The Alaska BAR RAG

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Inside:

Contributions sought

Women's archive to open

By Barbara Hood

When Mildred R. Hermann of Juneau became the first woman admitted to practice law in Alaska in 1934, women in the United States had enjoyed the right to vote for less than 15 years. It was to be several more decades before women joined the Alaska Bar in any great numbers, and even today, only about 28% of Bar members are women. But with women entering the legal profession in Alaska in increasing numbers and achieving some of its highest positions, Hermann's accomplishment is no longer an anomaly.

The New Year brings many occasions to celebrate the contributions Hermann and others have made to advance the status of women in both the legal profession and society as a whole.

The year 1998 marks the 150th anniversary of the 1848 "Women's Rights Convention" held in Seneca Falls, New York, by Elizabeth Cady Stanton and Lucretia Mott, which is widely viewed as the beginning of the women's rights movement. The year also marks the 85th anniversary of the Alaska Territorial Legislature's first official act in 1913: extending the right to vote to women seven years ahead of the U. S. Congress.

In gauging the progress women have made toward equality, it is worth noting that 1998 is the 126th anniversary of the decision by the U. S. Supreme Court *in Bradwell v Illinois* [83 U. S.130,141 (1872)) that women were not constitutionally entitled to practice law. The Court in *Bradwell* stated that "the natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life...The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is a law of the Creator." Faced with such perceptions about their role and aptitudes, there can be little doubt that women like Hermann blazed difficult trails.

To commemorate these events and its own 5th anniversary, the Alaska Joint State-Federal Courts Gender Equality Task Force plans to recognize the many contributions of women to the legal profession and

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I to r: Colby Smith, Vern Keller, Mike Heiser summit Elbrus.

Exploring new frontiers

Attorneys reach new heights

By Scott A. Brandt-Erichsen

Over the last several years, I recall reading articles about attorneys participating in climbing expeditions. I also remember listening with great interest to Julius Brecht's slide presentation of one of his climbing efforts at an Anchorage Bar Association meeting. I imagine almost everyone has had the opportunity to hear a first hand account of a McKinley ascent at one time or another.

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Thus, while the concept of attorneys reaching new heights is not novel, this story has some unique elements. Mountaineering feats such as McKinley carry with them risks to life and limb from weather, crevices, and steep slopes. The unique challenges in ascending Mt. Elbrus were different in nature with risks such as second degree theft, second degree assault, communication difficulties, and flying toilet tissue.

In August of 1997, a group of attorneys from Ketchikan traveled deep into the heart of Russia to scale Mt. Elbrus, the highest peak in Europe which stands at 18,510 feet (5,642 meters). The trip was conceived about two months in advance at a watering hole in Ketchikan. Vern Keller, Mike Heiser and Colby Smith (who served as a law clerk to Superior Court Judge Michael Thompson from 1996 through 1997) left Ketchikan on August 25, flying to Moscow. They then traveled by domestic carrier to Mineralnye Vody where they met up with their guide, Tatiana Timoshenko.

The expedition was set up through CET-NEVA, a climbing tour organization based in St. Petersburg, Russia, and located through the Internet. Arrangements were made through the Internet and CET-NEVA assisted with reservations and Visas. The expedition was reasonably priced, costing approximately $1,200 per person, including the domestic travel from Moscow to Mineralnye Vody. Travel to Moscow was additional.

From Mineralnye Vody, they drove four to five hours in a van to the training camp where the climbers spent a couple of days training for the climb. The valley below Elbrus is dotted with training camps. Elbrus

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President's Column

Professional liability insurance — or lack thereof ☐ David H. Bundy

Now that we have all survived the "Holiday Season" and can look forward to several more months of dark and cold, its time to deal with the "real world" again.

As mentioned in prior columns, one of the pending items before your Board of Governors is the issue of professional liability insurance. We all know that an appreciable percentage of Alaska attorneys do not have malpractice coverage, and at least some of us believe that is a shortcoming that ideally should be corrected, if there is a reasonable solution.

As you probably recall, a few years ago the Board conducted a survey of the membership on this subject. While most surveys have a low response, the Supreme Court ordered all members to respond, and 1,668 of the approximately 2,500 active members obeyed the order. (We are still considering what to do with those who failed to respond anyway -just kidding!) There were five options presented:

1. Mandatory coverage of at least 100/300(41.5% in favor).
2. Required disclosure to clients of whether attorney is covered, and the amount of coverage (32.2%)
3. Certification to the Bar of coverage or lack thereof.(47.0%)
4. No requirements (status quo) (39.7%)
5. Mandatory coverage through a bar-administered fund.(13.6%)

All of these options (including the status quo) were rejected by a majority of those voting, which left the whole issue unresolved, to say the least. Many of the comments submitted along with the responses were quite vehement, all of which shows that lawyers can get worked up over this subject.

The Board has elected to consider a proposal along the lines of option 2, but only to require disclosure if an attorney is not insured, rather than requiring disclosure of coverage in all instances, as there is the feeling that most clients expect that a lawyer does carry professional liability insurance and should be told if this is not the case. However, if there is coverage there is no real need to mention the fact. As of this writing I don't know whether the proposal will pass or in what form, and of course only the Supreme Court can implement any rule in this area.

The most frequent objections to proposal #2 in the survey were that disclosing coverage at the outset would set the wrong tone for the relationship and encourage meritless claims later.

I can see the wisdom of the first objection more than the second. Clients do not bring claims because they know the lawyer has coverage; they assume that there is coverage when they have a claim, and bringing a

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Editor's Column

A modest proposal for litigation reform ☐ Peter Maassen

It should come as no surprise to tested, character-passed, dues-paying members of the Alaska Bar Association that the Alaska Legislature has once again retained an Outside lawyer to file a patently lost-cause lawsuit in a far-off jurisdiction, appropriating $175,000 of your hard-earned tax dollars (well, not your tax dollars exactly, but you know what I mean) for the purpose. The apparent attraction of this particular lawyer, who hails from Idaho, is that he has lost similar cases in the past, and thus, the law of averages being what it is, he can only improve on his record while carrying Alaska's water.

The Legislature appears to have overlooked the fact that a number of Alaska practitioners have similarly dismal win-loss records and may even have been willing to do the job for less. Besides, whatever happened to local hire? Are Alaska lawyers really too proud to give bad advice when persons in power insist on it?

Speaking of frivolous lawsuits, a sublimely goofy book review on the subject appeared in the January 5, 1998, issue of that other high-toned Alaska newspaper, *The Alaska Journal of Commerce.* Yet another Outside lawyer, a guy named John Ritter, reviews an unnamed "recent book on the litigation explosion by Walter Olson," a book which, much to Ritter's surprise, concludes that the reasons for the American litigation explosion aren't the "obvious" ones of "too many lawyers, contingency fees, jury unpredictability, and lawyer advertising." Reviewing a book review is akin to writing a report on the *Classics Illustrated* version of a Great Book, but Ritter's review convinces me that Olson's unnamed book should remain unread, too, and I therefore address the book's conclusions only as reported by hearsay.

Olson says that what has actually fueled the litigation explosion is the silver-tongued ability of "litigation lawyers" to convince judges throughout America to "weaken legal rules" that good people everywhere used to be able to count on to thwart successful plaintiffs' suits (and we all know how easy it is to convince a judge of anything, especially the need to depart from long-standing precedent). Among Olson's major culprits: notice pleading, "broadened pretrial discovery," the equitable division of property in divorces (instead of just a clean slash down the middle, apparently), "statutes with vague standards like reasonableness," and the contract doctrine of unconscionability which "allow[s] courts to ignore part or all of a contract." All of these new rules, according to Olson, mean that "[c]ertainty is gone, inviting all parties to go to court and roll the legal dice."

Thus, while having a case thrown out "on a technicality" used to be the bugbear of those who thought that the legal system coddled criminals, it has now happily metastasized into the goal of the tort reformers. And here we "litigation lawyers" sat in our foolish ignorance, thinking that arbitrary decision-making was a bad thing, believing in and working toward a goal of rational decision-making based on the facts and equities of each special human problem. How could we have been so blind?

Olson is mistaken about other things besides social policy. He laments, for example, the supposed fact that "the standard of what could be discovered before trial was broadened to anything that could lead to discovery of relevant evidence," which, though a common belief even among lawyers, is mistaken. Read Rule 26 (b) (1), Alaska or Federal. Evidence need not be *admissible to* be discoverable, but it still has to be relevant, as well as "reasonably calculated to lead to the discovery of *admissible* evidence." True, relevance is broadly interpreted, but liberal discovery can prove to be an advantage to the defense as often as it does to the plaintiff.

Another of Olson's complaints is notice pleading, which means that lawsuits can "no longer be dismissed at an early stage for failure to word claims specifically and thoroughly." This provides the entree to my own great idea for tort reform, which I herewith offer to the Alaska Legislature (or any other—why should I favor the locals either?) with no claim for the credit if it passes. What we need is a law requiring all complaints to be written in Latin—and proper Latin, too, not your medieval Italianate High-Church corruption. Answers, of course, can be in English, since defendants have enough burdens to bear already.

This would solve several social problems in one fell swoop (*suopus felus).* It would dramatically limit the number of lawyers able to draft a simple complaint, narrowing the field to those who have studied dead languages; *morituri te salutamus*, and all that. We would see more of those wonderful causes of action from the good old pre-explosion days, ones that we know only by their Latin names like *assumpsit* and *essendi quietum de tolonio,* that carry with them equally arcane and arbitrary defenses that allow for perfunctory dismissals.

As a collateral benefit, we would provide employment opportunities in the court system for classics majors, whose job it will be to parse every complaint with Latin dictionary in hand and throw out all those that fail to word their claims correctly. And finally — and this is the real beauty of it — we'd get the spectacle of the tort reformers colliding headlong with the English-only advocates, with who-knows-what resulting mayhem for the enjoyment of the onlooker.

Until my reform is passed, most of us, I expect, will just continue to do what we've always done: advise people to sue if they have valid claims that the legal system can redress, advise them not to if they don't. Most of us could have done that for the Alaska Legislature, too, given the opportunity, and probably for a mere fraction of the $175,000 appropriated to pay the Idaho lawyer.

And maybe, for a little extra, we could've done it in Latin.

The Alaska BAR RAG

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President's Column

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claim is not so easy that they are frequently brought for no reason but to "hold up" the carrier. Other objections included the comment that other Alaska professionals are not required to have coverage as a condition of licensure, or to disclose its absence. I believe some hospitals require coverage in order to extend staff privileges to M.D.s, and in any event, why do we have to be followers, rather than leaders?

Of the 1,668 lawyers who responded to the survey, 349 said they did not have professional liability insurance. While I cannot prove it, it seems logical that a greater percentage of the non-respondents were not insured. So somewhere around 25% of the private practitioners in this state are not covered.

Insurance is universal among the larger firms that tend to represent businesses, so it is probable that lack of insurance is more common among the attorneys who primarily represent consumers. In the survey, 33.7% of full-time solo practitioners reported being uninsured. Among the part-time solos, the percentage rose to 81.4%. This means that when a consumer client hires a lawyer there is a significant chance that the attorney will not have malpractice insurance, yet these clients are relatively less able than others to bear the consequences of their attorney's negligence, on the rare occasion when that happens.

Is this a problem that needs to be addressed? If so, does the organized bar and the Supreme Court have any responsibility to deal with it? Is a rule requiring disclosure of non-coverage the correct approach to the problem? As far as I can detect, there is no consensus on any of these issues. Recognizing that any of the alternatives impacted small firms and solo practitioners to the greatest extent, a couple of years ago the Board appointed a committee from this constituency to make some recommendations. This committee was about as divided as the membership survey responses.

There is no hard evidence on the extent of the problem created by uninsured lawyers, although many of us have anecdotes of worthy claims that were uncollected or not filed at all, because there was no way to satisfy a judgment. That lawyers are allowed to practice without insurance may be perceived as a problem simply because that could be seen as a lack of concern for the public on the part of our profession.

The "image" of lawyers has never been pristine, and will not become so no matter what we do, but practical steps that can help the image problem should be considered. If lack of coverage is a problem that needs to be addressed, surely most of us would prefer to have the Board and the Court deal with this rather than another public body. (This is our year for "sunset" review, and the Legislative Auditors will mention this issue in their report to the Legislature.)

And if this is to be dealt with, then requiring disclosure of non-coverage has the smallest impact on the Bar as a whole. Most lawyers will not be required to do anything, and the uninsured will not be required to buy coverage. Unfortunately, as our survey showed, there is no option that will make everyone happy. The Board's intervention on this subject makes some members furious, and, we are advised, we are wasting the Bar's funds by trying to adopt a consumer protection role. Well, the Board was elected to make decisions, and some of them will not be popular with all members. It probably won't make the objections go away to point out that this rulemaking function is uncompensated and does not affect the Bar's budget!

We will, at a minimum, carefully consider any comments by members who choose to share them with us.

Bar Letters

Youth Court says thanks

The Anchorage Youth Court (AYC) thanks the Anchorage Bar Association for giving its members the option to donate when paying Anchorage Bar Association 1998 dues.

Since spearheading Anchorage Youth Court's development in 1989, the Anchorage Bar Association, its Young Lawyers Section, law firms and individual attorneys have been integral to AYC's success.

Support from the legal community, businesses, local and state government and individuals help AYC judge, attorney, bailiff and clerk volunteers divert and intervene before youth accused of breaking the law form a criminal behavior patter. Since January 1996, when the two-year Making a Difference pilot project began, Juvenile Intake has referred 806 juvenile cases to AYC. AYC defendants have worked 14,534 hours and paid $16,302.21 monetary restitution to victims and 86% of the defendants completing AYC have not reoffended. With support from the community, especially the many attorneys who volunteer their time to advise in AYC's court, donate funds and items, and the law firms who also donate, AYC is making a difference.

—Sharon A. Leon

Senate Bill 202 helps injured motorists

Last session I introduced Senate Bill 202 "The Alaska Consumers Automobile Insurance Reform Act." I authored this legislation to give injured Alaskan motorists a more even playing field when dealing with auto insurance companies.

Many injured Alaskans are not being fairly compensated by insurance companies that have skewed the system to improperly and unfairly withhold payments of legitimate claims. A recent example of this abuse was when an insurance company took nearly four years to finally pay an insured Alaskan motorist for an obviously covered loss. Senate Bill 202 remedies such abuse by establishing a maximum 90 day period by which insurers are required to pay for a covered loss.

Senate Bill 202 sets fairer guidelines for assessing the true value of damaged vehicles and when premiums can be increased.

The bill also provides injured Alaskan motorists the opportunity to pursue fair and equitable claims through arbitration. Many insurers currently require a policy holder to pay the costs of arbitration before the process even begins. This type of activity discourages claimants from pursuing a fair settlement since these up front costs can be very high. SB 202 prohibits insurers requiring claimants to pay arbitration costs up-front. Instead, the arbitrator will decide who should pay these costs.

Insurance companies have unfairly held the upper hand far too long in Alaska. Alaskans deserve fair and equitable auto insurance claims practices and the passage of Senate Bill 202 will help provide that.

—Sen. Dave Donley

Alaska Bar Association Annual Convention

Circle these dates for 1998: May 7, 8 and 9!

The Alaska Bar Association Annual Convention will be held Thursday - Saturday, May 7-9, 1998, in conjunction with the Alaska Judicial Conference at the Westin Alyeska Prince Resort in Girdwood.

Join us for a very special program including:

- Annual Alaska Appellate Update with Theresa Newman of Duke University School of Law
- Advanced Legal Writing with nationally acclaimed attorney and trainer Bryan Garner of LawProse, Inc.
- U.S. Supreme Court Opinions with Professors Arenella and Chemerinsky
- Alaska Native Law Update
- State of the Judiciaries Address by Chief Judge Singleton and Chief Justice Matthews
- 44 Things to Do Before Trial with nationally known trial attorney Morgan Chu from Los Angeles, and Mauri Long and Ray Brown of Dillon & Findley

✔ Join us at the Glacier Express for the President's Reception. And be sure to reserve a seat for the Awards Banquet with keynote speaker Don Mitchell, lawyer and author of *Sold American*.

✔ The Alaska Bar Association Annual Meeting will be on Thursday, May 7.

Providers of services to the legal community including publishers, printers, and insurance groups will be on hand to share information with Bar members. Watch for more information in upcoming editions of the *Bar Rag* and look for the special convention brochure in early 1998.

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ALSC President's Report

Poverty and politics

☐ Arthur H. Peterson

People in poverty are still with us. So are people in politics. We need to get more of the latter to recognize the plight of the former — to recognize the debilitating and often life-threatening *unfairness* of that plight. And it *is* plight, the twist of fate, not choice; the myth of the "downtrodden-by-choice" should need no further debunking at this late date. With a new year—an election year—the cycle begins again.

On the home front, the governor has introduced his Fiscal Year 1999 operating budget, which includes $125,000 to assist the Alaska Legal Services Corporation in providing civil legal assistance to poor people. Let's work to assure that the legislature does not lower that amount. Remember, in the early 1980's, ALSC received $1.2 million from the state. Neither the poverty population nor the unlawful assaults on that population have decreased with the funding decrease.

The direct fund-raising drive among attorneys has been doing a bit better this year. As of this writing (1/12/98), we have received over $32,000. Thank you, and keep up the good work. Talk to your colleagues who might not yet have contributed. As I've said before, we have a great *pro bono* program in this state; we greatly appreciate your work; but we need money, too. We have also received a few municipal grants and some pledges from Native corporations for the current fiscal year.

On the national scene, after passing a series of "continuing resolutions," in November Congress finally passed the conference committee version of HR 2267—the FY 98 appropriations bill for the Departments of Commerce, Justice, and State, and the judiciary and related agencies. This is the bill containing a little item appropriating money for the Legal Services Corporation. The amount is the same as last year's ($283 million). President Clinton had requested $340 million, the Senate had passed a bill containing $300 million, and the House had passed one containing $250 million.

THE GOVERNOR HAS INTRODUCED HIS FISCAL YEAR 1999 OPERATING BUDGET, WHICH INCLUDES $125,000 TO ASSIST THE ALASKA LEGAL SERVICES CORPORATION...

The various substantive restrictions on federal-funding recipients, including the one that prevents ALSC from using our Civil Rule 82 to collect attorney fees when it wins, were left in place. And some new ones were added! For example, a recipient (such as ALSC) that sues "the Corporation [LSC), or any agency or employee of a Federal, State, or local government" may be "debarred" from receiving additional financial assistance from the LSC! (Section 504 of the bill.) And all of the restrictions apply to services provided with *non*-federal, as well as federal, money. Write to your Congressman and Senator about the unfairness of these prohibitions.

As mentioned in my last report (*Bar Rag*, Nov.-Dec. 1997), the *LASH* case is now on appeal. Two additional parties have joined the case—on the defendant's side. The Washington Legal Foundation, an opponent of legal services for the poor, has filed an amicus brief on behalf of LSC, and the United States has intervened to defend the restrictions imposed by Congress.

In December, a federal judge in New York ruled against the plaintiffs in *Velazquez, et al. v. Legal Services Corporation and Legal Services of New York City* (see, *Bar Rag*, July-Aug. 1997). The judge found the new LSC regulations to be a permissible construction of the 1996 restrictions on LSC recipients.

On a more positive note, the Alaska Supreme Court has adopted a resolution creating the Access to Civil Justice Task Force. It will consist of a core group and an auxiliary group. With Justice Dana Fabe as the chair, membership is being selected at the time of this writing. I believe that the first item of business will be the preparation of a report that addresses the many aspects of the drastic cuts in federal and state funding for ALSC.

Also, at its January 17 meeting, the Alaska Bar Association's board of governors planned to take up the matter of an ALSC contribution line to be printed on the bar dues notice. The idea is to make contributing as simple as possible for the more than 2,000 Alaskan attorneys who do not usually contribute. A suggested amount might be stated on the notice, but that is *not* intended to be a *substitute* for the larger contributions many attorneys send in.

And, finally, we recently hired a statewide "development director" (modern title for fund-raiser, etc.). This is a step recommended to us by legal services programs and other nonprofit organizations. His name is Jim Minnery. His roots are in Alaska, being a graduate of East High School, in Anchorage. He has a B.S. in marketing, from Ohio State University, and has completed the course work for his master's degree in nonprofit organization management, from Regis University (in Denver). Among other work for nonprofits, he served the Alaska State Chapter of the March of Dimes, and, most recently, the Meet-the-Wilderness program in Denver. You will probably be hearing from him soon, if you haven' t already.

So, thanks again for your time and your money. ALSC is determined to survive to provide essential civil legal services to the poor

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ECLECTIC BLUES

Risk Manager ☐ Dan Branch

I was in the Juneau Foodland the other day, using the store grinder to reduce Deadman Reach Coffee beans into a usable form, when a frightened man's shout called me to the deli tables. There, hunched over a Thursday's edition of the *Juneau Empire*, sat an old, shaken guy.

He wore a Filson Mackinaw the color of old red paint and his face suggested that he was as tired as his clothes. Rain water from a nasty storm had pulled the locks of his silver gray hair over his forehead. Looking into his bloodshot eyes, I asked what caused him to call out. Without a word he handed me his paper. It didn't take me long to find the source of his concern. There, in the misery corner of the first page, a 32-point headline announced, "RISK MANAGERS DON'T LIKE SIGNS."

THERE, IN THE MISERY CORNER OF THE FIRST PAGE, A 32-POINT HEADLINE ANNOUNCED, "RISK MANAGERS DON'T LIKE SIGNS."

"Read it," he ordered. I did. According to the story, the local government risk managers wanted to stop the practice of placing announcement banners on the walkway that crosses Egan Drive. The picture accompanying the story showed the walkway adorned with banners advertising the *Vienna Choir Boys Concert* and the Juneau Art Walk.

If you own a car in Juneau, you will drive it under the walkway. This makes it the ideal place for community groups to pass the word about concerts, sporting events, and the mayor's 50th birthday. According to the story, all that will end. The risk managers are putting the kibosh on the signs and want everyone to honor their ban.

According to the risk-avoiders, the banner ban will protect the lives of those asked to hang the banners and avoid the dangerous possibility of an improperly installed sign coming lose and hanging over the highway. It will also satisfy those drivers who complain about the banners because they distract them while they are driving. The risk managers also want to protect their employer (the city) from being sued by the banner owners themselves, for damage to their signs.

While the risk managers admit that no one has actually been injured by a sign, they pointed out that one of the signs did come loose during a 55-mile-an-hour wind storm last week. Fortunately, it was secured before anyone suffered death or dismemberment.

Turning my attention to the shattered old man, I looked into his worried eyes and said, "It will be OK."

"Oh, no, it won't ever be OK," he responded. Then he told me his story:

I didn't always camp here in the backwash of Gastineau Channel. Years ago I lived in a city down south. Oh, it wasn't heaven but it was OK. People pretty much pulled their own weight and stayed out of their neighbor's business.

They had parks and schools and graveyards, just like here. The Moose and Elks put on fund raisers and every year we'd all gather in the high school auditorium to watch the kids dance the Nutcracker. On weekends during the season, the gym would fill up with folks enjoying the high school team play basketball. All this probably sounds pretty familiar. I've seen you Juneau folks do all those things just like we used to do them in my home town.

The old man took a break in history to sip from his coffee and watch someone in a Dodge pickup flip a 180 in the icy wet Foodland parking lot. Then he returned to his sad tale.

Well sir, things were going along pretty good when one of the ballet dancers in the Nutcracker slipped on a patch of artificial snow and twisted his ankle. Put the boy out of commission for a big basketball game so his dad hired a lawyer from the next town. The attorney sent the school a nasty letter. Rather than telling him to go chase an ambulance, the school administrators hired their own lawyer who settled the case out of court. The district then hired the lawyer's brother as a risk manager. Things went down hill from there.

The risk manager started writing memos, and for some reason the school officials actually read them.

First, he wrote a memo warning that ballet dancers could be seriously injured by falling from the auditorium stage into the orchestra pit. The school responded by covering the pit with plywood. Since the band had no place to play, it was disbanded.

It didn't take the manager long to figure out that children could harm themselves playing sports in the school gym, so it was closed. Seeing how much safer the school was after hiring their risk manager, the city hired one of its own. Right off, the new fellow determined that the city graveyard was nothing but a dangerous collecting point for biohazards. The city closed it, so we had to start burying our dead in the next town.

That's when I bailed out and came up here. Sold my house to a risk manager that the state brought in to keep the highways and parks safe. Now the parks have been covered with earth-friendly concrete and the state highways are cordoned off from use.

"No, son," he concluded, "it will definitely not be OK."

With that, the old guy drained his coffee drink and headed back into the rain. While watching him make his way across the parking lot, I saw a Dodge pickup pull another 180 and slide out of control past a jogger pushing her baby in one of those jogging kid carts. The jogger fell, losing her grip on her kid cart which then slammed into the old man. I ran out to help and found him laughing.

"This is the good life, kid," he said while getting up, "Don't ever let them take it away from you."

Need help? Call Joe Sonneman at
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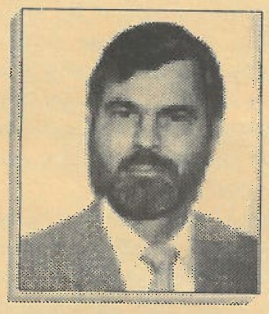
Creditors and bankruptcy

Part II ☐ Thomas Yerbich



In chapter 7 cases, other than to file a Proof of Claim, retain the records and keep the court apprised of address changes, there is little, if anything, the holder of an unsecured claim can do to protect the claimant's interests except sit back and wait for the trustee to complete administration of the estate and (hopefully?) make a dividend distribution. For the most part, active participation in the proceedings will be a waste of time, effort, and, if one hires an attorney, money.

In a chapter 11 case, one the principal rights of unsecured claimants is the right to vote on or object to confirmation of the plan. To vote against ("reject") a plan, the creditor need have no reason for so doing other than the creditor does not like it. However, an objection to a plan must be based upon the grounds that the plan does not comply with the requirements of the Code: not simply, "I don't like it."

Other matters arise during the administration of the chapter 11 estate that can materially impact holders of unsecured claims. The extent to which a particular creditor will want to monitor the proceedings or actively participate is usually dependent upon two factors: (1) the size of the claim; and (2) the existence of an active creditors' committee. The holders of small unsecured claims generally find it uneconomic to actively participate and instead rely upon the unsecured creditors' committee or a creditor with a larger claim to "monitor and react" to proposed actions that can materially impact unsecured claimants, *e.g.*:

(1) The assumption or rejection of an executory contract or unexpired lease, which can convert an obligation that would otherwise be treated *in pari passu* with the other holders of unsecured claims to a claim entitled to priority.

(2) Situations where secured creditors either obtain relief from stay, "stripping" the estate of what could be a valuable asset or one essential to continued operations, thereby rendering it more difficult for the debtor to generate income sufficient to pay the unsecured claimants.

(3) Where the debtor, to appease a particular creditor, *i.e.*, a bank with a security interest in the cash collateral, "gives away the farm" to the potential detriment of unsecured claimants.

CASH COLLATERAL

In chapter 11 cases particularly, a major issue confronting secured claimants is use of the cash or cash equivalent realized from the use or consumption of collateral ("cash collateral"), including proceeds, products, offspring, rents or profits, whether received pre- or post-petition. [§ 363(a)]. A secured claimant must be especially vigilante whenever the collateral is capable of consumption such as inventory, stock in trade, raw materials converted to goods sold in the ordinary course of business, receipt of receivables, or other cash/cash equivalent proceeds realized from the use of the collateral.

While the Bankruptcy Code makes special provision for cash collateral, it is imperative that the secured claimant maintain a "vigilante eye" and act timely to exercise the powers Congress has granted in order to preserve the interests in the cash collateral. One immutable fact applicable is that once cash is spent it can not be retrieved—in short, the time to act to ensure the barn door is shut is before the horse is out, not after! In the typical chapter 11 proceeding, the only source of cash to fund ongoing operations is from the use of cash collateral, *e.g.*, continued sale of inventory, collection of outstanding receivables, rents collected, or raw materials consumed in day-to-day operations. Typically, where the debtor is operating an on-going business, if a "deal" has not been made pre-petition, one of the first issues that must be confronted post-petition is the utilization of the cash collateral.

The trustee may, if authorized to operate a business, enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or hearing. [§ 363(c)(1)] However, cash collateral may not be used by the trustee unless (1) its use is consented to by the creditor having an interest in it or (2) the court, after notice and hearing, authorizes the use. [§ 363 (c) (2)]

Typically, inventory, accounts receivable, and "open line-of-credit" financing arrangements contain an "after-acquired" clause to automatically include within the collateral covered any like or similar items subsequently acquired by the debtor. However, a lien created by an after-acquired clause in a pre-petition security agreement does not attach to property acquired after the petition is filed. [§ 362 (a) (4)] The cash received in exchange for the pre-petition collateral is protected by virtue of the cash collateral provisions of the Code, but replacement receivables, inventory or other property, even if acquired with the cash collateral, belong to the estate free and clear of the pre-petition lien.

ADEQUATE PROTECTION

Whether negotiating a consensual agreement for its use or opposing the motion filed by the debtor/trustee to use cash collateral, the secured claimant needs to be mindful of ensuring that its position is adequately protected. In the use of cash collateral, two principal modes of providing adequate protection are commonly utilized, either alone or in tandem: (1) periodic payments and (2) a replacement lien on post-petition receivables and/or inventory. Occasionally, there will be a lien granted on other property of the debtor or the "equity cushion" may be sufficient to permit utilization of the cash collateral without impairing the interest of the creditor in the collateral used or consumed. The latter two are more the exception than the norm. *Caveat*: In the event an "equity cushion" provides the adequate protection, a creditor should ensure that a satisfactory reporting system is established to permit the creditor to monitor the "equity cushion" or place other appropriate restrictions on the debtor to prevent its disappearance.

A typical adequate protection agreement involving inventory, receivables or secured line-of-credit financing will contain several key provisions, including the "big three": (1) a "drop-dead" provision granting the creditor relief from stay if the terms of the agreement are not adhered to; (2) minimum loan to collateral value ratios to be maintained by the debtor; and (3) a system by which the debtor periodically reports its current collateral position, *e.g.*, inventory on hand and aged receivables, to the creditor. Without these, adequate protection may prove to be more illusory than real.

Should adequate protection prove to be inadequate, a secured creditor is entitled to a "superpriority" administrative expense claim provided: (1) an adequate protection order was entered by the court; and (2) the use of the collateral or cash collateral is an administrative expense under § 503(a). [§ 507(b)]

After the petition has been filed, the secured claimant should physically inspect the collateral. In particular, is the collateral declining in value, whether from normal obsolescence or depreciation, abusive use, inadequate maintenance, or other causes? If so, taking action to stop the erosion of the secured claimant's interest in the collateral is imperative. This action should be in the form of a motion for relief from stay, either absolutely or as an alternative conditioned upon the creditor being provided adequate protection. Remember, the purpose of adequate protection is to protect secured creditors from a decline in the value of the collateral during the pendency of the automatic stay. [*United Savings Ass'n of Texas v. Timbers of Inwood Assoc., Ltd.*, 484 US 365 (1988)]

SALE OF PROPERTY

The trustee is authorized, after notice and an opportunity to be heard, to sell the property of the estate outside the ordinary course of business, including property in which a secured claimant has a security interest. [§ 363(b)]

If subject to a lien or encumbrance, property may be sold free and clear of any such lien or encumbrance, with the liens on the property attaching to the proceeds. [§ 363(f)] Before property can be sold free and clear of liens and encumbrances, either:

(1) otherwise applicable nonbankruptcy law must permit it;

(2) the secured claimant consents to the sale;

(3) the price at which the property is to be sold exceeds the aggregate value of all liens on the property;

(4) the interest of the secured claimant is in *bona fide* dispute; or

(5) the secured claimant could be compelled to accept a money satisfaction for the interest.

At any sale of property sold, unless the court for cause orders otherwise, the holder of a secured claim attaching to the property may offset the amount of the claim against the purchase price of the property sold. [§ 363 (k)] This provision permits the secured creditor to ensure that it will receive at least the lesser of the value of the property or payment in full. In that case, the deficiency, collection of which from the estate may be "iffy," will be eliminated or at least reduced.

INSURANCE

Maintenance of insurance is an adequate protection issue. If the property is uninsured, whether the loan or security agreement requires such insurance or not, or the insurance expires, the interest of the creditor of the creditor is not adequately protected and relief, such as terminating the stay, is warranted. [*See In re Smith*, 43 BR 32 (Bank.ED Mo 1984); *In re Ryals*, 3 BR 522 (Bank.ED Tenn 1980)] If the loan/security documents require insurance, review the file to determine the requisite proof of insurance is present. If the claimant is not required to get notice of cancellation, it is prudent to obtain proof that insurance is **in force**. If not, an immediate demand on the debtor or trustee to insure the collateral or reinstate lapsed insurance should be made. Although it may be grounds for relief from stay or other relief, the secured claimant should not overlook the self-help remedy of obtaining its own policy to protect its interests.

POST-PETITION CREDIT

When authorized to operate a business, the trustee/debtor in possession is authorized to incur unsecured debt in the ordinary course of business without prior court authorization. [§ 364] Court approval, after notice and hearing, is required before any other debt, *e.g.*, secured or outside the ordinary course of business, is incurred. [§ 364(b)]

Frequently in chapter 11 cases, the debtor seeks to obtain post-petition credit secured by a lien that is equal to or senior to the liens of existing creditors. [§ 364(d)] The court may grant such equal or "superpriority" lien only if the interest of the holder of an existing lien on the property is adequately protected. [§ 364(d)(1)(B)].

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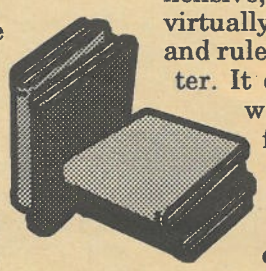

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Edward J. Imwinkelried,
Daniel D. Blinka
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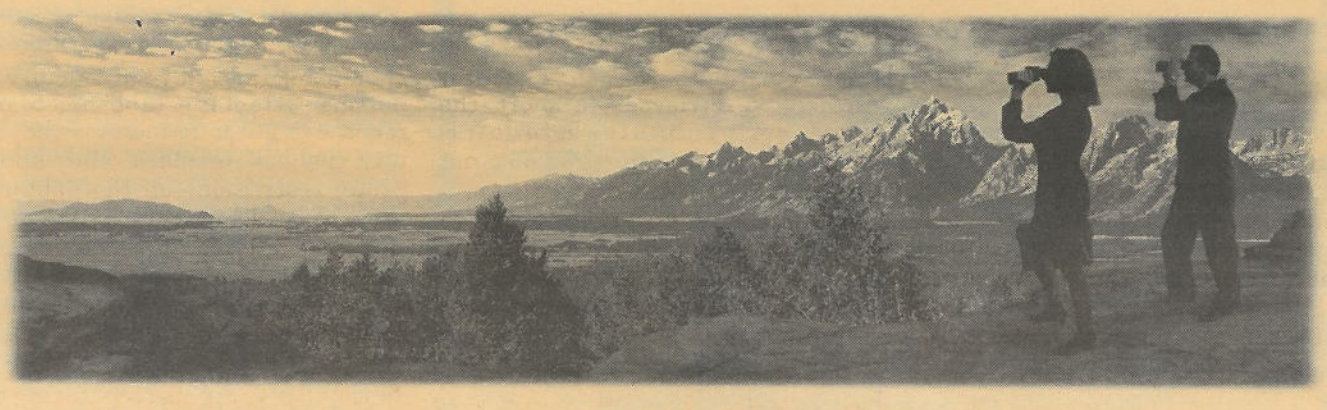

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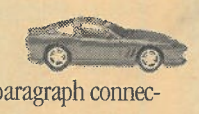

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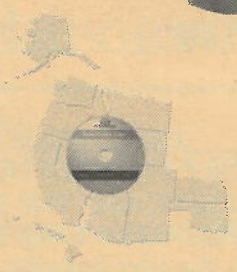

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Attorneys invited to contribute items to "Women in Alaska Law" archive

Continued from page 1

judicial system in Alaska by establishing an archive featuring all women who have practiced law in the State or contributed significantly to shaping its laws.

The primary goal of the archive is to create a historical record of women's roles in Alaska law to date, which can be available as a resource to the Bar and the public for many years to come.

Another important goal is to use the archive to develop educational materials such as displays and timelines for use in courthouses, schools and other public venues. By raising awareness of the many contributions women make to the legal community, the Task Force hopes to further its goal of promoting gender equality throughout the justice system.

The Task Force is seeking photographs, documents and other memorabilia relating to early women lawyers such as Hermann who are of historical significance. Anyone with names of such women or information about them is encouraged to contact any Task Force member at the numbers below.

Although the primary focus of the archive will be on women attorneys, non-attorneys who have made significant contributions to Alaska law will also be included. For example, long-time magistrates Sadie Brower Neakok of Barrow and Nora Guinn of Bethel will be interviewed for this project. The Task Force also is soliciting contributions for the archive directly from Bar members.

THE TASK FORCE IS SEEKING PHOTOGRAPHS, DOCUMENTS AND OTHER MEMORABILIA RELATING TO EARLY WOMEN LAWYERS

Specifically, it is seeking from each woman lawyer in the state, regardless of length of practice:(1) photographs of you taken during your early years of practice (personal or professional setting; black and white or color); (2) current photographs of you; (3) background narrative about your legal career, including details such as your law school experience, year of admittance to the Alaska Bar, areas of focus and expertise, special accomplishments, etc.; (4) brief descriptions of both your "moment(s) of greatest satisfaction" or "moment(s) of greatest frustration" in your professional work, and comments on whether or not you believe they were affected by your gender; (5) any "words of wisdom," anecdotes or insights you would like to share about your experience as a woman lawyer in Alaska; (6) comments about people who have been particularly inspiring or helpful to you; (7) quotes from any source that you have found particularly illuminating or enlightening about the role of women in law; (8) copies of any appropriate documents or memorabilia that you would be willing to share with or donate to the archive; and (9) any other information that you think would enhance the goals of the archive.

Mrs. Mildred R. Hermann of Juneau signing the new Alaska State Constitution, Fairbanks, 1956. Photo couresty of the Anchorage Museum of History and Art.

For simplicity of storage and display, the Task Force requests that the above photographs and information be submitted on plain white pages of 8-1/2" X 11" paper, unstapled.

Please attach the pages to the "clip and send" coupon (see page X) and mail them by no later than April 1,1998, to: Barbara Hood, GETF Executive Director, c/o 2413 Lord Baranof Drive, Anchorage, AK 99517.

If you have any questions or suggestions, or would like to volunteer to help, please feel free to call 248-7374. You may also contact any of the following members of the Task Force's Program Committee for further information: Leroy Barker, GETF Program Committee Chair (Anchorage), 277-6693; Barbara Armstrong, Alaska Bar Association, 272-7469; Robert Bundy (Anchorage), 271-5071; Hon. Patricia Collins (Ketchikan), 225-3197; 5usan Cox (Juneau), 465-3600; Hon. Michael Jeffery (Barrow), 852-4800; Holly Montague (Kenai/Soldotna), 262-8609; Susan Reeves (Anchorage), 258-6866; Hon. Eric Sanders (Anchorage), 264-0406; or Gina Tabachki (Fairbanks), 488-1534.

The first display drawn from the archive will be exhibited at the Alaska Bar Convention in Girdwood in May 1998. When not being used for display or special events, the archive will be kept with other historical materials maintained by the Alaska Bar Association's Historians Committee.

The Task Force invites women attorneys to be a part of history and contribute to the archive today!

Women in Alaska Law

An Archive Celebrating the Contributions of Women to Justice in the Great Land

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I authorize the Alaska Joint State-Federal Courts Gender Equality Task Force to include the attached materials in the archive on "Women in Alaska Law" to be maintained by the Alaska Bar Association, and to utilize them to develop educational materials such as brochures, booklets, news articles, displays and timelines for use in courthouses, schools, and other public venues.

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_____ENCLOSED IS MY CONTRIBUTION OF $_____ TO SUPPORT THE CREATION OF THE "WOMEN IN ALASKA LAW" ARCHIVE AND THE EDUCATIONAL EFFORTS OF THE GENDER EQUALITY TASK FORCE. (Please make checks payable to "Gender Equality Task Force")

Please detach this coupon, clip it to the materials you are contributing to the archive, and return them by April 1, 1998, to:

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Anchorage and Alaska will host the 4th International People First Conference from April 23-25, 1998. People First, with more than 500 chapters worldwide, is a self-advocacy movement for the developmentally disabled, who seek their human and civil rights and independence.

Alaska's People First chapters welcome your volunteer or sponsorship assistance for this important conference.

For more information on the conference, call Dave Berube at the Disability Law Center of Alaska: 344-1002

Excerpts from the JBA Minutes

NOVEMBER 14, 1997

Old Business: Lach Zemp presided over the meeting in President Mie Chinzi's absence today. Lach asked if there was any comment on Mie's pending motion regarding a change in the JBA bylaws about membership. Her motion basically removed the geographic barriers present in the bylaws to allow other Southeast attorneys to join as members. Discussion: Judge Weeks said that he would vote it down if membership was opened up, for various reasons. Steve Weaver stated that he recently received mailing labels from the ABA for mailing the dues notices out. Of the total 298 labels (which include attorneys from all of Southeast Alaska), 232 attorneys are located in the CBJ area. The rest are outside the CBJ. The majority of these are in Ketchikan.

In reference to some members' fear of Anchorage attorneys joining the JBA, David Walker said: "Is it true that the Anchorage Bar plans to put one of their copy machines in our Law Library here in Juneau?" (There is a rumor that the Anchorage Bar is making good money off their copy machine at the courthouse.) Judge Weeks announced that he had a new motion: He moved that the JBA NOT send dues notices to other attorneys in other Bar associations outside the CBJ area. This motion was seconded by Steve Weaver. A vote was taken, and the motion passed with only one objection from Eric Kueffner. (His objection remains unexplained). Mark Regan moved to table Mie's motion, and this motion passed with no objection.

The JBA having done its good work for today's meeting, the body dissolved into general chaos and chatter. After a while, Acting-President Zemp remembered that we needed to finish our business meeting, and asked: "Is there any New Business?" Finding none, the JBA *ADJOURNED.*

Sheri L. Hazeltine, Secretary

NOVEMBER 21, 1997

Old Business: Mie Chinzi discussed her Motion to Change the JBA Membership Bylaws, which was tabled last week. She said that she will defer to last week's actions and motion, and leave her motion tabled. Tony Sholty said that the only reason that Eric Kueffner was the lone dissenting vote last week on Judge Weeks' motion was because Eric didn't really understand what he was not voting for. At this point everyone looked at Eric, who still had no comment. Mie also stated that Eric Kueffner is in the process of reviewing all of the JBA's Bylaws, in the interest of updating them. Eric said he now has the JBA Bylaws.

On another note, Mie said that Roger Snippen had sent her a letter about revising our Bylaws, probably because this is such a controversial and important issue. This announcement was met with eagerness, as letters from attorneys to us are always welcome as either providing humorous relief or inciting controversy and chaos at our meetings. Someone asked why Roger never came to the Second Course, but did show up occasionally at our Westmark meetings. Naturally, this was met with Mr. Engleman's standard quick reply: "He's probably tired of the scallops."

In regard to our upcoming mailing of the JBA dues letter, Mary Alice McKeen moved that instead of soliciting attorneys outside the CBJ-area to join our membership, that we instead send them a letter inviting them to come to our weekly meetings. This motion passed with no objections, and a letter will be drafted for the JBA membership to examine at our next meeting. Tony requested that we make sure that an invitation was extended to the Whitehorse Bar Association. Mark Regan wanted a clarification that we were not asking them to join our membership, right? (Right.) Joe Sonneman asked for unanimous consent on this, but everyone ignored his comment.

Movie Reviews: There was a frank discussion about the movie "Starship Troopers": Bruce said that it was terrible. Steve said it was made by the guy who directed "Robocop." One unnamed attorney asked for advice on whether she should take her son to it. Someone said that there was nudity in it, to which she responded that she didn't care about the nudity. It was the violence and bad language she was concerned about. The group was dispersing, so it never did address these comments. Until next time.....

—Sheri L. Hazeltine, Secretary

DECEMBER 5, 1997

The talk of the meeting was FOOTBALL!, and our business was (as usual, actually) interspersed with generous halftime commentary.

Old Business:

Coach Mie Chinzi and Mary Alice McKeen gave us the stats on the Family Law Rules Committee. The committee and the Alaska Supreme Court have been reviewing rules and procedures, acknowledging the confusion across judicial districts about the division of labor between custody investigators, guardians ad litem, and children's attorneys. Mary Alice invites comments on all issues, and will faithfully transmit all comments to the committee for their attention.

New Business:

Assistant Coach Lach Zemp brought the assembled members into the huddle for a discussion of the Task Force for Civil Justice Access, of which he is a member. The Task Force is considerably concerned about the accessibility of legal services for those individuals with little or no income: Often, these folks cannot afford to get into the arena, much less play on a level field. Bart Rozell expressed an additional concern for those individuals whose income exceeds the limit for representation by Alaska Legal Services Corporation, but who still lack enough money to go to court.

Other issues included the possibility of alternative dispute resolution or mediation outside the bar, increasing involvement by public attorneys in doing pro bono work, improved access to the courts for rural and Native Alaskans, and the availability of jury trials in one's own community.

Judge Weeks suggested that, as long as the legislature has required attorneys to provide the Judicial Council with settlement data, attorneys could push to modify the system, so that they could report cases that they must reject because not enough money is at issue to justify the costs of trial preparation, such as the provision of expert witnesses.

Bruce Weyrauch announced that attorney Jeff Currall of Ketchikan seeks the open seat on the Judicial Council for attorney representative. Mr. Currall has Bruce's endorsement as a first string, seasoned candidate, who will bring a wealth of experience to the position. Bart Rozell also mentioned that support for Mr. Currall would be received well in Ketchikan.

—Steve Weaver for Sheri Hazeltine, Secretary

Alaska Bar Association
1998 CLE Calendar
(revised 1/15/98)

(NV) denotes No Video

Program #, Date & CLE Credits	Program Title	Program Location	In Cooperation With	Section
#01 January 14 2.75 CLE Credits Half Day	Explaining the New Probate Code (NV)	Juneau Centennial Hall		Estate Planning & Probate
#10 January 14 3.75 CLE Credits Half Day	Tort Reform	Anchorage Hotel Captain Cook		Tort Law
#09 January 23 2.0 CLE Credits Afternoon	Representing Clients Under the Federal Sentencing Guidelines (NV)	Anchorage Anchorage Museum	Federal Defender for the District Court of Alaska	
#02A February 6 2.75 CLE Credits Half Day	Property Issues in the Changing World of Domestic Relationships	Anchorage Hotel Captain Cook		Family Law
#02B February 10 2.75 CLE Credits Half Day	Property Issues in the Changing World of Domestic Relationships (NV)	Juneau Centennial Hall		Family Law
#11 February 12 3.0 CLE Credits Half Day	Hiring Foreign Workers	Anchorage Hotel Captain Cook		Immigration
#14 February 27 1.0 CLE Credits Morning	Recovery of Costs Under C.R. 79	Anchorage Hotel Captain Cook		
#88 March 2 3.0 CLEs Half Day (p.m.)	Mandatory Ethics: Professionalism in Alaska (NV)	Juneau Centennial Hall		
#03 March 4 CLEs tba Half Day	Child Sexual Abuse: What Family & Children's Lawyers Need to Know (NV)	Juneau Centennial Hall		Family Law
#88 March 4 3.0 CLEs Half Day	Mandatory Ethics: Professionalism in Alaska	Anchorage Hotel Captain Cook		
#08 March 5-6 13.5 CLE Credits	OMI 34th Annual Tax, Legal & Non-Profit Conference (NV)	Washington, D.C. Marriott Hotel	OMI	
#88 March 6 3.0 CLEs Half Day (a.m.)	Mandatory Ethics: Professionalism in Alaska (NV)	Fairbanks Regency Hotel		
#12 March 26 CLEs tba Morning	2nd Annual Discipline Over Easy	Anchorage Hotel Captain Cook		

Attorney Discipline Summaries

ATTORNEY DISCIPLINED FOR RECORDING PHONE CONVERSATIONS

Attorney X was engaged in acrimonious divorce proceedings when the attorney began to tape his spouse's telephone calls. Attorney X admitted to recording the spouse's telephone conversations for several reasons, including child-related concerns and suspected misuse of money earmarked for mortgage payments and other household expenses. After taping the spouse's telephone calls for a weekend the attorney confronted the spouse with the findings and gave the spouse two tapes. The attorney advised the spouse that all calls would be recorded. The attorney apparently monitored additional calls and then discontinued the practice prior to this grievance being filed.

Three Alaska ethics opinions condemn as unethical the surreptitious tape recording of opposing or third parties by lawyers because the practice involves "dishonesty, fraud and deceit" in violation of DR 1-102(A)(4), the precursor to Alaska Rule of Professional Conduct 8.4(c). Ethics Opinion 78-1 concluded that no lawyer should record any conversation without the consent and prior knowledge of all parties to the conversation. Ethics Opinion 91-4 reaffirmed that to engage in surreptitious recordings is an act of dishonesty which reflects on the lawyer's character, whether the act is performed in the lawyer's professional or personal capacity. Finally, Ethics Opinion 92-2 reiterated that even if the conduct is *legal, an attorney may not participate* in making a recording for the reason that the conduct involves deceit and misrepresentation and violates standards of fairness and inhibits candor.

Several mitigating circumstances existed, including personal or emotional problems, a full and free disclosure and cooperative attitude toward the disciplinary proceedings, and remorse, which justified a reduction in the degree of discipline to be imposed. Accordingly, Bar Counsel requested, and an Area Member granted, permission to impose a private written admonition, which Attorney X accepted.

●

CAROL ZAMARELLO DISBARRED AFTER CONVICTION FOR BANK FRAUD

Attorney Carol Zamarello, (ABA Membership No. 8011121) daughter of real estate developer Peter Zamarello, has been disbarred for her participation in fraudulent banking transactions in 1984 and 1985. In deals structured by her father, Ms. Zamarello signed a worthless loan guarantee for construction of a mall, "bought" another mall from her father and assumed its loan obligations so that he could avoid lending limits imposed on the bank, and submitted false loan application documents to a bank in connection with the purchase of a third mall. Following an investigation of Peter Zamarello's dealings, a federal grand jury indicted Ms. Zamarello along with her father. Under a November 1995 plea agreement she was convicted of two counts of bank fraud and cooperated with government officials in the prosecution of her father. In March 1997 the federal court sentenced Ms. Zamarello to one year probation and a $30,000 fine (in addition to $202,000 in restitution that she made to affected banks in related civil proceedings). Ms. Zamarello and Bar Counsel entered a stipulation for disbarment for her violation of the Code of Professional Responsibility, Disciplinary Rule 1-102(A)(4), which prohibits conduct by a lawyer involving dishonesty, fraud, deceit or misrepresentation. The Alaska Supreme Court approved the stipulation on November 11, 1997. The stipulation is available for public inspection at the Bar Association office in Anchorage.

●

JOHN G. FRANK DISBARRED

The Alaska Supreme Court on November 24, 1997, entered an order of disbarment against John G. Frank (Member No. 8404007) as of June 25, 1996, the date the Supreme Court approved a stipulation for Frank's interim suspension. The Disciplinary Board of the Alaska Bar Association recommended disbarment based on Frank's misconduct.

In July 1992, Frank was an associate attorney at a law firm in Juneau, Alaska. For various reasons, the firm terminated his employment and explicitly instructed Frank not to return to the premises. Following his dismissal, Frank entered his former law offices at around midnight and began collecting certain client files. He encountered a worker on the premises to whom he made statements to create the impression that he was legitimately there working late on law firm business. Despite initial denials, Frank acknowledged that he removed approximately eleven files from the law office.

During bar counsel's investigation, Frank misinformed bar counsel with respect to the means by which he had gained access to the building after he was instructed not to return. Bar counsel eventually determined that he had gained access to the office building in which the firm was housed by making misrepresentations to security personnel to obtain a building key. These false statements were knowingly made with the intent to deceive bar counsel in the course of the investigation.

Following his termination from the firm, Frank practiced law at another Juneau firm. He continued to represent a client who had retained his prior firm in April 1991 regarding a collection matter. Frank repeatedly advised his client that it would prevail in court and that it should not settle the suit. Contrary to Frank's assertions, the judge found for the opposing party after a trial. A written Decision and Order was filed and distributed to the lawyers on April 23, 1993; however, Frank did not notify his client that it had been issued nor that the court had found against it.

The prevailing party submitted a proposed judgment within 10 days and moved for Civil Rule 82 attorneys' fees. Frank filed an opposition, but still did not advise his client of the April 23 Decision and Order. A

Continued on page 11

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NEWS FROM THE BAR

Continued from page 10

Judgment with costs and attorneys' fees was distributed on June 11, 1993. Its terms required the client to ship some items to the prevailing party within 30 days of the judgment's date of service. Frank did not advise his client that a Judgment had been issued against it nor did he advise of a shipping deadline which the client needed to meet.

Instead, Frank knowingly sent his client a facsimile message containing an altered version of the court's April Decision and Order. This altered version was postdated to make it appear that it had been issued on June 11, the date of the actual judgment. On June 28, 1993, Frank wrote his client and utilized the figures for judgment, costs, and attorneys' fees contained within the June 11 Judgment, but falsely represented that he had calculated these figures himself after review of the court's Decision and Order. He advised his client that certain items would need to be shipped, but he did not advise that the shipping deadline was less than two weeks away. He also did not advise that a judgment had been entered.

Frank informed the company if it wished to appeal he would need to complete the appeal documents by July 2, 1993. When questioned why an appeal had to be filed when no judgment had been entered yet, Frank explained that he wanted to perfect the appeal because he was going to go on vacation, but he still did not advise that a Judgment had been entered.

When the client failed to ship the items by the court-ordered deadline, the prevailing party executed on the judgment in Washington state. It was forced to retain new counsel to defend itself against the garnishment of approximately $31,000 from its bank account. The prevailing party also filed a Motion for Contempt based on the client's failure to comply with the June judgment although the client still had no knowledge of the Judgment or its provisions.

Frank left his new firm during this time period. An examination of the client file following his departure revealed that it contained a second falsely-dated document, a copy of the Judgment modified to indicate it was issued at a later date. This document had not been forwarded to the client.

The Disciplinary Board found that Frank had violated ethical rules by engaging in intentional conduct involving dishonesty, fraud, deceit, or misrepresentation and that he caused serious injury or potentially serious injury to his client. The Board found numerous aggravating and mitigating factors applied. In view of certain mitigating circumstances, the Disciplinary Board recommended that the effective date of the disbarment be June 25, 1996, the date the Supreme Court entered an earlier stipulation for Frank's interim suspension.

The public file is available for inspection at the Bar Association office in Anchorage.

U.S. DISTRICT COURT REMINDERS

D.AK.LR 5.2 PROOF OF SERVICE Proof of Service is to be reflected on each separate document [not as a consolidated or separate certificate of service]. Failure to comply may result in the document being stricken by the court.

D.AK.LR 7.1 MOTION PRACTICE Motions or oppositions presented to the Clerk's Office for filing that have supporting documents [memo, affidavits, exhibits] shall:

- be firmly attached as one document.
- proposed orders shall not be stapled to motions or oppositions.

LOCAL CRIMINAL RULE 3.4. SENTENCING MEMORANDUM No less than (7) days prior to sentencing date, counsel shall each serve opposing counsel and the probation officer and file with the court their respective sentencing memorandum.

MEETING NOTICE

Alaska State-Federal Courts Gender Equality Task Force

The next two quarterly meetings of the Alaska State-Federal Courts Gender Equality Task Force will be held on the following dates:

Wednesday, February 11, 1998	**3:30 PM**
Wednesday, May 13, 1998	**3:30 PM**

Both meetings will take place in Courtroom 3 of the Federal Building & U.S. Courthouse, 222 West 7th Avenue, Anchorage. For further information, please contact Barbara Hood at 248-7374/FAX 248-8387.

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PROFESSIONALISM IN THE AMERICAN BAR ASSOCIATION

JEROME J. SHESTACK

People often ask me as the national representative of the legal profession what is the mission of the American Bar Association. My answer is simple. We seek to enhance the professionalism of all lawyers.

To some, this may seem a rhetorical statement. But I can assure you that the ABA today is very serious about advancing professionalism.

Why so serious now? For one, our profession's standing with the public is not stellar. More importantly, we have reason to be concerned as the legal profession is propelled by societal changes and the future seems uncertain. Our profession is more commercial and crass, our values seem fragile and often suspect. We could use a moment to reflect. Let us start by recalling what exactly we do profess as lawyers.

Didn't we become lawyers to be a part of a learned and noble profession? The best definition I know is that the lawyer is an "expert in the law pursuing a learned art in service to clients and in the spirit of public service; and engaging in these pursuits as part of a common calling to promote justice and the public good."

Let me amplify this in more specific terms. Here are the elements of professionalism that I believe define our calling.

First is fidelity to ethics and integrity. Ethical rules should not be a confinement, but a meaningful commitment — in the spirit of enlarging and enhancing one's adherence to the integrity of the profession.

Second is service to clients with competence and dedication—as well as independence. Independence is part of the lawyer's calling. Much of the reason so many lawyers face malpractice suits is that they do not have the wisdom and fortitude to say "no" to a client when "no" should be said.

Third is a meaningful legal education—not as a chore to meet some point requirement but as a commitment to growth and replenishment.

Fourth is civility. We need to resist the Rambo-type tactics in which civility is mocked and ruckus is routine. But civility is more than surface politeness; it is an approach that seeks to reconcile conflict, to diminish rancor and to reduce the antagonisms and aggressiveness of an • adversarial society for a more civilized condition. As Justice Anthony Kennedy recently put it, "civility is respect for the dignity and worth of a fellow human being." It is an end in itself.

Fifth is a commitment to improve the justice system and advance the rule of law. Today, our system of justice is overcrowded, under funded and dilatory. Today, the independence of judges is at risk. Today, access to justice is too often denied. There seems to be a war against the poor, but as someone wryly observed, without lawyers, the poor are too weak to fight back.

The justice system is our trust and our ministry. We bear the brunt of public dissatisfaction with the justice system's flaws and deficiencies. It is the obligation of every lawyer to make a limping legal structure stride upright. The final element of legal professionalism is pro bono service. There are many reasons for such service, apart from the common decency of helping those in need. Much has been given to our profession; it seems right to give something back—indeed, it is an ethical obligation. And if we are a profession committed to justice, then we should want to participate in making justice accessible. Finally, pro bono service almost always turns out to be a matter of great satisfaction in a profession that has its share of pain and tedium.

These six elements are the foundation of our professional values. I have asked every entity in the ABA to focus on these values. The response, to date, has been extraordinarily encouraging.

But we need the assistance of the state and local bar associations to help us advance and enhance these values as mainstays of our profession.

Take one justice issue: The independence of the judiciary. All of us need to stand up and protect members of the judiciary when they are singled out for vicious partisan attack by those who hold no respect for the necessity of an independent judiciary.

Or, take another need: Access to justice for the poor. Can there be any doubt that lawyers need to help to ensure adequate funding for the Legal Services Corporation and, thereby, the local legal services offices funded by LSC?

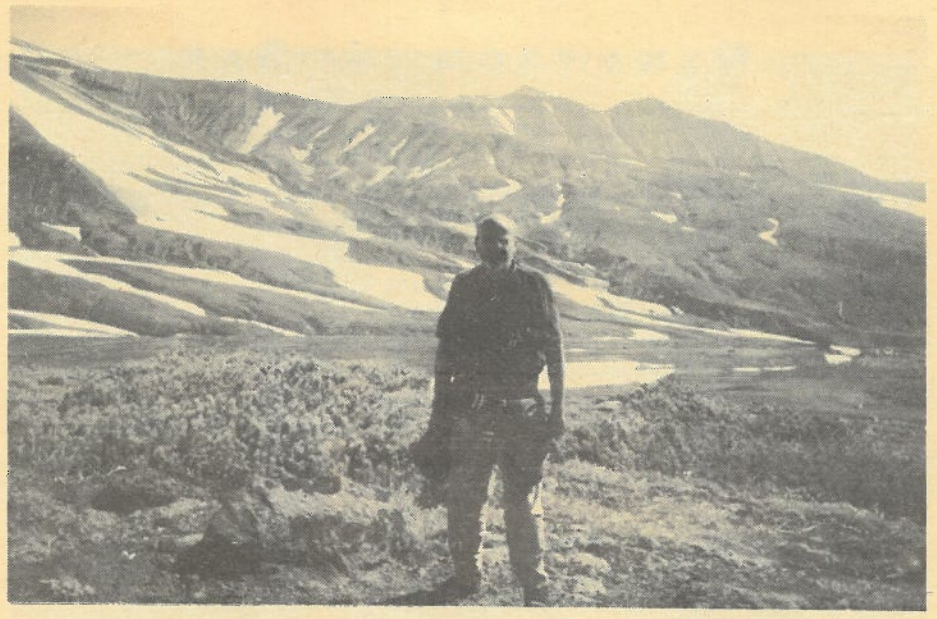
These are the kinds of issues we need to work on collectively.

I recognize that pursuing professionalism is no sport for the short-winded. It requires constancy, commitment and all the resources available within the organized bar.

Let's hope that by being true to our professional values, we can help renew public confidence in our profession. At the very least, we can ensure our own self-respect.

Reflections from a Russian visit

From Russia with love



James Hornaday at Kamchatka Volcano.

BY JAMES C. HORNADAY

My first contact with Russia came when I landed at Petropavlovsk, Kamchatka Airport to spend a month working as a Rotary Peace Corps Volunteer.

Taxiing by the military bunkers and the old, rusting Cold War planes was eerie, and I kept recalling that the Russians shot down a Korean airliner en route from Anchorage, (as well as the "duck and cover" drills under our desks as school children to protect us from Russian bombs in the 1950s).

The airport is only four and a half hours from Anchorage.

The size of Russia is overwhelming, as it contains the largest land area of any nation. All of Europe and the United States would fit with plenty of room left over in Eastern Russia, alone.

The people are great huggers and talkers, but ambivalent about their history. They have always been under the totalitarian thumb — Khans/Tartars, Tsars or Communists. Democracy is a new experience and hard to explain. The suffering of the Russian people is beyond our comprehension. They lost 20 million in World War II, and the Russian Communist government killed 60 million of its own people. The death rate still exceeds the birth rate. Average lifespan *for males is 59; for females, 65.*

Russians are deeply spiritual, but few have an active church life. Most have a connection with the Russian Church, which they consider the Mother Church of Christianity after Constantinopal fell. They lump the Roman Catholics and Protestants of the West together as equally misled. The Russian Church did not experience the Renaissance, the Reformation or the Counter-Reformation. Many Russians were deeply offended by the invasion of conversion-minded Christians coming to "save" Russia. They call them cults. As a result, recent legislation prohibits activities of new religious groups. (One of my interpreters thought Methodist was a make of automobile.)

Russia is the richest country in the world in natural resources such as oil, timber, gold, fish, and minerals. The Russian East is the action center for resource extraction. In Kamchatka, the average wage is only $300 per month and usually late. However, most Russians have dachas (large gardens) and sell their excess produce. Huge fields are lying fallow. Students help with the harvest. We helped dig potatoes. The distribution system is in confusion — Russia has the largest oil reserves, but a shortage of fuel oil. Graft is a continuous topic of discussion.

The Russians have marvelous music and art and are well educated with emphasis in math, physics, language and music. (They need more lawyers to set up the political system, as ours did 200 years ago.) Young Russians do not remember Communism. I enjoyed three days talking with students at two different academies. The law students loved to argue. One student gave a good imitation of Boris Yeltsin and I responded with a poor imitation of Bill Clinton. Some had heard of Jewel.

My one month Rotary Peace Corps tour focused on our Sister City and Rotary Club in Yelisovo, Kamchatka, population about 50,000. Yelisiv was an early Communist partisan. Up until just a few years ago, Kamchatka was a secret military area. My hosts and interpreters; Lena, Eleana, Tatiana and Alexi, kept me busy working with fellow Rotarian Barb Hill on a youth environmental exchange. Homerite Martha Madsen is in her third year working at the library. We also worked on playground projects and discussed Special Olympics. The local club is very active, supporting a disabled children's orphanage, clothing for the poor, tourism and other activities.

Kamchatka is the frontier of Russia and looks like Alaska, only larger. I enjoyed hikes to the volcano foothills, to the headwaters of a river and another four-day hike deep in the forest, with hot baths. A scientist advised they have bark beetles in Russia and the spruce have a major die-out every 30 years.

Freedom has come to Russia, although the Communists and Mafia are strong in some areas. Most people said they are better off than they were under Communism, but it is still hard. They sound like Americans complaining about their elected officials. I visited a newspaper that had changed its name from The Lenin Banner to the Yelisovo News.

My friends decided I look like Lenin and posed me in front of the Lenin statue in neighboring Petropalvsk, a city of 250,000 named after the ships of the Bering and Chirikov "discovery" of Alaska voyage. We looked out over beautiful Avacha Bay and tried to imagine the ships heading for Alaska.

We viewed the Crimean War battleground where the Russians repulsed the English and French and participated in the 300-year celebration of Kamchatka's connection to Russia.

The Russians have plenty of food and eat four to five times a day. My hostess babushka was certain I was starving as I could not eat the huge quantities she served me. I could not drink vodka and had a hard time keeping up with the toasts, substituting wine.

Large concrete slab apartments dominate, but more Russians are buying their own houses. Some areas are passing new legislation for individuals to obtain private title to land.

After a month in Kamchatka, I flew domestic Aeroflot to St. Petersburg, nine time zones away, for a Rotary World Peace Conference, primarily organized by Alaska attorneys Steve Yoshida and Carolyn Jones. St. Petersburg is a beautiful European city, named after Peter the Great. Peter was both talented and brutal. He built the city as his "window to the west," yet he killed his own son. The opulence of the Tzars produced lovely buildings like the Hermitage and St. Isaac's gold dome (purchased with proceeds of the sale of Alaska).

Six hundred from 30 countries attended the Peace Conference, which emphasized Russia's move from a command Communist economy to a free market economy. Russia is justifiably suspicious of Western ideas. The French Revolution slogan of "liberty, equality, fraternity" brought Napoleon and the burning of Moscow. The industrial revolution brought the German army in both World Wars. Communism was a disastrous Western idea, and now we are talking capitalism.

I met Russians who blamed the declining fish runs on Americans and Poles and local poachers. American fishers said the runs were in good shape. A banker advised that after 1,000% inflation rates, now the rates were only a "reasonable" 20%. An American business man said 20% was still too high.

The Japanese are very active in Russia and I also met Australian and Korean businessmen. The Russians fear a currency devaluation in early 1998. Native land claims are just emerging. Local Kamchatka Natives are claiming the fish in one of the rivers, but the government leased the entire run to a Japanese corporation.

The rapid decline of military spending has left many areas desolate. There is real concern on environmental issues. One law student suggested Greenpeace be hired to enforce environmental laws.

It is hard to know just what Americans have to offer, if anything. Perhaps a niche of non-governmental projects. The Russians are fatalistic, but they are very smart and they have so much that the long term view must be optimism. After basking in the marvelous St. Petersburg ballet, Swan Lake, and other superb music and dancing, the concluding ceremony was very moving as we joined hands and sang "Let There Be Peace on Earth."

Following the 15 hour return flight to Yelisovo, I attended a change of plea in the local court. Their criminal law is similar to ours with the presumption of innocence and attorneys provided for defendants. They do lack a civil law system of enforcing contracts and American businessmen advised us that it is very difficult to do business in Russia. One of the judges told me that with all of the changes, Russia has just not had time to put a contract system into place. Following the court hearing, we enjoyed a fine lunch with the local judiciary.

After five weeks, it was time to come home. Alaska greeted us with a fine show of the Northern Lights and the first snowfall.

"THE BONFIRE OF LIBERTIES: Censorship of the Humanities"

The Bonfire of Liberties is a national traveling exhibit sponsored by the Center for the Book in the Library of Congress and the Texas Center for the Book. It is being brought to Alaska by the Alaska Center for the Book, and will be on display in the Z.J. Loussac Library (Level 3) from **January 13 through March 14, 1998.**

In eighteen panels, the exhibit explores the sweeping impact of censorship in the humanities throughout the ages. The display examines censored texts (from the Bible to books by Judy Blume), censorship in historical writing, philosophy, drama, art and art history, biography, and more. While it seems that in recent times, much of censorship has focused on the subject of human sexuality; historically, the first target of censors was the Humanities - the broad field of inquiry and knowledge.

From *Huckleberry Finn* to Benjamin Franklin's *Autobiography to Chaucer's Canterbury Tales,* classic literature has faced censorship. Here in Alaska, the American Heritage Dictionary was removed from Anchorage schools due to objectionable language, and *Billy Budd* was challenged at the Noel Wien Library in Fairbanks because it was too sexually explicit and violent.

The local sponsor of the exhibit, the Alaska Center for the Book, is a non-profit organization celebrating the richness and diversity of language. It was founded in 1991 to stimulate public interest in literacy - through the spoken and written word - as central to our understanding of ourselves and the world around us. The Alaska Center for the Book is an affiliate of the Library of Congress Center for the Book.

ESTATE PLANNING CORNER

The cost of a simple will

☐ Steven T. O'Hara

The U.S. government recently increased the cost of a simple will. Here "cost" means a lost opportunity to save taxes and "simple will" means a will giving property outright to an individual who then has exposure to taxes.

Since 1987, the amount that may pass free of estate and gift taxes, known as the unified credit equivalent amount, has been $600,000 (IRC Sec. 2010 and 2505). This $600,000 amount generally created the opportunity for two taxpayers, each with at least $600,000 in assets, to save anywhere from $235,000 to $330,000 in estate taxes.

Effective January 1, 1998, the unified credit equivalent amount has been increased to $625,000 (IRC Sec. 2010(c) and 2505(a)(1)). This $625,000 amount generally creates the opportunity for two taxpayers, each with at least $625,000 in assets, to save anywhere from $246,000 to $344,000 in estate taxes.

The unified credit equivalent amount is scheduled to increase to $650,000 in 1999, $675,000 in 2000, $700,000 in 2002, $850,000 in 2004, $950,000 in 2005, and $1,000,000 in 2006 (*Id.*). Each increase will result in a greater opportunity to save estate taxes, provided taxpayers structure their asset ownership, wills and trusts properly.

Consider a husband and wife domiciled in Alaska. Both are U.S. citizens. They have no assets outside Alaska and no material debt. Neither has ever made a taxable gift. In their estate planning, they believed they did not need to consider anything beyond simple wills because they had heard they each may pass, at death, as much as $625,000 to their descendants without estate taxes. They figured with combined assets of no more than $1,250,000, or $625,000 each, their estates would never be subject to estate taxes. So they signed simple wills, giving all assets to the surviving spouse outright and to their descendants outright when there is no surviving spouse.

Husband has recently died. His surviving spouse now realizes that with assets of $1,250,000 (being the total value of her assets plus the assets to which she is entitled under her husband's will), her estate would owe $246,000 in estate taxes if she died in 1998 (IRC Sec. 2001(c) and AS 43.31.011).

Thus the cost of husband's simple will could be $246,000 in estate taxes. To avoid this tax exposure, the couple could have equalized their estates by separating assets so each owns $625,000 separately. Then husband could have signed a will or living trust giving the unified credit equivalent amount to a trust that would be available to his surviving spouse, but would not be included in her gross estate on her subsequent death. In general, husband could have named his surviving spouse trustee of the trust without adverse tax consequences (Adams and Abendroth, *The Unexpected Consequences of Powers of Withdrawal*, 129 *Trusts & Estates* 41 (August 1990) (discussing distribution powers held by a trustee who is also a beneficiary or related to one)).

CLIENTS REQUESTING SIMPLE WILLS NEED TO CONSIDER THAT THE SIMPLE WILL COULD ULTIMATELY COST THEIR FAMILIES HUNDREDS OF THOUSANDS OF DOLLARS.

The opportunity to eliminate or reduce taxes by giving property in trust, rather than outright, is not limited to the married couple. In other words, a simple will signed by a single individual can also be costly.

Consider a 90-year-old client with net assets of $625,000. He is not married and has never made a taxable gift. He has a 65-year-old daughter with her own net assets of $625,000. Both the client and his daughter are domiciled in Alaska, and their respective assets are all in Alaska. The client has a simple will, giving all to his daughter outright.

Suppose the client dies in 1998. His daughter would then learn that with assets of $1,250,000 (being the total value of her assets plus the assets to which she is entitled under her father's will), her estate would owe $246,000 in estate taxes if she then died (IRC Sec. 2001(c) and AS 43.31.011).

Clients requesting simple wills need to consider that the simple will could ultimately cost their families hundreds of thousands of dollars.

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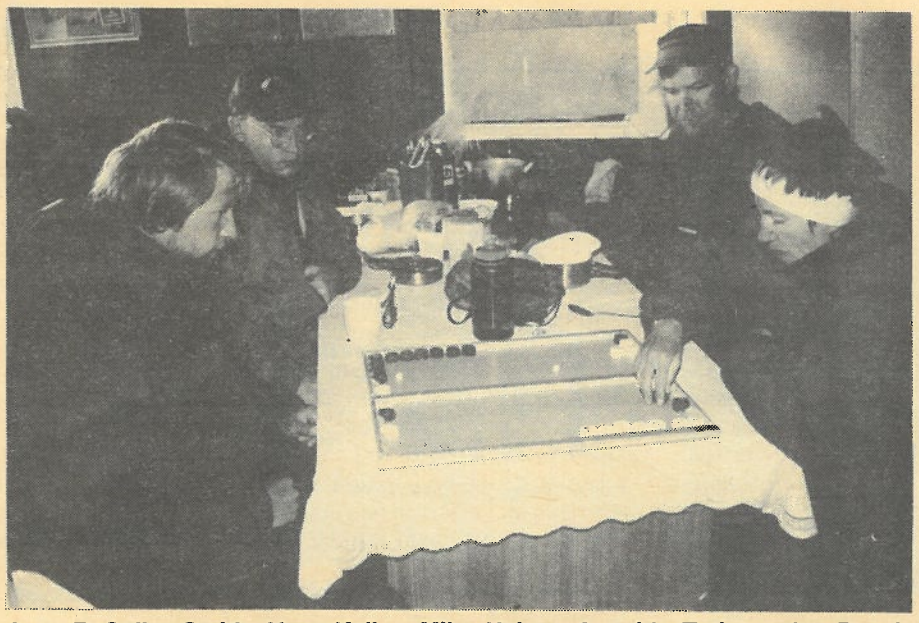
Attorneys reach new heights

Continued from page 1

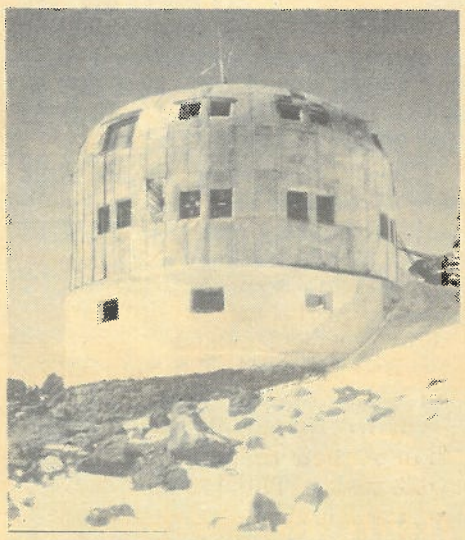
and the nearby mountain climbing training camps in the Shkelda Valley had greater domestic travel demand in Soviet times, but with the current Russian economy these camps have been suffering with less demand and less domestic travel.

In the brief (2 month) training time in Ketchikan in advance of the climb, Vern Keller reported training on a steep treadmill for about 40 minutes at a time and climbing Deer Mountain, a 3,000 foot peak adjacent to downtown Ketchikan, two or three times per week. Mike is the most experienced of the group and previously climbed and summited McKinley in 1993. Vern had not previously climbed any major peaks. Colby has climbed and summited Kilimanjaro.

After a couple of days training in the Shkelda Valley, a 20-25 minute car ride took them to the base of a gondola which took them to a chair lift which took them up to about 12,000 feet. From there, they rode in a Sno-cat from the top of the lift at 13,500 feet to Pruit Eleven ("refuge of 11," named after the spot where 11 climbers held out in a storm). The facility there has room for about 120 people. They were supposed to climb to 15,000 feet the next day for acclimatization, but were weathered in for five days. During these five days in the shack (yes, a 120-person capacity facility may be a shack), they read and ate and tried to stay warm. Backgammon, chess and writing in their journals were some of their entertainments. Unlike some other climbing expeditions, the guides cooked and waited on Mike, Vern and Colby at Pruit Eleven. Water was also a focus. The water source is a pipe from a glacier. During the cold snap, the amount of water was reduced. They were sure to filter and boil everything, having met a Norwegian in Moscow who had drunk Elbrus water and was very sick.



L to R Colby Smith, Vern Keller, Mike Heiser, & guide Tatiana play Russian backgammon at Pruitt II.



Pruitt II

Colby Smith successfully uses the Pruitt II outhouse (background).

There were other groups waiting out the weather at Pruit Eleven. Climbers came from Turkey, England, the Czech Republic, Australia, Korea and Russia. At most, there were about 50 people there at one time. One of the climbing groups they met while at Pruit Eleven had run into a bit of a mishap while training in the Shkelda Valley. The group had been training in another valley near the Shkelda Valley and their guide was beaten up when some local thugs were trying to rip off his clients' gear. That guide had to be hospitalized. (See, I promised a reference to second degree assault.)

The Ketchikan group had scheduled for only three bad weather days, and after five days in the unheated shack at Pruit Eleven, they had eaten up their food and had to go back down. They were able to change their tickets and get more food before returning to Pruit Eleven. The weather had cleared and so they continued to 15,000 feet the same day.

At 15,000, the Pashtukov rocks mark the location where groups routinely acclimatize. The next day they summited, starting climbing about 5:00 a.m. It took eight hours to get up and four hours down. The climb is not a technical climb, and does not require roping up, although some do.

Their guide, Tatiana, is the only woman guide in Russia. A 41-year-old smoker, Tatiana smoked four cigarettes on the way to the summit and one on the summit. She brought along a friend, Tatiana Moshnikova, as a translator. Moshnikova was on vacation and went along for fun.

The trip's greatest hazards were not directly related to the climb. Apart from the assault on the guide of another climbing party and the concern about potable water, wastewater was also a concern. The most severe threat during the five days that they were weathered in was going to the "ventilated" outhouse, which was located several yards away. Unfortunately, with the updraft, the wind from the storm would blow urine or other material back up the hole. Vern had one frightening incident where a length of toilet paper chased him around the outhouse. The most eventful aspect of the trip, apart from the group's experiences on the mountain itself, was attempting to check in at the airport in Moscow with ice axes affixed to the outside of their luggage. The local constabulary would not allow this packing method, and in the course of the confusion surrounding re-packing the ice axes, some local pickpockets made off with Mike Heiser's bankroll. The lesson here is "if you have a bankroll large enough to choke a horse, it is recommended that you not flash it around liberally in public places in Moscow." Despite being pickpocketed, Mike had nothing but good things to say about the Russians. He said that he was impressed with the friendliness of the people, who seemed very warm to Americans.

Elbrus is one of the "seven summits"—the highest peaks on each of the seven continents. Part of the motivation for climbing Elbrus was the reasonableness of the price and the prospect of bagging all seven summits. As a diabetic, Colby is seeking to be the first diabetic person to climb all seven summits.

The group plans to attempt the highest peak in South America, Acoacagus, in January of 1998.

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Implementing task-based billing . . . a law firm perspective

By Brett C. Don

INTRODUCTION

Task-based billing is getting a great deal of attention within the legal industry, particularly by clients attempting to promote budget planning and litigation efficiency. However, it is important to grasp and fully understand the far-reaching strategic benefits of implementing task-based billing throughout an entire law firm, rather than just on a client by client basis. Law firms need to realize that this demand by clients for a new billing alternative does not have to be looked upon as another form of "guerrilla warfare". They should recognize that this "system" has strategic value to them, and that as long as a firm is being "forced" to put these procedures and systems in place, they should do so in such a way as to reap the full benefit for themselves.

WHAT IS TASK-BASED BILLING ANYWAY? IN SHORT, IT IS A METHOD BY WHICH CLIENTS CONTAIN THE COSTS OF LITIGATION.

What is Task-based billing anyway? In short, it is a method by which clients contain the costs of litigation. For every time entry there is an associated *phase, task* and *activity* code. The "phase" is a general category referring to the type of litigation (e.g., Discovery, Trial Preparation and Trial, etc.). "Task" defines the type of work being done (e.g., Depositions, Post-Trial Motions, etc.). "Activity" codes describe how the work is accomplished (i.e., Research, Communications, etc.). Sounds simple right? Well, in the case of Task-based billing, the end definitely justifies the means, but without proper planning, the long road is a bumpy one.

STRATEGIC ADVANTAGES

I have found that there are three major strategic benefits associated with the concept of Task-based billing. The first is an opportunity for the firm to become more competitive when responding to fixed fee and value based proposals. Firms are seeing these types of proposals more frequently and by tracking task codes for each time entry for all clients, a firm will accumulate a history of data that will allow it to be more informed about its actual costs.

Second, a firm can use the history of data to define "best practices" within the firm and then benchmark internally. For example, if attorney A, attorney B and attorney C are consistently billing in the same range for the preparation of a Post-Trial Motion, but attorney D is billing three times the amount of time for the same task, a firm will now have the tools to see this inefficiency through the history of data. The firm can then proactively attack the problem with the hope of training attorney D with regard to the "best practice" for preparing a Post-Trial Motion.

Third, the use of task-based billing presents the firm with an excellent marketing opportunity. My research has found that there are a number of law firms utilizing task codes, but on a much lower level. In many cases, the task codes are being used only for those clients that demand them, and the tracking mechanisms (time/billing systems) have been fudged to "accept" these codes in order to satisfy the client requests. If these firms were to implement task-based billing across the board, for all clients, they would differentiate themselves early on. They would also be ahead of the curve because it is only a matter of time before the remainder of their clients begin utilizing some form of Task-based billing. Not only will the firm be positioned to respond quickly to the client request, but it can market its capability ahead of time. This can only be an advantage to the law firm, as it shows a conscious effort on the firm's part to recognize the client's need for more efficient and cost effective litigation. It will also position the law firm to be a resource to clients when they begin thinking about utilizing these types of tools. For example, the firm can guide the client to the standardized set of Uniform Task-Based Management System (UTBMS) codes for easier integration. The firm will have one more opportunity to communicate with the client, and finally, it will provide the firm the opportunity to place directly on the bills some value added information in the form of a quick summary of time and value of tasks by class.

THE PROCESS

The implementation process has six major phases but, depending on the size and culture of your firm, there could be additional phases.

First and most importantly, you must receive buy-in from the firm's Executive Committee, Managing Partner or other policy-makers. I cannot stress enough to you the importance of this "blessing from above." Without it the project will, at some point along the way, fail. I recommend identifying a project sponsor to "sell" the benefits of task-based billing and an implementation team to provide support. The sponsor should be someone with decision making power, usually a member of the Executive Committee, an influential partner or the Managing Partner.

Second, an implementation team must be assembled. The primary team should consist of a technology person (e.g., the MIS Director), the head administrative figure (e.g. the Executive Director), the project sponsor and a well respected "salesperson."

The ***third phase*** involves the analysis and, if necessary, the upgrade of your time and billing system (e.g., Elite, CMS Open, Juris, etc.) and network-based time entry software (e.g., DTE, Carpe Diem, etc.). Members of the Information Systems Group may need to upgrade these applications to the version that accommodates the task billing function. At my previous firm it took our group an entire weekend to complete the upgrades and testing. Once the upgrades are completed, both applications will need to be configured with the task codes.

Phase four involves the redesign of the time sheet to accommodate the task and activity codes. You may want to place your task codes on the back of the time sheet for easy reference. Depending on the needs of your firm, if you are standardizing with the UTBMS codes, they may need to be slightly enhanced. For example, you may want to add a few administrative codes, since the UTBMS codes do not take these into account.

LET'S FACE IT, MOST LAWYERS DO NOT WANT TO BE BOTHERED WITH ADMINISTRATIVE DETAILS.

During this phase, the billing worksheet, interim bill and final bill formats should be revised to include the task and activity codes. Again, a summary matrix should be added to the end of every bill that will show time and value of tasks by class (partner, associate or paralegal). Depending upon space, you may want to add a legend defining the task codes and place that next to the summary matrix for easy reference.

The true test will come in ***phase five*** as you begin to educate your employees. Implementation of this concept will constitute yet another change in their already hectic lives. My previous firm held numerous 30-minute educational sessions over a five-day period to explain why the firm decided to embrace task-based billing and how it would be implemented, including an explanation of the necessary changes in procedures. During the educational sessions, you should begin to hear the grumbling and mumbling about the additional burden this will pose with regard to the attorney billable hour goals. This phase of the project is where the well-respected salesperson earns his or her money. This person must get out among the people and SELL, SELL, SELL! This person is your cheerleader and diplomat rolled into one. It is critical that you have a well-respected, vibrant and charismatic person in the role.

The ***sixth and final phase*** is the roll-out and post-roll-out support. Your team will need to concentrate on hand holding and reassurance. Your "salesperson" should be out there knocking on doors to help alleviate the anxiety of using this modified process. Your sponsor should be doing the same thing except at the highest level. The sponsor needs to constantly reassure the upper echelon that the firm made a good, sound, strategic decision and the new procedures will become "old hat" in a short period of time. Your technical staff should be monitoring the data capture process, be in a position to respond to the minor technical problems that will occur and begin testing the bill format changes that will need to be utilized at the end of the month.

OBSERVATIONS

I see four major problems that you should be aware of during the implementation of Task-based billing. First, lawyers just want to practice law. Let's face it, most lawyers do not want to be bothered with administrative details. Because attorneys do not view the use of these codes as part of practicing law, acceptance will probably take longer than originally planned.

Second, the attorney's natural reaction is to pass the task of dealing with the codes off onto his or her secretary. This will not work with the *UTBMS* codes because they are not all-encompassing. There are times when categorizing a task will be like placing a "square peg in a round hole." For this reason, and because assigning codes in the wrong manner will skew your data analysis down the road, the timekeeper is in the best position to associate the task with the proper code.

Third, some attorneys like to "lump" their time together for multiple tasks. This practice is not acceptable for those attempting to use a task-based system, because each task must have a separate entry and, therefore, a separate code.

A final observation is that the *UTBMS* codes are not all encompassing, especially in the area of administrative/non-billable time. This problem can be corrected by creating your own set of administrative codes.

FINALLY...

Having been down this road, I am a major advocate of task-based billing. I also believe that the strategic advantages associated with the concept are much too great to ignore. The journey will not be an easy one, but the fruits of your labor will be well worth it in the end. Clients are driving this change, making the implementation of task-based billing inevitable for all firms planning to maintain a competitive edge. For those firms not yet embracing the concept of task-based billing, nor contemplating its value to the future of the firm, a warning: there will be a plethora of firms who *have* embraced it, and they will be waiting for your clients with open arms.

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Anchorage Legal Secretaries offer scholarship awards

The Anchorage Chapter of the National Association of Legal Secretaries is now accepting applications for the Virginia Retzlaff Memorial Scholarship award. The award of scholarship funds is based on scholastic achievement and leadership ability. Eligible applicants must be currently employed as a legal secretary or actively pursuing a career as a legal secretary. Deadline for submission is March 15, 1998. To obtain an application or further information about the scholarship award, please contact the ALSA voice mail at 566-ALSA.

Making it work the first time

BY JOE KASHI

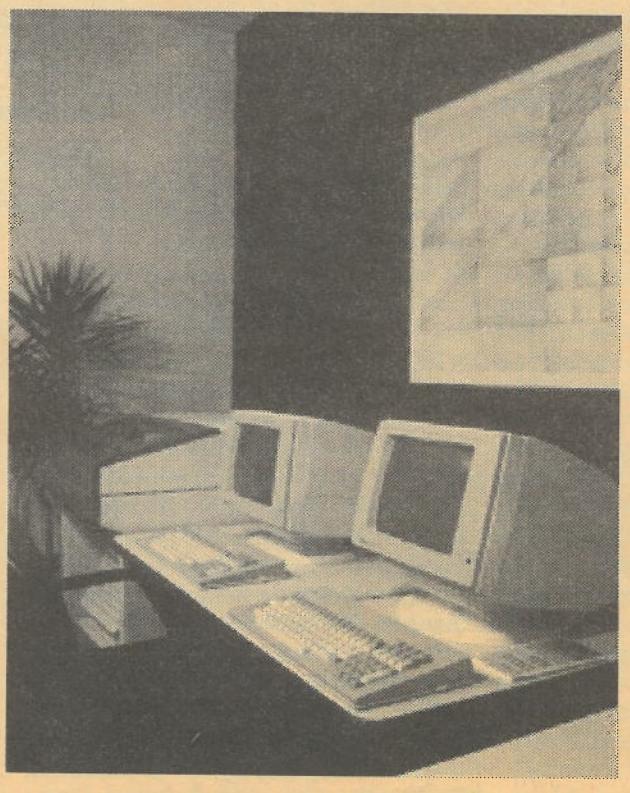
It was like agonizing over an imminent visit to the dentist. For over a year, everyone in the office knew that we had to replace the old network cabling. It was that simple.

Part of our office was on 10-year-old ArcNet and some people were reluctant to change what worked, albeit slowly. My part of the office was on Thomas-Conrad TCNS, the cutting edge state of the art, 100 megabit per second networking wonder of 1992. Unfortunately, Thomas-Conrad is no longer in business, TCNS is a memory, and spare parts were not available for computers that were starting to act up. It was time to change over to modern, 100Base-T Fast Ethernet. During the past few months, Fast Ethernet has dropped dramatically in price, so that it's actually less expensive, on occasion, than slower 10Base-T Ethernet.

None of us relished the idea of getting into the office's ceilings and floors to pull cable. It's a dirty, unpleasant job which we would prefer, had there been competent installers available, to leave to someone else. We had to do it but we did want to minimize our time and hassle. Here's how we did it.

Because our offices line a long corridor rather than being compactly grouped, we first had to decide where to put the network hubs that link all of the Ethernet computers together. Putting them in a central location makes a lot of sense, particularly when they're under constant supervision. After we had decided where to place the hubs, we then measured the distance to each computer from the hubs, taking into account any detours due to central lobbies, structural walls, or other obstructions. We added an additional 20% overall length plus a further six feet on each end as a margin for unanticipated routing problems.

Network cable often cannot run straight and true. You need to go around pipes, avoid as many fluorescent ballasts as possible, and absolutely avoid electrical motors, heaters, and large ventilation fans. All of these emit powerful amounts of electromagnetic noise. Because we're using unshielded, twisted pair cables at very high data rates, we needed to take every precaution against introducing spurious noise in the system.



I know of one network in a San Francisco law firm, for example, that stopped working completely because some inexperienced person laid a single network cable across a large electric motor. We all know what runs electric motors: magnetic fields. And we all know what educes unpredictable undercurrents in wires: magnetic fields. That one cable picked up electrical interference and transmitted enough of it across the network wiring to shut down the entire law firm until some observant soul saw a network cable draped across that big electric motor. Our own office building has more fluorescent light fixtures, fans and electric heating units than we would have liked and we gave them as wide a berth as possible.

After we decided on how long our cables needed to be, it was time to get the cables made up. There are two approaches to wiring a small to medium size law office. The first is to use what's called a "patch panel", something like a telephone closet. These tend to be expensive and require highly skilled installers, although they make sense for large offices. We, instead, chose to use "patch cords", fully constructed cables with RJ-45 connectors correctly attached at each end. Patch cords can be run directly from a network hub to individual network cards and do not require additional intermediate cabling, connectors or patch panels. You just plug them in at each end. I believe that patch cords make a great deal more economic sense for the small to medium office. For one thing, you can test them before installation and know that you have a good connection from end to end, without the need for expensive hourly technicians.

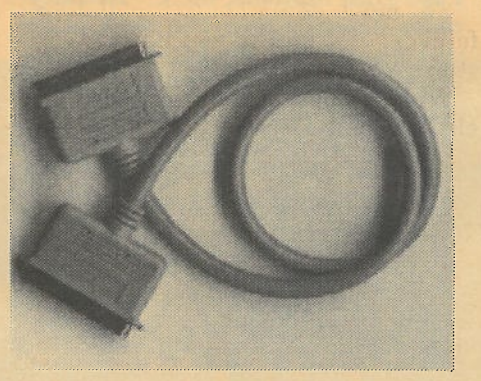
When we ordered our cables, we searched around for a good source, settling on Cableware Technology. Cableware sold high quality Category 5 UTP cables already made up in complete 100 foot patch cords, for a mere $14 per cable. These cables were inexpensive, well made, and used good RJ-45 end protectors. Custom length cables were only slightly more expensive. Even where we only needed a shorter cable, say 70 feet, we ordered the 100 foot cables and simply coiled the extra length under the floor.

Fast Ethernet cables do have some length and installation restrictions. You can find a very clear discussion of Fast Ethernet cabling restrictions and tips in PC Week's "Switched and Fast Ethernet - Second Edition", by Robert Breyer and Sean Riley, ZD Press, 1996.

Once our cables arrived, we tested each of them for proper wiring and good signal connection using an inexpensive L-COM Ethernet cable tester. After all of the cables were successfully tested, it was time to rig them into easy to handle wiring harnesses.

Because all of the computers, file servers, network printers and hubs within our office could be reached using only a few different routes, we made up cable harnesses just like the wiring harnesses in an automobile. Not only is it easier to pull one cable harness rather than seven separate cables, but it's neater, better complies with fire codes, and stronger. Laying out the cables in our long hallway, we made up the requisite bundles and determined where each user's cable should diverge from the harness and make its own separate path to that user's computer. By wrapping each harness with inexpensive wire ties every few feet, the cabling remained neat and untangled. If there was excess cable, we simply coiled it somewhere under the floor and wire tied it together neatly.

When running the cables, we made sure not to make any sharp bends or kinks. These cause substantial problems with high speed Ethernet. Because the floor below us in our building had drop ceilings, we were able to run the cabling under the floor, drilling a small hole through the floor at the appropriate place to bring up the patch cord for each computer. Using screw eyes and cable ties about every eight feet, we suspended each wire harness halfway between the drop ceiling and our office floor.



Before we assembled each cable harnesses, we also ensured that every cable, network card, and Fast Ethernet hubs actually worked and made good connection to our Novell IntranetWare 4.11 network. The last thing that we needed was to assemble and install a large cable harness. I tested everything with an inexpensive testbed file server and only one computer. A minimal setup like that is adequate to test for proper hardware function. Although it's unlikely that most offices will keep an extra file server, it's a really good idea to test everything on known-good equipment rather than experimenting on your main office network; if you crash a testbed computer, your law office can still function.

I used DOS to test all network connections, because that's simple and relatively foolproof. If there's a problem, it's easier to troubleshoot it in DOS compared to a more complicated operating system like Windows 95. By logging into the file server using each cable in turn, we knew that the cables were good and would make a proper Ethernet connection if we didn't damage them during installation. I tested each network card

Continued on page 17

SYNOPSIS OF CHANGES TO BANKRUPTCY FEE SCHEDULE EFFECTIVE January 1, 1998

The following amendments have been made to the Bankruptcy Fee Schedule, effective January 1, 19981

A complete statement of the fees as amended is available from the Office of the Clerk of the Bankruptcy Court, 605 W. 4th Avenue, Ste. 138, Anchorage, Alaska 99508.

EXEMPLIFICATION of Documents is increased to $10;

AMENDMENTS TO THE MATRIX or SCHEDULES D-E-F is $20 in all cases; The Bankruptcy Judge may, upon motion, waive for good cause.

In addition to the bankruptcy filing fee, a $30 MISCELLANEOUS ADMINISTRATIVE FEE will be charged in cases under all chapters. This administrative fee will also be collected for Cases Ancillary to Foreign Proceeding. In Involuntary Cases the administrative fee is to be paid by the Petitioning Creditor. The new total filing fee is: $175 for Chapter 7, $830 for Chapter 11 and $160 for Chapter 13 and may be paid by individuals only in installments.

The 50 cents/name previously charged in Chapter 11 cases is REPEALED;

The 25 cent fee for claims processed in excess of 10 is REPEALED;

The fee for filing MOTIONS TO LIFT STAY, ABANDONMENT of ESTATE ASSETS and WITHDRAWAL is revised to 1/2 Civil Case Filing Fee. The Civil Case Filing fee is currently $150. Exempt from this fee is a Child Support Creditor if the statutory form for representation is filed with the court.

REOPENING FEES are now due upon the FILING of the Motion to Reopen Case. The Bankruptcy Judge may upon motion defer the fee pending discovery of additional assets.

Saving dead files — on microfilm

By Joe Sonneman

Even in this virtual world, physical files still exist, talking up space even after courts decide the case. Can you just recycle all that paper?

Ethics Opinion 84-9 says that for two reasons automatic file destruction after one year does *not* satisfy record retention requirements.

First, even though lawyer-produced documents and drafts are not exactly client properties, document destruction might somehow violate the requirement that lawyers maintain complete records of all funds, securities and other properties of a client. Client consent to document destruction might overcome that objection.

Second, Ethics Opinion 84-9 suggests attorneys might need to review files themselves, to assure themselves that no conflict exists between a new case or client and an old one. This demand on lawyers of conflict-free representation has no time limit.

Third, Ethics Opinion 84-9 points out that lawyers must keep old files and records for a period long enough to produce them to the client or in connection with judicial proceedings. Because the statute of limitations for a potential malpractice action begins when the client discovers, or reasonably should have discovered, the problem, the period long enough to produce old files seems potentially without limit.

So, must you keep original files forever? Not unless you like paying storage fees.

What about scanning all those files electronically, converting them either to tape, disk or CD-ROM? There are three problems.

First, tapes and disks are magnetic media. The material tends to physically decay after 5 years or so.

Second, tampering of virtual files is easier to accomplish and harder to detect than with physical files; courts may decline to accept virtual reality.

Third, CD-ROM offers great compression and a happy difficulty in changing materials accurately recorded (if no changes were made prior to scanning), but electronics media changes so rapidly that no one can be sure that what is recorded today can be interpreted back in 20 years or so.

For example, what if, today, you brought to court an 8-inch floppy disk so much used by word processors 10 years ago? Few if any now have machines to read those once-familiar, now-obsolete disks.

Nearly 10 years ago, a *Bar Rag* article suggested microfilm to save dead files. "Records Management & File Retention - or - When Can We Throw Out the Client's File Without Getting Sued?" by Mahoney and Sivertsen (*Alaska Bar Rag,* Nov. - Dec. 1988). Microfilm machines remain in libraries everywhere.

That is still a good answer - and you (or your photographer) can produce microfilm yourself, using Kodak's extraordinarily finegrain Technical Pan film and a decent 35mm single-lens reflex camera.

Now that you've done your own microfilm, you can recycle all that paper? Better ask Bar Counsel just to be sure. But microfilm will probably outlast most lawyers and will always remain readily recoverable-if necessary, with ordinary magnifying glasses. Good fortune.

Attorney Sonneman operates Five Star Photos in Juneau.

HOW TO SHOOT YOUR OWN MICROFILM

1. First, use a board or wall at least two feet high and about four feet long. Mark off page-size spaces, two high and four wide, leaving a half-inch or so between pages in which you write page number 1 through 8. (There will be eight pages per frame, or 288 pages per 36-exposure roll of film.) Using a two-page-high vertical dimension on horizontal film one inch high creates a ratio of approximately 24:1, which is a standard microfilm ratio.

2. Attach a thin wood strip at the bottom and horizontal middle of the board, for the paper edges to rest on. Use small rolled bits of masking tape to hold the tops of the pages in place. Put the camera on a tripod and move it until the board is square-on to the camera and the two vertical pages fill up most or all of the screen. (That's why you need an SLR: to see what the lens will see).

3. In the first page of the first frame on each roll, and again whenever you change cases within a roll, place a piece of paper with descriptive words written large, at least two inches high. You will be able to read this without magnification afterwards.

4. Focus.

5. Shoot. Technical Pan is rated to ISO 25 for pictorial purposes, but for high-contrast microfilm, expose the film at 200/ASA/ISO, using a small aperture (f/8 is good) to assure focus.

6. Develop three minutes in Dektol (usually a paper developer).

7. After a stop bath of one-half to two minutes, use two fixing baths (and if possible a hypo clearing agent) for even greater permanence. The first fix should be at least 10 minutes; the second at least five.

8. Wash for at least 30 minutes, finishing with a 2-minute soak in a dilute solution of Photo-Flo. Have all liquid temperatures at 68-70 degrees.

9. Let the film dry in a dust-free environment.

10. You can store three rolls of finished film-over 850 pages worth-in one 35mm film canister. Add a small vial of a desiccant to keep this dry. Label the canisters, but remember, this procedure is intended for dead files referred to only rarely, hopefully to satisfy records retention requirements.

Making it work the first time

Continued from page 16

by removing the existing card, shutting off the computer and replacing the next card to be tested, rebooting and logging in. All the cards were good.

I took this opportunity to use Intel's standard setup software to program each card to the correct settings. It's simply easier to do this in a consistent batch before installation rather than tinker with each separate computer. Intel's setup software includes full diagnostics, so I also verified that each card worked perfectly. Use consistent settings for each card if possible and make sure that you write them all down for later reference. After verifying that each card worked correctly, I knew that any later connection problems resulted from hardware conflicts or software problems within a particular computer. Modern PCI cards turned out to be much easier to set up than the few older ISA 10Base-T Ethernet that we used for our network printers and the few remaining older workstations. Those older ISA cards often required manual hardware configuration, something that the inexperienced user should not attempt.

After all of the hardware was tested and set up, we planned to pull only our new cables through the floor and leave our older network in use until the following week. But given how long we had put off our re-networking project, I felt that it was better to finish the job in one day. Luckily, because all of the network cards were already tested and set up, changing each computer's network card and making a basic connection to the file server took only a few more hours. Because all of the attorneys worked in unison, some opening up ceilings, some pulling cable, some suspending the cable mid-way between the floor and drop ceiling below, and the others cleaning up as we worked, 15 network connections were installed in about four hours. Add another two hours to change out the network cards in 12 computers and we were dirty but done by 5:30 that Saturday afternoon. Add in another three or four hours to set up the workstation software in various DOS, OS/2, Windows 95 and Windows NT computers and we were up and running by Sunday afternoon.

We now have a fast, new network infrastructure using technology with a solid long-term future. Our actual installation went quickly and smoothly because everything was planned out ahead of time, thoroughly tested and preprogrammed.

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DEPOSITIONS TRANSCRIPTS APPEALS HEARINGS

Good faith and fair dealing: Whither are we wandering?

By Terry A. Venneberg

Welcome to the first employment law column, I believe, in *Bar Rag* history. When I first approached our esteemed editor about doing such a column, we both agreed that a significant gap in the Rag existed without such a column, and that it was about time that someone was stepping into the breach to fill this undeniable void.

After we stopped laughing, I still agreed to do the column, in the hopes of illustrating that there in fact had been a gap, whether anyone had known it or not, and that the gap actually did need to be filled by a nascent columnist like myself.

For my initial effort, I felt compelled, of course, to rehash a recent defeat before our Supreme Court. I think that I can safely promise that this column will not routinely be devoted to my defeats, unless every significant future development in employment law in Alaska involves me being on the losing end of a Supreme Court opinion. If that becomes the case, then it is unlikely that anyone would read this column, anyway, and it really would not matter what I wrote. In any event, this column will focus on *Ramsey v. City of Sand Point*, 936 P.2d 126 (Alaska 1997), and its impact on claims which might be brought under the implied covenant of good faith and fair dealing. First, a little background.

In *Mitford v. deLasala,* 666 P.2d 1000 (Alaska 1983), our court first held that an implied covenant of good faith and fair dealing existed in all employment contracts, including those deemed to be "at-will." In other words, regardless of whether a contract provided that employees could only be dismissed for "just cause," or even whether the contract specifically stated that an employee could be dismissed only "at any time, for any reason," there would be included in every employment contract an implied provision that required employees to be dealt with fairly and in good faith.

The next question that needed to be answered, of course, is, "What does that mean?" Over the next several years, our court attempted to answer that question. In *Jones v. Central Peninsula Gen. Hosp.,* 779 P.2d 783 (Alaska 1989), the court said that the "covenant does not lend itself to precise definition, but it requires at a minimum that an employer not impair the right of an employee to receive the benefits of the employment agreement." The court also noted in *Jones* that the covenant "requires that an employer treat like employees alike." Firing for an unconstitutional reason was held to be a violation of the covenant. *State v. Haley,* 687 P.2d 305 (Alaska 1984).

A private employer's violation of public policy was also held to be a breach of the covenant. *Luedtke v. Nabors Alaska Drilling, Inc.,* 768 P.2d 1123 (Alaska 1989) (*Luedtke I*). These cases, as well as others, began to fill in the missing pieces concerning how "good faith and fair dealing" could possibly have a place in the employment relationship, but never really provided an all-inclusive definition that could be applied to the new theory.

In *Luedtke v. Nabors Alaska Drilling, Inc.*, 834 P.2d 1220 (Alaska 1992) *(Luedtke II),* the court provided such a definition. After reviewing many of the cases that had been handed down since the *Mitford* decision concerning what was required by the implied covenant, the court found that the covenant contained both a subjective and objective standard. The subjective standard was relatively simple to understand; a finding of bad faith would be upheld "when the record supports a finding of an improper employer motive." In other words, the covenant would be violated where an employer was found to have acted with evil intent or sinister motives. The more difficult prong of the test to both understand and apply would be the objective standard, for which no evil intent or sinister motives would be required.

NEEDLESS TO SAY, THE LANGUAGE SET OUT IN *LUEDTKE II* HAS CAUSED MORE HEARTBURN TO EMPLOYERS AND THEIR LAWYERS THAN A TEXAS CHILI SUPPER.

The court in *Luedtke II* provided that "the covenant of good faith and fair dealing also requires the parties to act in a manner which a reasonable person would regard as fair." The Restatement (Second) of Contracts was quoted by the court, where it was noted that:

> Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further; bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty.

A showing of evil intent by the employer would clearly not be required in bringing a claim under the covenant. Employers would be required "to act in a manner which a reasonable person would regard as fair," even when the employment contract was "at-will." Finally, a clear statement of the objective standard to be applied to claims under the implied covenant had been provided by the court.

Needless to say, the language set out in *Luedtke II* has caused more heartburn to employers and their lawyers than a Texas chili supper. What do they mean, we have to act "in a manner which a reasonable person would regard as fair?" Can't we do anything about this? Do we really have to act "reasonably" in making our employment decisions, even if our contracts and manuals say that we can send them out the door any time we want? Clearly, the prospect of being required to act "in a manner which a reasonable person would regard as fair" served to cause a great deal of distress to those who were not accustomed to having their employment decisions examined by an outside, objective source.

Then came the *Ramsey* decision. In that case, the court held that the City's failure to investigate charges of excessive force which had been made against Ramsey could not serve as a basis for a claim under the implied covenant in that "Ramsey's employment contract authorized the City to terminate him for any reason whatsoever." "The covenant of good faith and fair dealing is implied in every contract in order to effectuate the reasonable expectations of the parties to the agreement, not to alter those expectations." Quoting a California decision, the court stated that, "The covenant of good faith cannot be interpreted to prohibit what is expressly permitted by Ramsey's contract with the City."

Setting aside my disagreement with the court as to whether Ramsey's contract authorized his termination "for any reason whatsoever," the larger question to be answered in the wake of *Ramsey* is whether an implied covenant of good faith and fair dealing does in fact still exist in at-will employment contracts. If a contract provides that an employee can be dismissed "at any time, for any reason," isn't that the very definition of an "at-will" agreement? And wouldn't any claim under the implied covenant be disallowed under such, a contract, in that dismissal "for any reason" would be "expressly permitted" by the agreement, and consistent with the "expectations" of the parties? Can employers now provide in their contracts or manuals that employees "hereby waive any potential claim under the implied covenant of good faith and fair dealing," or even that employees "hereby waive any potential claim for wrongful discharge or breach of contract," and basically immunize themselves from claims for breach of the implied covenant, under the theory that such claims would be "prohibited" by contract? It is likely that such a scenario was not the intended consequence of the Ramsey decision; however, an argument could certainly be made, as a result of the decision, that contract language could serve to prohibit claims under the implied covenant.

There is a logical inconsistency between *Luedtke II* and *Ramsey* that will need to be resolved by our court in future opinions concerning the implied covenant. Certainly, no party to a contract, including an employer, should be allowed to effectively "prohibit" claims under the implied covenant by contract. Such a prohibition would subvert the very purpose of requiring parties to act in a manner consistent with good faith and fair dealing. The requirement that employers "act in a manner which a reasonable person would regard as fair" is an important principle, which was unambiguously established by way of the *Luedtke II* decision. If one has difficulty with understanding the importance of this requirement, look at it like this: We require automobile drivers to operate their vehicles in a reasonable manner because, if they don't, physical injury and property damage will be the likely result. If employers fail to act in a reasonable manner, careers and lives can be damaged, and even ruined. In both cases, we require reasonableness and care because of the harm that is likely to result if reasonableness and care are not exercised. Hopefully, as our court continues to wander down the jurisprudential trail of good faith and fair dealing, it will keep this in mind, and continue to require employers "to act in a manner which a reasonable person would regard as fair," regardless of contract language which might to attempt to remove this requirement.

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"Lawyer Nome Alaska"

1896 ONE HUNDRED YEARS 1996

ALASKA BAR ASSOCIATION

BY JAMES A. VON DER HEYDT

The law office building was very narrow, squeezed between the North Star Bakery and Coffee Shop and Rose's Trading Post.

The lot itself was a meager 14 feet wide, and the building a mere 10 or 11 feet. There were three rooms in a row, railroad style, about 24 feet in all, a small reception area, then the law office itself, and at the rear about four final feet for the oil heater storage tank and the proverbial Nome honey bucket.

The building, with sharply peaked roof so snow could slide off easily, was painted what had become over the years, a worn and somewhat chipped battleship gray. The window facing Front Street was placed high so those passing by could not easily look in. The word "Lawyer" in gold paste-on letters was near the bottom.

When I rented the office from the widow of a Nome attorney who had died in a hunting accident a year or so before, the former occupant's name was deleted with a razor blade. I was fortunate to find identical lettering in a lost corner of the Northern Commercial Company department store down Front Street a building or two, and so added, "J. von der Heydt" to the window, above the already existing "Lawyer." Thus, I entered the private practice of law at Nome, Alaska, and became the only attorney practicing in the Second Judicial Division.

It was March of 1953.

In the beginning it should be noted that this short memoir is not intended to cover all aspects of my Nome law practice. Many experiences must be reserved for later recollection and subsequent inspiration.

I recall my office phone number was Main 82, and my home was Black 82. Thus, with the old live-operator activated system, one ring on the line was for my office, and two were for home. Conveniently, either ring could be heard at either location, so at home office calls could be answered, and vice-versa. This system proved to be most convenient, as when gone from the office for court or other duties, my wife at home could answer for me.

All these wonderful benefits have since been sacrificed to a modern touch-tone system, which, unfortunately, Nome fell heir to in the early 60's, after my departure from the city. No more operator named Christine, who, when no one responded to either ring, would tell the caller, "He's in court and the Missus is over at Audrey's for lunch. I'll take a message." Later, when back at the office, the message from Christine would be duly related, e.g., "You had a long distance call from Seattle, a Mr. Soandso called. Call him," and she would have the number. Since I had no secretary and did all my own office typing and phone answering, Christine, and her companion operators, bless them, were akin to secretary message-takers.

In a small town such as Nome, the practice was general as general is. In the course of the seven years I occupied that funny little law office, sooner or later, nearly every type of legal work materialized as various clients came through the office door. I recall patent and copyright, tax, anti-trust, contract, criminal defense, almost all by court appointment, as I was "the only lawyer there," and, of course, among many others, divorce.

As guided by published standard Bar fees, an uncontested divorce cost $225, of which $25 constituted the court filing fee. Other allowable charges were equally meager by today's standards. One could make a decent living practicing law in Nome in the 1950's, and on a fairly regular basis, a significant case would come along that made it all worth while.

During these years, Alaska remained a Territory, with all the political limitations such status entailed. Nome, the largest city in the Second Division, had a population of nearly 3,000 in summer, fewer in winter, when the faint of heart and cowardly fled south on the last boat to such inferior locales as Seattle or Southern California.

The city was the Division's transportation, legal, and commercial center. The seat of the U. S. District Court for the Territory of Alaska, Second Division, was at Nome, as was the Division's headquarters of the Department of Justice, represented by a U. S. Marshal and his deputies, and a U. S. Attorney. Other federal departments had offices there, such as Interior and its "Reindeer Service," an agency now thankfully long gone from the spectrum of government responsibilities. Noted too are the beginnings of the Weather Bureau and the Civil Aeronautics Administration, for commercial aviation in Alaska was then coming into its own.

The people of Nome in the 50's had pretty liberal standards. Open gambling was evident in several places, particularly the "Glue Pot" where Charlie the Tramp managed poker or panguingui games, and was noted for his rapid sleight of hand, removing a generous cut from each pot for the house. There were many liquor stores, and just as many saloons, and most any time of the day or night, one could hear raucous voices and blaring juke boxes emanating from these latter emporiums. Winter or summer, for there really are only two seasons in Nome, the atmosphere was much the same. Every now and then a Lady of the Night appeared, self evident by dress and manner, usually financed by a Seattle or San Francisco syndicate. These unfortunate women rarely graced the city for long. Standing in front of the Polar Bar on a dark, cold, and windy winter evening did little to stimulate contentment, long term employment, or suggest meaningful career advancement.

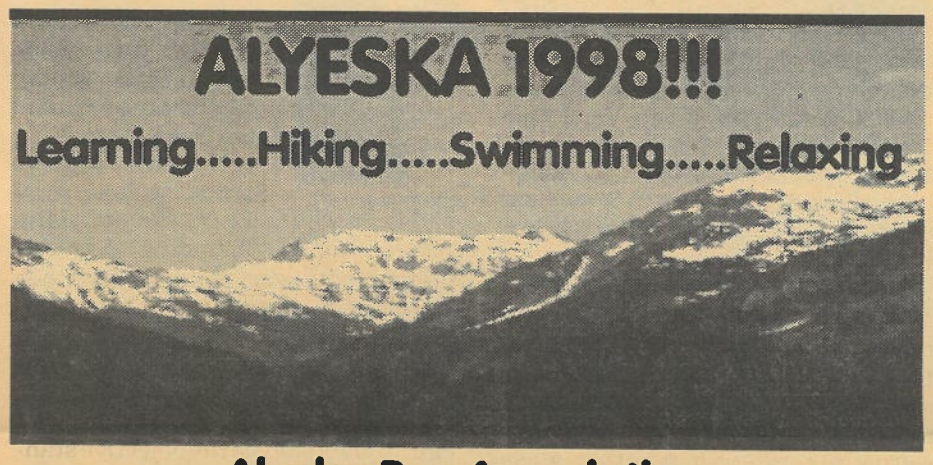
Nome's "Police Force," for the most part, was one man, the "Chief", who normally calculated to see and hear as little as possible. The position, if such it was, was not a particularly enviable one, and Chiefs came and went with notable regularity. Often the city's official listings indicated the Chief to be a person named, "Vacant." The town generally was wide open for any temptations that fate or chance might offer. Nome, then, was its own town, with its own rules, and few limitations, but nevertheless, an interesting place for a novice young lawyer to begin the practice of law.

My wife and I came to know many of the native Eskimo people of the community, and found them to be gentle, responsible, and trustworthy citizens. For various reasons, over the years, a substantial number became clients, and this relationship was rarely other than an enjoyable one. Those few Native friends still living in Nome now have become the "Elders," and upon the rare occasion I return to the city, meeting is a sentimental happening, with enthusiastic welcoming hand shakes. It's good to go back.

I soon learned that divorce was to become a major part of my law practice. Individuals resident in Anchorage, Fairbanks and Juneau, who cherished the privacy of a Nome filing and disposition, often became clients, and traveled to Nome only for the final court hearing. For many of those living in outlying villages of the Second Division, particularly the Native people, divorces were handled solely by mail.

The envelopes came in all sizes, shapes and colors. Some were fat, others lean, suggesting a message, short and to the point. All had been addressed simply, "Lawyer Nome Alaska." Since I was the only individual in the area known by that designation, the postal clerks deposited such envelopes in my mail box. I

Continued on page 20



Alaska Bar Association Annual Convention

Circle these dates for 1998: May 7, 8 and 9!

The Alaska Bar Association Annual Convention will be held Thursday - Saturday, May 7-9, 1998, in conjunction with the Alaska Judicial Conference at the Westin Alyeska Prince Resort in Girdwood.

Join us for a very special program including:

- Annual Alaska Appellate Update with Theresa Newman of Duke University School of Law
- Advanced Legal Writing with nationally acclaimed attorney and trainer Bryan Garner of LawProse, Inc.
- U.S. Supreme Court Opinions with Professors Arenella and Chemerinsky
- Alaska Native Law Update
- State of the Judiciaries Address by Chief Judge Singleton and Chief Justice Matthews
- 44 Things to Do Before Trial with nationally known trial attorney Morgan Chu from Los Angeles, and Mauri Long and Ray Brown of Dillon & Findley

✔ Join us at the Glacier Express for the President's Reception. And be sure to reserve a seat for the Awards Banquet with keynote speaker Don Mitchell, lawyer and author of *Sold American*.

✔ The Alaska Bar Association Annual Meeting will be on Thursday, May 7.

Providers of services to the legal community including publishers, printers, and insurance groups will be on hand to share information with Bar members. Watch for more information in upcoming editions of the *Bar Rag* and look for the special convention brochure in early 1998.

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"Dead Man Walking" author Sister Helen visits Alaska

As the Federal Public Defender for Alaska, Anchorage attorney Rich Curtner has been inspired by many people who have dedicated their professional careers to fighting the death penalty. But when he recently met Sister Helen Prejean, author of *Dead Man Walking,* he was especially moved.

"Sister Helen has so much energy and inner strength in dealing with this issue, and such a positive attitude," Curtner says. "She is an inspiring person to meet and be with, compared to almost anyone I've met. She is the patron saint of the abolition movement."

Apparently Curtner is not the only person inspired by Sister Helen. In recent years, she has received many national and international awards. In early January, she was nominated for the Nobel Peace Prize.

Rich Curtner, L, meets with Sister Helen Prejean (center) and a colleague in New Orleans.

Alaskans Against the Death Penalty (AADP) is sponsoring a visit to Alaska by Sister Helen on January 27-28, 1998. Her visit could not be more timely: the Alaska Legislature stands poised to pass a bill that would place an advisory vote on whether to reinstate the death penalty on the November 1998 ballot. Curtner, chair of the committee planning her visit, urges members of the Alaskan legal community to hear Sister Helen speak, regardless of their views on the death penalty.

Sister Helen Prejean

"She's inspirational to anyone," he says.

Sister Helen has lived and worked in the State of Louisiana all her life. She joined the Sisters of St. Joseph of Medaille in 1957. In 1981, her involvement with poor residents of the New Orleans inner city led her to prison ministry, where she counseled death row inmates in the Louisiana State Penitentiary. In this capacity, she became spiritual advisor to three men who were ultimately executed. Her experiences led her to write *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States,* which was nominated for a Pulitzer Prize and became an Oscar-winning film featuring Susan Sarandon and Sean Penn.

"I am always struck by how little real information about the death penalty people have," Sister Helen says, "Mainly what they have is politicians, rhetoric and media sound bites. Most have never reflected about the death penalty and what it truly entails."

Anchorage attorney Jim McComas, AADP President, urges members of the Bar to attend the upcoming events because of the special perspective Sister Helen brings to the issue.

"The unique thing about Sister Helen is her understanding of and empathy for the real human beings caught up in the death penalty process-those whose family members have been murdered as well as the people confined on death row," McComas says. "These intensely personal human experiences are too often overlooked in the clamor for the death penalty."

The death penalty is an issue in which lawyers have traditionally taken particular interest. The American Bar Association has recently called for a moratorium on death sentences, citing its arbitrary application. The Alaska Bar Association, Alaska Native Justice Center, and other advocacy groups have passed resolutions against reinstatement of the death penalty here.

Co-sponsors of Sister Helen's visit include the Alaska Academy of Trial Lawyers; Alaska Civil Liberties Union; Executive Board, Alaska Christian Conference; Interfaith Council of Anchorage; National Association for the Advancement of Colored People, Anchorage Chapter; Alaska Native Justice Center; and Amnesty International.

Sister Helen's public speaking engagements include the following:

• *Anchorage,* Tuesday, January 27: *Luncheon,* Commonwealth North, Noon;

Reception, Atwood Hall, Performing Arts Center, 6:00-7:30 PM ($75.00/person);

Public Presentation, Atwood Hall, 8:00 PM (Free Admission). For more information, contact Dale Kelley, AADP, at 258-2296.

• *Juneau,* Wednesday, January 28: *Public Presentation,* Centennial Hall, 8:00 PM (Free Admission). For more information, contact Robbie at 586-2227, Ext. 25.

BOOK EXCERPT

Lloyd LeBlanc has told me that he would have been content with imprisonment for Patrick Sonnier. He went to the execution, he says, not for revenge, but hoping for an apology. Patrick Sonnier had not disappointed him. Before sitting in the electric chair he had said, "Mr. LeBlanc, I want to ask your forgiveness for what me and Eddie done," and Lloyd LeBlanc had nodded his head, signaling a forgiveness he had already given. He says that when he arrived with sheriff's deputies there in the cane field to identify his son, he had knelt by his boy — "laying down there with his two little eyes sticking out like bullets" — and prayed the Our Father. And when he came to the words: "Forgive us our trespasses as we forgive those who trespass against us," he had not halted or equivocated, and he said, "Whoever did this, I forgive them." But he acknowledges that it's a struggle to overcome the feelings of bitterness and revenge that well up, especially as he remembers David's birthday year by year and loses him all over again: David at twenty, David at twenty-five, David getting married, David standing at the back door with his little ones clustered around his knees, grown-up David, a man like himself, whom he will never know. Forgiveness is never going to be easy. Each day it must be prayed for and struggled for and won.

Nome

Continued from page 19

learned by sight experience what to expect from the outward appearance of each envelope. The stout ones contained currency in unknown amount, and an accompanying note, hand written, usually in pencil, indicating that the writer wanted a divorce. The lean ones contained only an inquiry about securing a divorce and the costs. The envelopes were from villages located anywhere from Hooper Bay to Barter Island, an enormous area, covering most of Northwestern Alaska. All were promptly answered, and replies to the ones containing currency always contained a receipt. It was fortunate at this time that obtaining a divorce through proper legal channels became fashionable. The fat and lean envelopes arrived with surprising regularity. Distances often were great, and it soon became evident that some method need be devised so that a simple uncontested divorce could be obtained without the otherwise necessary substantial expenses of plaintiff's air travel to Nome.

The use of written interrogatories, answered under oath, came to mind, and the method was tested. A motion was filed before the judge of the District Court to allow plaintiff to present his or her evidence by sworn answers to written interrogatories. An order was signed by the judge authorizing this procedure, which became known in the von der Heydt law office as the "mail order divorce." Questions were then prepared in writing calculated to cover all aspects of the necessary proof, and these were forwarded by mail to the plaintiff, with instructions to take the document before a Notary Public, or the local Postmaster, who also could administer oaths. The questions propounded were answered in writing in spaces provided, signed by the plaintiff, and sworn to before the particular official. The document was then returned to the Nome law office. Assuming all appeared in order (and once in a while it did not), a court time was set for publication of the proof. The judge took the bench, the questions and answers were read aloud into the record in open court, and if the judge found the proof to be sufficient, a decree of divorce was entered.

The system worked well for the most part, and filled a need for judicial relief for many individuals who lacked funds for the considerable expense of air fare from far away villages to Nome.

But, the method was only successful under certain limited circumstances. First, no controversy could exist regarding property rights, custody of minor children and their support, and it was, necessary that the defendant sign and file with the court an "Appearance and Waiver" form, whereby he or she agreed not to contest the granting of the divorce under the allegations and prayer for relief contained in the complaint. However, it was a rarity that conflicts existed, and the vast number of "mail order divorces" proceeded without difficulty.

From time to time, particularly during the summer tourist season, wandering attorneys from areas in the Lower 48, having seen the message spelled in golden letters on the office window, stopped by to chat and ask questions about the practice of law on Front Street in Nome, Alaska. In various ways, the question was usually asked, "What in heaven's name are you doing practicing law in this remote corner of the world?" I suppose the answer, that I liked the place, found it interesting and rewarding, and no, I did not want to move to Denver and practice there, was none too satisfactory. Shaking their heads, many left obviously unconvinced. But, I was surprised by the number of letters that later came, thanking me for my time and wishing me well. It surely is not Boston, some wrote, but it is amazing to think about you and your law office in Nome, and by the way, good luck.

These many years later, the time I lived in Nome and practiced law there, seem a hazy sequence of my life, but that day in 1959 when I left to assume the newly created Superior Court bench in Juneau, it was difficult to hide a serious lump in my throat. The first months in Juneau I found myself frequently Nomesick. The tundra, the icy sea, the summer beach with its magnificent rolling breakers, the Sawtooth Mountains on the northern horizon, all had become a part of me. My dear wife, Verna, experienced the same nostalgia for that place called Nome. But, in time, Juneau too became home.

But, these recollections also crowd my memory. Winter in Nome was a special time, the quiet season. Like many Alaskan cities that are thronged with travelers in summer, after September made way for October, Nome was returned to its year-round residents. A delightful and meaningful social life reactivated. Snow piled high on roof tops, deep on city streets, the Bering Sea became an extended plain of white as far as the eye could reach. Cars, tractors, and road graders were bedded for the winter. The city spent no money foolishly to clear the streets or wooden boardwalks. When the snow heaped too deeply, someone cut ice steps for transit over the higher drifts. Fur parkas were the fashion of the time, as were bunny boots and mukluks.

Temperatures met 30 degrees below zero, the air was crisp and zinged one's cheeks. The darkest days welcomed a reluctant dawn, low over the sea to the southern horizon, near 10 in the morning, and saw twilight fade to darkness by three in the afternoon.

It was the good life. I knew it then and I know it now.

Bar People

Marc Bond, formerly with Delaney, Wiles, et.al., is now with Unocal in Anchorage.....**Lori Bodwell**, formerly with the Law Office of James Hackett, has opened the Law Office of Lori M. Bodwell in Fairbanks.....**Douglas Carson** has become an associate attorney at LeGros, Buchanan & Paul.....**Loretta Cieutat** has relocated from Anchorage to New Orleans.....**Ted Christopher** has relocated from Bethel to Anchorage.

Terri-Lynn Coleman has closed her Fairbanks office and is now associated with the Law Office of Rita T. Allee.....**Bill Council**, formerly of Council & Sanders, has now opened the law office of William T. Council, LLC.....**Jan Hart DeYoung** is now an Assistant Attorney General in Anchorage.....**Cynthia Drinkwater** is now with the Disability Law Center in Anchorage.....The firm fka Young & Feldman, is now Feldman & Orlansky. Besides **Jeff Feldman** & **Susan Orlansky, Jim Fosler** is also associated with the firm.

Michael Fowler is now with the Department of Journalism, American University in Cairo.....**Midori Gellert** is now with Stone, Jenicek & Budzinski.....**Gordan Goodman**, formerly with the DA's office in Palmer, is now with the DA's office in Kenai.....**Darin Goff**, formerly with Miles & Goff, is now with Robertson, Edgren & Christensen.....**Thomas Gingras** & **Douglas Moody** have formed the firm of Gingras & Moody.....**Andy Hemenway**, formerly of Anchorage, is now a Hearing Officer with the State of Alaska Dept of Administration in Juneau.

Cynthia Herren has relocated to Las Vegas, NV.....**Wayne Hawn**, formerly with William Azar, P.C., is now with Weidner & Associates.....As of January 1, 1998, **Faulkner, Banfield, Doogan & Holmes**, has changed: the Juneau firm is now Faulkner Banfield; the Anchorage firm is now Holmes, Weddle & Barcott.....**Millard Ingraham** is now with the firm of Henderson & Borgeson in Santa Barbara, CA.....**Sharon Illsley**, formerly with the DA's office in Kenai, is now in Golden, CO.

Ken Jensen, Walter Garretson, Kevin Morford and **Timothy Verrett** have formed the firm of Jensen, Garretson, Verrett & Morford.....**Barry Kell** is now with Wilkerson & Associates.....**Mary Anne Kenworthy**, formerly with ALSC in Anchorage, is now with the Office of the Solicitor, Division of Indian Affairs, in Washington, D.C.....**Mindy Kornburg** is now in Durham, N.C.....**Paul Lisankie**, formerly with the Law Office of Trena Heikes, is now with the Attorney General's office in Anchorage.....**Loni Levy** will be leaving the AG's office and opening the Levy Law Offices, effective April 1, 1998.

Paul Niewiadomski has relocated from Anchorage to San Jose, CA.....**Karen Quist** has relocated from Wasilla to King Salmon.....**John Reeder**, formerly with BP Exploration (Alaska), has opened his own law office in Anchorage.....**L. Andrew Robinson**, formerly with Hartig, Rhodes, et.al., has opened Robinson Law Office in Palmer.....**Joseph Slusser**, formerly with the DA's office in Fairbanks, is now with the DA's office in Kodiak.....**Vance Sanders**, formerly of Council & Sanders, has opened his own law office in Juneau.

Jennifer Wells, former Magistrate in Tok, is now with the Alaska Court System in Anchorage.....Effective January 1, **Larson, Timbers & Van Winkle** has changed its corporate name to Larson, Timbers & Thomas. The firm writes that "**H. Connor Thomas** is a member of the firm and is entitled to all rights and privileges. He has been shown the secret handshake and may sing the corporate song in all public places."....**Stephen Wallace**, formerly with the DA's office in Kodiak, is now with the AG's office in Anchorage.....**Mark Wittow** has transferred to the Seattle office of Preston, Gates & Ellis.

Theresa L. Williams, formerly with the PD's office, is now with CIRI.....**Brett Wood** has relocated from Fairbanks to Virginia.....**Daniel E. Winfree** of the Winfree Law Office in Fairbanks was recently elected President of the 1998 Western States Bar Conference and will host and preside over the Conference next February on the Big Island of Hawaii.....**Bruce Weyhrauch**, formerly of Faulkner Banfield, has opened the Law Offices of Bruce B. Weyhrauch in Juneau.

Nancy Marie Edtl and **Steven Pradell** were wed Oct. 31, 1997, at Elmendorf Air Force Base.....**Randal Buckendorf** changed jobs and is now at ARCO Alaska, Inc.

Attorney **J.P. Tangen** has opened a new law office in Anchorage, Alaska. After a three year hiatus in Vancouver, British Columbia where Mr. Tangen served as President and Chief Executive Officer of Silverado Mines Ltd. Tangen, formerly Regional Solicitor for the U.S. Department of the Interior, has resumed the private practice of law at 310 K Street, Suite 200, Anchorage, AK 99501

Wolf retires from Copeland, Landye, Bennett and Wolf, LLP

David P. Wolf, 55, has announced his retirement from the law firm of Copeland, Landye, Bennett and Wolf, LLP. Wolf, a member of the Alaska Bar for 27 years, has been a member of the firm since 1976 and was manager of its Anchorage office.

Wolf specialized in business, real estate, and federal land law and was actively involved in the organization of many village corporations established under the Alaska Native Claims Settlement Act (ANCSA) of 1971. Between 1969 and 1973, Wolf was first supervising attorney in Fairbanks and then executive director of the Alaska Legal Services Corp. During that period, he assisted as co-counsel to the plaintiffs who successfully established Native rights to pipeline lands, which in turn led to the passage of ANCSA.

Mark Copeland, on behalf of the firm, said Wolf "made a valuable contribution to ANCSA corporations, particularly with respect to his successful resolution of land disputes that many of the corporations had with federal and state governments. We will miss him professionally and personally and wish him and his wife, AM, the best of health, happiness and success."

Wolf is retiring from the practice of law to pursue other interests, principally in the acquisition and sale of mortgages from the F,D.I.E. and private lending institutions.

The name of the firm well continue to be Copeland, Landye, Bennett and Wolf, LLP.

New Staff announcement

Jim Minnery has been named statewide development director for Alaska Legal Services Corporation, a non-profit organization whose mission is to provide free civil legal assistance to low income Alaskans.

Minnery will be responsible for strengthening and diversifying the financial resource base including grant writing, corporate and individual gifts, community partnerships, and developing a Private Bar Campaign.

Jim Minnery

He also is accountable for creating and implementing public relations strategies. Minnery has been in the nonprofit sector for 8 years working as a community director with the Alaska State Chapter of the March of Dimes in Anchorage and, most recently, as director of development for an adventure education organization based in Vail, Colorado. He holds a bachelor's degree in business administration from Ohio State University and a master's degree in nonprofit management from Regis University in Denver.

Saphronia Young joins Oles Morrison & Rinker LLP in Alaska; Receives appointment as state rep to ABA subcommittee

Oles Morrison & Rinker LLP (OMR) welcomes Saphronia Young as an associate into their Anchorage, Alaska office.

Young joins OMR's construction litigation group, where she will focus on representing contractors and subcontractors in construction disputes before state and federal administrative agencies and in state and federal litigation. She also will formulate employment policies and handle personal injury and employment claims related to construction work and design.

Since joining OMR, Young has been named Alaska representative to the Young Professionals Subcommittee of the Fidelity & Surety Law Committee of the Tort & Insurance Practice Section of the American Bar Association.

OMR, one of Seattle's oldest law firms, is one of the country's leading law firms specializing in construction and public contract law.

Prior to joining OMR, Young practiced construction and surety law in Kansas City, where she litigated at the trial and appellate levels in areas representing sureties, contractors and owners.

Young received the 1997 President's Award from the Association for Women Lawyers of Greater Kansas City, the 1996 President's Recognition Award for the Young Lawyers Section of the Missouri Bar.

Published twice, Young co-authored a chapter of the Missouri Desk Book on Construction Law and, more recently, a chapter on bad faith litigation for the Kansas City Metropolitan Bar Association's upcoming book on business torts.

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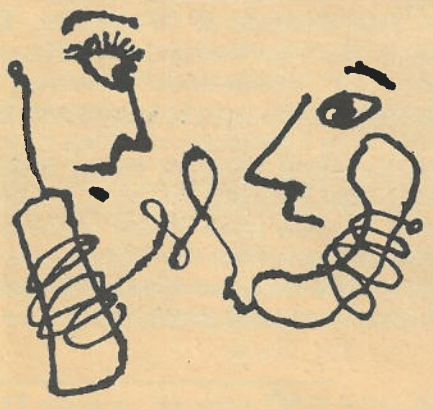

As corporate counsel begin their search,

42% call co-workers in their company

41% call lawyers outside the company

21% turn to lawyer directories.

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Law firm announces reorganization

On January 1, 1988, the law firm of Faulkner, Banfield, Doogan & Holmes, P.C. reorganized and became two separate firms.

The shareholders in the firm's Anchorage and Seattle offices have changed the firm name to Holmes, Weddle & Barcott, P.C. They will continue to practice in their current Anchorage and Seattle locations.

Attorneys in the firm's former Juneau office will continue to practice at the same address and have formed a new professional corporation known as Faulkner Banfield.

The last voyage of the floating court

By James H. Chenoweth

The following article is from "Down Darkness Wide," a book being written by James Chenoweth about his career as a lawman in Territorial Alaska. This chapter is reprinted with his permission. Chenoweth started his law enforcement career with the Anchorage Police Department. From 1954-1962, he was the Chief Deputy U.S. Marshall in the 3rd Judicial Division (later District). He noted that he was the last Chief Deputy in the territory of Alaska and with statehood he became the first Chief Deputy.

Justice isn't rooted to any single location. She may wear a blind fold (as she is traditionally depicted) but she has always been able to travel. Monarchs took their own brand of justice with them as they moved from castle to castle. Our own circuit judges lugged their law books from town to town. The usual practice of deputy marshals in the southwest was for four or five to go out "on the scout" together, accompanied by a portable jail-wagon. Paid six cents for every mile and two dollars for every arrest, they hunted for men on the run, suspicious travelers, stolen horses or cattle, contraband and whiskey.

Alaska put its own spin on the way justice traveled around. In 1900 James Wickersham was appointed to one of two new judgeships in Alaska. His new post was at Eagle, near the Canadian border, a small settlement that had grown up around a new army post; Fort Egbert. The power of Territorial Judges actually exceeded those of Territorial Governors. In addition to handling court cases, Alaskan judges issued liquor licenses, supervised elections and the formation of town governments, approved bond issues for schools, appointed U.S. Commissioners and performed a variety of administrative duties, including passing judgment on the qualifications of persons who wanted to practice law.

(One circuit judge in Alaska-I think it was Judge Dimond-instructed the two attorneys traveling with him out in the bush to test an applicant's knowledge of the law. Amid much conviviality in the applicant's cabin, their mission was forgotten until late in the evening at which time they asked the applicant what he knew about the law. His reply was, "Nothing". Puzzled, they asked why he wanted to become a lawyer. He replied that he thought it would be nice just to say he was one. They left his cabin. The next day the attorneys reported to the judge that when they questioned the applicant about his knowledge of the law, he had answered every question truthfully and accurately. The judge granted the application and the miner became a lawyer.)

Back to Judge Wickersham, who felt there wasn't much to keep him busy in Eagle. Within the 300,000 square miles of his district, there were only 1,500 whites and 4,000 natives. The routine business was small and not likely to increase. Wickersham suggested to Washington that he could assist judges in other Alaskan divisions that were overburdened with litigation. He was instructed to hold a term of court at Unalaska if the judge for that area had no objection. He started his trip on Aug. 3, 1901.

Unalaska is an island near the outer tip of the Alaska Peninsula. The judge's travel route took him first to Nome where he learned that one of the cases awaiting him at Unalaska involved the murder of several miners, and that some witnesses were officers and sailors on U.S. Revenue Cutters stationed at Unalaska who could not be called away from their vessels. The court would have to go to them.

THEY SAILED AT MIDNIGHT FOR UNALASKA, 750 MILES AWAY. IT WAS ALASKA'S FIRST "FLOATING COURT".

Judge Wickersham also learned at Nome that there were only "a few competent jurors at Unalaska;" it would be impossible to get enough qualified persons there to act as grand jurors and trial jurors.

Already comfortable with the need for practical solutions in Alaska, Judge Wickersham decided to select both juries from the people in Nome. He instructed the United States marshal to gather in 16 men as grand jurors and another 18 to serve as trial jurors. The court party now included himself, the deputy clerk of the court, the U. S. marshal and two deputies, an assistant U. S. attorney, and 34 jurors. Judge Wickersham herded everyone aboard the steamer St. *Paul.* They sailed at midnight for Unalaska, 750 miles away. It was Alaska's first "floating court".

Judge Wickersham had set a precedent. Using the U. S. Revenue Marine for transportation in the early years, court personnel heard litigation and exercised judicial powers in many villages which had previously been beyond reach. Later, the U. S. Coast Guard replaced the Revenue Marines and began a periodic Bering Sea Patrol to bring medical and dental help to coastal villages. Included in its operational mission was a high priority for law enforcement. Occasionally, court personnel traveled along as guests, continuing the "floating court" tradition of handling judicial matters in remote coastal villages.

•

With statehood starting to brighten the horizon, U.S. Marshall Fred Williamson (3rd Judicial Division) thought the summer of 1957 might be the last time a federal "floating court" would put to sea. He discussed the possibility with Bill Plummer, who agreed to go along. In the orders for the Bering Sea Patrol, cut by the Coast Guard on May 24th, the captain of the Coast Guard Cutter *Wachusett* had been appointed U.S. Commissioner, but arrangements were made for Bill and Fred, as U. S. Attorney and U. S. Marshal, to travel with the *Wachusett* on its scheduled patrol during July and August. Their presence made it a "court cruise".

Fred, bless him, had a conscience. While I was hard at work testifying in a courtmartial taking place at a military post in Washington, he had been busy recovering stolen property aboard a ship at sea. It was pretty exciting stuff. Someone had boarded a temporarily beached boat at Whittier and stolen a propeller shaft, lifeboat, and expensive electronic equipment. We identified the suspect vessel as the *Barwell,* which was operating out of Amchitka Island west of Adak.

Fred and Deputy Ed Dolan were aboard the Coast Guard Cutter *Clover* for four days, hunting the *Barwell.* Located at last, there followed a "hot pursuit" chase during which a shot had to be fired across the fleeing vessel's bow before it could be boarded near Adak, the occupants arrested, and the stolen property recovered. "Heave to, and prepare to be boarded!" It was a sea chase worth remembering and Fred had been part of it. Possibly he felt he was hogging the excitement by immediately following up that nautical adventure with a "floating court" voyage.

...OUR ROUTE BETWEEN SEWARD AND BARROW WOULD DEPEND ON WHATEVER DUTIES AROSE DURING THE PATROL.

At any rate, when I got back to Anchorage, Fred told me he had changed his mind about going on the *Wachusett,* and had arranged for me to take his place. I told (my wife) Dennie of my unexpected assignment. She said she'd struggle valiantly to manage without me for awhile and suggested that in spite of my well-established reputation for avoiding hazardous situations, I should attempt to keep a life jacket somewhere within reach. Because this would be a once-in-a-lifetime opportunity, I borrowed a 16mm movie camera from attorney Stan McCutcheon, bought all the film available, changed my socks, and was ready to go !

On the 4th of July, Deputy Pat Wellington drove me down to Seward, his post-of duty. The *Wachusett* was already tied up at the Standard Oil dock, having traveled up the Alaskan coast from Seattle. Its ultimate destination was Barrow, the northernmost community in the United States, but our route between Seward and Barrow would depend on whatever duties arose during the patrol.

I boarded about 5:30 p.m. and was greeted by Lt. Liverance who had already arranged for me to berth with the Chief Petty Officers. After settling in, I went ashore to prowl around Seward. Heard rumbles of a big gambling game, which Pat later found in the Flamingo Club. Alley B was working.

Returning to the ship around 8:00 p.m., I met the Executive Officer, David Haislip, who introduced me in turn to Captain G. T. Applegate, the Commanding Officer. They welcomed me warmly, extended wardroom privileges (whatever that meant), and gave me the freedom of the ship. The next day, overcast and windy, I spent some time ashore with Pat, checking on the theft of 200 tons of scrap metal. Returned aboard the *Wachusett* around 2:00 p.m. Shortly afterward, we got underway for Kodiak. Without the U.S. Attorney aboard.

The name of our ship was not unknown in Alaskan history. In 1882 the Navy ordered the steam warship, the U.S.S. *Wachusetts,* to the Gulf of Alaska, believing that its extreme mobility would allow it to reach any riotous area. The Navy's real goal was to justify withdrawing marines and seamen who had been policing the Juneau mining area. After a miner's court in Juneau sentenced two Indians to death, the too-late arrival of the *Wachusetts* supported Alaska's plea for the need to establish a system of courts and law enforcement officers in Alaska. That plea to Washington went unanswered for many years.

The name might be the same, but the ship undoubtedly looked different. The current version was a bit shorter than a football field. Painted white, it lacked the rakish red stripe on the hull that Coast Guard vessels now sport. The top of the tail mast bristled with electronic gear and surf boats were lashed snugly to davits on both sides. There were about 160 members in the ship's crew.

We docked in Kodiak the next morning where I was met by Vern Carnahan of the Office of Naval Intelligence. The Navy had a busy port in Kodiak, generating the usual problems surrounding any military installation. Vern and I had coordinated on several matters involving both naval and civilian personnel. He gave me a lift into town and since we had no deputy stationed there at the time, I opened up our office for business. It was Saturday, but I reached Bill Plummer by phone. "Be there Tuesday for sure, Jim," and that's the word I passed on to the Executive Officer, David Haislip.

On Monday, I had to tell him that Bill cancelled his travel plans. Now Haislip, apparently the legal officer aboard, would have to prosecute any crimes I brought to his attention and Captain Applegate would be the presiding magistrate. Which left me as the sole surviving civilian of the floating court during its final voyage!

Due to leave on Wednesday, I spent the intervening time talking with Lt. Commander "Robbie" Robinson at the naval base, lunching with Vern Carnahan, chatting with pro-gambling advocate Frank Irick (who was unhappy to learn I had been in town since Friday without him having known it), and discussing with Commissioner Mabel Fenner the jurisdictional problems at new

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The last voyage of the floating court

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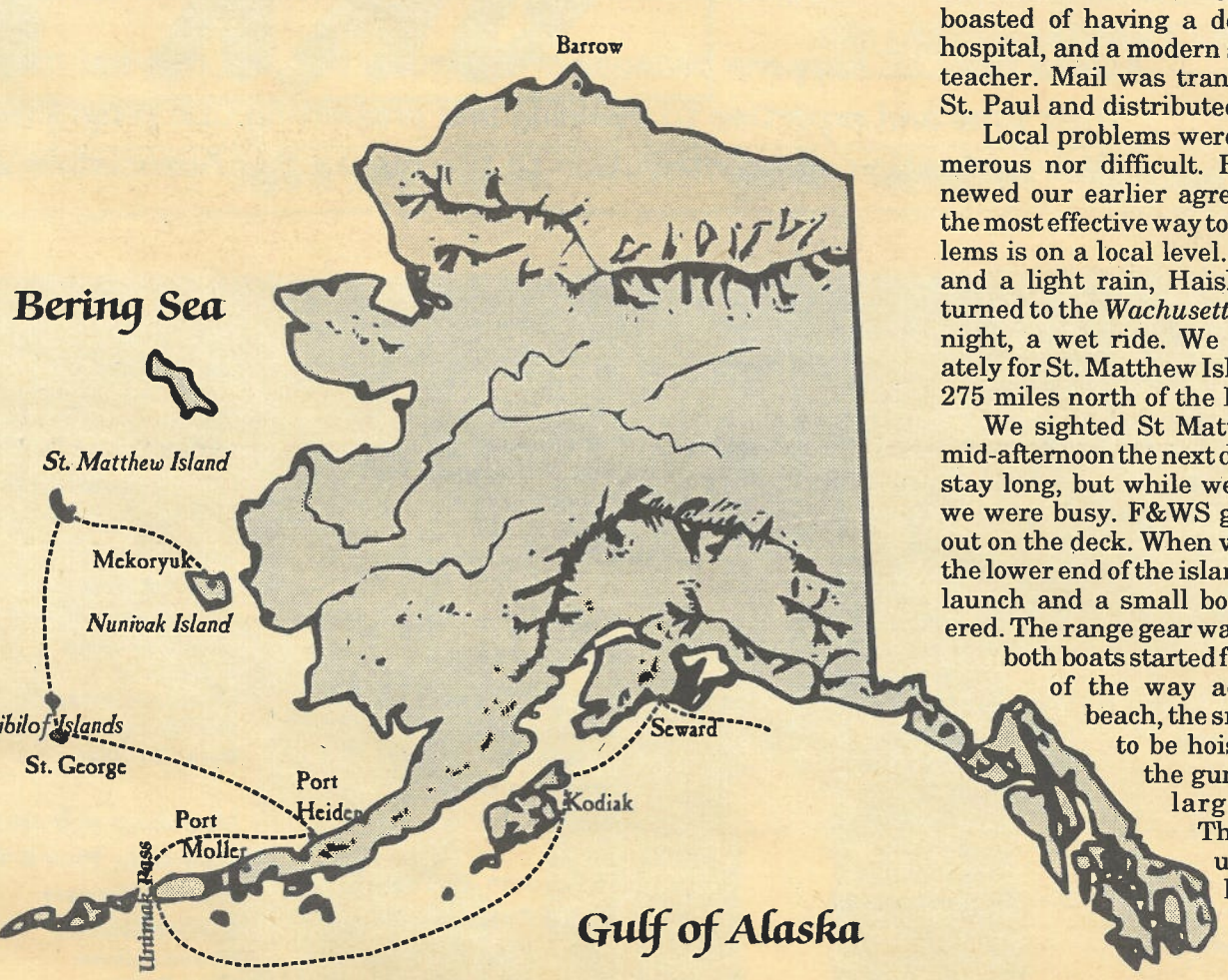
White Alice communication sites. I suggested she take the position that White Alice sites are military reservations and crimes on those sites are federal crimes. I passed on to Treasury Agent Dave Carpenter information about marijuana parties being set up in Kodiak. All just routine stuff.

Tradition was upheld the next morning as a naval band braved fog and an overcast sky to play us away from the dock. I got a guided tour of the ship and watched the gun drill after lunch. A storm warning predicted weather "rough to very rough."

Two civilians also had joined us, Fish and Wildlife agents en route to St. Matthews Island to estimate the size of a reindeer herd there and evaluate the range necessary to support it. The herd was imported there as emergency rations by the Coast Guard during World War II and had run wild since then. Learning that Nunivak Island was a future port-of call for us, they told me the island was a game sanctuary for musk oxen. Originally 25 in number, they had been captured by a Norwegian group, taken to Norway, shipped to New York, then to Seward, Alaska, via Seattle and finally wound up in Fairbanks as part of a domestication experiment. Not one animal was lost during the trip. When funds ran out for the experiment, they were shipped to Nunivak.



During the afternoon the sea became rough and choppy. For sailors, the Bering Sea is a very tough body of water. It is relatively shallow; consequently the ships that sail there must have a shallow draft and, therefore, a tendency to roll in bad weather. In the Bering Sea, a cold current from the Arctic collides with a warm current from the Pacific. The clash results in heavy fogs and violent storms. During storms, waves may reach over 40 feet in height. Ice is a constant menace and ships generally entered the sea only from May to October.

That night the storm grew, moving (as they told me) into a "class 5 status". Salt spray everywhere! That didn't seem to bother anyone but me. Everything not lashed down went flying. It was casually suggested that I wouldn't be in anyone's way if I decided to pass the time braced in my bunk. I did, and with some difficulty avoided being pitched out. Dawn brought no improvement, but by noon the wind had dwindled to eight knots. According to my log, the Captain had been seasick so I decided I wouldn't feel too embarrassed if I succumbed. The Chiefs encouraged me to eat. I reluctantly took their advice and began to think I might live.

With my optimistic outlook somewhat restored, Chief DeShaw opened radio contacts with villages.

Chignik had no self government, no schoolteacher, no postmaster, no town ordinances, and no landing strip. With a population of 250 Natives, 10 whites, and two canneries, the tribal chief consulted cannery officials and then made whatever decisions were necessary.

Perryville was even smaller, with a total population of 120 Natives. Shifted here by the U S. government from where they had lived in the Katmai area, they hung on to their earlier culture and retained their Native government, headed by a tribal chief. No way in or out except by boat.

With a population of about 200, Sand Point had a husband-and-wife team of schoolteachers, as well as a postmistress. A landing strip was being built. Apparently there were no formal ordinances or any governing body, but Sand Point was "in the loop" as the relay village for radio contact with the surrounding area.

Our sociological research ended abruptly. The radio was needed on a stand-by basis. A fishing vessel called *Sharasan* had left Port Heiden four days earlier heading for Port Moller but had not been heard from since then. We began to sweep for any kind of distress call.

By the next morning the storm had eased down but a dense fog swirled in all around us. I hadn't seen a speck of land since we left Kodiak. We were moving north through Unimak Pass, at the eastern end of the Aleutian Islands and right next door to where Judge Wickersham had taken his first floating court.

Leaving the Gulf of Alaska behind us, we were entering the Bering Sea. Around the corner and just to the right, we had intended to land at Sarichef, but ground swells made that impossible. Just before noon, we swung northeast and at four in the morning, anchored outside of Port Heiden. We had joined the search for the *Sharasan.*

By breakfast, the sea was smooth. The sky was a brilliant blue with patches of fog still hugging the water. Mid-morning, a Coast Guard plane radioed it had located the *Sharasan* about 45 miles away from us. We up-anchored and headed out.

Two hours later, we gently coasted up to where the *Sharasan* drifted slowly in a fog bank. Fishing nets still hung limply over the stern. Our surf boat was lowered and its crew boarded the *Sharasan.* I watched as a body was moved into the surf boat and brought back to the *Wachusett.* It turned out that the "body" was Fred Sundean, the sole occupant of the *Sharasan,* was still alive. Hoisted aboard the cutter in a basket stretcher, he was treated for food poisoning. His radio had conked out and whatever he had eaten made him too sick to repair the radio. Towing his boat toward Port Moller, we were met by another fishing vessel, the *Fare Well.* Sundean and his boat were both handed over to the *Fare Well.* (In the process I learned from the *Fare Well* crew that fishing had been terrible. They had been out two months and had just barely made their expenses. Might be slim pickings in the coastal villages.)

By 8:00 p.m., we were headed for St. George Island in the Pribilofs. The fog closed in around us again.

The Pribilofs are a small group of islands about 180 miles north of the Aleutians. They are also called the Fur Seal Islands because they are the world's largest fur seal sanctuary and the breeding grounds for northern fur seals from April to November.

The indiscriminate slaughtering of seals had earlier made the Pribilofs a focal point of international controversy. In the 1880s, overkill by several nations severely depleted the seal herds so the United States Bureau of Fisheries began direct supervision of sealing in 1910. During the year of our patrol, the United States, Canada, Japan, and Russia created the North Pacific Fur Seal Commission to further protect the depleted seal herds which have since grown from about 125 thousand to 1,500 thousand. The two major islands in the Pribilofs are St. George and St. Paul.

We anchored at St. George about 7:30 on the evening of July 14th. I went ashore with Dave Haislip and spent a couple of hours talking with the Superintendent, Dan Benson, who was also the U. S. Commissioner at St. George. With a population of 200 Natives and 25 whites, St. George boasted of having a doctor, nurse, hospital, and a modern school with a teacher. Mail was transferred from St. Paul and distributed by Benson.

Local problems were neither numerous nor difficult. He and I renewed our earlier agreements that the most effective way to resolve problems is on a local level. In fog, mist, and a light rain, Haislip and I returned to the *Wachusett* around midnight, a wet ride. We left immediately for St. Matthew Island, roughly 275 miles north of the Pribilofs.

We sighted St Matthew around mid-afternoon the next day. We didn't stay long, but while we were there, we were busy. F&WS gear was laid out on the deck. When we stopped at the lower end of the island, one motor launch and a small boat were lowered. The range gear was stowed and both boats started for shore. Part of the way across to the beach, the small boat had to be hoisted athwart the gunwales of the larger launch. Then we moved up island and landed the F & W S agents ashore, along with two boatloads of gear. The agents would remain on the island until the *Wachusett* picked them up later. Since the island was uninhabited, during that period the agents would have to fend for themselves. No McDonalds!

While they were digging in, we headed for Mekoryuk on Nunivak Island which is east of St. Matthew and fairly close to the Alaskan mainland. Mekoryuk lies on the north side of the island. (Just in case you're interested, the village on the extreme southern side is Ingloothloogramiut.) Mekoryuk was our first major stop and the Coast Guard's first real opportunity since leaving Seward to do what they came to do: provide medical and dental help to coastal villages. So we stayed a couple of days.

Mekoryuk was a small but fairly prosperous village with about 200 residents, and since most of them were Natives, it was governed by a tribal council, under a constitution and bylaws. Fifty-eight children attended the local school, (grades 1-8), taught by Paul Estle and his wife. Though he had no formal medical training, Paul also handled the town's first-aid problems. People lived largely on reindeer meat and fish; their income was derived mostly by selling reindeer meat in Nome and Bethel at 40 cents a pound.

A landing strip was being built on the bed of a dried-up lake about four miles from the village. Many high-powered outboard motor boats scooted around, driven as though they were floating hot-rods. Crime was minimal with nothing pending at the time. Most offenses were sex violations, which the tribal council handled by admonition. The presence of a National Guard unit, led by the local minister, may have helped to keep things on an even keel.

I inquired about the musk oxen herd, mentioned earlier by the Fish and Wildlife agents. The herd roamed the south part of the island and had grown to about 125 by now, but I never got a chance to see them.

(Next issue: the Wachusett continues her journey)

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