501; (907) 279-2526; FAX (907) 276-5046, with any comments.

The author is Alaska Judicial Council Executive Director.

A look at Practicing law in 1993

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> rugged independence of thought and intellectual honesty which shine forth amid the clouds of controversy.

The historic ideals of the legal profession have been based on both honor and performance. These are mutually applicable, not mutually exclusive. Today too many lawyers are business oriented, less idealistic than their predecessors. Indeed, some scoff at the idea of serving a higher good. True, times are economically difficult for many lawyers right now. But difficult times should breed strong lawyers.

When it comes to projecting its true image, the legal profession is sometimes its own worst enemy. Its lack of public relations is unbelievable. Much of this is a result of the adversarial system itself. Unfortunately, when cases capture national attention, the media often focus on the sensational details rather than on the facts of the litigation. One adverse new story about a lawyer destroys the most effective efforts to portray lawyers' contributions to society. There's not a lot lawyers can do to change the media, but by conducting ourselves with resolution and honor, we can uphold the ideals of our profession. The law itself is greater than the media, greater than any man or woman, any lawyer.

Justice is not a mirage, but a realizable goal. It was defined by Daniel Webster as "the great interest of man on earth." How that goal is sought is important. As Abraham Lincoln said, "I must stand with anybody that stand right, stand with him while he is right, and part with him when he goes wrong." Accordingly, we must be willing to part with any lawyer who "goes wrong." The profession must be valued above any member.

Personal Costs

A professional life is a mixed blessing. There can be satisfaction from performing well in court, chagrin from falling short. We are flattered by appreciative clients and the approving nods of other lawyers but increasingly harangued, indeed abused, by the media. When a difficult day is finished and we review bruised egos and personal frustration, who counsels the counselor?

A lawyer's life is a constant struggle to maintain hard-earned credibility. We are envied, feared, hated, and loved all in the same day. We bare the emotional and economic grief of our clients and permit our own emotions to become drained as we try to maintain objectivity.

As our professional lives grow and seasoning sets in, we lawyers begin to withdraw and nurse frustrations and fears. We become detached rather than betray our vulnerabilities—for are not *we* the counselors?

Every day requires our full attention, for others pay for and demand our wholehearted professional efforts. It matters not that we have problems in our own lives—families or finances—for we are expected to ignore those. We tell ourselves to put aside personal anguish, despair and depression. We tend to forget that lawyers should be allowed to be *human*.

How extensive must be our growth and understanding to deal objectively with others! Lawyers, more than any other professionals, should have a broad grasp of human experience. Out business is *people*—the sum total—good and bad, greedy and benevolent, loved and unloved. Although we are disciplined to analyze facts, we also have to empathize with clients as people. We must both act and react.

Trial lawyers also bear the strain, torment, and challenge of being legal "warriors." Battling for clients' rights against powerful adversaries exacts a toll. Sometimes personal pride and professionalism may be all that is left at the end of the day.

It is the special talent of conscientious trial lawyers to view any wrong, including threats to society, as capable of being exposed and remedied. Trial lawyers use their skills to update legal principles and doctrines so they may be used to protect people who otherwise might be overcome by the economic clout of multi-million-dollar corporations and insurance behemoths.

Ultimately, it is in the courts that dedicated lawyers bring reactionary legislation to heel. Unrelenting advocacy, played by the rules, has helped preserve the ideals of the republic for 200 years. Throughout the history of our country, trial lawyers have exposed unfair practices and duplicity, making wrongdoers choke on their own words and deeds. They have given the "little guy" the key to the courthouse.

Roger C. Strodel practices law in Peoria, Illinois. Reprinted with permission of TRIAL (November 1993). Copyright the Association of Trial Lawyers of America

Stevens gripe

Because Alaska Bar Association has printed incorrect information over a long period of time in the *Alaska Directory of Attorneys* about Sen. Theodore Fulton Stevens, I suggest that his full name and a retraction be printed in the next *Bar Rag* in a prominent place. Senator Stevens was licensed in 1960, not 1953, per petition for reciprocity. See *Application of Theodore F. Stevens for admission to the Alaska Bar*, 355 P.2d 164 (Alaska 1960). As you know, I raised serious questions about Senator Stevens' Alaska Bar license on May 9 when the issues were first published in "Letter to Editor," *Anchorage Daily News*. May husband, Tom, wrote a "Viewpoint," *Alaska Journal of Commerce*, concerning the same on October 4. Since there has been no public or private response from Senator Stevens, I can only assume what was written was true.

Theresa Nangle Obermeyer

(Ed. note: The Bar Association does not publish the Alaska Directory of Attorneys. This directory is produced and marketed by a private publisher).

TANANA VALLEY BAR

The dawn cracked hard as a solitary sun-dog scurried its way across the early morning sky. The beams of light bending a ray of hope that today's TVBA meeting might contain "some humor."

The sound of a China Air 747 rumbled its way-across the sky. The rumble of the 47,000 foot-pounds of thrust per engine made its way through the still morning air that had the consistency of granite. It was a mild autumn day with temperatures hovering in the mid-20's with lows predicted for the 40's.

•••

Covell gave Noreen a referral from a gentleman who resided at 1931 Eagun Street (sic). Bob went on about some of his clients including "Frank" who purportedly makes profane comments to Mr. Noreen that only he can hear. For instance, Turney will pass him in the hall way and say "hey asshole." Warren Taylor perked right up from his lunch of stuffed green peppers, and stated "What, does he think you're a judge?"

Noreen says things then like "Frank, I got you off on that case where you confessed to committing the offense in the newspaper what are you complaining about?" So Frank replies "yeah, and you screwed that one up too."

Bob went on to read to us from the California Bar Rag. Being a larger more sophisticated state and Bar Rag evidently, rather then merely having cartoon drawings of women that are at the very least, inappropriate if not downright demeaning and degrading; in the California Bar Rag they have an article on women lawyers with tattoos. The letters to the editor castigated the publication for its degrading T & A depiction of tattoos on women's buttocks. That publication had further reported that the average salary for a partner in a top-10 California law firm was slightly under $600,000 whereas a comparable attorney in New York would earn over a million. The meeting was adjourned without further noteworthy issues to be heard. Respectfully submitted.

KENNETH L. COVELL
Nov. 19, 1993

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Guests or notable members with strong ties to some more Southern Alaskan cities included Charlie Cole and Jay Rabinowitz.

President Zimmerman inquired of Charlie Cole as to whether he had anything to report.

Cole responded, "no." Then he talked for the rest of the meeting. Charlie stated, "I would like more criticism on what we do." Despite the invitation for a TVBA fieldday, Charlie still managed to dominate the speaking time for the remaining half hour of the meeting.

It seems that in the Anchorage press the AG's office is taking some heat for settling some of the 25 year old oil tax cases. In brief, Mr. Cole attempted to explain that the UK windfall profits tax and the Abu Dhabi tax scheme have little to do with the price of tea in China but a lot to do with tax revenues in the State of Alaska.

After consulting with numerous experts who "wrote the book" on such subjects, the experts reported to State's counsel the response any good TVBA member would give any of its clients on any question: "Maybe." Based on this formidable advice, the AG's office decided that discretion was the better part of valor and settled the case. Besides, Charlie noted, on appeal Justice Rabinowitz votes against us in every tax case.

He did not expect that the U.S. Supreme Court would grant a Writ of Certiorari on the constitutionality of a tax scheme similar to Alaska's employed by the State of California. However, he reports that he is sleeping much better knowing that he settled the case which collected Alaska's taxes under such a scheme shortly before the Supreme Court granted the writ as his analysis of each and every individual Supreme Court Justices' position on the issue is that they will find such tax schemes to be unconstitutional. (Ed. note: The court did so rule in January.)

Dave Call leveled some criticism at the attorney general's office for not consulting with the TVBA on one of its big tax cases.

Andy Kleinfeld criticized the attorney general for rushing these tax cases to settlement after 20 years because he wants his kids to have jobs after they get out of law school.

Evidently, despite the fact that the legislature was critical of the method of settlement, everyone down on the other side of Berner's Bay was willing to spend every penny of it but then turned around and sued the state.

Upon inquiry, it was revealed who won the case of *Ramona Barnes v. Charles E. Cole*. It seems that this constitutional issue involved who gets what office, in which building. This issue brought on continued bantering between the chief justice and the attorney general who evidently has new offices in Justice Rabinowitz's new courthouse. Reports have it that the court system is poised to buy the Anchorage Times building and the adjacent hole in the ground.

KENNETH L, COVELL
Nov. 12, 1993

●

Guests: Our future would-be Supreme Court Justice Bob Eastaugh was present and on the campaign trail. H. Russell Holland, Federal District Court Judge and Jonathan Link, Alaska Superior Court Judge also were present.

Bob Eastaugh commented that if TVBA meetings were anything like they sounded in the TVBA Minutes he expected his appearance would be an exercise in courage. He noted indeed that there was some similarity between the meetings and the Minutes. When asked why he was here and what he wanted to tell us he responded that he couldn't say what he wanted to talk about because evidently it's been interpreted that the judicial canons applied to judicial candidates and Canon 7 prohibited him from telling us anything that we might want to hear about his qualifications or ideas, with the possible

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Getting Together

Competition, collaboration and gender

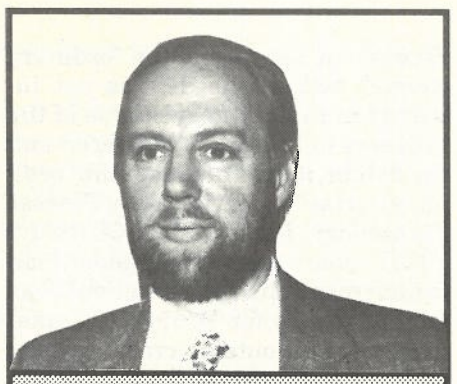
Are certain methods of Alternative Dispute Resolution (ADR) better than others? Do we really need all this touchy-feely stuff? Is that necessary to resolve cases outside of court? After all, judges have been settling cases for years, without the need for talking about feelings and the use of "I messages." Which methods are the best suited for resolving cases? In a competition between various dispute resolution methods, which one would win?

Confluence Northwest, headquartered in Portland, Oregon, is my nominee for the Northwest's premier environmental mediation organization. My opinion may be biased because I met and was greatly impressed by one of its principals, Elaine Hallmark, at the 1991 National Conference on Peacemaking and Conflict Resolution. I recently came across an article by Elaine entitled "Competition, Natural Resources and Gender: Rays of Hope from an Environmental Mediator" [*Conciliation Quarterly*, Vol. 2, No. 4 (Fall, 1992)]. The article has some fascinating insights about the current dispute resolution scene.

Hallmark's theses include the following:

- We are virtually trapped into competition as the dominant mode of behavior throughout our society.
- We need to shift to a more cooperative mode in order to achieve long term sustainability of our limited natural resources.
- We have two major cooperative models that can help us make such a shift: the female culture of cooperative relationships and the "win/win" model of negotiation and mediation.
- Our competitive mindset is so strong that it is in danger of co-opting the very models that could help us to make this needed change.

That our society is firmly grounded into a competitive mindset seems beyond challenge. Citing A. Kohn, *No Contest: the Case Against Competition,* 1986, Hallmark asserts that we are locked into the competitive approach primarily in two ways. First, our society has placed a high value on competition for the individual (intentional competition). Second, our societal structure builds competition directly into the system (structural competition). Boys in particular are taught to compete from their earliest days. Even their conversation reflects



Drew Peterson

a desire to gain or maintain status. See. D. Tannen, *You Just Don't Understand*, 1990.

Women, in contrast, are raised to have a more cooperative world view. Tannen calls the effect of these gender differences on human interactions a form of crass-cultural communication. Other cultures, such as Native American, embody similar cooperative characteristics.

Any discussion of gender and cultural differences, of course, includes much in the way of generalization, and men as well as women can have cooperative attributes. It is nevertheless clear that the structural competition which is built into our system makes it very difficult to bring more cooperative methods of dispute resolution to the foreground. We have built competition into virtually all of our decisionmaking processes. Our economic system, our schooling, our legal system, and even many of our leisure activities, all condition the success of one person on the failure of another.

The women's movement has struggled greatly with this effort to achieve recognition of the female culture as valuable and deserving of equal status in society with the more competitive male culture.

In the feminist struggle to gain equality, women have often been urged to become more competitive. Some feminists believe that the only road to equality is to beat the men at their own game, and are offended at the very notion that there might be a distinct female culture. Women are encouraged to play hardball in the office and at home, rather than be bulldozed by the male culture. They are encouraged to learn "games mother never taught us," and to win their legitimate place in American culture.

Hallmark observes similar pressures to competitively co-opt the so-called "win/win" model of negotiations. The concept of mutually beneficial negotiations has gained much public awareness since the publication by the Harvard Negotiation Project of *Getting to Yes* (R. Fisher and W. Ury, 1981). Yet one of the co-authors of *Getting to Yes* actually sells the win-win approach by pitting it against other approaches and asserting that he can get you a better deal using the win-win methods. Hallmark finds it ironic to expect a shift to cooperative models to come from winning a competition with the traditional competitive mode.

Similar competition exists in the mediation field over the types of processes used, and whether such processes get people "focused right in on the issues" or are "touchy-feely." Often, taking time for everyone to listen to each other's perspective, including things such as feelings, values and emotions, is seen as a waste of time. Mediators are increasingly finding themselves in competition with each other, and much of the competition is over style. During the mediation processes themselves many people, more often male than female, resist efforts to cooperatively face their own emotions and feelings,

One example is the mediation model of the American Arbitration Association (AAA), the United States' oldest and one of its best recognized ADR providers. The AAA model emphasizes the frequent use of caucuses in the mediation process. While it is difficult to get a true appreciation for the other side's point of view in a caucus, caucuses are very effective at generating pressure towards rapid settlement. Some commercial mediators (often male attorneys) who make extensive use of caucusing speak disparagingly of other more "touchy-feely" mediation styles.

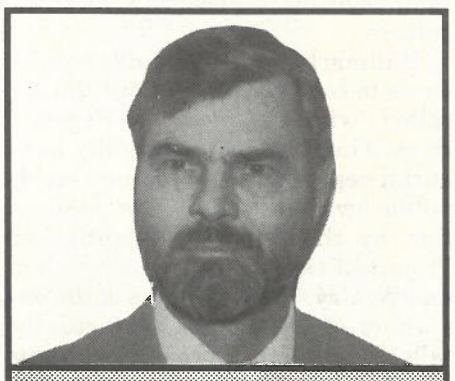
Hallmark believes that decisions about natural resources offer the best opportunity to incorporate a cooperative model of dispute resolution as the dominant one, because the predominant competitive decision making mode simply does not work in the natural resources area. The same argument can be made with perhaps even more persuasiveness for family issues. Both the family and natural resources areas involve questions where there are generally no clear right or wrong answers, especially if one takes long range considerations into account.

Along with Elaine Hallmark, I am optimistic about the future, as cooperative models of resolving disputes are becoming an increasingly important feature of our society.

Only when we have substantially replaced competitive with cooperative structures, I believe, will we be ready to adequately handle the challenges to our increasingly complex and shrinking world.

Bankruptcy Briefs

DePrizio comes to the ninth circuit



Thomas Yerbich

For 4 years, creditors have waited with bated breath to see what the Ninth Circuit would do when confronted with a *DePrizio* "trilateral preference" issue (payments made within 1 year—but not within 90 days—of the bankruptcy filing on insider-guaranteed obligations).

On August 23, 1993, instead of a sigh of relief, one heard howls of anguish; the Ninth Circuit adopted the *DePrizio* rule extending the preference period from 90 days to one year in trilateral preference situations [*In re Suffola, Inc.*, 2 F3d 977 (CA9 1993)]. Although the trustee has the option to recover from either the initial transferee ("outside creditor") or the entity for whose benefit the transfer was made ("inside creditor"), recovery may not be had from both. The trustee is entitled to but a single recovery [2 F3d at 980].

The key relevant facts in *Suffola* are summarized as follows:

1. The outside creditor, at the time of the loan, obtained the personal guarantees of insiders as well as a security interest in certain assets of the debtor corporation;

2. The outside creditor was fully secured at the time of the transfer but undersecured when the bankruptcy petition was filed;

3. The debtor was insolvent at the time of the transfer; and

4. The source of the funds was from the sale of equipment, other than collateral of the outside creditor.

From these facts, one can eliminate certain factual situations from the impact of *DePrizio-Suffola*: (1) the outside creditor is fully secured at the time the petition is filed [2 F3d at 985; *In re C-L Cartage Co.*, 899 F2d 1490, 1493 (CA10 1990); *In re Gamest*, 129 BR 179 (Bkrtcy.D.Minn. 1991); 547(b)(5)]; (2) the debtor was not insolvent at the time of, or rendered insolvent by, the transfer [547(b)(3)); or (3) the source of the funds or property for the transfer is the outside creditor's collateral (assuming (1) the security interest is unassailable as a preferential transfer, (2) the outside creditor has a perfected security interest in the proceeds, and (3) the absence of a commingling issue) [547(b)(5)].

The *Suffola* panel addressed several issues.

First, the panel refused to be dragged into the "equitable approach" quagmire followed by some courts [*see* 4 King, *Collier on Bankruptcy*, ¶ 550.02 (15th ed. 1993)], rejecting the "equitable approach" by adopting a literal reading of the Code [2 F3d dt 980-81].

Second, *Suffola* rejected the "two-transfers theory:" A single payment by a debtor to an outside creditor is treated as two separate transfers - the first to the outside creditor in satisfaction of the underlying obligation; the second from the debtor to the guarantor in satisfaction of the guarantor's contingent liability - only the second being a preferential transfer [2 F3d at 981-82].

Suffola also declined to follow *dicta* in I*n re Erin Food Services, Inc.*, [980 F2d 792, 801, n. 15 (CA1 1991)] that if the outside creditor was fully secured at the time of the transfer - but undersecured on the petition date, no "benefit" accrued to the insider. The court held that the relevant date was the date the petition was filed [2 F3d at 985-86].

Although *Suffola* discussed whether a waiver of subrogation rights by the insider-guarantor eliminates any potential preferential recovery on the theory that the insider has no contingent claim against the debtor that is reduced on a dollar-for-dollar basis by the payment to the insider-guaranteed outside creditor [2 F3d at 984; *see In re Southmark Corp.*, 993 F2d 117, 121 (CA5 1993)], hinting that it very well could, that issue was left to be decided by another panel on another day [2 F3d at 986].

Suffola also specifically declined to decide the question of whether a different conclusion might obtain where a guarantor previously has been discharged from liability on the guaranty through personal bankruptcy [2 F3d at 986; *see In re DePrizio*, 86 BR 545, 553, *aff'd* in part, *rev'd* in part, 874 F2d 1186 (CA7 1989)].

In addition to the two issues left open, there are two other significant defenses potentially available to the insider-guaranteed outside creditor: (1) a "nonrecourse guaranty" in an amount less than the loan balance; and (2) the "ordinary course" transfer - applicable to both the 90-day and extended 1-year periods.

Where the guaranty is nonrecourse, secured by pledged collateral having a value less than the post-transfer loan amount: (1) the insider-guarantor's exposure (the value of the collateral) is the same after the transfer as before; (2) therefore, the insider-guarantor does not benefit from the transfer; and (3) it follows *a fortiori* the transfer did not enable the insider-guarantor to receive more than he would have under a chapter 7 liquidation. [*In re Erin Food Services, Inc., supra*, 980 F2d at 802-803]

The "ordinary course" exception [547(c)(2)], not present, argued or discussed in *Suffola*, also prevents avoidance of an otherwise preferential transfer. What constitutes "ordinary course" is "fact-determinative;" however, substantial guidance exists in the Ninth Circuit regarding the proper application of the "ordinary course" exception.

First, the challenged transaction must relate to debtor's business operations [*Henderson v. Buchanan*, 985 F2d 1021, 1025 (CA9 1993) - holding a "Ponzi scheme" was not a business, therefore, transactions in furtherance of a "Ponzi scheme" could not be in the "ordinary course" of debtor's business]. Both the debt and repayment must meet the "ordinary course" test; if the debt is not incurred in the ordinary course of the business of both the transferee and the debtor, it does not meet the "ordinary course" exception [*In re Pioneer Technology, Inc.*, 107 BR 698 (BAP9 1988) - short-term shareholder loan to undercapitalized corporation]. Second, to qualify for "ordinary course" exception, an outside creditor must establish by a preponderance of the evidence satisfaction of a two-prong test: (1) the debt and its repayment are ordinary in relation to past practices of the debtor and the transferee; *and* (2) the payment was ordinary in relation to prevailing business practices [*In re Food Catering & Housing, Inc.*, 971 F2d 396, 398 (CA9 1992)]. To this should be added the admonition that the past practices of the debtor and transferee can be so random and haphazard as to yield no reasonable ascertainable boundaries, and the conduct of the parties should be measured against an objective standard based upon practices common to businesses similarly situated with that of the debtor and transferee [*In re Loretto Winery, Ltd.*, 107 BR 707, 709-10 (BAP9 1989)].

Some "red-flags" concerning what probably is not in the "ordinary course" are as follows. (1) Use of economic pressure such as threats to terminate the relationship, demands for payment or changing the terms to the detriment of the debtor [*In re Seawinds Ltd.*, 888 F2d 640 (CA9 1989)]. (2) Unusual debt collection or payment practices [*In re Powerine Oil Co.*, 126 B 790 (BAP9 1991)]. (3) Payment amount greater than usual and/or written demand for payment [*In re Food Catering & Housing, Inc., supra*]. (4) Payments not made within the time specified in the contract between the parties outside "ordinary course" unless late payment is consistent with the prior practice of the parties [*In re Loretto Winery, Ltd, supra*]. Although Congress amended 547(c)(2) eliminating the 45-day requirement, delay in making payment remains particularly relevant to determining whether an otherwise preferential transfer falls within the "ordinary course" exception [*In re Food Catering & Housing, Inc., supra*] (5) Holding a check for an unreasonably long time before presenting to the drawee or drawer bank for payment [*cf. In re Wolf & Vine*, 825 F2d 197 (CA9 1987)]; however, processing delays by the drawee or drawer bank does not establish a disruption of the "ordinary course" between the transferee and debtor [*In re Gaildeen Industries, Inc.*, 71 BR 759 (BAP9 1987)].

What can outside creditors do to protect themselves? First and, perhaps, foremost, remember the basic purposes underlying 547: To prevent one creditor from getting a preferential payment over another but not to disturb customary financial practices [HR Rep. 95-595, 95th Cong., 1st Sess. 373-374 (1977)]. Second, keep in mind the underlying premise of *DePrizio-Suffola*: A benefit is conferred on the insider-guarantor as a result of the transfer. Third, follow certain basic rules. (1) Be consistent in dealing with the debtor with respect to the amount and timing of payment or be able to articulate unusual objective factors warranting departure from the "norm." (2) Avoid using the insider guaranty as an *in terrorem* device - if the guarantor has no economic substance independent of the investment in the business enterprise of the debtor, what true "comfort," other than to insure preferential treatment by the debtor, can an outside creditor derive from the guaranty? (3) Obtain a waiver of the right of subrogation from the guarantor. (4) Limit the amount of the guaranty to the reasonably expected net worth of the guarantor, plus, perhaps, a buffer in long-term loans to cover increases in net worth. (5) Consider nonrecourse guarantees secured by the assets of the guarantor, with periodic financial disclosure updates to "sweep-in" after-acquired assets. (6) Avoid taking any unusual collection actions when faced with a financially troubled debtor.

Which, if any, precautionary measure is appropriate is, of course, a judgment call based upon an overall assessment by the outside creditor. If the guarantor (or guarantors collectively in a multiple guarantor situation) have the financial wherewithal to satisfy the debtor's obligation to the outside creditor, there is no problem - the outside creditor has resort to the guarantor(s) for satisfaction of the obligation. *Suffola* only presents a problem where the guarantor(s) is(are) also "financially challenged" or "economically deprived."

Suffola also recognized the right of a creditors' committee to bring avoidance actions [2 F3d at 978, fn. 1]. This may be extremely important inasmuch as creditors receiving preferential transfers are usually those whose continued "cooperation" is deemed essential by the debtor in possession and challenge by the debtor may be comparable to shooting one's self in the foot. Moreover, the benefitted insiders are usually the ones controlling the debtor and are not likely to want to initiate an action that may very well increase their exposure. Thus, actions to avoid preferential transfers by debtors in chapter 11 cases are the exception not the norm. Thus, the power of a creditors' committee to challenge preferential transfers may be essential to preserving the interests of other creditors.

Finally, in closing, legislative relief for secured creditors is in the Congressional hopper. The Bankruptcy Reform Act of 1993 (S.540), pending action on the Senate floor, contains a provision amending 550 by adding a new subsection (b) limiting transfer avoidance to situations where all elements of 547(b) are satisfied as to the first transferee (outside creditor in trilateral preference situations) and the exceptions in 547(c) do not protect the first transferee. Thus, as amended, 550(b) would preclude the trustee from recovering from insider-guaranteed outside creditors during the extended 1-year period, legislatively overruling *DePrizio-Suffola*.

The Bar Rag welcomes articles from its readers

Attorney disciplined for abusive communications with opposing party; other lawyers disciplined

Attorney Robert J. Jurasek received a public reprimand from the Disciplinary Board of the Bar for engaging in abusive litigation tactics and communications with the opposing party and counsel. After a day care center filed a small claim against Jurasek for unpaid day car services, he invoked district court rules, asserted a counterclaim, and sent a series of threatening and embarrassing letters to the center. In one letter, Jurasek stated that the center's director was "qualified to wipe the rears of people using public restrooms" because he was "so acquainted with BS." After the center retained counsel to defend the counterclaim, Jurasek sent a letter to the center discussing the merits of the case; he also copied the center's insurance adjuster with letters of opposing counsel. Jurasek ultimately accepted a $1 offer of judgement, and received an award of 18¢ in attorney fees at the "prevailing party," with the trial court specially remarking about Jurasek's "unseemly" and "unprofessional" conduct.

Bar Counsel found violations of DR 1-102(A)(5) (which prohibits conduct prejudicial to the administration of justice), DR 7-102(A)(1) (which prohibits conduct solely to harass or maliciously injure another), DR 7-105 (A)(1) (which prohibits communication with a party know to be represented by a lawyer), and DR 7-105 (A) (which prohibits threat of criminal charges solely to gain a advantage in a civil matter. (The misconduct occurred before the effective date of the Alaska Rules of Professional Conduct.) Bar Counsel was concerned not only about Jurasek's abusive litigation tactics but also by the fact that he had recently completed a superior court clerkship yet seemed eager to employ the civil justice system to oppress the opposing party.

The Disciplinary Board approved a stipulation for discipline by public reprimand and imposed that discipline in person at its meeting of January 7, 1994. As a condition of discipline, Jurasek will be required to make restitution to the day care center for its litigation costs. The stipulation, a detailed statement of background facts, and Jurasek's explanatory statement are contained in the public record at the Bar Association Office.

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Attorney X represented Wife in a divorce proceeding. Attorney A was counsel of record for Husband. On a Saturday morning, Wife and Husband met and reached a settlement agreement based on a document prepared by Attorney X. The two of them then came to Attorney X's office and asked her to finalize the agreement. Husband and Attorney X later disputed whether he told her he had discharged his lawyer. However Attorney X told Husband he should consult counsel, and she agreed to not file the settlement documents for five days. The following Monday Attorney X faxed a copy of the agreement to Husband's "former" attorney. Neither Husband nor Attorney A contacted Attorney X within the five day deadline to rescind the agreement, so Attorney X filed the settlement papers. Husband later changed his mind, Attorney A filed a motion to set aside the agreement based on Attorney X's improper contact, and the court granted the motion.

Bar Counsel found a negligent, isolated and harmless violation of DR 7-104 (A)(1), based primarily on the fact that when Attorney X participated in the settlement with Husband she knew that Attorney A was still his counsel of record. With the approval of an Area Discipline Division member, Bar Counsel issued and Attorney X accepted a written private admonition for this misconduct.

Tanana Valley Bar

continued from page 4

exception of the fact that he will have been admitted to practice law in Alaska for 25 years as of tomorrow.

Fred Brown held forth on the rating form sent out by the Bar Association proclaiming that generally we were supposed to rate potential candidates on personal knowledge but indeed that generally nobody had personal knowledge of any of the candidates and that the candidates generally got ranked on the personal knowledge they obtained from other people who purportedly had personal knowledge of the candidates, and that indeed for anybody to fill out the forms they would have to lie. An unnamed TVBA member complimented Fred on the fact that he finally "figured it out." Another forgotten TVBA member inquired of Mr. Eastaugh whether he thought we should rate any other judicial candidate low if they had not paid their TVBA dues? In a truly judicial fashion Mr. Eastaugh stated Canon 7 prevented him from answering that question.

It was moved and seconded that Eastaugh be sent a TVBA dues notice. In typical Anchorage fashion Eastaugh inquired as to whether or not there might be some type of group rate of something in the range of $150 or under so that all the members of his firm could be admitted to the TVBA and not treated cruelly at meetings. He was assured that we could probably arrange to have all the members of his firm admitted for $150, however, if he wished them not to be treated cruelly that would cost extra.

KENNETH L. COVELL
Nov. 5, 1993

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)-(I).

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

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The new CLE Library Catalog will be mailed to all Bar members this spring.

Bar People

Soon to be admitted **Dan Lowery** won first place for 1993 in both the National Writing Competition in American Indian Law and the American Indian Law Review Competition with his paper "Developing a Tribal Common Law Jurisprudence: The Navajo Experience."

The law firm of Staley, DeLisio & Cook has been divided geographically into two separate firms: DeLisio, Moran, Geraghty & Zobel, P.C. in Anchorage and Cook, Schuhmann & Groseclose in Fairbanks.....**S. Joshua Berger** has joined the law firm of White, Pierce, Mailman & Nutting.....**Wallace Burnett** has relocated from Fairbanks to Washington, D.C.....**Mark Butterfield,** formerly with ALSC, is now with Wisconsin Winngebago Legal Services in Wisconsin.....**Elizabeth Anna-Marie Baker** is an associate with the Law Offices of William J. Bonner and **A. Robert Hahn** assumes the role of "Of Counsel" to this firm.

Svend Brandt-Erickson has transferred to the Seattle office of Heller, Ehrman, et.al.....**Paul Cossman** and his wife have embarked on a long sailing voyage in the South Pacific and plan to be out of the country for the next two years.....**Darlene Erickson** is now an Assistant Borough Attorney in Barrow.....**Victor Krumm** has his own law office in Sarasota, FL.

Cynthia Klepaski is now an assistant Borough Attorney for the Fairbanks North Star Borough.....**Andrew Lamber**, formerly with OPA, is now with Kalamarides & Associates.....**Suzanne Lombardi**, formerly with the D.A.'s office, is now with Faulkner, Banfield, et.al.....**Michael Sean McLaughlin**, formerly with Guess & Rudd, is now an assistant bar counsel with the Alaska Bar Association.

Ronald Noel, formerly with Hughes, Thorsness, et.al., is now with Tesoro Petroleum Corp.....**Larry Ostrovsky**, formerly with the Office of the Governor in D.C., is now with the A.G.'s office in Anchorage.....**Susan Reeves**, formerly with Heller, Ehrman, has now opened her own law office in Anchorage.....**Connie Sipe** is with the Division of Senior Services in Anchorage.

Keith Sanders, former assistant Bar Counsel for the Alaska Bar Association, is now working for British Petroleum in Anchorage.....**A.M. Tadolini** is now assistant general counsel for Alyeska pipeline Service Co.....**Diane Vallentine**, formerly with Gianini & Associates, is now with Jermain, Dunnagan & Owens.

Terry Venneberg, formerly with Wade & DeYoung, has opened her own law office in Anchorage.....**Randall Weiner** and **Susan Williams** have relocated to Boulder, CO.....**Edward Niewohner** and **Richard Wright** have formed the firm of Niewohner & Wright.....**Mary Ellen Zalewski** has relocated back to Anchorage after a sabbatical in New York and Costa Rica and working in Homer....**Suzanne H. Lombardi** recently joined the law firm of Faulkner, Banfield, Doogan &

Susanne H. Lombardi

Holmes as an associate. Lombardi was previously with the Anchorage District Attorney's Office. She practices in the firm's Anchorage office with an emphasis in general civil and maritime litigation.....**Tina Kobayashi** and **Richard Drake Monkman** announce the arrival of Tatsu Drake Monkman, November 12, 1993, at 8 lbs., 11 oz.

Professional Legal Secretary recipients

Arlie Dehut, PLS, of Birch Horton Bittner & Cherot....**Jenelle Herlihy, PLS**, of Jermain Dunnagan & Owens....**Alice Lang, PLS**, of Bliss Riordan....**P.J. Marker, PLS**, of Birch Horton Bittner & Cherot....**Yvonne Robinson, PLS**, of Hughes Thorsness Gantz Powell & Brundin....and **Nancy Verlinde, PLS**, contract legal secretary, recently passed the seven part Professional Legal Secretary examination administered in September of 1993.

A picture of rural justice: Six years of progress

continued from page 1

ber if interactions have begun to take place among organizations such as the University of Alaska (both the Anchorage and Fairbanks branches), the Judicial Council, the courts, and the state's executive branch agencies, especially those working with families and children. In 1987, a number of tribal courts and councils had been resolving disputes for some years, and VPSOs had been working with them to enforce local ordinances, supervise probationers and resolve disputes informally. From 1987 through 1990 the governor's office worked actively to encourage continued development of such local dispute resolution. In addition, the federal government, through the Bureau of Indian Affairs, increased funding and support for tribal courts. In 1987, some regional non-profits — Tanana Chiefs in particular — already had been actively helping villages to draft and enforce ordinances. Today, most other regional Native nonprofits have initiated formal or informal programs to encourage local dispute resolution, whether through tribal courts or through tribal councils.

The Alaska Judicial Council has documented this increased attention to rural justice in a series of reports. The first report, published in 1991, presented a bibliography of selected rural justice materials. The second, which was funded by the State Justice Institute and published in 1992, evaluated the Minto and Sitka tribal courts and the PACT conciliation organization in Barrow and analyzed the Indian law applicable to tribal courts in Alaska and interactions among state agencies, tribal councils and courts and provided names and addresses for those organizations throughout the state which have been identified as offering dispute resolution services.

The evaluation of the Minto and Sitka tribal courts and PACT, a nonprofit conciliation organization of Barrow (*Resolving Disputes Locally: Alternatives for Rural Alaska, 1992*), revealed that low-cost, volunteer-staffed organizations could respond to local needs by resolving disputes among neighbors, handling children's and family cases, and enforcing local ordinances. The two tribal courts served non-Natives as well as Natives, either because the non-Natives were related through marriage to Natives or because they lived in the community. Compliance with the decisions or processes of all three organizations was voluntary for all parties, but did not appear to present a problem for non-Natives.

The organizations not only served a wide range of residents, they also appeared, in some instances, to save the state money. The Fairbanks District Attorney's office reported no misdemeanor prosecutions for Minto for several years and only a few felony prosecutions. In contrast, this office prosecuted numerous misdemeanor and felony charges from their interior villages. In Barrow, the PACT organizations handled landlord-tenant and small claims cases which might otherwise have gone to the state court. In Sitka, the tribal court handled many cases involving children from the tribe. The Judicial Council found that the local organizations had established informal, yet strong, relationships with a number of state agencies.

Resolving Disputes Locally: A Statewide Report and Directory (1993) expanded the scope of the council's documentation of the range and extend of dispute resolution activity to include every region of the state. The Council found that, throughout the state, tribal councils and tribal courts work on Indian Child Welfare Act cases, handle traditional adoptions, enforce local ordinances, especially those relating to alcohol control and minor criminal matters, and maintain community harmony. As was the case in the three communities evaluated in the earlier report, parties participate in tribal court or tribal council proceedings voluntarily, although social pressures to do so may play some role. The actions of tribal courts and councils range from imposing small fines, to requiring community work service, to asking offenders to leave the community. In family cases, council members or tribal judges may offer parenting advice or may help decide adoption of foster car placements. If offenders are unwilling to pay fines or participate in recommended solutions, villagers ask for assistance from state agencies.

Some tribal courts or councils handle only one or two types of cases, while others cover a wider range. Relatively few villages maintain tribal courts distinct from their village councils. More commonly, the council performs legislative, executive and adjudicative functions as the need arises. When performing judicial functions, councils typically meet as a group to consider the appropriate response to a situation. The councils might use the same procedures for legislative/executive functions and for adjudicative functions, or they might adopt different procedures for adjudication of cases.

Where tribal councils have established separate tribal courts, judges have often been elected to the court, typically sitting in groups of three or more rather that singly. Many tribal courts have elders as judges, but some area, separate elders' councils advise the courts and councils. A few tribal organizations have planned regional and appellate courts, but none were operating actively at the time of the assembly of the Judicial Council's directory.

The tribal courts and councils constitute an informal network of organizations that routinely interact with state justice system agencies such as the court system, troopers and VSPOs, prosecutors, public defenders, and the Division of Family and Youth Services. Nearly always, arrangements are worked out on a case-by-case basis with state agency personnel and judges. Despite their informality, however, many of the relationships have continued over a decade of work. The Judicial Council directory documents numerous instances of cooperation between the state and tribal organizations. In child neglect cases state social workers have exchanged information with tribal social workers about appropriate foster care and other needs. Other state social workers have worked through tribal courts and councils to secure the cooperation of the affected family, to monitor the family's progress, and to report problems to the social worker. Some tribal courts and councils have assisted the state by supervising sentenced offenders doing community work service or on probation or parole in their home town. Prosecutors' offices note that communities with strong tribal courts and councils typically have very few offenders in the criminal justice system. This suggests that local organizations can be effective in reducing state costs.

As a result of its findings, the Judicial Council concluded that such cooperation permits all the groups involved to serve the needs of local residents more appropriately and efficiently. Both state and local tribal organizations would benefit from increasing and formalizing their cooperative dispute resolution efforts. The local institutions can handle many types of cases or can specialize, depending on the needs of the area and the people available to help with the organization. The local institutions can also try new programs, such as victim-offender mediation. The Judicial Council has encouraged the governor and legislature to support and further the efforts of state agencies and tribal courts and other organizations to resolve disputes locally, especially because of the state's inability to pay for justice services in many areas. State courts, social workers and other justice system professionals have been urged to further their interactions with tribal courts and councils. The Judicial Council has also recommended that Native organizations support and collaborate fully with local initiatives for resolving disputes at a community level.

Teresa W. Carns is senior staff associate with the Alaska Judicial Council.

Estate Planning Corner

New estate and trust tax rates

The 1993 Tax Act substantially increased the income tax rates of estates and trusts. For this writer, the effect of these higher income tax rates is an increase in death taxes.

Estates and trusts reach the top tax rate of 39.6 percent at only $7,501 of taxable income (I.R.C. Sec. l(e)). By contrast, individuals generally do not reach the top tax rate until they have over $250,000 of taxable income (I.R.C. Sec. l(a), (b), (c), and (d)). The 1993 tax rates are as follows:

Estates and Trusts

1993 Taxable Income	Tax Rate
$1 to $1,500	15%
$1,501 to $3,500	28%
$3,501 to $5,500	31%
$5,501 to $7,500	36%
$7,501 and above	39.6%

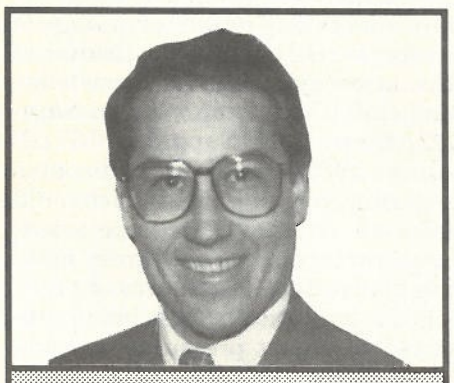
Married Filing Jointly

1993 Taxable Income	Tax Rate
$1 to $36,900	15%
$36,901 to $89,150	28%
$89,151 to $140,000	31%
$140,001 to $250,000	36%
$250,001 and above	39.6%

Unmarried Individuals

1993 Taxable Income	Tax Rate
$1 to $22,100	15%
$22,101 to $53,500	28%
$53,501 to $115,000	31%
$115,001 to $250,000	36%
$250,001 and above	39.6%

Adjusted for cost-of-living increases, the 1994 tax rates are as follows:



Steven T. O'Hara

Estates and Trusts

1994 Taxable Income	Tax Rate
$1 to $1,500	15%
$1,501 to $3,600	28%
$3,601 to $5,500	31%
$5,501 to $7,500	36%
$7,501 and above	39.6%

Married Filing Jointly

1994 Taxable Income	Tax Rate
$1 to $38,000	15%
$38,001 to $91,850	28%
$91,851 to $140,000	31%
$140,001 to $250,000	36%
$250,001 and above	39.6%

Unmarried Individuals

1994 Taxable Income	Tax Rate
$1 to 22,750	15%
$22,751 to $55,100	28%
$55,101 to $115,000	31%
$115,001 to $250,000	36%
$250,001 and above	39.6%

Consider a single client who died on December 31, 1993, leaving $30,000 of taxable income to report for 1993. His estate is not able to make a distribution until June 1995. For the tax year ending December 31, 1994, his estate also has $30,000 of taxable income.

Under such circumstances, decedent's estate would owe $5,527 in federal income tax for 1993, decedent's final tax year. For 1994, the tax year following decedent's death, the estate would owe $11,031 in federal income tax. In other words, even though taxable income stayed the same, the estate would owe twice as much tax for 1994 as it did for 1993. The only difference between the two years is the death of the taxpayer.

Thus, for this writer, the new income tax rates are an indirect increase in death taxes.

One way for an estate or trust to avoid the new income tax rates is to make a distribution to one or more beneficiaries who are in a lower tax bracket. For example, in our example above, suppose there are two beneficiaries of the estate, each of whom is in a 28% tax bracket. Suppose the estate is able to make a distribution to them, in the amount of $13,500 apiece, by the end of 1994.

Under such circumstances, for the 1994 tax year, the estate would be entitled to an income distribution deduction of $27,000, and each beneficiary would be required to report $13,500 as his allocable share of the estate's income (I.R.C. Sec. 661 and 662). As a result, the estate would owe $645 in federal income tax for 1994, and each beneficiary would owe an additional $3,780 in federal income tax for 1994, for an aggregate tax of $8,205. This aggregate tax is $2,826 less than the $11,031 in tax that the estate would otherwise have to pay, as discussed earlier.

In order to get an income distribution deduction, an estate must make the distribution giving rise to the deduction before the end of the estate's tax year. On the other hand, trusts may make an election to treat distributions made within the first 65 days of any tax year as if they had been made the preceding tax year (I.R.C. Sec. 663(b)). For example, during the first 65 days of 1994, the trustee of a trust may, in general, make a distribution and elect to have that distribution treated as if made in 1993.

For future years, fiduciaries of estates and trusts may consider investments that generate tax-exempt income as a way of avoiding the higher income tax rates. As tax rates increase, the tax-equivalent yield on such investments increases. For example, for a trust in the new 39.6 percent tax bracket, a bond paying tax-exempt interest at the rate of 4.5 percent produces a taxable-equivalent yield of 7.45 percent.

Fiduciaries may also consider shifting assets into investments that generate capital gain, since the maximum capital gains rate, even for estates and trusts, remains at 28 percent (I.R.C. Sec. l(h)).

Thomas R. Lucas named ALSA boss of the year

Thomas R. Lucas, sole practitioner, was named 1993 "Boss of the Year" by the Anchorage Legal Secretaries Association at their 20th Annual "Bosses' Lunch," held at the Captain Cook on Bosses' Day, October 15.

In an anonymous competition, Jo Thornton entered the winning essay on her boss.

Born and raised in New York. Lucas earned his B.A. degree, magna cum laude, and his J.D. degree from the State University of New York. He has served as a field attorney for the National Labor Relations Board in Buffalo, New York and as a trial specialist for the NLRB in Anchorage.

In 1984, he joined the law firm of Hughes Thorsness Gantz Powell & Brundin. He opened his sole practice in February of 1992, focusing on preventive labor relations. Lucas' practice is limited to representation of management in NLRB, EEOC and HRC law, wage and hour, collective bargaining, arbitrations, wrongful discharge, employee manuals and management training.

Thornton noted in her essay that Lucas is "always very professional and handles himself with a great amount of integrity, even when working under the pressures of deadlines. He respects me and knows how to tactfully push me to reach my potential and is enthusiastic and supportive of my desires for continuing education."

The ALSA awards luncheon was sponsored in part by donations received from: Robertson, Monagle & Eastaugh; Wohlforth, Argetsinger, Johnson & Brecht, P.C.; the Law Office of Thomas R. Lucas; C & C Express Courier Service; Florists-Action Florist; Anchorage Floral Cache; Flower Mart; Growing Concern; Pink Petal Florist; and Uptown Blossoms. Other sponsors included the Anchorage Hilton Hotel, Downtown Deli, The Monogram Shop, Nordstroms, O'Malley's on the Green, Olsten Services and the Berry Company Yellow Pages.

Outside Counsel Fees Increased

On January 8, 1994, the Board of Governors adopted an amendment to the bylaws (following Publication and comment) which increases the required fee for Outside Counsel participating on a particular case under Civil rule 81. The fee for Outside Counsel is now $250 annually, with $10 of that fee contributed to the Lawyers' Fund for Client Protection. The annual fee continues until the attorney notifies the Alaska Bar Association that the case in which the attorney is participating is closed or the attorney has withdrawn from the case. Attorneys appearing under Civil Rule 81 in cases prior to the effective date of this rule will begin paying the $250 annual fee on January 1, 1995.

Alaska Bar Association Ethics Opinion 94-1

Attorney Communication With The Managing Board of a Government Agency, Regarding Pending Litigation, Without The Consent of Counsel Representing The Agency

The committee has been requested to give an opinion as to whether it is proper for an attorney who represents a party in litigation against a government agency to make a presentation to the managing board of the agency regarding the clients' settlement position, without the consent of the attorney representing the agency. Under the facts presented to the committee, the attorney's desire to make the presentation is based on a belief that settlement offers made on behalf of the claimant have not been adequately communicated to the board by its attorney.[1]

It is the opinion of the committee that the communication would violate of Rule 4.2 of the Alaska Rules of Professional Conduct.

Rule 4.2 provides as follows:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party or person he knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.[2]

The preliminary issue is whether the managing board of the government agency is encompassed within the term "party" as used in Rule 4.2. Persons who might be considered to be the "party" in the context of communications with governmental representatives were addressed in Alaska Bar Association Ethics Opinion 71-1, in which the committee advised that:

> (A)ttorneys may ethically communicate with employees of a governmental entity, so long as that communication is not made with employees of the entity who may reasonably be thought of as representing the entity in matters relating to the matter in controversy, and as long as the lawyer reveals to the employee his identity and representation and the connection between the representation and the communication.

In the context of private corporations, officers have uniformly been thought of as representing the entity in the controversy. Thus, for example, in ABA Formal Opinion 1410 (1978), it was held that *officers* and employees of a corporation should be considered parties, for purposes of DR 7-104(A)(1), if those officers and employees could commit the corporation by virtue of their authority. *See, Illinois State Bar Association Committee on Professional Responsibility,* Op. 85-12 (April 4, 1986) (includes top management persons with the responsibility of making any final decisions); *South Carolina Bar Ethics Advisory Committee,* Op. 86-10 (June 16, 1986) (board members of homeowners association are encompassed by term "parties" in a dispute with the association). If the board to which the presentation has the ability to commit the agency or otherwise exercise control over decisions regarding litigation, it must be considered to be a "party" within the meaning of Rule 4.2.

The next issue is whether the right of the people to petition their government under the first amendment to the United States Constitution and Article I, section 6 of the Alaska Constitution, or any provisions of law that require governing bodies to provide an opportunity for public participation in meetings, compel an exception under Rule 4.2 whereby counsel is "authorized by law" to communicate with the governing body without the consent of its counsel. In that regard, the Comment to Rule 4.2 provides:

> This rule does not prohibit communication with a *party*, or an employee or agent of a *party*, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private *party*, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, *parties* to a matter may communicate directly with each other and a lawyer having independent justification for communication with the other *party* is permitted to do so. **Communications authorized by law include, for example, the right of a *party* to a controversy with a government agency to speak with government officials about the matter.** [Emphasis added]

Unfortunately, this Comment addresses communications by both the "party" and the "lawyer," thereby tending to blur the distinction between the two with regard to permitted communications. Rule 4.2 does not regulate the conduct of a party who is not an attorney. With regard to attorneys, it is the committee's opinion that the Comment interprets Rule 4.2 to authorize direct contact regarding a matter in controversy with a government officer or agency, without consent from the agency's attorney, when the contacting attorney is a "party" to the controversy, and is not acting in a representative capacity. Thus, where the attorney is a "party," there is no limitation on his or her first amendment rights.

However, it is the committee's opinion that Rule 4.2 and the interpreting Comment do not authorize an attorney to advocate a clients' position relating to pending litigation directly to the governing officer or body of a public agency without the consent of the opposing counsel.

There are few interpretations or discussions of the "authorized by law" exception to Rule 4.2, and the available analyses do not clearly distinguish between rights of a "party" and the permissible scope of attorney representation. One commentator, for example, confuses these issues and concludes that prohibiting a lawyer for a private party in litigation with the government from conducting *ex parte* interviews with "relevant governmental officials" would permit the government agency's lawyer to veto discussions between "private parties and government official." 2 G. Hazard & W. Hodes, *The Law of Lawyering* §4.2:109 (2d ed. 1991). The limited available commentary also does not adequately address different policies that should be considered depending on whether the communications in question involve pending litigation, or the role of the government official to whom the communications are directed, *i.e.* is this the decision maker?[3]

The principal issue faced by the Committee is whether the reasons for the general prohibition against attorney communications with a represented party regarding the subject of representation are sufficient to support the limitation on exercise of the right to petition one's government that may result from enforcement of the Rule to prohibit communications by an attorney representing a party with governmental decision makers concerning pending litigation.

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

These concerns are most obvious in situations involving verbal communication in the absence of opposing counsel where a strong risk exists that a lawyer may elicit damaging statements from, or conclude an ill-advised settlement with, a represented party who is effectively deprived of advice of counsel. In other situations, such as written communications, the concerns are less apparent, but those communications are nevertheless prohibited. *See*, ABA Ethics Opinion 1348 (August 19, 1975) (sending copies of settlement offers to a represented adversary is improper). Many of the concerns would seem to be diminished in the context of a presentation to a government agency, particularly if that presentation is made in a public meeting.

Perhaps the best statement of the policy behind Rule 4.2, however, and one which encompasses all of the other reasons for the rule, is that it is designed to permit an attorney to function adequately in his or her proper role and to prevent the opposing counsel from impeding performance as the legal representative of the client. *E.g., Obeles v. State Bar*, 108 Cal. Rptr. 359, 510 P.2d 719, 722-23 (1973). An attorney is not entitled to directly communicate his or her version of the applicable facts and law to an adverse party represented by counsel. That party has retained counsel based on a determination that skilled assistance is necessary to evaluate the facts and applicable law, to develop the strengths of the client's position, and to permit the client to avoid direct demands and communications from the opponent. Direct communications by opposing counsel with a represented adverse party usually would be made only for the purpose of by-passing the party's counsel in the hope of obtaining an advantage or opportunity that would not otherwise be available or to advocate a position that was not persuasive when presented through the party's counsel. The direct communication may distort the strengths or fairness of the communicating party's position and overstate the risks to the other party, thereby serving to undermine the adverse party's confidence in his or her attorney and perhaps create beliefs, fears or impressions that cannot later be corrected by that party's counsel. Those concerns clearly apply in the context of a presentation to a government agency.

The committee believes the first amendment right of a citizen to petition the government does not "authorize" attorneys to directly communicate with the governing body of an agency on the citizen's behalf regarding a matter in litigation. This position is supported by *Walters v. National Assoc. of Radiation Survivors*, 574 U.S. 337, 105 S.Ct 3180 (1985). *Walters* involved first amendment challenges, based on free speech and right to petition, to a federal statute which limits to $10 the fee that may be paid to an attorney or agent who represents a veteran seeking benefits for service connected death or disability. In upholding the validity of the statute, the court determined the statutory claim process provided claimants with an opportunity to make a meaningful presentation and that significant governmental interests favored limitations on speech. The governmental interests that were found to out-weigh the first amendment rights were the desire to keep proceedings non-adversarial, because there were few complex cases, and a policy against veterans sharing their awards.

Similarly, many other agency proceedings are relatively simple in nature and intended to be suitable for lay presentation of issues. Any argument that an attorney is necessary to communicate complex issues regarding pending litigation invokes the countervailing policies set forth above. Rule 4.2 clearly does not restrict the "party's" right to petition its government by personally appearing before the governing body, and the lawyer is not prohibited from suggesting such an appearance.

Additional support for the limited impairment of the right to petition government is found in *In Re Vollintine*, 673 P.2d 755, 757 (Alaska 1983). That case approved a restraint imposed by the Code of Professional Responsibility on the first amendment right of free speech. The attorney in that case was disciplined for authoring correspondence containing intemperate and harassing statements regarding government employees involved in resolving his client's allotment claim. In rejecting a claim that the attorney's freedom of speech rights outweighed the restrictions created by the Code of Professional Responsibility, the court quoted from the concurring opinion of *In Re Sawyer*, 360 U.S. 622, 79 S.Ct. 1376 (1959), where Justice Stewart said:

> [A] lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.
>
> Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.

The committee is of the opinion that the phrase "authorized by law" does not apply to all laws of general application permitting communications. Rather, to be effective as an exemption from Rule 4.2, a provision of law authorizing direct attorney contact with a represented government agency must specifically allow the communication, except in those circumstances such as communications during hearings or during the conduct of discovery where the authority, if not clearly expressed, can

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NEWS FROM THE BAR

At the Board of Governors meeting on January 7 & 8, 1994, the Board took the following action:

- Reviewed the legislative audit management letter and the President's response.
- Created a public relations subcommittee of the Board to investigate how to carry out the Board's long range planning goals of increasing public information and education about the Bar Association and the legal profession and authorized no more than $5,000 for this.
- Issued a public reprimand to Robert Jurasek for a discipline matter.
- Issued a private reprimand in a discipline matter.
- Reviewed the CLE and convention report and set up a subcommittee to make recommendations for the Distinguished Service and Professionalism Awards.
- Adopted a resolution supporting the Anchorage School District's grant proposal for a law related education coordinator.
- Approved the establishment of a special committee of lawyers and court reporters.
- Approved several status change requests of members going from inactive to active and accepted three resignations from the Bar.
- Listened to remarks by Theresa Obermeyer during the public comment period.
- Voted to accept a stipulation for discipline, and recommend to the supreme court censures in two cases involving an attorney.
- Adopted a Hearing Committee report which recommended a public censure for Bruce Rausch.
- Voted to accept a Hearing Committee report which recommended that Melody Crone be disbarred.
- Adopted an ethics committee opinion entitled "Attorney Communication with the Managing Board of a Government Agency, Regarding Pending Litigation, without the Consent of Counsel Representing the Agency."
- Heard the discipline and fee arbitration case status report and case summaries.
- Voted to publish an amendment to the bylaws establishing a standing committee on Pro Bono Service.
- Voted to grant a hearing in an admissions appeal and refer the matter to a hearing master.
- Voted to deny Max Arnold's request for reconsideration of his bar application on the basis that he is still under suspension in California.
- Approved three reciprocity applicants for admission.
- Approved an expanded legal assistance program (military) waiver for Capt. James Agar and a ALSC waiver for Michael Hildebrand.
- Approved a request for waiver of active bar dues for a member due to hardship resulting from a medical condition; voted to refund active bar dues for 1993 to a member and make application for this member to be transferred to disability inactive status.
- Voted to grant inactive status to a member upon payment of the remaining 1993 obligations.
- Extensively reviewed the medical benefits options for Bar staff and voted to renew the contract with Blue Cross with a 20 percent reduction in premiums.
- Voted to recommend an amendment to Rule 26 which would require an attorney referred to the Substance Abuse committee by the Supreme Court following conviction of a drug or alcohol related offense, to follow the committee's recommendations or risk suspension.
- Reviewed the proposal for a mandatory Rules of Professional Conduct course for Bar members; asked Bar Counsel to redraft a proposed rule requiring attorneys to submit an affidavit that they have read and familiarized themselves with the Rules of Professional Conduct.
- Asked Bar Counsel to draft a proposed rule which requires written disclosure to clients if the attorney has malpractice insurance with limits less than $100,000/$300,000.
- Adopted a bylaw amendment which requires Outside Counsel under Rule 81 to pay an annual fee of $250 to the Bar Association.
- Appointed a subcommittee to review the comparison between the ABA Model Rules of Disciplinary Enforcement and Alaska's rules.
- Took no action on a Judicial Council request for support of a grant proposal to study fee shifting rules.
- The Board received the financial statements for the end of 1993 and was advised that income was $1,668,034 and expenses were $1,442,200. The amount of income over expenses was $225,834, or $50,000 more than budgeted.
- The Board heard remarks from Sol Gerstenfeld, a member of the public who attended the meeting on Saturday.

Ethics Opinion 94-1

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be implied.[4] Laws requiring agencies to permit public participation or comment in meetings do not require or specifically authorize the type of communication in question.

Although various rules might be imposed to deal with differing aspects and means of communication with the governing body of an agency regarding pending litigation, or the results of such communications, the enforceability of a rule and the likelihood of voluntary compliance are best insured by a uniform rule that is easily applied. There are no significant policies supporting an attorney's right to communicate on behalf of a client, regarding pending litigation, directly with a represented party and, therefore, unless such communications are specifically authorized by law or consented to by counsel for the other party, they are prohibited, even when opposing counsel is present or available.[5]

Several related aspects of this issue deserve brief discussion. It is obvious that the governing body of an agency can direct its attorney to consent to a request for appearance transmitted through the attorney for the agency, or it might direct its attorney to invite opposing counsel to appear before the body if that course of action appears appropriate. Rule 1.2 obligates an attorney to abide by a request or direction of that nature from the client.

The party may also, consistent with the right to petition government, solicit the governing body or its members to request a presentation by the party's attorney. However, the attorney may not solicit an invitation to appear before the body to discuss pending litigation, nor may the attorney suggest that course of action to the client. If an attorney receives an unsolicited invitation to appear before the governing body of an agency to discuss pending litigation, the attorney may make the presentation, but he is obligated to give the attorney representing the agency reasonable prior notice of the invitation or request, and provide the agency attorney with copies of any materials provided to the board.

SUMMARY

In summary, it is the opinion of this committee that:

1. A party is not prohibited by Rule 4.2 from communicating with a decision making body of a government agency regarding pending litigation, without consent of the attorney for the body, whether or not the party is represented by counsel.
2. An attorney who is a party to litigation has the same rights as any other party, including the right to communicate as set forth in paragraph 1 above.
3. An attorney representing a party may not communicate regarding litigation pending against a government agency or officer directly with a government official or body having decision making authority concerning that litigation, without the consent of the attorney representing the official or governing body.[6]
4. If an attorney representing a party in litigation with a government agency is requested by its governing body or other person having decision making authority to meet and discuss the matter in litigation, the attorney may attend the requested meeting, but the attorney must give reasonable notice of the invitation to the attorney representing the agency, and provide such attorney with a copy of any material to be presented to the agency body or official.

Approved by the Alaska Bar Association Ethics Committee on December 2, 1993.

Adopted by the Board of Governors on January 7, 1994.

1 The obligation to communicate serious settlement offers is set forth in Rule 1.4 and the related Comments. The issue is not otherwise dealt with in this opinion.

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

3 Where the government official to whom the communication is directed does not have the ultimate authority to determine the course of pending litigation, and is not a member of a body vested with that authority, the committee agrees with those opinions holding that an attorney should give notice to the government's counsel prior to communication with the government official and that any submissions made to the government official should be given to such counsel.

4 See "Communication with Adverse Party: Worker's Compensation Carrier Contacting Claimant," Oregon Opinion 437 (September 1981), permitting oral communications only when "required by the statute" and directing other "authorized communications" be in writing with a copy to counsel representing the claimant.

5 Texas similarly interpreted Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct, which is specifically applicable to communications about the subject of representation to an ". . . entity of government the lawyer knows to be represented by another lawyer regarding that subject . . .", as prohibiting a telephone conversation with an individual city counsel member expressing disapproval of the city's settlement offer in negotiations for settlement of litigation against the city. It does not appear that the "authorized by law" exception to the Rule had any effect on the decision. State Bar of Texas, Professional Ethics Committee Opinion 474 (Texas June 20, 1991)

6 This opinion does not prohibit an attorney representing a party from communicating with the Alaska State Legislature or any committee thereof regarding a matter in litigation, without the consent of the Attorney General's Office or special counsel for the legislature, so long as neither the legislature nor the legislative body is a party to the litigation.

The Board of Governors is proposing an amendment to the bylaws which would establish a standing committee on Pro Bono Service. The Board will consider this amendment at their meeting on March 4 & 5, 1994. Please address any comments to Deborah O'Regan, Executive Director at the Bar office by February 18, 1994.

Article VII. Section 1(a) Standing Committees.

(8) the Pro Bono Service Committee, a 9 member committee responsible for identifying and promoting activities which would facilitate the provision of pro bono services and encourage all attorneys to provide pro bono service; at lease three of the members shall be from communities outside of Anchorage, Juneau and Fairbanks.

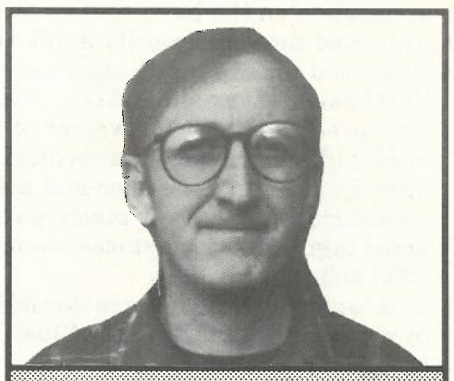
Eclectic Blues

Velvet Elvis

During the past year I read with horror about the sheep-napping case that has caused so much pain (or is it disdain?) in members of the Tanana Bar Association.

Someone, thought to be a resident of the Southern Railbelt, ruthlessly converted an inflated Fairbanks lamb. Blatant ransom notes appeared on the pages of this very publication. It was disturbing for Ketchikan Legal practitioners, but we were able to take comfort in the fact that such antics couldn't happen within the antebellum airs of Alaska's Deep South.

No sir, not here, was the sentiment shared by members of the Ketchikan Bar while they shared caffeine and companionship at the informal meeting of the members



Dan Branch

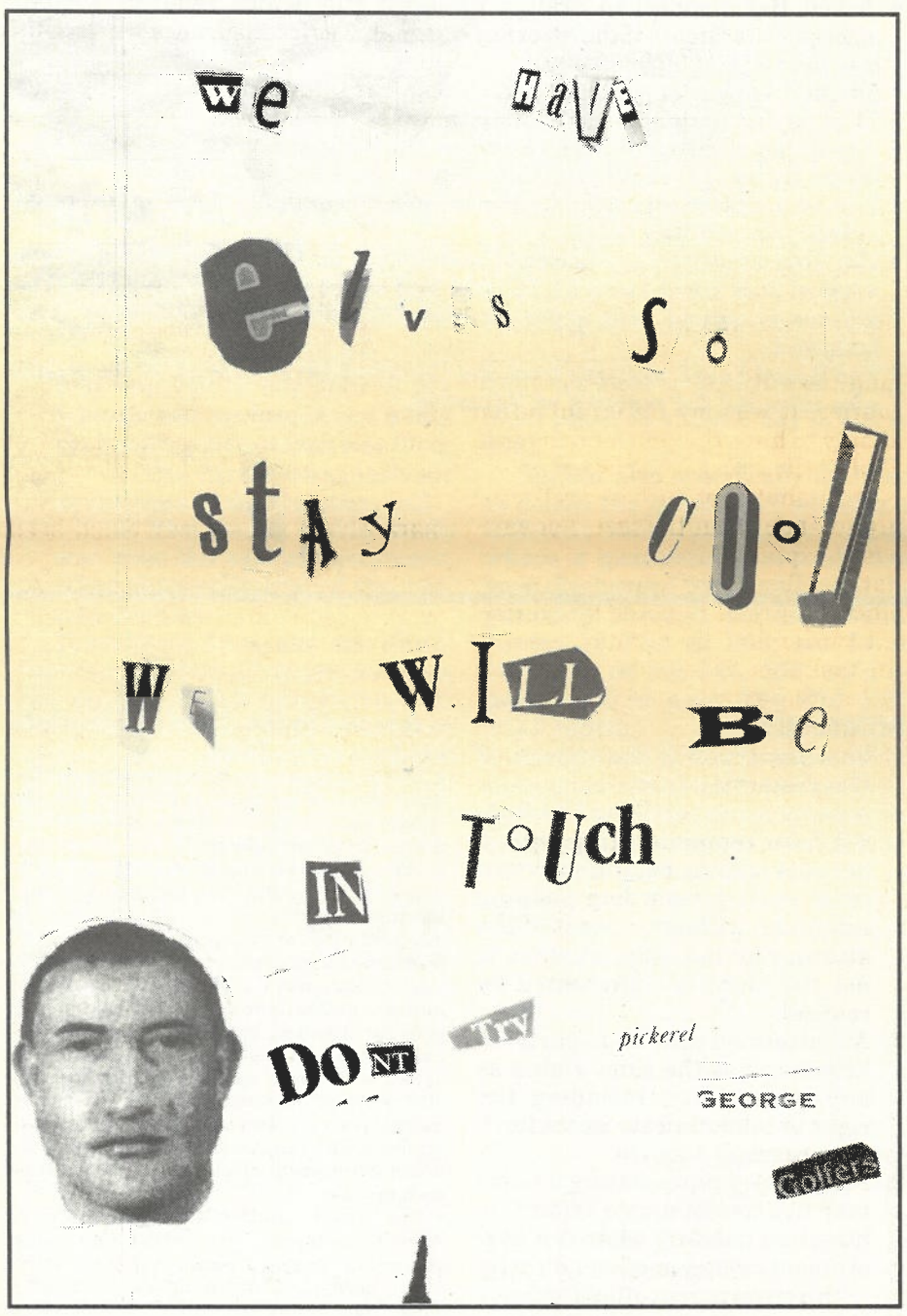
known as "Coffee." That was before someone kidnapped Velvet Elvis.

It all started last summer when David Seid left Juneau to take over the Ketchikan Public Defender office. He brought along Velvet Elvis, a most prized possession. The Velvis, as he is known to admirers, is an airbrush rendering of Elvis Presley done lovingly on black velvet cloth.

Elvis arrived safely in Ketchikan and soon assumed a position of honor in the office of Attorney Seid. One day, while away defending the rights of his clients, David's royal portrait of The King fell into the hands of persons unknown.

It didn't take long for Mr. Seid to learn that the Velvis had not been taken by art lovers. The kidnappers didn't take his velvet Elvis to bask in the beauty of its day-glow colors. They didn't want him to recreate the thrill of the King's first appearance on the Ed Sullivan Show or to trigger memories of the glory of Graceland. They were after lucre.

Shortly after he discovered his loss, Seid received a ransom note. It was accompanied by a Polaroid photograph of Velvis in one of Ketchikan's dispensaries of intoxicating beverages. The Elvisnappers, careful not to leave clues of their identity, used letters cut out of magazines to spell out this directive: We Have Elvis so stay cool. We will be in touch. Don't



try pickerel, George [or] golfers. The letters had been pasted onto a sheet ripped from a yellow legal pad.

The first ransom note was followed by a series of instant photographs showing the Velvis in different locations. In one he is being embraced by the owner of a local drinking establishment. In another he is admiring a large stuffed salmon. Seid also received a picture of Velvis on the seat of a Japanese motorcycle (The colonel is turning in his grave) and another of the King riding in a Ketchikan Fire Truck. These were followed by a picture of the Velvis standing next to a large video game display. The Elvisnappers supplied this caption on the bottom of this photograph: Gambolling in a dark spot. Another photograph showed Velvis having his teeth cleaned in a local dentist's office.

The Hygiene pix was accompanied by typed ransom note that said: "If U wont to see your velves again you must dilever a box of canned fooods to tha homeless shelter, ore a gold cadillac car wud be gud. ps his teeth dont hert no mor."

]f U wont to see your velves again

you must dilever a box of canned fooods to tha homeless shelter,

ore a gold cadillac car wud ǥ be gud.

ps his teeth

dont hert no mor

This last note confused the situation. Were the kidnappers a political action group forcing good works, or lowlifes seeking a free ride on Mr. Seid's misery? No one took it as a serious directive.

When news of the art theft circulated along Tongass Avenue, David Seid learned that he was not alone in his admiration of the Velvis. A group of concerned citizens, calling themselves The Friends of Velvis, formed to solve the crime. Unfortunately, even a roomful of Elvis look-alikes couldn't shed light on the mystery. The use of a sheet of legal paper suggested an inside job. On the other hand, spelling and typing errors in subsequent messages suggested that the kidnappers had been denied a formal education.

In a strange development, someone calling himself E.A. Presley II, Esquire sent an open letter to the Velvisnappers. Mr. Presley uses this letter to explain that since the painting theft, he had found a new place to dwell, down the end of lonely street at the Heartbreak Hotel. In this heart-wrenching letter, Elvis junior confesses crying velvet tears over the loss of this, his only portrait of his father. It ends with a simple plea— Return Elvis to sender. Address known.

The letter from E.A. Presley II may have pushed the Friends of Velvis to action. Rumor has it that on December 10, 1993 while the last of the day's weak winter sunlight faded behind Gravina Island, one of them, acting on a tip that The King was in the First City Saloon, entered the drinking establishment. The would-be rescuer was an attorney so he blended easily with the Ketchikan lawyers who had crowded into the bar for the annual bar association Christmas party. After scanning the crowd for Elvis kidnappers, he ducked into the toilet only to find that Elvis no longer hung on the wall.

Velvis is still missing. His owner has yet to receive reliable instructions from the Velvisnappers on how to rescue his painting. Neither Mr. Seid nor The Friends of Velvis have given up yet.

Hopefully, Velvet Elvis will be back in the public defender office by press time. For now it looks like David Seid and The King will have a "Blue Christmas" without each other.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ALASKA

EFFECTIVE NOVEMBER 26, 1993

BANKRUPTCY FILING FEES
INCREASED TO THE FOLLOWING AMOUNTS

CHAPTER 7 .....$160.00

CHAPTER 13 .....$160.00

CAHPTER 11 .....$800.00
PLUS NOTICING FEE

Bull & Ballou and the Fairbanks revenge

By William Satterberg

There is an attorney in Fairbanks who is a most formidable opponent.

For years, Gail Ballou and I fought the good battle over a piece of real estate known as the Moose Lodge. The issue had to do with the construction of a building upon the property, and allegations that my client had somehow constructed the facility improperly. Allegations and counterallegations had been exchanged, ad infinitum, and the protracted battle, which included one delightful sojourn to the Supreme Court and one other attempt, was, shall we politely say, bloody.

Eventually, however, as all good cases do, this one also came to an end. An equitable settlement in which probably nobody won, but a settlement nonetheless. That is when the real battle started.

One day soon after the foray, I returned to my office to find that my chair had been replaced by a full, almost life-sized cutout of a bull moose. The cutout, which was the descendent of a Moose Head beer advertisement, unabashedly extoled the machismo virtues of the ungulata.

Seeing the cardboard cutout of the wild animal before me, clearly in rut, my male hormones expectedly rose to the challenge. "How could this mere *woman*, of all things (who just happened to beat the living baloney out of me) have the . . . fortitude . . . to place this life-sized cutout of a charging bull moose in my office?," I demanded.

My secretaries, who immediately took Gail's side, chuckled and later guffawed hysterically, eventually rolling uncontrollably onto the floor.

My face reddened, and I once again bellowed in indignation and rage. Something had to be done to overcome this direct affront to my male dignity and ego.

I opted for the real thing, baby. Primordial instincts being as they are, I elected to go hunting.

Admittedly, I am not much of a hunter, although I like to tell stories about my hunting exploits, which seem to become grander as the years go by. On this particular occasion, however, affronted by the clear audacity of Counselor Ballou in even entering my lair in placing the cardboard cutout behind my desk, I elected to go hunting with a vengeance. I also decided to take along a rifle, just in case.

My chosen locale was my favorite rough and remote Chena Hot Springs Road, north of Fairbanks. My quarry, as always, was the mighty moose, preferably something in the yearling range, close to the road, with antlers which would make nice pocketknife handles. No road signs for me this time.

I stalked for days, putting miles upon my trusty Dodge Ramcharger, and occasionally even muddying my tennies as I scouted out a particular pond or bog. Then, it happened.

One Saturday, as a friend of mine, Mark, and I were driving along Chena Hot Springs Road, we espied a young critter standing way off in a pond. Following a series of shots which sounded more like the proverbial shootout at the OK Corral, the animal went on to meet its maker, and the innards of my freezer. Now, let's turn to the legal aspects of hunting, which is why lawyers should hunt.

There is a specific regulation on the books which discusses the need to keep a portion of a male moose's anatomy in order to prove that it is, in fact, a male and not a cross dresser. Despite these legal requirements, more often than not, most hunters in the woods simply detach this all important piece of evidence and fling it as far as possible. On the day of this harvest, much to Mark's amazement and eventual disgust, I was particularly meticulous, and proceeded to follow the regulations closely.

After a fashion, we returned to Fairbanks, proceeded to care for the meat as any good hunter would do. Mark quite generously gave me the

encumbered hindquarter. Even then, rather than cutting off the evidence and flinging it as far as possible, much to my wife's shock and consternation, I proceeded to retain the evidence and separated those two portions of the larger portion of evidence from the combined total. Those two remaining portions were what more than one man has often referred to another as having when exercising certain acts of bravado.

The remaining two pieces of anatomy were properly skinned and cared for, and then frozen, although I had considered pitching them for a moment. My plan was beginning to gather shape, and it was time to get the ball rolling.

Fairbanks, like most legal communities, utilizes the services of a courier. It was my initial intention simply to have the courier deliver to Gail Ballou those portions of the moose's anatomy which best reflected my attitude about the case. For various unexplained reasons, the courier flatly refused and quickly left my office, only to be replaced by a different courier the following day. Clearly, the task was up to me.

I authored a short letter to Gail which indicated that, during the life of the case, I had been exercising a firm hold upon these particular items of her client's. I explained that I now felt that it was time to return them to her.

Still unable to locate a courier, one of my intrepid secretaries eventually volunteered to deliver the delightful duo directly to Gail. Upon reaching Gail's office, my secretary was politely informed that she could leave the material with Gail's secretary, who would make sure that Gail received it.

There is an unwritten bond in the world, however, which indicates that secretaries will not often subject each other to the whims and caprices of their respective attorneys. Accordingly, my secretary was totally unwilling to reek vengeance upon Gail's secretary and insisted that Gail be contacted directly. That is when the fun began.

When Gail entered the office, it is my understanding that she initially looked curiously at the offering which was being given to her, and politely read the letter. It was then that the look of enlightenment came across this solicitor's face. Clearly, she realized that the torch had been handed, so to speak, to herself.

Everyone had a good chuckle out of the delivery, and there were no ill feelings.

For several years, I thought that the incident was over with until I recently had occasion to speak with Gail about another matter. During the discussion, we were sharing humorous anecdotes and Gail indicated to me that her office just recently found the proverbial rotund treasures locked in ice in the glacier of her office freezer. (Maybe I should have opted for pickling them.) Apparently, Gail's secretary had been defrosting the icebox during a biennial cleaning and, during the process, located the two badly freezer burned baubles. The whole dispute almost erupted again. Fortunately, following explanation from Gail, it is my understanding that my gift has now found its final repository in the local garbage depository.

Advisory Alert

IRS Pursues Program Against Non-filers

Lawyers — and their clients — have been targeted in Colorado, Connecticut, Louisiana, New York, Ohio, Pennsylvania, and Rhode Island as part of the IRS' Compliance 2000 Program to determine whether such persons have filed federal tax returns. There are more than 10 million non-filers in the U.S.

At the same time, the IRS has in existence a program (which has a limited life) which permits non-filers who come in *voluntarily* to file returns and pay back taxes and interest without being subject to any criminal prosecution. The IRS will also enter into extended payment agreements if the circumstances justify it and will waive civil monetary penalties if any reasonable cause can be shown for failure to file.

Those who wait to be discovered by the IRS are likely, however, to be subject to penalties and criminal prosecution. The ABA's Section of Taxation strongly recommends that bar associations advise members — and members to advise clients — to take advantage of this opportunity and to fully comply with IRS inquiries and requirements.

Special News for Clients

Lawyers, acting in their fiduciary capacity, should educate and assist their clients in taking advantage of this program. The ABA, in cooperation with state and local bar associations, and accounting and tax preparer firms, has set up state-to-state volunteer committees to educate the public about the IRS program and to provide hands-on assistance to low-income non-filers. For moderate-income non-filers, individuals will be referred to lawyer referral services. For information on the committee in your state, please contact your state bar association of the ABA Section of Taxation (202-331-2230).

Special News for Lawyers

Lawyers who have failed to file could face severe consequences including suspension or disbarment from practice before the IRS. Further, if a tax practitioner is suspended or disbarred by the IRS Director of Practice, his or her law firm could no longer employ or share fees for tax work with that lawyer. Law firms should take appropriate steps to ensure partner and associate compliance to avoid firm suspension from practice before the IRS.

It would be devastating to individual attorneys but also to our profession if lawyers allow the showcasing of attorneys as tax evaders. The IRS Director of Practice has announced that lawyers who make a voluntary disclosure pursuant to the existing IRS program will receive only a private letter of reprimand.

Juris Prudence

New statute protects employer

Last session, the Alaska Legislature passed a new law designed to protect employers which became effective in August, 1993. The new law presumes that an employer who discloses information about an employee's job performance at the request of a prospective employer is acting in good faith. Therefore, unless the plaintiff establishes a lack of good faith, the employer may not be held liable for the disclosure or its consequences.

The legislation was modeled on a 1991 Florida statute and was championed by the Alaska State Chamber of Commerce. It adds a new section to the miscellaneous provisions of the Code of Civil procedure. AS 09.65.160.

The legislation was motivated by the concern that employers have become increasingly unwilling to provide complete and meaningful disclosure of an employee's job performance for fear of being sued for defamation. As a result, prospective employers in both the private and public sectors have been virtually unable to obtain any employment information.

As a general matter, a tort claim for defamation is established if a false communication conveyed to someone other than the individual causes

Daniel Patrick O'Tierney

harm to the individual's reputation. Written defamation is libel; oral defamation is slander.

Although statistics vary on the number and outcome of defamation cases regarding employer references, many employers have concluded that disclosure comes with a risk they cannot afford to take. As a consequence, employers have increasingly adopted a 'name, rank and serial number' policy under which only dates of employment and salary level is released to prospective employers. Company lawyers often advise along the same cautionary lines in order to avoid buying their client a lawsuit.

In large measure, Alaska's new law makes explicit in statute what most courts have recognized as a matter of common law principle. At common law, an employer has a defense of qualified privilege in communicating information about a former employee to a prospective employer if the communication is made in good faith, for a legitimate purpose and is not inappropriately communicated.

But Alaska's new statute goes somewhat further in creating a *presumption* that employer disclosure about job performance at the request of a prospective employer is made in good faith. The burden, then, is upon the employee to rebut the presumption of good faith disclosure. The statute specifies that a lack of good faith may be shown if the information disclosed was knowingly or recklessly false, deliberately misleading, given with a malicious purpose or violated a protected civil right prohibiting employment discrimination.

In short, the employer reference law codifies a measure of limited protection to employers for truthful, honest job performance disclosures. But the law does not prevent someone from filing a defamation lawsuit nor does it provide an absolute defense to the employer. As such, business practice advice by some attorneys on minimizing legal exposure for employment references may well continue to be as cautionary as before.

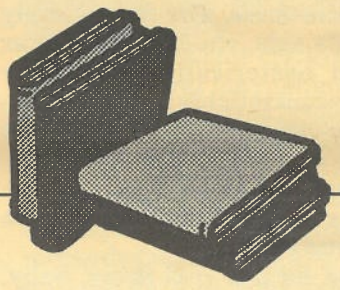
Further in that regard, a new breed of defamation action called "compelled self-publication" has been recognized in some state jurisdictions. In these cases, fired employees (often as part of a wrongful discharge action) claim they have no choice but to disclose to prospective employers the official reasons they were terminated. Thus, they argue that they are being effectively compelled to "publish" their former employer's defamatory statements — or slander themselves — which entitles them to sue the prior employer for slander.

Advocates of Alaska's new law expect that it will increase the prospects that employers will provide candid and complete job performance information. To a large extent, a freer flow of information in the employment marketplace is undoubtedly as important to able employees as it is to their prospective employers.

If employers are likely to make more informed judgments because of the availability of meaningful information on job applicants, everyone will benefit. But the jury is really still out on the impact of the recent change to Alaska's employer reference law in this regard.

The preceding article is reprinted with permission of Alaska Business Monthly for which the author has written a regular column on legal matters of interest to the business community since 1986.

Book Reviews



Federal Appellate Practice: Ninth Circuit, by Ulrich, Thompson Q Kessler, P.C., and Sidley & Austin (Lawyers Cooperative Publishing, 1994), $135.00 (approx). Reviewed by Michael Thomas of Robertson, Monagle & Eastaugh.

BY MICHAEL THOMAS

Anyone who has prosecuted or defended federal appeals in the Ninth Circuit knows that it is a frustrating and time consuming business to collect all of the information that is necessary or helpful in getting the job done.

The applicable rules are, of course, readily available. The statutes and cases can be found, but only if you are smart enough to ask the right questions. Information about how to communicate with the Court or the Clerk's office, and how the Court goes about its business, is available, but some of it is hard to find. We have all spun our wheels compiling some of the practical and legal data, and wondered what we have overlooked.

It is a great delight, therefore, to discover a book that collects just about everything you wanted to know, and some things you didn't know to want, in one place. It is an easy prediction that every firm or government office that practices in the Ninth Circuit will want this book.

This is a BIG practice manual. The pre-publication final draft available for this review was 800 notebook-size pages long, not including the voluminous Appendices, Table of Cases, and Subject Index. Not all of the information and authorities provided are of equal practical value, and chapters dedicated to specialized areas of appellate practice may be of little or no use to some offices or firms. Taken as a whole, however, it is what it sets out to be: A truly comprehensive text covering Ninth Circuit practice and procedure.

It begins with a brief survey of the history and operation of the Ninth Circuit. Chapter 2 discusses management of a firm's appellate practice. The book then has chapters on the nuts and bolts of practice and procedure: appellate jurisdiction and appealable orders (Chapter 3); standards of appellate review (Chapter 4); initiating and prosecuting civil appeals (Chapters 5 & 6); motions and extraordinary writs (Chapter 7); the decision making process within the Ninth Circuit (Chapter 8); and post decision proceedings including costs, fees, sanctions, rehearing and en banc consideration (Chapter 9). There follow several chapters on specialized appellate practice, including criminal appeals (Chapter 10); administrative agency reviews (Chapter 11); bankruptcy appeals (Chapter 12); and immigration, labor, power and tax appeals (Chapter 13). There are some 16 appendices, including filing checklists for civil, criminal, and bankruptcy filings; the relevant rules and excerpts from relevant statutes; general orders of the Ninth Circuit; several useful forms; and user instructions for the Ninth Circuit computer bulletin board.

The authors[1] have made no attempt to compare Ninth Circuit rules, case law or procedures with those of other appellate courts. They also have made a conscious decision not to attempt a critique of the law as they find it, although they note critiques by others, particularly when the criticisms come from sitting members of the Court, in published opinions or elsewhere. What they do provide is a very comprehensive and up-to-date compilation of the law of appellate practice in this circuit.[2]"

Typically, an explanation of the rule of law, including as necessary the historical development of the rule and its relationship to related rules and practices in the Federal District Courts and federal agencies, is followed by extensive lists of examples of applications of the rule. Footnotes annotate the text to United States Supreme Court and Ninth Circuit case law and scholarly commentary. The annotations are particularly useful in noting divergent authority within the circuit, even where that divergence in result has not been acknowledged in the cases, themselves. The text is peppered with practice pointers, and even the most experienced federal appellate attorney will find new and helpful ideas in this book.

My own practice having involved review of administrative agency actions, special attention was given to the chapter on that subject. It is an excellent synopsis of the law and collection of the authorities. It covers the presumption or reviewability; sources of jurisdiction for the various federal courts; limits on jurisdiction, including the doctrines of standing, primary jurisdiction, exhaustion of remedies, finality, ripeness, mootness, and actions committed to agency discretion; and the various standards of review which may be applicable. There is a concise summary of judicial review under the Administrative Procedure Act, as well as review under the Hobbs Act. At the end of the chapter there is a lengthy table setting out statutory sources of jurisdiction for review of agency actions, giving for each statute the agency or administrator to be named as respondent, the title of the action subject to review, persons entitled to seek review, time limits, and court of jurisdiction. Again, the information is certainly available elsewhere, but you are struck with the amount of time you would have saved over the years had the book been on your shelf.

No practice manual is perfect, and neither is this work. Although in the course of reading the book one would certainly get to know a number of the men and women who have served on the Ninth Circuit, there is no chapter giving biographical and professional information about the active and senior members of the court. Consideration is being given to adding the information in a later edition; its omission from what is otherwise a comprehensive guide to the practitioner in the Ninth Circuit is odd.

One can hope that the useful information found in the appendices will be tabbed in a subsequent edition. While the authors could not include citations to all relevant cases, in a few instances citations to important cases were notable by their absence. In the chapter on review of agency actions, a fuller discussion of the circumstances under which the district and circuit courts will allow augmentation of the administrative record as complied by the agency would be useful, since that is often an area of heated dispute.

But these are nits. Overall, one has to agree with former Ninth Circuit Chief Judge James Browning,

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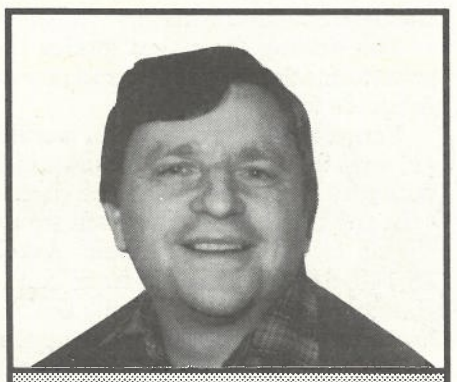
View from the Periphery

The church and public policy

In 1934, when the Social Security Act was passed, churches could not get into the program because government could not tax churches. Nontaxation of churches was historic American policy, not because tax exemption was a beneficent subsidy from the state, but because of the long recognition that one sovereign (the state) could not legitimately tax another (the church).

The first Chief Justice of the U.S. Supreme Court, John Marshall, said it: "The power to tax is the power to destroy." Taxability brings with it heightened scrutiny and answerability to the taxing power. There is nothing wrong with "scrutiny" to ensure compliance with civil and criminal law; it is the "heightened" that is scary. It is answerability to the state that would spread a potential net for the free exercise of religion.

In 1951 voluntary participation by the church in Social Security became legally possible. But because of the 1983 Social Security Act Amendment, as of January 1, 1984, church employees (except for certain exempt ministers) were to pay 7 percent of their gross income, with a 0.3 percent credit, as social security taxes. [26 U.S.C. §1402 (e) and (g) (Supp. 1984)]. This is not entirely unreasonable, seeing as employed individuals in other walks of life were paying FICA taxes and seeing that the Social Security system needed salvaging. It was not unreasonable, even though church employees tend to work for lower wages because they viewed their work as ministry, and even though the belief of some churches was that the church



Walt Arden

should solely provide for the welfare of the believer.

What is unreasonable is the church's liability under the 1983 Act for the employer matching portion of the FICA taxes. For the first time in our nation's history, the government was directly taxing the church. Congress was deeming it expedient to sweep aside the historical nontaxation of churches, with the chill on religious freedom implied thereby, to secure an extra measure of revenue. (IRS can seize property and impose criminal sanctions for noncompliance.)

On November 26, 1984, Philadelphia lawyer William Bentley Ball filed suit in the U.S. District Court for the Middle District of Pennsylvania to challenge church taxation under the new amendments. The court held that the federal government could subject Bethel Baptist Church to social security taxes without violating its rights under the First, Fifth and Fourteenth Amendments to the Constitution, and this was upheld by the Third Circuit, *Bethel Baptist Church v. United States,* 822 F.2d 1334 (3rd Cir. 1987).

The Third Circuit had affirmed the District Court's grant of summary judgment for the government, even though a factual issue was raised whether the solvency of the social security system would be impaired by church noncontribution. The free exercise clause, establishment clause and equal protection clause arguments were all buried under the rubric of two government interests, deemed "compelling": 1) the fiscal integrity of the social security system could be threatened by these constitutional claims by churches (such a threat has never existed before 1984, but, remarkably, now churches threaten fiscal integrity), and 2) because of the "broader public interest simply in the collection of social security taxes and the maintenance of a functional social security system." There you have it: A direct tax on churches is permissible because of public policy. The U.S. Supreme Court denied ceriorari in 485 U.S. 959 (1988), making the *Bethel Baptist* holding the law of the land.

By the time of the *Bethel Baptist* filing, Congress had amended its tax contributions provision to state that if a church conscientiously objected, it could opt out of being directly taxed. This shifted the entire FICA tax burden to the church employee, as if the employee were considered self-employed for social security purposes but an employee for all other purposes.

That certainly was not what churches wanted. "Conscientious" churches now were forced to raise the salaries and wages of employees and nonexempt ministers to nullify the burden to them of the double social security taxation (there was not even a 0.3 percent credit to the employee portion by now). This was pretty hard on the ministry fisc, and perhaps had the Lord wondering about its propriety. Today, every now and then a notice from the IRS evidences a thinly-veiled disdain for "such churches" which had opted out and placed the FICA tax burden on the employee. That certainly was not what churches wanted.

Well, where do we go from here with "public policy?" The power to destroy in the tax realm has for 10 years been latent, nascent. What about national health insurance? Public policy may dictate that a church employer must pay 80 percent and the employee 20 percent of cost of the employee's mandated health insurance policy. Public policy may have this mandated insurance cover abortion-on-demand as mainstream health care. A constitutional free exercise of religion problem may be discerned in this.

The solution: Shift 100 percent of the cost of the health insurance policy to the employee.

Book Reviews

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who says in the Preface:

> *"Federal Appellate Practice: Ninth Circuit* is a welcome addition, both to the resources available to attorneys who practice before the court and to the court itself . . . The authors are to be congratulated for undertaking and completing an important task, and doing it very well."

1The principal authors are the partners in the small Phoenix appellate practice firm of Ulrich, Thompson and Kessler. Paul Ulrich has co-edited state and federal appellate handbooks for the ABA and the Arizona State Bar, and has authored or edited a number of works on law office management and health law. His partners, Nancy Thompson and Donn Kessler, have also co-edited practice handbooks. Gaye Gould and Kathleen Sweeney also contributed substantial chapters.

2Research is current through June 1993. Annual updates are planned.

New book profiles 200 of nation's top law firms

For the first time in the legal field a unique guide provides detailed, inside information about the country's major law firms. Written by a team of Harvard Law School students, "*The Insider's Guide to Law Firms*" provides a complete tool kit to anyone interested in the legal profession. The book was written from accounts of people who have worked in the firms," said Michael Walsh, the co-editor-in-chief. "The guide provides detailed, up-to-date information not found in any other public source. It offers an overall look at 200 firms nationwide, as well as specific information about associate salary, hiring practices, work atmospheres, practice areas, management styles, social life, and diversity."

"This revolutionary book really places you inside the law firms. It is a must read for anyone considering working in a firm," said June Thompson, Director of the Harvard Law School Office of Career Services.

The book is the result of a year's effort by a team of Harvard law students led by Michael Walsh and Sheila Malkani. "As prospective applicants to a large number of law firms around the country we were tired of hearing about each one's 'collegial atmosphere' and nothing more," said Walsh. "We wanted to know the inside information and specific reasons why we should or should not work there, and we felt like the other 130,000 law students and one million lawyers around the country would like to know too."

To obtain a copy of the book, call 1-800-LAW-JOBS.

Cases from the Dept. of Law

The mischief of alcohol

The mayor of Mountain Village was charged with burglary this month in Bethel. The mayor and two co-defendants allegedly broke into city hall and stole a case of vodka, evidence confiscated in a liquor importation case. Shortly after being caught, the mayor tried to fire the peace officer who investigated the case.

•••

Last December, a man was charged with possessing alcohol with intent to sell. He imported 108 bottles of vodka into Bethel.

The man claimed the vodka was for a wedding and the trial was moved to Anchorage when it proved impossible to pick an unbiased jury in Bethel.

In Anchorage, the defendant launched a publicity campaign; with the help of a sympathetic local media he portrayed himself as persecuted immigrant and was acquitted.

This month (August) a former Bethel police officer watched from across the street as he traded a bottle of vodka for a crisp $50 bill. The man was arrested and indicted.

•••

A Bethel police officer responded to a report of a residential break-in to find that it was his own residence. He identified the fleeing intruder by the fact that he was wearing the officer's jacket. He was also wearing the officer's shoes and had the officer's wife's jewelry in his pocket.

The Burglar has been convicted 40 times within the last five years of various petty misdemeanors. He also holds the unofficial record for blood-alcohol content in this area; an incredible .666 percent - over six times the legal limit.

•••

In Nome, a theft case was solved when the victim of a burglary located the suspect on foot 20 miles outside of Nome. The victim beat the burglar up, recovered the stolen goods, took the burglar's shoes, and reported all of this to the troopers. The footsore defendant was happy to be arrested.

Metaphors useful for voir dire, closing argument

By Paul M. Lisnek

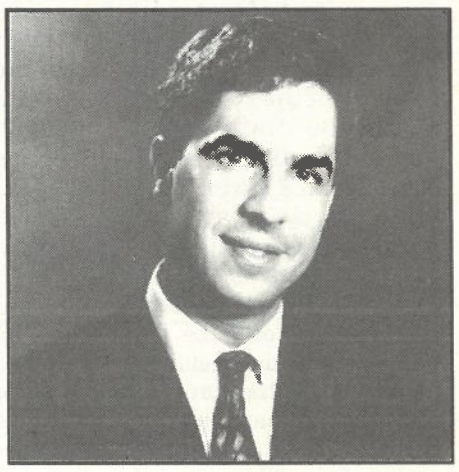
Every lawyer would like to know what is important to potential jurors. Yet our ability to ask questions of jurors of often limited, or in the case of federal court, nearly non-existent. There are clues available to us that go beyond the words jurors speak and may be indicative of their personal attitudes and values.

In short, the clues exist in the "life metaphors" that jurors, and all of us for that matter, wear (sometimes literally) on our sleeve. The technique described in this column emerges from the concepts and theory of Charles Faulkner, as presented in his audiotape series "Metaphors of Identity: Operating Metaphors & Iconic Change" (Genesis II, Longmont, Col., 1991).

Meaningful life metaphors of the jurors are illustrated by their answers, but when answers are limited, they may be visible through the icons they exhibit through clothing. Have you paid attention to the pins, jewelry and other accessories worn by jurors? Do you observe what they carry, lunch bags and such that jurors bring with them to court? Ever notice the titles of the books and magazines that the jurors may bring with them for the day? These are icons of meaning, in many cases, as they represent things of import to that juror.

When you are permitted to ask questions, do you inquire about the juror's favorite bumper stickers, books and movies, all of which can give clues to what drives a juror? While time will rarely permit it, consider the power of asking jurors for their favorite childhood stories. You may be surprised to know that a juror's drives and needs are often conveyed through the characters and stories they hold dear. For example, what kind of background might a person have whose memorable childhood story is the "Ugly Duckling" or perhaps, "The Secret Garden." Through personal experiences in which these stories were cited by persons, there were many ties noted between that person's values and their memories of the story. Many a pain, gain or memory is locked inside the childhood story that stands at the forefront of our memory. Learning juror metaphors can also help the lawyer to shape the account and evidence, accordingly by including some reference to the types of values incorporated in the opening and closing.

You may wish to work in anecdotes or analogies that involve metaphors of import for the jurors. For example, if during voir dire you learned the jurors' favorite childhood stories of a meaningful bumper sticker (but be certain the bumper sticker was placed by the juror and not by a relative with access



Paul M. Lisnek

to the family car), then return to the elements of that information which tie to the reality you seek to create through your evidence.

Take, for instance, the juror who notes the story of the ugly duckling. In closing, and if appropriate, the lawyer can describe the plaintiff in a personal injury case, for example, to the qualities and characters of an underdog who might now be rejected by other members of society. Could anything be more powerful for that particular juror, as well as others who will relate to the argument on an other than conscious level?

To develop this skill at a higher level, take some time (outside the courtroom, perhaps at home or in the office) to ask people what type of an animal, plant, song, book, article of clothing, color, place, instrument, activity, vehicle, sport, etc. they would be, if they were such a thing presently. Then ask which of these metaphorical identifications they would like to be. Finally, ask them to describe the process through which their expected current identification would transfer them into the desired identification.

- Describe the main characters of the story.
- What was the main character's purpose? Goal?
- What do you like about the story? What did it do for you?
- What did the story mean to you? Say to you? What was its value?

The driving force that guides the transformation is a telling and powerful guide for that person.

For example, suppose your paralegal says that he or she now identifies with jazz music, but given the chance to be any kind of music, he or she would choose to be classical music. Asked how that transformation from jazz to classical would occur imagine the following response: "The pumped up and soulful jazz sounds would merge into a melodic pattern, fulling out and expanding to include strings and other instruments, until they created a rich classical flavor" (If this example is bit funky for you, it happens to be a real example from a person who practiced this exercise). What have you learned about the respondent's driving force? It suggests, possibly, that the person seeks options, fullness and a mellowing course.

During deliberations, would this person not attempt to resolve the case in a similar pattern? People are creatures of habit, and we resort to familiar process. Under stress, we are even less likely to seek new roads of creativity. So if they can identify their driving forces metaphorically, then they will do so in their deliberations as well.

If this all makes sense, then return to the childhood story for a moment. Now, consider learning, if time permitted in voir dire, the following information about a juror's favorite childhood story he or she identifies with:

Time permitting (and it rarely will), ask the juror to retell the favorite story, changing it, as he or she wishes, to end as the juror wishes it would have ended. Let the juror feel free to add resources to characters, to add a sense of recognition for the characters. Don't be surprised if the qualities the juror adds to the main characters are not the same qualities the juror wishes he or she had in his or her own life.

Does this provide information on that juror's decision-making style? Once again, consider using the information gathered during this voir dire exercise appropriately and meaningfully in closing argument. Incorporate the characteristics and resources the juror would add to create a powerful reality. Give them what they seek and create a sense of comfort for them.

This is not a technique many lawyers will have time to exercise in voir dire. But the power of life metaphors is best explained through this type of information each of you can relate with in you own life. In trial, you will gain greater insights into the jurors through the information you are able to gather when asking about favorite books, movies or magazines. Look deeper into the answers and try to identify the values and attitudes that drive that person. You can expect these same values and attitudes to guide their in-court decision-making process as well.

Paul M. Lisnek, J.D., Ph.D., lectures and writes on lawyering skills. He is a senior trial consultant with Tsongas Associates and is vice president of the National Institute for Legal Education and senior partner with Salamone and Lisnek, P.A. He also hosts Continental Cablevision's television talk show "Inside the Government."

Readers are encouraged to write Lisnek with specific topics, challenges or difficulties they have encountered and which they wish to have him address. They are also encouraged to include short anecdotes and stories reflecting communication concerns of lawyers for possible inclusion in future columns. Letter should be directed to Paul M. Lisnek at 612 N. Michigan Ave., Suite 217, Chicago, IL 60611.

Paul Lisnek, J.D.,
will present a CLE,
"Jury Psychology: Communication in the Courtroom,"
on June 3, 1994 in Anchorage.
Watch for the brochure in the mail.

Supreme Court vacancy to be filled by Feb. 24

Following its meeting in Anchorage on January 9-10, 1994, the Alaska Judicial Council announced that Robert Eastaugh, Karen Hunt, Thomas Jahnke, Jerry Wade, and Donna Willard had been nominated to fill the Supreme Court position. The Governor has 45 days from the Council nomination date in which to make the appointment. All the nominees currently reside in Anchorage, with the exception of Jahnke, who lives in Ketchikan.

The Judicial Council is required by law to submit a list of names of two or more qualified candidates for each judicial vacancy to the Governor. The Governor appoints a judge from the candidates nominated by the Council. The Judicial Council uses written information from the applicant, investigations, a survey of Alaska Bar Association members, public comment, references and personal interviews to make its nominations.

The 45-day period ends Feb. 24.

Alaska Supreme Court

Candidate	Professional Competence	Integrity	Fairness	Judicial Temperament	Overall Performance
James R. Blair	Acceptable	High Acceptable	Acceptable	Below Acceptable	Acceptable
Robert E. Congdon	Below Acceptable	Acceptable	Acceptable	Below Acceptable	Below Acceptable
Robert L. Eastaugh	Good	Good	Good	Good	Good
Cynthia M. Hora	High Acceptable	High Acceptable	High Acceptable	High Acceptable	High Acceptable
Karen L. Hunt	Good	Good	Good	Good	Good
Thomas M. Jahnke	High Acceptable	High Acceptable	High Acceptable	Acceptable	High Acceptable
William K. Jermain	High Acceptable	High Acceptable	Acceptable	Acceptable	Acceptable
Douglas D. Lottridge	Below Acceptable	Acceptable	Acceptable	Acceptable	Acceptable
Peter A. Michalski	Acceptable	High Acceptable	High Acceptable	High Acceptable	Acceptable
Joseph J. Perkins, Jr.	High Acceptable	High Acceptable	Acceptable	Acceptable	Acceptable
Hugh G. (Jerry) Wade	Acceptable	High Acceptable	High Acceptable	High Acceptable	High Acceptable
Donna C. Willard	Acceptable	Acceptable	Acceptable	Below Acceptable	Acceptable

The tabulation of survey scores from members of the Alaska Bar Association evaluating judicial candidates for the Supreme Court justice position was released Dec. 17 by the Alaska Judicial Council. Candidates were rated on professional competence, integrity, fairness, judicial temperament, and overall performance. Candidate evaluations are summarized in seven ranges: Excellent (4.5 - 5.0), Good (4.0 - 4.49), High Acceptable (3.5 - 3.99), Acceptable (3.0 - 3.49), Below Acceptable (2.5 - 2.99), Deficient (2.0 - 2.49) and Poor (1.0 - 1.99). Copies of the surveys are available, upon request, from the Judicial Council.