ONE HUNDRED YEARS
1896 1996
ALASKA BAR ASSOCIATION

CONVENTION HIGHLIGHTS

Inside:

Anatomy of a discipline case; new mediation rules, courthouse news, how to get referrals & ALSC update . . . for starters.

$2.00

The Alaska BAR RAG

VOLUME 20, NO. 4 — *Dignitas, semper dignitas* — JULY-AUGUST, 1996

Women arrive on the court bench

By Pamela Cravez and Susanne Di Pietro

The appointment of Dana Fabe to the Alaska Supreme Court this year marks the first time a woman has been chosen to serve on an Alaska appellate court and highlights the steadily expanding role women are taking on the state court bench.

Just 37 years ago, when Alaska's supreme and superior courts were established, no women even applied *for judgeships.* In 1962, Dorothy Awes Haaland, former member of the Constitutional Convention and territorial legislature, became the first woman to put her name in for the superior court bench.

Haaland, who had served as territorial commissioner in Cordova, who clerked for federal District Judge Anthony Dimond and headed the aviation section of the state attorney general's office, was bypassed by the Judicial Council. The Council nominated Clifford Groh and Ralph Moody for the Anchorage Superior Court slot, with Moody receiving Gov. William Egan's appointment. Although Haaland applied three more times, the Council did not recommend her to the governor.

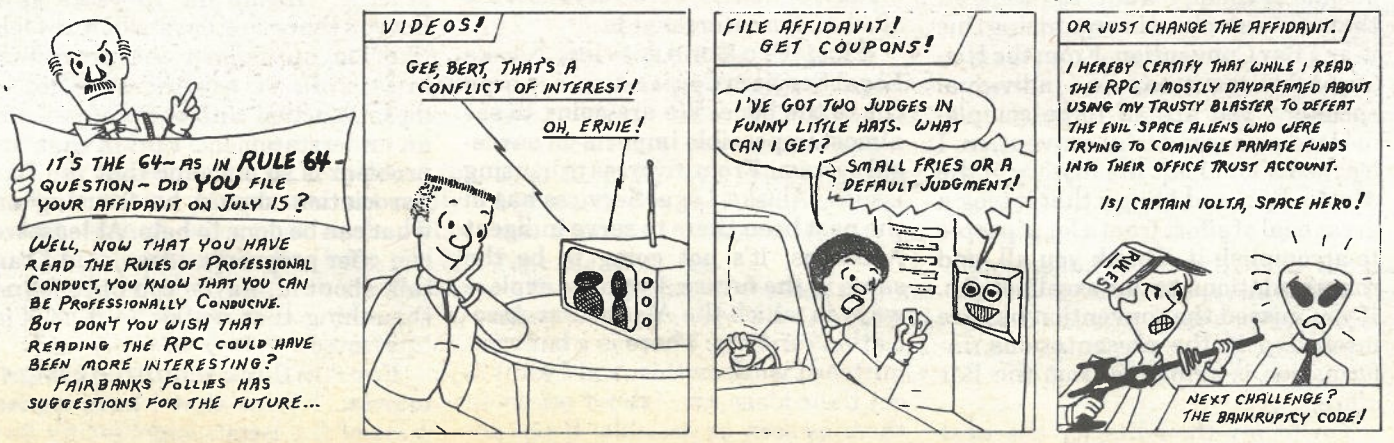
It took the establishment of a lower, district court in 1968 for women to finally make inroads

The second woman to apply for a superior court position, Fairbanks practitioner Mary Alice Miller, made it to the governor's desk, but no further, in 1965. This time Gov. Egan opted to appoint Warren William Taylor to the Fairbanks bench.

It took the establishment of a lower, district court in 1968 for women to finally make inroads on the state court bench. The district court, charged with handling misdemeanors and minor civil matters, took over some of the cases reserved at statehood for magistrates and handled before statehood by territorial commissioners. Women (with and without law degrees) had frequently held magistrate and commissioner posts.

Continued on page 20

FAIRBANKS FOLLIES



Probate and Commerce: Our legislature and virtual uniformity

By Arthur Peterson

In the universe of uniform laws, probate and commerce were the primary beneficiaries of Alaska legislative action this year.

During the 1996 session, the legislature passed the revision of Uniform Probate Code Articles II (wills and intestate succession) and VI (nonprobate transfers) and Uniform Commercial Code Article 8 (investment securities). It also passed some amendments to the Uniform Unclaimed Property Act. HB 553, proposing the revision of Uniform Commercial Code Article 5 (letters of credit), was introduced toward the latter part of the session, with the intent of holding hearings on it during the interim. HB 72, proposing the Uniform Fraudulent Transfer Act, met an unfortunate death.

The bills that passed and the two that didn't were promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL, or ULC for "Uniform Laws Conference") The Alaska versions very closely track the national wording.

PROBATE

In 1990, the NCCUSL promulgated a major revision of Article II of the Uniform Probate Code (UPC), and made further amendments in 1993, dealing with wills and intestate succession. In 1989, it made major changes to Article VI, dealing with nonprobate transfers on death. These revisions have been enacted here as ch. 75, SLA 1996 (CSHB 308[JUDI), effective January 1, 1997.

As mentioned in the uniform-laws wrap-up article in the July/August 1995 *Bar Rag*, these changes, introduced by Representative Sean Parnell as HB 308, responded to three basic themes: (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 in the two-plus decades since the UPC was originally promulgated.

The Alaska Bar Association's Estate Planning and Probate Section has been reviewing the revision since 1992, and provided substantial assistance in this effort to keep Alaska's UPC up to date.

These amendments include the following separable packages (either as a new feature or as an amendment of current provisions)

- Uniform Testamentary Additions to Trusts Act,
- Uniform Simultaneous Death Act,
- Uniform Disclaimer of Property Interests Act,
- Uniform International Wills Act, and
- Uniform Act on Intestacy, Wills, and Donative Transfers.

The Alaska version adheres very closely to the national version, making only minor, non-substantive style and format changes and nine substantive changes. I won't burden this article with a description of all nine substantive changes, but one feature of the "official," national version of the Article II revision that CSHB 308(JUD) does *not* include is the phase-in approach to the surviving Spouses elective share. (See AS 13.12.202, retaining Alaska's current version, which allows a surviving spouse to elect a flat one-third of the "augmented estate.") The phase-in approach allows a range of three percent, to a spouse who was married to the decedent for one but less than two years, to 50 percent to a spouse married for 15 years or more.

At least part of the theory behind this new approach is that the longer a spouse was married, the more he or she shared in the marital life and economics of the decedent and contributed to the development of the estate.

continued on page 6

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

The new president's priorities


Beth Kerttula

For those of you who don't know me I am beginning my first President's column with a short introduction. I was raised in Palmer and Juneau, Alaska. I have worked as an Assistant Public Defender, in a small private firm, and for the legislature, and am now an Assistant Attorney General in the Oil, Gas, and Mining section in Juneau. I have practiced for 15 years. I'm very happy to serve as President of the Alaska Bar and thank you for the opportunity.

As Bar President, I have a number of interests that I hope to pursue in the next year, but before I give you an outline of them, I want to thank all the people involved in organizing this year's Bar Convention. From the Historians' Committee to the individual speakers, you are all to be complemented on a wonderful convention. I learned a lot about the history of the Alaska Bar, and I know that it took a great deal of effort from a lot of people to accomplish it. Thank you all, and congratulations on an excellent job. If you missed the convention but are interested in the presentations, information is available from the Bar office.

On to my thoughts for the next year. At the convention, Judge Singleton noted that in many ways a Bar President's year is guided by events over which she has no control. I think that's true, but I still have a few goals for the year. I figure that in my last column I can own up to whether I made it or not. So, here's my short list of what I'm interested in.

First: Pro Bono service. Alaska Legal Services Corporation has been cut to the bone. We are going to see almost impossible impacts on our legal system. From divorces to housing issues, Alaska Legal Services has in the past been there to serve indigent Alaskans; it's not going to be the same in the future. I want to explore ways in which the Alaska Bar Association can help. There is a bar committee at work on this, and I want to get their ideas and ask for action on them as soon as possible. If you are interested, please let me or the bar staff know.

Second: the convention. After this year's convention I have seen the benefit a convention can be. However, I have serious questions about the costs and the fact that few bar members attend. Whether to continue to have conventions will be an issue that will be explored by the Board of Governors in the next year. Having said that, the 1997 convention in Juneau is happening. While we are still at the brain-storming stage, my initial idea for the theme is "Politics, Public Policy, and the Law." This would allow us to take advantage of our state capital, the administration and the legislature (some would say "for a change"). If you have a suggestion or other thought about this, please let me know.

Third: Quality of life. I'm not kidding. Having hit 15 years as a lawyer there are days when it feels like I'm up against the proverbial brick wall. To say there's a lot of dissatisfaction with our profession is an understatement. I think that the problem is so endemic that the Bar Association should be focusing on what can be done to help. At least we can offer programs, ideas, and I can talk about it. Maybe you have found something that works — if so, I'm interested.

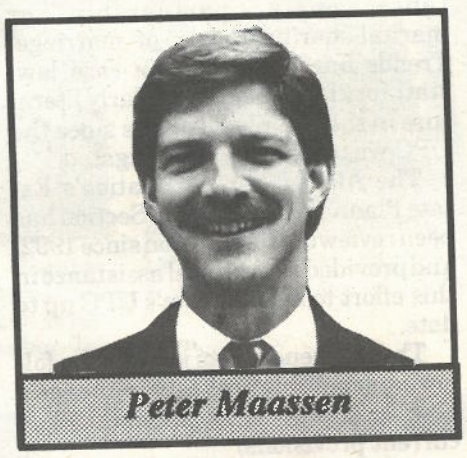
Fourth: Bar committee assignments. I think that I have signed most of the letters announcing Bar committee appointments by now (no one warned me that being Bar President involved a lot of writer's cramp). Choosing committee members was very difficult. One of the problems was that it was the very first thing I had to do as President, and I didn't have time to call everyone, which I would have liked. Another problem was that some committees for which we solicited interest actually didn't have any vacancies — a frustrating situation. To try to make it easier next year, I will make it a priority to announce when committee requests are due (only for committees that actually have vacancies) and to encourage you to contact me, the President Elect David Bundy, or the Bar staff about your interest. A personal letter or telephone call from you makes a difference. I admit that I created a few new committee positions to try to include as many people as possible this year, but it just wasn't possible to include everyone. As a result, a lot of great people aren't on committees. So, if you are on a committee and just don't have the time or interest, let us know. There are people who would like a chance to serve. Finally, thank you to all of you who are on Bar committees. It's hard work and it is truly appreciated.

Well, that's the list. I think it's fairly modest, but I know even this will take a lot of work. Hopefully it leaves enough room for Judge Singleton's eventualities. Let me know if you have thoughts as the year progresses. I like hearing what you think, and I believe that's a big part of my job. My home phone and fax numbers are: Telephone: (907)463-5440; Fax: (907)463-5441.

That's it for my first column. I never thought I would get it written — I've sought advice from many of the good writers I know, including my mother and Dan Branch, who fortunately works in my office. In the future I encourage you to read Dan's column first, and then read mine. Thanks, I look forward to working with you this year.

Editor's Column

Corruption rampant in our highest courts, says grammarian


Peter Maassen

The letters continue to pour in from delusional *Bar Rag* readers who think that airing their pet peeves will somehow benefit the rest of us. Here is a sampling from the mailbag:

Dear Editor:

Book Publishing Company is, one would think, in the book publishing business, yet it can't seem to figure out that the rule number that should appear in the upper right corner of the right-hand page is the number of the last rule to appear on the page, not the first. See, for example, pp. 17, 25, 29, 37, 39, 43, 45, 47, ad nauseam, in the Alaska Rules of Court, 1996-97 Main Edition. BPC has done it this way for years. If I had a dictionary that used such a nonutile system I'd throw it out. Am I the only one who is bothered by this?

— The Paginator

Dear TP:

Yes, you are the only one. The reason is that no one else has noticed. Lawyers who consult the Alaska Rules of Court often enough to have figured out that they are numbered sequentially are not playing the game with the proper Alaskan devil-may-care attitude. Remember, your Rule 64 Affidavit (already past due, by the way) applies only to the Rules of Professional Conduct.

Dear Editor:

A superior court judge whom I shall not name recently signed an order containing the phrase, "being fully advised in the premises." Now, I happen to know that the judge was fully advised while in the old premises, viz. 301 K Street, whereas she signed the order in the new premises, viz. the next block east. Is a motion for clarification in order? Is this point appealable?

— Stickler for Accuracy

Dear Stick:

This may surprise a naifnik like you, but some experienced practitioners suspect that our overworked judges often sign the form orders submitted by prevailing parties without even reading them, operating on the hoary principle quasi modo (literally, "I've got a hunch"). Try this experiment: In your next uncontroversial form order, insert the words "And besides, I'm wearing mismatched socks" before "IT IS SO ORDERED," and see if it doesn't get signed anyway. It worked for me. In fact, that's how I got title to my car.

Dear Editor:

I'm not usually the schoolmarmy type who pounces priggishly on every misuse of the subjunctive, but certain unnatural goings-on in our high courts must be stopped before I run screaming into the street. I refer to the insidious corruption of the word "plead" (rhymes with "greed"), the past tense of which is "pled" (rhymes with "dead"), not "plead" (still rhymes with "greed") The view that "plead" can sometimes rhyme with "dead" used to be confined to those lawyers who also made free use of the caveat "Dictated but not read" (rhymes with Fred).

One would think that our high courts would be among the last institutions to succumb to the fallacy that proper speech follows the thoughtless utterances of the common man, rather than vice versa. However, please note this evidence of a disturbing trend: In *Burcina v. City of Ketchikan*, 902 P.2d 817, 821-22 (Alaska 1995), the Court refers to a statute which "estops a civil plaintiff from denying a criminal act to which he plead [ouch!] nolo contendere;" in *Pusich v. State*, 907 P.2d 29, 42 n. 6 (Alaska App. 1995), the

Continued on page 3

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).

President: Elizabeth J. Kerttula
President Elect: David H. Bundy
Vice President: Dennis L. McCarty
Secretary: Joseph Faulhaber
Treasurer: Venable Vermont, Jr.
Members:
Ray R. Brown
J. John Franich, Jr.
Barbara Miklos
William B. Schendel
Ethel Staton
Kisten Tinglum
Diane Vallentine
Executive Director:
Deborah O'Regan
Editor in Chief: Peter J. Maassen
Managing Editor: Sally J. Suddock
Editor Emeritus: Harry Branson
Contributing Writers:
Dan Branch
Drew Peterson
Mary K. Hughes
William Satterberg
Scott Brandt-Erichsen
Walt Arden
Michael J. Schneider
Daniel Patrick O'Tierney
Steven T. O'Hara
Thomas J. Yerbich
Steven Pradell
Joyce Weaver Johnson
Contributing Cartoonist
Mark Andrews
Design & Production:
Sue Bybee & Kathy Scheid-Graupe
Advertising Agent:
Linda Brown
507 E. St., Suite 213
Anchorage, Alaska 99501
(907) 272-7500 • Fax 279-1037

Discovering data stored on electronic media

BY JOSEPH L. KASHI

Amendments to the Federal Rules of Civil Procedure, generally adopted in Alaska as well, have placed the discovery of electronic records squarely before the legal profession. Trial courts have ordered, and appellate courts have upheld, the preservation, discovery and admission of electronic evidence since the mid-1970s.

In a widely reported May, 1996 decision, for example, the U.S. Supreme Court denied a certiorari petition by the defendant tobacco companies requesting the high court to overturn earlier Minnesota state court decisions requiring the tobacco companies to provide plaintiffs with a computerized database compiled by defense attorneys.

Defense attorneys had contended that their litigation support database, used by defendants to index and quickly search through nineteen million tobacco litigation documents, was a privileged attorney work product and that reasonable discovery demands were satisfied simply by providing defendants with paper copies of the nine million requests records.

Defendants also contended that providing the plaintiffs with their litigation support database, whose development cost tens of millions of dollars, was an unconstitutional taking of property. Both the Minnesota courts and the United States Supreme Court disagreed and compelled discovery of the computerized document database. See *R.J. Reynolds, et al v. Minnesota, et al,* U.S. Court docket number 95-1611, cert. denied May 28, 1996.

Electronic Discovery requests are determined by traditional concepts governing discovery

Electronic media discovery (EMD) has the same objective as the production and discovery of paper documents; traditional discovery concepts apply, even though electronic records differ from paper documents because they are easy to copy in exactly accurate form and, at least superficially, appear to be easily altered. As the bulk of the nation's commerce, and much of its interpersonal communication, moves to purely electronic forms, it is inevitable that the information stored only in electronic records take center stage. Rule 34(a) now explicitly references electronic records; and, discoverable documents are now generally held by the courts to include computer hard drives, magnetic tapes, disks, digital tapes and microfilm. *See Crown Life Insurance Co. v. Craig,* 995 F.2d 1376, 1382 (7th Cir. 1993).

Electronic records, such as Email, have been crucial in many cases, the most famous of which was the Oliver North prosecution in which backup tapes disclosed incriminating Email that North previously attempted to delete. Discovery of purely electronic communications, such as E-mail, are now regularly ordered by federal courts. See, for example, *Seattle Audubon Society v. Lyons,* 871 F. Supp. 1291, 1308 (W.D. Wash. 1994). 1038.

Courts often order the production of computerized records in a usable electronic format

Even before Rule 34 was amended to explicitly reference electronic records, federal courts routinely applied Rule 34 to require both the production of actual computer records in electronically usable form and the entry upon premises where the respondent operates its computer systems, upon a showing of need. Actual inspection, use and manipulation of the respondent's computer system has been often ordered under appropriate protective measures because the discovered data is far easier to analyze and to use meaningfully in its native electronic form. The substantial need to expedite litigation, in fact, seems to have been the principal rationale underlying the recent state and federal R.J. Reynolds decisions.

Federal Rule 34(b), third paragraph, explicitly requires, for example, that

> a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories with the request.

This provision, and the requirement of Rule 34 (a) that records be produced or translated "into reasonably useable form," both suggest that electronic records shall be produced not only in the form of printouts, but in their original computer searchable format, the form "as they are kept in the usual course of business."

Only when masses of electronic data can be computer searched in the ordinary fashion can probative evidence be fully ascertained and any cross-relationships be effectively correlated. Otherwise, the parties seeking discovery will drown in a mass of data whose important relationships are not obvious to a person using pencil and paper. Thus, the annotations to Federal Rule 34 further provide that a discovery respondent may be required to use his electronic devices to

> "translate the data into useable form when that data as a practical matter may be made useable to the discovering party only through such electronic manipulation".

In Ball v. State, 421 NYS2d 328 (N.Y. 1979), for example, plaintiff was allowed the use of defendant's computer database of auto accident records to ferret out traffic accident patterns traceable to faulty road design. The New York Court specifically ordered discovery of the computerized documents because only in that fashion could a mass of relevant data be readily produced and analyzed for several different variables. Ball contains an excellent discussion of the general arguments favoring and opposing discovery of computerized data.

Likewise, the failure to preserve computerized records in an electronically searchable format resulted in the imposition of severe sanctions in *National Assoc. of Radiation Survivors v. Turnage*, 115 F.R.D. 543 (N.D., California, 1987) and in *William T. Thompson Co. v. General Nutrition Corp., Inc.*, 593 F. Supp. 1443 (C.D., Cal., 1984). See also 84 ALR4th *Discovery-Accident Reports*, particularly Sections 5 and 6, for an extensive discussion of circumstances under which personal injury plaintiffs might, upon a showing of need, obtain discovery of the computer data underlying accident reports and pertaining to accident history along particular stretches of public roadway.

Admissability of Electronic Records

Federal Evidence Rule 1001 (3) recognizes that verified digital copies of computer records are trustworthy and admissible by providing that

> . . . if data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original.

Subsection 4 then declares that electronic re-recordings are an acceptable counterpart duplicate when reproduced by techniques which accurately reproduce the originals.

Under Evidence Rule 1003, a duplicate is generally admissible to the same extent as an original unless: (1) a genuine question is raised as to the authenticity of the original; or, (2) under the circumstances, it would be unfair to admit the duplicate in lieu of the original. Subsection 2 does not appear to unduly concern the attorney seeking to make use of verified electronic materials.

The admissibility of computerized data is determined by ordinary evidentiary rules. *Mesquite v. Moore*, 800 SW 2nd 617 (Tex. App. 1990). However, because such data is more readily altered or destroyed, rather stricter foundational standards may be employed by the trial judge. See generally 7 ALR4th 8, *Admissibility of Computerized Records* and 32B Am. Jur. 2nd *Federal Rules of Evidence* Section 235. Thus, it's important to do pretrial discovery regarding the underlying design and reliability of the computer systems, of their associated databases and of the handling and protection of the original data from alteration. See,

Continued on page 22

Editor's column

Continued from page 2

"defendant plead [oof!] nolo contendere to one count of manslaughter;" in *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113, 1115 (Alaska 1993), "theories of negligent and intentional tort are plead [unnnh!];" in *Frontier Companies of Alaska. Inc. v. Jack White Co.,* 818 P.2d 645, 648 (Alaska 1991), the "amended complaint also plead [arggh!] an additional theory against Frontier;" and in *Darling v. Standard Alaska Production Co.*, 818 P.2d 677, 683 n. 13 (Alaska 1991), the plaintiff "has not plead [oooh, now stop it!] any claims for relief grounded on these theories."

I ask you, have our appellate courts ever set a more socially destructive precedent? What is to be done?

— Grammar Guardian

Dear Gram:

To answer your first question first: Yes, our appellate courts have set a more socially destructive precedent, and one which I'm surprised a language maven like you could have missed. I refer to that old bugbear "lie/lay/lain, lay/laid/laid," which ought to be on the written exam for judicial clerkships. At least our high courts' misuse of these verbs seems confined to criminal cases, due perhaps to the dark ambience of the genre. See *Velez v. State*, 762 P.2d 1297, 1305 (Alaska App. 1988) ("He pushed her down on the couch [and] laid on top of her"); *State v. Williams*, 653 P.2d 1067, 1069 (Alaska 1982) (witness "found Tom laying on the floor with a cord around his neck"); *Schikora v. State*, 652 P.2d 473, 475 (Alaska App. 1982) (a car "was laying in the lot uncovered"); *State v. Salit*, 613 P.2d 245, 248 (Alaska 1980) (witness "noticed the garment bag laying over a chair"); *Brown v. State*, 601 P.2d 221, 224, 225 (Alaska 1979) (witnesses "found the victim's body laying half out of the cab" as well as "a vial containing hashish oil laying on the ground"); *Peterson v. State*, 562 P.2d 1350, 1352 (Alaska 1977) ("there was a shotgun laying across his chest").

Of course, each of these offending sentences can easily be corrected by substituting the noun "chicken" for the subject of the "lay" clause and inserting an appropriate object, e.g. "there was a [chicken] laying [eggs] across his chest," but the storyline may suffer as a result.

For the most creative confusion of the "lie/lay" duo, see *One Cocktail Glass v. State*, 565 P.2d 1265, 1272 (Alaska 1977), in which a gambling house's bank "held the money that was being bet against by the players who had lain their bets on the table." The justice who wrote that sentence is no longer sitting, though presumably for unrelated reasons.

But back to "plead/pled" for a moment: My own tolerant dictionary gives both, and "pleaded" as well, as acceptable past tenses of "plead." But the rulebooks don't always get it right, as witness BPC's Alaska Rules of Court, above. My advice to you is to continue the good fight irregardless.

A tale of Tyonek,

Part I

1896 ONE HUNDRED YEARS 1996

ALASKA BAR ASSOCIATION

By Russ Arnett

In 1957 Stan McCutcheon was at the jail in Anchorage when two Tyonek residents asked to see him. Stan was a Democratic Party heavyweight as well as possibly being the best criminal defense lawyer in Alaska at that time. He had close ties to many of the Native villages, including Tyonek. Later he represented the village in a favorable sale of oil rights which enabled the village to build much-needed housing.

The men had been in jail for 30 days but did not know why. Stan determined that they had been charged by the United States with statutory rape. The charges had been brought by the law enforcement officer of the Bureau of Indian Affairs.

Two Tyonek women were about to give birth. The fathers were known and were the accused. The reason one of them remained unmarried was that the Russian Orthodox priest had not yet arrived for his annual visit to Tyonek. The parties involved were communicants of that faith. The Russian Orthodox marriage ceremony is stately and impressive. It includes wedding crowns being held over the bride and groom for a lengthy period and this requires dedicated physical exertion on the part of those holding the crowns. One of the defendants had cut and skinned logs and was preparing to build a home for his bride, their child, and himself. The other defendant, like many of his sex, was altar-shy.

An Assistant U.S. Attorney and the B.I.A. enforcement officer had decided to put an end to such immoral and felonious sexual enterprises of the young men of Tyonek.

One of the defendants said he had been approached by a man who did not identify himself as a peace officer but said he was from the Native Service and wanted to help him. The defendent also said the man from the Native Service asked the woman involved a number of obscene questions. The Native Service man told a large number of residents that he would charge them also if he had to. The defendant said they had never been told not to fornicate and the local custom was that you would marry the girl if she got pregnant.

These facts were duly reported by McCutcheon to the Anchorage bar at its morning coffee at the Oyster Loaf. Fourteen lawyers, almost half of the Anchorage bar, volunteered to defend the young men. Though the ages of the parties and the undisputed facts appeared to constitute statutory rape, we thought we could give the United States a good fight with a jury, with Stan McCutcheon as lead counsel. However, the District Judge was J.L. McCarrey Jr., a staunch Mormon, and we did not know what rulings he would make and what instructions he would give to the jury.

Indian law in Alaska was much less developed at that time. The doctrine of 44 "sovereignty" had neither been propounded nor argued in courts. I had heard mention of the "Five Major Crimes Act" and was able to locate it in the U.S. Code. Essentially it provided that in "Indian country" an Indian could only be prosecuted for five major crimes committed against another Indian, except in tribal courts. Forcible rape was one of the five major crimes but statutory rape was not. We thought it worth a try.

At the hearing on our petition for a writ of habeas corpus, Virgil Seizer of the Land Office testified that Tyonek was included in an educational reserve created in 1915 and he showed the boundaries on a map for the judge. Except for that, there was no Indian reservation.

Judge McCarrey held that Tyonek was "Indian country," dismissed the charges and discharged the defendants who had been unable to make bail.

One of the defendants told me that though he still intended to be married in Tyonek when the Russian priest came through, in light of the fact that his fiancee was about to give birth, they would like to be married. I arranged a church wedding although it was not Russian Orthodox. Both bride and maid of honor were radiantly pregnant. The minister did not seem to resent the provisional character of his ceremony.

The reception was held at a home for unwed mothers where both girls were staying so that they could give birth in Anchorage with medical assistance. We had a wedding cake and ice cream. The bride and groom were happy and proud. The groom later became a highly respected leader in Tyonek.

The decision was cited by the National Lawyers Guild in their Civil Liberties Docket. In 1973 the Native American Rights Fund requested copies of the court papers for the National Indian Law Library.

The Justice Department was upset by the decision. They found unacceptable the idea that any Alaskan Native was not subject to the jurisdiction of the civil courts. Bob Bartlett, Alaska's delegate to Congress, secured the adoption of legislation which made Alaska Natives fully subject to the jurisdiction of the civil courts, thus settling the matter (or so we thought).

Torts

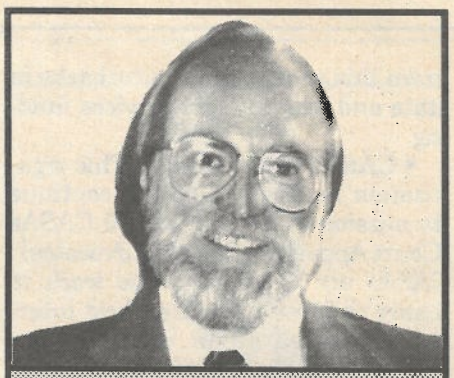
Insurance law highlights

Tumbleson/Kvasnikoff:

On July 8, 1996 the Ninth Circuit Court of Appeals certified the following question to the Supreme Court for the State of Alaska:

> Do the 1990 Amendments to the Alaska Motor Vehicle Safety Responsibility Act found at AS 20.20.445(a)-(c) implicitly repeal AS 28.20.445(h) so that there is no longer a "trigger" for the payment of excess underinsured motorist coverage?

Because this troublesome issue has ground claims handling to a halt for over a year, attorneys on both sides of the aisle hope that the Supreme Court will accept certification and issue a prompt ruling.



Michael Schneider

Interest and Rule 82 in UM/UIM Claims:

On June 21, 1996 the Alaska Supreme Court issued its decision in *State Farm Mutual Automobile Insurance Co. v. Harrington,* Op. No. 4360. Read it. The case decides a much contested issue. Carriers are now obligated to pay interest and Rule 82 attorneys fees on amounts awarded in UM/UIM cases.

$100,000/$300,000 Limit In Auto Policies is "Ambiguous":

Construing a State Farm Policy that provided that the limits of liability were "$100,000 each person, $300,000 each accident," the New York Court of Appeals recently held that the language could be "reasonably construed" either to make $100,000 the maximum any person could recover no matter how many people were injured or to provide $100,000 in coverage in the event that one person was injured but $300,000 (in essence, a combined single limit) if two or more people were injured. This ambiguity led the court to uphold a $190,000 arbitration award for a single plaintiff. See *Mostow v. State Farm Insurance Cos.*, No. 142, June 5, 1996, *Lawyers Weekly USA* No. 9908409 (8 pages). A copy of the opinion can be ordered from *Lawyers Weekly* by calling 800-933-5594. Other cases reaching the same result include: *Nichols v. State Farm Fire and Casualty Co.*, 175 Ariz. 354 (App. 1993); *Farm Bureau Mutual Insurance Co. v. Winters*, 248 Kan. 295 (1991); *Andrews v. Nationwide Mutual Insurance Co.*, 124 N.H. 148 (1983); and *Haney v. State Farm Insurance Co.*, 760 P.2d 950 (Wash. App. 1988).

Innovative billing strategies solving lawyer-client productivity paradox

The newest and perhaps most innovative way for lawyers to score victories for their clients is by adopting alternative billing strategies, according to the author of a new American Bar Association Section of Law Practice Management guidebook, *Billing Innovations: New Win-Win Ways to End Hourly Billing.*

"From the lawyer's point of view, billing by the hour may seem appropriate and advantageous. From the client's point of view, time is not what clients feel they are buying when they consult a lawyer. They want favorable solutions, results and benefits," said Richard C. Reed, a Washington lawyer and consultant, and author of *Billing Innovations* as well as two other books on alternative pricing strategies for lawyers.

In *Billing Innovations,* Reed explains how solo lawyers, small, medium and the largest law firms are using new billing and pricing methods to satisfy their clients. In addition, he discusses how to implement innovative billing procedures in a law firm, how to overcome resistance to change, and how to integrate strategic planning, quality management, compensation and technology systems to produce an environment where value billing methods can succeed.

Throughout 19 chapters, Reed explains why more than 20 types of innovative billing methods outpace hourly billing, or what he calls the "productivity paradox." The key for lawyers, he says, is understanding how innovative billing methods can result in greater efficiency and earlier resolution of disputes, and create more value for clients of all types.

The book also provides, as an appendix, the Uniform Task Based Management System: Litigation Code Set. The Code Set is the result of a tripartite initiative between the ABA Section of Litigation, The American Corporate Counsel Association, and a sponsoring group of major corporate law departments and law firms coordinated and supported by Price Waterhouse, LLP.

Beyond theory and examples of lawyers and law firms experimenting with alternative pricing methods, Reed includes actual copies of law firms' representation agreements, a helpful self-assessment checklist for selecting a billing method, a cost/benefit review of 14 types of innovative billing arrangements, and a series of compensation evaluation forms.

ABA Law Practice Management Section books and *Billing Innovations* ($144.95) are available by calling toll-free 1-800-285-ABA1 (2221) from 7:30 a.m. to 5:30 p.m. CT, or via the Internet at http://www.abanet.org/lpni/catalog.

Solid Foundations

Foundation approves grants of $193,000

On June 6, 1996 the Trustees of the Alaska Bar Foundation awarded IOLTA grants for the 1996-1997 fiscal year. Thanks to the many firms and attorneys who participate in the IOLTA program, the Foundation was able to allocate $193,000 to various non-profit organizations that provide legal services to the needy. This is $29,000 more than IOLTA resources were able to provide last year.

Four organizations received grants:

• **The Alaska Pro Bono Program.** In granting $180,000 to this organization, the Foundation sought to further its primary mission to provide legal services to the poor. Alaska Pro Bono provides the needy with free legal representation and sponsors many statewide classes and clinics. The program is one of the most successful voluntary legal services organizations

Mary Hughes

in the country, closing 1,200 cases a year. More than 50% of Alaska Bar Association members participate in the Pro Bono program.

The Trustees found it particularly important to fund the Pro Bono Program this year, given the cutbacks in state and federal legal services funding.

• **CASAs for Children.** This organization received $3,000 to continue its mission to train over 120 CASAs (Court Appointed Special Advocates). CASAs are volunteers who work to insure children have their best interests represented in court. These volunteers research information on a child's background in order to help the court system make more informed decisions about the child's future.

• **Catholic Social Services.** CSS was provided $6,000 for its Immigration/Refugee Program. CSS provides legalization assistance to Alaskan immigrants. The program provides several services, including: immigration litigation; small claims court filings; translation services; preparation of legalization and asylum appeals; traffic court appearances; and intervention in workers' compensation cases.

• **Alaska Women's Resource Center.** This organization received $4000 to help further its goal of providing legal information and referrals to needy women in the Anchorage Community. Last year, the Women's Resources Center provided 157 women pro bono legal services, and performed 1,320 legal referrals.

In addition to these four IOLTA grants, the Trustees also issued a grant to the Alaska Department of Law History Project using monies from the Foundation's general fund. The History Project, headed by Alaska Attorney General Bruce Botelho, aims to produce a written history of the Department of Law and the office of the Attorney General. The Foundation will match any private contributions the project is able to solicit, up to $2,500.

The Trustees are hopeful that increased participation in the IOLTA program by Alaskan attorneys and law firms will make more grants possible next year.

Probate

Continued from page 1

A corollary is that it is fairer to the children of a prior marriage to limit the relatively rarely used elective-share entitlement of a surviving spouse who entered into a late-in-life marriage.

The Article VI amendments (nonprobate transfers) update Alaska's current pay-on-death (POD) provisions and add transfer-on- death (TOD) provisions. These amendments add to the kinds of property that may be transferred without probate. The general purpose of these changes is to simplify the change of ownership upon the death of the owner, by avoiding the expense, delay, and complication of probate proceedings.

At least 19 states have enacted one or the other, or both, of these sets of Article VI provisions — either as part of their Uniform Probate Code or as the freestanding Multiple-Person Accounts Act and the Uniform TOD Registration Act.

COMMERCE

The Senate Labor and Commerce Committee introduced SB 300, picking up the NCCUSL's revision of the investment securities article of the Uniform Commercial Code. It passed without change, and was enacted as ch. 17, SLA 1996, effective January 1, 1997. Again, with minor, non-substantive, drafting-style changes, it is virtually identical to the national version.

This revision goes beyond the NCCUSL's 1978 amendments, which Alaska enacted in 1990. A key element is the recognition of current handling of investment securities by electronic means instead of paper and by the use of clearing corporations and securities intermediaries. The concept of "uncertificated securities," presented in the 1978 amendments, did not adequately solve the paperwork crisis that developed in the 1960's, but those amendments serve as a prelude to this revision.

The revision was promulgated by the NCCUSL in 1994, and, as of February 27, 1996, had already been enacted in at least 13 states and introduced in the legislature of at least 17 others. A major push is being made to get all jurisdictions to enact it soon, to provide the legal structure for the way securities are being handled in practice, and thus to avoid the need for additional federal statutes or regulations.

Late in the session, the House Labor and Commerce Committee introduced HB 553, to enact the NCCUSL's revision of UCC Article 5 (letters of credit). The committee plans to conduct a public hearing on this bill, presumably in Anchorage with statewide teleconference hookup, some time this fall.

The basic purpose of this revision is the update of the law governing the $200 billion U.S. letter-of-credit industry. It is necessary for Article 5 to be revised to recognize changes in technology and in commercial practices, addressing the paperwork overload that developed in the 1960's and the increasing number of issues that are no longer adequately dealt with in the decades-old current law. One of the main features of this revision is the simplification of Article 5. Another is its recognition of the Uniform Customs and Practices for Documentary Credits, a body of material that is used in connection with most international letters of credit.

UNCLAIMED PROPERTY

The governor introduced HB 434, based on the NCCUSL's 1995 amendments of the Uniform Unclaimed Property Act. The legislature' passed the bill as CSHB 434 (L&C) As of this writing, it was just recently transmitted to the governor, and he has not yet signed it. Its nominal effective date (in its sec. 13) is July 1, 1996, but the bill is not likely to have been signed by then.

The basic thrust of the amendments is to update the Act and simplify and streamline the reporting requirements. It also puts a statutory limit on the amount of finder's fee that a person can charge to search for owners of unclaimed property. I have not had a chance to review this bill in detail, nor to compare it with the NCCUSL's official version.

FRAUD

Representative Brian Porter introduced HB 72 in 1995 to enact the Uniform Fraudulent Transfer Act (UFTA) . However, a group of attorneys and others in Anchorage raised a question about application of the Act's protection to ***future*** creditors. That question is the subject of an article in the July/August 1995 issue of the *Bar Rag* (page 18).

Our current fraudulent transfer statutes (AS 34.40) are from the 1884 adoption of Oregon civil law for the *District* of Alaska, and can be traced back to the 1854 Laws of Oregon. In fact, our AS 34.40.010 is based on the *1571* English fraudulent transfer statute. Alaska never even enacted the Uniform Fraudulent *Conveyance* Act, promulgated by the NCCUSL in 1918.

As described by the NCCUSL, the basic purpose of this new 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 Bankruptcy Reform Act of 1978 changed federal law, and creditor-debtor relationships have changed, so that a re-thinking of state law on fraudulent transfers has become necessary. HB 72 responds to that need.

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, and the Act provides assurances that the corresponding obligations are satisfied. By last year, it had been enacted in at least 33 states.

None of Alaska's unique qualities is relevant to the argument against UFTA's protection of future creditors. UFTA poses no threat to legitimate trusts and estate planning. It should be enacted here.

THE CONFERENCE AND ITS METHOD

The NCCUSL does not own the label "Uniform . . . Act." Nevertheless, the legal profession has properly come to assume that an Act bearing that label is a product of the NCCUSL — as are those discussed here. The NCCUSL, in conjunction with the American Law Institute and the American Bar Association and various scholars and advisers, does the research and drafting — *at least* a two-year process. Enactment is then up to the states.

The NCCUSL is a nonprofit, unincorporated association, comprised of some 300 commissioners who represent the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands. The commissioners are state and federal judges and justices, law professors, public and private law practitioners, and legislators who are lawyers. The Conference is in its 105th year, and Alaska has been a member since 1912.

MORE DETAIL

As with my previous reports, 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 1995/96 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, including the explanatory section-by-section commentary, 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.

—Art Peterson is an Alaska Commisioner to the NCCUSL.

Bar People

Judith Bush has relocated from Fairbanks to Washington....**Nathan Callahan** is now with the P.D.'s office in Waterloo, Iowa....**Mark Christensen** has joined David Edgren and Kenneth Robertson to form the firm of Robertson, Edgren & Christensen....**Peter Giannini** has closed his law practice and is now House Counsel to Chugach Alaska Corporation in Anchorage. He has become of counsel to the Law Offices of Koval & Featherly....**Robin Gabbert** has joined the firm of Russell, Tesche & Wagg....**Kimberly Geariety,** formerly with Partnow, Sharrock & Tindall, is now with Owens & Turner....**Karen Hegyi** is working for the Barrow Tribal Court....The firm of Hedland, Fleischer, Friedman, Brennan & Cooke has been changed to **Hedland, Brennan, Heideman & Cooke**....**Ted King** is now living in Bellingham, WA....**Deborah Niedermeyer** is now working for Peter Aschenbrenner in Fairbanks....**Steve Porter,** counsel for Atlantic Richfield Co., has transferred to their Huntington Beach, CA office....**Fran Purdy,** formerly with ALSC, is now with the Office of the Long Term Care Ombudsman in Anchorage....**Jody Reausaw** is now with the office of Josephson & Bair....**Bryan Schulz**, formerly with Keene & Curral, and **Michael Holman** have formed a partnership in Ketchikan....**James Webb,** formerly with Faulkner, Banfield, et. al. in Juneau, has relocated to Arcata, CA.

Robin Jager Gabbert, formerly of Anchorage, is returning in June from the Netherlands where she has practiced since 1993 with Arthur Andersen & Co. as a tax attorney, and with Shutts & Bowen, where her practice emphasized international tax and commercial planning work. She will return to her former firm of Russell, Tesche & Wagg, whose practice emphasizes employment law, insurance defense, municipal law, and workers, compensation.

Robin Gabbert

Anchorage attorney and former Bar Rag movie columnist **Ed Reasor** is now a full time writer/producer of film and TV movies. Ed's first effort, *"Cold Heart of a Killer,"* based on Sue Henry's *"Murder On The Iditarod Trail,"* was viewed by 14 million people in January. Ed has 14 other film projects in various stages of production but is now accepting submissions of original screenplays, published books, or true stories from Alaska residents only. Contact him at I Love Movies, Inc., 6731 W. Dimond Blvd., Anchorage, Alaska 99502, or at 907-243-6071, fax: 243-4920

Roger E. Holl was chosen as Alumnus of the Year at the Alumni Banquet of the University of La Verne April 20 in Southern California. On March 16, 1996 he was married to Ludimilla Onojchenko, M.D.

Senior Attorney **Michael Stehle** has been named a principal of the Anchorage office of Bogle & Gates P.L.L.C., according to managing attorney **Douglas Parker**.

Stehle joined the firm as a litigator in 1991, after practicing law with the firm of Dorsey & Whitney in Minneapolis and Great Falls, MT. His current practice focuses on admiralty and maritime litigation as well as general civil litigation.

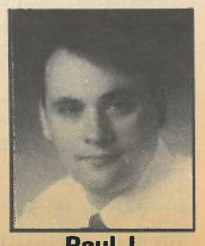
The announcement formalizes his inclusion in firm ownership. According to Parker, it acknowledges Stehle's accomplishments and fine reputation within his field.

Stehle received his J. D. with high honors from the University of Montana School of Law. He is a member of the American Bar Association, and the Anchorage Inns of Court. He is also admitted to the Bar in Montana, Minnesota, and Alaska, as well as the Ninth Circuit Court of Appeals. He is a volunteer member of the Board of Directors of Challenge Alaska, a nonprofit organization that provides recreational opportunities to people with disabilities.

Bruce B. Weyhrauch has become a shareholder in the law firm of Faulkner, Banfield, Doogan & Holmes. A graduate of Northwestern School of Law, Lewis & Clark College, he was admitted to the Alaska Bar in 1987. Weyhrauch practices in the firm's Juneau office with an emphasis in fisheries, government affairs, and natural resource development.

Bruce Weyhrauch

Paul J. Niewiadomski also has joined the firm as an associate. A 1995 graduate of the University of Michigan School of Law, he was admitted to the Alaska Bar in 1996. He practices in the firm's Anchorage office with an emphasis in Civil Litigation.



Paul J. Niewiadomski

Eric Dickman, a solo practitioner in Seattle who limits his practice to maritime issues (in Alaska and Washington), was recently admitted to the New York State Bar.

Missives from Micronesia

May 28, 1996

Former Juneau attorney Mark Sokkappa recently moved to Micronesia, in a position at the Chuuk Supreme Court. He reports on his experience in telefax message to Shelly Owens in Juneau.

We received your fax and letters. We're on island time. So excuse the late reply. Our phone hookup was also on island time.

We've been drinking a lot of coconut water, ice coffee, and mango juice. We've been sitting under the shade of palm trees looking out over the water at the glacier, Whoops, I mean coral reef and islands. I haven't arranged any diving yet but there is time, as with everything.

The first cases they handed me involved the impeachment of the Governor. I should have expected that I would walk into a constitutional crisis. Not that anybody really worries about it here, though.

We have had electricity most of the time we've been here. Running water comes and goes. Sort of like rural Alaska.

•

June 10, 1996

Wanted to say Hi to you and let you know how exciting it was to settle my first big case here. The impeachment trial of the state governor was scheduled to begin today. The Chief Justice and I used Tom Stewart's settlement method that took over 10 hours, but ended in the governor's resignation saving the state a fortune in time and money. I even stole Stewart's story about Holmes and Frankfurter and told it to the governor, while footnoting Tom Stewart as the source, of course. The Chief Justice was amazed as he watched the settlement progress. Instead of coffee at opportune times, though, we used an entire cooler of cold drinks. Since we were facing a constitutional crisis we even had to keep the police happy.

Pretty wild day. It is the hardest I've worked in months. I really love seeing the cases from the other side of the bench. The Judges are very good here. Of course, we operate at the pace of a letter or two a day interrupted by two-hour conversations, which suits me fine.

We're still trying to sell our house. Only one offer so far.

How's Juneau doing? Everyone must be out fishing. Say Hi to the Juneau Bar Assn. for me.

Pradell and Associates recently presented $500 in scholarship and achievement award funds to Clint Hess and Paul Manson, both members of the Anchorage Youth Court who were selected by the Youth Court Bar members as those who best demonstrated the qualities of: Leadership, Effort, Aptitude, Dedication, Ethics, Responsibility, & Service (spelled "Leaders") while serving as a member of the Anchorage Youth Court Bar. The awards were presented at the fourth annual AYC Dessert Reception at the Anchorage Museum of History and Art in May. Shown above is Clint Hess receiving an achievement award, presented by attorney Steven Pradell. Cary Carrigan of KIMO and incoming AYC Bar Association President Kori Callison are also pictured.

Juneau attorney volunteers in Tanzania

Elizabeth Cuadra's idea of a good vacation is not what some would imagine. Instead of heading to the beach for sun and sightseeing, the Juneau attorney recently spent three weeks volunteering in a remote village in Tanzania, East Africa.

Cuadra, who recently retired, said volunteering provided her with a rare, firsthand experience of life in a developing country. She was part of a team of North American volunteers who worked on various community development projects in the village.

She worked with local people and other volunteers to repaint a classroom building at the village's secondary school and also taught English and civics to the students. "The school administrators, teachers and students all were very welcoming," she said.

At the invitation of the school's civics teacher, Cuadra presented lectures on topics such as government in the United States, the principles of democracy and women and development.

The school started about seven years ago with the help of volunteers. Before that, students traveled to other villages for high school or ended their education with elementary school. Today, more than 400 students attend the school, many coming from hundreds of miles away for an education they cannot receive elsewhere. Over the years, dozens of teams of volunteers have helped build dormitories, make desks and chairs, dig trenches for electricity and teach students.

Cuadra said the community deeply appreciates the help of the volunteers and hopes that more volunteers will come to help at the school, particularly in teaching students in subjects such as English, civics, science and math.

The volunteer programs are coordinated by Global Volunteers, a private, nonprofit organization based in St. Paul, Minn. Founded in 1984, Global Volunteers sends teams of volunteers to Tanzania and sites in 14 other countries year-round. Volunteers work under the direction of local leaders and alongside local people.

Most volunteers view this opportunity as an alternative to a standard vacation and, as such, the volunteers pay their own costs for participation. The organization is not subsidized by any government or religious agency.

The cost of developing-country service programs range from $995 to $1,725 excluding air-fare. European programs are $1,690 to $1,995, and USA programs are $350. All service-program expenses, including air fare, are tax-deductible. The fee includes orientation materials, ground transportation, food and lodging at the site, project and program expenses.

Three-week trips are scheduled throughout the year to Indonesia, Tanzania, Vietnam, Poland, China and Russia. Two-week trips are scheduled to Jamaica, Costa Rica, Ecuador, Mexico, Spain, Italy, Turkey and Greece, with one-week programs offered in the southern United States.

For a current schedule and more information on each program, contact Global Volunteers at 1-800-487-1074, 375 E. Little Canada Rd., St. Paul, Minnesota 55117.

Bankruptcy Briefs

Self-incrimination in bankruptcy

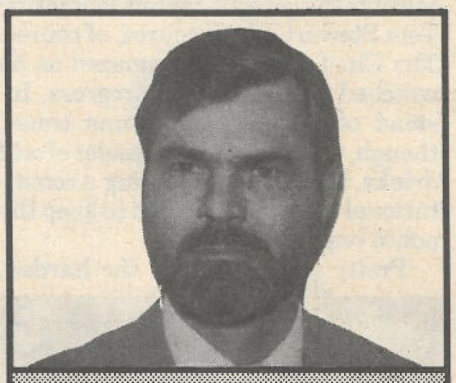
Not infrequently a bankruptcy proceeding, civil in nature, involves criminal implications as well. This can arise within the context of the bankruptcy proceeding itself or as a matter ancillary to the bankruptcy proceeding.

For example, a debtor making a false statement in connection with bankruptcy proceedings not only faces denial of discharge under BC §727(a)(4) but, also, may be prosecuted criminally under 18 USC §157(3); or an act that may bar discharge of a particular debt, *e.g.,* fraud or embezzlement under BC § 523(a)(4), may also constitute a criminal act, *e.g.,* 18 USC §§ 1341 [mail fraud], 1343 [wire fraud], or 1961 [RICO]. Thus, when the debtor is confronted with a civil action to bar discharge or determine dischargeability of an obligation, the threat of criminal prosecution may lurk in the background. This, of course, gives rise to the Fifth Amendment privilege against self-incrimination.

Whenever the possibility of criminal prosecution exists, the consensus of criminal defense experts is that a client is well advised to say nothing beyond giving one's "name, rank and serial number."

But what are the collateral effects should one simply "take the Fifth" as a matter of course? Asserting one's privilege against self-incrimination cannot be used as a grounds for barring discharge, unless the debtor has been granted immunity. [BC § 727(a)(6)(B); *In re Martin-Tigrona,* 732 F2d 170 (CA2) *cert. denied,* 469 US 859 (1984)] Nor is refusal to testify in a bankruptcy proceeding on self-incrimination grounds necessarily grounds for denial of confirmation of a chapter 11 plan, unless the refusal to testify impedes basic administration of the case. [*In re McCormick,* 49 F3d 1524 (CA11 1995)]

Nonetheless, "taking the Fifth" may have unpleasant, if not potentially disastrous, adverse consequences in a bankruptcy proceeding. A defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege. It is not only permissible to conduct a civil proceeding at the same time as a related criminal proceeding, but, also, unlike a criminal case, the trier of fact in a civil case may draw adverse implications from the invocation of the Fifth Amendment



Thomas Yerbich

privilege against self-incrimination. [*Baxter v. Palmigiano,* 425 US 308, 96 SCt 1551, 47 LEd2d 810 (1976)] Thus, in a bankruptcy proceeding, be it the main case or a related adversary proceeding to bar discharge or determine the dischargeability of a debt, the court may infer "guilt" from a refusal to testify. In addition, using the Fifth Amendment privilege as a shield may bar the introduction of other exculpatory evidence. For example, refusal to testify on crossexamination may result in direct testimony being stricken [*Lawson v. Murray,* 837 F2d 653 (CA4) *cert. denied* 488 US 831 (1988); **United States v. Baker,** 721 F2d 647 (CA8 1983)] or, refusal to testify at a deposition may result in an affidavit being stricken and entry of summary judgment in favor of the opposing party because there are no genuine material issues of fact to be tried [*see United States v. Parcels of Land,* 903 F2d 36 (CAl 1990)].

Nor may the Fifth Amendment be used as a sword in that a refusal to submit to a Rule 2004 examination or deposition may result in an affidavit submitted in support of a motion for summary judgment being disregarded. [*In re Edmonds,* 934 F2d 1304 (CA4 1991)]

One need not, however, necessarily either suffer an adverse decision in the civil proceedings from the adverse inference drawn from "taking the Fifth" or risk criminal conviction from the testimony given. A remedy does exist: stay of the civil action pending completion of the criminal proceedings.

There is no Constitutional requirement that a civil case be stayed pending the outcome of criminal proceedings. [*Federal Savings & Loan Insurance Corp. V. Molinaro,* 889 F2d 899 (CA9 1989)] In the absence of substantial prejudice to the rights of the parties involved, simultaneous parallel civil and criminal proceedings are unobjectionable. However, a court may nevertheless decide in its discretion to stay civil proceedings when required in the interests of justice. [*Securities Exchange Commission v. Dresser industries,* 628 F2d 1368 (CADC), *cert. denied,* 449 US 993 (1980); *see generally United States v. Kordel,* 397 US 1, 90 SCt 763, 25 LEd2d 1 (1970)]

A decision whether to stay civil proceedings in the face of a parallel criminal proceeding is made in light of the particular circumstances and the competing interests involved; including consideration of the extent to which the defendant's Fifth Amendment rights are implicated. [*Federal Savings & Loan Insurance Corp. v. Molinaro, supra*] The court should generally consider: (1) the interests of the plaintiff(s) in proceeding expeditiously with the civil litigation or any particular aspect of it, and the potential prejudice to plaintiff(s) of a delay; (2) the burden that any particular aspect of the proceed ing may impose on the defendant; (3) the convenience of the court in managing its case calendar, and the efficient use of judicial resources; (4) the interest, if any, of persons not parties to the litigation; and (5) the interest of the public in the pending civil and criminal litigation. [*Keating v. Office of Thrift Supervision,* 45 F3d 322 (CA9 1995)]

The reality or imminence of the criminal prosecution is, perhaps, the key to assessing the degree to which Fifth Amendment rights are implicated. Where an indictment has not yet been returned and there is a mere potential for criminal prosecution, implication of the Fifth Amendment privilege is discounted. [*Federal Savings & Loan Insurance Corp. v. Molinaro, supra*] Are there alternatives available that may reduce the degree to which the Fifth Amendment privilege is implicated? For example, may the civil proceeding be bifurcated and the portions of the civil action that parallel the criminal proceedings severed so that the civil action may continue as to the balance? As long as the civil action and criminal proceedings are not predicated upon identical conduct or evidence, implication of the Fifth Amendment privilege is minimal. [*See Keating v. Office of Thrift Supervision, supra*]

The other factors delineated by the Ninth Circuit in *Molinaro and Keating,* should rarely, if ever, outweigh the inherent prejudice to the debtor if a criminal indictment has been returned and a criminal proceeding is actually in process. On the other hand, where implication of the Fifth Amendment privilege is practically nonexistent, such as where there is but a mere remote possibility that the debtor could be prosecuted criminally, stay of the civil proceedings should rarely, if ever, occur. Between the two extremes lies the middle ground where implication of the defendant's Fifth Amendment privilege exists beyond a mere potentiality but not necessarily a certainty, such as situations where there is an active criminal investigation but the defendant has not been charged. In those cases, the court must weigh the competing interests against the implication of the defendant's Fifth Amendment privilege.

Probably the principal factor considered in those instances is the detriment or prejudice the plaintiff(s) will suffer if the civil trial is delayed. The principal issue is the probable length of the delay: the longer the delay, the greater the potential prejudice to plaintiff(s). A short delay, to perhaps allow the criminal investigation to sort itself out, like a short continuance of the trial, should have little prejudicial effect upon plaintiff(s). The potential length of the delay is probably also a significant factor to be considered in assessing the detrimental effect upon the court's case calendar or the efficient use of judicial resources.

Not to be overlooked are the interests of third parties. For example, if the civil action involves denial of discharge under § 727, all creditors have an interest that may be prejudiced in some way by a delay, particularly if that delay is of inordinate length. If the civil action involves a fraudulent transfer, the transferee has an interest in having its rights in the property adjudicated and the transfer either avoided or the cloud on the title removed.

The burden on the defendant, other than implication of a Fifth Amendment privilege, also needs to be considered. For example, the potential adverse impact on preparation of a defense in the criminal proceeding if the defendant is required to simultaneously defend the civil action, or the potential for scheduling conflicts. The due process rights of a defendant in a criminal proceeding go beyond just the right to counsel, protection against self-incrimination, and searches and seizures specifically mentioned in the constitution. Due process requires that a criminal defendant be given adequate opportunity to prepare and present an adequate defense to the charges. [*See, e.g., United States v. Bogard,* 846 F2d 563 (CA9 1988)] To this, the court must also be sensitive.

Finally, as *Keating* reminds us, the interest of the public in high profile/highly publicized cases must not be allowed to override the individual defendant's due process rights. However, in those cases where there is a strong public interest factor, such as the public confidence in the enforcement scheme of thrift institutions present in *Keating*, it must be weighed against the prejudicial effect on the individual defendant's rights.

In summary, in making its determination of whether to stay civil proceedings, the court should examine all relevant factors. A stay of civil proceedings pending the outcome of a parallel criminal action is not, indeed should not be, granted as a matter of course. The court should, even where an indictment has been returned, ascertain what, if any, alternative action may be taken to reduce implication of the defendant's Fifth Amendment rights or minimize the burden on the defendant short of staying the civil action. While the court must remain sensitive to and guard the rights of defendants, it should do so in a manner that minimizes the prejudicial impact on the rights of other interested parties.

The Bar Rag welcomes articles from its readers

STATE COURT NEWS

Anchorage court facilities near completion

By Stephanie Cole

Artwork Arrives Soon

With the opening of the Nesbett building on May 20, Phase I of the Anchorage Courthouse Expansion Project is essentially complete.

Unfortunately, most of the artwork wasn't completed and installed in time for the building dedication, so an additional ceremony to honor the artwork and artists is planned for later this summer.

Susie Bevins-Ericsen has designed a suspended, perforated metal sculpture for the two-story main lobby. According to Bevins-Ericsen, the design represents humanity's spiritual journey in search of truth, and is derived thematically from Alaska Native legends and imagery. Lee Wallace is carving two, 10-foot red cedar totem poles for the building exterior.

In the upper windows of the large lobby bays on floors three through six, Vivienne McConnell is installing stained glass in abstract, intricate patterns. The patterns and colors echo colors and lines present elsewhere in the building, and are different on each floor.

D. Lowell Zercher has designed a series of wall clocks for the building (seven inside and one mounted outside the main entrance) in a variety of styles from traditional to whimsical.

Justice Dana Fabe has donated a 6 1/2 ft. by 4 ft. monoprint, "Rain Coming" for the new jury assembly area. The Alaskan landscape by Professor Bill Brody of the Art Department at the University of Alaska Fairbanks, hung in Justice Fabels courtroom when she was a superior court judge.

Phase II of the project, the remodeling of the existing Boney building to accommodate court functions which weren't moved into the new Nesbett building, is well underway. Phase II is currently scheduled for completion by early September. After the remaining occupants of the old district courthouse are moved into the remodeled space in the Boney courthouse, the demolition of the district courthouse (Phase III) will begin. The demolition will take place in the fall of 1996 or spring of 1997, depending upon how soon the building can be released to the contractor. The final step in this project will be the construction of a landscaped, open garden square in the footprint of the old district court building.

Also currently underway is a major refurbishing of the former *Anchorage Times* buildings across the street from the Nesbett Courthouse. The court system purchased these buildings in 1994 to house the court's statewide administrative offices. Occupancy is scheduled for mid-October.

Court Responds to New Legislation

At the end of each legislative session, the court responds with a flurry of activity to statutory changes which necessitate changes in court rules, procedures and forms. The passage of the "Domestic Violence Protection and Victim Protection Act of 1996" will result in a major revision of court procedures and forms. The legislature also approved a relocation of coroner functions from the court system to the State Medical Examiner's Office within the Department of Health and Social Services. A transition team is currently working to effect this change in a manner which minimizes the impact on decedents' families. The new system will streamline and modernize death reporting and death investigations throughout Alaska. For information about changes in coroner and public administrator procedures, contact Janna Stewart in Anchorage at 264-8237.

Court Committee Looks at Racial and Ethnic Bias

In September 1995, the Alaska Supreme Court created the Court Advisory Committee on Fairness and Access, to examine issues of racial and ethnic bias in the state court system. The Committee, co-chaired by Justice Jay A. Rabinowitz and Fairbanks Superior Court Judge Mary E. Greene, plans to forward to the Supreme Court a report and recommendations for changes and improvements to the state courts by December, 1997. This Committee's work mirrors inquiries currently underway in many other state courts to explore similar issues and concerns.

The committee has formed six subcommittees: Rural Access (cochaired by retired Kodiak Superior Court Judge Roy Madsen and Bethel Superior Court Judge Dale Curda) , Language and Culture (chaired by Kotzebue Superior Court Judge Richard Erlich), Disparate Confinement (chaired by Fairbanks Superior Court Judge Mary E. Greene) , Court Employment Practices (chaired by Justice Jay A. Rabinowitz) , Consumer/User (chaired by Sitka Superior Court Judge Larry Zervos) , and Jury Composition (chaired by Anchorage Superior Court Judge Larry Card.) Members of the subcommittees are volunteers from culturally, ethnically and geographically diverse backgrounds.

The Committee has held one public hearing in Anchorage, and expects to hold other public hearings later this year. Information will also be gathered from surveys, focus groups and other research methods. Attorneys are encouraged to share their experiences, and the experiences of their clients, with the Committee. For further information about the work of the Committee, call Court Analyst Jill DeLaHunt at 264-8227.

State Court on the Internet

The dial-in Alaska Appellate Courts Bulletin Board System (AACBBS) has been discontinued. You may now obtain electronic versions of appellate opinions and other Alaska Court System information on the court's home page on the Internet at http://www.alaska.net/~akctlib/homepage.htm. The Alaska Court System has offered its opinions via the home page since August 1995.

Anchorage Law Library Will Close in August

The Anchorage Law Library remains in the Boney Courthouse, but will expand into part of the area formerly occupied by the Clerk's Office. As part of that expansion, the library will be closed for as long as a week in mid or late August for remodeling. Notices will be posted well in advance of the closure.

Other details

Clerk of Court Charlene Dolphin offers many thanks to the bar for your patience during this past month during the move to the Nesbett Courthouse. The move went very well, thanks in large part to extremely hard work by many court employees and a very efficient and friendly moving company, Mayflower World-Wide Movers.

Unfortunately, we have had numerous computer and phone problems since we moved, which I am sure have frustrated you as much as they have us. The Bar Code program is finally up and working as of Friday, May 31. Without this program, we have not been able to locate all the files to process motions, defaults, etc. in a timely manner. For this I apologize and promise that we'll be working very hard in the next few weeks to get back to full working order and to process all the documents that have become back logged since the move began.

As you have probably noticed, we have a centralized customer service area in the new Nesbett building. The new supervisor for this division is Cathy Franklin, formerly the Accounting Division supervisor. The centralized customer service function takes the place of four public counters in the Boney building. We hope that this change will make it easier for you and your staff to do business with us. Because most of the staff in this division are new and not all the staff are cross-trained in all areas, we have had to delegate certain clerks to handle specific functions, such as cashiering, small claims, etc. Eventually, all clerks in this division will be trained to provide full service to you.

In April, the superior court Appeals Division was combined with the Civil and Small Claims Division. The supervisor for the new Appeal/Civil/Small Claims Division, Julie Anderson, has been very busy in reorganizing and training. The clerks now function as case managers with each clerk assigned a specific group of cases (e.g., one clerk is assigned all cases with case numbers ending in 1,2 & 3 etc.) Under this system, we are already noticing improvement in efficiency and reduction in errors. The case managers will also be trained to process certain documents (such as substitution of attorneys and stipulations) which were previously handled by the legal technicians, thus relieving much of the backlog for the legal technicians. We will continue to identify other functions which can be done by the case managers to help reduce the time it takes us to process motions, defaults, etc. Under this new system prior to the move, we were processing documents within 1-2 days of receipt of the files by the case managers and legal technicians. We have, of course, lost a little ground because of the move, but within a month we hope again to meet our goal of processing documents within 1-2 days of receipt of the files by this new division.

During the next year, we hope you see many positive changes as we continue to streamline procedures and provide additional training for our staff. I encourage you to let me know if there are specific procedures you want us to review or if you have ideas about how we can better serve you.

Again, thank you for your patience and support and I hope you are enjoying our beautiful new courthouse as much as we are, says Dolphin

From the hi-tech mail bag: the 'net & games

For attorneys who've been intrigued about trying the Internet, the World Wide Web thereon, and other possibilities of online cruising, Anchorage's Loussac Library has an answer.

ANCHORAGE MUNICIPAL LIBRARIES

As of this summer, the library has computerized its entire catalog, and expanded the ability of users to access the Internet. Moreover, library card-holders need not run down to the library to do it.

The new database access provides links to magazine and newspaper indexes; more than 800 journals; the Library of Congress; and soon, the Web, itself. Municipal Librarian Mary "Mo" McGee says the news system provides greater speed and the ability for users to do subject searches throughout the national database maintained by Data Research Services. The system also links to SLED, the University of Alaska-developed internet access (short for Statewide Library Electronic Doorway). SLED also provides the full database offered by State of Alaska offices, the Alaska Court System, and federal courts.

Remote access is supported by the system; the library provides a PIN number for card-holders, who then may access the new catalog and SLED internet system with their off-site modems. (The dial-in access number is 562-SLED.) For the non-techie user, the library also offers on-line help.

•

Bar Rag readers may recall a review we published a couple years ago for the *OBJECTION!* computer game that simulates a trial situation.

TransMedia, the Louisiana-based corporation that developed the game with attorney author Ashley Lipson, has just published *Civil Objection!!* as a follow-up to the first game. This one features auto negligence, and fictional Lisa Lamborghini, who "can't get into her car without being rear-ended." The game is based on liability/traffic laws for all 50 states (the player selects the appropriate state of jurisidiction at game start-up), with cross-references to case law and the references *Comprehensive Evidence* and *Testimonial Evidence.* As in the first game, the game-player responds as plaintiff attorney to a series of preloaded questions.

This version of courtroom role-playing is improved over the previous with better sound, grpahics, and animation, and the second game also adds documentary and demonstrative evidence. The player must reach a specific level of proficiency to advance in each of the 8 levels of play, and in this version, the judge is signficantly more impatient at slow response. Like the first game, *Civil Objection!!* is certified for CLE credits in 15 states (excluding Alaska) and comes with a 250-page guide to testimonial evidence (*Rules of Evidence for Witness Testimony*). It's tricky to load and start, and light on program documentation, but fun once it's running on PC or Mac. Depending upon the manuals ordered, the game sells for $149-$299. Reach TransMedia at 1-800-832-4980.

SLED

The Statewide Library Electronic Doorway (SLED) was developed through a joint effort of librarians from around the State and funded by both the Alaska State Library and the Elmer E. Rasmuson Library, University of Alaska Fairbanks.

SLED is a service providing computer-based menu access to electronically available state, federal and worldwide information of interest to Alaskans. SLED can access library catalogs and information databases from around the world via the Internet.

SLED is available 7 days a week, 24 hours a day to any home or business with a dial-up computer connection or direct Internet access. **But I don't have a computer and modem . . .** Anchorage Municipal Libraries provides public access to SLED during library open hours. Ask a Reference librarian for help locating terminals with SLED access.

How to connect

Dial-up access Alaska net
In Anchorage: 258-7222
Settings: No parity - 8 data bits - 1 stop bit.
Press return twice. If garbage characters appear, or if a prompt is requested, type the letter o. At the login and password prompts, type SLED.

West® LAW LEADS

July 12, 1996

West *Law Leads* is produced by West Information Publishing Group (WIPG), which consists of West Publishing and Thomson Legal Publishing. This weekly report is for news media covering law, business and technology. For more information, contact Jennifer Moire of WIPG at (612) 687-6064 or by email at jmoire@westpub.com.

Dispute heats up over Internet domain names

West's Legal News --A growing storm between owners of Internet domain names and trademark owners is moving directly over InterNIC, a small company operating under an agreement with the U.S. government as the registry for "domain" addresses. In an effort to avoid liability, InterNIC established a name-granting policy that gives deference to trademark owners over others. The Electronic Frontier Foundation, a public policy group, says it is preparing to bring a class action suit contesting the policy. David Graves of Network Solution, Inc., which operates InterNIC, says in a press release issued June 24, "The Policy is reasonable in the absence of legislation addressing the relationships, if any, between trademarks and domain names, and recognizes that disputes must be resolved by the parties, either by negotiations or in the courts."

25 states adopt 'good faith' job reference laws to shield businesses from liability

West's Legal News--In response to fear among businesses that divulging employee job performance information to prospective employers may land them in court, state legislatures have been passing or introducing bills to protect employers who provide "good faith" job references. Prior to 1995, only five states had employer-immunity laws. For fear of being sued, many companies put in place "no comment" policies when prospective employers called with questions. Organized labor or trial lawyers' associations opposed the bills in many states.

Judge who appeared on 'Crossfire' not immune from civil suit

West's Legal News--A judge who appeared on the "Crossfire" television program to defend his controversial child custody decision is not entitled to absolute immunity from defamation and false light claims filed by the child's mother, who was appealing the judge's decision at the time of the TV appearance, the West Virginia Supreme Court of Appeals has unanimously ruled. West Virginia's highest court concluded that Judge Hey's television appearance was not an official judicial act because it was not a function normally performed by a judge. In 1989, Judge Hey ordered Judith Roush to choose one of three alternatives: marry her boyfriend; live separately from her boyfriend; or lose custody of her daughter. Judith Roush had also sued Pat Buchanan (one of the hosts of Crossfire), Cable News Network, Inc., and Turner Broadcasting System, Inc., CNN's owner, but they settled.

NALFMA turns to West for home page

The National Law Firm Marketing Association (NALFMA), an organization that sprang up after the 1977 Supreme Court decision easing restrictions on attorney advertising, has decided to give West the job of designing and maintaining the NALFMA Internet site. The site will include a discussion forum for members, membership information, membership form, and an archive of articles on marketing and communications. West hopes that the site will showcase how marketing can be done on the Internet.

Headnotes!

An oldie but goodie

This week's headnote falls under the Key Topic Criminal Law and Key Number 110k308 k.Innocence.

U.S., 1932 Defendants accused of crime are presumed to be innocent until convicted. *Powell v. State of Alabama*, 287 U.S. 45, 53 S.Ct. 55

Headnotes are summaries of points of law found in judicial opinions, are written by attorney/editors at West, and are classified according to West's Key Number system.

Visit West Publishing on the Web:
http://www.westpub.com

NEWS FROM THE BAR

ALASKA BAR ASSOCIATION ETHICS OPINION NO. 96-4
Billing Practices — Propriety Of Billing More Than One Client For The Same Hours

The Committee has been asked whether it is appropriate to bill more than one client for the same hours[1] when the lawyer has agreed to work on an hourly fee basis. In the Committee's opinion, it is not appropriate to bill more than one client for the same hours.[2]

Several billing practices involving more than one client and the same hours spent may be criticized. First, a traveling lawyer bills one client for travel time and another for work performed while traveling. Second, a lawyer appears for multiple clients during a single trip to the courthouse, but charges each client for the total time spent at court. Third, a lawyer recycles work product, and charges the client for the same time it took to originally prepare the brief.

The model rules provide that a lawyer's fee shall be reasonable.[3] ARPC 1.5(a). In determining the reasonableness of a fee, the following factors are considered:

(1) The **time and labor required,** the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;

(2) The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee is fixed or contingent.

Id. (emphasis added). As the rule suggests, what constitutes a reasonable fee will vary with the particular circumstances. *See Fourchon Docks, Inc. v. Milchem, Inc.*, 849 F.2d 1561 (5th Cir. 1988) ("language of [Rule 1.5(a)] as well as state court decisions have held that the guidelines are permissive and that consideration of them all is not mandatory."). Rule 1.5 recognizes there are many different types of fee arrangements. The Committee does not mean to suggest that the practices identified in this opinion would never be permissible.[4] Nonetheless, in the case of an hourly fee arrangement, the time and labor spent on the project must be a paramount factor.

Further, Rule 7.1 prohibits a lawyer from making false or misleading statements about the lawyer's services. ARPC 7.1. As noted in the comment, "[t]his rule governs all communications about a lawyer's services . . . ." ARPC 7.1 cmt. While this rule does not specifically address a lawyer's bill for services, it applies to all communications. Thus, a lawyer's bill for services may not be misleading.

The lawyer who has agreed to bill a client on the basis of hours expended cannot ethically bill the client for more than the actual time spent. In each of the scenarios posed above, the lawyer is charging the client for more time than the lawyer actually spent on the specific project. When viewed from the client's perspective, or the perspective of what fee the lawyer has actually earned, the ethical obligation seems clear.

For example, a lawyer spends 3 hours traveling to attend a deposition in Seattle. If the lawyer decides to spend the time on the airplane drafting a motion for a different client, he or she may not charge both clients, each of whom agreed to hourly billing, for the time during which he was traveling on behalf of one client, but drafting a document on behalf of another. The lawyer has not earned 6 billable hours. Similarly, the client who agrees to pay a lawyer on the basis of hours spent, would not expect to pay the lawyer when he or she was not actually working for that client.

In another example, a lawyer schedules court appearances for three different clients on the same day. The lawyer spends 3 hours at the courthouse, the amount of time he or she would have spent for each client if it had not been for the fortuitous scheduling. The lawyer may not bill each client 3 hours. The lawyer has not earned 9 hours of billable time. The lawyer has earned no more than a single fee for the morning's work. While it might be reasonable for the client to pay for 3 hours for each hearing if each one was conducted separately, the efficiency and benefits of arguing all three motions on the same day should inure to the benefit of the clients.

In a final example, a lawyer performs research on a topic for one client which later turns out to be relevant to a question raised by a second client. The lawyer may not charge the second client the same number of hours for the recycled work product that he or she charged the first client. The lawyer may only charge the second client for the actual time spent updating or modifying the brief, unless the fee agreement provides otherwise. Similarly, a lawyer who spends 1 hour recycling a set of discovery for use in a personal injury case has not earned more than 1 billable hour in fees. In addition, the client likely expects that the lawyer's hourly rates will reflect the efficiencies which may be gained because the lawyer has significant experience in a particular area of the law.

In summary, where the client has agreed to pay the lawyer on an hourly basis, the economies associated with a lawyer's efficient use of time must benefit the client rather than giving the lawyer an opportunity to charge a client for phantom hours.

Approved by the Alaska Bar Association Ethics Committee on May 2, 1996.

Adopted by the Board of Governors on May 13, 1996.

1 This opinion is limited to hourly fee billing arrangements.

2 In reaching this conclusion, the Committee has considered and agrees with that portion of the American Bar Association Formal Opinion 93-379 which addresses this subject.

3 The focus of the predecessor Model Code of Professional Conduct was somewhat different in prohibiting fees that were "clearly excessive." DR 2-106.

4 This opinion is limited to those circumstances where the lawyer and client have agreed that the fee will be based upon the hours worked.

Robert Price disbarred; other lawyers placed on interim suspension

The Alaska Supreme Court on July 1, 1996 disbarred former Anchorage lawyer Robert Price. The Bar Association began investigating Price in October 1994 after his former law partners notified the Bar that Price had apparently misappropriated $10,000 of client trust funds for himself. At about the same time, Price left Alaska and attempted to resign from the Bar.

Because of the pending disciplinary investigation, the Board of Governors did not allow Price to resign. Over the next year, Bar Counsel tried to locate Price, serve him with the charges against him, and obtain a response. However, Price disappeared after leaving the state. He could not be located either at his address of record with the Bar Association or at other addresses obtained by the Bar.

Ultimately Bar Counsel served Price by publication with a petition for formal hearing. Because he failed to answer the petition, the charges against him were deemed admitted. A hearing committee considered the investigation record and recommended that Price be disbarred. On review, the Disciplinary Board concurred, and forwarded its recommendation to the Supreme Court.

In addition to ordering Price's disbarment for misappropriating client funds, the court censured him for failing to answer the charges against him, and ordered that he be publicly reprimanded for not maintaining a current service address. The public file on this case can be reviewed at the Bar Association office in Anchorage.

• • •

Several Alaska lawyers have been placed on interim suspension by the Supreme Court.

Three lawyers are on interim suspension under Bar Rule 26(a) following conviction of a serious crime. Juneau lawyer Norman E. Staton, Jr. pleaded guilty to felony cocaine possession with intent to distribute. Fairbanks lawyers Dennis M. Bump and Gerard R. LaParle, who represented Bump in his divorce, were accused of involvement in a scheme to hide some of Bump's assets from his wife. Bump entered a plea agreement to felony theft. A jury found LaParle guilty of a scheme to defraud, theft and perjury. Staton, Bump and LaParle will remain on interim suspension pending final disciplinary action (by way of public hearings or stipulations for discipline).

A fourth lawyer, John G. Frank, formerly of Juneau, agreed to interim suspension while a stipulation for final disciplinary action is considered. Frank is accused of several acts of dishonesty related to his unlawful entry into a building. In another matter, he is accused of sending altered documents and making false statements to a client.

POSITION ANNOUNCEMENT

The U.S. District Court seeks a Staff Attorney. Applicants are required to be graduates of an accredited law school and admitted to the Alaska State Bar. Under general direction of the Chief Judge, the position involves providing legal and case management assistance to the court for both Civil and Criminal cases involving pro-se litigants. This is a part-time position (20 hrs/week) funded at $29,458+25% COLA. A complete Position Description is available from the Clerks Office at 222 W. 7th Ave. Interested applicants should submit a detailed resume by August 2, 1996 to:

Chief Judge James K. Singleton
222 West 7th Ave., #41
Anchorage, Alaska 99513

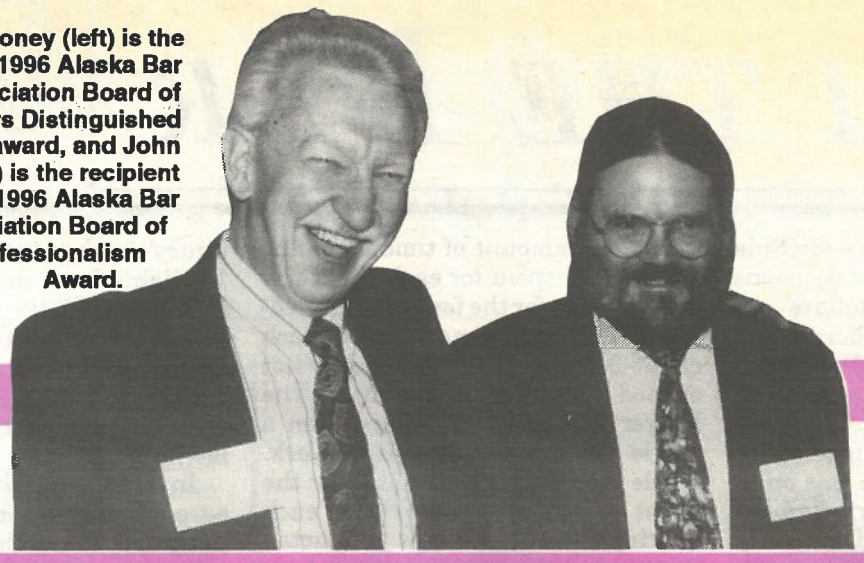
★★★ *ALASKA COURT SYSTEM* ★★★

ACTING DISTRICT COURT JUDGE IN VALDEZ

Appointed by the Presiding Judge of the Third Judicial District. Appointment expected to last 9 to 12 months. $86,088 pro-rated for the time actually served. Perform judicial duties of a district court judge as defined in AS 22.15 and possible pro-tem assignments as superior court judge with judicial duties as defined in AS 22.10. Required to travel within the Third Judicial District and be "on-call" in Valdez three weekends per month. REQUIREMENTS: Must be a U.S. and State of Alaska citizen; at least 21 years of age; a resident of Alaska for at least 5 years immediately preceding appointment; engaged in the active practice of law for at least 3 years immediately preceding appointment; and licensed to practice law in the State of Alaska. A completed Alaska Court System application and resume should be mailed to Honorable Elaine Andrews, Presiding Judge, Third Judicial District, 825 W. 4th Ave., Anchorage, AK 99501. Applications and a detailed bulletin may be obtained and/or hand delivered to the Personnel Office, 825 W. 4th Ave., Rm B4, Anchorage, AK 99501. Applications may also be obtained at the Valdez Courthouse. Persons with disabilities who wish to apply and require reasonable accommodation to participate in any portion of the interview process should advise us in advance. The contact number is (907) 264-8242 V; 264-8241 TDD. Applications must be received no later than 4:30 p.m., July 31, 1996.

ALASKA COURT SYSTEM

Several Acting District Court Judges in Anchorage will be appointed by the Presiding Judge of the Third Judicial District. Appointments are expected to last three to six months. The salary will be $86,148 pro-rated for the time actually served. The successful candidates will perform judicial duties of a district court judge as defined in AS 22.15 and possible pro-tem assignments as superior court judge with judicial duties as defined in AS 22.10 and will be required to travel within the Third Judicial District. REQUIREMENTS: Must be a U.S. and State of Alaska citizen; at least 21 years of age; a resident of Alaska for at least 5 years immediately preceding appointment; and licensed to practice law in the State of Alaska. A completed Alaska Court system application and resume should be mailed to the Alaska Court System, Attn: Personnel, 303 K St., Anchorage, AK 99501. Applications may also be obtained and hand delivered to the Personnel Office at 825 W. 4th Ave., Anchorage, AK 99501. Persons with disabilities who wish to apply and require reasonable accommodation to participate in any portion of the interview process should advise us in advance. The contact number is (907) 264-8242 V; 264-8241 TDD. Applications must be completed and received no later than 4:30 p.m., August 9, 1996. Dist Ct. Judge.



Bob Mahoney (left) is the recipient of the 1996 Alaska Bar Association Board of Governors Distinguished Service award, and John Murtagh (right) is the recipient of the 1996 Alaska Bar Association Board of Governors Professionalism Award.

100th Anniversary of the Alaska Bar

Mahoney & Murtagh Receive Bar Awards

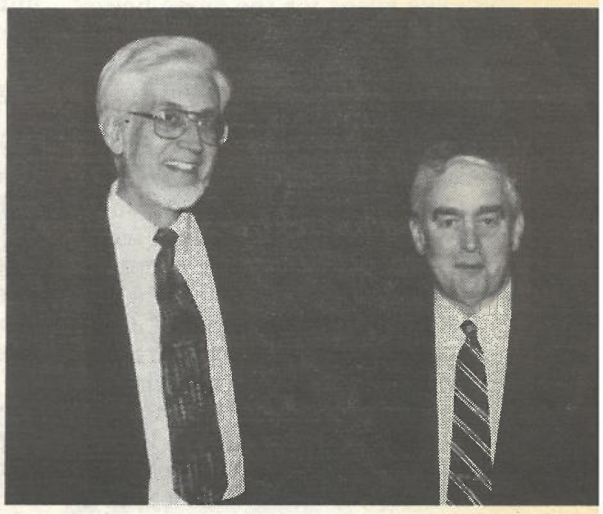
Bob Mahoney and John Murtagh received awards presented by the Board of Governors during the Annual Bar Convention in Anchorage in May.

Mahoney received the Distinguished Service award which honors an attorney for outstanding service to the membership of the Alaska Bar Association. Mahoney has served on the Alaska Rules of Professional Conduct committee since 1986; has been an ethics committee member for about 10 years and chair since 1994; and has served as special bar counsel in conflicts cases.

Murtagh was the recipient of the Professionalism award. This 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. Murtagh is a criminal defense attorney and sole practitioner. He has also served on the Board of Governors, the Alaska Rules of Professional Conduct Committee, and has served as faculty for numerous CLE seminars.

Bruce Bookman (left) and Katherine Tank accept the 1996 Alaska Pro Bono Program Law Firm Award on behalf of Perkins Coie. Chief Justice Compton (right) made the presentation.

Chief Justice Compton (right) presented Sharon Gleason with the 1996 Alaska Pro Bono Program Solo Practitioner Award.

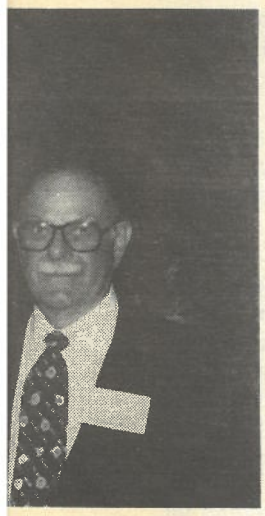


Left to right: Judge H. Russel Holland, Justice Danie von der Heydt at the Annual Awards Banquet.

Tim Lynch (left) and Leroy Barker (right) of the 100th Anniversary of the Alaska Ba Committee; Leroy is Chair of the Commit

ALASKA BAR ASSOCIATIO

Convention Highlights



, and Judge James

Left to right: Jay Kerttula, Charlie Cole, Judge Walter Carpeneti & George Hayes at the Annual Awards Banquet.

Outgoing President Diane Vallentine.

Incoming President Beth Kerttula.

Left to right: Judge Tom Stewart, Judge James Fitzgerald, and Cliff Groh enjoy a moment at the 1996 Annual Awards Banquet

Anchorage Bar Treasurer Ken Jacobus (left) and retired Alaska Justice Daniel Moore (right) present Mike White with the Anchorage Bar Association Distinguished Service Award.

e of the Historical panels created in commemoration roject was spearheaded by the Alaska Bar Historians' Tim is Chair of the Historical Panels Sub-Committee.

1996 Bar Convention & 100th Anniversary Sponsors

Alaska Association of Legal Administrators, Inc.
Alaska Court System
Alaska Shorthand Reporters Association
ALPS — Attorneys Liability Protection Society
Anchorage Bar Association
Atkinson, Conway & Gagnon
AVIS Rent a Car
Bank of America
Bankston & McCollum
Birch, Horton, Bittner & Cherot
Brady & Company Insurance Brokers
Clark Boardman Callaghan
Copeland, Landye, Bennett & Wolf
Davis Wright Tremaine
Dean Moburg & Associates, Court Reporters
DeLisio Moran Geraghty & Zobel
Dillon & Findley
Document Technology Inc.
Faulkner Banfield Doogan & Holmes
First National Bank of Anchorage
Gruenberg & Clover
Heller Ehrman White & McAuliffe
Hoge & Lekisch
Jensen, Harris & Roth
Jermain, Dunnagan & Owens
Just Resolutions
Lane Powell Spears Lubersky
Litigation Sciences, Inc. (LSI)/Pixel Inc.
Martindale-Hubbell
Law Offices of McCarrey & McCarrey
Joseph A. McLean
MICHIE
Midnight Sun Court Reporters
Pacific Office Center
Preston Gates & Ellis
Ribelin Lowell & Company Insurance Brokers Inc.
Ridgway's
Robertson, Monagle & Eastaugh
Royce & Brain
Stepovich Law Office
WEST Publishing Co.
Winfree & Hompesch
Young, Sanders & Feldman

1896 ONE HUNDRED YEARS 1996
Alaska Bar Association

1896-1996

Getting Together

An Alaska appelate mediation program

The Mediation Committee of the Alaska Court System is currently considering the implementation of an appellate mediation program. Similar programs are currently in existence in a number of other states. A number of questions are raised by such a proposal. I have attempted to answer them in this column from the perspective of my own biases in the field. Interested parties should contact the committee or the court rules attorney Christine Johnson.

Drew Peterson

Whether? The threshold question for the consideration of an appellate mediation program is whether such a program should be initiated in the first place. Appeals come late in the process of a dispute, and it could be argued that mediation is too late to be effective at the point of appeal. Such a view is belied, however, by the successful programs which have been conducted in other states. The success rates are less than for mediation at earlier stages, around 50% or so, but that can still constitute a major saving for litigants as well as for the court system as a whole.

Which Cases? Some types of cases have been found to have more potential for a mediation approach than others. Surprisingly, family cases have not been found to have a high potential fo successful mediation at the appellate stage. More commonly successful have been disputes that are purely about money.

Nonetheless, the only cases to be consistently excluded by the other states are criminal proceedings. I would suggest that only these be excluded until such time that there is clear evidence that other kinds of appellate cases will not resolve themselves in a mediation setting.

Voluntary Versus Mandatory? Mandatory mediation is an oxymoron. People cannot be ordered to mediate, but only to attend an introductory session to be educated about what mediation might have to offer to their dispute, as is currently required under Alaska's civil mediation rule, Rule 100. Nonetheless, mandatory mediation to that limited extent does serve to overcome the paradox of mediation: People are most in need of mediation at the time they are least willing to utilize it, because they have become polarized and fixed in their negotiating positions. As with Rule 100, I would advocate mandating a short exploratory mediation session in every non-criminal appellate case to educate the parties about the mediation process and explore the possibilities of settlement.

How? There is an ongoing debate in the mediation community over the preferable styles of mediation, and whether settlement-conference-style mediation is truly mediation at all, or some different and more coercive process. My own view is that settlement conferences are mediation, at least as long as the factors of voluntariness and confidentiality are an essential part of the process. I also believe that a settlement conference setting with a neutral judge mediator is the logical form of mediation for an appellate mediation program.

Who? I will no doubt get in trouble with my private mediator friends with this one, but I believe that the logical mediators for a mandatory program are neutral justices or judges with appellate experience. Parties should be allowed (and even encouraged) to utilize private mediators if they so choose. But if they are going to be required to mediate when they may not desire to do so, they should do so only with duly appointed and experienced judges. Judicial mediators, moreover, should have specialized training in mediation techniques, so they can recognize those cases that are appropriate for a more empowering style of mediation than that found in settlement conferences.

At Whose Cost? If mediation is going to be mandatory, then it should be available to the disputing parties at no cost. If the parties prefer to hire a private mediator (which should be allowed and even encouraged) they should do so at their own expense.

For an appellate mediation program to be effective it is critical that it occur at the earliest possible opportunity in the appeal process.

When? For an appellate mediation program to be effective it is critical that it occur at the earliest possible opportunity in the appeal process. I believe it should occur within the first 30 days after filing the notice of appeal. This will allow for early exploration of settlement possibilities, with substantial savings in appeal-related costs if such efforts are successful. Waiting until later in the appeal process will eliminate much of the economic incentive for settlement.

What Effect on Appeal? It is also crucial to a successful appellate mediation program that it have no possible effect of delaying the appeal proceedings, except when agreed upon by all parties to the appeal. Appellate proceedings are agonizingly slow in any event, and any ability to use the mediation process to further delay the appellate decision will harm the effectiveness of such a program.

Special Concerns? A major concern of special impact in Alaska is the great distances often involved between parties and counsel. To eliminate such concerns, I would require that mediations be held in any location where all parties and counsel can be present. Moreover, when any party or counsel is not available in the community, I would then require that the initial mandatory mediation session be conducted by teleconference with all participants and the mediator. (Parties and their counsel could share a conference phone). This would be awkward, but is necessary in a state as large as Alaska. The only alternatives would be to eliminate the majority of rural litigants or cause them great expense.

A more limited concern for an appellate mediation program, but a major concern for mediation in other arenas, is the need to establish special protocols for domestic violence cases. Since most appellate parties would be present with counsel, it would seem that there should be few opportunities for abuse. However, cases involving *pro se* litigants should be screened for domestic violence concerns in advance. Once again, the answer could be to conduct telephonic mediation sessions in such instances.

Conclusion. An Alaska appellate mediation program is an idea whose time has come. To be effective, I believe that such a program should be mandatory, should be available at no cost to the litigants, should occur early in the appeal process, should not delay the appeal, should involve neutral judge mediators, should mandate only a brief introductory mediation session, and should allow for telephonic participation. The issue is currently under consideration by the Alaska Court System's Mediation Committee. Comments or concerns should be addressed to the committee or to the court rules attorney; Christine Johnson.

The grievance process—a cautionary tale

By Steve Van Goor

It's been one of those days. Your secretary called in sick. Your great p.i. client just went down the hall to another lawyer. And now, you have this certified letter from the Bar.

What's this? you mutter. You open the envelope and see a one-page letter telling you that a person whom you know as "the client from hell" has just filed a complaint against you. Gee, you think, so much for the fact that you turned a case that barked like a rottweiler into a decent recovery for Mr. "Grateful." What do you do?

Well, whatever you do, resist the temptation to score two points with the round file. Set aside some time to take a serious look at it and send back a response. It's your opportunity to show that there isn't a basis for the Bar and you to spend some serious correspondence time together.

This is another in a series of articles on the programs and services funded by your Bar dues. Today, the Bar dedicates about a third of its of $1.6 million budget to the discipline process. The Bar's discipline section consists of bar counsel, two assistant bar counsel, and four support staff.

Assistant bar counsel are assigned exclusively to the investigation and processing of grievances while bar counsel supervises their efforts and provides support for the Bar's fee arbitration program, Ethics Committee, Lawyers' Fund for Client Protection Committee, Alaska Rules of Professional Conduct Committee, Consumer Assistance Program & Lawyers' Assistance Program (CAPLAP) Committee, and other committees appointed from time to time by the Board of Governors. In addition, bar counsel represents the Board in admissions matters, provides general counsel support to the Board, and fields well over 800 calls a year for informal ethics advice, both on the phone and in writing.

See an explanation of discipline procedure, page 15

But back to that one-pager you just received. About 200 to 250 complaints against lawyers are filed with the Bar office in any given year. That's about one for every 10 lawyers actively practicing in state. Of course, like the major airlines, the Bar seems to have its "frequent flyers"—those with two or more pending at any given time.

The majority of complaints involve allegations of neglect, failure to communicate, violations of court rules, or a just plain failure to pay attention to a client's case.

Complaints aren't discriminatory. They can be made against partners in major firms, public lawyers, long-suffering associates, or a one-person practice. Contrary to a widely held belief, clients aren't the only folks with standing to make a complaint. Virtually any person—opposing counsel, opposing party, judge, juror, bystander or whoever—with knowledge of the facts can file a complaint. The mechanical requirements are simple. The complaint must be in writing, signed by the complainant and contain adequate and sufficient allegations which, if true, would be grounds for professional discipline.

Contrary to what some may think, the Bar discipline process isn't something that gets written as a case goes along. Nestled right there in about the middle of the Rules of Court Book is a collection of Alaska Bar Rules. You probably remember puzzling over that first part when you applied for admission and the Bar exam. It's Part 2 that explains the way in which a grievance about a lawyer's conduct first comes in the door and how a lawyer might be forced out the door in cases of serious misconduct.

Found in this issue of the *Bar Rag* is a summary of the process, together with citations to the rules, given to new admittees during the Mandatory Ethics Program. As you go through it, please keep in mind that the process is designed to get the information necessary to allow the Bar to decide whether there's a problem with a lawyer's practice or not. Frivolous grievances are thrown out of the hopper early on. Grievances intended to frighten a lawyer from collecting the balance of a just fee are as obvious as Day Glo orange in the middle of Cook Inlet. Retaliatory grievances are equally obvious. But whether frivolous, mean-spirited, retaliatory or whatever, don't ignore them. Take the time to give the Bar a response.

—The author is Bar Counsel for the Alaska Bar Association

Alaska attorney discipline procedures

By Steve Van Goor

Introduction

This is a brief summary of the policies and procedures followed by the Alaska Bar Association in attorney discipline matters as well as a description of the process itself. The Alaska Bar Rules referenced in this summary may be found under "Alaska Bar Rules, Part II, Rules of Disciplinary Enforcement," in the *Alaska Rules of Court* published by Book Publishing Company and in the *Alaska Court Rules—State and Federal* published by West Publishing Company.

Grievances

Under Bar Rule 22(a), grievances against attorneys must be in writing, signed by the complainant and contain a clear statement of the details of each act of alleged misconduct, including the time and place of each. The grievance must contain allegations which, if true, would constitute grounds for discipline under Bar Rule 15. Bar counsel may also initiate an investigation of misconduct which comes to the Bar's attention in the absence of a specific grievance. Bar Rule 11(a)(15).

Intake Review

When a grievance is received by the Discipline Section, it is initially reviewed by a legal assistant to determine whether the grievance meets minimum requirements. If it is deficient as written (e.g. incomplete, not signed, fails to name an attorney, contains unclear allegations, etc.), the legal assistant returns the actual grievance to the writer and informs the writer of the deficiencies. No further action is taken until a properly prepared grievance is received.

If the grievance meets minimum requirements, a file number is assigned and the grievance is reviewed by an assistant bar counsel.

The assistant bar counsel sends a "10 Day Intake Letter" to the attorney named in the grievance along with a copy of the grievance. This letter advises the attorney that a grievance has been filed and that the attorney may, no later than 10 days from the date of the assistant bar counsel's letter, voluntarily submit written information concerning the grievance to assist counsel in determining whether a grievance should be opened.

After the 10 day period has expired, assistant bar counsel reviews the grievance and response, if any, provided by the attorney. If assistant bar counsel determines that the allegations in the grievance are not adequate or sufficient in light of the information submitted, counsel will decline to open an investigation and will notify both the complainant and the attorney. If, on the other hand, adequate or sufficient allegations are present, assistant bar counsel will accept the grievance for investigation. Bar Rule 22(a).

Investigation

When a grievance is accepted for investigation, assistant bar counsel sends a letter to both the complainant and the respondent attorney. The complainant is advised that the matter has been accepted for investigation (sometimes only as to certain allegations) and given further information about the discipline process including the requirement of confidentiality under Bar Rule 22(b). The respondent is advised that he or she must respond to the allegations accepted for investigation within 20 days of the date of service of the Bar Association's letter under Bar Rule 22(a). Failure to answer a grievance within the time required or within extensions which may be granted by assistant bar counsel is a separate basis for discipline under Bar Rule 15(a)(4).

Both the complainant and the respondent are also advised of the "Six Month" policy of the Disciplinary Board. The Board has directed bar counsel to make a determination whether to dismiss a grievance or seek discipline within six months of the *filing* date of the grievance. As a result, both parties are advised that it is very important to meet deadlines for responses to the Bar Association and that extensions of time are granted only for good cause.

When the respondent's answer to the grievance is received, it is reviewed by assistant bar counsel, and a copy of the answer is generally sent to the complainant for further comment. If the complainant submits a comment, assistant bar counsel may request a further reply from the respondent.

During the investigation, assistant bar counsel may request the production of documents from the complainant and respondent and may also conduct depositions. Bar Rule 24(a). As necessary, court files are reviewed and witnesses are contacted.

Determination

Once assistant bar counsel has completed the investigation, he or she must determine whether an ethical violation has occurred, and, if so, determine a recommended disposition. These determinations are reviewed by bar counsel who then decides whether the recommended disposition of the grievance is appropriate.

Dismissal

If there is no probable cause to believe that a violation has occurred [Bar Rule 22(c)], or if there is a lack of clear and convincing evidence that a violation has occurred [standard of proof under Bar Rule 22(e)] or if the conduct complained of does not constitute grounds for discipline, assistant bar counsel will dismiss the grievance and advise the complainant of this action in a letter explaining the Bar Association's reasoning. Bar Rule 11(c).

The complainant may appeal this decision. In that event, the file is reviewed by a member of an Area Hearing Division designated by the Executive Director. Hearing divisions consist of attorneys and public members appointed by the president of the Board to assist in the disciplinary process. Bar Rule 12. The division member may affirm or reverse the decision to dismiss or request that further investigation be conducted. Bar Rule 25(c).

Ethical Violations

If there is sufficient evidence of an ethical violation, assistant bar counsel, in consultation with bar counsel, must decide what level of sanction should be sought.

Written Private Admonition

Generally, minor or isolated instances of misconduct are resolved by written private admonition by assistant bar counsel, the lowest level of discipline. Bar Rule 22(d). A request for admonition must be reviewed and approved by an area division member. Bar Rule 22(d). The admonition letter is directed to the respondent and carefully explains the basis for the Bar's findings of misconduct. The admonition may also require that the respondent fulfill specified conditions, e.g., institute calendaring systems, pass the Multistate Professional Responsibility Exam, have financial accounts reviewed by an accountant, etc. Bar Rule 16(d). The letter becomes a permanent record of discipline imposed on the respondent and, in the event of future formal proceedings, may be used in those proceedings in deciding the severity of sanction to be imposed.

The respondent may decline to accept the admonition. In that case, the admonition will be vacated and assistant bar counsel may proceed with formal public proceedings. Bar Rule 22(d). If the admonition is accepted, the complainant is advised of the basis for the admonition but the complainant does not, as a matter of policy, receive a copy of the admonition itself.

Reprimand

The next level of disposition is reprimand by the Disciplinary Board. The Disciplinary Board is the Board of Governors of the Bar Association when it considers grievance and disability matters. Bar Rule 10(a). The Board consists of nine lawyers elected by the membership of the Bar Association and three public members appointed by the governor of Alaska. Alaska Integrated Bar Act, AS 08.08.010 *et seq.*

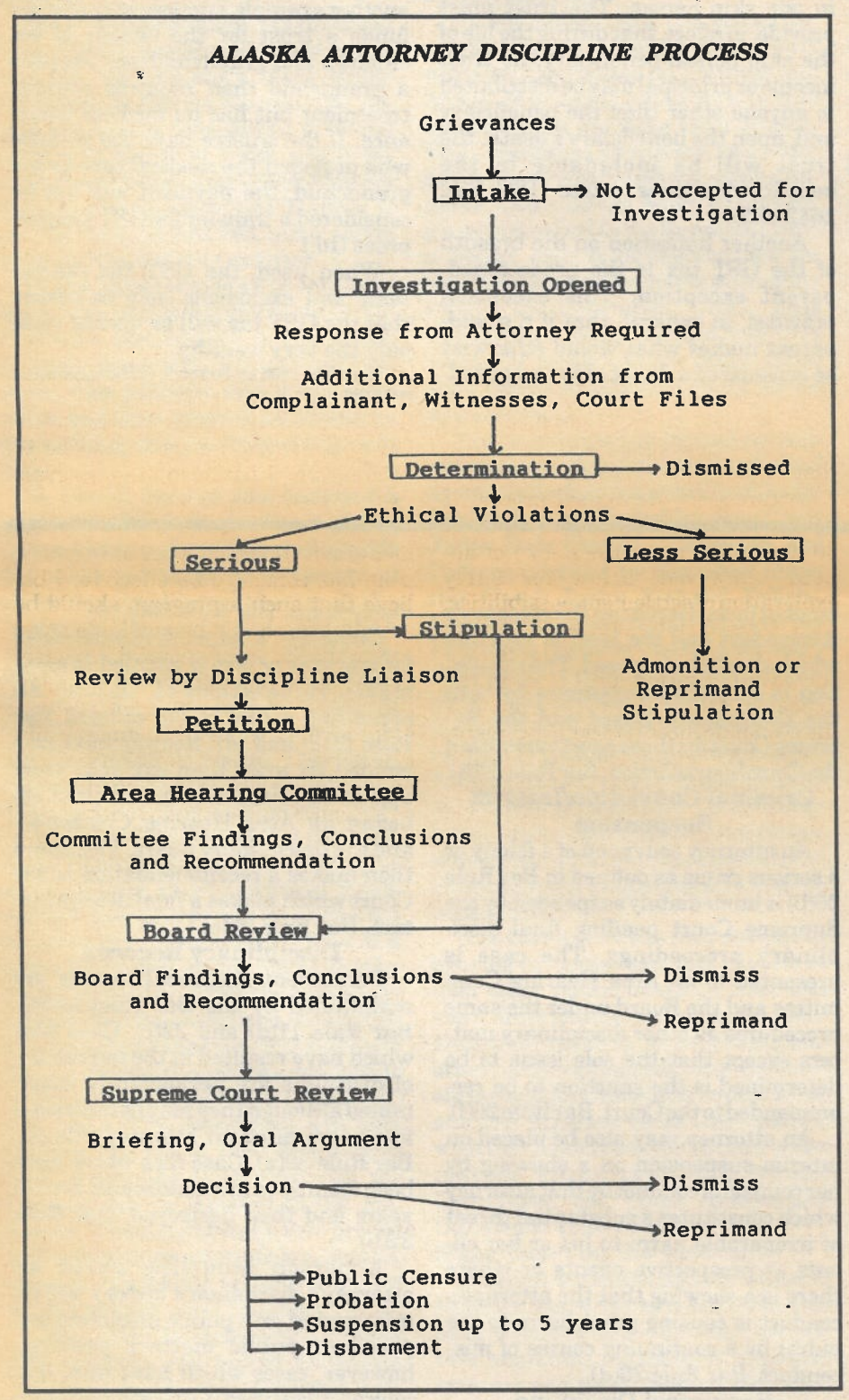
Reprimand may be imposed either by stipulation between assistant bar counsel and the respondent or following the formal hearing process described below. Generally, reprimand is imposed in cases: (1) in which the respondent has been previously admonished; (2) in which there is a series of less serious violations; or (3) in which the conduct is of a nature that the respondent should receive the criticism of the entire Board rather than just bar counsel.

Petition for Formal Hearing

Serious violations or a continuing course of ethical misconduct are referred to the formal hearing process. Following investigation and consultation with bar counsel, assistant bar counsel obtains permission from the Board Discipline Liaison to file a petition for formal hearing against the respondent with the Bar's Executive Director. Bar Rules 10(f) and 25(d).

Continued on page 16

ALASKA ATTORNEY DISCIPLINE PROCESS



U.S. District Court Notice

Office Hours

Effective August 5

The Office Hours for the U.S. District Clerk's Office will be:

Monday	8:00 a.m. to 4:30 p.m.
Tuesday	**9:00 a.m. to 4:30 p.m.**
Wednesday	8:00 a.m. to 4:30 p.m.
Thureday	**9:00 a.m. to 4:30 p.m.**
Friday	8:00 a.m. to 4:30 p.m.

Public Information Access

Effective August 5, the U.S. District Court "Public Access to Court Electronic Records (PACER)" system will be available to anyone with a Personal Computer and modem. This system will provide access to the following information: 1. Civil case lists, 2. Criminal case lists (after October of 1996), 3. Court calendars, 4. Party name searches, 5. Case number search, 6. Case lists by filing date. Subscription and computer set up information are available by sending a self-addressed envelope to: PACER, U.S. District Court, 222 West 7th Ave, #4, Anchorage, Alaska 99513.

Estate Planning Corner

GST tax exemptions and exclusions

Steven T. O'Hara

The generation-skipping transfer ("GST') tax was created because Congress would like an estate tax paid at each generation—when parents die, when their children die, when their grandchildren die, etc. The GST tax may catch, for example, estate plans that avoid estate tax in the children's generation.

The basic concept of the GST tax is that whenever a gift, bequest, devise, inheritance, or even a change in trust beneficiary occurs and a generation is skipped, a flat 55% GST tax could be owed *in addition* to any gift or estate tax (IRC Sec. 2601 and 2641).

There are several exemptions and exclusions to the GST tax. The best known is the $1 million GST exemption. Congress has given every individual a $1 million GST exemption, which shelters up to $1 million in generation-skipping transfers (IRC Sec. 2631 and Treas. Reg. Sec. 26.2663-2(a)).

Another important exemption is based on the $10,000 annual gift-tax exclusion. This gift-tax exclusion enables an individual to make annual gifts of up to $10,000 to each of any number of persons, without any gift tax on the transfers (IRC Sec. 2503 (b)).

Under the GST tax system, so-called direct skips made by gift are generally exempt from GST tax to the extent of the $10, 000 annual gift-tax exclusion (IRC Sec. 2642 (c) (1)) . A direct skip is a transfer subject to gift or estate tax by an individual to another who is two or more generations younger (IRC Sec. 2612(c)(1)). The transferee, the individual two or more generations younger than the transferor, is known as a "skip person" (IRC Sec. 2613).

For example, consider a single parent in need of financial assistance. Both her parents are alive but are unable to assist, so her grandmother helps by giving her about $6,000 per year. Here the gifts would be considered direct skips for purposes of the GST tax; but just as the gifts are sheltered from gift tax by the $10,000 annual exclusion, so they are sheltered from GST tax.

The exemption relating to the $10,000 annual gift-tax exclusion is of limited utility for direct skips made in trust. This exemption will not apply to a direct skip made in trust unless all trust interests are practically vested in one skip person. The trust must provide, in effect, that during the life of the skip person-beneficiary, no trust income or principal may be distributed to anyone other than the beneficiary and, upon the beneficiary's death, the trust will be includable in the beneficiary's gross estate (IRC Sec. 2642(c)(2)).

Another limitation on the breadth of the GST tax is the predeceased-parent exception. This exception provides, in general, that if a grandparent makes what would otherwise be considered a direct skip to a grandchild, and that grandchild's parent (who is the child of the grandparent) is then deceased, the transfer will not be considered a direct skip for GST tax purposes (IRC Sec. 2612(c)(2)). In other words, under the predeceased-parent exception, the grandchild is bumped up into his parent's generation, but only under a direct skip.

The gift-tax exclusion for payments for educational and medical expenses is also an exclusion for GST tax purposes. This gift-tax exclusion provides, in general, that a person will not be considered to have made a gift if that person pays, on behalf of another, tuition to an educational organization or to a person who provides medical care, regardless of the amount of the payment (IRC Sec. 2503(e)).

For example, suppose a grandfather wishes to pay the college tuition of a grandchild, and suppose that tuition for one year is $14,000. If grandfather pays that tuition directly to the college, the payment will not be considered a transfer for gift or GST tax purposes (Id. and IRC Sec. 2611 (b) (1)) . As another example, suppose grandfather funds a trust for the benefit of his children and grandchildren. Suppose a grandchild then requires medical treatment but has no medical insurance. If the trustee pays the persons who provided the medical care to the grandchild, the payment will not be considered a transfer for GST tax purposes (Id.).

When used, the GST tax exemptions and exclusions help to assure that the GST tax will be visited upon only the very wealthy.

Attorney discipline

Continued from page 15

The Discipline Liaison is a member of the Board appointed to provide guidance and assistance to bar counsel and staff in implementing Board policy and to review requests for formal proceedings. *Id.*

The petition is much like a complaint in a civil case or an indictment in a criminal case, although disciplinary proceedings are *sui generis* and neither civil nor criminal. Once the petition is filed, all proceedings are open to the public. Bar Rule 21(a). The Executive Director maintains a file on the matter which is available for public review, similar to court files maintained by the court clerk's office. Bar Rule 21(d).

The respondent must answer a formal petition. Bar Rule 22(e). Failure to answer a petition is itself grounds for discipline. Bar Rule 15(a)(4).

Area Hearing Committee

The matter is then referred to an area hearing committee appointed by the Executive Director in the judicial district where either the attorney maintained an office or in which the misconduct occurred. Bar Rule 9(d).

The proceeding is similar to a trial in civil or criminal courts. The respondent is entitled to representation by counsel at his or her expense, to examine and cross-examine witnesses, to present evidence, to have subpoenas issued, and to make a peremptory challenge or challenges for cause concerning the composition of the hearing panel. Bar Rule 22(f).

Bar counsel has the burden of proving the misconduct alleged by clear and convincing evidence. Bar Rule 22(e). Following the hearing, the committee deliberates and issues written findings of fact, conclusions of law and a recommendation for disciplinary sanction. Bar Rule 22(l). The committee may recommend dismissal of the case, reprimand by the Disciplinary Board, or public censure, probation, suspension for up to five years or disbarment by the Supreme Court. Bar Rule 16.

Disciplinary Board

The hearing committee's report and the record of proceedings are then forwarded to the Disciplinary Board. Either bar counsel or the respondent may appeal. Bar Rule 25(f). The Board has the authority to enter those findings, conclusions, and recommendations it finds are justified from the record. The Board may resolve a case by dismissing the matter or issuing a reprimand to the respondent. It may also forward the matter to the Supreme Court with a recommendation for a higher level of discipline. Bar Rule 22(n).

Supreme Court

Attorney discipline is a matter of original jurisdiction in the Supreme Court. Bar Rule 9(c). Thus, the Court considers all discipline cases in which a recommendation is made for public censure and higher sanctions. Bar Rule 22(r). Only the Court may issue these sanctions. Bar Rule 16(a). Either side may appeal a finding, conclusion or recommendation of the Disciplinary Board in such cases. Bar Rule 22(p). Normally, appellate briefs are submitted by both sides, and the Court hears oral argument before issuing its decision.

The Court may issue its decision in the form of an order, a memorandum opinion and judgment or a published opinion. Notice of public discipline is sent by the Bar Association to the courts, the attorney general, the National Discipline Data Bank, and other jurisdictions in which the respondent is admitted. Bar Rule 28(h). The Bar also publishes notices of suspension or disbarment in the newspapers. Bar Rule 28(g).

Stipulated Discipline

A disciplinary matter may also be presented to the Disciplinary Board and the Supreme Court by stipulation. In that instance, assistant bar counsel and the respondent agree on a statement of facts describing the attorney's misconduct and the level of sanction which should be imposed. The stipulation is subject to acceptance by both the Disciplinary Board and the Supreme Court for those sanctions within the Court's jurisdiction. Bar Rule 22(h).

Criminal Conviction/Interim Suspension

An attorney convicted of a felony or a serious crime as defined in Bar Rule 26(b) is immediately suspended by the Supreme Court pending final disciplinary proceedings. The case is presented to an Area Hearing Committee and the Board under the same procedures as other disciplinary matters except that the sole issue to be determined is the sanction to be recommended to the Court. Bar Rule 26(f).

An attorney may also be placed on interim suspension on a showing by bar counsel of conduct by that attorney which constitutes a substantial threat of irreparable harm to his or her clients or prospective clients or where there is a showing that the attorney's conduct is causing great harm to the public by a continuing course of misconduct. Bar Rule 26(d).

Reciprocal Discipline

A member of the Alaska Bar Association who is disciplined by another jurisdiction will be subject to the imposition of identical discipline in Alaska under Bar Rule 27. This rule provides the respondent and bar counsel with an opportunity to inform the court of any reason why the imposition of identical discipline in Alaska would be unwarranted. Bar Rule 27(a) and (d).

Reinstatement

A disbarred or suspended attorney may seek reinstatement from the Supreme Court under Bar Rule 29. Generally, a request for reinstatement is filed prior to the expiration of the term of suspension. Bar Rule 29(b). However, a *disbarred* attorney may not be reinstated until at least five years from the effective date of the disbarment. Bar Rule 29(b)(5).

Generally, a respondent suspended for one year or less is entitled to automatic reinstatement unless an opposition is filed by bar counsel. Bar Rule 29(c) and (d). Respondents suspended for more than one year must appear at reinstatement proceedings before an Area Hearing Committee and the Disciplinary Board. The Board then makes a recommendation to the Court which makes a final determination. Bar Rule 29(c).

Disciplinary Records

Permanent statistical records are maintained by the Bar Association. Bar Rule 11(d) and 32(c). Case files which have resulted in the imposition of discipline are permanently maintained although they may be destroyed five years after an attorney's death. Bar Rule 32(a). Case files which have been dismissed are maintained for five years and then destroyed. Bar Rule 32(b).

A person inquiring about an attorney's disciplinary history will be informed of any public discipline imposed or public matters pending; however, cases which have been dismissed or resulted in private discipline are confidential unless the attorney involved waives confidentiality, the Supreme Court orders disclosure or one of several limited exceptions to Bar Rule 21 applies.

Disability/Trustee Counsel

In addition to the disciplinary process discussed above, Part II of the Bar Rules contains procedures for dealing with attorneys who have become disabled (Bar Rule 30) and for appointing trustee counsel to assist the clients and to inventory the practice of an attorney who has died or become unavailable. Bar Rule 31.

Further Information

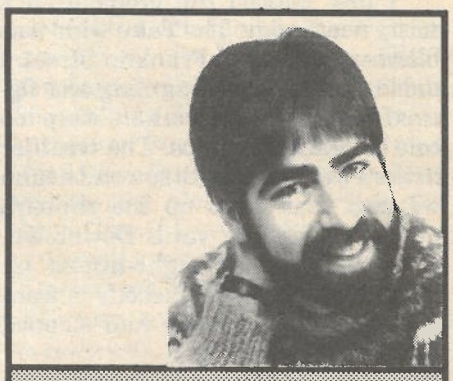
Please contact Bar Counsel or the Executive Director of the Bar Association with any questions you may have concerning the operation of these rules.

Family Law

The importance of attorney referrals

One of the most often overlooked avenues for obtaining new clients is referrals from other attorneys. When I worked as an associate in one of the largest firms in the state, rainmaking was generally performed by the partners. I received few referrals from other lawyers, who probably assumed that I had enough to do by virtue of my employment. Once I opened my own doors as a solo practitioner, I was initially surprised when potential clients would tell me that other attorneys had referred them to my door.

At first I thought that these practitioners may have been sending clients my way simply because I was new to solo practice, and perhaps they felt that I needed the work. As the referrals continued to call, I began to feel some camaraderie with these other lawyers, and that I was not simply "out there" on my own, alone, hanging out a shingle.



Steve Pradell

My practice has grown, and my referral sources continue to increase. I have learned that word-of-mouth referrals can be a primary source of business for attorneys, especially in the field of family law.

There are many reasons why lawyers refer cases to others in our profession. A lawyer may simply be too busy to handle new cases. One successful Anchorage family law attorney sends me numerous cases when she feels that she has enough clients. She also sends me existing clients when she is out of state so that I can monitor her caseload. I have sent so many "thank you" cards to her that she has told me to stop!

It is ironic that many of the best referrals come from our adversaries, against whom we do "battle" in the courtroom. These same opponents can be our best allies when it comes to referrals. For this reason, it is important to attempt to maintain a good working relationship with the attorneys we come across through our cases.

Referrals are made often because a lawyer does not practice in the area in which a potential or existing client desires representation. This is why it may be important to let others know of the areas in which you practice, so that they can send someone your way when the appropriate legal issues arise. A lawyer who knows you and your areas of practice may be more comfortable sending an existing client to you, for there may be less fear that you will take away all of the other lawyer's business because you do not provide the services that the other attorney handles for his client. This symbiotic relationship works both ways. You can refer certain matters which you normally do not handle to others, who in turn may refer cases back to you. Being a source of referrals can be a great way to expand your practice, and it may be better to turn a case away in a legal area in which you are not familiar, rather than keep the client and attempt to learn the law as you proceed.

Clients often look for attorneys who have certain personalities, reputations, practice styles, or other qualities that best suit their needs. Referrals can come from other lawyers who may feel that you can offer a client the best type of representation because of your unique approach. Another very successful family lawyer who had a full caseload referred many clients to my desk who wanted an "aggressive" attorney, to my surprise. He enjoyed the clients who were less demanding, and my workload increased.

Referrals also are made when attorneys have potential conflicts of interest, retire, have cases which become complex, and for many other reasons. Clients may call the "family lawyer" in order to find the name of someone who they can trust. Most clients would rather see someone on the basis of a recommendation than from reading the Yellow Pages, which are cluttered with the names of strangers. Selecting a lawyer can be an intimidating process.

Just how does an attorney get referrals from other lawyers? The answer is simple: Ask for them. Tell those you come across in your practice that you would be happy to consult with any potential clients who are referred to you. Volunteer to assist another attorney should a vacation arise. Ask each new client how they were referred to you, and thank any attorney who provides you with a potential client, regardless of whether you actually get the case. So here's the pitch: I love referrals!

Preg Testin' - A Cowboy Poem

A ranch I bought, for I thought I ought to own the fishing rights.
There's a meadow stream, and the waters teem with browns and cutts and whites.
And the evening rise to the caddis flies is a sight to bring you peace:
Use elk hair hackle and light light tackle, and the rules are catch and release.
It's a working place, but no cattle grace the meadows with my brand.
To make cows grow 's'not a game I know, so I lease the rights to the land.
I was told why Dad, as a rebel lad, left the old home place near Cheyenne;
The hours are long and the pay's a song, and the grave is your pension plan.
But I thought I should, in that rural hood, make friends with my rancher neighbors.
And so, said I, I'd be glad to try my hand at some cowboy labors.
And stockman Dean said he'd be keen to allow me to work the next day;
So I dusted my tack and was up at the crack, ready to ride on my bay.
"Well you'll not need that handsome steed, but its fine to take that new Stetson,
For we'll not ride the great divide, today we'll be doin' preg testin'."
We went in Dean's truck, through the ruts and the muck, to the place the cattle were gathered:
Pens and some chutes in the high Bitterroots, and Dean had a glove which he lathered.
Then Dean told me what my job 'd'be: push the cows on their way to the holder;
Haze the steers through the gate on the way to their fate, they would not be gettin' much older.
He'd test the females, enclamped in the rails, thus the long glove he was wearin';
For it's quite a reach into the breach, to see if they're fertile or barren.
I took a last gaze at that landscape of sage, and commenced to work with the cattle.
I soon chased one to the mouth of the run, and that was the start of the battle.
She slid to a stop so I gave her a pop, with my hat on the top of her hips;
Then her tail she swished and my face was enriched, with a mixture of water and chips.
I reflected with rue as I wiped off the goo from my cheeks and my eyes and my mouth,
Were I a romantic, this stuff aromatic would send my illusions due south.
But I continued to push that cow on the tush, in the shade of the Mountains Tendoy,
For I thought she was sayin', since your only here playin', then welcome to the west, cowboy.
I worked all that day sending stock the right way, and wished that my contract was over;
When my mentor fair howls from his throat and his bowels, and swears like a chuckwagon drover.
And not long was the pause ere I learned of the cause: in the dust and commotion and blear,
A mistake by the sender, on a matter of gender, and Dean had preg-tested a steer.

—Warren W. Matthews

Eclectic Blues

Try smiling

Just the other day I was over in a North Douglas kitchen, drinking dark, roasted coffee and discussing Juneaulinos with a friend. Since he lives on the southwest side of Gastineau Channel, I figured that he might be a neutral source of information about residents of the capital city.

"Bud," I said, "Why don't people in downtown Juneau smile during working hours?"

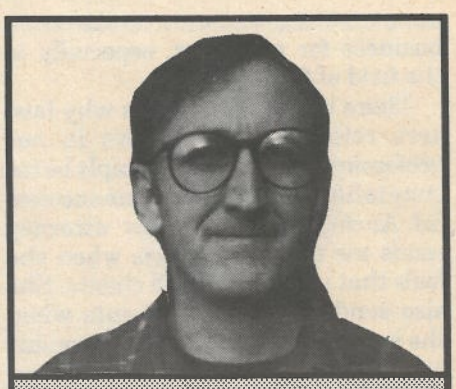
"How do you find the people at work?" he asked.

"Couldn't be a friendlier bunch," I replied.

"How about the neighbors?" asked Bud as he continued his investigation.

"Great," I answered. "It's the ones I don't know who won't smile.

"That doesn't surprise me," he replied, "given what I have learned through years of careful study of the subject."



Dan Branch

"You got any answers?" I asked hopefully.

"Well," my friend responded, "I think I do. You see, I have given that question a good deal of thought over the years. Even set up an observation post at the Front Street fast-food palace.

"I first noticed the problem on a nasty winter day. The Taku wind was blowing hard down Franklin Street. I didn't feel much like smiling and figured that the office workers were too cold to crack their lips. The weather broke a week later with sun and a calm warmth that woke up the rhubarb plants out in the yard. Downtown, folks still rushed tight-lipped up Seward Street as if somebody in front of Percy's Liquor Store had slapped them.

"I followed one of these guys past Hudson's Shoes to see if he could keep up the frown. When he ran into one of his buddies outside of Rainbow Foods, they both broke into smiles and happy conversation. They even laughed.

"This happens all the time in downtown. Grim folk will walk by you like you were a lamp post and then turn into normal, friendly people when they cross paths with acquaintances. I tried smiling at them first. This seemed to make 'em uncomfortable. I figure Juneau is just getting too big to make strangers feel welcome."

"But Bud," I broke in, "people in Anchorage smile. People in Ketchikan smile. People in the Bush smile . Why can't Juneau folk do it? Juneaulinos do more than their share of helping those in need."

"Well," my Dougite friend responded, "we once took advantage of cheap airfares to take the family up to Anchor Town for the Fur Rondy. On the whole, folks in Alaska's one big town do smile a fair amount.

"On the plane ride home, I gave the matter a great deal of thought. People in a town the size of Ketchikan or smaller realize that in a small town, you can't hide from your enemies. So, you try to make everyone your friend. That's why these folks smile all the time. They can't afford to frown."

"I don't go along with that Bud," I said.

"Let me finish, Dan." Bud replied. "In the Railbelt, folks have lots of places to go. They know that they can walk unrecognized through the Costco Store. The pressure is off folks in the Railbelt. They can smile at a guy walking down 4th Avenue, secure in the knowledge that they will probably never see him again.

"That brings me to Juneau. This town is too big to keep on the good side of everybody, but it is small enough that you are likely to see the same faces on every noontime trip to your favorite coffee bar. Once a Juneaulino makes the commitment to smile at a stranger, he will feel uncomfortable unless he smiles at the same stranger every day. Once he does that, he's on a downward spiral to friendship.

"You see, Dan, people in Juneau just can't afford to smile at strangers."

After Bud finished his dissertation, I drained the dregs of my French roast and started back across the Gastineau Channel bridge. He might be right, but it still wouldn't hurt people in Juneau to crack a smile at a stranger if the sun is shining and a tour bus hasn't smashed the fender of their Subaru wagon.

No one would take it personally.

1996 CLE Calendar

DATE/CLEs	TITLE	CITY/LOCATION
#36 July 23	Education Law Issues	Anchorage
cles tba		Hotel Captain Cook
#47 Aug. 5	Federal Off the Record	Anchorage
2.0 cles	with the 9th Circuit Court	Federal Bldg.
#13 Aug. 23-24	Estate Planning Techniques (NV)	Anchorage
14.0 cles		Regal Alaskan Hotel
#12 Sept. 23	Professional Responsibility	Juneau
3.0 cles	With ALPS & Video vignettes	Centennial Hall
#88 Sept. 23	Mandatory Ethics for Applicants (NV)	Juneau
3.0 cles		Centennial Hall
#88 Sept. 25	Mandatory Ethics for Applicants	Anchorage
3.0 cles		Hotel Captain Cook
#12 Sept. 25	Professional Responsibility	Anchorage
3.0 cles	With ALPS & Video Vignettes	Hotel Captain Cook
#12 Sept. 27	Professional Responsibility	Fairbanks
3.0 cles	With ALPS & Video Vignettes	Westmark Hotel
#88 Sept. 27	Mandatory Ethics for Applicants (NV)	Fairbanks
3.0 cles		Westmark Hotel

Position Announcement

The Federal Public Defender Office for the District of Alaska is seeking applicants for an Assistant Federal Defender. Women and Minorities are encouraged to apply. Candidates must be law school graduates and members in good standing of the bar of any state, territory or federal district court. The position is based in our Anchorage office, but travel throughout the District of Alaska may be necessary. Applicants should have sufficient experience to immediately undertake the defense of serious criminal cases in the U.S. District Courts for the District of Alaska as well as appeals in the Ninth Circuit Court of Appeals. Criminal trial experience, especially in Federal court, and a commitment to the representation of those unable to afford counsel are desired qualities for this position. Salary is dependent upon qualifications and experience. Please send a cover letter with resume, including three references, and a writing sample by August 2, 1996 to:

RICH CURTNER
FEDERAL PUBLIC DEFENDER
550 W. SEVENTH AVENUE, SUITE 1600
ANCHORAGE, ALASKA 99501

AN EQUAL OPPORTUNITY EMPLOYER

SOLICITATION OF VOLUNTEER ATTORNEYS

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

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

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

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

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

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

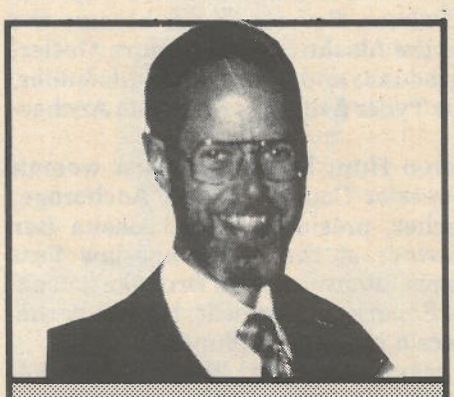
ALSC Report

Financial and other foolish frustrations

Everybody knows that, as taxpayers, we all want the government to use our money efficiently. We do, don't we? The current Congress apparently doesn't think so. Or else it has some other reason for cutting the funding of the Legal Services Corporation by one-third in Fiscal Year 1996. It is no secret that legal services programs around the country attract and retain some of the top graduates of some of the best law schools — people who could command salaries two to five times what legal aid pays them. And I've never seen a legal services attorney who did not put in a substantial amount of uncompensated overtime.

The dedication of legal services attorneys and their administrative and support staff provides a great deal of volunteer service. For a Congress that supposedly endorses "volunteerism," the current D.C. crop's disregard of the efforts of these people is suspicious. Perhaps this Congress simply does not like it when a poor person, represented by a legal services attorney, wins against the government or big business. Here's another irony: the harder these attorneys work and the brighter they are and the more cases they win, the more antagonism they engender in such folks as those comprising the current congressional majority.

While mouthing belief in the principle of equal justice for all (which, presumably, includes poor people), the majority in Congress has pursued a variety of measures not only to drastically cut the legal services budget, but to zero it out altogether and to impose



Arthur H. Peterson

undue restrictions on the types of legal services that may be provided.

Some members of Congress have been quoted in the press as saying that the private bar, private charities, and state and local governments can pick up the legal services programs. It is a political axiom that political memories are long. But this current group has forgotten that the present legal services funding system was established just a couple of decades ago *BECAUSE* the private bar, private charities, and state and local governments were not doing the job. We now have one of the best systems in the world.

For dereliction, we need look no further than our own copycat Alaska Legislature. Instead of filling the gap, of which it was fully informed, our budget-cutting-mad legislature cut last year's $261,000 appropriation down to $100,000 for FY 97 (and almost zeroed it out). In its intransigence, the legislature adamantly rebuffed Governor Knowles' efforts to put at least another $100,000 in this item.

Some of the municipal governments are chipping in to help. For example, the North Slope Borough funds the Barrow office, and the City and Borough of Juneau has raised its grant from $50,200 in FY 96 to $68,900 for FY 97 (which will provide approximately 32 percent of the Juneau office's FY 96 budget figure).

One of our state senators was quoted as asking rhetorically why the state should help fund an outfit that sues the state! Does he not believe that the governmental bureaucracy can make a mistake? Does he not think that legal advice and litigation are often necessary to correct the mistake? Does he not realize that statutes and regulations are sometimes ambiguous, requiring judicial interpretation? Does he not know that litigation can be complex and will proceed more efficiently (that notion again) with a lawyer?

Or does he simply think that when BP or Exxon brings the state to court with its battery of lawyers to resolve a statutory ambiguity, that's okay, but a poor person with such a problem should be able to do it alone? The senator's rhetorical question suggests a willful disregard of a poor person's need for representation — a disregard of what it really means to espouse equal justice for all.

What this all means for Alaska Legal Services Corporation is that, from a high of $1.2 million of state funding in the early 1980's, we are down to $100,000 in FY 97. From a high of 14 offices and 70-some employees around the state, we are down to five offices and 30-some employees. This result comes not because the program has done a poor job (as of a fairly recent report, we'd won something like 85 percent of our Supreme Court cases, for example) or because there are fewer legal problems and the poor people need less legal assistance (there aren't and they don't). It comes because the current Congressional and legislative majorities don't believe in the program.

Not only doesn't Congress want to fund the program, it has passed H.R. 3019 (I don't know the P.L. number yet), the omnibus funding bill for FY 96, to include a wide and wild range of restrictions on what the funding recipients (such as ALSC) may do. And not only that, the restrictions apply to what the recipients may do with *NON*-federal money!

For example, sec. 504 of the Act prohibits a recipient from representing a person in reapportionment litigation, in attempting to influence adoption or amendment of an administrative regulation or other agency policy of general application and future effect, in attempting to influence passage or defeat of legislation, in participating in a class action suit, in abortion litigation, in litigation if the person is a prisoner or is an alien not lawfully admitted to this country, in welfare reform litigation, etc., etc., etc.

As a compromise (!), subsections (b) and (e) allow a recipient to use non-federal money to represent a person in *responding to a request* from an agency or legislative body. But then sec. 508 requires a recipient to *divest* itself of pending cases that will now be prohibited. Think of the ethical and practical problems with this nutsy idea.

"Mean-spirited" is a term that has been fairly widely applied to the current Congress. Section 504 (a) (13)'s prohibition on collecting attorney fees under any federal or state law (such as Alaska's Civil Rule 82) is a good illustration of this trait. We're not only denied direct funding, we're denied the right to collect attorney fees from the opposing party when we win. Those fees have provided a helpful supplement to keep the program going.

In a future report, I hope to give some illustrations of some typical, everyday clients' situations adversely affected by the funding problems and the federal restrictions. For now, let me suggest that, with the primary and general elections coming along this year, let's talk to the candidates *before* they are elected, to see where they stand on the provision of legal assistance to poor people. And let's talk to our friends and relatives and colleagues around the country.

Maybe we can help explain to the candidates that the concept of equal justice for all is fundamental to our society and our system of government. It requires more than lip service from our politicians. Let's convince of them of this need before they get into office.

The author is president of the Alaska Legal Services Corp.

In the Kingdom of Juneau

Royal Bar Association of Juneau

June 7, 1996

The prodigal son has returned. Well, not quite, but Gerry Davis is back in Juneau seeking work, food, and shelter after a wallet depleting trip to Amsterdam and its surrounding continent. Gerry is offering book and movie rights of his tour of European McDonalds, so there weren't many details forthcoming. He did, however, reveal tantalizing snippets (a near bar fight in Cadiz, Spain) that will guarantee a first printing of 50. Until publication and the book-signing, Gerry is looking for work (yes, legal work) to tide him over....

Sherri Hazeltine spurred on a lively discussion concerning tort reform that resulted in Tony Sholty and Dan Wayne debating the finer points of the oft-cited but little understood phenomenon known as "the chilling effect." The debate was fueled by Dan's bald assertion that the rights of "regular citizens" (as opposed to those of us who are irregular) will be chilled if tort reform becomes law. Tony, apparently having eaten too many triples from Wendy's asked "where's the chill?" This question opened the gates to an unprecedented level of debate amongst our usually staid and restrained gathering. With the air charged with impassioned rhetoric, we moved on.

Barbara Carver gave birth to a 9 lb 2 oz healthy baby boy, whose birth size is only exceeded by his name: Alexander James Oscar Craver (to hyphen) Kirchhoff. Reports are that Dad wants to call him A.J., but perhaps the acronym of his name will better suite him: AJOCK. Mom and son are doing well.

— LACH ZEMP, SECRETARY

Women make inroads on state court bench

Continued from page 1

missioners. Women (with and without law degrees) had frequently held magistrate and commissioner posts.

One of the first women magistrates, Sadie Brower Neakok, was appointed in 1960 to serve as Barrow's sole judicial official. Neakok handled a wide variety of cases ranging from coroner's duties to divorce and custody matters. Since she was Barrow's highest legal authority, she decided cases typically reserved for district or superior court judges. Neakok stepped down after 17 years, leaving a legacy as a fair-minded jurist with a fine appreciation for bicultural issues and creative problem-solving.

Although Neakok often handled district court-level matters, a district court for Barrow was not created in 1968, when the legislature established a district court for Bethel, prompting the promotion of Nora Guinn from deputy magistrate to district court judge.

As the ranks of women increased in the Alaska bar (from about 15 percent of admittees at the beginning of the 1980s to about 30 percent by the end of the decade), so too did the number of women appointed to district and superior court.

Guinn, of Eskimo descent, thus became the first Native appointed to the bench and also among the first three women appointed to the Alaska state court bench in 1968. Guinn was such a popular fixture in the Bethel judicial system that no other person competed for the judgeship. The Judicial Council, normally required to send up at least two names to the governor for consideration, made an exception and sent only Guinn's.

In addition to Guinn, Gov. Walter Hickel appointed Mary Alice Miller and Dorothy Tyner to the district court in 1968. Miller, who had unsuccessfully applied for superior court three years earlier, now became one of three new Fairbanks District Court judges. She had practiced in Steamboat Springs, Colorado for five years before coming to Alaska in 1955. Active in the Tanana Valley Bar Association, Miller served as its president from 1965-1966.

Tyner, one of seven applicants for five new Anchorage District Court judgeships, came to Alaska in 1944 and practiced in Juneau, Seward and Anchorage before being appointed to the bench.

Although both Tyner and Miller applied for promotions to the superior court bench during their district court tenure, neither was successful. Upon their retirements, Tyner in 1977 and Miller in 1981, both of their seats went to women, a trend unbroken until James Wanamaker was appointed to Tyner's old seat in 1993. Beverly Cutler replaced Tyner in 1977 and Jane Kauvar replaced Miller in 1981.

As the ranks of women increased in the Alaska bar (from about 15 percent of admittees at the beginning of the 1980s to about 30 percent by the end of the decade), so too did the number of women appointed to district and superior court. (Bar statistics are based on people currently practicing in Alaska. Of the people who took the bar exam in 1980 and who are still practicing today, 30 percent were women.)

On the district court level four women took judgeships, while six women were elevated to the superior court bench.

In addition to Jane Kauvar's 1981 appointment to Fairbanks District Court, three women were appointed to the Anchorage District Court during the 1980s—Elaine Andrews (1981), Martha Beckwith (1984), and Natalie Finn (1983). Two of these replaced male judges, while Beckwith replaced Beverly Cutler when she was appointed to the Palmer Superior Court.

At the beginning of the 1980s no women had been appointed to the superior court. In fact, fewer than 10 women put their names in for superior court positions between 1959 and 1980. Those applying included Dorothy Haaland (1962, 1967, 1970, 1973); Mary Alice Miller (1965, 1970); Helen Simpson (1967, 1975); M. Ashley Dickerson (1970); Sylvia Short (1970); Dorothy Tyner (1973); Sheila Gallagher (1979, 1980); Carolyn Jones (1979, 1980); and Cheri Jacobus (1980). Of these, the Judicial Council sent three on to the governor: Miller (1970), Gallagher (1979, 1980) and Jones (1980). The governor did not appoint a woman to the superior court bench until 1982.

Even though women had still to be appointed to the superior court bench in 1980, that year Donna Willard started the process of placing a woman's name in contention for an even higher office, the Supreme Court. The Judicial Council did not nominate Willard for the post, but, she did pave the way for more women to apply for the Supreme Court when the next vacancy occurred in 1983. This time, Karen Hunt and Sandra Saville joined Willard in applying for the justice position. The Judicial Council did not nominate any women.

Finally, in 1982 with the creation of a new superior court judgeship in Palmer, Beverly Cutler became the first woman to sit on the Alaska Superior Court. Cutler, a Yale Law School graduate and former public defender, had replaced Dorothy Tyner five years earlier on Anchorage District Court.

In early 1984 Karen Hunt became the first woman appointed to the Superior Court bench in Anchorage. Hunt, a former teacher, president of the Alaska Bar Association, and partner at the Anchorage law firm Delaney, Wiles, Hayes, Reitman and Brubaker, took over Daniel Moore's Superior Court seat, becoming the first woman to replace a man on the Superior Court.

Later that same year, Joan (Katz) Woodward joined Hunt and Cutler on the superior court bench. Woodward took a newly created superior court position in Anchorage. A graduate of Boalt Hall in California, Woodward practiced employment discrimination law, served as a hearing officer, and helped found the Abused Women's Aid In Crisis center (AWAIC) before Governor William Sheffield made her a judge.

A couple of months later, in 1985, Governor Sheffield appointed Meg Greene to the superior court bench in Fairbanks. Greene took over from Warren William Taylor — the position Mary Alice Miller unsuccessfully applied for in 1965. A Harvard Law School grad, Greene clerked for Justice Jay Rabinowitz and later worked at the Public Defender Agency before becoming the first woman to serve on Fairbanks Superior Court.

In 1988, Dana Fabe and Niesje Steinkruger were appointed to the superior court in Anchorage and Fairbanks, respectively. Fabe, former head of the Public Defender Agency, clerk to Justice Edmond Burke, and Northeastern Law School graduate, would become the first woman to successfully move beyond the superior court.

While, the 1990s have seen a woman seated on the highest state court bench, this decade is also witness to women broadening their representation on lower state court levels.

With five out of 16 district court positions statewide and seven out of 31 superior court positions statewide, women made up 26 percent of the trial judiciary in 1994. This is about the same percentage as women who were active members of the bar. However, it does not include appellate positions where, in 1994, women held no seats.

While, the 1990s have seen a woman seated on the highest state court bench, this decade is also witness to women broadening their representation on lower state court levels.

During the '80s, with the exception of Beverly Cutler in Palmer, no women were appointed to judgeships outside of Anchorage and Fairbanks. The appointment of M. Francis Neville to the Homer District Court in 1990 and Patricia Collins to the Ketchikan District Court in 1995 show women making inroads in smaller Alaskan communities.

These district court positions along with the appointment of two more women to Anchorage District Court, Stephanie Rhoades (1992) and Stephanie Joannides (1994), suggest an acceptance of women judges at the district court level nearly three decades after women were first appointed to that court.

The appointment of women to the superior court, however, has slowed since six women became judges in the 1980s. In 1991 Elaine Andrews was promoted from Anchorage District Court to Superior Court, becoming the only new woman superior court judge out of 12 superior court openings since 1990.

Unlike early years after statehood when only one or two women were applying for judgeships, women now make up about one-third of the applicants for judgeships and a quarter of the nominees. The steady increase in women applicants reflects the increase in women practicing law in Alaska. Women typically make up a third of those passing the bar exam each year. During the 1980s and 90s the makeup of the trial bench began to reflect the greater number of women practicing law in Alaska. Statistics show women now make up about 30 percent of the district court bench, about 20 percent of the superior court and 12 percent of the appellate bench.

Although women continue to apply and be nominated in greater numbers for judicial posts, fewer women have been appointed to the bench this decade than last, and most of the appointments—aside from Justice Fabe—have occurred in district court.

Supreme Court

Dana Fabe

Superior Court

Joan M. Woodward

Mary E. Greene

Elaine Marie Andrews

Karen Hunt

Beverly W. Cutler

Niesje Steinkruger

District Court

Natalie K. Finn

Jane F. Kauvar

M. Francis Neville

Stephanie Rhoades

Stephanie Joannides

Patricia Collins

Women in the Judiciary

THE NATIONAL PICTURE

Throughout the United States it has only been within the last two decades that women have been appointed to judicial posts with any regularity.

The first woman judge, Esther Morris, served as justice of the peace in South Pass Mining Camp in the Territory of Wyoming in 1870. She was followed by Marilla Ricker, appointed U.S. Commissioner in the District of Columbia in 1884. Two years later, Carrie Kilgore became the first woman to be appointed to a state court bench as master of chancery in Philadelphia. Kilgore, the first woman to graduate from the University of Pennsylvania Law School, was an anomaly, since few women went to law school in the 1800s. Just obtaining a license to practice law proved difficult for 19th century women, since licensing statutes in many states required attorneys to be male. Gradually, as women lobbied to have statutes changed, more states admitted women to the practice. By 1890, about 100 women had been admitted to practice in 21 states.

> *"Gradually, as women lobbied to have statutes changed, more states admitted women to the practice."*

In the next years the percentage of women practicing law slowly increased from about one percent in 1910 to over two percent of all attorneys in 1930. The number of women judges also slowly increased. In 1930 12 states had women serving in some judicial capacity. By 1940, 21 states had women on the bench. The greatest gains in both the pool of women available for judgeships and those being appointed or elected judge occurred after the women's movement of the 1970s.

In 1970 women accounted for only 2.7 percent of those practicing law. One decade later, women grew to 13 percent of the bar, with 59,000 women admitted to practice by 1980. This sudden growth among women lawyers ushered in an era of increasing appointments of women to the judiciary.

Of the 400 women judges nationwide in 1973, only 240 were attorneys and served beyond positions of justice of the peace or municipal court. By 1977, Professor Beverly Cook found more than double that number of women on the bench, 916 or 5.8 percent of the lawyer and nonlawyer judges in the states. These numbers continued to grow in the next three years. The latest study (in 1980) found that just within the years between 1977 and 1980, the number of women on appellate and major trial courts throughout the country increased by 45 percent from 157 to 227. In early 1980, New Hampshire was the only state that did not have a woman on the bench.

The parallel between women's admission to the bar and their appointment to the bench is inescapable. As more and more women enter the practice of law, the pool of candidates for judgeships increases. According to American Bar Association figures, women made up 39 percent of law students enrolled in 1985 and 40 percent of the class of 1987.[1] If this trend continues, it is estimated women will make up one third of the bar by the year 2000.

In Alaska, women already make up one third of those passing the bar exam and roughly one quarter of those actively practicing law.

Information in this article comes from an article by Larry Berkson, "Women on the bench: a brief history," Judicature, Volume 65, Number 6, December-January 1982. The National Center for State Courts and American Bar Association have not updated this information.

1 David A. Kaplan, "Enrollment Continues to Plunge," *National Law Journal*, April 8, 1985.

Statistics

	Applicants	Nominees*	Appointees
Female	139 (14%)	55 (12%)	20 (13%)
Male	855 (86%)	402 (88%)	135 (87%)
Total	994 (100%)	457 (100%)	155 (100%)

**Includes seven nominees for Anchorage Superior Court, appointment not yet made.*

Applicants for Judgeships

9 of the first 200 applicants (up to 1970) were women (5%)
14 of the next 100 applicants were women (14%)
14 of the next 200 applicants were women (7%)
35 of the next 200 applicants (Nov. 1980 to 1987) were women (18%)
38 of the next 200 applicants (1987-1992) were women (19%)
29 of the last 94 applicants (late 1992 to 1996) were women (31%)

Appointees

7 of the first 100 appointees (through 1982) were women (7%)
13 of the next 54 appointees (1983 to 1996) were women (24%)

Nominees

4 of the first 100 nominees were women (4%)
2 of the next 100 nominees were women (2%)
14 of the next 100 nominees (1976 to 1983) were women (14%)
22 of the next 100 nominees (1984 to 1992) were women (22%)
14 of the next 57 nominees (mid 1992 to 1996) were women (25%)

Statistics, estimated as of June 28, 1996, compiled by Teresa W. Carns, Senior Staff Associate, Alaska Judicial Council.

Discovering data stored on electronic media

Continued from page 3

for example, 16 Am. Jr. *Proof of Facts* Section 273 regarding the applicability of the best evidence rule, of the business records exception to the hearsay rule, and of general issues regarding foundation and reliability. Illustrative forms regarding discovery into the respondent's underlying computer system and associated records can be found in 8 *Federal Procedural Forms* Section 23:277 and 12 *Federal Procedural Forms* Section 45:122.

Authentication of Computerized Records

Showings of a.) chain of custody, b.) testimony as to authenticity, and c.) that the original data is preserved unchanged are basic to the authentication of computerized records and should be quickly performed in the ordinary course of litigation. Both your client and the opposing parties should be put upon immediate notice to protect and preserve the original state of the computerized evidence and that you expect disclosure of all computerized records and the nature of the opponent's computer system as part of the mandatory discovery disclosures required by ARCP 16.1 (k) and ARCP 26 (a).

Electronic records, although easier to apparently change than paper records, often leave subtle electronic fingerprints indicating furtive changes. For example, the listed date on a record may not match the date embedded in the hidden DOS file header. Previously deleted versions usually remain on a local or network hard disk although not listed in the directory. Backup tape logs can be checked to see when different files drafted, changed and backed up. Electronic indices and full text search tools like the WordPerfect Quickfinder often include file and text references.

Thus, although electronic records appear to be more readily alterable, adulterations or deletions often leave largely invisible fingerprints that only the most knowledgeable can brush over. Where an attorney suspects that computerized records have been altered or deleted, or otherwise hidden, then the appropriate course of action is to contact a computer professional to thoroughly examine the records for electronic inconsistencies. Contact someone who is truly expert and who can stand up to examination in court, not your twenty year old nephew.

If evidence is not immediately preserved when litigation becomes foreseeable, then the authenticity of electronic records as later produced can become a matter of concern under Evidence Rule 1003 (1), given what appears, to the casual observer, to be the easily altered nature of electronic records. Because electronic records are central to the workings of most businesses and governmental agencies, working copies of the records are innocently altered by employees in the regular course of business. A high degree of assurance thus does not necessarily apply to belated printouts of computerized records or even to later electronic searches of databases. Early preservation is crucial and federal trial courts have recognized both the importance of this requirement and the real ease of protecting the initial state of electronic records.

Trial courts have thus taken an increasingly stern stance that each party to potential litigation has an affirmative duty to preserve the state of their computer system and of its electronic data as of the date when litigation first became foreseeable. In some recent Silicon Valley industrial theft and national security espionage cases, for example, trial courts have, upon a proper showing of need, issued ex parte orders authorizing a premises and computer search without notice to the respondent, who might otherwise quickly flush the incriminating information down an electronic toilet.

Sanctions for Failure to Protect Electronic Data against alteration

As early as 1974, federal courts required the preservation of electronic data. See, for example, *William T. Thompson Co. v. General Nutrition Corp.,* 593 F. Supp. 1443 (C.D., Cal. 1984, and I*n Re Equity Funding Corporation of American Securities Litigation*, Number 142, Judicial Panel on Multi-District Litigation, 375 F. Supp. 1378, 1400[5] (1974.

In William T. Thompson Co., the court imposed discovery sanctions against a defendant corporation for discovery abuse where the defendant allowed the routine alteration and destruction of electronic records by its employees during the regular course of business. Default was accordingly ordered against the defendant for discovery abuse. The defaulted defendant maintained about two thousand data backup tapes and the court reasoned that it was easy to preserve the initial system and data state by preventing the destruction of the pertinent electronic backup tapes despite a regular document destruction schedule.

In another seminal case, the U.S. District Court in National Assoc. of *Radiation Survivors v. Turnage*, 115 F.R.D. 543 (N.D., Cal. 1987) severely sanctioned a federal agency and its attorneys for failing to protect pre-litigation computer data. The court held, pursuant to earlier versions of Federal Rule of Civil Procedure 26, that the agency's failure to preserve an accurate record of the pre-litigation state of its principal veteran claims database and accurate records of possible claims constituted seriously sanctionable conduct by both the agency and by its general counsel.

In this case, the agency did nothing to make early archival backups of the data pertinent to the litigation and did nothing to prevent its employees from making routine changes, alterations and deletions to the principal electronic database after the possibility of litigation first became known. The agency initially declined to produce its computer records and tried to force the manual review of millions of claims, which would have resulted in what the court termed an unconscionable burden upon the plaintiffs.

Protective Orders

Federal courts routinely order that computer records be analyzed in their native state for patterns of information, clustering of similar cases and other analytic matters best done through electronic manipulation. See, for example, *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 295 (N.D., Cal. 1992), where the court held that tapes of computer payroll systems would be considered authentic business records for purposes of expert analysis. However, where actual search of the computer system is contemplated, the courts favor protective orders or stipulations that avoid undue disruption of the responding party's business, that protect the respondent's computer system from potential damage, and that avoid the disclosure of proprietary information.

For example, the Ninth Circuit held in 1984 that the presumption in favor of the discovery of electronic evidence could not be read as mandating that a responding agency be required to make expensive and substantial improvements in its computer filing system merely in order to retrieve the data in the format sought by plaintiffs. See *Munoz-Santana v. United States Immigration and Naturalization Service,* 742 F.2d 561 (9th Cir., 1984). *See also United States v. IBM*, 76 F.R.D.97 (S.D.N.Y. 1977).

By 1987, the Ninth Circuit in *Pink v. Oregon State Board of Higher Education,* 816 F.2d 458 (9th Cir. 1987) held that central computer system tapes of faculty information maintained in the ordinary course of business, and useful for statistical analysis by expert witnesses, were discoverable. However, in Pink, both parties' experts had discovered inaccuracies in the original database. Plaintiffs moved that the court compel the Board to correct and update the inaccuracies in its computerized records. The court held that whether to allow grant a protective order and to compel discovery into computerized records, including access to an opposing party's computer system, is within the discretion of the court and premised upon traditional discovery concepts.

In *U.S. v. Kupka,* 57 F.3d 1078 (9th Cir. 1995), the Ninth Circuit held that it was within the sound discretion of the trial court to deny a mail fraud defendant's request for access to the FBI's computer records as part of his Brady discovery. In that case, the Ninth Circuit held that because the defendant failed to connect his claim of misconduct to information that would be obtained from inspection of the FBI computer, the trial court did not abuse its discretion in denying access to the FBI computer.

In *Lawyers Title Insurance Corp. v. United States Fidelity and Guarantee Co.,* 122 F.R.D. 567 (N.D. Cal., 1988), the court refused to order computerized record discovery where the showing in support of the request suggested only a mere possibility that insurer might not produce relevant, unprotected documents. This court was concerned about protecting the expensive proprietary internal design of the Aetna system from possible appropriation by the other party, a direct competitor.

Many discovery requests involve establishing crucial evidentiary patterns from large masses of data. When done manually, such discovery requests are probably more oppressive and prohibitively expensive. In such instances, computerized research of data may make such discovery and subsequent analysis feasible in the first instance by providing a facile means to sort records from many different angles, and thus should be favored.

Many years ago, as Deputy Kenai Peninsula Borough Attorney, I was involved in precisely the sort of case where discovery and electronic analysis of computerized business records might have proven quite valuable to the other party if properly requested and used. Instead, the discovering party only propounded general written interrogatories, requested manual inspection of a huge quantity of paper records and then sought an extensive manual review of the local telephone carrier's records by the telephone carrier in order to show that local sales tax was not applied properly. The Superior Court denied a motion to compel the requested manual discovery regarding the underlying individual customer billing records as "cumbersome", and involving "great expense in recompilation of records." The Alaska Supreme Court affirmed in *Douglas v. Glacier State Telephone Company,* 615 P.2d 580, 593 (Alaska 1980). A computerized search would have made a great deal of sense here.

Advising a client regarding spoilation of computerized evidence

As soon as it becomes apparent that litigation might involve access to computerized records, put both your own clients and all other parties on written notice of the possible evidentiary value of computerized records and demand that such records be protected from alteration, deletion or loss. Plan for initial discovery to determine if specific access to the computer premises is required and plan how you will make a showing of need for the particular records, whether for the specific data contained in them or to ascertain patterns of information or to materially speed litigation.

In reviewing Ninth Circuit case law pertaining to the discovery of computerized records, one factor stood out from all others: trial courts have become very irritable indeed when important computerized records have been destroyed or altered after possible discovery requests became foreseeable, particularly because computerized data is so easy to preserve. In such instances, the courts have not hesitated to impose significant discovery sanctions, even when the computer data has been discarded carelessly as a result of ordinary record destruction decisions made by employees or when data has been altered by later employee usage in the ordinary course of business.

Avoiding this problem is actually very simple.

Whenever the need for discovering electronic data becomes foreseeable, instruct your client to immediately make two separate, complete, and fully verified copies, to be stored in two safe off-premises locations. These can then be restored as needed to show the data as it existed at any particular time. Be sure that prior and subsequent backups are preserved as well even if such preservation interferes with ordinary backup tape rotation or document retention schemes. Of course, an ordinary restored backup tape will not allow you to inspect the system for "deleted" files or earlier versions of a document. To later examine a tape backup for deleted files may require that your client or your opponent makes an "image" backup of the entire system, something that may require special software.

Tales from the Interior

Water under the bridge

Although I realize that I have written three articles about my next door neighbor, Bob, who is also my tenant, I can assure you that I am not picking on him. In fact, I think he is picking on me. Whether it was Warren Taylor, the dead king salmon, or this most recent incident, there is no longer any doubt in my mind that he is up to something.

So what's "this most recent incident?"

Many people don't know this, but Bob fancies himself to be a commercial fisherman. Every summer he departs for the Yukon River and his set-net site. It is something that he purchased from a client about two years ago, for a tidy sum of money with the idea that he could cast his nets on the water and, apparently, catch men. Certainly, he has ended up with a few clients in the process, although none that I'd be proud to claim.

The summer of 1995 was no different. About the first of July, Bob departed for parts unknown on the Yukon River, seeking to develop new curse words, and looking for the mighty, elusive king salmon (even though I had left one in his freezer for two years)

Once again, peace descended upon Fairbanks. One evening, I spied seated on Bob's front porch steps a pleasant looking, 30ish woman. Accompanying her were two small children - a boy and a girl. Following the exchange of pleasantries on my way to the car, during which she asked if I was an attorney, and I answered, of course, in the affirmative, while fumbling for a card, I proceeded to enter my vehicle.

Just as I was preparing to pull out of my parking spot, I saw the young girl, who was probably less than four years old, beginning to behave quite strangely . I had seen such behavior in other little children before, and it normally immediately preceded what young children will do when they have got to go potty very badly, and there is no potty in the nearby vicinity. At that age of innocence, they simply will pick the nearest bush, tree or other convenient location to relieve themselves. I even did it on the first grade playground once during recess, amid peals of laughter from some second grade girls: Before I could leave my vehicle and tell the lady that I actually had a bathroom in my office next door, the child became committed to Bob's window well. At first, I thought nothing of it, except to figure that people had tinkled on trees for centuries and, as such, Bob's basement window well should be no exception. Besides, it was Bob's office and not mine. Suddenly, I realized too late that the young lady had different intentions! It was not a socially acceptable "number one," but the dastardly proverbial "number two!"

I dashed in a panic from my vehicle, realizing that a deposit had now been made in Bob's window well which would last for some period of time, and well beyond the termination of his tenancy with me. I announced to the woman that if the children really needed to go to the bathroom, they could use my office. (Bad choice of words there.)

Innocently, the woman asked the child if she needed to relieve herself.

William Satterburg

The girl politely and honestly replied, "Not anymore." Still, the woman insisted that the girl and her brother go to my office, just in "case" (as opposed to casement).

At the office, the girl explained to me that this person was not really her mother, but someone else. She also told me that she had been told to use the window well, which caused me a certain degree of concern. After all, I figured that if Bob's clients thought of him in such a manner, perhaps those ads in the newspaper were beginning to work.

After doo-dahs, I returned the children to Bob's office. I explained to the lady that her child had soiled Bob's window-well. Again, the lady feigned ignorance and was annoyed that I was bothering her while she was writing her note to Mr. Sparks. Being ever the diligent attorney, and knowing full well my legal rights, I insisted that she come and take a look at the despicable deed. She approached the window well and looked inquisitively at the deposit and then stated, matter of factly, "So what? Dogs mess all over the place, so why shouldn't people?" It was at that point I realized we were getting nowhere fast.

I explained to her that, even though this was Fairbanks, Alaska, and not Anchorage, people still cleaned up after their dogs and that people-doo was hygienically different than doggy-doo. Recognizing that the child had proceeded to adorn Bob's window-well with what I considered to be an insult to our fine profession, I nicely asked the lady whether or not she would still clean up the remnants, regardless of her position on philosophical similarities between dogs and people.

She then changed the subject (a tactic which I also use often when asked to take out the garbage) and berated me profanely on a totally unrelated topic. I gently reminded her that her language was not appropriate in front of the children. In an entirely unanticipated response, she came to within three inches of my face, in classic drill sergeant style like my little sister always used to use, looked up at me, raised the volume of her discourse to the number ten, and began to jab me repeatedly in the chest with her index finger.

Still fully aware of my legal rights, I informed the lady that she was now engaging in an assault upon my precious body, and that it was not a welcome intrusion. After all, I had studied this particular phenomenon in my first year of law school, and was relatively certain that I knew the elements of the offense, especially after failing them on the bar exam. I knew what my rights were, although I still have a problem differentiating between a criminal and a civil assault. Of course, when my clients engage in such behavior, I normally tell the D.A. that it is minor disorderly conduct, deserving of only a dismissal.

"Assault?," she asked incredulously. "YOU are accusing me of assault? I beg your pardon, sir, but you are the one that is assaulting me!"

I responded as I have been trained to do by some of the best legal minds, "What?"

"You heard me," she yelled. "Children! Look at this. This man is assaulting me. Bad man. Bad man. All men are bad men." She was beginning to sound like my sister.

At that point, I began to look for someplace to crawl into. None was available except the window-well, and even that idea was rapidly developing merit. My male dignity clearly was at stake. I valiantly tried to salvage the situation.

"Lady," I said, "If you don't square away your act right now, I'll call the police."

At that point, she grabbed both sides of her blouse and ripped it open, bearing her chest for all to see. A true gentleman, I averted my eyes - three or four times.

Once again, she began to yell at the children that she was being assaulted by me, now pointing to her chest to indicate that I had torn open her clothing. I began to wonder whether or not she had velcro fasteners someplace. Her blouse had just opened too easily as far as I was concerned. I could never seem to do it during my dating years, when I used to blame it on my nail biting.

Saving what little pride I had left, I announced "Okay lady, that does it. I'm calling the police." I beat a hasty retreat to my office, and was entering the doorway when she yelled at me, " Hey, if that last bit bothered you, just watch this!" With that, she lifted her skirt to her waist and did a "number one" all over Bob's front yard. To say that I was stunned, shocked, and mildly aghast, would be an understatement. Having never been faced with such an incident ever before in my life, I ran into my office and asked my receptionist to come and view the spectacle.

By the time we returned to the porch, the woman had finished watering the lawn, and was behaving as if nothing had happened. I again told her that I was calling the police, and then walked out to take a look at the license plate number on her vehicle. At that point, the passenger door of the vehicle opened, and a man fell out on the ground. Although it appeared that this chivalrous fellow was intent merely upon saving his damsel, as well, and attempted resolutely to stagger blindly into battle, I knew he could never catch me. The end result was that she helped him up and shoved him headlong back into the truck. The entire entourage then departed the vicinity, much to my relief.

You can well imagine the response I received from the Fairbanks Police Department when I reported that a young girl had gone poo in Bob's window-well, while the lady with her had profusely watered Bob's front lawn. Undoubtedly, recognizing that this was a local defense attorney who was reporting the complaint, the officers must have felt that there was indeed justice in the world after all. Despite my demands that they immediately come and bag the evidence, take photographs, and listen intently to my statement, the officers indicated that they had a much more important call to respond to elsewhere in the city involving a serial jaywalker. I was left to my own devices. There was no way that I was going to clean the evidence out of Bob's window well. After all, destruction of evidence is a crime, and Harry Davis has made that clear to all of us on many occasions. In fact, I still intend to send the evidence to the police department in the near future, so that I will not be accused of such a misdeed.

Approximately two weeks later, Bob returned from his fishing trip. Upon hearing the story, he told me that the lady was not his client, but was someone who was on the other side and was apparently having a certain problem grasping reality. Moreover, the individual was reputedly unpredictably violent, a fact I apparently had overlooked. Bob must have believed this, as well, since he received a package from her at about the same time. Rather than opening it to see if it contained brownies, Bob delicately walked over to the x-ray device of the State courthouse, to see if it was a bomb or another bicycle speedometer. It was that subtle act of courage on Bob's part that convinced me that, just maybe, this particular visit could have turned out worse than it actually did. And besides, Bob's lawn hadn't been watered all summer.

Convention Highlights

ONE HUNDRED YEARS 1896 1996
ALASKA BAR ASSOCIATION

ALASKA BAR ASSOCIATION

100th Anniversary of the Alaska Bar

Photos by John Tuckey

Chief Judge James Singleton during the Joint Judicial Address at the 1996 Alaska Bar Association Annual Convention.

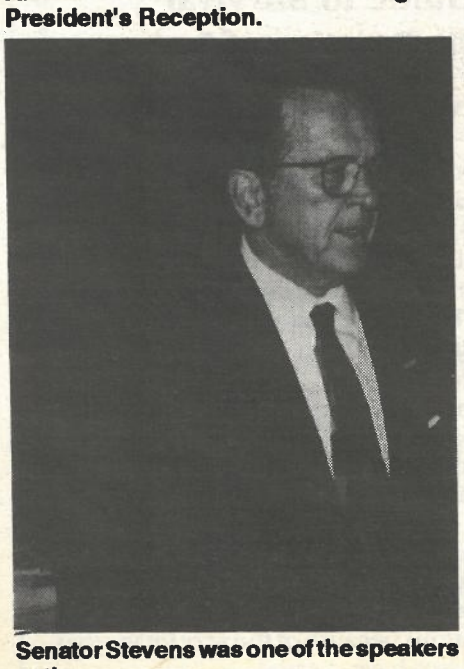
Left to right: Diane Vallentine, Immediate Past President; Dan Winfree, outgoing Board member; Beth Kerttula, President; and Philip Volland, outgoing Board member exchange goodbyes after Dan and Phil received their plaques honoring their service on the Board.

Left to right: Doug Bailey, moderator, and Charlie Cole, one of the speakers at the Annual Awards Banquet.

Left to right: Alaska Bar Board members Venable Vermont and Joe Faulhaber, Bar Counsel Steve Van Goor and Ken Eggers sample the refreshments at the Alaska Center for the Performing Arts during the President's Reception.

Left to right: Tom Daniel, Judge Mike Jeffery, and Carol Daniel at the Annual Awards Banquet.

Left to right: Judges Dick Savell, Mike Thompson, and Larry Weeks have a relaxing judicial caucus at the President's Reception.



Senator Stevens was one of the speakers at the program.

Become An Arbitrator For the NASD

The National Association of Securities Dealers, Inc. (NASD) is recruiting arbitrators to provide expedient, fair, inexpensive and binding resolution of disputes within the securities industry. Arbitration has become a significant mechanism for dispute resolution in the securities industry. The NASD provides the largest forum for securities arbitration, with an increasing number of cases each year. Arbitrators come from all walks of life — educators, homemakers, medical professionals, lawyers, etc. If you have at least five years of business, professional, investing or other related experience, you may be eligible. As a prospective arbitrator, what is most important is your interest in the securities industry and commitment to delivering conscientious and fair decisions. One Introductory Training Program is required before hearing a dispute and arbitrations are scheduled to suit the parties' and arbitrators' schedules. On average cases last about two and one-half days and compensation is in the form of an honorarium. For an application please call Lucien Salem, Esq. at (415) 882-1234 or write to him at NASD Arbitration, San Francisco, 525 Market Street, 3rd Fl., San Francisco, CA 94105.