1997 Alaska Bar

CONVENTION HIGHLIGHTS

May 8 - 10, 1997
Centennial Hall, Juneau

Wendell Kay

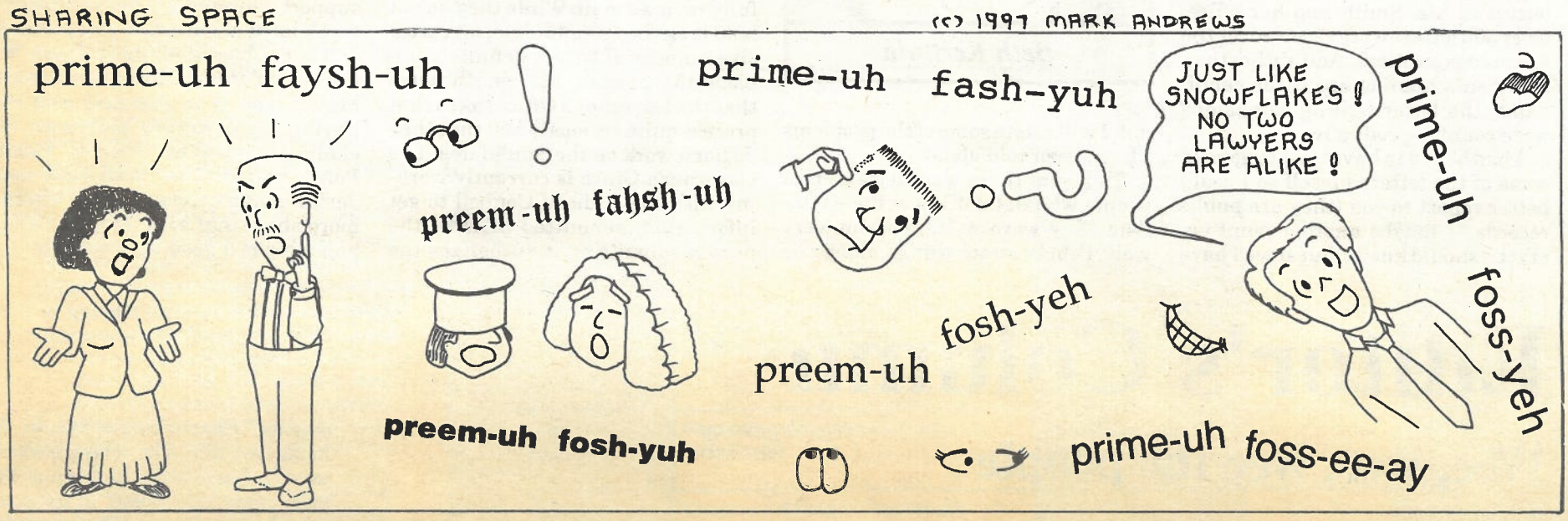
Inside:

- Wendell Kay remembered
- California karma
- Electronic discovery
- ALSC still going...
- Humor & other weighty items

$2.00

The Alaska BAR RAG

VOLUME 21, NO. 1 — *Dignitas, semper dignitas* — JANUARY-FEBRUARY, 1997



A close shave deal in the Czech Republic

By Frank Nosek
as reported by Joe Sonneman

On December 17, 1996, Frank Nosek reported on "A Close Shave in the Czech Republic" to the Alaska Bar's International Law Section. Section Vice-Chair Joe Sonneman wrote this report.

•

Practicing law for more than 30 years in Alaska, I became interested in international law after handling sporadic international transaction cases, starting about 1969. I did some transaction work when Eastern Europe opened up; starting in 1989, I frequently traveled there.

In the Czech Republic (as in Hungary and Poland, whose laws are similar) and the former Yugoslavia the government needed to divest itself of most everything when these nations changed to a market economy. Divestiture is called privatization, and the process went rapidly in Poland, slowly in Hungary, and at medium speed in the Czech Republic.

Privatization usually occurs in waves, starting with small-scale privatization: mom and pop stores, restaurants, repair stores, and family stores, where governments easily identify who wants to run what, and where restitution problems (common in privatizing medium and large companies) do not interfere.

Restitution is giving back a business to its prior owners, but who are the owners? When was ownership acquired? Germans took over most East European companies in WW II, and Communists then followed, so it is always difficult to determine when restitution may apply in a transaction. Despite this problem, governments returned many medium and large companies to private hands, while retaining companies involved with national security.

I was recently involved in a transaction which well models the Eastern European way transactions frequently have worked.

The Background

First, know that only one in 15 transactions succeeds; many fail. Most Eastern European transactions are joint venture formations, but this was an acquisition.

The Czech National Razor Blade Company—Astra—is not a national security concern. But under Communism's worldwide economic plans, Astra supplied razor blades for much of the communist world. It made 50 percent of razor blades sent to Russia, and 80 to 90 percent of those going to communist Africa, Eastern Europe, and Cuba.

Yes, these old-style, double-edged blades are of only modest quality, giving only four shaves per blade, not 10 or so as with a modern Gillette or Schick blade. But major corporations now scrap with each other in a big scramble for world markets. These scrambles occur often in Eastern Europe, where new governments put former Communist companies—and markets—up for grabs.

So Gillette Europe wanted to buy out Astra, and I was asked to assist in the sale.

The Parties

We first lined out who was representing whom. I had, several years

Continued on page 18

The Ninth Circuit:

An inside perspective

By Julia A. Follansbee

For trial attorneys whose main practice is in state court, the idea of a trial in federal court, let alone an appeal to the U.S. Ninth Circuit Court of Appeals, is a daunting proposition. The myriad federal rules, statutes, and the enormous body of federal case law are *terra incognita*, capable of striking fear into the hearts of all but those intrepid few who practice almost exclusively in the federal courts, specializing in exotic disciplines such as tax, bankruptcy, environmental law, immigration, social security, admiralty, and federal criminal defense or prosecution. Nonetheless, many trial attorneys have federal cases at some point in their career. Consequently, they may have to consider whether to appeal or how to defend against an appeal in a federal appellate court.

What few may realize is that the appellate process is as daunting for those involved in decision-making as brief writing and oral argument are for the advocate. This article reveals why decision-making is a difficult business. The viewpoint here is from inside the Ninth Circuit. This perspective may provide some valuable insight to sophisticated federal practitioners as well as to newcomers and those bringing infrequent federal appeals.

The Ninth Circuit Caseload

The Ninth Circuit, headquartered in San Francisco, is the largest geographic circuit, encompassing nine western states (Montana, Idaho,

Continued on page 3

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

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

President's Column

Use caution in letters of support

After the last Anchorage Superior Court appointments were made I received an interesting telephone call from Cindy Smith, the Coordinator of Boards and Commissions for the Governor's Office. Being a person who thought that having a lot of letters from as broad a spectrum of supporters as possible would help a judicial candidate, I was surprised to learn differently.

During the last two rounds of appointments, everyone who held the same belief as I (the more the better) evidently acted on that belief. The result was an incredible deluge of letters to Ms. Smith and her office. Over 500 letters were received for the Anchorage positions. And, rather than being enlightening about the candidates, the letter-writing campaigns were counter-productive.

I had hoped to have time to go read some of the letters myself so I could better report to you (they are public records — maybe another point everyone should know), but since I have not, I will relate some of the problems I have been told about.

Beth Kerttula

To begin, there were letters from people who did not know the candidate they were writing about very well. People wrote things along the lines of "I met the candidate at a party and the candidate seemed nice," and "I don't know the candidate, but I know the candidate's spouse." I don't need to tell you how unimpressive a lead-in like that is. Then there were people who wrote for a lot of candidates, and then called to say who they were "really supporting." Some people did not spell candidates' names correctly (this one makes me nervous as I have one of those difficult-to-spell names). In all, there were a lot of letters that clogged up the system without helping the candidates.

The Governor's Office staff carefully reviews mail. While they do not hold it against a candidate, an excessive number of letters definitely impacts the process. Ms. Smith notes that the Governor's Office takes that process quite seriously and that they do homework on the candidates. The Governor's Office is currently working with the Judicial Council to get information submitted to it (if the person submitting it authorizes the release). In all, the Governor's Office is doing a thorough job. From my own observation, they are being very responsive to those of us who wrote letters about candidates.

That's what I have to report. How does that affect what future judicial candidates do?

Ms. Smith and I agree that a letter from someone who knows a candidate well would help, discussing some aspect that was not brought out during the process. Also, as I've noted above, the Governor's Office reads these letters, and the Governor knows what people say in them about the candidates. But for now, it appears that it's content, not volume, that counts. Certainly, we should all use good sense in this — don't ask people who don't know you to write. Don't think that "celebrity" letters will help if the people don't know you. Don't think that just because you have the most letters you'll win. And do be reasonable. If you or someone you support is applying to become a judge think hard about what you present.

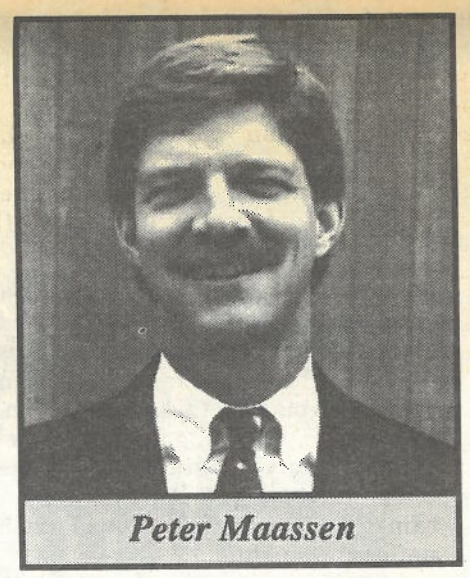
That's about it for this column. We are busy planning the convention (on May 8 and 9 in Juneau) and are having some exciting programs, including a panel on "Politics, Public Policy, and the Law" with some wonderful participants. I'll be writing more about that soon. Happy 1997, I hope this is a good year for you.

Editor's Column

Wee, wee, wee the people

Those readers with their ears to the ground may have heard about the push to create an Anchorage Toddler Court, modeled after the Anchorage Youth Court and designed to punish minor naptime infractions and to referee playground fracases before they turn into suits for unwanted touching. A few objections have been raised. Besides attention span, the major problem with judgment by one's two-year-old peers is lack of written source materials.

Partly to remedy this lack, but mostly because the Editor didn't take the time over the holidays to think of a suitable new topic, the *Bar Rag* reprints here a scholarly article that first appeared several years ago in another, only slightly less prestigious publication:



Peter Maassen

•

Five Little Piggies

This[1] little[2] piggy[3]

[1] As early as 1913, the Texas Court of Civil Appeals held the word "this" to be "a demonstrative adjective, used to point out with particularity a person or thing present in place or thought." *Stevens v. Haile*, 162 S.W. 1025, 1028. The court's conclusion has never been seriously questioned.

[2] Under Massachusetts law, the adjective "little" refers to something "of the approximate dimensions of a paper-wrapped cigarette, or somewhat larger." *Massachusetts Ass'n of Tobacco Distributors v. State Tax Comm'n*, 235 N.E.2d 557, 558 (Mass. 1968). At the time of this writing, it remains to be seen whether other state courts will follow Massachusetts or opt instead for the more complex, four-part "bread-box" test.

[3] "Piggies" are "hollow cylinders of rubber, about three feet long, which, after being clasped about live wires, render the latter innocuous to those who may touch or come in contact with them." *Donnelly v. Lehigh Nav. Electric Co.* 102 A. 219, 221 (Pa. 1917). The Pennsylvania court's holding may be contextually problematic, given (1) the adjective "little," which seemingly precludes a three-foot length; and (2) later clauses of the above text, which appear to refer to directed self-propulsion, selective ingestion, and expressions of fear, all of which indicate some measure of sentience. Instead, "piggy" is most likely intended to be a corrupted form of "pig," which Southern courts — where pig litigation seems most prevalent — define as "a young swine of either sex that has not reached sexual maturity." *State v. Feeler*, 635 S.W.2d 24, 27 (Mo.App. 1982). "A 'sow' may none the less be a 'pig'; and a 'pig,' doubtless, is often a 'sow.' Or, at least, so we hold." *Blackman v. State*, 179 So. 389, 390 (Ala.App. 1937).

went[4] to[5] market.[6]

[4] While the verb "went" indicates movement from place to place, no mode of transport is textually indicated. It can be surmised that a reasonable little piggy would avoid traveling on foot, as the denouement of such an expedition can be catastrophic. "Pork on foot . . . may, in due season, . . . be prepared for and converted into pork." *Byous v. Mount*, 17 S.W. 1037, 1038 (Tenn. 1890). There is a legal inference that the little piggy traveled by train. "Piggyback service" indicates movement "on railroad flatcars." *Atchison, Topeka & Santa Fe Ry, Co. v. U.S.*, 244 F.Supp. 955, 958 (N.D.I11. 1965) (distinguishing "fishyback service" and "birdyback service" at 959 n. 3). The little piggy's movements were thus under the jurisdiction of the Interstate Commerce Commission. *Substituted Service — Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, 322 I.C.C. 301 (1964).

[5] "In its ordinary meaning, 'to' conveys the idea of movement toward and actually reaching a specified object." *Desantis v. Zell,* 98 N.E.2d 68, 71 (Ohio 1951). Thus, the reader knows that the little piggy not only "move[d] toward" the market by train; he "actually reach[ed]" it as well.

[6] The word "market" comes from the Latin *mercatus*, meaning "trade or traffic, buying and selling." *Sitzes v. Raidt*, 335 S.W.2d 690, 699 (Mo.App. 1960). In common parlance, a market "is a place where merchandise is freely offered for sale, as distinguished from a place where it is manufactured or delivered." *Mottola v. U,S.*, 149 F.Supp. 189, 194 (Cust.Ct. 1957). As relevant to the little piggy, it is noteworthy that a market may be "a public place . . . where domestic animals may be on display." *State v. City of Miami*, 76 So.2d 294, 297 (Fla. 1954). While it may be disquieting to think of the little piggy "on display" at the market, there is no indication that the setting is anything but a "free market," and the little piggy's visit anything but volitional.

This[7] little[8] piggy[9] stayed[10] home.[11]

[7] *See* note 1, *supra*. The repeated use of the word "this" perhaps emphasizes that the little piggies were

Continued on page 8

The Alaska BAR RAG

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

The Ninth Circuit: An inside perspective

Continued from page 1

Washington, Oregon, California, Nevada, Arizona, Hawaii, and Alaska) and two Pacific territories (Guam and the Northern Mariana Islands). This large region produces about 700 appeals per month from its many district, tax, and bankruptcy courts. Half never reach the judges' chambers because of settlement, dismissal, or other factors. About 350 new appeals remain each month for the Court to resolve. Because of this volume, there can be a significant delay between the filing of appellate briefs and a notice from the Court that the appeal has been "calendared" for decision.

To say that an appeal has been "calendared" means that it has been assigned to one of five to ten panels of Ninth Circuit judges holding court for one week each month in a specific city. These one-week court sessions are referred to as "calendars." Each panel on a calendar consists of three judges. Each three-judge panel will include at least two Ninth Circuit judges, one of whom may be on senior status, while the third slot may be filled by a district judge or an appellate judge from another circuit, sitting by designation. The presiding judge, however, will always be a Ninth Circuit judge on regular active service. Judges on regular active service are required to sit on at least eight oral argument calendars per year, with each calendar lasting a week. The individual judges who appear on the panels are assigned randomly to the calendars.

Not every city where the Ninth Circuit holds court has enough cases to hear oral argument every month. For example, Portland has a single calendar nine months of the year; Alaska has a single calendar once a year; and Honolulu has two a year. In contrast, Pasadena, which handles the tremendous volume of southern California appeals, usually has three panels each month, while San Francisco and Seattle each have at least one panel per month.

Although the Ninth Circuit has 28 positions for regular active judges, currently it has only 20 active judges because of judges who have taken senior status and the lack of appointments during the present administration. That is why so many panels now have one visiting judge, usually a district court judge. The current active judges , in order of seniority, are Chief Judge Hug and Judges Browning, Schroeder, Fletcher, Pregerson, Reinhardt, Hall, Brunetti, Kozinski, Thompson, O'Scannlain, Leavy, Trott, Fernandez, Rymer, T.G. Nelson, Kleinfeld, Hawkins, Tashima, and Thomas. The current 17 senior judges are Judges Wright, Choy, Goodwin, Wallace, Sneed, Skopil, Farris, Alarcon, Poole, Ferguson, D.W. Nelson, Canby, Boochever, Norris, Beezer, Wiggins, and Noonan.

What Happens To The Appeal After Briefs Are Filed

After a notice of appeal is filed with the district court clerk's office, counsel will receive a notice from the Ninth Circuit regarding the briefing schedule; i.e, when the briefs and excerpts of record will be due for submission to the Court. After multiple copies of both parties' briefs and excerpts of record are filed with the court, each appeal is weighted on a subjective scale of difficulty by the Court's staff attorneys in San Francisco. There are 1-weight, 2-weight, 3-weight, 5-weight, 7-weight, and 10-weight appeals: the higher the number, the harder the case is thought to be to resolve. In rare instances, the judges' chambers will discover a misweighted case — a 3-weight is actually very difficult to decide, or a 7-weight is readily resolved in a short memorandum disposition. But the staff attorneys are very experienced at "eye balling" briefs and discerning just how difficult an appeal will be to decide. The assignment of a level of difficulty to each appeal is very important because it governs how cases subsequently are assigned to calendars and to each judge's chambers.

There are about 30 cases assigned to each calendar, consisting of a total of approximately 120 points. These 120 points are calculated by adding up the assigned weights of the appeals, consisting of 3-weights through 10-weights. The 30 appeals of 120 points are then divided among the three judges assigned to the panel. For each appeal, staff attorneys prepare a one-page inventory sheet that shows the case's weight and describes the issues posed in the briefs and any other issues the staff attorneys spot, such as potential jurisdictional problems. The inventory sheets also state whether similar cases have been decided recently or are under consideration by another panel.

A month or two before the appeals are calendared for oral argument, the inventory sheets are distributed to the chambers of the three panel judges assigned to that calendar. Also distributed are copies of the briefs and the excerpts of record (each judge and each law clerk assigned to an appeal have a copy of the briefs; the excerpts are shared within each chambers). The three panel judges and their law clerks examine the inventory sheets, briefs, and excerpts to decide which cases they would prefer to work on. The staff of the presiding judge on the panel decides how to apportion the cases so that no one chambers gets too many easy or too many difficult cases. The division usually can be made so that each chambers will get some of their preferred cases. However, some presiding judges assign cases without regard to preferences. After the cases are assigned, the law clerks divide them based on their preferences, or the judge assigns them to specific clerks.

Preparation of Cases for Calendar

By this process, each judge is primarily responsible for 10 appeals of varying difficulty out of the 30 appeals on the calendar. For those ten appeals, the judge is usually designated the "writing judge." Law clerks (three per judge) must then prepare the bench memoranda for the three or four appeals for which they are primarily responsible. In addition, each law clerk must monitor seven or eight of the remaining twenty appeals that have been assigned to the other two chambers. Thus, each law clerk must analyze and write bench memoranda for three or four appeals each month. In addition, each law clerk must be completely familiar with seven or eight other appeals, including their briefs and excerpts, case law, and bench memoranda, for a total of ten to twelve appeals per month per law clerk. Each judge must be familiar with the facts, case law, bench memoranda, and record in all 30 appeals on the calendar.

This creates a massive amount of reading, analyzing, and writing to prepare for each calendar. For 30 appeals, a stack briefs and excerpts of record is about 5 feet tall: this is at minimum what the judge and law clerks read each month. It does not include the case law that must be read for each appeal, or any transcripts or exhibits that are not included in the excerpts of record. In addition, each chambers orders the district court records for its ten assigned appeals. Those records typically fill one to two boxes per appeal. The amount of material that must be mastered within strict time limits by judges and law clerks to prepare for a calendar is truly phenomenal.

The Bench Memoranda

Prepared by law clerks, the bench memoranda are crucial documents in the Court's preparation for a calendar. Each bench memorandum must identify the documented material facts of the case, the issues the panel must decide (which can be different from the issues the parties present), and the correct law to be applied (which may not be cited in the briefs). Bench memoranda usually are not more than 25 pages

The purpose of the bench memoranda is to help the panel judges determine the factors that must be considered in the decision-making process. The memorandum reveals what an appeal really "looks like" when both side's arguments are analyzed in light of the lower court's decision and the correct law and facts. The law clerk responsible for the bench memorandum proposes a resolution of the appeal to the panel and recommends, in accordance with Court rules, whether an opinion or unpublished memorandum disposition should be prepared. In short, the bench memorandum is a complete analysis of the appeal and it can become the foundation for the Court's opinion.

Sometimes, bench memoranda will track the issues and arguments presented in the briefs. Many times, however, they do not, because counsel from one or both sides ignore issues the Court must attend to, present the facts in a way not in accordance with the record, cite the wrong law on one or more of the issues, or a combination of these factors. The most common mistakes found in briefs prepared for the Ninth Circuit are described later in this article.

Work on each chamber's bench memoranda begins two to four weeks before the next calendar's appeals are set for argument. Simultaneously, various motions pertaining to appeals on the calendar must be dealt with, as well as any work remaining from previous calendars (petitions for rehearing, writing and editing opinions or memorandum dispositions, screening calendars and *en banc* decisions).

Bench memoranda are prepared for all appeals except those in which a resolution is readily apparent. On 3-weight cases, each judge's chambers has discretion either to prepare a bench memorandum or a proposed memorandum disposition. The judge's chambers responsible for preparing the bench memorandum or proposed memorandum disposition also assesses whether oral argument is needed in the 3-weight case. Ordinarily, oral argument is the rule on appeals weighted 5 or above.

All memoranda are circulated among the panel judges ten days before the calendar begins, so that the other chambers have adequate time to review and critique them before oral argument. Law clerks are used to having their memoranda severely critiqued, sometimes very "publicly" within the Court, during these ten days. Every law clerk knows that three judges and two other law clerks stand ready to dissect each memorandum once it is circulated among the three chambers. Sometimes, judges will state upon circulation that they disagree with their law clerk's memorandum. But this is all part of the normal process of debate in reaching a decision in an appeal. For those involved, it is a crucible for learning how Courts go about the decision-making process.

Oral Argument

Preparing for a calendar is intense, relentless, fast-paced work. Parties appearing in the Ninth Circuit should know that by the time oral argument takes place, the judges are thoroughly acquainted with the briefs (and their quality), the district court record, and the case law. The notebooks the judges prepare for *each day's* appeals are three inches thick. The judges are ready to fire questions at oral argument and they expect responsive answers, not evasions. The judges expect attorneys to be as prepared as they are, which means advocates had better know every nuance of the facts and case law. *The judges' last impression of a case is the oral argument, so its importance cannot be underestimated.* When the judges walk off the bench, they go straight to a conference room to decide the fate of all the appeals heard that morning.

What The Court Does in Non-Calendared Months

The work on a new calendar normally must begin immediately when the previous month's calendar is finished. If an opinion or unpublished memorandum disposition from a previous calendar is to be issued, its writing must be squeezed in somehow between calendars or finished during one of the three or four months per year the judge is not on calendar. Although four months "off calendar" may seem a luxury to those who are unfamiliar with the inner workings of the Court, those months free from new appeals are a necessity for finishing work that remains from previous calendars. Chambers will stagger months "off calendar" at regular intervals to deal with the inevitable backlogs. Long waits for a decision usually mean that a panel is having trouble resolving an appeal, and that the judges are trying to deal with each other's concerns while at the same time preparing for new calendars. Often, long-awaited decisions are accompanied by dissents, an indication

Continued on page 17

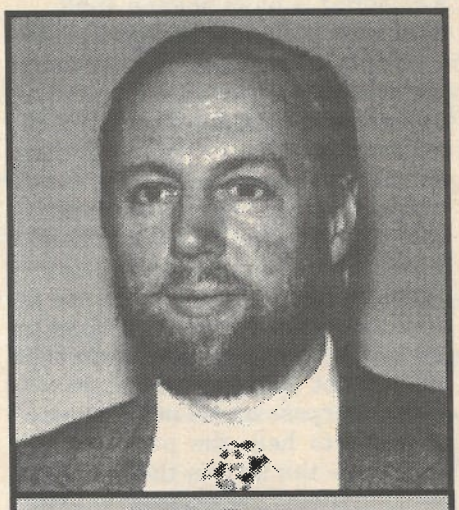
Getting Together

Special ethical issues for attorney mediators

What is an attorney-mediator to do if the duties as a mediator are in conflict with a rule of attorney ethics? What if promises of confidentiality in mediation are in conflict with a corresponding legal duty to disclose information, such as the unethical acts of a fellow attorney? Or how about the satisfied mediation customer who subsequently attempts to hire the attorney-mediator's firm to represent him in another matter? What ethical duties pertain to such matters, and should they be judged by mediator or attorney ethical standards?

With the growth of the field of alternate dispute resolution (ADR), sophisticated clients are demanding that their attorneys add such methods to their repertoires, while lawyers are themselves increasingly interested in working as ADR neutrals. What lawyers and their law firms are discovering, however, is that there are many ethical questions that arise for the mediator-attorney, and that many of these questions are as yet largely unanswered.

A recent article in the *National Law Journal* by D. Alan Rudlin, Greer D. Saunders, and Barbara L. Hulbert (November 18, 1996, p. D9), has as its premise that the current codes of professional responsibility for lawyers, such as the ABA's Model Rules of Professional Conduct, have not yet evolved to keep pace with the growth of lawyer participation in ADR. As a result, attorneys interested in incorporating ADR into their practices may find that there are inconsistencies between the model rules and specific ADR rules that exist in certain states. The article's authors assert that often there is simply no guidance as to the obligations of



Drew Peterson

attorneys who choose to act as mediators.

At this time, there are no universally accepted ethical standards for mediators in general, nor for attorney-mediators. The American Arbitration Association, (AAA), the Society of Professionals in Dispute Resolution (SPIDR), and the ADR Section of the ABA have worked together to create Model Standards of Conduct for Mediators, but although they have been endorsed by both AAA and SPIDR, they have not yet been adopted by the ABA House of Delegates. Even when they are adopted, such standards are not designed for and do not resolve the specific ethical dilemmas presented to attorney-mediators.

ABA Model Rule 8.3 requires that attorneys must report misconduct that raises a "substantial question" about another attorney's honesty, trustworthiness, or fitness to practice law. This duty may contrast, however, with other provisions guaranteeing confidentiality to the mediation process. Alaska Civil Rule 100, for example provides that "[m]ediation proceedings shall be held in private and are confidential." Thus attorney-mediators observing attorney misconduct in the mediation process could find themselves in violation of one rule or the other.

A case concerning this type of ethical dilemma is *In re. Waller*, 573 A.2d 780 (D.C., 1990). Attorney Waller represented the plaintiff in a case referred to mediation by the court. The case was for medical malpractice, and it joined as defendants a hospital and medical tissue bank, but not the doctor who performed the allegedly negligent operation. When asked by the attorney-mediator during the mediation why the surgeon had not been sued, Waller stated that he was the surgeon's attorney. Believing that Waller had a conflict of interest, the mediator told him to bring the matter before the trial judge. When Waller failed to do so, the mediator himself reported the conflict of interest to the court.

The court's mediation order in the *Waller* case included a provision that "no statements of any party or any counsel shall be disclosed to the court or be admissible as evidence for any purpose at the trial of this case." The mediator nevertheless believed that disclosure was permissible because it was a matter unrelated to the mediation and could affect the administration of justice. The District of Columbia's Board of Professional Responsibility agreed, stating that "we do not feel that the confidentiality requirement was intended to preclude disclosures such as that made by the mediator to the judge in this case."

Waller may be a starting point for having this issue addressed, but there is simply no clear guidance. The best apparent solution is for attorney-mediators to include a written waiver of confidentiality in their agreements to mediate with respect to disclosure of information required by statute or as a matter of professional responsibility. Such a written waiver, however, could still be in conflict with a broader grant of confidentiality provided by a statute or court rule, such as is found in Alaska Civil Rule 100.

The issue of whether it is appropriate for an attorney-mediator to act as an advocate for a party who has previously participated in mediation sessions conducted by that attorney acting as a mediator is arguably more clear. Two separate cases, *Poly Software International Inc.* v. Su, 880 F. Supp 1487 (D. Utah 1995), and *Cho* v. *Superior Court of Los Angeles County*, 45 Cal. Rptr 2d 863 9 Cal. Ct. App. 1995(rev. denied Jan. 31, 1996) each call for the disqualification of both the former attorney-mediator and the attorney-mediator's firm from representing parties who previously participated in mediations or settlement conferences.

The *Poly Software* holding was that an attorney who serves as a mediator cannot subsequently represent anyone in a "substantially factually related" matter, without the consent of the original parties, when the mediator has received confidential information in the course of a mediation session. In doing so, the court applied ABA Model Rule 1.9, which precludes a lawyer from representing someone whose interests are adverse to a client formerly represented in a substantially related matter. The court did so even though a mediator does not actually represent any party in an action.

> *"The law journal authors conclude that much remains to be decided and clarified for attorney-mediators and their firms as they expand into the field of ADR."*

The *Cho* case agreed with the rationale of the *Poly Software* case. In *Cho* the confidential information came from a settlement conference with a sitting judge. The judge subsequently retired and joined the firm representing one of the parties to the litigation. The entire firm was subsequently disqualified from the case, even though they attempted to set up a "cone of silence" around the judge. The court noted that "no 'cone of silence' could ever convince the opposing party that the confidences of a mediator would not be used to its disadvantage" under such circumstances.

The law journal authors conclude that much remains to be decided and clarified for attorney-mediators and their firms as they expand into the field of ADR. The benefits to attorneys of incorporating ADR into their practices, both as advocates and as neutrals, may outweigh the difficulties. But these and similar ethical questions need to be addressed to assure that attorneys will not unwittingly run afoul of their legal ethical duties in pursuing their new profession as ADR neutrals.

You can Now Reach the Bar Staff Through E-Mail!

Staff Member	Primary Duties	E-Mail-Address
Deborah O'Regan	Executive Director	oregand@alaskabar.org
Steve Van Goor	Bar Counsel	vangoors@alaskabar.org
Barbara Armstrong	CLE Director	armstrongb@alaskabar.org
Mark Woelber	Assistant Bar Counsel	woelberm@alaskabar.org
Louise Driscoll	Assistant Bar Counsel	driscoll1@alaskabar.org
Gerry Downes	Controller	downesg@alaskabar.org
Deborah Ricker	Discipline investigations, intake/attorney complaints	rickerd@alaskabar.org
Ingrid Varenbrink	Fee Arbitration Assistant & CLE Librarian	varenbrink@alaskabar.org
JoAnne Baker	Fee Arbitration Assistant & CLE Librarian	bakerj@alaskabar.org
Deborah Lash	Executive Secretary: coordinator for bar exam drafting & grading, member status changes	lashd@alaskabar.org
Norma Gammons	Discipline Section Administrative Supervisor	gammonsn@alaskabar.org
Cheryl Rapp	Legal Secretary	rappc@alaskabar.org
Karen Schmidlkofer	Accounting Assistant	schmidk@alaskabar.org
Rachel Tobin	CLE Assistant: seminars, sections, convention	tobinr@alaskabar.org
Krista Scully	Admissions Secretary & Receptionist: bar exam applications, CLE registrations, legal intern permits, Rule 81	scullyk@alaskabar.org
Robyn Helvey	Lawyer Referral Service Receptionist: address changes, mailing labels, handles requests for jury instructions	helveyr@alaskabar.org

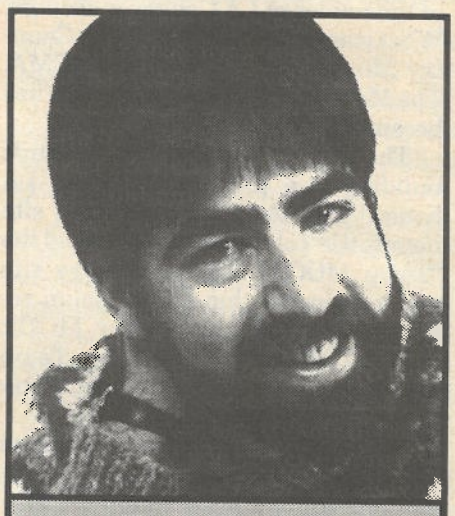
Bar Office Phone: 272-7469
Fax: 272-2932

Family Law

Alaska Supreme Court modified past child support calculation: *Matthews* test is out: civil rule 90.3 controls

A recent decision of the Alaska Supreme Court modifies the manner in which past child support obligations are determined in Alaska. In *Matthews v. Matthews*. 739 P. 2d 1298 (Alaska 1987), the Court held that a parent is obligated both by statute and by common law to support his or her children, even in the absence of a court order of support. A parent's duty of support encompasses a duty to reimburse other persons who provide the support the parent owes. The Court held that a claim for reimbursement belongs to whomever supported the children, and is simply an action on a debt. The superior court was directed on remand to determine the actual amount a parent reasonably expended in support of the children, and to equitably allocate the burden between the two parents. The court was instructed to consider any legal defenses the non-custodial parent properly raised, and was to enter appropriate findings of fact and conclusions of law pursuant to Alaska R. Civ. P. 52(a).

This method set forth in *Matthews* placed a heavy burden on a custodial parent, who was required to produce evidence of all actual expenses for the child. A parent who failed to meet this burden could lose such a claim, if receipts were not kept since the birth of the child.



Steve Pradell

A parent who failed to meet this burden appealed her case to the Alaska Supreme Court in *Vachon v. Pugliese*, Slip Op. No. 4428 (November 8, 1996), arguing that the superior court should have ordered the obligor to reimburse her for past child support as set forth in Alaska Civil Rule 90.3. The court found that *Matthews*, decided in 1987, was not determinative of the issue because the court was not asked then to decide whether the newly-enacted Civil Rule 90.3 governed the issue.

In *Vachon*, the Court reversed the trial court's ruling, holding that the superior court should have applied Rule 90.3 to determine past child support not covered by support orders, absent extraordinary circumstances. For all practical purposes, *Matthews* has been overruled by this decision, which apparently applies to all cases since Rule 90.3 went into effect in 1987.

The opinion in *Vachon* provides good reasons to replace the *Matthews* requirements with a Civil Rule 90.3 calculation: Civil Rule 90.3 has the advantage of simplicity, predictability and consistency. Requiring proof of actual costs is difficult, and incremental costs attributable to support are often underestimated. Using the Rule, it appears that a superior court judge would determine the income or potential income of the obligor during the period when support was owed, and base support on a percentage of the income earned pursuant to the formula set forth in the Rule. In *Vachon*, the Court determined that its ruling did not violate the prohibition against retroactive modification of arrearages set forth in Rule 90.3(h)(2), as there was no existing child support order for the period where reimbursement sought, and no existing arrearage to modify.

SOMETHING FOR NOTHING!

It's time to renew your section membership for 1997! Did you know that the first section you join is FREE with Bar membership? Additional sections cost $10 each.

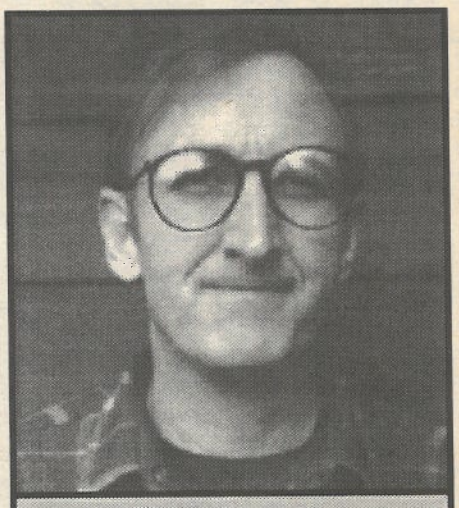
Benefits of section membership include:

- Monthly meetings
- Annual professional updates
- *Section News* newsletter
- Free telephonic hook-ups for out of town section members
- Advance notice of items of interest in your area of practice

If you don't renew, you will be dropped from section membership lists. Call the Bar office at 907/272-7469 (or fax: 907/272-2932; e-mail: tobinr@alaskabar.org) to continue your section membership!

Eclectic Blues

Death by *Feng Shui*



Dan Branch

It's always there, calling you—the sun-cursed place you left to come North to adventure. You can cover your ears with flaps from a beaver hat or with a Nordstrom's scarf, but the message will still get through.

When this quiet song of homecoming turns into a seductive siren's chant, we pack the family onto an Alaska Airlines jet and head to California where both my wife and I were born.

After two weeks of being hammered by Taku winds this winter, we crab-walked onto a stretch-737 jet and rode it South to the land of fruit and nuts.

We found the Golden State confused, as usual. During the November elections the same majority that voted to legalize the use of marijuana for medicinal purposes passed a ban on all affirmative action. In Orange County former representative Bob "B-1" Dornan lost his seat. Apparently a believer in "The X Files," the Bomber claims that his opponent won with the assistance of aliens.

The fast pace of life is wearing on the people of Los Angeles. In an effort to simplify, Angelinos now flock to Trader Joe's stores which offer microwavable heath food, quick fococcia mixes, and a large selection of wines to wash down the tasty treats. One of our SoCal friends explained, "With one hour commutes, no one has the time or the energy to cook anymore."

Government officials must also feel the energy drain. They have assigned someone to drop all but the initials out of the names of LA County museums. What was once The Los Angeles Country Museum of Art is now LACMA. The Museum of Contemporary Art has become "MOCA."

The MOCA is relatively new. While building it a permanent home, LA housed MOCA at an industrial site near Little Tokyo which was called the "Temp MOCA." The temporary site was so popular that the museum retained use of it, even after MOCA moved to its new home. The Temp MOCA has now become the Perm Temp MOCA.

When we were there, visitors to LACMA rushed through the visiting exhibits without even taking the time to read the titles. They want the simple images, quick and hot like a microwave dinner. This didn't happen when LACMA had a proper name.

Fast food fococcia and good wine can't remove the sense of frustration and unhappiness that plagues many Californians. Looking for causes that are within their power to fix, they drift to the New Age section of their local book store and discover the *Feng Shui* section. *Feng Shui* (pronounced, "Fin Shoooowee" by Angelinos) is the art of re-arranging your home to control good and bad energy.

Looking for answers, one of our SoCal friends brought a disciple of the Red Hat Tibetan School of *Feng Shui* up from San Diego to analyze her house. The *Feng Shui* master, a Mr. Swartz, helped her use plants and mirrors to keep out the bad energy while letting in the good.

My friend learned that plants are positive forces (even if they are artificial) as long as they are placed in real dirt. Fish are good too. Water can be good or bad depending on which way it flows.

As he was leaving, my friend asked Mr. Swartz if there was anything she could do about her next door neighbor. For 16 years he had cursed her every time she left the house. It was wearing on her. The master recommended that she hang a mirror outside her house to direct the neighbor's bad energy back at him.

Following directions, my friend did hang the mirror on the bad neighbor's side of the house. Three days later, the neighbor keeled over and died on his front steps. The authorities are not going to prosecute, forgoing a chance to make legal history with the first death-by-reflection case.

We learned a lot during our visit in the Land of the Odor Eaters. There's value in the crunch and flavor of freshly cooked food and having the time to prepare it in your own kitchen. Those who honor museums by pronouncing their entire names are more likely to find the artists' secrets. We also learned that mirrors can be deadly weapons—at least in Lost Angeles.

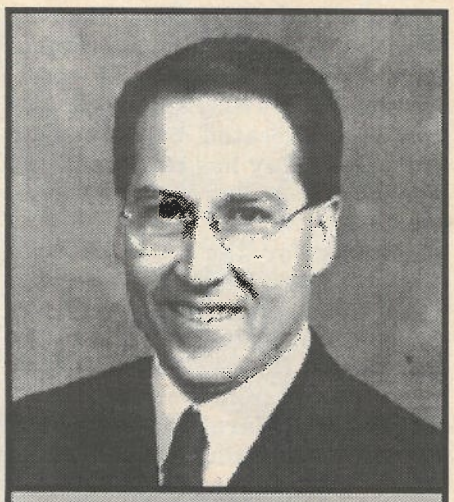
Estate Planning Corner

A disadvantage of retirement plans

There is no question that qualified retirement plans, including pension and profit sharing plans and individual retirement accounts, are outstanding tax shelters. Not only are contributions to these plans generally tax deductible, but the tax on the earnings within the plans are deferred until distributed.

Clients may overlook, however, that qualified retirement plans convert (1) capital gain into ordinary income and (2) property transferred at death that could otherwise be income-tax free into ordinary income.

Suppose a client purchases, through his IRA, 1,000 shares of publicly traded stock for $10,000. Suppose it is growth stock upon which little or no dividends are declared. Suppose the stock appreciates at a rate of 10% a year and the IRA holds the stock for 21 years. At the end of 21 years, the stock is worth $80,000. If the stock is then sold and the proceeds distributed to the client, the full $80,000 would be subject to federal income taxation at ordinary income rates, the top rate of which is currently 39.6% (IRC § 1(a))



Steven T. O'Hara

By contrast, suppose the client does not buy the stock through his IRA. Instead, he purchases the stock directly in his own name. During the 21 years he holds the stock, the client pays little or no income tax on the stock because little or no dividends are declared. When the client sells the stock for $80,000 21 years after its purchase, the $70,000 of gain over his $10,000 cost basis would be subject to federal income taxation at capital gain rates, the top rate of which is currently 28% (IRC § 1 (h)).

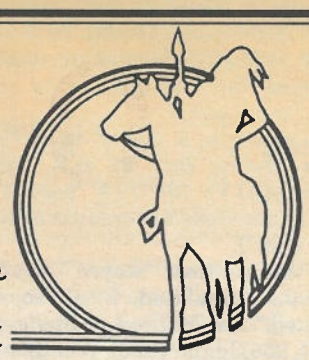
Moreover, suppose the client dies 21 years after the stock is purchased but before it is sold. If the client owned the stock directly in his own name, his estate's tax basis in the stock would be stepped-up to fair market value at date of death, completely eliminating the federal income tax on the 21 years of appreciation (IRC § 1014 (a)). On the other hand, if the stock is owned by the client's IRA, the client's IRA beneficiaries would not get a step-up in basis and the full $80,000 would be subject to federal income tax (IRC § 1014 (e)). This comparison is illustrated in Exhibit 1 following this column.

Therefore, all things being equal, if a client is going to own both growth assets and income-producing assets, he might want to consider owning the growth assets directly and having his qualified retirement plans own the income-producing assets.

Exhibit 1

Purchase Price of Stock		$10,000
Date of Death Value of Stock		$80,000
Sale Price of Stock		$80,000
	IRA Owned	**Individually Owned**
Cost Tax Basis	$0*	$10,000
After Death Tax Basis	$0*	$80,000
Sale Price	$80,000	$80,000
Income Tax Basis	($0*)	($80,000)
Gross Income	$80,000*	$ 0
Income Tax Exposure	$31,680	$ 0

*Assuming 100% of distribution is taxable.



Western States Bar Conference

FEBRUARY 26 - MARCH 1, 1997

Scottsdale, Arizona

The 49th Annual Western States Bar Conference will be held in sunny Scottsdale, Arizona, February 26 - March 1, 1997, at the Double Tree Paradise Valley Resort. Scottsdale provides an abundance of recreational, dining and shopping opportunities.

The Western States Bar Conference is an annual gathering of current and past state bar leaders, ABA officers and attorneys interested in issues affecting lawyers and bar associations. The year's topics include: integrating young lawyers into the profession, bar programs on family violence, lawyers and the Internet, and the bar's role in judicial appointments. All programs have CLE credits pending.

A special pre-meeting golf tournament will be held Wednesday, February 26 at the Stone Creek Golf Club. A casual wild west dinner and casino night will cap the Friday meeting sessions.

For further information and registration, contact Dana Vocate, Director of Administration for the Colorado Bar Association, (303) 860-1115.

Bar People

Ed Attala, former law clerk to Judge Andrews, is now clerking for U.S. District Court Judge Sedwick.....**Kevin Anderson** has relocated from Maryland to Anchorage.....**Cheryl Brooking**, formerly with Hartig, Rhodes, et.al., is now with Wohlforth, Argetsinger, et al.....**James Bendell** has closed his Anchorage office and relocated to Port Ludlow, WA.

Roger Belman, former law clerk to Judge Jahnke, is now with Guess & Rudd in Anchorage.....**Bill Bonner** has relocated from Anchorage to Valdez.....**Elizabeth Baker** is now an Assistant Municipal Prosecutor in Anchorage.....**Gayle Brown**, a former sole practitioner, is now associated with Rex Lamont Butler.

Martin Barrack, former Special Counsel to Partnow Sharrock & Tindall, is now with Objective Systems Integrators, Inc. in Folsom, CA.....**Keith Brown, Sanford Gibbs** and **Richard Waller** have formed the firm of Brown, Waller & Gibbs.....**John Tiemessen**, formerly with Hughes, Thorsness, et al. in Fairbanks, is now with Clapp, Peterson & Stowers.....**JoAnn Chung**, formerly with the PD's office, is now with the AG's office in Anchorage.

Louise Driscoll, formerly with Lane Powell, et al., is now an Assistant Bar Counsel with the Alaska Bar Association.....**Kevin Donley**, former law clerk to Judge Michalski, is now with the DA's office in Anchorage.....**Carol Daniel**, formerly with ALSC, has opened the Law Offices of Carol H. Daniel.....**George Davenport**, formerly with Robinson, Beiswenger & Ehrhardt in Kenai, is now with the PD's office in Palmer.

The former firm of **Groh, Eggers & Price**, is now Groh Eggers, LLC.....**Terry Fikes** has relocated to Salt Lake City.....**Marc June**, formerly with Birch, Horton, et al. has opened the Law Offices of Marc June in Anchorage.....**Doug Kossler**, formerly with the PD office, is now with Gilmore & Doherty.....**Barat LaPorte**, former law clerk to Justice Fabe, is now with Bogle & Gates.

Bob Linton, formerly with the DA's office, is now with the Office of Special Prosecutions & Appeals.....**James Mulhall**, former attorney with the Mat-Su School District, has relocated to Glendale, AZ.....**Susan Mason** and **John Treptow**, formerly with Atkinson, Conway & Gagnon, are now with Keesal Young & Logan.....**Christine McLeod**, formerly with ALSC in Fairbanks, has relocated to Sitka.....**Michael Sean McLaughlin**, former Assistant Bar Counsel with the Alaska Bar Association, has left that position to return to school.

Nancy Nolan, formerly with the AG's office, is now with the Alaska Court System.....**Ken Odza**, formerly with the Alaska Court System in Anchorage, is now with Faulkner, Banfield, et al. in Juneau.....**Laurie Otto**, formerly Deputy AG, is now with the International Brotherhood of Electrical Workers in Anchorage.....**Michael W. Price & Sabrina Fernandez**, formerly with Groh, Eggers & Price, and **Susan Swann**, are now with the firm of Price & Swann.

Mary Pinkel is now a Hearing Examiner for the State Human Rights Department.....**RoseAnn Rotandaro**, formerly with Ashburn & Mason, has relocated to Palo Alto, CA.....**Dick Ray** has relocated from Fairbanks to Anchorage.....**Diane A. Smith** is now staff attorney/pro se law clerk for the U.S. District Court.....**Roger Smith** has relocated from Anchorage to Newport, TN.

Nan Thompson is now with the AG's office.....**Retired Judge Tunley** has relocated from Nome to Green Valley, AZ.....**Marcia Vandercook** is currently working for the Alaska Department of Law, as staff to the Governor's Task Force on Civil Justice Reform, from her new home in Wisconsin.....**Susan Wibker**, formerly with the DA's office, is now with the AG's office.....**Laura L. Farley** of LeGros, Buchanan & Paul has become a shareholder and director with the firm.

After a summer stint in the 9 to 5 workforce, **Deborah Niedermeyer** has returned to legal writing and research on contract out of her home. Niedermeyer, who clerked with Judge **Mary E. Greene**, is a former associate at Perkins Coie Seattle. A 1976 graduate of Harvard University and 1989 graduate of NYU School of Law, she has practiced law in Alaska since 1993.....**David F. Leonard** announces the opening of the Law Office of David F. Leonard. Formerly associated with Hughes, Thorsness, Gantz, Powell, & Brundin; with Clapp, Peterson & Stowers; and with Aschenbrenner Law Offices, Leonard has been practicing in Alaska since 1989.

Leigh Ann Bauer and **Susan Carse** have opened a law office in Anchorage as Bauer and Carse.....**Russellyn Carruth** has relocated to New Jersey.....**Rosa Garner** has relocated to Madison, WI.

Peter Ginder, formerly of Kemppel, Huffman & Ginder, has opened the Law Offices of Peter C. Ginder, P.C.....**Millard Ingraham** is now living in San Francisco.....**Aleen Smith** has relocated from Anchorage to Seattle.

The firm of **Ziegler, Cloudy, King & Peterson** is now the firm of Ziegler, Cloudy, Peterson, Woodell & Seaver.....Davis & Goerig became Davis & Davis, PC. George Goerig is now a sole practitioner.


Allingham

Attorney **Lynn M. Allingham** recently completed the Intellectual Property Law Certificate Program at the University of Washington in Seattle. This 40-hour course focuses on the fundamentals of patent, trademark, copyright and trade secret Law, including franchising.

She announces the addition of Intellectual Property Law to her private law practice in Anchorage. Her current law practice emphasizes business law, mediation and arbitration.

Wee, wee, wee the people

Continued from page 2

"equal in power, dignity, and authority." *See Coyle v. Smith,* 31 S.Ct. 688, 690 (1911) (interpreting analogous phrase "this Union").

[8] *Cf.* "wee," *infra.*

[9] *See supra*, n. 3. *But cf. In re Vermont Toy Works, Inc.*, 82 B.R. 258, 324 (Bankr.D.Vt 1987) (A "pignus" is "a thing delivered to a creditor as security for debt").

[10] In this context, "stayed" most likely means "inhabited, lived, sojourned, rested." *See McLeod v. Stelle*, 249 P. 254, 256 (Idaho 1926). Whether to stay is generally discretionary, *Solarana v. Industrial Electronics. Inc.*, 428 P. 2d 411, 417 (Hawaii 1967); it may therefore be presumed that to "stay" was the little piggy's own decision, not dictated by either statute or judicial precedent. In maritime law, to "stay" is the opposite of to "touch." *In re Moncan,* 14 F. 44, 46-47 (D.Oregon 1882). Assuming a maritime connection (*cf.* "fishyback," supra n. 3), the little piggy who decided to stay home was thus likely enjoined not to touch anything in the others' absence.

[11] In ordinary usage, a "home" is "the dwelling place one shares with his family." *Bob Jones University v. S.C. Tax Comm'n*, 261 S.E.2d 309, 310 (S.C. 1979). Because there is no textual indication that the aforementioned little piggy had a family, the necessary implication may be that the five little piggies all lived under one roof and comprised a "family," in which case their "home" may actually have been a "piggery," *i.e.*, "a place where swine are kept or bred." *Whitpain Township v. Bodine*, 94 A.2d 737, 739 (Penn. 1953). Whether the little piggy owned the piggery, or merely let it from another, is not determinative of its status as "home." Indeed, "[a] motel room may be a 'home.'" *Myers v. State*, 454 N.E.2d 861, 863 (Indiana 1983). However, an apartment which contains "no furniture, except for a couch and a TV, no food, no garbage, no cooking utensils, no linens, no clothing, [with] the front door ... secured by planking" is probably not a home. *People v. Marin,* 559 N.Y.S. 2d 530, 531 (App.Div. 1990). The presence of garbage may alone connote a piggery. *See infra* n. 17.

This[12] little[13] piggy[14] had[15] roast[16] beef.[17]

[12] *See supra,* n. 1.

[13] *See supra*, n. 2.

[14] *See supra*, n. 3. Repeated use of the phrase "this little piggy" probably indicates that the activities of five separate little piggies are addressed. Otherwise, the drafters would have logically reverted to pronouns. *See City of Kenai v. McLane*, 821 P. 2d 717, 719 (Alaska 1991) (assume that every word has a useful purpose and that superfluity was not intended).

[15] In *Smith v. State*, 277 S.W. 530, 532 (1925), the Arkansas Supreme Court provided the definitive decision on "had," which it somewhat tautologically held to mean "having in possession or control."

[16] "Roast" means "[t]o expel volatile matters from by exposing to heat." *U.S. v. United Verde Copper Co.*, 71 P. 954, 956 (Ariz. 1903).

[17] A "beef" may be "either a bull, a cow, or an ox." *Maier v. Randolph*, 6 P. 625, 626 (Kan. 1885). The problem of "expel[ling] volatile matters from" a large, hoofed animal may explain why the subsequent little piggy "had none," *see infra*. It is interesting to note that "roast beef" is not ordinarily recognized as food for little piggies. In *Bishop v, City of Tulsa*, 209 P. 228 (Okla.App. 1922), the court described a manufactured "hog food" which consisted of "the trimmings from meats, fruits, bread, and vegetables, not suitable to serve to the patrons of high-class restaurants, together with certain scraps or leavings from the tables, meal, bran, and oats." In an apparently irrelevant aside, the court noted, "We cannot say as a matter of law that restaurant hash is necessarily garbage, though some of it should, as a matter of right, be so classifed." 209 P. at 230.

This[18] little[19] piggy[20] had[21] none.[22] This[23] little[24] piggy[25]

[18] *See supra,*, n· 1.

[19] *See supra* n. 2.

[20] *See supra*, n. 3.

[21] *See supra.*, n. 15.

[22] With the acerbic mixture of brevity and wit for which it is well known, the Fifth Circuit noted in a landmark case, *Intern'l Erectors, Inc. v. Wilhoit Steel Erectors,* 400 F. 2d 465, 468 (1968) : " 'None' cannot mean 'some.' "

[23] *See supra,* n. 1.

[24] *See supra,*, n. 2.

[25] *See supra,* n. 3.

went[26] "Wee,[27] wee, wee,[28] wee,"

[26] This use of the verb "went" marks an interesting lapse into contemporary slang. Rather than connoting movement from place to place, "went" in this context may be synonymous with "said," or "remarked," *e.g.*. (in its present tense): "I go, 'Hey, don't I know you from somewhere?' Then he goes, 'Wee, wee, wee!' " *Cf,* "went to work," *Rabinovitz v. Travelers Ins.* Co. 105 N.W. 2d 807, 811-12 (Wis. 1960); and "went to a vital issue," *State v. Cahny*, 249 A.2d 264, 268 (Conn.App. 1968).

[27] "We" suggests the corporate aggregate, as opposed to the individual. *Aungst v. Creque,* 74 N.E. 1073, 1074-75 (Ohio 1905). *See, e.g.,* U.S. Const. Preamble, "We the people . . . "

[28] *Cf.* the analogous triplet in "Give me a ranch and a big pair of pants and give me a Stetson too, and let me Wahoo, wahoo, wahoo," by Billy Boyd and his Cowboy Ramblers.

all[29] the[30] way[31] home.[32]

[29] "The word 'all' is not a word of novel import, but is part of the layman's everyday vocabulary." *O'Brien v. Village Land Co.* 780 P. 2d 1, 2 (Colo.App. 1988); *Travelers Ins. Co. v. Cimarron Ins. Co.*, 196 F.Supp. 681, 684 (D.Oregon 1961). Every layman therefore knows the old story of how, "[i]n considering whether the statute of Mertin, in which the words *'omnis viduae'* were used, applied to each of five kinds of dower, Lord Coke observed, *'Oui omne dicit nihil excludit,'* which literally translated means, 'He who says all does exclude nothing.'" 196 F.Supp. at 684. *See also State Tax Comm'n v. Marcus J. Lawrence Memorial Hospital,* 495 P. 2d 129, 130 (Ariz. 1972) ("the word 'All' means the whole amount").

[30] "It is a rule of law well established that the definite article 'the' particularizes the subject which it precedes." *Brooks v. Zabka,* 450 P. 2d 653, 655 (Cole. 1969). "It is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an.'" *Id.; accord, Lower Manhattan Loft Tenants v. N.Y.C. Loft Board*, 496 N.Y.S.2d 979, 982 (App.Div. 1985) ("'the' refers to someone or something that is unique or exists as only one at a time"); *Cf.* "this," *supra* n. 1. Necessarily, then, there was only one "way home" for the little piggy. As the mode of transport, by law, must have been train, the only conclusion is that the piggery was reachable by railroad track but not by road or footpath.

[31] In legal terms, a "way" is "[t]hat along which one passes to reach some place; a road, street, track or path." *Beach v. Soles,* 120 F.Supp. 400, 404 (N.D.Calif. 1954); *see also Robinson v. City of Bartlesville Bd, of Ed.*, 700 P. 2d 1013, 1015 (Okla. 1985) ("A passage, path, road or street"). But *see supra*, n. 30. "Way" in this context must be synonymous with "railroad track."

[32] *See supra*, n. 11. Once home, a little piggy is afforded the protection of the Davis-Bacon Act, 40 U.S.C.A. § 276a (West 1992), but probably not the Mann Act, 18 U.S.C.A. §§ 2421-2424 (West 1993). The intricacies of the federal statutory scheme could themselves be the subject of another article.

Solid Foundations

1997 IOLTA grant applications available

In 1996, the Alaska Bar Foundation allocated $193,000 to IOLTA grant recipients: the Alaska Pro Bono Program received $180,000; the CASAs for Children was provided $3,000; the Catholic Social Services' immigration work received $6,0001 and the Alaska Women's Resource Center garnered a $4,000 grant. Each organization provided legal services to Alaskans who otherwise would be unassisted.

The Alaska Pro Bono Program continued its outstanding work with members of the Alaska Bar Association and provided much needed free legal representation to the less advantaged. The statewide effort is incomparable in the number of people it serves and the number of volunteers it recruits.

Mary Hughes

The immigration work, a part of the many services provided by Catholic Social Services, received IOLTA assistance and was the focal point for the provisioning of legalization assistance to immigrants in Alaska.

The volunteers trained by CASAs for Children helped the Alaska Court System make more informed decisions about the future of Alaska's children.

The Alaska Women's Resource Center furthered its goal of providing legal information and referrals to needy women.

These four nonprofit organizations epitomize the care and generosity found in Alaska among its people. The Alaska Bar Foundation is proud to be a supporter of such fine and outstanding programs.

Grant applications for 1997 IOLTA grants are now available. Organizations which provide legal services for the disadvantaged or improve the administration of justice are eligible to apply. Applications are due by April 15 for a July 1 — June 30 funding cycle. Applications may be obtained from the Alaska Bar Association.

Law office moves

James R. Szender has relocated his law office from midtown to Suite 1250 of the Bank of America Center, located at 550 West Seventh Avenue, in downtown Anchorage. He will continue his general practice there, emphasizing real estate, business, probate, and municipal and administrative law and litigation.

Szender is an honors graduate of the University of the Pacific, McGeorge School of Law and has been in private practice in Anchorage for more than 14 years. He has represented the cities of St. Paul, Stebbins, Anchorage, and Whittier, participated in the Exxon Valdez litigation, and served as a hearing officer for the University of Alaska. He has also written and lectured on several subjects, including Native lands and land claims, small business formation, and landlord-tenant law.

In Honor of
Justice Jay A. Rabinowitz

You are cordially invited to a concert to honor the retirement of

Justice Jay A. Rabinowitz

and

his 37 years of service to the Alaska Court System

Discovery Theatre
Alaska Center for the Performing Arts
Anchorage

Friday, February 28, 1997

Concert will begin ***promptly*** *at 7:30 p.m.*

Champagne and dessert reception follows in the Carr-Gottstein Lobby.

Discovery Theatre doors open at 7:00 p.m.
No reserved seating.

Cost: *$25 per person. Seating is limited and will be confirmed on a first response basis.*

This event is supported by grants from the Alaska Bar Association and the Anchorage Bar Association.

REGISTRATION FORM

Payment must be received before February 10, 1997. Mail this form and a check payable to the Alaska Court System, Attn: Bobbie Heym, Justice Rabinowitz Retirement, 820 West 4th Avenue, Anchorage, Alaska 99501; or purchase your ticket at the Alaska Bar Association, 510 L Street, Suite 602, Anchorage. **Space is limited. No reserved seating.**

Name: _____

Address: _____

_____

No. of Persons Attending ____ x $25 per person = $_____ . (total enclosed)

Persons requesting accommodations because of a disability should contact Bobbie Heym at 907/264-8232 no later than February 14, 1997.

1997 CLE Seminar Video Replay Schedule

LOCATION SITES

Dillingham	Jury Room, Courthouse
Fairbanks	Cook Schuhmann & Groseclose Conference Room
Juneau	Dillon & Findley Conference Room
Kenai	Courthouse Jury Assembly Room
Ketchikan	State Office Building Law Library (2nd Floor)
Kodiak	Law Office of Jamin, Ebell, Bolger & Gentry
Valdez	Law Office of William Bixby

Call or fax the Bar office to register: Phone 907-272-7469 / fax 907-272-2932.

Practical Technology Solutions for the Small Law Office (#97-03)
(Anchorage: 1/23/97)

Dillingham:	2/28/97, 12 noon
Fairbanks:	2/28/97, 9 a.m.
Juneau:	2/28/97, 9 a.m.
Kenai:	3/14/97, 1 p.m.
Ketchikan:	TBA
Kodiak:	4/19/97, 10 a.m.
Valdez:	TBA

■ **Discipline Over Easy (#97-15)**
(Anchorage: 2/7/97)

Dillingham:	TBA
Fairbanks:	3/7/97, 9:00 a.m.
Juneau:	3/7/97, 9:00 a.m.
Kenai:	3/7/97, 1:00 p.m.
Ketchikan:	3/8/97, 9:30 a.m.
Kodiak:	3/8/97, 10:00 a.m.

■ **Doing Business with Big: Brother: Problems and Procedures in Administrative Practice (#97-01)**
(Anchorage: 2/27 and 2/28/97)

Dillingham:	No Replay
Fairbanks:	3/28/97, 9 a.m.
Juneau:	3/28/97, 9 a.m.
Kenai:	No Replay
Ketchikan:	No Replay
Kodiak:	4/12/97, 10 a.m.
Valdez:	TBA

■ **1997 Probate in Alaska (#97-04)**
(Fairbanks: 2/21/97)

Dillingham:	TBA
Juneau:	4/25/97, 9:00 a.m.
Kenai:	4/25/97, 1:00 p.m.
Ketchikan:	6/14/97, 9:30 a.m.
Kodiak:	4/26/97, 10:00 a.m.

■ **Comanagement in Alaska: A Viable Alternative to Dual Management Under ANILCA? (#97-02)**
(Anchorage: 3/4/97)

Dillingham:	4/4/97, 12 noon
Fairbanks:	4/4/97, 9 a.m.
Juneau:	4/4/97, 9 a.m.
Kenai:	No Replay
Ketchikan:	No Replay
Kodiak:	4/5/97, 10 a.m.
Valdez:	TBA

Call the Alaska Bar Office at 907-272-7469 for more information on video replays.
Or fax us at 907-272-2932 or e-mail alaskabar@alaskabar.org

NEWS FROM THE BAR

Proposed Bar rule and Ethics Opinion

Bar Rule 16(e)

PROPOSED ADDITION GIVING THE COURT AND THE BOARD THE DISCRETION TO REQUIRE A RESPONDENT TO UNDERGO A LAW OFFICE AUDIT

(Additions italicized; deletions bracketed and capitalized)

Rule 16. Types of Discipline and Costs.

. . .

(e) Law Office Audit.

When a finding of misconduct is made, in addition to any discipline listed above, the Court or the Board may require the Respondent to undergo an audit of the Respondent's law office at the Respondent's expense by an auditor or auditing entity approved by the Board and to comply with the recommendations of the audit. The auditor or auditing entity will inform Bar Counsel of the findings and recommendations of the audit.

Ethics Opinion 95-5 on Surreptitious Taping Withdrawn by Board

Ethics Opinion 95-5 concerning undisclosed tape recording of conversations with potential witnesses in criminal cases was withdrawn by the Board of Governors at its October 1996 meeting.

The Board's vote followed a recommendation by the Alaska Rules of Professional Conduct Committee to withdraw the opinion in light of the Alaska Legislature's amendment to the Victim Rights Act, AS 12.61. The amendment prohibits defense counsel and their investigators from surreptitiously recording interviews with victims and potential witnesses in criminal cases.

The Committee observed that a lawyer is prohibited under Rule of Professional Conduct 4.4 from using means that have no substantial purpose other than to embarrass, delay or burden a third person nor use methods of obtaining evidence that violate the legal rights of such a person. Since a state law now forbids surreptitiously recording interviews, a defense lawyer who does so would be violating this rule.

Since the opinion condoned what the rule and statute prohibited, the Committee recommended, and the Board directed, that it be withdrawn.

Attorney X admonished for communicating with opposing party

Attorney X received a written private admonition for contacting an opposing party represented by counsel, a violation of Alaska Rule of Professional Conduct 4.2. The attorney represented Red Business, which had interests in fishing boats. Attorney A represented Green Business, which also had interests in the boats. Both clients were involved in pending transactions to refinance and sell the vessels. Attorney A advised Attorney X to deal exclusively with him. Attorney X contended, wrongly, that the respective interests of Red Business and Green Business did not overlap, and communicated orally and in writing with Green Business concerning the boats. Private discipline was appropriate because Attorney X's misconduct caused none of the harm that Rule 4.2 is designed to prevent, namely, overreaching of Attorney A's client or other interference in Attorney A's attorney-client relationship. Mitigating factors included the absence of any prior disciplinary record. There were no aggravating factors.

1997 Alaska Bar CONVENTION HIGHLIGHTS

May 8 - 10, 1997 • Centennial Hall, Juneau

Come to beautiful Southeast Alaska for the 1997 Convention!
Watch for the convention brochure in the mail!

CLEs
Thursday, May 8
Morning
Politics, Public Policy and the Law
A panel of distinguished members discuss how politics and public policy have shaped the way law is made and interpreted in Alaska.

Noon
Alaska Bar Association Annual Meeting and Luncheon

Afternoon
For the First Time!
Update on Recent Alaska Appellate Decisions
Theresa Newman, Lecturer in Law, Duke University School of Law & General Editor, *Alaska Law Review*

Friday, May 9, 1997
Morning
They're Back!
Update on Recent U.S. Supreme Court Opinions
Professor Peter Arenella, UCLA School of Law and Professor Erwin Chermerinsky, USC Law Center

Afternoon
He got rave reviews in Fairbanks in 1995!
A Global Perspective on the Law, the Courts, and Cross-Cultural Issues
Rev. Dr. Michael Oleksa

Saturday, May 10, 1997
9:00 a.m. - 4:00 p.m.
Voir Dire: The Phil Donahue Approach to Jury Selection
A panel of a judge and two experienced trial attorneys use breakout groups and demonstrations to show you how to get answers to difficult questions.

Special Events
Thursday, May 8, 1997
6:30 - 8:00 p.m.
President's Reception
Gastineau Salmon Hatchery

8:00 - 10:00 p.m.
"Politics, Public Policy and ...Poetry?"
A public performance of attorney-artists' original works. Coordinated by the Juneau Bar Association.
Valentine's Coffee House

Friday, May 9, 1997
6:30 - 10:00 p.m.
Annual Awards Banquet

Saturday, May 10, 1997
Invitation to the Bench and Bar from the Juneau Bar Association
Watch for details about a special legal community event to be held Saturday!

For more information call
907-272-7469

Call the Alaska Bar office 907-272-7469 / fax 907-272-2932
e-mail alaskabar@alaskabar.org for more information.

UNITED STATES DISTRICT COURT
for the District of Alaska
CLERK OF COURT

Office Hours

Effective Monday, January 13, 1997, the office hours for the U.S. District Court will be 9:00 a.m. to 4:30 p.m. Monday through Friday.

Filing Fees

Effective December 18, 1996 the following fees will be in effect:

Civil Filing fee	$150.00
Adversary Filing fee in Bankruptcy	$150.00
Attorney Admission fee	$ 50.00 (*$75 proposed).

The Administrative Office has raised the Attorney Admission Fee to $50, with $20 going to the Treasury and $30 to the Administrative Office. The Court is proposing to add an additional $25 to help support the local Bar/Bench District Conference. Also the Court is proposing to require attorneys appearing from out of the district *(pro hac vice)* to pay the same attorney admission fee of $75. Comments regarding this proposal should be addressed to:

Clerk of Court
222 West 7th Ave., #4
Anchorage, Alaska 99513

Filing of Documents

To assist with the filing of documents before 9:00 a.m. and after 4:30 pm, a "drop box" has been placed outside the Clerk's Office, room 229. This drop box is for use only after 4:30 p.m. or before 9:00 a.m. Documents placed in the drop box between 4:30 p.m. and 7:30 a.m. will be file stamped with the previous day's date. Documents left in the drop box between 7:30 a.m. and 9:00 a.m. will be file-stamped with the current day's date. Documents placed in the drop box between 7:30 a.m. and 9:00 a.m. will not be available for court hearings that morning.

When an original document and one copy are filed accompanied by a diskette containing that document, the diskette size must be three and one-half inches. Larger size diskettes will not be accepted.

Alaska Bar Association

CLE

Discipline Over Easy:
An Informal Breakfast with Bar Counsel

Friday, February 7, 1997
8:00 -10:00 a.m. • Hotel Captain Cook, Anchorage

Topics:
- Overview of Discipline Section Functions
- Short take on the Disciplinary Process: Life Cycle of a Grievance
- Top 10 Reasons Why Grievances are Filed
- How to Respond to a Grievance, OR
  Don't Just Write a Letter Telling Us Your Client Is A Jerk!
- Your Disciplinary Record: What Counts and How Much
- Informal Ethics Advice: What To Expect
- Most Common Requests for Informal Ethics Opinions
- Ethics Committee Formal Opinions
- Top 15 Formal Ethics Opinions by the Alaska Bar Association
- National Trends
- Q & A Session

Faculty
Steve Van Goor, Bar Counsel
Louise Driscoll, Assistant Bar Counsel
Mark Woelbar, Assistant Bar Counsel

Registration: $55 includes breakfast
CLE Credits: 2.0

Watch for the brochure in the mail!

• •

Comanagement in Alaska:
A Viable Alternative to Dual Management Under ANILCA?

Tuesday, March 4, 1997 • 8:30 a.m. - 5:00 p.m.
Hotel Captain Cook, Anchorage

Sponsored by the Alaska Native Law Section

Topics
- Legal Authority & Impediments for Comanagement
- Comanagement Outside Alaska
- Comanagement in Alaska
- Comanagement: A Viable Alternative to Dual Management? Dialogue & Questions

Faculty - in alphabetical order
Lauri J. Adams, Regional Solicitor, U.S. Department of Interior
Taylor Brelsford, U.S. Fish & Wildlife Service
Les Carpenter, Inuit Leader in Canadian Comanagement
John Coady, Alaska Department of Fish & Game
Jerry Couture, Yukon Territory Comanagement Official
The Honorable *Jay Hammond*, Former Governor of Alaska (invited)
Kathleen Hill, Tribal Policy Director, Region X, EPA
Charles Johnson, Director, Polar Bear Commission
Larry Merculieff, Indigenous People's Council for Marine Mammals
Myra Munson, Sonosky, Chambers, Sachse, Miller & Munson
Caleb Pungowiyi, Eskimo Walrus Commission
Frank Rue, Commissioner of Fish & Game, State of Alaska
Don Samson, Native American Fish & Wildlife Society (invited)
Calvin Simeon, Director, Natural Resources, Association of Village Council Presidents
Judge *Eric Smith*, Alaska Superior Court, 3rd Judicial District
Sky Starkey, Tribal Attorney
The Honorable *Fran Ulmer*, Lt. Governor, State of Alaska
Peter Usher, International Authority on Fish & Wildlife Comanagement, Ottawa
Deborah Williams, Special Assistant to the Secretary, U.S. Department of Interior, Anchorage

Registration: $135 includes luncheon
CLE Credits: 7.75

1997 Probate in Alaska
LIVE in Anchorage and Fairbanks

Do you do probate? Did you know the rules have changed effective January 1, 1997? Start the year off with a review of these important changes!

Fairbanks:	Anchorage:
Friday, February 21, 1997	Wednesday, March 26, 1997
9:00 AM - 4:00 PM	9:00 AM - 4:00 PM
Regency Hotel	Hotel Captain Cook

Morning Agenda:
- 1996 Revisions to the Alaska Uniform Probate Code

Afternoon Agenda:
- A "How To" for Simple Estate Planning
- Administration of an Estate
- Informal Opening of an Estate
- Informal Closing of an Estate

Faculty
Probate Master *Alicemary Closuit*
Probate Master *John Duggan*
Richard Hompesch, Hompesch & Associates
Jo Kuchle, Cook, Schuhmann & Groseclose
Tonja Woelber, Sole Practitioner

Registration:	Morning Session Only:	$90
	Afternoon Session Only:	$90
	All Day (both sessions):	$110
CEL Credits:	5.25	

Look for the brochure in the mail!
Also, watch for an announcement about a possible LIVE Probate CLE in Juneau!

Sponsored by the Estate Planning & Probate Law Section

• •

Defense and Prosecution of Environmental Crimes in Alaska:
How to Keep Your CEO Out of Jail

Friday, April 11, 1997 • 8:30 a.m. - 5:00 p.m.
Hotel Captain Cook, Anchorage

Topics:
- Overview of Environmental Law — Criminal Penalties
- What Makes a Federal Environmental Case Civil or Criminal?
- Prosecution of Environmental Crimes -State and Federal
- Defense of Environmental Crimes
- View from the Bench
- Trial Problems and Sentencing Issues

Luncheon Address:
"Environmental Prosecutions: Trends & Dispositions"
Lois Schiffer, Assistant Attorney General, Environmental & Natural Resources Division, U.S. Department of Justice, Washington, D.C.

Faculty:
Judge H. Russel Holland, U.S. District Court
Lois Schiffer, Assistant Attorney General, Environmental & Natural Resources Division, U.S. Dept. of Justice, Washington, D.C.
Deborah Smith, Assistant Chief, Environmental Crimes Section, U.S. Dept. of Justice, Washington, D.C.
Robert Bundy, U.S. Attorney
Timothy Burgess, Asst. U.S. Attorney
Ron Sutcliffe, Asst. Attorney General, State of Alaska, and Special Asst. U.S. Attorney
Jeffrey Feldman, Young & Feldman
Michael Spaan, Bogle & Gates

Registration Fee: $145, includes extensive course materials
Lunch only: $25
CLE Credits: 7.0

Watch for the brochure in the mail!

Call the Alaska Bar Association at 907-272-7469 / fax 907-272-2932
e-mail: armstrongb@alaskabar.org

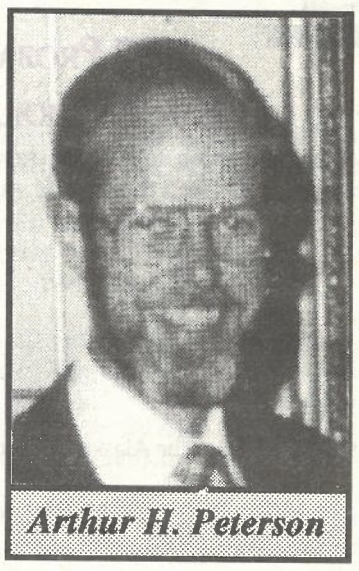
ALSC President's Report

30 years and still going

The word "strong" is missing from the end of that heading because the Alaska Legal Services Corporation is missing people and missing offices it used to have — staff and offices necessary to provide adequate legal services to the indigent people of our state. But 1997 marks ALSC's 30th anniversary.

We used to be 14 offices strong, with 78 to 97 employees. (I am fuzzy on the employee number because various counts include VISTA and other volunteers.) Now we have five and a half offices, with 32 employees and a few volunteers. Having survived the Reagan era, when he tried to zero out the national program altogether, we have now lost close to a million dollars in federal and state funding just since 1995.

The corporation was formed in 1966, and its incorporators (*Herb Soll, Dave Call, and Ted Pease*) held the first meeting in September of that year.



Arthur H. Peterson

However, it was in July of 1967 that an executive director was hired and business was actually begun. *Bill Jacobs* was that first executive director, serving until May 1970.

From then until June 1984, when *Robert Hickerson* was promoted from chief counsel to executive director, eight people also held that position: *Richard Buckley, Phil Byrne, Dave Wolf, Frank Flavin, Loyette Goodell, Jim Grandjean, Gordon Jackson, and Ralph Knoohuizen. Robert,* with 12 and a half years in office already, clearly holds the record.

Past presidents are still around and active: *Ted Pease, Chancy Croft, Max Gruenberg, Cari John (nonattorney), Margie MacNeille, Tony Strong, Connie Sipe, Art Peterson, Lloyd Miller, Maryann Foley, Will Schendel, Dave Case, Mike Smith* (nonattorney)

Serving on the board of directors since 1974 (first as an alternate member), I've seen the satisfying growth and the distressing reduction that the corporation has survived. Let's hope that it survives the current crisis, too.

The current national scene is still grim, but not hopeless. On the last day of the federal fiscal year, September 30, Congress passed and the President signed the FY 97 omnibus appropriations bill that included $283 million for the Legal Services Corporation. That's $57 million less than the $340 million sought, but $5 million more than the FY 96 appropriation. *Senator Ted Stevens'* future role as chair of the Senate Appropriations Committee should help, but the election resulted in Senate and House membership that leaves the LSC's funding uncertain.

Incidentally, in case any of you might be looking for a tough job, the president of the Legal Services Corporation has resigned, and a search committee is looking for his replacement. Notice will appear in the Federal Register soon.

On the state level, *Governor Knowles* has included $100,000 for ALSC in his requested FY 98 budget. That amount is down from the $260,000 he requested last year, which the legislature reduced to $100,000. Although, as a legal services supporter, he fought to increase the $100,000 during the 1996 special session, he has now apparently decided to acquiesce in the legislature's budget-cutting craze.

Several municipal contributions, along from with some nonprofit corporations, are a major help. This fall's direct appeal for attorney contributions has produced $32,049, as of January 2, 1997, with one couple (both attorneys) giving $10,000! But nothing has matched our recent million-dollar loss of federal and state funding.

The ALSC board of directors has closed offices, cut positions, reduced some positions to half time, reduced some employee benefits, denied cost-of-living adjustments, sub-leased out some of the office space, and pursued a variety of other cost-cutting measures, while trying to maintain a statewide system of providing legal services to the poor.

Recognizing this dire situation, the Alaska Bar Association's Board of Governors recently reversed its October denial of our request to waive CLE fees for ALSC attorneys taking necessary continuing legal education seminars, and agreed to allow 30 CLE admissions per year. Some of our funding sources require ongoing legal training as a condition of continued funding. Relying on our attorneys' dedication to serving the poor and to the principle of equal access to the justice system, we pay them a minimal salary. We can't demand that they donate CLE fees for the classes relevant to their work, and the corporation, itself, cannot readily pick up the tab. We appreciate the bar's assistance with this item.

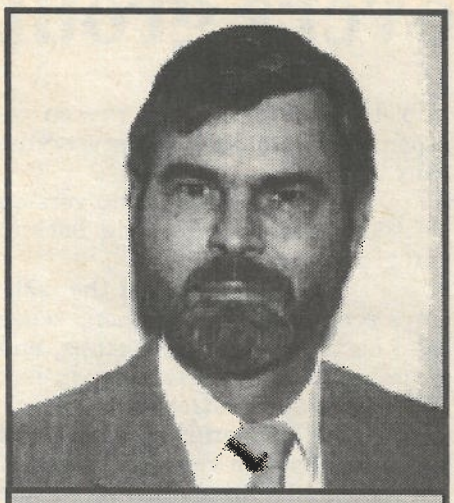
Try to picture law practice without ALSC — without the expertise, people, and structure needed to serve the several thousand ALSC clients each year. Think of the pro bono need that the remaining practitioners would have to fill.

Another action the Board took at its December 1996 meeting was to agree to join several other legal services programs in challenging some of the practice restrictions imposed on us by Congress last spring . Among the particular concerns are the imposition of the long list of restrictions on what services we may provide with NON federal money and the denial of the right to collect attorney fees (under Alaska's Civil Rule 82, for example) when we win in court. *Legal Aid Society of Hawaii, et al. v. Legal Services Corporation* should be filed by the middle of January. More about this action later.

So, join with ALSC in commemorating our 30th year, and help us strive for a continued, strong legal services program.

Bankruptcy Briefs

Fraudulent transfers



Thomas Yerbich

There are basically three avenues available to the trustee to avoid fraudulent prepetition transfers: (1) "actual" fraud [§ 548(a) (1)]; (2) "constructive" fraud [§ 548 (a) (2)]; or (3) fraudulent conveyance under state law [§ 544 (b) /AS § 34.40.010]

Actual Fraud [§ 548(a) (1)]

A transfer made with an "actual intent to hinder, delay or defraud" a creditor, whether existing or future. If the transfer is made with the requisite intent to either "hinder" or "delay" or "defraud" it is proscribed. Although often used synonymously or interchangeably, each has a somewhat different meaning. As commonly used, "hinder" is to make slow or difficult a process, causing harmful or annoying interference; "delay" is to stop, detain or hold back in time, usually by interference; and "defraud" is to deprive of something by deception or fraud. Thus, one may "hinder" without delaying or defrauding or "delay" without fraud. [*In re Adeeb*, 787 F2d 1339 (CA9 1986)]

It is not the effect of the transfer that governs, but the intent of the debtor in making the transfer. Conversely, the "no harm—no foul" rule does not apply; the fact that no creditor was injured by the debtor's action is irrelevant. [*Id.*] An intent to hinder, delay or defraud is usually inferred from the facts and circumstances surrounding the transaction. More common indicia of fraud are: (1) actual or threatened litigation against the debtor; (2) transfer of all or substantially all the debtor's property; (3) attempts to conceal the transfer; (4) insolvency or unmanageable indebtedness; (5) a special relationship between the debtor and transferee; and (6) retention by debtor of beneficial use of the property involved in the putative transfer [see In re *Acequia, Inc.*, 34 F3d 800 (CA9 1994)1. The presence of a single badge of fraud may spur mere suspicion; the confluence of several can constitute conclusive evidence of an intent to defraud. Once indicia of fraud has been established, the burden shifts to the transferee to establish some "legitimate supervening purpose" for the transfer. [Id.]

Constructive Fraud [§ 548 (a) (2)]

A transfer for less than "reasonably equivalent value" at a time when the debtor was insolvent, which renders the debtor insolvent, or the debtor is placed in a position that the debtor can not reasonably expect to pay future obligations. Value is defined as property or satisfaction or securing a present or antecedent debt [§ 548 (d) (2) (A)], including an equitable claim [*In re United Energy Corp.*, 944 F2d 589 (CA9 1991)].

The first prong, "reasonably equivalent value," is undefined by the Code. Only one bright-line test exists: A noncollusive foreclosure sale regularly conducted under state law is conclusively presumed to be reasonably equivalent value [*BFP v. Resolution Trust Corp.*, 511 US 531, 114 SCt 1757, 128 LEd2d 556 (1994)]. However, a foreclosure sale may be set aside on any grounds permitted by state law, *e.g.*, the sales price is so grossly inadequate as to shock the conscience or is not commercially reasonable [*In re Lindsay*, 59 F3d 942 (CA9 1995) *cert. den.* 116 SCt 778 (1996)1 Beyond that, the issue gets incredibly murky. In fact, it might aptly be described as either a "prism in a fog" or a "riddle surrounded by a puzzle, wrapped in an enigma."

Forget the so-called "*Durrett* rule," i.e., 70% of the fair market is a benchmark below which reasonably equivalent value cannot exist, or any other easily applied mechanical rule. The generally accepted rule is that reasonably equivalent value is determined by the totality of the facts and circumstances surrounding the transfer. The majority in *BFP (in dicta)* appears to have tacitly approved of this approach outside the regularly conducted, noncollusive foreclosure sale situation.

Courts have focused on the putative benefit received by the debtor and, inferentially, the estate (creditors); however, the value received need not directly benefit creditors by being susceptible to direct attachment and execution [*In re Roosevelt*, 176 BR 200 (BAP9 1994)]. Moreover, value received by a third-party may be sufficient if the debtor received the original consideration or the relationship between the debtor and the third-party is such that the debtor realizes a benefit as well [*In re R.M.L., Inc.*, 195 BR 602 (Bank.MD.Pa 1996)].

Factors courts have considered are: (1) differential from fair market value; (2) arm's length nature of transaction; (3) relationship between the debtor and the transferee; (4) relative bargaining position of the parties; (5) executory promise of questionable value or performance; (6) risk to debtor that benefit will be realized; (7) market conditions at the time of transfer; (8) effect on the debtor's financial condition; (9) effect on ability of debtor to continue business operations; (10) ordinariness of the transaction; and (11) good faith of transferee. [*E.g., Mellon Bank, N.A. v. Metro Communications,* 945 F2d 635 (CA3 1991), *cert. den.* 503 US 937 (1992); *In re Morris Communications NC, Inc.*, 914 F2d 458 (CA4 1990); *In re R.M.L., Inc.*, 187 BR 455 (Bank.MD.Pa 1995); *In re Jodoin*, 185 BR 98 (Bank.D.NH 1995); *In re Treasure Valley Opportunities, Inc.*, 166 BR 701 (Bank.D.Id 1994); *In re Chomakos*, 170 BR 585 (Bank.ED.Mich 1993) *aff'd* 69 F3d 769 (CA6 1995:), rehrg den.]

The second prong involves the "unreasonable small assets: ("USA") test or the "debts beyond reasonable ability to repay" ("reasonable ability") test, under which the court must re-create the financial condition of the debtor at the time the transfer took place. The tests can be distinguished through the use of the balance sheet approach in the "USA" analysis, while "reasonable ability" requires the valuation of assets as part of an ongoing concern. [For an excellent discussion of the "USA" and "reasonable ability" tests and their application see *In re Pajaro Dunes Rental Agency, Inc.*, 174 BR 557, 591-95 (Bank.ND.Ca 1994)]

In applying the "USA" test, most courts use a relativistic, case-by-case approach. Under this approach, the court weighs the raw financial data of the balance sheet against the nature of the entity and its need for capital over time. [*See Barrett v. Continental Illinois Nat'l Bank & Trust Co.*, 882 F2d 1(CA1), *cert. den.*, 494 US 1028 (1990); *Matter of Desert View Building Supplies, Inc.*, 475 FSupp 693 (CD.Ca. 1978), *aff'd* 633 F2d 221 (CA9 1980) [Table]] The "reasonable ability" test focuses on the debtor's future ability to generate cash and pay its debts as they come due. [*See Moody v. Security Pacific Business Credit, Inc.*, 971 F2d 1056 (CA3 1992); *Matter of Taxman Clothing Co., Inc.*, 905 F2d 166 (CA7 1990)]

State (Alaska) Law Fraudulent Conveyance [§ 544(b)/AS § 34.40.010]

Like § 548(a) (1), AS § 34.40.010 voids transfers made with 548(a) (1) cases, "badges of fraud" provides circumstantial evidence of a fraudulent conveyance: (1) inadequate consideration; (2) transfer in anticipation of a pending or threatened suit; (3) insolvency of the transferor; (4) failure to record; (5) transfer encompasses substantially all the transferor's property; (6) transferor retains possession of the transferred premises; (7) transfer completely depletes transferor's assets; and (8) relationship of the parties. Not all the "badges" need be present to support a finding of fraud. [*Gabaig v. Gabaig*, 717 P2d 835 (AK 1986)]

In addition, similar to the provisions of § 550 (a), where the remedy of avoiding the transfer is inadequate, Alaska allows recovery of damages. The measure of damages is the lesser of the value of the property fraudulently transferred or the amount of the debt. The value of the fraudulently transferred property is determined as of the time of the fraudulent transfer or when the creditor reduces the debt to judgment, whichever occurs later. [*Summers v. Hagen*, 852 P2d 1165 (AK 1993)]

AS § 34.40.010 invalidates conveyances or assignments of "an estate or interest in land, or in goods, or things in action," plus the rents and profits from them. It is, thus, very narrow in its applicability. Unlike § 548, which reaches all "property," the language of § 34.40.010 does not extend to transfers of money, e.g.,payments made. In interpreting another statute having similar wording, the Alaska Supreme Court sharply differentiated between "money" and a "thing in action" [*Berger v. State, Department of Revenue,* 910 P2d 581 (AK 1996)] *Black's Law Dictionary* defines a "thing in action" (also commonly referred to as a "chose in action") as a nonpossessory right to bring an action to recover money. That money is not a thing in action is further supported by the AS § 01.10.060(9) definition of personal property as including both money and things in action.

The same rule should apply where payment is made by check. Even if one were to consider a check, a negotiable instrument by UCC definition [AS § 45.03.104(c)], as itself being a "thing in action," under the UCC it is "issued" when delivered to the initial holder [AS § 45.03.105(a)], which is not a conveyance or transfer of that which is created, i.e., the check itself. But, does issuance of a check operate as a conveyance or assignment of a thing in action?

Analysis of this question starts with the recognition that the demand account upon which the check is to be drawn is itself a thing in action. Thus, one might, at first blush, assume that the check operates as an assignment of at least some part of the thing in action. However, that is not really the case. The issuance of a check transfers no rights in the demand deposit account to the named payee; the payee acquires nothing until the check is honored. Therefore, a transfer by a check does not become effective until the check is actually honored. When the transfer becomes effective it is a transfer of funds (money) from the demand account of the payor in the drawee bank to the payee or to the account of the payee in either the drawee bank or the drawer bank; the functional equivalent of the withdrawal of cash by the debtor and handing it over to the creditor. [See *Barnhill v. Johnson*, 503 U.S. 393, 112 S.Ct. 1836, 118 L.Ed.2d 39 (1992); *Butler v. David Shaw, Inc.*, 72 F3d 437 (CA4 1996)1 As noted above, money is not a thing in action. Thus, there was no "transfer" of any property enumerated in AS § 34.40.010. While payments in cash or by check may be fraudulent under § 548 or the UFCA and UFTA, they are not fraudulent within the scope of AS § 34.40.010.

The Bar Rag welcomes articles from its readers

HI-TECH IN THE LAW OFFICE

Electronic discovery, Part III

Discovery stipulation covers ground rules

By Joseph Kashi

The following stipulation suggests ground rules for the conduct of electronic discovery in general conformance with the Federal Rules of Civil Procedure. Remember: this information is provided as a starting point only. Each attorney is responsible for applying his or her skill and analysis of the situation and not relying solely upon the suggested stipulation.

•

STIPULATION REGARDING COMPUTERIZED RECORDS DISCOVERY

The parties stipulate as follows:

I. INITIAL DISCLOSURES

A. The existence, identity and nature of computerized and other electronic records shall be disclosed in each party's initial disclosures made pursuant to Civil Rule 26 in the same fashion as all other records.

B. If not already done, each party shall immediately make and safely preserve two separate and verified complete archival backups of all electronic and computerized records which might be pertinent in any way to any matters foreseeably arising in connection with the subject matters of this litigation. Each party shall take all appropriate safeguards to preserve the evidence and prevent intentional or inadvertent alteration or spoliation of computerized and other electronic records.

C. The parties shall disclose without limitation at least the following information regarding such records:

1. Each current and prior actual file name(s) of each record containing relevant information, and the names, addresses, and job descriptions of each person creating, maintaining, compiling or otherwise having responsibility for such record and of the information content of it. The responding party shall describe with particularity the pertinent information contained in each such record.

2. The location where every copy of such records are retained, including without limitation primary and standby network file servers or other central computers, specific desktop workstations containing copies and prior and later versions of such records, and each backup set containing copies and various versions of such records.

3. The backup method whereby copies of such records are made and preserved in the ordinary course of business including specific identification of:

a. The names, addresses and job descriptions of each person responsible for making and preserving any backups;

b. brand, model and version of the backup devices and backup programs used,

c. the schedule for the making, preservation, retention, reuse and destruction of all backups, and whether such backups have in fact been reused or destroyed,

d. the operating system and operating system version number of each computer where any identified record is stored and/or backed up.

4. The brand, name and version number of each application program used in the recordation, search, manipulation and storage of data in any of the records set forth above. Where commercially available programs are used, the respondent shall provide the name and address of the program's publisher. Where custom application programs are used to record and store information, the respondent shall describe the program's functions and the hardware and operating system requirements for its ordinary operation.

5. During the initial disclosures, each party shall provide to the other party verified copies of each and every pertinent computerized record and other electronic document in their native electronic file format and in a mutually convenient computer media format usable by the receiving party. Each party shall provide the other party with usable temporary copies of each application program pertaining to any electronic record in a mutually convenient computer media format usable by the receiving party. The provided electronic records shall be further described and identified as to the date when any information was last recorded, when the verified copy of each record was made, and the immediate source of the record, (for example, whether it was made from a verified backup copy produced pursuant to Section I (B) above).

6. It shall be the responsibility of each party to check any native format computer and electronic records and programs provided to the other party for computer viruses or other comparable dangers using an up to date anti-virus program of modern design comparable or better in protection to the latest version of Dr. Solomon's or McAfee. The receiving party shall have a comparable responsibility.

7. Where feasible, image format backups shall be provided rather than file by file backups.

II. RULE 35 INSPECTIONS AND ENTRY UPON PREMISES

On-site and Rule 35 inspections shall comply with both the general provisions of Rules 34 and 35 and also the following provisions.

A. Either party may request that it be allowed to review computerized and electronic records on the responding party's site and under normal operational conditions. Each party shall be allowed two such visits, an initial inspection and a later followup. Each party will render all reasonable cooperation to the other party and shall seek to avoid becoming unduly burdensome while at the same time concluding the discovery operations envisioned by a later written scope of discovery stipulation. The scope of discovery stipulation shall be based upon information received from each party during the initial disclosures together with such other information as each discovering party reasonably believes to be relevant and within the possession or control of responding party.

B. Discovering party shall be entitled to bring with it such experts to direct and observe discovery as it might deem advisable. Responding party shall also be entitled to have its own such experts upon the premises as it might deem advisable.

C. Responding party shall make available, at the time of inspection and entry, all personnel responsible for the operation, maintenance and use of the various computer systems. Such respondent's personnel shall in fact operate the system in response to the directives of the discovering party. The discovering party's personnel shall not themselves operate or manipulate the system. Responding party's personnel shall have the re-

Continued on page 15

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:
Tom Mize
604 Barnette St. Rm 210
Fairbanks, AK 99701-4576
(907) 451-9251

Third District:
Al Szal
825 W. 4th Ave.
Anchorage, AK 99501-2083
(907) 264-0415

Fourth District:
Ron Woods
604 Barnette St. Rm 202
Fairbanks, AK 99701-4547
(907) 452-9201

Hi-Tech in the Law Office

Electronic discovery, Part III

Discovery stipulation covers ground rules

Continued from page 14

sponsibility to:

1. operate such programs as requested by the discovering party

2. mount, recall and use such backups of prior data, and recover deleted or altered files, as requested by the discovering party

3. search through files, display data, make printouts of records and data, and make verified native electronic format copies of data.

4. operate any appropriate and safe third party search, retrieval and data discovery programs requested by the discovering party.

5. generally do all other operations requested by the discovering party that will not damage the responding party's computer system or data.

6. warn the discovering party of any potential dangers inherent in any request of the discovering party and, where appropriate and not obstructive, refrain from engaging in any action that might damage the responding party's data or computer system as set forth in section I, below.

D. All persons and experts used by each party shall enter into appropriate non-disclosure agreements. No person or expert shall be used by either party where there is an existing conflict of interest with regard to such person's employment by third parties.

E. On-site inspections shall be conducted at such a time as will not unreasonably burden the responding party's business operations.

F. Initially, each party shall separately bear the cost of making or responding to discovery, including employee and expert time, but this provision shall not be deemed as affecting or prejudicing the award of costs by the Court at the conclusion of this case in accordance with prevailing rules of court.

G. Discovering party shall be afforded such time as is reasonably necessary to conduct discovery but shall not be entitled to oppressive or burdensome discovery times and operations. It is anticipated that approximately_____hours is a prima facie reasonable time for the initial on-site inspection and computer search and manipulation. Because the factors affecting any follow-up on-site visit are not known at this time, no time limit is currently provided but such times shall be reasonable under the circumstances and neither unduly restrictive or burdensome.

H. Discovering party shall be entitled to bring with it appropriate specialized search and data recovery programs of its choice and responding party shall run such programs on the inspected computer systems at the request of discovering party so long as such programs will not damage any system or record, in which case responding party shall make a copy of the target computer system and install such copy on a comparable but non-critical system and then run such programs.

I. During all phases of the discovery process, responding party shall have the responsibility of protecting its own computer system and data, making and preserving complete system backups, and ensuring the safety of its own computer systems from any damage, data destruction or other difficulties during discovery. Responding party shall promptly object to any dangerous or damaging requests of discovering party, may refuse to implement such requests, and shall specify the grounds for such objection and refusal toimplement such requests.

J. Each party shall take all prudent and reasonable steps to prevent the introduction of any virus, worm, Trojan Horse, or other like and similar programs into the computer system of the other party.

K. The discovering party shall not appropriate for its personal gain, or otherwise disclose except in the course of this litigation, any proprietary information or data regarding the design, implementation and use of the responding party's computer system, applications and data. A "Chinese Wall" between the discovering party's own internal information services personnel and the personnel involved in this discovery shall be a sufficient defense against any later allegation of later unauthorized appropriation and use of apparently similar aspects of the responding party's proprietary system design, implementation and applications.

•

DISCLAIMER: The case citations and analyses set out in this and prior articles on electronic discovery represents the opinion of the author only and the law is evolving very quickly. The information in these articles should be considered solely as research starting points for the attorney, who is solely responsible for his or her own research and pleading. The author, the American Bar Association and the publisher disclaim all responsibility and liability for any alleged inaccuracies or differences in interpretation or precedental value.

In the Kingdom of Juneau

Royal Bar Assoc. of Juneau

Minutes
January 3, 1997

If the Juneau Bar Association had a horoscope for 1997 it might read something as follows:

Life has been too easy. Gray clouds of controversy hang on your horizon and only the swiftest diplomacy by those in power outside of your organization will bring sunnier skies. Although no change in overall health is expected, your diet for 1997 promises indigestion, severe for some. The stars' rotation through your quadrant indicates that money will be less plentiful than demand, and you will struggle in balancing your expenditures between doing right and having fun. One of your own will reach for the stars and find a seat waiting. As for romance, the stars will be in strong alignment on solstice, and, for one of you, will bring union, commitment, unfettered passion and a permanent crew member.

New Business: Geoff Englemann, taking tactical advantage of the absence of one known vocal scallop supporter, proposed that the JBA approach the Second Course about offering something other than scallops for our meetings. Bringing this issue to the forefront caused several members to express their heretofore undisclosed anti-scallop views. One member was overheard asking: "Does this include abolishing veal scallopini and scalloped potatoes?" Having raised important questions, inquiries will be made to the Second Course. (See horoscope above).

Old Business: Gerry Davis reported on the progress of the JBA homepage committee. I didn't hear what Gerry said because I was discussing baby-sitters with a member of our local bench (see horoscope above), but since I'm the only other member of our committee, I can report that we drank a six, surfed the web, and decided that we needed to drink another six before we could earnestly pursue this. (Gerry let me know if this differs from what you said).

—Lach Zemp, Secretary

Tales from the Interior

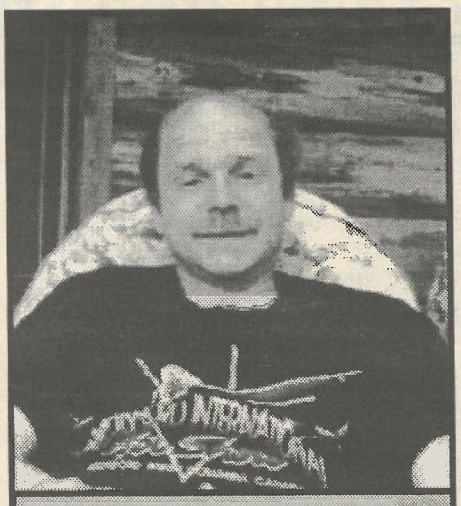
Bridging the gap

Even judges are human, even if they very seldom admit it, and prefer the God-like approach instead.

During a recent matter in Fairbanks, I had occasion to appear before Judge Ralph Beistline regarding an individual who had constructed house in front of a house owned by my client on the side of a hill. Ordinarily, that would not have been a problem, except that the individual who formed the subject of my complaint had built his house in such a manner as to block out the center stage view from my client's house, which had previously had an unobstructed view of Fairbanks, the Tanana Valley, and the Alaska Range.

Suffice it to state that my clients were not happy campers, and the analogy which was best drawn was similar to one purchasing a ticket for the best seating at Phantom of the Opera, only to have another individual buy a lower seat in front, and then stand up through the entire performance so that they could get a better view.

Following the assignment and recusal of one judge, followed by the preemptory challenge of yet another, Judge Beistline became the selected jurist to hear this hotly contested case. The opponent was represented by ex-judge James Blair. Recognizing that the construction season was rapidly upon all concerned parties, Judge Beistline wisely scheduled a hearing to take place in a brief period of time,



William Satterburg

as soon as possible, in order to address the issues pertaining to whether or not injunctive relief should be granted with respect to the monument which was being constructed in front of my client's house.

The hearing was scheduled for two hours, and Judge Beistline made it clear that each side would have one hour to present its case, although additional time might be necessary. Because I was the plaintiff, I was scheduled to go first. This was a novel concept in Fairbanks.

At the commencement of the hearing, Judge Beistline announced to all present that he had only two hours to conduct the hearing. Moreover, he indicated that he had just returned from the dentist. In making this announcement, his voice was relatively coherent, although the drool coming from his chin did seem to be slightly out of character.

The case commenced with a dynamite opening argument by yours truly, pointing out concepts of equity, factual dispute, and my Phantom of the Opera analogy, which was given to me as an idea by one of the witnesses when I was in the bathroom preparing for the hearing.

At various points, the opposition would voice objections to my questioning, to which Judge Beistline would gurgle and rule. It all seemed to be going well regarding the dispute, although each of us, I believe, was having some difficulty understanding the good Judge's rulings, given his numbed lips, drool, and watery bloodshot eyes.

At one point, I was quick to point out that I was relying upon a case which wad decided by the highly respected judge James Blair and affirmed without an elaboration by the Alaska Supreme Court. That seemed to bring a rise out of everyone. Otherwise, however, we proceeded along rather well, and when I was done using up my one and one-quarter hours of the one hour allotted to me, I handed the case to James Blair.

They claim that timing is everything in trial. Well, maybe not everything, but certainly a lot.

In this particular case, unbeknownst to myself, timing played a significant role in the progress of the case.

Although Judge Beistline is an eminently fair jurist, his novocaine was wearing off. This became more apparent as the speech became clearer, the drool less pronounced, and his demeanor more aggressive. Fortunately, it was my opponent's turn and I was able to relax.

> *"They claim that timing is everything in trial. Well, maybe not everything, but certainly a lot."*

No decision was reached that day. Time simply ran out on everyone, probably to the defense advantage and certainly as part of the defense tactic.

Regardless, by the time time ran out, Judge Beistline was once again completely with us, and used the remaining few minutes of the hearing to make it very clear to all parties concerned that his novocaine was now completely worn off, and he was not particularly happy with the dispute which was before him. Although I personally felt that the dispute was something which a person could easily sink his teeth into, Judge Beistline disagreed, and indicated that both parties should endeavor to reach a compromise, or else.

Although the "or else" was never fully explained, it was my profound hope that his dental work had been completed.

The Ninth Circuit: An inside perspective

Continued from page 3

that the appeal was not easily resolved.

THE COMMON MISTAKES OF APPELLATE COUNSEL

The Court's preparatory work for calendars, and consequently its decision-making process, is hampered primarily by: (1) poorly written briefs, (2) poorly prepared excerpts of record, (3) arguments that do not relate to controlling case law, (4) the failure to know or use the record facts, and (5) the use of the wrong standard of review. Briefs that contain these problems are no help to the Court in its decision-making process. *Simply put, advocates whose briefs contain these mistakes will fail to persuade.* Unfortunately, such briefs are the rule rather than the exception. When confronted with these problems, the Court must undertake its own analysis (via the bench memorandum) using the correct law and facts reflected in the record. Thus, even if the appeal has a favorable outcome, the fact that the written decision doesn't substantially track the arguments in the brief means that the Court had to go off on its own to get the answers it needed to make a decision. This is a very risky proposition for advocates, because *it means that they lose control of the appeal once the Court begins to scrutinize it.*

Many mistakes could be prevented by attorneys asking two questions before appealing: (1) "Where did the lower court err?" and (2) "Was the error serious enough to obtain a reversal under the proper standard of review?" Always remember that, for each issue that may be novel to the advocate, the Court probably has seen this issue, and variations on it, many times before. The judges have considerable knowledge of the law when reading the arguments in most briefs. They know when an advocate is not relating to the proper questions or precedent. And they know that a great deal of extra work will be required to resolve such an appeal.

1. Poorly Written Briefs

When a brief is read in an appellate court, it is read with a purpose: to understand what the party thinks went wrong (or, went right) with the case at the lower court. The judge or law clerk is under pressure to quickly learn the facts of the case and the arguments, to try to figure out a resolution, and to meet the ever-present calendar deadline. If the brief isn't well-written, it is difficult for the Court to follow the facts and arguments. *Hours of precious Court time are wasted unraveling what advocates are trying to communicate.* The Court knows within the first few pages, from the writing style alone, whether the brief fits into this category. Sometimes the frustration at having had to interpret will show in the judges' questions at oral argument.

Forcing the Court to interpret is always risky. The wise advocate knows the importance of clear communication. Editing is a crucial part of brief-writing. Editing can make the difference between winning and losing. Do you really want the judges muttering "Just what is this guy trying to tell me?!**#" instead of "Hey, that is absolutely right and I'm in complete agreement with this argument. Poor writers are at a particular disadvantage in the Court when opposing counsel are excellent writers.

2. Poorly Prepared Excerpts of Record

The purpose of the excerpts of record is to "provide each member of the panel with those portions of the record necessary to reach a decision." Circuit Rule 30-1.l(a). But all too often, parts of the record that are critical to a decision are missing from the excerpts. For example, excerpts filed in a breach of contract case will not include the contract. Many advocates fail to grasp what record documents a court needs to resolve an issue on appeal. This is somewhat understandable, though, because so few advocates are experienced in the actual decision-making process, let alone what the Court does with the excerpts.

When crucial parts of the record are not in the excerpts, the Court will try to find them in the district court record. That is part of the reason district court docket sheets are required to be included in the excerpts. The Court may even contact the attorneys for both sides. However, these extra steps always consume precious Court time and can cause real problems in terms of the deadline for calendar.

Another problem is the inclusion in excerpts of documents that cannot be read because of poor copying. Record documents that cannot be read are worthless to the Court. Advocates should take care to ensure that every document included in the excerpts is easily readable.

Good excerpts of record will always be prepared to coordinate with the briefs. "Every assertion in briefs regarding matters in the record shall be supported by a reference to the page or document number of the original record where the matter relied upon is to be found." Circuit Rule 28-2.8. There is an easy way to do this: sequentially number the pages in the excerpts and refer to them in the brief as "ER [page number]." Then, prepare a table of contents that correlates documents in the excerpts to the original district court record. For example, "ER 16" can be "CR [i.e., "court record"] docket # 58, exh. 13 (affidavit to summary judgment motion)." The Court can then easily find the original document if necessary. A detailed table of contents and the use of tabs on excerpts are both very helpful. Well-organized excerpts that help the Court to move efficiently through the materials definitely are noticed and are greatly appreciated.

3. Arguments That Do Not Relate To Controlling Case Law

This common mistake can lose an appeal almost as soon as the brief reaches the judge's chambers, particularly if the controlling law is contrary to the arguments made. The failure to discuss controlling case law means that the brief cannot be persuasive, especially if the issues on appeal are all related and dependent on the controlling law for a resolution. If the concept is one the Court deals with frequently, the judge or law clerk will recognize the problem immediately, and will read the rest of the brief with considerable skepticism. If the opposing counsel is skilled, he or she will point out the error in a response or reply brief. But often neither party seems aware of the controlling law, so neither brief helps the Court. The Court must then set aside the briefs and do its own research and analysis to determine if there is any way to distinguish the facts of the appeal from the law that controls. Again, this is risky for advocates.

Because this mistake is so common, I disagree with one expert on appellate brief writing who tells his Continuing Legal Education program attendees that they should do less research in their brief preparation. In my opinion, the lack of research is a major reason advocates lose appeals, because they miss issues the Court *must* consider.

A related problem is the attempt to distinguish controlling case law in a way that is unreasonable, and therefore unacceptable, from a court perspective. But this topic is beyond the scope of this article — it pertains to the parameters within which courts typically make decisions, a subject that could easily fill a book.

4. The Failure To Know Or Use Record Facts

The first item an appellate court wants to know in any appeal is "what happened to cause a lawsuit in the first place?" The Court often cannot rely on the facts recited in the briefs because in the process of advocacy, the parties argue forcefully for contrary facts or leave out critical facts. Appellate courts almost always review the transcripts, the exhibits, and everything else in the record so that they will have an accurate picture of the events leading to the dispute and what happened in the lower court.

More often than not, an appeal can be resolved simply by what is found in the factual record. This is particularly true with appeals of summary judgments (which are legion in appellate courts), when the critical question is whether there are material issues of fact that remain for trial. Advocates should never assume the Court pays no attention to the excerpts and lower court record. Because the record reveals the true state of the facts, it is a crucial part of decision-making. I have seen appellate decisions turn on the presence of *one word* in hundreds of pages of transcript, or *one representation in one letter* buried in the excerpts, which neither side had mentioned in their briefs. Because these facts literally were the "smoking guns" of the case, both counsel obviously were not as familiar with the record as they should have been. Instead, their briefs concentrated on arguing complex legal principles that ultimately were useless to the resolution of the appeal.

5. The Wrong Standard of Review

Of all the mistakes advocates make, using the wrong standard of review is the most irritating to the Court. There are three reasons for the Court's umbrage at this particular error.

First, standards of review rarely leave room for disagreement as to which one applies. Appellate courts have spent centuries determining how much leeway they have, under specifically enumerated circumstances, to overturn a lower court's, a jury's, or an agency's considered decision. If they have spent this much time developing their mechanism for reviewing cases, they expect advocates to respect and use it. *Standards of review are the prism through which the court must view the case no matter how egregious counsel may think the lower court's errors.* Advocates can miss the winning arguments when they attempt to convince the Court to apply the wrong standard of review instead of working with the correct one.

Second, the Ninth Circuit has documented its standards of review in a 154 page treatise. This treatise is updated every fall and circulated to every Court chambers and to the lower courts within the circuit. One of the first things a judge or law clerk does is to check the standard of review cited in the brief against that provided in the treatise.

Third, and most important, if advocates fail to apply the proper standard of review, the arguments will not relate to the only context within which the Court is empowered to resolve the appeal. The brief must be set aside while the Court performs its own analysis with the correct standard of review, via the bench memorandum. This is another way an advocate loses control of the appeal once it reaches the Court. Although the appeal may still be won, it will not be because of the advocate, for he or she might just as well not have been involved.

Often, the panel judges will trap an unsuspecting counsel at oral argument on the wrong standard of review. One of the judges will ask, "Now, according to your view of the case, when we apply de novo review, your opponent must lose because of [factor x], is that right?" Counsel invariably agrees and elaborates on "factor x," quite unaware that in asking the question, the panel was simply making certain that counsel was continuing, even at oral argument, to rely on the wrong standard of review.

Some aspects of the law are not subject to argument. A set standard of review, like controlling case law, is one of them. It is best to deal with the standard that *is*, rather than argue for the standard as you *wish it to be.*

CONCLUSION

The problems described here occur not only in the Ninth Circuit, but in all state appellate courts and federal circuits as well. The mistakes discussed in this article stem from the same problem; i.e., *not knowing what is elementary and critical to a court's decision-making process.* Understandably, this is not common knowledge. Rarely do advocates have any significant experience in actual decision-making, and it is certainly not taught in law schools. Many advocates seem unaware how courts arrive at decisions (or so I surmise from reading their briefs and petitions for rehearing). Conversely, judges may not appreciate how difficult it is for an advocate to try to second-guess which arguments are most likely to persuade.

There is no doubt that the perspectives of courts and attorneys on the law and how it should apply can greatly differ. While attorneys must advocate, courts must make decisions that effect the lives and actions of all of us. Nonetheless, there is a common ground where the best advocacy can help to shape the court's final decision. I hope this article is a small step toward better advocacy, a view of the inner workings of the Ninth Circuit, and an understanding of some of the obstacles this Court encounters in the never-ending business of making decisions.

•

Ms. Follansbee is the founder and president of Follansbee and Associates, a legal consulting firm that assists attorneys in developing winning appellate strategies, writing persuasive briefs, and delivering oral arguments that make a difference. As senior law clerk at the Ninth Circuit Court of Appeals, she reviewed several thousand appellate briefs and wrote hundreds of bench memoranda to assist judges.

A close shave in the Czech Republic

Continued from page 1

before, helped managers of Astra present a privatization plan to the Czech Republic's National Property Fund (NPF). This was basically a loan and payback (leveraged buyout), typical of such privatization plans, and it worked. So the Czech Republic sold Astra to this group of 11 shareholders, basically at a low appraisal value. Ownership of Astra Razor transferred to the 11, with debt back to Czech Republic of $6 million.

"The closing and celebration were the most difficult."

(Under the old Communist way of doing things, the government said that if your local village population was 10,000 persons, of which 10% were considered support industry workers, then you, the Factory Manager, were required to hire 9,000 people, even if you only needed 200 to produce your product. So the workers knew they were cruising, and politicians knew they had to protect the workers' paychecks, so that's why politicians are involved in approving privatization deals like this.)

NPF's initial evaluation of Astra's ancient assets and feather-bedding workforce was just $6 million. Three years later, in a different economic climate, the company sold to Gillette for about 40 times more. But that gets ahead of the story.

Astra kept operating after privatization and had a good market, healthy cash flow and a strong profit that didn't have to be siphoned back to a central Communist organization. Despite a few environmental problems, for three years Astra satisfied its markets at stable levels. Then an interfamilial fight broke out between ex-Communists and new investors in the group.

Some of the Astra investors called me in and said they wanted to sell, because they didn't see a future with the ex-communist shareholders. We looked for several bidders before discovering Gillette's interest.

The Deal

Usually, you first negotiate price, but that wasn't the case here. Gillette didn't seem to care about Astra's antiquated assets. Gillette was interested only in world market share—an asset much more valuable to Gillette than the old razors and obsolete factories were to Astra or the NPF. Once we understood that, we very easily arrived at a price that was far in excess of plant and inventory value.

We then entered into an MOU (memorandum of understanding) with Gillette, also creating an internal agreement with the company's investor groups so that they could continue their war against each other, if they unanimously agreed on dealings with Gillette.

We met in an old room in a Prague church, with a large, round table seating 35 people. Meetings always took two days. At one such meeting, Gillette's Boston-based tax expert tried to slice the price, but he couldn't speak Czech, so our clients just looked at him and he eventually left.

Astra's operation as a Czech limited liability company (LLC), called an SRO, made the tax agreement provisions of the sale scary; laws change quickly and governments often tax such sales at the rate of 25-40 percent of the sale price.

An important new Czech law—designed to encourage capitalism—provides that the sale of privately owned shares incurs no tax if shares are held over 90 days.

So we structured the sale to first convert the limited liability company into a joint stock company (called an ASC) so that we could ultimately sell all shares to Gillette with no tax, instead of selling the LLC/SRO with a 25-40% tax liability

Gillette negotiators were originally leery of this strategy, because they wanted to buy a company, not shares, but they finally agreed.

It took us four months to change Astra from an LLC to an ASC, because of Astra management's internal war, but we did do it. We issued shares, waited 90 days, and then registered the shares and the properties—a very cumbersome process in the Czech Republic.

Our last hurdle was proving to the Minister of Competition (anti-trust) that Astra's changed form did not badly serve the Czech people. We also wanted to approach the Miistry unemcumbered by government debt, so we had to find outside creditors to finance the outstanding National Property Fund loan. We went to a Western bank, asking Gillette for assistance. We persuaded Gillette to place some interest-bearing deposits with Credit Anstalt, an Austrian bank with Prague offices. We then borrowed from Credit Anstalt (courtesy of Gillette), refinanced and repaid the NPF debt, and proceeded directly to the Competition Ministry. All this took 9 months.

Minister of Competition review is politically scary. Because most high-ranking government officials are former anti-Communist revolutionary principals, they typically find it very difficult to approve transactions in which former big-time Communists become millionaires. In our case, a former minister of the interior (Gestapo equivalent) was among Astra's ex-Communist investors, and Competition Ministry did kick us around quite a bit.

But when the Minister of Competition was in a car accident, his deputy took over. Like most deputies, he didn't want to make a decision, so we went to local politicians and prevailed upon them to help us, by pointing out how helpful the Astra deal would be to local employment .

In the end the Competition deputy approved the sale, and the acquisition survived the subsequent waiting period for government or public appeal.

The Close

The closing and celebration were the most difficult.

Credit Anstalt did the closing, because it was one of few Prague banks with wire transfer capability. The parties met at a law office to sign over stock certificates and have all the documents notarized—a more difficult process than in the United States. We had a two-foot high stack of paper, and in Prague the notary must use a wax seal and thread through each page. Notarization is very time consuming, and you can't run past midnight, which would disrupt the closing by having documents signed on the wrong day.

But notarization finalized the deal. We then walked over to the bank, just two blocks away, to get the money. The shareholders never had major money before, so we had to make some detours in this simple two-block walk. First, we had to stop in a bar and belt down the local equivalent of tequila or vodka and then we had to stop at a jewelry shop where they each ordered $10,000 Rolex watches.

Then to the bank. People in Eastern Europe don't use checking accounts, but pay in cash. On that day, the Czech kroner was running 27 to 1 in exchange for U.S. dollars, so the bank had a big, long table stacked high with cash, which took some time to transfer. Some Astra shareholders left with their money and bodyguards, jumping into waiting cars and driving away to unknown locations. Others put their share of the cash back in the bank.

My fee was also part of this, so I was watching the exchange rate, because every point the Czech kroner gained, I lost a lot in U.S. dollars—a point that did not concern the Czech shareholders, who kept their money in kroner. Sorting this out took all day.

For the most part, that was the transaction, although like most transactions, this had a 'holdback' of several millions, in case something was not as stated. Because the buyer cannot complain about what is disclosed, we had disclosed everything we could think of, in a letter that was, itself, many inches thick.

So the Astra-Gillette deal finally closed about November 18, 1996, and a celebration followed.

The Celebration

The Gillette-Astra deal was a large transaction, which got a lot of notoriety. Companies involved in such major deals try to outdo each other in their post-deal celebrations. In this, Gillette was no exception. They celebrated at the Carlsbad Spa, which has seven springs, the water of each supposedly curing something else. (They all tasted like rusty water to me, with no noticeable effects.)

Carlsbad's Hotel Grand Putt has a casino and even its regular rooms have 14-foot ceilings, so this was a very lavish affair. The celebration was vintage Eastern Europe, right out of the 1930s. We began with a very formal dinner, retiring to ante-rooms to smoke cigars and drink brandy, with a band that played nothing faster than waltzes and foxtrots.

We were essentially three very separate groups: The ex-Communists (who'd fought with the investor group); the worldwide gathering of Gillette people (none of whom spoke Czech); and the Czech investors (who hated the ex-Communists). The groups were separate, but I could walk around to each of them.

The next day, they all took the waters at the spa, and had yet another dinner and dance, but it was all very formal and not very much fun. Luckily, I had other business and so missed this grand conclusion.

The Post Mortem

This was a fairly typical deal, which we kept confidential until after the money transferred, but which is now well-known public information. All that remains are potential lawsuits among the shareholders and the termination of the one-year holdout clause. If claims are made under that holdout clause, a Czech judge will arbitrate them in Czech courts (instead of under the more commonly used, Paris-based International Chamber of Commerce arbitrators), a concession to the Czechs, who felt better protected this way.

Gillette is pleased as punch because they solidified their market share in the former Communist world. They will also acquire a factory in India, but for the remainder of this century probably will just expand and merge Astra with Duracell, which they bought over the summer.

A dozen more millionaires are running around Eastern Europe, and the Czechs are pleased with the deal but may still fight among themselves. And I liked it, because I could do this by practicing law in the Czech Republic, although the Czech bar is now devising more stringent requirements for the practice of law there.

I have two other Czech transactions pending in the beer industry, and a number of companies are interested because Czech beer has such a good reputation.

I got into this through an Alaskan who is also Czech, whose friend achieved a high position in the government. We went to the National Property Fund and tried to figure out which companies were making money and did not have major environmental problems. We'd then develop a privatization plan and look for someone who would want to buy the company. We did the Astra privatization plan in 1992 and didn't find Gillette until 1995.

The real catalyst to Gillette's purchase was Astra's destructive infighting, which motivated investors to sell. Yes, the shareholders did get a windfall—they were basically given the company and sold it for a profit. The political problem was that some shareholders were ex-Communists, but local politicians are forced to favor such deals in order to support the local labor force.

All Eastern Europe countries have a Napoleonic Code history. Where American attorneys would worry about intent, in Eastern Europe everything must remain within the four corners of the document. Thus, everyone concentrates on substantive aspects, leaving to the end such issues as arbitration clauses, convertibility of money, and governing law.

But by then the deal is too good to pass up, so it is going to go. We refer to local Czech Republic codes as much as possible and very clearly spell out what we are trying to accomplish—and then we just cross our fingers and hope for the best.

Failing to address a "goose" case may be a "tacit concession" and dispositive of your case

BY MAX GRUENBERG, JR.

"The terminology for a commanding precedent, factually on all fours, varies, being referred to as a 'Goose' case in Louisiana, a 'Spotted Horse' or 'Spotted Dog' case in Alabama, a 'Cow' case in Kansas, and a 'White Horse' or 'White Pony' case in Texas. Jefferson v. Ysleta Independent School Dist., 817 F.2d 303, 305 n. 1 (5th Cir. 1987)."

Hays v. State of Louisiana, 18 F.3d 1319, 1320 n.7 (5th Cir. 1994).

•

Two recent Alaska Court of Appeals decisions establish a new potentially far-reaching rule concerning "Goose" cases.

Turney v. State, 922 P. 2d 283, 293 (Alaska App. 1996), involved a constitutional challenge to a statute. The State had argued that a previous court of appeals decision upholding the statute was controlling. The Court said:

> Turney completely ignores *Earley v. State*, 789 P.2d 374 (Alaska App. 1990). His opening brief does not cite the case. Even after the State's brief pointed out that *Earley* was the controlling authority on Turney's constructional claims, Turney failed to discuss (or even acknowledge) Earley in his reply brief. **Turney's pointed refusal to address a controlling decision of this court must be interpreted as a tacit concession that *Early* is dispositive of Turney's overbreadth and vagueness challenges to the disorderly conduct statute.** (Emphasis added).

State v. Hiser, 924 P.2d 1024 (Alaska App. 1996), was a sentence appeal. The State argued that two Alaska Supreme Court cases were controlling. The court stated:

> Even though the State relies on *Rust v. State*, 582 P.2d 134, *modified on rehearing*, 584 P.2d 38 (Alaska 1978) and *LaBarbera v. State*, 598 P.2d 947 (Alaska 1979), Hiser's brief contains no discussion of these two cases. In fact, Hiser fails to mention these cases at all. **Hiser's pointed refusal to address controlling decisions of the supreme court must be interpreted as a tacit concession that *Rust* and *LaBarbera* are dispositive of his case.** 924 P.2d at 1025-26 (footnote omitted) (emphasis added).

Judging from its recent use twice within three months, this new theory is likely to find increasing favor with the court.

Good lawyers will use this theory, if opponents fail to distinguish a Goose case. They will also be wary of leaving even arguably controlling authority unchallenged, lest their silence be held a "tacit concession" that the Goose case disposes of the issue.

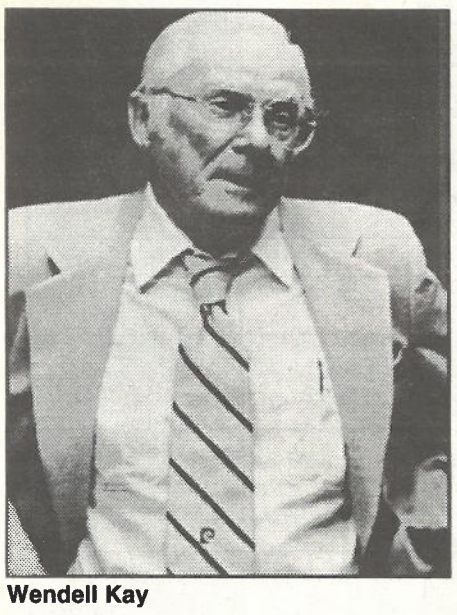
Correction

The Journal of the Legal Profession, from which the Bar Rag reprinted the article "Rumpole and the Equal Opportunity Harrasser" by Douglas S. Miller in the November-December 1996 issue, is a publication of the University of Alabama School of Law, not the University of Nevada School of Law as erroneously reported. We're not sure how this error occurred.

ALASKA BAR ASSOCIATION 1997 CLE CALENDAR

Program #, Date & CLE Credits	Program Title	Program Location	In Cooperation With	Section
#03 January 23 2 CLE Credits Early Morning	Practical Technology Solutions for the Small Law Office	Anchorage Hotel Captain Cook		Family LPM
#15 February 7 2 CLE Credits Early Morning	Discipline Over Easy	Anchorage Hotel Captain Cook		
#04 February 21 5.25 CLE Credits AM 2.75/PM 2.5 Full Day	1997 Probate in Alaska	Fairbanks Regency Hotel		Estate Planning & Probate
#01 February 27-28 Feb. 27 - 3 CLEs Feb. 28 - 3.5 CLEs Half Days/Mornings	Doing Business with Big Brother: Problems & Procedures in Administrative Law	Anchorage Hotel Captain Cook		Administrative
#02 March 4 7.75 CLE Credits Full Day	Co-Management In Alaska: A Viable Alternative to Dual Management Under ANILCA?	Anchorage Hotel Captain Cook		AK Native Law
#88 March 6 3 CLE Credits Morning	Mandatory Ethics for Applicants	Anchorage Hotel Captain Cook		
#04 March 26 5.25 CLE Credits AM 2.75/PM 2.5 Full Day	1997 Probate in Alaska	Anchorage Hotel Captain Cook		Estate Planning & Probate
#14 April 4 CLEs tba Early Morning	Off the Record with the Alaska Supreme Court	Anchorage Hotel Captain Cook		
#09 April 8 CLEs tba Morning	Risk Management	Anchorage Hotel Captain Cook	ALPS	
#88 April 11 3 CLEs Afternoon	Mandatory Ethics for Applicants	Juneau Centennial Hall		
#05 April 11 7 CLE Credits Full Day	Defense & Prosecution of Environmental Crimes in Alaska	Anchorage Hotel Captain Cook		Crim. Def. Crim. Pros., & Env./Natl. Resources Law
#13 April 16 2.75 CLE Credits Morning	Negotiating Employment Law Settlements	Anchorage Hotel Captain Cook		Employment
#88 April 18 3 CLEs Afternoon	Mandatory Ethics for Applicants	Fairbanks Regency Hotel		
#701 May 8 Convention CLE 3 CLE Credits	Politics, Public Policy & the Law	Juneau Centennial Hall		CONVENTION
#702 May 8 Convention CLE No CLE Credits	State of the Judiciaries Address	Juneau Centennial Hall		CONVENTION
#703 May 8 Convention CLE 2 CLE Credits	Alaska Appellate Decisions Update (T. Newman)	Juneau Centennial Hall		CONVENTION
#704 May 9 Convention CLE 3.25 CLE Credits	U.S. Supreme Court Decisions Update (P. Arenella & E. Chermerinsky)	Juneau Centennial Hall		CONVENTION
#705 May 9 Convention CLE 3.25 CLE Credits	A Global Perspective on Law, the Courts, and Cross-Cultural Communication (Rev. Dr. M. Oleksa)	Juneau Centennial Hall		CONVENTION
#08 June 5 3.75 CLE Credits Morning	4th Annual Workers' Comp Update	Anchorage Hotel Captain Cook		Employment
#88 September 22 3 CLE Credits Morning	Mandatory Ethics for Applicants	Juneau Baranof Hotel		
#10 September 22 CLEs tba Afternoon	Ethical Issues: Morgantown Civic Center Collapse	Juneau Baranof Hotel	ALPS	
#88 September 24 3 CLE Credits Morning	Mandatory Ethics for Applicants	Anchorage Egan Convention Center		
#10 September 24 CLEs tba Afternoon	Ethical Issues: Morgantown Civic Center Collapse	Anchorage Egan Convention Center	ALPS	
#88 September 26 3 CLE Credits Morning	Mandatory Ethics for Applicants	Fairbanks Regency Hotel		
#10 September 26 CLEs tba Afternoon	Ethical Issues: Morgantown Civic Center Collapse	Fairbanks Regency Hotel	ALPS	
#11 October 22 CLEs tba Day Long	10th Annual Alaska Native Law Conference	Anchorage Hotel Captain Cook		AK Native Law
#06 December 5 CLEs tba Morning	Jury Selection	Anchorage Hotel Captain Cook		
#07 December 11 CLEs tba Early Morning	Off the Record	Anchorage Hotel Captain Cook		

Wendell Kay, The Silver Fox



Wendell Kay

By Russ Arnett

In the 1940's and 1950's the city limits of Anchorage did not include the area which in now Fairview. Law enforcement beyond the city limits was in the hands of the U.S. Marshal and the U.S. Attorney.

Because of limitation of personnel and the inadequacy of Territorial statutes, enforcement was less strict than that within the city. In a portion of the area popularly known as "Eastchester Flats," vice flourished. There were Lucky's Hot Spot and the Club Mambo, and the competition between them sometimes included gunfire.

Elsewhere near Anchorage there were the Last Chance, the Stage Coach and other "B joints" where the "B girls" pushed drinks and themselves. This was the milieu from which many of Wendell Kay's clients of that period emerged. In the process of defending them, Wendell became one of Alaska's all-time great criminal defense lawyers.

Wendell had a client who was a stock promoter. One of Wendell's perquisites for representing the client was the use of a Cadillac. The morning after the client was indicted, Wendell drove to work in his old beat-up Ford.

Most of the heavy duty trial lawyers during Wendell's early years in Alaska were heavy drinkers. They drank preparing for trial and to celebrate victory or mourn defeat after trial. Also they drank, in Wendell's words, because it was St. Swithen's Day. Some even drank during trial. The famous George Grigsby had a bottle behind a book in the law library. Wendell was particularly sensitive and empathetic toward his clients, which made the punishment of a trial harder for him than for a less compassionate lawyer. It may have made it more difficult for him to control his drinking, particularly in the early years.

Wendell was proud of his father, who had practiced law in a small town in Illinois. Wendell used a large table as a desk, which his father had used. Wendell graduated from Northwestern University School of Law in 1938. He also served in the Army during World War II. Though he also had more serious duty, he liked to mention duty at the Weapons of War exhibits at Grant Park in Chicago. GIs found Chicago during wartime a great town for women, and Grant Park had a particularly high density.

Wendell was a political liberal at a time when one could be so proudly and openly. I first met him in Nome in 1952 when he went there with Stan McCutcheon to see whether Wendell would like to be their Territorial judge. When he campaigned for the Territorial Legislature on the Kenai Peninsula, he would usually pick up a couple of divorces and maybe a fisherman's case. (Nearly all lawyers welcomed uncontested divorces.) When the Eisenhower election brought with it a flock of freshman Republican legislators in the Territorial House of Representatives, Wendell had a great time as practically a one-man opposition and occasionally tied the majority in knots.

Wendell's liberalism later caused him to challenge a minister who said in his sermon that it would be a bad thing for a Catholic such as Kennedy to become President. Wendell never returned to that church.

During the campaign a young Ted Kennedy came to Alaska seeking support for his brother at the upcoming Democratic National Convention. The Alaskan delegates wanted to extract a promise from Kennedy to push for a dam on Rampart canyon, which Kennedy had been opposing. Ted said that his brother hoped to gain their support on his merits and could not make such a promise. Wendell replied that this promise was essential if he wanted support of the Alaskan delegation. Wendell added "and you can tattoo that on your ass." Ted laughed. What else could he do? The next day there was a phone call from Washington. They advised that Sen. Kennedy had made a speech in the Senate advocating the Rampart dam, much to their surprise. Wendell became a big Kennedy fan and campaigned for him.

Wendell and Bob Ziegler of Ketchikan crossed swords in a public poetry accusation contest, reflecting the polar political views which they held. The poetry was great, but the only part I remember was the title of one of Wendell's poems to Bob: *Oh, Sweet Bard of the Salmon Can.*

Wendell was proud of having tried five cases in one week.

Wendell won five drunk-driving cases in a row against a particular Assistant U.S. Attorney who later left Alaska and was appointed county attorney in a small town in Nebraska. Local officialdom was present at his first trial as county attorney to see if they had made a mistake in hiring him. The charge was drunk driving. He did a great job and obtained a conviction. He later told an Alaskan friend, "If there is one thing I could do, it was try a drunk driving case."

Wendell was not vain. He would usually greet you with a smile which often led to a story or a joke. He joked about there being a club of his ex-clients at McNeil Island Penitentiary. He told the story of being late one evening for an appointment with a client. His office at the time was in a house. When he arrived the client was inside relaxing in an easy chair. Wendell asked him how he had gotten in. The client smiled and said that was the kind of charge he was facing.

When the Alaska Court System was formed, Wendell was part of a group which attempted unsuccessfully to control the appointment of the first judges. He also argued that it would be appropriate to appoint all Democratic judges, as our system was supposed to be non-partisan, not bi-partisan.

Late in his career, Wendell taught trial tactics at Arizona State, returning to Anchorage during the summers. When the dean, a friend from law school days, hired Wendell, he was asked to go easy on the war stories.

Before Wendell died in 1986 he told his family that he wanted a large amount—$10,000 comes to mind—to be used for a party for his friends.

The party was held at the Hilton, and it was BIG. And it was happy. An open invitation was published as part of the obituary. Wendell's friends from many walks of life, including the notables of Anchorage, met in the ballroom for free food and drink, neither of which ran out. Nobody could hear the speeches, nor did they seem to care. I wonder if a few clients from the Eastchester Flats days were there.