- Open season on consumers
- Bankrupt partnerships
- Cultural communication
- People news

HUMOR: The driveway defense, TVBA, Historical billings...and 2 poems

$2.00

The Alaska BAR RAG

VOLUME 17, NO. 4 — Dignitas, semper dignitas — JULY-AUGUST, 1993

Commercial code revisions: Status report

BY ART PETERSON

The first regular session of the 18th Alaska Legislature adjourned May 11. Three bills, containing five major changes in uniform laws, passed. Two other uniform-laws bills are pending and will carry over to the 1994 session, and there is a promise of action on others.

The National Conference of Commissioners on Uniform State Laws (NCCUSL), in conjunction with the American Law Institute and the American Bar Association and various scholars and advisers, does the research and drafting. The NCCUSL's promulgation of an Act or a set of amendments culminates a minimum of two, and often several, years' work. It's then up to the state legislatures and governors.

The Uniform Commercial Code saw the most action in Alaska this past session. The NCCUSL continually monitors it and promulgates changes to it. Alaska's UCC is now up to date, but we will be presented with more amendments in the future. The NCCUSL also prepares explanatory material, some of which is reflected in the descriptions below.

Here is a synopsis of Alaska's recent legislative activity regarding uniform laws:

Funds Transfers

SB 86, introduced by Senator Kerttula, achieves especially important changes in the Uniform Commercial Code, by adding Article 4A (AS 45.14), on electronic funds transfers. While making some very minor modifications to conform to Alaska'a style and format requirements, the bill faithfully adheres to the NCCUSL's current language. It became ch. 34, SLA 1993, and will take effect January 1, 1994.

Unless the parties to a transaction use the same bank, a funds transfer involves at least four entities: the originator of the payment, the bank to which the originator communicates the first payment order, the beneficiary's bank that receives the final payment order, and the beneficiary. Billions of dollars are transferred daily by this means, and, on at least one day (in 1989), three trillion dollars were so transferred. The UCC has not dealt with funds transfers between commercial entities.

As business practice has come to rely more heavily on the speed, efficiency, reliability, and comparatively low cost of electronic technology, the many questions that arise from that reliance demand answers. This bill provides them.

What happens if the first bank makes a mistake as to the amount to be paid? What happens if the second bank doesn't notify the beneficiary? What happens if the payment order is fraudulent and not actually issued by the originator? What happens if there is a bank failure? What are the remedies if someone takes a loss? Who bears the risk of loss at a given time in the transactional process? What constitutes acceptance and rejection (both rightful and wrongful) of a payment order, and what must be done to amend a payment order? These are some of the questions answered in Article 4A, and this new article does not change the rules in Articles 3 and 4 (AS 45.03 and 45.04, respectively) dealing with signatures and endorsements on pieces of paper (checks) as the basis for determining liability.

The federal government has threatened to intervene if the states do not promptly enact UCC Article 4A. As of February 1993, at least 44 states had already done so. Alaska has now joined them.

CENTER OF KETCHIKAN'S UNIVERSE

See story, page 15

More UCC Changes

Senator Kerttula also introduced SB 112, to enact the new UCC Article 2A (AS 45.12), personal property leasing; revised Articles 3 and 4 (AS 45.03 and 45.04), negotiable instruments and bank deposits and collections; and repeal of Article 6 (AS 45.06), bulk transfers. The final version of SB 112 — CSSB 112(Jud) — makes a very few minor changes, but no significant policy change, in the original. The bill, again faithfully adhering to the NCCUSL's latest wording, became ch. 35, SLA 1993. It will take effect January 1, 1994.

Development of these additional UCC changes is another significant

continued on page 18

ADA impacts courts

BY LYNDA S. BATCHELOR

In 1990, Congress passed the Americans with Disabilities Act (ADA). The public accommodations portions of this law became effective in January, 1992. There are an estimated 43 million disabled Americans covered by the ADA which Prohibits discrimination and guarantees equal access to public facilities. This population includes the hearing impaired, visually impaired, speech impaired, wheelchair users, and those with other physical and/or mental limitations.

Until the passage of the ADA, these citizens had no right of "equal access" to public facilities. Of course, new construction required curb cuts, wheelchair access to entrances and restrooms, etc., but there were no requirements that existing buildings provide access to the basic services that we all enjoy.

continued on page 19

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

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

President's Column

Gender bias

The Bar Convention in Juneau last month offered a provocative program on gender bias in the profession. But as informative and helpful as this program was, I left Juneau with the disturbing impression that we yet deny the existence of gender bias.

We were first told by Judge Coughenour, Chair of the Ninth Circuit Gender Bias Task Force, how pervasive gender bias is even today. During 1992, the Ninth Circuit Task Force conducted a survey of attorneys and judges which concluded that a subtle but pervasive bias against women persisted in the profession. Their study included a survey of Alaska practitioners.

We were then shown a video produced by the Minnesota Bar Association which demonstrated the worst, but typical types of gender bias among lawyers, all of which could exist here in only slightly different form.

But then came the panel of our own, and the denial. Gender bias, it

Philip Volland

seems, didn't or couldn't exist in Juneau or Fairbanks because "we're not like that." And in the discussions that occurred later in hallways and on sidewalks, I had the uncomfortable feeling that gender bias was regarded by some as no more than a trendy topic for discussion. It was as if we had forgotten that the Ninth Circuit's survey included Alaskan lawyers, and that it merely confirmed what earlier studies by the Bar had already told us.

I know we want to think of ourselves as different in Alaska. I don't fault those on our own panel who tried to explain why gender bias didn't seem like a real problem for Alaskan attorneys. I, too, would have declared myself gender-bias free until my partner asked for extended maternity leave and I suddenly found myself confronting my own resentment and questioning her commitment.

Even at the convention (and after the gender bias session) I heard myself unintentionally using the term "manpower" to describe a commitment of Bar Association resources. And, just last month I sat with other judges and lawyers to welcome 49 new admittees to the Bar — nearly half of whom were women — and heard them take an oath that yet uses the terms "him" and "his," as if all lawyers and all clients are men.

The truth is that our profession — even here — is riddled with gender bias. A 1989 survey of Alaskan attorneys found that women earned considerably less than their male counterparts and had a tougher time advancing in the profession. Differences in annual income between men and women in comparable positions ranged between $4,500 and $33,200 annually, with even highly experienced female partners falling considerably below their male counterparts.

Regardless of the explanations for these differences, the 1989 study concluded that female attorneys had a lower success rate in the private bar career paths most likely to lead to higher income. More recently, the Ad Hoc Working Group on Gender Bias in Alaska reported that a surprisingly large number of women attorneys have experienced demeaning comments from lawyers or judges in our own courts. And the vast majority of our colleagues who are women characterize their experience with the legal profession as that of exclusion, not of acceptance.

It's not the fault or intent of any of us that this is the case, but it is a fact. That bias exists merely reflects the fact that this profession of ours has been male dominated for centuries. We have come to measure success, and the qualities of a good lawyer, by values that are typically associated with men. Acknowledging this bias now does not mean that we assume responsibility for having created it. (I wonder if this fear of blame is not the root of our denial.)

All that recognition of gender bias means is that we will shoulder responsibility for change. And we don't need to change the world. If we begin changing how we feel and act in our own firms and in our own courtrooms, institutional change will follow.

Alaska's Ad-Hoc Working Group

continued on page 3

Law review survey results

Should the Alaska Bar continue to publish the *Alaska Law Review?*

YES: 297 NO: 91

The following are selected comments under boxes marked "NO":

"There are so many law review participants at other schools hungry for a topic — it it's note worthy they'll find it — I find the law review a major waste. Get rid of it."

"With the many publications available most legal issues are well covered, and it is difficult to find time to read available material. I haven't read the *Alaska Law Review* in years and would use only in context of researching a particular issue."

1) "Updating" the law is currently covered annually by sections; 2) significant changes in law are best presented in CLE materials; 3) any "gap" resulting from elimination of *Alaska Law Review* could be absorbed by expanding the Bar Rag.

"In twelve years of practice, I cannot thing of one useful article. I see the index, see topics not relevant to my practice and set the book on the shelf unread."

"The Alaska Supreme Court is not likely to be impressed by critique in the Law Review. The number of useful articles is very small. The cost of the budget is overblown. The Bar Association should save money."

"Your "con" argument misses the point. It's not whether the publication is good or bad, it's whether the Bar Association should subsidize it. It shouldn't. Let those practitioners who find it useful by a subscription to it."

"1) too expensive; 2) it does not provide a diversity of perspectives, particularly all articles on criminal law subjects are written from defense point of view."

Selected "YES" comments:

"The Law Review is one of the few really visible benefits received from the Bar. While the intangible benefits are many, this cost is very small and worth the money."

"The *Alaska Law Review* is not merely an academic luxury. It is an important forum for in-depth analysis of Alaska Law. Practitioners who don't read and contemplate it, should!"

"We need it more than ever. Sometimes legislative bodies (BOG) has to do things for the benefits of constituents that constituents wouldn't do for itself."

"The *Alaska Law Review* is just about the only means open to attorneys to present scholarly critiques of the Alaska Supreme Court. Without it, the legal profession in Alaska will be poorer, at least intellectually diminished."

"I read it from cover to cover and frequently refer to it in my work." (Submitted by an Alaska justice.)

"Provides one of the few methods which I can utilize to keep up to speed on acres of the law outside my specialty and uniquely Alaskan in focus."

"I strongly urge the Bar Association to continue publishing the *Alaska Law Review*. I have used articles and notes from the *Alaska Law Review* extensively in my practice and find it a useful means of insight into the developing trends in Alaska Law. The cost is well worth it."

"The Alaska Bar Association should continue to publish the *Alaska Law Review*. The *Review* consistently publishes articles and notes that are useful and relevant to all practitioners and judges. During the existence of the *Review*, in published opinions alone, the Alaska Court of Appeals and the Alaska Supreme Court have cited the Review over 100 times. To argue that the *Review* is merely and academic exercise and not useful to practitioners is to ignore its proven value as a resource for appellate practitioners and bar members." (Submitted by an Alaska Justice.)

"The Alaska Bar should continue to support the *Alaska Law Review*, otherwise there would be no effective scholarly review of legal issues that directly affect Alaska. To withdraw support is a step backward for the Alaska Bar."

"Law review provide valuable research assistance as well as an informative discussion of how Alaska law compares with other jurisdictions. Cuts should be made elsewhere first before cutting a publication which assists lawyers to be better practitioners and serve the public with more knowledge."

To receive complete copy of survey, contact the Bar Office at 272-7469.

The Alaska BAR RAG

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

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

Letters from the Bar

No fan of Ross

I cannot restrain myself from responding to the letter recently printed in the Bar Rag, from Wayne Anthony Ross to Lawyers Against Discrimination.

Mr. Ross, I never expected to agree with you about much. We come from opposite ends of the political spectrum, and our moral and social values are also clearly at odds. It takes only a casual conversation between us to discover that.

However, nothing you have previously said prepared me to have you call me a degenerate and a pervert in print. Perhaps you wrote those things supposing you were referring to people you don't know and who have no "semblance of intelligence and moral character," as you said in your letter. But that isn't who you were writing about. You were writing about me and people like me.

Whatever you may think about my religious or moral beliefs, I would have thought that the ethics of our profession would have prevented you from publicly calling me clearly libelous names, such as degenerate and pervert, based solely on your belief that I might sleep with people of whom you don't approve. Personally, I have never wondered whom you do or do not sleep with. I never thought it mattered, either as a professional or as a political matter. I WOULD disagree with your opinions regardless of whom you choose to associate with in you private life. My God is obviously not your God. I assume that you at least respect my right to choose my religion, if not my companions.

I confess that I will find it difficult to confront you in the courtroom in the future without feeling outrage at your casual and arrogant condemnation of myself, my friends, and my associates. I hope you will feel some pang of conscience at your off-handed cruelty and insensitivity, not to mention your bad manners and lack of professionalism, but I confess I am not optimistic. It is precisely because of attitudes like yours that we so desperately need antidiscrimination legislation.

Allison Mendel

An anecdote JV?

I appreciated your *Bar Rag* publishing my letter wherein I solicited from Alaskan lawyers anecdotes of humorous and unusual past events that may have occurred in your courts. The footnote you added: "(P.S. Ed. note: Copy the *Bar Rag*. We'll use what Mr. White doesn't.)" suggests a joint venture. I will reciprocate by copying the *Bar Rag* on all anecdotes I might directly receive.

An idea: You could top all anecdotes that I might collect nationwide by having one of your investigative reporters find a judge or a lawyer who might remember an occasion in past years when one of Alaska's many bears strolled in to a courtroom to interrupt a trial in progress. Did the Judge find the bear to be in contempt of Court and, if so, what did he do about it?

William F. White

Coach says thanks

The West High Mock Trial team won the Alaska State championship in March and represented Alaska at the Nationals recently concluded in Atlanta. Several local law firms contributed money to help the team travel to Atlanta. Major contributors from the local legal community included the law firm of Hughes, Thorsness, Gantz, Powell & Brundin; Mike White, a partner with Hartig, Rhodes, Norman, Mahoney & Edwards; and the Anchorage Bar Association. Additional sponsors included the law firms of Lane Powell Spears Lubersky; Bliss Riordan; Birch, Horton, Bittner & Cherot; and the Law Offices of Chancy Croft. Without the support of these law firms, the team would never have had the chance to represent Alaska and compete in the Nationals.

As the team's attorney-coach, I wanted to write and express my personal thanks to all of these organizations.

Gregory S. Fisher

Join the surfers

Could you please alert your members, perhaps through your journal, to the fact that the National Association of Surfing Attorneys (NASA) has been formed.

This organization is dedicated to legal issues surrounding the coastal zone and is open to lawyers and activists who work on development, public access, pollution and accident issues in the coastal zone environment.

Anyone who is interested in joining should contact NASA at 1642 Great Highway, San Francisco, California 94122, phone (415) 664-6272 or on the east coast Stephen M. McCabe, 114 Old Country road, P.O. Box 855, Mineola, N.Y. 11501, phone (516) 741-6266.

Stephen M. McCabe

THE BAR RAG WELCOMES LETTERS

Gender bias

continued from page 2

on Gender Bias is telling us that it is time to develop a program for change. But for some reason we're not listening. We don't need another or newer study here merely to update our own 1989 survey, or further analyze the Ninth Circuit's 1992 study, or confirm the recent observations of Alaska's Ad Hoc Working Group. We need to act. We need to listen to those colleagues who are telling us that the problem does in fact exist. We need to support the Ad Hoc Working Group's proposals and work plan. And, most importantly, we must begin shaping the change within ourselves.

The solutions are neither difficult nor impracticable. We need to clean up the tools of our trade — the statutes, rules, respect. We need to re-define values so that commitment to the practice is not measured by time given and hours billed. This profession cannot penalize our equally talented female colleagues merely because their sex makes them the bearer of children during a critical time in the development of their careers. We also need to pay heed to the perceptions of our female colleagues who see a subtle, pervasive bias, which those of us not affected by it cannot recognize.

We should welcome this change and this challenge. Time off to devote to family affairs need not be thought of as "maternity leave", but simply "leave." We should all develop an expectation of extended leave sometime in our career to refocus our priorities and rekindle our zeal. If recognitions of gender bias forces this change upon us we will all be the better for it. And too, we should begin to measure success by the *quality* of our practice, not the hours billed or the time spent. We will only improve our profession by doing so. Widespread public respect for the practice of law will not come until the bench and the bar alike mirror the number and values of women and minorities in our society at large.

Ours is a profession whose guiding principles of advocacy are rooted in "equality" and "fairness." We use those terms virtually every day. It is surely not too much to ask of ourselves that we act as we speak.

New officers elected for '94

Philip R. Volland was elected president of the Alaska Bar Association at the Bar's annual convention held June 10-12, 1993 in Juneau. Volland is in private practice in Anchorage with the law firm of Rice, Volland & Gleason and has been a member of the Alaska Bar Association since 1977.

Other officers are President-elect Daniel E. Winfree, a Fairbanks lawyer with the firm of Winfree & Hompesch; vice president John Thorsness from Anchorage, who is a partner in the firm of Hughes, Thorsness, Gantz, Powell & Brundin; Secretary Elizabeth Kerttula, an assistant attorney general in Juneau; and Treasurer Brant McGee, the Public Advocate with the Office of Public Advocacy in Anchorage.

LAWYERS

By law, Lawyers should be disqualified and/or barred from elective public office. It is ethically wrong and distasteful. This will eliminate the potential for a conflict of public interest and the inevitable massive graft and corruption scandal. In the words of Senator Barbara Boxer, "If all the senators who are lawyers abstained, and everyone married to lawyers abstained, there might not be enough votes to pass anything." There are now 40,111 lobbyists (mostly lawyers) registered to influence the vote of 100 U.S. Senators.

*Except those positions where a law degree is a prerequisite for the job.

"Beverly Hills Today," May 7, 1993. Submitted by Hugh B. White.

INVITATION FOR PUBLIC COMMENT

FEDERAL PUBLIC DEFENDER
NANCY SHAW

DISTRICT OF ALASKA

The United States Court of Appeals for the Ninth Circuit is conducting a routine evaluation of operation of the Office of the Federal Public Defender for the District of Alaska. The Court conducts this evaluation midway through the four-year term of each Federal Public Defender. Responses to this survey will be considered should Nancy Shaw, Federal Public Defender, apply for appointment to a subsequent term of office.

Any persons who have had an opportunity to observe Ms. Shaw and/or her office should feel free to communicate their views to:

Office of the Circuit Executive
121 Spear Street, Suite 204
P.O. Box 193846
San Francisco, CA 94119-3846
ATTN: Public Comment/District of Alaska

Responses will be accepted until September 1, 1993 and will be kept confidential.

LOOK AT WHAT WE'RE DOING WITH 47%.

Your participation in the Alaska Bar Foundation's IOLTA program requires so little. Just a few minutes at your bank signing some forms. Then you can forget it. Maybe forever. At least for years.

In the meantime, the nickels, dimes, and dollars generated as interest on those small or short-term trust accounts—combined with hundreds of other IOLTA contributions—will add up quickly. Last year, with only 47% of Alaska's law firms participating, $232,000 were contributed to three important projects.

With so little effort, so much good was done. Think what we could do if every law firm participated. That's something none of us would forget.

Alaska Pro Bono Program

(APBP) is jointly sponsored by the Alaska Legal Services Corporation and the Alaska Bar Association. The program involves private and public sector attorneys in the delivery of free legal services to Alaskans.

In 1992, a $165,000 grant was provided from IOLTA funds for several purposes. In addition to providing the economically disadvantaged with free legal representation, the APBP provides the following services to the community statewide: free monthly *pro se* classes which provide information and assistance concerning uncontested divorces, uncontested custody, and support orders for unmarried parents; Chapter 7 bankruptcy classes; advice-only question and answer clinics called Tuesday Night Bar; a special landlord/tenant law *pro se* and advice-only educational clinic; assistance in the area of wills, estate planning, housing, and consumer matters through the Elderlaw project for low-income clients over sixty years of age; and appointments for low-income *pro se* plaintiffs filing U.S. District Court civil cases.

For more information on the IOLTA program and how you can participate, call the Alaska Bar Foundation at 272-7469.

Participating Law Firms as of January 1, 1993

Joyce M. Abraham-Simmerman, P.C.
Law Offices of Louis E. Agi
Alaska Legal Services Corporation
Law Office of Daniel W. Allan
Helene M. Antel
Artus & Choquette
Ashburn & Mason
Ashton & Dewey
Atkinson, Conway & Gagnon, Inc.
Law Offices of C.R. Baldwin
Joyce E. Bamberger
Bankston & McCollum, P.C.
Barokas & Martin
Law Offices of Christian N. Bataille
Batchelor, Brinkman & Pearson, P.C.
Baxter, Bruce, Brand & Rodriquez
Birch, Horton, Bittner & Cherot
Bledsoe & Knutson, P.C.
Law Offices of William Bixby
Law Office of Arona S. Blachman
Bliss Riordan
Bogle & Gates
Law Offices of William J. Bonner
Boyko & Flansburg
Gregg B. Brelsford
Law Office of Carol A. Brenckle
Law Office of Teresa Foster Brimner
Law Offices of Robert C. Brink
Frederic E. Brown, Atty. at Law
Law Office of Patrick T. Brown
Law Office of Roger Brunner
Burr, Pease & Kurtz, P.C.
Law Offices of Rex Lamont Butler
Call, Barrett & Burbank
William B. Carey
Law Offices of Linda M. Cerro
Swan T. Ching
Law Offices of Mark Clayton Choate
Nils Christiansen, Atty.
Matthew W. Claman
Clark, Walther & Flanigan
Law Offices of Charles W. Coe
Law Office of Dan K. Coffey
Bonnie J. Coghlan
Law Offices of Kathryn Coleman
Brennan & Cooke, P.C.
Craig A. Cook
Law Office of Gregory F. Cook
Copeland, Landye, Bennett & Wolf
Coryell & Associates
Kenneth L. Covell
Law Office of Charles C. Coy
Law Offices of Glenn E. Cravez
Law Office of Dennis P. Cummings
Law Offices of Ronald E. Cummings, P.C.
Law Offices of Ralph B. Cushman, P.C.
Davis & Goerig, P.C.
Davis Wright Tremaine
Delaney, Wiles, Hayes, Reitman & Brubaker, P.C.
Law Offices of Dan E. Dennis
Dillon & Findley, P.C.
Law Office of Vincent DiNapoli
Loren Domke, P.C.
Law Offices of Robert B. Downes, P.C.
Law Office of Richard D. Ellmers
Ely & Havelock
Law Offices of Deitra L. Ennis
Virginia M. Espenshade
Farleigh & Shamburek
Faulkner, Banfield, Doogan & Holmes, P.C.
Thomas E. Fenton
Findley & Pallenberg
Law Office of James E. Fisher
Franklin D. Fleeks
Foley, Foley & Kelley
Law Office of Maryann E. Foley
Alexis G. Foote
Law Office of William T. Ford
Law Office of Carl C. Frasure, II, Esq.
Friedman & Bros.
Law Office of Stephen Frost
Gaitan & Cusak
Peter A. Galbraith
Walter H. Garretson, P.C.
Law Offices of David E. George
Giannini & Associates, P.C.
Gilmore & Doherty
Gissberg Law Office
Law Offices of James B. Gottstein
David E. Grashin & Associates
Gray, Gevedon, Cole & Razo, P.C.
Brian Mark Gray, P.C.
Law Office of Stephen Greer
Law Office of Marc Grober
Groh, Eggers & Price
Gruenberg & Clover
Patrick J. Gullufsen
Law Office of Donna Habermann
Stan Hafferman
Hagans, Brown, Gibbs & Moran
Law Office of J. Glen Harper
Law Offices of Richard L. Harren
Law Office of Kathleen Harrington
Hedland, Fleischer, Friedman,
Richard C. Helgeson
Heller Ehrman White & McAuliffe
Law Offices of Andrew Hemenway
Hintze, Herrig, & Wright
Law Offices of John L. Hoffer, Jr.
Hofstad & Lewis
Hoge & Lekisch
Law Offices of Lee Holen
Holman Law Office
Law Offices of Alan J. Hooper
Houston & Henderson
Hughes Thorsness Gantz Powell & Brundin
Kenneth P. Jacobus, P.C.
Jamin, Ebell, Bolger & Gentry
Thom F. Janidlo
Jermain, Dunnagan & Owens, P.C.
Michael Jungreis
Kalamarides & Associates
William W. Kantola
Joseph L. Kashi
Kemppel, Huffman and Ginder, P.C.
Law Office of Elizabeth Page Kennedy
Law Office of Amrit Kaur Khalsa
G. Rodney Kleedehn
Law Offices of David E. Kohfield
Koval & Featherly, P.C.
Law Office of Robert W. Landau
Lane Powell Spears & Lubersky
Larson, Timbers & Van Winkle, Inc.
LeDoux & LeDoux
Karl Fulton Lehr
Law Office of Erik LeRoy
Law Office of Kenneth Leyba
Libbey & Suddock
Law Offices of Charlene Lichtmann
Law Firm of Donald F. Logan
Law Offices of Dick L. Madson
James S. Magoffin, Jr., Atty. at Law
David D. Mallet
Maloney & Haggart
Martin, Bischoff, Templeton, Langslet & Hoffman
J. Jeffrey Mayhook, P.C.
Stephen A. McAlpine
Law Office of James W. McGowan
Law Offices of Patrick J. McKay
Stephen McKee
McNall & Associates, P.C.
Mendel & Huntington
Law Offices of Dennis M. Mestas, P.C.
Miller, Joyner & Associates
Law Office of John M. Murtagh
Phil N. Nash, Atty. at Law
Thomas G. Nave
Law Office of Richard P. Newman
Niewohner & Wright, P.C.
Law Office of Robert S. Noreen
Olmstead & Conheady
Law Office of Paul E. Olson
Jan S. Ostrovsky
Owens & Turner
Shelley K. Owens
Law Office of William C. Pace
Parrish Law Office, A.P.C.
Law Office of Michael J. Patterson
Pearson & Hanson
Perkins Coie
Law Offices of A. Lee Petersen, P.C.
Law Office of F.P. Pettyjohn
Law Offices of Janet D. Platt
Stanley B. Pleninger
Preston Thorgrimson Shidler Gates & Ellis
Chris Provost
Law Office of Colleen A. Ray
Rice, Volland & Gleason, P.C.
Julian C. Rice
Robertson, Monagle, & Eastaugh, P.C.
Rose & Figura
Law Office of Patrick G. Ross
Royce & Brain
Ruddy, Bradley & Kolkhorst
Law Offices of Daniel T. Saluri
Law Office of Patti J. Saunders
Law Offices of Sandra K. Saville
Law Offices of Gordon F. Schadt
Schendel & Callahan
Law Office of Ernest M. Schlereth
Schleuss & McComas
Law Office of Carol Jane Seidlitz
Richard W. Shaffer
Law Office of R. Brock Shamberg
Smith, Coe & Patterson
Michael R. Smith
Sonosky, Chambers, Sachse, Miller & Munson
Staley, DeLisio, Cook & Sherry, Inc.
James T. Stanley Corp., P.C.
Paul D. Stockler
Law Offices of Dana Robert Stoker
Law Office of Robert E. Stoller
Stump & Stump
Law Office of R.N. Sutliff
Taylor & Hanlon, P.C.
Law Office of Robin A. Taylor
Law Office of Janet K. Tempel
Valerie M. Therrien, Atty. at Law
Linda S. Thomas
Colette G. Thompson
Law Office of G. Nanette Thompson
Law Offices of Tucker S. Thompson
Michael A. Thomson, Atty. at Law
Richard S. Thwaites, Jr.
Torrisi & Snyder
Fred W. Triem, Atty. at Law
Warren A. Tucker
Charles E. Tulin & Associates
Law Office of Vincent L. Usera
Law Office of Cesar O. Velasquez
Law Offices of Vincent Vitale, P.C.
Law Office of Frank J. Vondersaar
Wade & DeYoung
Wadsworth & Associates
Wagstaff, Pope & Clocksin
Law Offices of Walker Oldham
Law Offices of David T. Walker
Law Office of Karl L. Walter, Jr.
Daniel C. Wayne
Law Office of W. David Weed
Kevin A. Wehrung
Daniel W. Westerburg
Kirk Wickersham
Law Office of Thomas R. Wickwire
Law Offices of Donna C. Willard
Law Offices of Richard J. Willoughby
Law Offices of Charles Winegarden
Winfree & Hompesch, P.C.
Law Offices of Tonja Woelber
Wohlforth, Argetsinger, Johnson & Brecht, P.C.
Brett M. Wood
Law Offices of Thomas J. Yerbich
Law Offices of Steve K. Yoshida, P.C.
Clarke Logan Young Law Office
Michael J. Zelensky
Ziegler, Cloudy, King & Peterson
Elizabeth A. Ziegler

Catholic Social Services

Many immigrants to Alaska, in addition to the other problems they face in attempting to enter the United States, speak little or no English. They require special assistance with the often confusing immigration laws. Catholic Social Services (CSS), through its Immigration/Refugee Program, provides the only legalization assistance available in Anchorage to aid immigrants with the immigration laws.

$27,090 in IOLTA funds were contributed to CSS. In addition to maintaining the previously existing legalization services, requests for which increased 23.6%, funding was used for a part-time Legal Affairs Coordinator to deal with other numerous requests.

Anchorage Youth Court

(AYC) is a nonprofit organization which supports an alternative preadjudicatory system for Anchorage youth. Through this program, juveniles accused of breaking the law are allowed to submit their case to the AYC and to be represented and judged by their peers. Those convicted within this system are required to perform community service instead of receiving a criminal record. This allows the youth to atone for the wrongdoing without damaging his/her future and lessens the traffic of juvenile cases in our courts.

This program also benefits the students in junior and senior high schools who are trained in many facets of the legal system and receive hands-on trial experience as attorneys, judges, bailiffs, clerks, and jurors.

In 1992, $40,000 in IOLTA funds were donated to AYC to maintain its operation and expand its services to more students.

Alaska Bar Foundation

THINK WHAT WE COULD DO WITH 100%.

Juris Prudence

About the family leave act

In August, the provisions of the Family and Medical Leave Act of 1993 take effect. This new federal law applies to all businesses, as well as nonprofit and governmental organizations, that have 50 or more employees within a 75 mile radius.

There has been considerable discussion about the impact of the law, although the 50 employee threshold reportedly exempts about 95 percent of all U.S. businesses from coverage. By some accounts, up to 70 percent of the nation's civilian workforce will be affected, however.

Since September, 1992, Alaska (like many states) has had its own version of a family leave act in effect. However, Alaska law only applies to employees of state and local government, including the University of Alaska and the Alaska Railroad. Consequently, private sector businesses in Alaska should familiarize themselves with the new federal legislation, and the related regulations scheduled for adoption in June by the U.S. Department of Labor. The federal law provides for damage awards, interest and attorney fees if you fail to comply.

The federal law guarantees employees (male and female) of subject businesses up to 12 weeks of annual, unpaid leave for births/adoptions or the care of children, spouses or parents with seri-

Daniel Patrick O'Tierney

ous health conditions. The threshold for employer coverage is crossed if a business employs at least 50 workers each day during a 20 week period within the current or preceding calendar year.

Nevertheless, not every employee of that business is necessarily eligible to benefit. The employer can exempt employees who have not worked at least one year AND who have not performed at least 1250 hours of service (or 25 hours/week) during the year preceding the desired employee leave.

Eligible employees, however, must be granted a total of 12 work weeks of unpaid leave during any 12 month period after childbirth/adoption or to care for the "serious" health condition of the employee or the employee's child, spouse or parents. Couples employed by the same employer are restricted to 12 weeks total (as opposed to 24 weeks) leave.

Parental leave is limited to the year following a child's birth or placement. Further, 30 day notice of the leave is generally required for foreseeable instances of leave. For the purposes of medical leave, a "serious" health condition is defined as physical or mental illness/injury which either requires treatment in a facility, or continuing treatment by a health care provider. Federal regulations are expected to further clarify the criteria in this area. The employer can also require certification of the medical condition and a second medical opinion.

The law also provides additional employment and benefits protection for employees who avail themselves of parental or medical leave. For example, employers must guarantee that their employees can return to the same job or an equivalent one. However, "key" salaried employees who are among the highest paid 10 percent of the employer's workforce need not be restored to their former position (or an equivalent) if it would cause serious economic harm to their employer's operation.

Further, the employer must maintain existent health care coverage during an employee's leave. If the employee does not return to work from leave, the employer may recover the premium paid in most circumstances. Also, the employer may require that accrued personal, vacation or sick leave be applied to the extent available for any part of the employee's period of leave.

There has been considerable concern in some quarters about the impact of the leave requirements of the new law, primarily in higher health insurance costs. As is the case under the Americans with Disabilities Act passed by Congress last year, smaller businesses are exempt from federal leave coverage as a result of the 50 employee threshold. Nevertheless, some have speculated that companies might attempt to stay below that number by using temporary or contract workers, for example, or spinning off parts of their company.

As a practical matter, the vast majority of the workforce cannot afford to go without income for up to 12 weeks while on unpaid leave. To that extent, it is less likely that the new law's impact on any given business enterprise will be necessarily onerous. Many companies with 50 or more employees voluntarily provide some type of unpaid family or medical leave to their employees already.

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

Board further defines representation

ALASKA BAR ASSOCIATION
ETHICS OPINION NO. 93-1
Preparation of a Client's Legal Pleadings in a Civil Action Without Filing An Entry of Appearance

The Ethics Committee has been asked whether the preparation of legal pleadings in civil litigation for pro se litigants constitutes the unethical practice of law. In the committee's opinion, a lawyer may ethically limit the scope of his representation of a client, but the lawyer should notify the client clearly of the limitation of representation and the potential risks the client is taking by not having full representation. When an attorney limits the scope of his representation, an attorney-client relationship is still created between the attorney and the client, with all the attendant duties and responsibilities called out in the Professional Canons.

The attorney requesting the ethics opinion states that he is helping many pro se litigants prepare their own child support modification motions.[1] Many of these litigants, he states, are unable to obtain legal counsel due to their poor financial condition. Assistance with their self-help efforts presents one of their few options for access to the courts. EC 2-33 stresses the legal profession's commitment to making high quality legal services available to all. Attorneys are encouraged to cooperate with qualified legal assistance organizations to provide pro bono legal services on behalf of the poor. Canon 6 of the Code of Professional Responsibility further provides that a lawyer should represent a client competently and zealously. When an attorney undertakes the representation of any client, that client should receive a high quality of legal service. The Committee is essentially asked to address the interplay between these ethical and professional considerations when a lawyer provides legal services to a pro se litigant without entering an appearance in the litigation in question. The Committee concludes that such assistance is not unethical when conducted under the guidelines set forth below.

According to the facts before the committee, the attorney assists in the preparation of pleadings only after fully describing this limited scope of his assistance to the client. With this understanding, the client then proceeds without legal representation into the courtroom for the hearing. The client may then be confronted by more complex matters, such as evidentiary arguments concerning the validity of the child support modification, or new issues such as child custody or visitation to which he may be ill-prepared to respond. The client essentially elects to purchase only limited services from the attorney, and to pay less in fees. In exchange, he assum es the inevitable risks entailed in not being fully represented in court. In the Committee's view, it is not inappropriate to permit such limitations on the scope of an attorney's assistance.

A non-profit legal assistance organization may limit the scope of representation to its clients. For example, non-profit legal assistance organizations that provide free legal services to low income clients may offer, in lieu of representation in court, a class on pro se divorce to individuals seeking simple uncontested divorces and may also offer such classes to individuals with more complicated divorce matters provided that all clients are fully advised of risks involved in pro se representation. ABA Opinion 90-18 (July 31, 1990).

Also, the Virginia Bar Association has recognized that a lawyer may assist pro se litigants in the preparation of discovery requests, pleadings or briefs without entering an appearance.[2] Opinion 1129 (Virginia 1988). Such assistance creates an attorney-client relationship, however, and the attorney must therefore comply with the Code of Professional Responsibility. The attorney is responsible to the client for the attorney's conduct during the course of the professional relationship, however limited. Within the agreed scope of the representation, the attorney must provide the client with all counseling necessary to make informed decisions.

Amended by the Alaska Bar Association Ethics Committee on March 4, 1993.

Adopted by the Board of Governors on March 19, 1993.

[1] The Committee is aware that attorneys may get involved in preparing pleadings and filings for clients outside the area of domestic relations, and for purposes which are not as worthy. Behind the veil on anonymity, an attorney can assist in "ghostwriting" matters for the client without the apparent threat of sanction. However, if an attorney "ghostwrites" something for a client which the attorney could not ethically sign, either because of constraints of the civil rules or the Professional Canons, he or she has engaged in unethical behavior. DR 1-102(A)(2) prohibits an attorney from circumventing a disciplinary rule "through actions of another." Subsection (A)(4) prohibits an attorney from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation." *See also* 7-102(A)(1)-(7). If an attorney prepares or assists in the preparation of a pleading to be signed by a pro se litigant, they are under the same ethical constraints as if they were to sign the pleading with their own name.

[2] Some jurisdictions require an attorney who prepares pleadings or documents for a pro se litigant to disclose his or her assistance to opposing counsel and the court on the face of the document. *See* N.Y. Bar Assoc. Opinion 1987-2 (1987). The requirement is premised on the belief that non-disclosure of such assistance would be misleading because pro se litigants may, and often times do, receive preferential treatment from the court. Upon reflection, the Committee is not certain that this belief is well-founded. The committee believes that judges are usually able to discern when a pro se litigant has received the assistance of counsel in preparing or drafting pleadings. In that event, the Committee believes that any preferential treatment otherwise afforded the litigant will likely be tempered, if not overlooked.

Seasoned counselor invokes driveway defense

BY WILLIAM SATTERBERG

The date was February 16, 1993. The place, ubiquitous Tok, Alaska. I had returned, long after the trials and tribulations of the spring of 1978, but still remembering the Great Washing Machine Case.

I was older, and had long since left state employment for the allegedly greener pastures of private practice. (Why people were continually leaving the private sector for the greener pastures of state employment was a question which still faced me.)

My client was a well respected Tok citizen. The allegations against him, heinous as they were, were related to drunk driving. Despite my best efforts to convince the State that the most it could get in the way of a conviction might be basic speed, the State still insisted on its rights to trial. Following numerous delays, the trial was finally going to happen.

The drive from Fairbanks to Tok was uneventful, except for my concern that there might not be enough jurors for the trial. In the past case, despite valiant attempts on the part of the Tok magistrate to call in jurors from the surrounding vicinity, few, if any, had materialized. In a previous case, approximately 50 jurors were summoned, with only eight appearing.

During earlier attempts to schedule the trial of my particular case, when the temperatures were prohibitive, jurors had been continually calling in with excuses ranging from sickness, poor health of the automobile, simply not *wanting to serve on jury duty*, to not calling in at all.

As such, in an abundance of caution, the magistrate summoned both the red and the blue panels, for a total of 150 jurors.

When I arrived in Tok, the small parking lot of the courthouse was empty, with the exception of the magistrate's car. I next drove to my client's house. I changed clothes and prepared for trial. Jury selection was still one-half hour away, but it was beginning to look like the prospects of having enough jurors to select from were dim.

I was mistaken.

When it came time to go to the courthouse, I planned to drive over and park in the parking lot. That thought was immediately dashed, however, when I pulled out onto the highway and saw a line of cars stretching one-quarter mile long, with the entrance to the courthouse and the court parking lot virtually clogged with various pickup trucks and an assortment of snow machines. The place looked like a sale day at Nordstrom.

As I entered the building, I had to push past various prospective jurors who jammed the hallways and lining up as best as possible, while the patient Tok magistrate studiously logged their attendance into the records.

Apparently, both the red and the blue panels had decided collectively to show up for the trial of this rather celebrated case. There were over 100 jurors, at best count, on standby either in the parking lot, the hallways, or in the line that stretched out towards the street, not to mention interested bystanders and moral supporters. It became clear that finding a jury panel was not going to be a problem. Selecting the six jurors would obviously be a much greater task.

The court and counsel conferred for several minutes, suitably impressed by the dedication to public duty of the citizenry of Tok. There had to be a method, however, to wade through this morass of humanity to arrive at the six to serve on a DWI case.

Various alternatives and suggestions were discussed, all of which were rejected for various constitutional or practical grounds. Finally, it was decided to rely on the most competent method available -- the court clerk, Denise.

Denise -- who is reputed to be able to leap tall mountains and buildings at a single bound, and counts as her movie heros Dracula, King Kong, and the Beast of Beauty and the Beast (before transformation) -- was summoned to the task.

"Denise," Judge Pengilly stated, "find us a jury panel. I don't care how you do it, but find us a jury."

Without batting an eyelash, Denise responded. "No problem."

As Denise went about her task, the court and counsel remained locked in chambers, fearful of the wrath which would follow when the prospects were informed that not all of them could sit on the jury panel.

For the next half hour Denise expertly, and without ever disclosing her tactics, arrived at a limited panel of thirty prospects. Throughout the ordeal, at various times, loud cheers, whoops, and cat calls could be heard from the hallway. We were later informed that the cheers were for the jurors who actually got to serve on the jury, as opposed to those who had to go home. This was the first time that making the first cut to be on a jury panel could be considered an honor. But then again, this was Tok, Alaska.

After the initial panel was seated, jury selection, a la Pengilly, began. Many of the jurors were excused for cause. Some were peremptorily challenged. One juror simply excused herself and did not return after the break, without being missed. Everyone, amazed that a panel so quickly had been selected, retired to contemplate the next day's events.

On day two, it was obvious that serious trial tactics would be necessary to win this case.

After much contemplation, I seized upon a new defense which will undoubtedly go down in legal history as the "Tok driveway defense."

Recognizing that my client had been stopped literally at the edge of his driveway, it made clear sense to all in Tok that the stop simply should not have occurred at all. Of course, there were other factors to consider as well, such as an allegedly obsolete book of Alaska State Troopers standard operating procedures which said that a susp ect should be Mirandized before taking the intoximeter. (The book also said that tape recordings still should surreptitiously be disclosed to the defendant because "it will impress both the judge and the jury.")

True to form, the State presented its regular two types of witnesses: the arresting officer and an intoximeter expert, (who was never actually qualified as an expert. Still, he was able to point to a picture of an intoximeter and accurately identify it as an Intoximeter 3000.)

My client's wife next testified, followed by the client. The total defense case took less than 43 minutes, and the entire trial took slightly less than five hours. The jury retired at 3:00 p.m. All sides anticipated a rapid verdict, although there were questions about whether or not the Tok automatic acquittal would result.

At 6:00 p.m., there was a knock on the door, and the first note was handed out.

"We're ready for dinner," it read.

An order was sent to the local eatery, "Fast Eddy's." After a long delay, the food returned. (Fast Eddy's was a local Tok oxymoron. Apparently, the speed associated with Fast Eddy's has no relationship whatsoever to the way that the food is produced, but refers, instead, with a concept of digestive elimination.)

Deliberations continued. At approximately 8:00 p.m., both sewer lines to the courthouse froze up. The jury was instructed that it was upon "tinkle only" status. That, coupled with the locally renowned effect of Fast Eddy's, we all figured, would soon force the jury to a verdict. Although the Supreme Court has ruled that giving instructions to the jury along the lines of what is known as a "Allen charge" may be unconstitutional, to date there has been no opinion rendered with respect to whether or not clogged plumbing, coupled with a dinner from Fast Eddy's, would be coercive. The jury was at an impasse, and drastic steps were necessary to overcome the blockage.

At 9:30 p.m., the jury returned to the courtroom, and announced, "We're hung." Not wanting to inquire into that particular issue, the court asked whether or not the jury would be able to reach a verdict. The members asked if they could retire to the jury room and try again. Much to everyone's dismay, the court granted the request. The jury once again retired for another half hour, but the attempt was in vain. This should have been evident to all concerned earlier in the evening, when the jury had asked the bailiff to go out and buy a bottle of Tylenol.

At 10:00 p.m. an extremely haggard jury returned to announce that it was hopelessly deadlocked. Naturally, I was proud at the moment, since I obviously felt that one juror must have been holding out for acquittal.

I was mistaken. The sole holdout wanted to lynch my client.

The next day, I began to postmortem the case.

Both sides had clearly presented their evidence. With the exception of that one period of time, when the D.A. called to the court's attention that there was snoring coming from within the jury box, it appeared that the jury was paying attention.

I next considered final argument. Perhaps the D.A.'s statement regarding the "two beer defense" in Fairbanks being the equivalent of the "five beer defense" in Tok, might have had something to do with it. But nobody had seemed particularly flustered at that insinuation regarding the local capacity to drink, and I dismissed the accusation as being proudly accepted as fact, not braggadocio.

I then remembered my theory of the case. Of course! It was the inevitable Tok driveway defense! A new rule of law had been established in Tok, which would go into the Alaska State Troopers standard operating procedures, right along with the Tok Miranda warnings:

Don't stop anyone within 20 feet of their driveway.

SOLICITATION OF VOLUNTEER ATTORNEYS

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

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

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

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

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

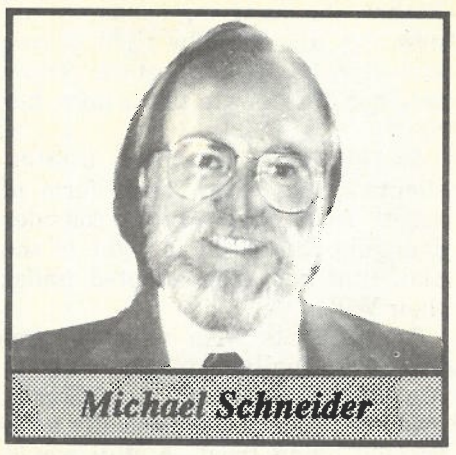
Fourth District:
Ron Woods
604 Barnette St. Rm 202
Fairbanks, AK 99701
(907) 452-9201

Torts

Open season on insurance consumers

Friday, July 9, 1993, was one of those "good news/bad news" days. My clients, Mr. and Mrs. Hillman, who had been toiling before the superior court and the supreme court since 1985 in their litigation against Nationwide Insurance Company, received their second (and probably last) decision from our supreme court. The Hillmans had their bad faith case dismissed at the trial court level in early 1991. An adverse Rule 82 award of approximately $155,000 had been entered against them. Thankfully, the supreme court reversed the Rule 82 award and determined that the Hillmans, because they had prevailed in establishing coverage and again prevailed in obtaining the full policy limits available under their uninsured motorist policy, were the prevailing parties in the litigation and in the appeal. See *Hillman v. Nationwide Mutual Fire Ins. Co.*, Opinion No. 3971, July 9, 1993, at pp. 17-18. This was wonderful news for the Hillmans. That's where the good news for the Hillmans, and the rest of the insurance consumers in Alaska, ended.

The record before the appellate court, interpreted in the light most favorable to the nonmoving party (the Hillmans), showed that Nationwide denied coverage before making any investigation of the facts or law; that Nationwide made subsequent formal denials of coverage without having conducted significant investigation; and that Nationwide violated its own guidelines and policies in handling this claim, which were specifically intended to guarantee fair, honest, and reasonable claims handling (a contention admitted by Nationwide's district claims manager and its regional claims attorney). Among Nationwide's standard-operating-procedure violations were the local adjuster's failure to consult with higher echelons within the company before denying a death claim; failing to resolve all reasonable doubts about coverage in favor of the policyholder; withholding from the file any explanation for why the policyholder was required to sign a nonwaiver agreement; obtaining a legal opinion just to "paper the file" and for the main purpose of denying the claim; failing to provide a policyholder with a previously promised letter from Nationwide's local attorney regarding coverage (which letter was supportive of the Hillmans' position); lying to the policyholder about whether the letter was available; and "stonewalling" the claim for four years because of subjective vindictiveness toward the Hillmans' chosen attorneys. Additionally, there was evidence that the regional claims attorney unilaterally decided not to offer the Hillmans the $50,000 policy limit despite early authority to concede both coverage and full liability under the policy. *Id.* at 9-10. The court concluded that "none of these facts suffice to raise a factual question as to whether Nationwide's denial of coverage lacked a reasonable basis" because that denial was based on an explicit exclusion in the policy. *Id.* at 10-11. The court went on to conclude that Nationwide's demand



Michael Schneider

for arbitration and its election to go through the arbitration process without making *any* offer was not actionable as a matter of law, even though the Hillmans recovered an amount in excess of the policy limits and did so after the award was reduced for substantial comparative fault allocation. *Id.* at 12-13. The Hillmans always viewed this as suggesting unreasonable claims handling, as almost *any* allocation of fault to the uninsured driver would have resulted in the payment of the policy limits.

Having litigated this case for the better part of a decade, I pretend no objectivity in the matter, so I will instead quote the observations of the dissent written by Justice Compton and joined in by Justice Burke:

> "While declining to comprehensively define the elements of the tort of bad faith, the court has actually eliminated the implied covenant of good faith and fair dealing in insurance contracts. The court concludes that summary judgment is appropriate if the insurer has a reasonable (colorable) contractual basis for denying liability. In other words, the insurer may enforce a contractual basis for denying liability *regardless of any subjective bad faith.*"

(Emphasis added). *Id.* at 19.

• • •

> ... this court now concludes that as long as there exists a reasonable contractual basis for a denial of liability, a bad faith claim sounding in tort will fail, regardless of any evidence of subjective bad faith. The court interprets our adoption of *Gruanberg* as "seem[ing]" to require proof of both objectively unfair conduct *and* subjective bad faith.

• • •

Id. at 22.

> "Instead of providing more protection for an insured by adopting the proposition that a bad faith claim may sound in tort, in fact we are providing less protection. In the context of first party insurance claims, the court has actually limited the covenant of good faith and fair dealing by imposing a twofold requirement which it has not required in any other contract. The covenant of good faith and fair dealing is meaningless if existence of a reasonable contractual basis for denial of liability is alone sufficient to defeat a bad faith claim."

Id. at 23, n. omitted.

• • •

> "The court is correct in rejecting the Hillmans' assertion that reasonableness is always a question of fact for the jury. But the proper question is whether a reasonable jury could conclude that Nationwide acted unreasonably, *i.e. either* objectively unfairly or with subjective bad faith."

Justice Matthews' philosophy may well have been foretold in *State Farm Mutual Auto. Ins. Co. v. Linda Weiford,* 831 P.2d 1264, 1268 (Alaska 1992), where the court, with the exception of Justice Burke, concluded that bad faith claims would not lie against State Farm, while at the same time observing:

> "Given Broatch's testimony, the $5,000 offer might support a fact finder's conclusion that State Farm was guilty of bad faith."

Usually, when substantial evidence in the record supports a jury's conclusions about the nature and quality of a litigant's conduct, the jury's conclusions are left undisturbed. It is generally the jury's province to find facts and to make decisions about motive, intent, and reasonableness. Far from supporting the philosophy that seemed to underlie the court's adoption of the tort of first-party bad faith in *State Farm Fire & Casualty Co. v. Nicholson*, 777 p.2d 1152 (Alaska 1989), the court's decisions in *Weiford and Hillman II* seem to not only gut that protection, but insulate the insurance industry by taking from juries their traditional role of evaluating conduct and determining intent, and by providing the defense in these cases an opportunity to develop a defense, *as a matter of law*, in almost any case by defining or conjuring up some "reasonable basis" for whatever action was taken.

Conclusion.

If you are involved, or are considering becoming involved, in insurance bad faith litigation, you will wish to carefully review *Hillman II*. As the court frankly states at page 6 of the opinion:

> "We had no occasion to comprehensively define the elements of the tort of bad faith in a first-party insurance context in *Nicholson*; we have not done so in subsequent cases, *see e.g., State Farm Mutual Auto. Inc. Co. v. Weiford*, 831 P.2d 1264 (Alaska 1992); nor do we do so now."

The *Hillman II* decision has not only left us without a comprehensive definition of the tort of bad faith or it damage elements, it has stripped insurance consumers of the modicum of protection that *Nicholson* was allegedly intended to provide, while dramatically limiting the province of the jury to evaluate concepts of motive, intent, and reasonableness in the context of insurance bad faith litigation.

Bankruptcy Briefs

Estate planning is more than a will

Some people are under the impression that a Will is all they need in order to plan their estates.

There is no question that a Will is a significant part of any estate plan. It nominates the guardian of minor children, often its most important task, and also the decedent's personal representative, who may be required to make important tax elections and allocations.

In many instances, however, a Will does not dispose of assets. For example, consider the client who prepares a Will, intending all assets to go to X, but who fails to verify that his last beneficiary designation filed with his life insurance company is consistent with his Will. Suppose the client's last designation names Y as the beneficiary of the life insurance. Under such circumstances, upon the client's death, the life insurance proceeds will go to Y and not to X, regardless of what the Will says.

So in planning their estates, clients must review all beneficiary designations, including under all insurance policies, pension and profit sharing plans, annuities, IRAs, Keoghs, pay-on-death accounts and the like. Review must be made of not only the primary beneficiary, but also of the person or persons who would take if the

Steven T. O'Hara

primary beneficiary dies before the client.

A will may also be ineffective because of how the client's assets are owned. Consider a married couple with assets in excess of $600,000. They sign Wills that use the so-called A/B plan, which under current law is intended to eliminate all estate taxes on aggregate assets of up to $1,200,000. After signing the wills, the couple fails to separate their assets and continues to own them in a form of co-ownership with right of survivorship.

In general, upon the death of the first spouse to die, the tax benefits of the A/B plan would be lost because no assets would be disposed of under the decedent's Will. Rather, the surviving spouse would now own all assets by right of survivorship, and her estate would face needless estate taxes upon her death.

So in planning their estates, clients must review their form of asset ownership and consider changing that form in light of the plan that has been adopted under their Wills.

Often clients wish to avoid probate, especially probate outside Alaska. In this case, the client's primary document is typically a revocable living trust. A Will would still need to be prepared in conjunction with the revocable living trust, but the Will would merely pour over into the trust (A.S. 13.11.200). The client's beneficiary designations and form of asset ownership may also need to be changed in light of the client's revocable living trust.

Irrevocable living trusts may also be advisable, such as a trust that would own insurance on one or more lives or a trust that would pay income to the client for a term of years. With or without one or more irrevocable trusts, the client may also wish to undertake an annual gifting program, with the goal of minimizing estate taxes.

Of course, the client's Will is ineffective during his lifetime. So besides living trusts, the client should consider a durable power of attorney (A.S. 13.26.332), which would be especially helpful in the event of the client's disability, and a Living Will (A.S. 18.12.010).

Also helpful is an inventory and location list, which the client keeps with the originals of his Will and other estate planning documents. The inventory lists all the client's assets, along with approximate values, and the location list identifies the location of all important documents (such as insurance policies) and contact persons.

Often clients will share their inventory and location list with the persons named in their Wills or living trusts, but in any event they should be informed of where they may obtain a copy of the inventory and location list in the event of the client's death or disability.

Even after the client has performed all the recommended work to plan his estate, a change of fact or law may occur, requiring the client to revisit the whole process. This is what gives estate planning a bad name, since the client often feels that it is never done. (This writer frankly tells clients that estate planning is like, and about as much fun as, a diet in the sense that estate planning is an ongoing process needing regular attention.)

Thus, although the Will is an important part of estate planning, the plan is typically not complete when the Will is done.

Poem

Ode To The New Lawyers

In these hollowed halls of justice
We convene to celebrate
Your crossing of the bar,
Your ascension to this high estate.

There are those of us who wonder,
Would I do it again if I could?
Would I take up with that jealous mistress,
Work words for my livelihood?

Or would I become a professor
And live in an ivory tower,
Write scholarly books by the dozens,
and not know the meaning of "dower"?

Would I still feel the lure of the law books
If they lurked in a Lexis computer?
Would my heroes still be Harry Davis
And Madson and Milton M. Souter?

O, the law hasn't changed all that much.
You still need a brain to be good.
You cannot succeed as a lawyer
If you act like Robin Hood.

So, welcome to the legal profession.
It's all that it's cracked up to be —
So long as your sense of humor
Is not an absentee.

Jacquelyn, John and Kathryn,
Jeffrey, Deborah and Ted,
We're glad you decided to join us.
May you never be underfed.

Submitted by Chris Zimmerman. Poem by David H. Call, for swearing in of new admittees in Fairbanks, June 22, 1993

More attorneys disciplined for tape recording conversations; other attorneys sanctioned

Summaries of discipline imposed

Attorney X and Attorney Y represented plaintiff in a personal injury matter. Prior to filing suit, the attorneys retained a private investigator to investigate plaintiff's claims and gather evidence on plaintiff's behalf. During the course of the investigation, the private investigator proposed that he surreptitiously tape recorded certain conversations between himself and defendant's employees. Attorneys X and Y agreed and instructed him to do so. Bar counsel concluded that the attorneys' conduct violated Ethics Opinion 78-1, which prohibits taping by an attorney without the prior consent of all parties to a conversation. Bar counsel concluded that Ethics Opinion 78-1, read in conjunction with Disciplinary Rule 1-102(A)(2) (an attorney shall not "circumvent a Disciplinary Rule through the actions of another"), prohibits a lawyer, not only from personally surreptitiously taping a conversation, but also from directing his or her agents or employees to do so.

In aggravation, both Attorney X and Attorney Y had substantial experience in the practice of law. In mitigation, the attorneys' conduct resulted from ignorance of the ethical prohibition rather than willful disregard of it, the attorneys had no prior discipline record, their conduct was not motivated by selfishness or dishonesty, they admitted their misconduct and were cooperative with the Bar throughout the investigation. Attorneys X and Y received and accepted a written private admonition.

●

Attorney X and Attorney A were co-counsel for Client, with fees paid to Attorney A for distribution to Attorney X of her share. The attorneys became involved in a dispute concerning the amount of distribution. During this dispute, Attorney X tape recorded telephone conversations with Attorney A and with Client without their knowledge or consent. Bar Counsel found a violation of Alaska Ethics Opinion 78-1, which prohibits surreptitious recording of any conversation by an attorney, DR 1-102(A)(4), which prohibits deceptive conduct. After receiving approval from an Area Discipline Division Member, Counsel issued a written private admonition to Attorney X. Other charges brought against Attorney X by Attorney A arising from the fee dispute (e.g., misrepresentation, extortion, prejudicial withdrawal) were dismissed.

●

Attorney X received a written private admonition for surreptitiously taping a telephone conversation with a client after the client had leveled what were later demonstrated to be unfounded charges against the attorney with the court and the bar. Bar counsel found no basis under Ethics Opinion 78-1 for recognizing, in essence, a "self-defense" exception as advocated by Attorney X, and accordingly concluded that Attorney X had committed ethical misconduct in taping the conversation.

In aggravation, Attorney X had substantial experience in the practice of law. In mitigation, Attorney X's misconduct resulted from ignorance of the ethical prohibition rather than willful disregard of it, he had no prior record of discipline imposed, he admitted his misconduct and he was cooperative with the Bar throughout the investigation. Attorney X received and accepted a written private admonition.

●

Attorney X was retained by Wife to represent her in a divorce matter. Husband was initially unrepresented. Attorney X sent Husband an "Appearance and Waiver" form, which would permit the divorce to proceed on an uncontested basis. The accompanying letter from Attorney X stated that Attorney X "sincerely hoped that [Husband would] elect to secure a quiet, peaceable end to the marriage." The letter informed Husband that such "peaceable settlement" would not only benefit Wife, but would "work to [his] advantage as well," based on the fact that "in our society, it typically is the man" who faces the prospect of "financial destruction" first in divorce cases. The letter went on to make a number of statements purporting to advise Husband of the "benefits," from his perspective, of signing the form and receiving an uncontested divorce. Attorney X did not specifically advise Husband to get a lawyer, but noted that, if Husband refused to sign the form, Attorney X "hope[d] [he would] consult with an honorable attorney more interested in [Husband's] welfare than in merely stirring the pot to garner a larger fee for himself."

Bar counsel concluded that the letter violated Disciplinary Rule 7-104(b), which prohibits an attorney from giving advice to an unrepresented party other than the advice to seek counsel. Bar counsel found that the letter, as a whole, was specifically designed to advise Husband that it was in his own best legal interest to sign the Appearance and Waiver and to discourage him from actually obtaining counsel or contesting the matter.

In aggravation, Attorney X had received one prior written private admonition. In addition, Attorney X had substantial experience in the practice of law, and failed to acknowledge the wrongful nature of his conduct. In mitigation, Attorney X cooperated with bar counsel during the investigation and agreed to be more careful in the wording of his letters in the future. Attorney X received a written private admonition and was ordered to take and pass the MPRE within one year of issuance of the admonition.

●

Attorney X was retained by a repair shop to prosecute a collections action against a customer who had taken his equipment from the premises without first paying a disputed repair bill. In his demand letter, Attorney X alleged that the customer's actions constituted conversion and criminal theft and stated that the repair shop had "authorized [him] to institute criminal and civil proceedings ... if full payment ... is not received by close of business Monday ...." Upon receiving a complaint about the letter from the customer, Attorney X determined that he had unknowingly violated Disciplinary Rule 7-105(A), which prohibits an attorney from presenting or threatening to present criminal charges solely to gain an advantage in a civil matter. The attorney immediately apologized to the customer and his client for his conduct, withdrew from representation, and voluntarily reported his misconduct to the Bar Association.

In mitigation, Attorney X had no prior disciplinary record, he was relatively inexperienced in the practice of law, his actions were not motivated by selfishness or dishonesty, he "voluntarily reported his own misconduct, expressed remorse, suffered "other sanctions" in the form of loss of his client, and was cooperative at all times with bar counsel-herein. There were no aggravating factors apparent.

Attorney X received and accepted a written private admonition. He was expressly commended in the admonition for his exceptional handling of this matter after initially learning that he had made a mistake in the preparation of the demand letter.

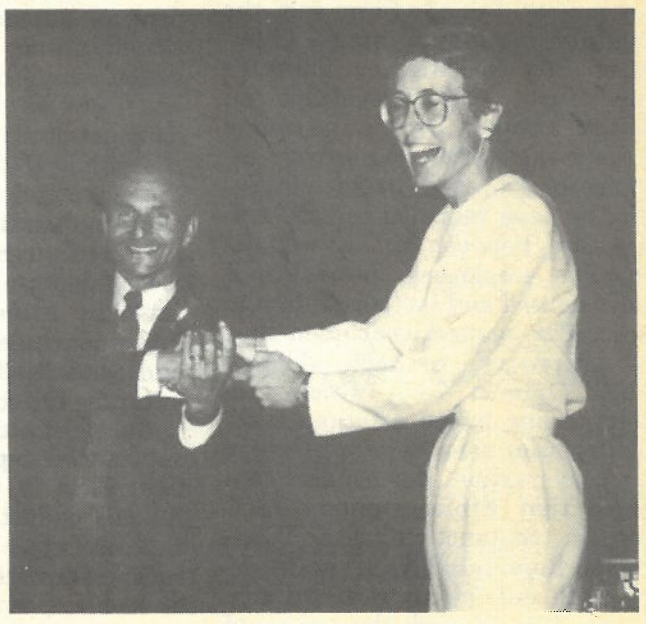
●

Attorney X received a written private admonition for failing to file a criminal appeal brief. The attorney received one time extension but failed to meet the new deadline and didn't ask for another extension. The court set a new deadline but again the attorney did not file a brief. The court dismissed the appeal. Client obtained a new lawyer, who got the case reinstated. At hearings on the court's order to show cause why she should not be sanctioned, Attorney X's employer explained that Attorney X's office was overwhelmed with work, that the attorney was competent but had difficulty prioritizing work, and that the attorney had been demoted and would no longer be working on criminal appeals. The court declined to sanction the attorney. Bar Counsel found a violation of DR 6-101(A)(3) with potential injury to Client (loss of appeal rights) but no injury in fact. The attorney had no record of disciplinary sanctions, and had suffered personal and professional opprobrium through her appearances before the court, her employer's investigation, and her reassignment. After concluding that private discipline was sufficient to protect the public, Bar Counsel requested and received approval to issue a written admonition, which Attorney X accepted.

●

Attorney X consulted with Potential Client concerning a civil action against Defendant. Ultimately Potential Client hired Lawyer A instead of Attorney X. Lawyer A sued Defendant, who hired Attorney X to defend him. Lawyer A demanded that Attorney X withdraw for conflict of interest, which Attorney X did. Meanwhile, however, Attorney X disclosed to Defendant that Potential Client was aware of Defendant's cash assets. Bar Counsel found that this was information the disclosure of which was "likely to be detrimental" to Potential Client because Defendant could easily hide cash subject to execution. Disciplinary authorities agree that the duty of confidentiality attaches to information provided by a prospective client, even though the consultation does not result in an attorney-client relationship. Because the disclosure appeared to be negligent, Bar Counsel received approval to impose discipline on Attorney X by written private admonition. A knowing violation would have resulted in public discipline.

1993 ALASKA BAR



(Left photo) Bruce Weyrauch, of Juneau, demonstrates how short Beth Kerttula is, while Barbara Armstrong watches the dog at the Sandy Beach picnic on Douglas Island. At right, Barbara Blasco passes the President's Gavel to Phil Volland.

At left, bar Fun Ru
and Ross Ripley c
his Watchman TV
(Above, from left)
members during

(Top) Early risers sign up for the Fun Run at Sandy Beach after the convention. At right, Beth Kerttula and Jay Frank time Mauri Long as she crosses the Fun Run finish line.

CONVENTION • JUNEAU

AWARDS

At center top, Chief Justice Daniel Moore Jr. presents the Law Firm Pro Bono Award to Michael Zahare, accepting for Bliss Riordan. At right, Don Craddick thanks the bar for the annual Pro Bono Award.

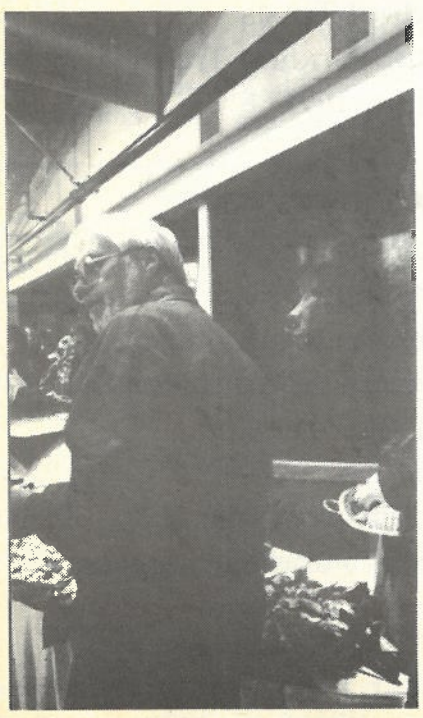
Susan A. Burke, a partner in the Juneau law firm of Gross & Burke, received the Board of Governors Professionalism Award. The annual award recognizes an attorney who exemplifies the attributes of the true professional; whose conduct is always consistent with the highest standards of practice and who displays appropriate courtesy and respect for clients and fellow attorneys. Burke, a member of the Bar since 1971, has served on the Alaska Commission on Judicial Conduct, the Law Examiners Committee, the Alaska Code Revision Commission and the Commission on the Future of the Permanent Fund, as well as served as faculty for the Bar's Mandatory Ethics course for new admittees. She is very active in the musical field in Juneau.

Kenneth P. Eggers was the recipient of the Alaska Bar Association Distinguished Service Award. This award, presented at the 1993 Alaska Bar Association annual convention on June 12 in Juneau, annually honors an attorney for outstanding service to the membership of the Alaska Bar Association. Eggers served on the Bar Association Board of Governors, as well as the Board subcommittee on the Model Rules of Professional Conduct. He is a member of the Employment Law Section and has served on its executive committee. Eggers has been a Hearing Master for an admissions appeal hearing and has also served on the planning committee for various CLE programs. He has also been on the Anchorage Bar Board of Directors.

lunteers move up the finish line so that Shirley Kohls (left runner), Judge Ripley, the race before time expires. (Center photo at left) Judge Roger Brunner shares the NBA playoffs during the Awards Banquet at the bar convention in Juneau. embers Philip Volland, John Thorsness, Beth Kerttula and Dan Winfree listen to al Meeting in Juneau.

RECEPTION

Outgoing President Barbara Blasco (left) chats with Executive Director Deborah O'Regan and incoming President Phil Volland, while at right, Judge Dick Savell (left) admires Judge Mike Thompson's tie.



(Top left) Ken Jensen fills his plate at the opening reception at Junau's DIPAC Hatchery and aquarium, unaware that the black bear over his shoulder is thinking the same thing. At right, Canadian judges and their wives pose at the fish wheel. Far right, Justice Edmund Burke receives his 25-year certificate of Alaska Bar Association membership from President Barbara Blasco.

PHOTOS BY STEVE VAN GOOR AND SALLY J. SUDDOCK

Solid Foundations

1993-94 grants total $320,000

1993-94 IOLTA grants were awarded by the Trustees of the Alaska Bar Foundation on June 3, 1993. Grants requests totalled over $320,000. Grants awarded were:

Alaska Pro Bono Program: $135,000 for the delivery of free legal services to low income Alaskans. The program is an example of an extremely successful collaboration of the Alaska Bar Association and the Alaska Legal Services Corporation. In addition to providing the economically disadvantaged with free legal representation, the program sponsors many statewide classes and clinics.

Catholic Social Services: $30,000 for its legalization assistance program. The Immigration/Refugee Program continues to serve an ever-growing clientele. Legalization and asylum are of utmost importance to immigrants, most of whom cannot afford the legal expertise necessary to interpret the immigration laws.

Anchorage Youth Court: $5,000 for operation of its legal education program. Another $5,000 will be held in reserve to be distributed in January 1994, subject to funding availability, upon review by the Trustees of certain documentation to be provided by Anchorage Youth Court. The alternative preadjudicatory system for Anchorage youth allows juveniles accused to breaking the law to be judged by their peers; it also benefits students in junior and senior high school by training them in the American justice system.

Mary Hughes

Because of a lack of IOLTA funds, the Trustees prioritized the goals of IOLTA funding. The foremost goal, funding legal services for the disadvantaged, received ninety-four percent of the funds available, although much less than either applicant requested. The remainder was allocated to the administration of justice through Anchorage Youth Court activities.

BEFORE THE ALASKA BAR ASSOCIATION
DISCIPLINARY BOARD

In The Disciplinary Matter Involving	)	Alaska Bar Association Filed and Entered on Oct. 5, 1992
DAVID M. CLOWER,	)	
Respondent.	)	

ABA Membership No. 7710106
ABA File No. 1991D115

RECOMMENDATION OF THE DISCIPLINARY BOARD

The Disciplinary Board voted unanimously to recommend to the Supreme Court a public censure and a suspension for some period of time. The Disciplinary board recommends a 14 month suspension retroactive to March 1, 1992. Respondent must comply with the following conditions before reinstatement:

1. Respondent must consent to disclosure of his disciplinary record including the 1986 discipline and the 1991 grievance to a licensed Ph.D. psychologist;
2. Respondent obtain from that psychologist certification of fitness that respondent does not suffer from any psychological or emotional problems that might affect his ability to meet his obligations to clients and the profession;
3. On return to the practice of law, Respondent must show proof of E & O Insurance with policy limits of $100,000/$300,000 and a term of at least one year;

In addition, the Board recommends that Respondent be allowed to petition the Bar for reinstatement prior to the expiration of the 14 month suspension period upon a showing under Bar Rule 29 that he has met all of the above conditions and has established his fitness to practice law.

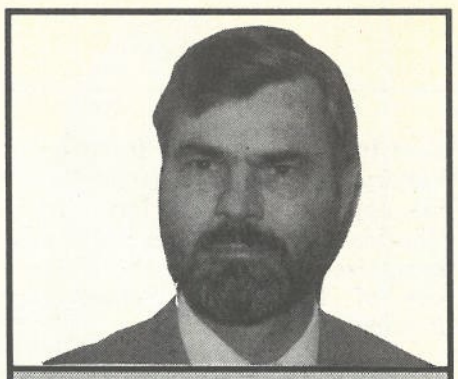
Bar counsel is directed to submit a bill for costs and fees.

DATED this 30th day of September, 1992.

ALASKA BAR ASSOCIATION
/s/Barbara J. Blasco
President of the Disciplinary Board
Adopted by the Supreme Court, Apr. 30, 1993

Bankruptcy Briefs

Consider partnership impacts



Thomas Yerbich

Partnership federal income tax issues frequently arise in a bankruptcy, either when the partnership itself or a partner is the debtor.

One of the issues most frequently encountered is the effect of partnership debt on basis in the partners' interests in the partnership ("outside basis"). The overall impact depends upon (1) whether the partnership continues business operations, (2) the nature of the obligation (recourse or nonrecourse), (3) whether the partnership assumed a partner's obligation or incurred it directly, (4) the character of the partner (general or limited), and (5) the date the partnership obligation was incurred — "transaction date" (before or after January 29, 1989 — the date the § 752 regulations were amended). [Refer to IRC § 752; Treas.Reg. § 1.752-1 (1956) (transactions incurred prior to January 29, 1989); Treas.Reg. § 1.752-1T (1989) (transactions incurred between January 29, 1989 and December 28, 1991); Treas.Reg. § 1.752-1, -2, -4 (1991) (transactions incurred after December 28, 1991).]

Basic Rules

Certain basic rules apply to partnership obligations; these should be kept in mind throughout.

1. The determination of whether an obligation is "recourse" or "nonrecourse" is made at the partnership level. An obligation is recourse as long as any partner has personal liability on the obligation, i.e, partner legally obligated to make net payments, directly or indirectly, to satisfy the obligation out of nonpartnership assets. Any other obligation is nonrecourse. [Treas.Reg. § 1.752-2]

2. An increase in a partner's share of partnership debt is deemed a cash contribution by the partner to the partnership increasing outside basis. [IRC § 752(a)]

3. A decrease in a partner's share of partnership debt is deemed a cash distribution from the partnership to the partner decreasing outside basis. [IRC § 752(b)]

Recourse obligations, irrespective of the transaction date, are allocated to partners essentially in accordance with the ratio for sharing partnership losses; any limited partner's share is limited to the amount obligated to contribute to the partnership in the future.

For transactions entered into before January 30, 1989, if the liability is nonrecourse it is allocated among all partners in accordance with each partner's share of profits (not losses § the reverse of recourse debt). For transactions entered into on or after January 30, 1989 each partner's share of nonrecourse debt is the sum of the partner's share of minimum gain computed under the § 704(b) regulations, gain partner would realize with respect to a § 704(c) revaluation, and a proportionate share of "excess nonrecourse liabilities."

If the partnership assumes an obligation of a partner (usually in connection with the contribution of encumbered property to the partnership), it is recharacterized as though it were a cash transaction. The debt is allocated among the partners in the same manner as if the partnership directly incurred the debt. To the extent the contributing partner is relieved of liability (excess over contributing partner's allocated share of the obligation), it is treated as a cash distribution reducing the contributing partner's outside basis, but not below zero (any excess treated as capital gain if contributing an encumbered capital asset). Noncontributing partners' outside bases are increased by the amount of the assumed debt allocated to each partner.

Partner's Bankruptcy

In the event a partner files bankruptcy, the partnership is dissolved [AS § 32.05.260(5)], but is not terminated [AS § 32.05.250]. Nor does dissolution affect existing partner obligations, *inter sese* or *inter alios*. In the absence of an agreement to continue the partnership business, the partnership must wind up its affairs, distribute its assets and terminate [AS § 32.05.330(a)]. Thus, if the partnership does not carry on its business operations but winds up its affairs and terminates, the partnership liquidation rules apply. If the partnership is solvent (i.e., partnership assets exceed partnership liabilities), the fact termination is forced by a partner's bankruptcy will not change the tax consequences of the liquidation. On the other hand, if the partnership is insolvent (i.e., partnership liabilities exceed partnership assets), partners may be required to make additional capital contributions to satisfy the deficiency with a corresponding increase in outside bases [IRC § 722].

If the partnership is not liquidated but continues its business operations, to the extent the debtor partner receives a discharge, the debtor partner no longer has any risk of economic loss and, as to that partner, any obligation is nonrecourse. However, unless the debtor partner is the only partner personally liable on the obligation, this does not affect the recourse nature of the debt at the partnership level. [If the debtor-partner was the only partner bearing a risk of economic loss, the debt becomes nonrecourse at the partnership level and the entire debt would have to be reallocated as nonrecourse debt among the remaining partners.)

If the debtor-partner was a general partner or a limited partner with an obligation to make future contributions, to the extent the debtor-partner is relieved of liability, there is a deemed cash distribution to the debtor partner under § 752. With respect to the remaining partners, each would lose the right of indemnification from the debtor partner and, therefore, the partners' pro rata share of the obligation would increase § a deemed cash contribution under § 752. The result is simply a pro rata redistribution the debtor partner's allocated share of partnership debt among the remaining partners. If the debtor partner is a limited partner without an obligation to make future obligations, there would be no change in debt allocation [except, perhaps, to the extent required by application of the 1991 regulations].

If the liability is nonrecourse, since the debtor partner is "stripped" of the right to share in future profits under the partnership agreement by his termination as a partner, there is a decrease in the allocation of partnership debt to the debtor partner and a corresponding pro rata increase to the remaining partners [recomputed under the 1991 regulations] § deemed a cash distribution to the debtor partner and a cash contribution by the remaining partners under § 752.

Partnership Bankruptcy

What happens to partners' outside bases if the partnership is the debtor?

In a chapter 7 and many chapter 11's § NOTHING! The partnership does not receive a discharge and the risk of economic loss among the partners remains unchanged. In a chapter 7, the partnership is liquidated and the liquidation rules apply. The problem arises, if at all, in a chapter 11 where there is a reduction in the obligation. (It should also be noted that a modification of the original transaction is a debt-for-debt exchange generating a new transaction date resulting in the modified debt being governed by the 1991 regulations. Thus, in any event, debt allocation would have to be redetermined under the 1991 regulations, which could result in some adjustment.) Also, the "bankruptcy - insolvency" exclusions from income under IRC § 108(a) apply at the partner, not the partnership, level. However, if the debt reduced is a seller-financed obligation, the partnership may elect to reduce the purchase price under § 108(e)(5) notwithstanding the insolvency or bankruptcy of the partnership [*see* Rev.Proc 92-92, 1992-46 IRB 34].

In the case of partnership nonrecourse debt, any reduction in debt pro rata reduces the allocation to each partner § treated as a deemed cash distribution under § 752. To the extent the deemed cash distribution exceeds a partner's outside basis, as debt forgiveness income it, unless § 108(e)(5) applies, constitutes ordinary income to the partner. [If the forgiven debt is connected to a passive activity, it may be passive income that may be offset by passive activity losses (see Rev.Rul. 92-92, 1992-45 IRB 21)].

In the case of partnership recourse debt, the problem is somewhat more subtle. Discharge of partnership obligations that can occur in a chapter 11 case [11 USC § 1141(d)(1)] does not necessarily benefit the partners [11 USC § 524(e); *e.g., United States v. Tharp,* 973 F2d 619 (CA8 1992); *Underhill v. Royal*, 769 F2d 1426 (CA9 1985); *Federal Deposit Insurance Corporation v. Casey,* 741 P2d 473 (Okla. 1987)], *qua* partners or as guarantors.

In the absence of a discharge of partners' obligations, it might be argued that a reduction in partnership debt results in no reallocation. Under the § 752 regulations any deemed cash distribution as a result of decrease in partnership debt might be offset by a corresponding deemed cash contribution by the nondischarged partners' assumption of partnership debt. However, this is questionable because under these facts there is no true "assumption" of partnership debt by the partners: there has been a forgiveness of indebtedness at the partnership level but not at the partner level. The probable outcome is that the nondischarged partners, lacking a right of indemnification by the partnership, would have a bad debt deduction arising at the time the creditor enforces the partners' surviving obligations.

If less than all partners are discharged, the result turns on the terms of the partnership agreement. If the partnership agreement (or some other contractual or statutory provision) provides that nondischarged partners are entitled to indemnification by a discharged partner, the economic risk of loss would remain unchanged and the result should be the same as if no partner was discharged. If, on the other hand, the right to indemnification is limited to an amount in excess of each nondischarged partners' pro rata share of partnership obligations without regard to guarantees or releases of other partners, the result is much different.

In the latter case, all partners, including non-discharged partners, would receive a deemed cash distribution equal to each partner's pro rata share of the forgiven indebtedness. The nondischarged partner would either have a deemed cash contribution equal to the amount of the forgiven indebtedness, if deemed an assumption of the partnership indebtedness; or, if not deemed an assumption, a bad debt deduction when the creditor enforces the surviving obligation.

In the case of a bad debt deduction, the other issue would be whether it was a "business" or "nonbusiness" bad debt §- a subject in a world all its own. [*See e.g., United States v. Generes,* 405 US 93, 92 SCt 827, 31 LEd2d 62 (1972); *Litwin v. United States,* 983 F2d 997 (CA10 1993)]

Bar People

Alaska attorneys selected for honors

Joseph L. Kashi was recently appointed chair of the American Bar Association Law Practice Management Section Litigation Applications group, one of the largest interest groups within the ABA's Law Practice Management Section, and one devoted to the application of sophisticated computer technology to the litigation environment. He is also chair of the Law Practice Management Section's Small Firm Networking group and is currently preparing this section's authorized manual on networking law offices. Previously, he was section editor for Winning with Computers, Volumes One and Two, and a contributing editor for *Law Office Computing*, a premier national legal automation magazine. In conjunction with Thomas Boedeker, Kenai Peninsula Borough Attorney and others, Joe Kashi also presents some of the Alaska Bar's continuing legal education seminars on law office automation and computer technology.

●

Thomas P. Sweeney of Wilmington, Delaware, president of the American College of Trust and Estate Counsel, has announced that **David G. Shaftel,** with the Law Offices of David G. Shaftel, of Anchorage, has been elected a Fellow of the College. His election took place during a recent meeting of the Board of Regents of the College in Lake Buena Vista, Florida.

The American College of Trust and Estate Counsel is an international association of lawyers who have been recognized as outstanding practitioners in the laws of wills, trusts, estate planning and estate administration. The College actively pursues improvements in the administration of our tax and judicial systems in these areas of law, in addition to providing scholarly publications and programs of continuing legal education for its Fellows. Membership is by invitation of the Board of Regents.

●

Bruce E. Gagnon, a lawyer with the Anchorage law firm of Atkinson, Conway & Gagnon, was elected to membership in the American Law Institute in May 1993. He is the only Alaska lawyer ever to be elected to the American Law Institute (ALI) in its 70 year history. Mr. Gagnon was notified of his appointment in a letter from Charles Alan Wright, a nationally recognized professor of the University of Texas Law School and President of ALI.

Bob Wagstaff, Doug Pope & Jonathon Katcher have formed the firm of Wagstaff, Pope & Katcher. **Jon Katcher** and **Kate Michaels** also announce the birth of their daughter, Michelle Elise, born May 18, at 9 lb 5 1/2 oz.....**Deborah Books Durden** recently joined the law firm of Faulkner, Banfield, Doogan & Homes as an associate. She practices in the firm's Anchorage office.....**Sandra J. Cole** also recently joined the law firm of Faulkner, Banfield, Doogan & Homes as an associate.

Durden

Ms. Cole previously taught and practiced in the field of nursing. She practices in the firm's Anchorage office with an emphasis in personal injury defense litigation.....**Kenneth C. Kirk**, of Anchorage, has been appointed by Gov. Hickel to a public seat on the Correctional Industries Commission, replacing **J.L. Smith. Kirk**, an attorney in private practice, will serve through July 1, 1997.

Cole

Legal secretaries elect officers

The Anchorage Legal Secretaries Association recently elected their 1993-1994 Board of Directors: **Nanci L. Biggerstaff**, CPS, PLS, Law Offices of Kenneth Norsworthy, President; **Yolanda (Lani) Marrero**, Law Offices of Kenneth Wallaak, Vice President; **Lindsey Galin**, PLS, Faulkner Banfield Doogan & Holmes, Searetary; and **Jerri Shackelford**, Kelly & Associates, Treasurer.

Nanci Biggerstaff, CPS, PLS, of the Law Offices of Kenneth Norsworthy and Paula Marqua, PLS, of the Law Offices of Donna Willard recently passed the seven part Certified Professional Legal Secretary examination administered in March 1993.

Law firm joins association

The Alaska law firm of Faulkner, Banfield, Doogan & Holmes announces that Commercial Law Affiliates (CLA), a non-profit, international association of which the firm is a member, is now the largest law firm network in the world.

The brainchild of Minneapolis attorney Leon I. Steinberg, CLA was created to address the difficulties lawyers experienced when trying to find qualified counsel in other cities. Law firms across the United States — including Faulkner, Banfield — joined Steinberg in building the network, which has since expanded internationally to its current size of 124 firms worldwide.

"I was always apprehensive about the quality of service my clients would receive when I referred them to firms in other jurisdictions," said partner Randall J. Weddle. "There was no system to ensure that clients would be well taken care of — and that firms wouldn't be predatory towards my relationships. Our membership in CLA solved those problems."

"We soon found additional benefits — having easy access to information and resources, being able to call someone with an informal legal question or share ideas on firm management," he added.

CLA is the only international network where prospective firms must meet strict quality-control criteria in order to be accepted as members. Firms also must adhere to a number of rigorous on-going requirements — such as a referral evaluation process — designed to closely monitor the quality of services.

"We never really envisioned being the largest — nor has that been a goal," Steinberg added. "Our growth has been driven by member and client needs for assistance in an increasing number of jurisdictions across the world," he said.

IN THE SUPREME COURT OF THE STATE OF ALASKA

In The Disciplinary Matter Involving	)	
DARREL J. GARDNER,	)	Filed and Entered Appellate Courts of the State of Alaska
Respondent.	)	
ABA Membership No. 8310119	)	

Supreme Court No. S-5544
ABA File No. 1991D115

Before: Moore, Chief Justice, Rabinowitz, Burke, Matthews, and Compton, Justices.

On consideration of the Bar Association's motion to transfer respondent to disability inactive status dated February 24, 1993,

IT IS ORDERED:

1. The motion for transfer to disability inactive status is granted. Respondent Darrel J. Gardner is transferred to disability inactive status until further order of this court.

2. The Bar Association shall provide the notices required in Bar Rule 30(e) and (f). The respondent may not practice law until reinstated by order of this court under Rule 30(g).

Entered by direction of the court at Anchorage, Alaska on this 15th day of April, 1993.

/s/Jan Hansen
Clerk of the Supreme Court

Eclectic Blues

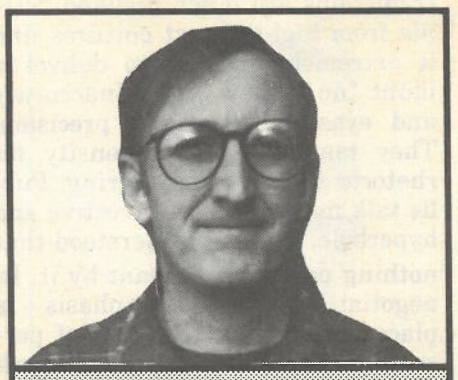
Life at the center of Ketchikan's universe

Way back, before the Norwegians brought their fishing boats up the Tongass Narrows, Ketchikan Creek was the center of human life on Revilla Island. The creek supported a nice salmon run which provided sustenance for the nearby human residents.

Later, as the town grew, the Sons of Norway built a hall where people came to dance or meet over lutefisk. More wayward men looked for a personal relationship in one of the town's many brothels. When the town became civilized, the people who like civilization pushed the ladies of the night across the line to a boardwalk street lining Ketchikan Creek. This turned the creek into the only place in the world where fish and men moved upstream for the same purpose.

Contrary to myths floating around Juneau and points north, Ketchikan is now exceedingly civilized. The old houses on Creek Street mostly cater to souvenir seekers. The Sons of Norway have sold their hall to a computer golf franchise. Touring classical music performers regularly perform at the local Catholic church.

And we have the mall.



Dan Branch

Ketchikan's mall is more than a place to fill up on Big Macs or cash in on moonlight madness sales. It is the center of our community. Most important events take place there.

Our children find their first Easter eggs in the mall, hidden in pastel-colored shredded paper outside of Stenford's Drugs or the Kinney shoe store. Popping open the plastic treasures, they find paper certificates redeemable for inflatable Easter bunnies at a booth in front of Waldenbooks.

In the fall, the same children dressed as their favorite fantasy flood the place armed with plastic pumpkin treat buckets thoughtfully provided by McDonald's. Thousands of dollars are spent to transform the center of commerce into a Hollywood theme park. Last Halloween, the place was invaded by creatures from *Beauty and The Beast*. Next year it will probably be *Jurassic Park* with *T. Rex* popping out of Elmo's barbershop to scare the candy out of our little darlings.

Ketchikan's children welcome St. Nick to southern Southeast Alaska at the mall parking lot, taking care not to get too close to the rotors of his Santacopter. Later on inside, they whisper secret Christmas requests in the great benefactor's ear while a nearby escalator provides cover noise.

Throughout the year, Ketchikan folks are drawn to the mall by events like the boat show, owner/pet look alike contest and the library book sale. Once annually they seek health care services there. On health fair day, scores of groggy coffee hounds line up early near The Bon to give blood for cholesterol testing. When done, the patients rush over to McDonald's for caffeine and an Egg McMuffin.

Given the importance of our mall to Ketchikan, it is no wonder that our high school seniors have their post-graduation, all-night party at the mall. Later, when they join adult society, these same citizens will don formal dress and head for the mall's annual Festival of Lights Ball. There they may dance to the excellent sounds of the Ketchikan Jazz Society Band or indulge themselves at the gambling tables set up near The Workhorse.

Why would the 14,000 residents of Revilla Island center their lives at a shopping mall? If you want the answer to that question, spend a year in southern Southeast where we measure rainfall in feet, not inches. When November storms roar through town, the mall's artificially benign atmosphere provides a warm, dry womb for our children to grow. Even on nonfestival days, it's a place for parents to sip coffee from Seamart while their children watch free Disney videos. Later the whole family can join their neighbors strolling past shops on their way to Plaza Sports where hours can be spent admiring hootchies and graphite trout rods.

It's a life.

More news of bar people

David Rankine reports that's he's relocated to Reno, trying to adjust to his new enviornment. "Hopefully any Alaskan Lawyer passing through the area will give me a ring," he said. His new address and phone are 1036 Bell #4, Reno NV 89503-2837, Tel. (702) 324-5538.

DiPaolo

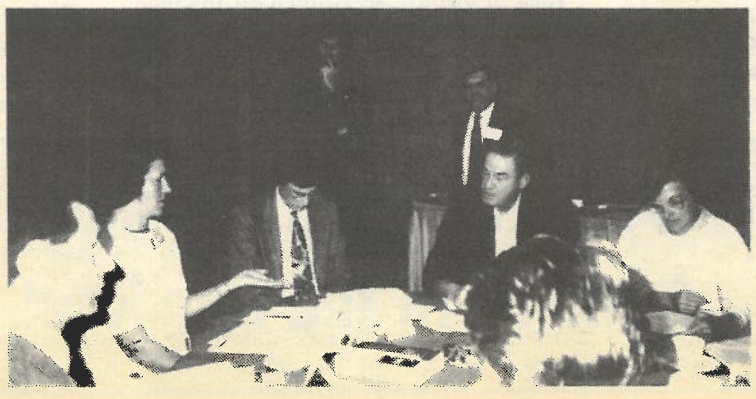
Chalem

Brooking

Reporters elect officers

The Alaska Shorthand Reporters Association has elected new officers. for 1993. Lenny DiPaolo, of Anchorage, was elected president, and Karyn Chalem, of Anchorage, will serve as vice presid4ent. Also elected were Gary Brooking, of Anchorage (secretary); Rebecca Zimmerman, of Juneau (treasurer). Newly elected board members are Nancy Means, Julia Swenson, and Rocky Jones, immediate past president.

Glenda Dodson, of Alaska Stenotype Reporters, was awared the 1993 Pro Bono Award for court reporting.



Attorneys puzzle an issue during the panel on Ethics & Professionalism in Pretrial Practice at the annual convention in Juneau (left). At right, banquet-goers discuss the salad.

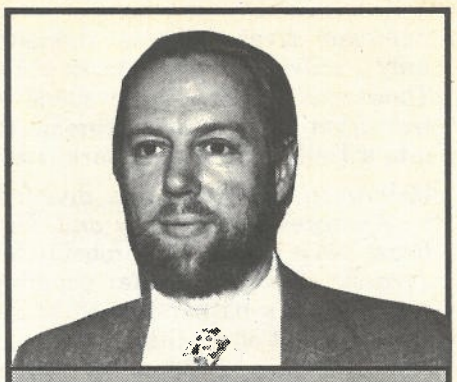
Getting Together

Negotiating across cultures

Cross Cultural Negotiations. "Ich bin ein Berliner," was one of the more famous phrases of President John F. Kennedy, attempting to show his solidarity with the people of West Berlin after the erection of the Berlin wall. Unfortunately, that phrase actually translates in Berlin as "i am a jelly-filled doughnut." Kennedy's well intentioned grammatical error probably caused no great harm, but it does illustrate the difficulty in communications between different cultures, even cultures with similar backgrounds.

I have recently finished reading *Negotiating Across Cultures* by Raymond Cohen (United States Institute of Peace, Washington D.C., 1991). Cohen's book provides a fascinating glimpse into the difficulties of cross cultural international diplomatic negotiations between the United States and five non-European countries: Japan, China, Egypt, Mexico, and India. Cohen (who is an Israeli and thus not a member of any of the cultures examined) analyzes numerous negotiations that have taken place with such countries over the past forty years. He demonstrates repeated incidents where negotiations have gone awry, sometimes to the point of total failure, because of cultural misunderstandings between the negotiators.

Culture. Cohen's book first analyzes culture, which he concludes has three key aspects, 1.) that it is



Drew Peterson

a quality not of individuals, but of society, 2.) that it is acquired by individuals from their respective societies, and 3.) that each culture is a unique complex of attributes at all levels of living. Thus defined, politics and diplomacy can hardly be supposed to lie beyond the scope of culture, as many diplomatic texts assume to be the case. Cohen demonstrates that such assumptions have led to many misunderstandings over the years.

Communication. The book examines a number of different analytical approaches to intercultural communications which have been used in previous literature on the subject. These include case studies of particular negotiations, examinations of individual national negotiating styles, and systematic, theoretical approaches to the subject of cross cultural negotiations. Approaches that Cohen finds particularly useful include Lorand B, Szalay's distinction between the form and meaning of language, and Edward T. Hall's distinction between high-context and low-context cultures.

According to Szalay, ideas themselves do not pass directly between individuals, but only through code: the word and the patterns of sound or print. For a message to be correctly understood there must be sufficient similarity between the intention of the sender and the meaning attributed by the receiver.

For there to be real understanding, there must be matching semantic assumptions between the parties. This is difficult enough even within a single culture, but between separate cultures the problems of communication become almost insurmountable. Szalay gives numerous examples of words that have almost entirely different meanings in different cultural traditions ("corruption" is a fascinating example). Such difficulties can arise at any stage of the negotiation process.

High-Context versus Low-Context Cultures. According to Edward T. Hall, high-context cultures are associated with a collective ethic. Maintaining face and group harmony is of highest priority. Individuals from such cultures communicate indirectly rather than directly. They weigh their words with extreme care. Directness and contradictions are much disliked. People from high context cultures find it extremely difficult to deliver a blunt "no." They prefer inaccuracy and evasion to painful precision. They may have a propensity for rhetoric and verbal posturing. Public talk may be full of invective and hyperbole, but it is understood that nothing personal is meant by it. In negotiations much emphasis is placed upon the cultivation of personal relationships. before a frank interchange of views becomes possible.

In contrast are the low-context cultures, exemplified by the United States. Individuals from such cultures use language in a quite different way. Meaning is conveyed explicitly, and indirection is disliked. Speaking "straight-from-the-shoulder" is admired. There is little patience for "beating around the bush," and people are admonished to "get to the point."

In such cultures doing business does not require becoming bosom friends. Individuals have an easy ability to distinguish between their personal and business roles. Language in low context cultures performs more of an informal than a socially lubricative function. Accuracy and truth are the highest virtues. Contradiction is not felt to be offensive. Indeed, it is believed that society thrives on debate and persuasion. Saving face is not nearly so important in such cultures. Guilt rather than shame is the psychological price paid for misdemeanor. One is therefore less sensitive to what others say. Little importance is attached to hint and allusion, and nonverbal gestures are paid little attention. The purpose of communications is to inform, not to impress.

Different Concepts of Time. Consideration of time is particularly effected by cultural attitudes, and Cohen and Hall also discusses the differences between monochronic and polychronic senses of time. High context, polychronic cultures seem to have all the time in the world. Steadiness, not haste, is the cardinal virtue. Such cultures often have a pervasive sense of the past, and can harbor long memories. Low context, monochronic cultures, in contrast, are extremely time conscious. Schedules and deadlines loom over everything. Schedules are almost sacred, and everything must be planned ahead of time. The focus is almost entirely on the future, and there is a preoccupation with rapid change.

Cultural Negotiating Styles. Cohen finally discusses how such cultural differences effect negotiation styles. Low context cultures, he asserts (here citing Japanese political scientist Mushakoji Kinhide's analyses of Japanese-American negotiations) are "can-do". They are grounded on the belief that man can freely manipulate his environment for his own purposes. Under such a view, a person sets objectives, develops a plan, and then acts to change the environment in accordance with the plan. In contrast is the "adaptive" negotiating style of the Japanese and other high-context cultures. Such a style views the world as a complex, ambiguous place. Subjective factors figure prominently in such a view of negotiations. Negotiation is not an end in itself, but simply one aspect of an ongoing relationship. Long term wisdom may be long term folly.

Diplomatic Cultural Blunders and Accomplishments. These analyses are obvious oversimplifications. We all have elements of both high-context and low context cultural styles in our personalities and in our dealings with others. Nevertheless, such analyses have much utility in the real world. The majority of Cohen's book consists of colorful examples of miscommunications on the international diplomative scene. He describes numerous cases where negotiations either went awry, for failure to recognize such cultural differences, or were successful because they were recognized and effectively dealt with. Fascinating stories abound about negotiations on issues such as the Astoria Affair, the Camp David Accords, Colorado River Negotiations, Mexican Gas Talks, the Achille Lauro Affair, International Bill of Human Rights, Military Assistance India, Semiconductor Negotiations with Japan, and Textile Negotiations with China. Individual negotiators discussed include Richard Nixon, Mao, Warren Christopher (once again in the news recently), Ho Chi Minh, John Foster Dulles, Henry Kissinger, Shimon Peres, Indira Ghandi, Anwar Sadat, Zhou Enlai, Jimmy Carter, a Jawarahal Nehru, to name just a few.

Recommendations and Conclusions. Raymond Cohen concludes his book with 10 recommendations for the cross-cultural negotiator. Simplified, they are:

1. Study your adversary's culture and history.
2. Try to establish a personal relationship.
3. Do not assume that what you communicate will be understood exactly as intended.
4. Be alert to indirect statements and nonverbal gestures.
5. Be sensitive to your adversary's status and face.
6. Do not overestimate the power of advocacy.
7. Adapt your strategy to your opponents' cultural needs.
8. Avoid the temptation to compromise with yourself. Flexibility is not a virtue against intransigent opponents.
9. Be patient.
10. Outward forms and appearances may be as important as substance.

Cohen's book provides a fascinating glimpse into the cultural aspects of international diplomatic negotiations. The principles he sets forth can also be helpful in all of our negotiations. After all, we are all the product of different cultural upbringing and cultural factors effect all of our negotiations (to one extent or another).

Have some local bar news?
Send it to the Bar Rag!

On the Murder by the U.S.B.A.T.F. and F.B.I. of the Men, Women and Children of the Branch Davidians in Waco, Texas

BY PHILLIP PAUL WEIDNER

The knock. No knock. The boot at the door.
Fire in their eyes. Blood on the floor.
Storm troopers. So sure. Searching. What for?
What all tyrants fear. Someone who knows more.

Cossacks and Huns. Now B.A.T.F.
Tattoo the Jews. Burn what is left.
Stamp out the weed. They'll want freedom next.
Don't let them read. They'll want freedom next.

Oh, C.I.A. How you love K.G.B.
What joy war can bring. What profit. What greed.
Oh, thank the Lord the F.B.I. sees
All those dangerous fools who dare to be free.

And our borders so safe. So tight and secure.
D.E.A. dogs sniff our old underwear.
I.N.S. agents make certain and sure
No wetbacks or gooks who won't pay slip in here.

We got wire taps and phone traps and judges to sign.
Marshals and handcuffs. Tanks in a line.
Gas and grenades. Guns of all kinds.
Nooses and chairs wired to fry you so fine.

Roadblocks and drug tests. Computers no neat.
We can track you by air. We can see your night heat.
Our cages are many. Our laws such a treat.
A crime for each act. The world at our feet.

Religion. Fine churches. Prayer for a creed.
Allegiance. Loyalty. What else could one need?
When one lives for the word. One simply believes
What the press prints is real. What one sees on T.V.

Such timeless solutions. Centuries of same.
Foolish to question. Foolish to blame.
No matter the era or country or name.
What greater power than fear or than shame?

Yea the masses rejoice at the slaughter of those
Who the Father has fingered. The ones who oppose
The serene blissful life of ignorant repose.
The mire of the mind. Of the heart. Of the soul.

As the trappings of wealth we so proudly behold.
Join our cultural smugness. One thought of old.
One candle still flickers. One spark in the cold.
One sacrilegious story is told.

And retold round the fires deep in the woods.
In the caves. In the cells. One peeks 'neath the hood.
And the might of the fist, the wrath of the God
Of government crumbles. One says what one should.

For the club and the lash and the rack and the death
Of innocents, children, bullets' swift breath
Can only strike flesh. Cannot reach the depths
Of the heart or the mind. Cannot kill what's left.

The numbers are endless.
The names are no mind.
The killing so senseless.
The horror so blind.
Atrocities countlessly
Couched as what's right.
Majority's angel
Of death in the night.
From wolf packs
To Congress
Ravage the weak.
Smother the voices who
Dare question, to seek,
Make an example
To capture the meek.

Yet like the proud phoenix.
Antaeus of yore.
The truth. Ah, the truth
Will rise just once more.

And again. And again.
As the waves on the shore
Softly caressing, casting their spore.

Sprouting and flowering and
Bearing the seed
Of what the world is
Of what we all need.

The essence of mankind.
The heart we must need.

The truth.

What we know.

All we must do and be.

TANANA VALLEY BAR

TVBA MINUTES
JUNE 11, 1993

The crowd was small but of a high quality. No minutes were read as Nicole was in Juneau.

Michelle McComb advised that if you are pregnant they don't make you go through the metal detector at Federal Court. She further advised your undersigned that if he is going to attempt this maneuver he probably ought to shave his beard first.

The Honorable Secretary of the TVBA gave a practical pointer on the applicability of appellate rule 602 (a) (2) to administrative decisions. The Supreme Court agreed that if an order is a final order it ought to say so on it and further that is should say that you have a right to appeal such order within 30 days to the Superior Court. (Implicit in this decision is also that the administrative agency ought to serve it on the individual who is affected by the order, as that was not done in the instant case).

Mistress Aly Closuit was asked to report on the Joe Vogler search as she is involved with the search dog group PAWS. After only being able to contribute the usual hot-air hypothesis the authorities have put forth on the Vogler issue, she was chastised unmercifully for her failure. However, when asked "shy didn't the dogs find him" she responded with the quick witted retort "because he isn't there". When asked "where is he?" She stated "If I knew that he wouldn't be missing".

Madson degenerated the topic at hand and he regurgitated an old Errol Flynn story. It seems in the glamour days of Hollywood Errol Flynn tied a chunk of fat to a string and fed it to a pet goose. When the goose had eliminated the food stuff he then fed it to a second, third, et sequel geese. He then lead the gaggle around by the string.

While dictating these minutes in front of our charming (and beautiful, intelligent et sequel) secretary Jenny Wagner, she commented that only Dick would tell a story like that at a TVBA meeting and it is disgusting.

Attendance having been low; because either (a) the membership was at the Bar Association meeting or (b) the membership feared everybody else would be at the Bar Association meeting so didn't go to the TVBA meeting. The material, like the attendees, being small but of high quality, the meeting was adjourned. So ends these minutes, good by, good luck.

Yours for independence,

KENNETH L. COVELL

Dept. of Law report

Strange, interesting and sometimes togue-in-cheek comments culled directly from Department of Law monthly reports.

In Bethel, a man convicted of first-degree sexual abuse tried to get his 10-year sentence overturned. He claimed that a now-retired district attorney has agreed to a five-year sentence in return for a plea bargain. (The former DA was unavailable for comment, having joined the Peace Corps and moved to an island of Africa_

The state responded by saying the witnesses were still available for a trial, so the appropriate remedy was a plea withdraw.

The judge granted the defendant a re-sentencing in which the state was forced to recommend five years.

The State "stuck to its 'bargain' and recommended five years. Of course we made it clear the recommendation was in no way binding on the court and that the court had a duty to exercise its own independent judgment."

The defendant was sentenced to 12 years in jail with an additional five suspended. "So for all his efforts, the defendant got two extra years in jail."

Commercial code returns to Juneau in '94

continued from page 1

step by the NCCUSL to keep the Commercial Code abreast of current commercial practices.

Personal Property Leasing

Personal property leasing, from horses and cars to commercial kitchen equipment to oil rigs, has become a major industry, with a 1989 dollar volume of 150 billion dollars. Until now, the UCC provisions on sales (Article 2) and secured transactions (Article 9) did not appropriately address leasing questions.

One of the most important questions answered by the new article is when leases are subject to Article 9. Certain lease contracts establish what are, in effect, conditional sales, in which the lessor is no different from a creditor covered by Article 9. Under the new provisions, a secured transaction exists if the lessor has no residual right to the property when the lease expires. This is different from a "true" lease, under which the right to the property reverts to the lessor. If the contract states that the right to the residue is valueless, it can be inferred that the lease really is a conditional sale, in which case Article 9 applies.

The new article creates a new category — "finance leases" — and deals with remedies, warranties, consumer leases, and fixture and accession problems. It establishes a great deal of needed certainty in an industry that is fundamentally interstate in nature.

As of February 1, 1993, 31 states had enacted Article 2A, 27 of them with the 1990 NCCUSL amendments (included in our SB 112). Article 2A bills are pending in other states.

Negotiable Instruments

Again trying to recognize the demands of the electronics age in the commercial world, the NCCUSL promulgated a set of amendments to UCC Article 3, commercial paper. The proposal includes compatibility amendments of Article 1 (general provisions) and Article 4 (bank deposits and collections).

Articles 3 and 4 are companion articles, and much of the language is unnecessarily technical and archaic. This revision reorganizes the material into a more logical sequence and significantly clarifies and modernizes the law. It solves numerous problems that have arisen during the past four decades of experience with the UCC and negotiable instruments.

One shortcoming of the old Article 3 is its tendency to deal with all instruments in the same way. The revised version recognizes important distinctions, for example between notes and drafts. Another needed modernization stems from the fact that, whereas when Articles 3 and 4 were originally drafted, only banks offered checking. Today, banks, savings and loan associations, credit unions, and brokerage houses offer accounts upon which checks and other types of payment orders can be drawn. This revision addresses the several issues arising from that fact.

As of February 1, 1993, 19 states had enacted the revision, and bills were pending in others.

Bulk Sales

The third part of ch. 35, SLA 1993 repeals AS 45.06, bulk transfers — the UCC's Article 6. Due to changing times, changing business practices, and developments in other parts of the law, the concerns that prompted, and the concepts included in, the old Article 6 no longer obtain. The NCCUSL promulgated alternative approaches to updating this article: a set of amendments (including redesignating the article "bulk sales" to reflect a narrowing of the coverage) and a repealer.

Most states that have taken action so far have chosen the repealer (16 out of 21, as of February 1, 1993). A group of Anchorage commercial attorneys expressly endorsed the repeal approach in SB 112.

A bulk sale is one in which a business sells all or a large part of its inventory to a single buyer outside the ordinary course of business. One goal of the laws on this subject had been to protect creditors of such businesses from the proprietor who absconds with the proceeds of the sale.

"...all have agreed to work for enactment of a clean version of the bill next year."

UCC Article 6 replaced a variety of earlier bulk sales laws in the states. All of them were enacted in a climate of smaller businesses that were localized in scope. But the credit environment has changed, so that the risk of the absconding merchandiser is no longer very great. Business creditors can evaluate credit worthiness far better than was the case when the UCC was first promulgated, and they can pursue absconding sellers with much less difficulty. New laws have partially overlapped Article 6, and more sophisticated and wide-spread inventory financing under UCC Article 9 has provided even more significant protections for creditors.

Limited Partnership

In 1992, the 1985 version of the Uniform Limited Partnership Act was enacted, minus the NCCUSL's 1985 amendments regarding the certificate of limited partnership. That bill replaced Alaska's 1917 version.

The general purpose of the 1985 NCCUSL Act is to provide a more flexible and stable basis for the organization of limited partnerships, and to help states stimulate new limited partnership business ventures.

This year, Senator Jim Duncan introduced SB 66, and Representative Carl Moses introduced HB 112, to pick up the missing amendments on certificates. The essence of those amendments is the replacement of the old long-form certificate with the modern "notice" or short-form certificate, recognizing that it is the partnership agreement itself, not the certificate, that is the constitutive document for the partnership. They also recognize that the long-form certificate is both unnecessary and infeasible in this era of limited partnerships with hundreds or thousands of partners, changing regularly. The amendments are overwhelmingly supported both nationally and in Alaska.

The legislature passed HB 112, and SB 66 will carry over to the next session.

Unfortunately, a Senate floor amendment of HB 112 added a section (sec, 18 of HB 112 am S) that says, in its entirety, "If the partnership agreement or the certificate of limited partnership does not contain a provision for dissolving the partnership, upon application of a partner the court may prescribe an equitable way to dissolve the partnership, taking into account the interests of the partners and creditors of the partnership."

Fearing that the additional language created the interpretations that could deprive Alaskans of some of the estate planning and tax advantages of investment in a limited partnership, some Anchorage attorneys convinced the Department of Law and the governor that the bill should be vetoed. They believe that the benefits of the bill were outweighed by the possible danger of sec. 18.

Not all attorneys agree with their position — either as to the likelihood of an actual problem arising or as to the balance of the bill's benefits against sec. 18's potential danger — but the governor did not want to take the chance of letting the bill's deviation from the Uniform Act cause such a problem. He concluded his June 25, 1993 veto message, by stating that "This Administration is available to work with the Legislature to resolve the problems posed by the language of [sec. 18]."

The governor, the sponsor of HB 112, the sponsor of the Senate floor amendment, the attorneys who sought the veto, and Alaska's uniform law commissioners have all agreed to work for enactment of a clean version of the bill next year.

Custodial Trusts

The House Rules Committee, chaired by Representative Carl Moses, introduced HB 280 to enact the Uniform Custodial Trust Act. This Act, in the words of the NCCUSL's prefatory note, is "designed to provide a statutory inter vivos trust for individuals who typically are not very affluent or sophisticated, and (are) possibly represented by attorneys engaged in general rather than specialized estate practice. The most frequent use of this trust would be in response to the commonly occurring need of elderly individuals to provide for the future management of assets in the event of incapacity."

Essentially the same bill (HB 509) passed the House April 8 of last year and died in Senate Judiciary at the end of the session due to lack of time, not opposition. The current bill was favorably reported out of House State Affairs Committee, and now resides in House Judiciary. It will carry over to 1994, and the Judiciary Committee chair, Representative Brian Porter, has promised an early hearing on it next session.

Wills and Intestate Succession

As mentioned in my uniform-laws update last year, in 1990 the NCCUSL promulgated a major revision of Article II of the uniform Probate Code, dealing with wills and intestate succession. The new version concluded a systematic study by the Joint Editorial Board for the Uniform Probate Code and a Special Drafting Committee to Revise Article II.

The revision responded to three basic themes that emerged in the 21 years since the UPC was promulgated: (1) the decline of formalism in favor of intent-serving policies; (2) the recognition that will-substitutes and other inter vivos transfers have so proliferated that they now form a major (if not the major) form of assets transmission; (3) the advent of the multiple-marriage society, resulting in a significant portion of the population being married more than once and having stepchildren and children by previous marriages and in the acceptance of a partnership or marital-sharing theory of marriage. Trends have developed in case law, statutory law, and the scholarly literature.

The Alaska Bar Association's Estate Planning and Probate Section has been reviewing the revision. Representative Carl Moses has tentatively agreed to introduce it next session. Although not every state has enacted the complete Uniform Probate Code, Alaska has, and it is important to keep it up to date.

These amendments include the Uniform Statutory Rule Against Perpetuities, but the rule can stand alone (as the older version does now in our Title 34 rather than with the Probate Code in Title 13). They also include the following separable packages

—Uniform Simultaneous Death Act,

—Uniform Testamentary Transfer to Trusts Act,

—Uniform International Wills Act, and

—Uniform Act on Intestacy, Wills, and Donative Transfers.

Family Support

Representative Carl Moses has also tentatively agreed to introduce the Uniform Interstate Family Support Act. This item is a comprehensive revision of the Uniform Reciprocal Enforcement of Support Act (AS 25.25). It was promulgated by the NCCUSL in 1992, and, as of May 15, 1993, had already been enacted in three states, was awaiting the governor's signature in Washington, and was pending in 15 additional states.

UIFSA updates URESA, recognizes the growing number of single-parent households, resolves problems stemming from jurisdictional disputes and multiple support orders, and makes a number of other improvements. Interstate uniformity is especially important in this area.

"Although not every state has enacted the complete Uniform Probate Code, Alaska has, and it is important to keep it up to date."

Fraudulent Transfers

Alaska's uniform law commissioners are considering proposing enactment of the Uniform Fraudulent Transfer Act. As described by the NCCUSL, the basic purpose of this Act is to provide "a creditor with the capacity to procure assets (that) a debtor has transferred to another person to keep them from being used to satisfy the debt."

The Act works as a deterrent to artificial insolvencies that are achieved by transferring assets in an effort to defeat the interests of creditors, and it provides creditors with a remedy. Credit is essential to the economic life of the country,

continued on page 19

Equal access for courts

continued from page 1

The next time you are in a public building, put yourself in the shoes of a person in a wheelchair, or a person who is blind or deaf. Are there properly constructed entryways that allow for easy wheelchair access to all facilities? Are there braille placards identifying locations in the building, i.e., in and outside elevators, offices, restrooms? Are there public text telephones that can be used by a hearing-impaired or deaf person? Are there visual alarm systems to alert that person of a fire, or of the phone ringing? Can that person register in a hotel and have access to TV closed captioning?

These involve minor things that we take for granted but that present to a person with a disability major inconveniences and often an inability to even partake in the basic rights that Americans possess. This translates to a form of discrimination that disabled persons have had to accept for years. But with the passage of the ADA they finally are now guaranteed their Constitutional rights.

Access to courts - the "TAC"

The American Bar Association and the National Judicial College in their 1991 document entitled "Court-Related Needs of the Elderly and Persons with Disabilities - a Blueprint for the Future" made monumental recommendations for opening up the doors to the justice System. In the introduction to their study, they make a statement that says it all:

> Inaccessible justice is justice denied, especially for the elderly and persons with disabilities, who may have problems reaching the courthouse doors and, once inside, may have difficulty fully participating in the judicial process.

This document recommends that the justice system be a "model of accessibility" and that it be a "barrier-free and technologically enhanced environment in which what is needed by one is available to all. "In referencing the ADA it states, "all court operations should afford full and equal access for persons with disabilities including judicial and nonjudicial court personnel, job applicants, lawyers, litigants, victims, witnesses, jurors, and members of the public."

These recommendations of the American Bar Association and the National Judicial College are now mandated by law. Responding to these judicial requirements, the National Court Reporters Association (NCRA) has developed what they call the "Total Access Courtroom." The Total Access Courtroom is a crucial part of this "technologically enhanced environment" that is being called for. It is a technology that allows 22 million hearing impaired and many thousands of visually impaired Americans to participate in the justice system - not just as litigants, witnesses or jurors, but even as trial spectators.

In this time of budget crisis, courts today are required to think smarter, react faster and work harder. And now with the passage of ADA they are charged with accessibility on a scale they have not dealt with before. Also, the courts are striving to enter the 21st century with a goal toward total automation, and by providing instant accessibility to court proceedings and instant research capability, the Total Access Courtroom can serve those needs, as well.

Computer Integrated Courtroom

According to NCRA specifications, there are four key components that make up the Total Access Courtroom. The first and key component is the Computer-Integrated Courtroom (CIC) technology which has been proving its effectiveness for many years in courtrooms around the country. There are now nearly 20 CIC's in state and federal courts located in Washington, Oregon, California, Colorado, Arizona, Texas, Illinois, Kentucky, Michigan, Minnesota, Ohio, Pennsylvania, Kansas, Georgia, Florida and Alabama. More are being added each year.

At the heart of this computer communications system is a court reporter whose steno machine is linked by cable to a computer. As the reporter enters testimony into the computer, the electronic signals are automatically translated into English text. This text is transmitted on a real-time basis automatically to PC's and video monitors at the bench and at the attorneys' tables. Additional monitors could easily be added to the system to meet the needs of disabled jurors or spectators.

TAC's three components

With the addition of the other three components which make up the Total Access Courtroom - Text/Video Integration, Captioning and Braille Display - the court reporter's real-time translation can be converted into the kind of communication best suited to the needs of each disabled person. For example, the hearing impaired can view either the printed text or captioned video. The visually impaired could research the ongoing proceedings through either the printed Braille transcript or the real-time Braille display.

Real-time translation has a number of significant benefits for courtroom participants. Having the testimony displayed on their computer monitors within seconds after it is spoken eliminates the need for attorneys or judges to request readbacks. In considering an objection, the judge has the benefit of referring to the precise formulation of the question or statement before making a ruling. If there is a need to refer to previous testimony, it can be called up and displayed. To follow current proceedings and refer to previous testimony at the same time, the attorney or judge can simply view one body of text in a window and the other on the rest of the monitor. Courtroom interpreters also benefit from real-time translation by being able to refer to the computer monitor in formulating the translation of questions asked of a non-English-speaking witness.

The CIC permits lawyers to bring the full text of their depositions, discovery summaries, legal memoranda and other trial materials to the courtroom on diskettes and to "load" these materials into the computer that has been assigned to the side of the case. The computers used by the parties and the court are separate, each having its own database and security code in order to ensure that proper handling is accorded to these confidential and privileged litigation materials.

As the trial] progresses, a complete record of the proceedings is stored in each computer. These proceedings, as well as the previously-loaded documents, can be called up at any time, annotated and key-word-searched. This review and search capability gives the trial lawyers and the judge a remarkable new ability to deal with the facts of an extended or complex case with a speed and accuracy that could not be previously reached.

Text/Video & Captioning

Video cameras are being used with increasing frequency to record testimony at both depositions and trials. In order to provide Text/Video Integration and Captioning, the second and third components of the Total Access Courtroom, video cameras will be strategically placed throughout the room to record testimony and display it on monitors. The video system will be linked to the court reporter's computer so that the reporter can generate captions (subtitles) for the benefit of hearing-impaired people. This is basically the same technology that provides captioned television programs for the 22-million Americans with hearing disabilities. Watching a captioned video of court proceedings allows the hearing-impaired person to view the person testifying or questioning at the same time as reading what is being said. This is very beneficial since it doesn't require the hearing-impaired person to constantly shift their attention between the person speaking and a monitor displaying the real-time only.

Text/Video Integration means that as the court proceedings are recorded by the court reporter and on the videotape, the reporter's CAT system synchronizes the English text and the video. This synchronization makes it easy to review the videotape. By simply keying a relevant name, date or phrase into a PC, an attorney or judge can immediately retrieve both the text and video portions of the testimony. Thus the video testimony shown on a computer screen can be compared against the written testimony on the same screen. That would allow the attorney, judge or jury to not only consider a witness' earlier words, but his or her behavior, tone of voice or mood during that testimony.

The video could either be displayed in a corner of the same computer screen on which the text appears or on a regular television monitor. The technology enables a lawyer to find a specific passage on a videotape in seconds, so as one attorney cross-examines a witness, the attorney's partner could cue video clips of contradictory testimony.

Braille display

The fourth component of the Total Access Courtroom, Braille Display, now offers the visually impaired a broader access to our legal system. Using newly developed software such as BrailleView or KeyBraille in conjunction with other total-access technology, visually impaired individuals can scroll back to a specific place in the court record, designate text for translation to braille, and then read the braille.

For example, a blind attorney can object, challenge a witness' testimony, and then locate the contradictory statements that occurred earlier in the proceedings. The attorney moves the cursor back to the previous testimony, perhaps an answer with its characteristic "A" at the left margin, and then translates the text and reads it one line at a time. A plastic strip, slightly rough to the touch and located just underneath the space bar on the computer keyboard contains braille cells. Each cell includes several pins, which are the actual moving parts of the braille cell. The pins are electronically rearranged as necessary every time a new line of text has been translated. The operator thus can read continuous lines of text one line at a time.

Judges' disabilities

The symbol of justice is a woman wearing a blindfold, but what about a judge who is literally blind? Can someone with such a disability handle the responsibilities of so demanding a position? This issue arose when Richard Casey, a totally blind New York attorney, was recommended for appointment to a federal judgeship in the Southern District of New York. If nominated and confirmed, he would be the first blind person to be seated on the federal bench. Total Access Courtroom technology makes this a possibility. Judge Richard Brown of Waukesha, Wisconsin had a promising career in front of him when in 1983 a brain tumor caused him to lose his hearing. However, with daily use of real-time technology, he has been able to continue his Court of Appeals duties.

We take for granted our right to walk into any courtroom in America and observe how the system operates. Yet until recently, for millions of Americans with disabilities, the doors to the judicial system have been closed. The ADA has opened those doors, and the Total Access Courtroom technology makes it possible for all to enter and participate. We can truly now be a government "of the people and for the people."

• Commercial

continued from page 18

and the Act provides assurances that the corresponding obligations are satisfied. As of April 15, 1993, it had been enacted in 30 states.

More Detail

As with last year's report, this synopsis does not do justice to any of the Uniform Acts mentioned — neither the ones that passed nor the others. And, of course, the 1993 proposals in Alaska are just a small percentage of the product of the NCCUSL.

Anyone wanting to read any of the Alaska bills should contact the nearest Legislative Information Office. Those wanting to see the official NCCUSL version could look it up in Uniform Laws Annotated. Those wanting their very own pamphlet copy of a Uniform Act, or an information packet, should contact

John M. McCabe
Legal Counsel & Legislative Director
NCCUSL
676 N. St. Clair Street,
Suite 1700
Chicago, Illinois 60611.

The author is one of Alaska's Uniform Law Commissioners, retired from the Alaska Department of Law in October 1990, and currently in private practice with the Juneau/Sitka/Anchorage law firm of Dillon and Findley.

Billing sheets Famous People in History

By J. B. Dell

LENIN

tc Trotsky	.25
tc Bugarin	.25
telegram Munich Assembly	.50
conf Trotsky & Bugarin	1.00
Work on first draft of Plan for World Domination	2.50
Approve menu for Bolshevik Xmas party	.40
Revise World Domination plan	1.00
Work on secret password for entry to meeting of Moscow Soviet	.75
Finalize World Domination Plan	1.50
Drinks w/Armand Hammer	1.00
Staff conf	.30
tc Trotsky; tc Trotsky; tc Trotsky; tc Trotsky; tc Trotsky; recommend that Stalin assassinate Trotsky	1.50

JOHN HINKLEY

Attempt tc w/Jodie Foster	.25
Attempt tc w/Jodie Foster	.25
Attempt tc w/Jodie Foster	.25
Rev Jodie Foster photos	1.0
Work on first draft ltr to Jodie Foster	1.0
Attempt tc w/Jodie Foster	.25
Rev Jodie Foster photos	1.5
Attempt tc w/Jodie Foster	.25
Research at Library re: Foster habits & pet peeves	2.50
Rev ltr to Jodie Foster	.75
Attempt tc w/Jodie Foster	.25
Rev Jodie Foster photos	1.00
Finalize ltr to Foster	1.00
Draft telegram to Jodie Foster	.30

MOSES

Conf w/women of Medea	.60
Travel (Mt. Sinai)	1.50
Conf w/Yahweh	1.00
Work on first draft of Commandments	1.50
Conf w/Yahweh	1.00
Revise & edit Commandments	1.00
Conf w/Yahweh	.50
Finalize Commandments; purchase of granite tablets at Sy's Hardware	1.50
Conf Aaron: Draft memo to Pharoah re: First Plague	.75
Conf w/Yahweh; conf Pharoah re: remaining plagues	2.30
tc Camel Express Travel Agency; cross Red Sea	12.00

TONTO

Conf w/Lone Ranger	.50
Go into town & get beat up by racist hooligans	1.50
Report back to Lone Ranger	.30
Polish Lone Ranger's pistols and floss Silver's teeth	2.50
Memo to file	.50

LAND USE LAW WORKSHOP

Presented by the

Alaska Chapter, American Planning Association &
Western Planning Resources

featuring

Edith M. Netter

Noted Attorney and Mediator in Land Use/Environmental Law,
Boston, MA; with local attorneys as discussants

Monday, August 9, Holiday Inn, Anchorage

Session 1: 9:00 a.m. - Noon

"National Trends in Land Use Law"

Session 2: 1:30 p.m. - 4:30 p.m.

"Planning in the Face of Conflict: The Role of Mediation in Resolving Land Use Disputes"

Contact the KPBEDD, 110 S. Willow St., Suite 106, Kenai, AK 99611
or phone (907) 283-3335

COST: $30 each session (advance reservations required — payable at the door)

Your dues

Alaska's one of 3 full service unified bars

The basic questions I am usually asked about bar dues are "what do I get for my bar dues?", or "I only pay $X dues in another state, why are they so much higher in Alaska?"

Alaska is one of 35 unified bars in the country (including D.C., Puerto Rico and the Virgin Islands.) 18 states remain voluntary bars.

Of the 35 unified bars, here's a summary of the numbers which perform certain mandated functions:

Admissions:	9
Discipline	25
Fee Arbitration	12
CLE	22
Lawyers' Fund for Client Prot.	19

Only 8 unified bars do both admissions and discipline; only 3 bars do admissions, discipline and fee arbitration; and the same 3 states perform these functions plus administer a Lawyers' Fund for Client Protection and a CLE program. These 3 states are Alaska, Idaho and Arizona.

A unified bar requires that an attorney, to practice law in that jurisdiction, must become a member of that bar. Through bar dues, the members support the mandated core functions of the unified bar. In many of the unified states, it is not the bar association which performs these functions, but rather the function may be performed by a separate Board which is directly under the supreme court of that state. Voluntary bars will have these functions performed by a Board under the supreme court.

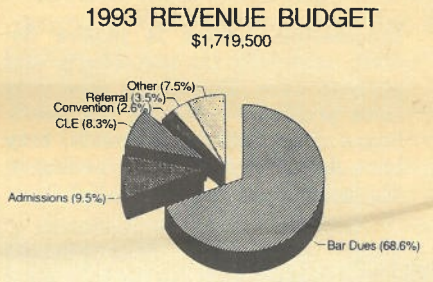
When you pay your bar dues, you may be paying a license fee to a bar association to perform several mandated functions. Or, you might be paying a license fee to a state supreme court which regulates these functions more directly and is subsidized by the state.

There is a cost to remaining self-regulating. The Alaska Bar performs more mandatory functions than all but 2 other state bars. The Bar Association receives no state money, so these functions are paid for by member bar dues and fees such as admissions fees, CLE fees and the LFCP fee.

Deborah O'Regan
Executive Director

1993 Budgeted Revenue

Bar Dues	$	1,180,000
Admissions	$	163,000
CLE	$	142,500
Lawyer Referral	$	60,000
Convention	$	45,000
Other		
Interest	$	25,000
Labels	$	17,500
Installments	$	15,500
Late Fees	$	8,500
Sections	$	8,000
Misc.	$	54,000
	$	1,719,000



1993 Budgeted Expenses

Discipline	$	485,000
Administration	$	350,000
CLE	$	265,000
Admissions	$	165,000
Lawyer Referral	$	52,500
Board of Gov.	$	47,500
Convention	$	45,000
Other		
Fee Arb	$	37,500
Bar Rag	$	35,000
Law Review	$	34,000
Sections	$	8,000
Committees	$	4,500
Misc.	$	15,000
	$	1,544,000