The Alaska BAR RAG

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Inside:

5th & 9th Circuits head for Supreme Court IOLTA showdown

By Mary Alice Robbins
Texas Lawyer *magazine*

The 5th U.S. Circuit Court of Appeals recently refused to sit as a full court to rehear a panel's 2-1 decision that the Texas Interest on Lawyers' Trust Accounts program is unconstitutional, increasing pressure for the U.S. Supreme Court to take the case.

On May 31, the court denied the petition for a rehearing *en banc* in *Washington Legal Foundation, et al. v. Texas Equal Access to Justice Foundation, et al.* with a 7-7 vote; Judge Patrick Higginbotham did not participate. The decision, announced in an unsigned opinion, creates a conflict on the IOLTA issue between the 5th and 9th Circuits.

Through the IOLTA program, the TEAJF takes the interest on clients' funds held for short periods in lawyers' trust accounts. The program usually generates about $5 million a year to help provide civil legal services to the poor, although the total this year may be closer to $4 million, says Betty Balli Torres, TEAJF's executive director.

"Two judges on the 5th Circuit have been able to attempt to thwart the program," alleges TEAJF Chairman Richard L. "Dick" Tate, of Richmond, Texas' Tate & Associates.

Judge Jacques Wiener Jr. said in a strongly worded dissent that the 2-1 panel holding "dismantles IOLTA programs that have found favor in all 50 states as a means of funding legal services for the underprivileged" while fulfilling lawyers' ethical obligations to help provide those services.

Chief Judge Carolyn King and Judges E. Grady Jolly Jr., Fortunato Benavides, Carl Stewart, Robert Parker and James Dennis joined Wiener in the dissent, which urged the U.S. Supreme Court to take another look at the case.

In 1998, the high court held 5-4 in *Phillips v. Washington Legal Foundation* that interest on funds deposited in lawyers' trust accounts is the "property" of their clients but failed to address whether the funds were "taken" by the state or the amount of "just compensation," if any, that was owed. The Fifth Amendment to the U.S. Constitution guarantees that private property won't be taken for use without just compensation.

"While the interest at issue here may have no economically realizable value to its owner, possession, control and disposition are nonetheless valuable rights that inhere in property," the Supreme Court majority said in an opinion written by Chief Justice William H. Rehnquist.

Wiener called Rehnquist's statement perplexing. "With the utmost respect (and at the risk of revealing my own intellectual shortcomings), I read the court's opinion in Phillips as begging the question of what other 'valuable rights' inhere with the ownership of money, which, axiomatically, can only be defined by its face value," Wiener wrote for the 5th Circuit dissent.

SHOWDOWN

The IOLTA issue is back before the Supreme Court, which has decided to hear a similar case from the state of Washington.

In November 2001, the 9th U.S. Circuit Court of

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TVBA picnics under the midnite sun Pg. 4

U.S. District Court Judge Ralph Beistline hands out prizes to kids in Fairbanks.

Alaska's judicial pioneers attend reunion of Territorial Lawyers

By Margaret R. Russell

The scheduling of this year's Territorial Lawyers dinner to coincide with the Alaska Bar Convention prompted Judge Tom Stewart of Juneau, one of the founders of Alaska's judicial system, to attend the fifth annual Territorial Lawyers dinner May 16 at the Mahogany House B & B in Anchorage. Also attending were Senior Judges James Fitzgerald and James von der Heydt, both of whom reside in Anchorage.

The dinner brought together many of the lawyers and judges who practiced law in the Territory of Alaska, along with their spouses and guests, to share memories of the early years and catch up on news about themselves and mutual friends, present or not. Many of those present attend the dinner every year, relishing the opportunity to see old friends and reminisce about the fun and the challenges of practicing law in the territorial court and during the early years of Alaska's own judicial system.

Both of the senior U.S. District Court judges held a variety of legal positions in Alaska's Territorial and state governments. Senior Judge von der Heydt began his career in Nome where he served several years as a U.S. Marshall, and a year as a U.S. Court Commissioner. After serving two years as U.S. Attorney for Alaska, he opened a private practice in Nome and was elected to Alaska's first House of Representatives in 1957. In 1959, he was appointed Alaska's first State Superior Court judge in Juneau. He was appointed to the federal bench in 1966.

Senior Judge Fitzgerald was an Assistant United States Attorney from 1952-1956, followed by a term as Anchorage City Attorney between 1956 and 1959. In 1959, he acted as legal counsel to the governor and State Commissioner of Public Safety, and was then appointed to the Superior Court bench. He was an Alaska Supreme Court Justice from 1972 until he was appointed Judge of the United States District Court in Anchorage in 1975.

Judge Tom Stewart's Alaska roots probably go deeper than those of any of the other longtime Alaskans in the room. He almost certainly was the only person who lives to this day in the same house he grew up in, where he has resided for most of the past 84 years.

Stewart's house was built

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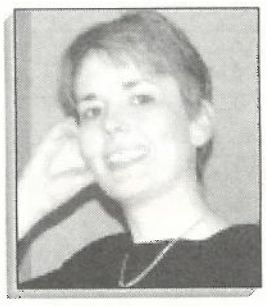
President's Column

Pro bono activity encouraged

☐Lori M. Bodwell



Recent interest rates have depleted the funds available through the Bar Foundation. Because this money helps fund Alaska Legal Services among many other worthy causes, the issue of pro bono activity by lawyers has once again been brought to the fore.

Currently, Bar Rule 6.1 encourages lawyers to engage in pro bono work without setting any hour goal. The Board recently received a request to adopt the new ABA model rule 1.6 with an aspirational goal of 50 hours of pro bono work. That rule is published for comment in this issue. The rule uses some strong language and I urge you to read it and forward comments as it will affect your practice.

The rule is most useful in spelling out the different types of work that would be considered pro bono work. The rule recognizes that no one form of pro bono work is "better" than another. Not all attorneys have the experience and staff to take on a pro bono domestic relations or immigration case. Not everyone is skilled in criminal law and able to take conflict appointments from the court.

But given the comprehensive list set forth in the rule and its commentary, everyone has some skill that can be used to benefit the community. Everyone, even state employees and judges who may be otherwise precluded from performing traditional pro bono work, can volunteer for Bar committees, without which your Bar association would cease to function effectively, or participate in Law Day or Youth Court.

I question the need for a rule that sets a fictitious hourly goal on pro bono time. Volunteer work should not be conscripted service begrudgingly performed to meet some quota. The quality of representation would inevitably suffer.

We, as attorneys, should take proactive steps to participate in pro bono activities – not because a rule mandates it and not because a law degree carries with it some special obligation to work for free, but because the communities we live in will be the better for it.

Next time you get a solicitation for volunteers for Bar committees or a call from youth court, say yes and make the time. Better yet, do not sit back and wait for a call from someone soliciting pro bono attorneys. With funding cuts, the various agencies that provide pro bono legal services have fewer and fewer resources to run their organizations and need you to call and volunteer your time.

If you cannot find the time, you can make a financial contribution to the Robert Hickerson Partners in Justice annual campaign for Alaska Legal Services.

Give what you can and make it an ingrained part of your day. Encourage those around you, especially new attorneys, to start their careers with a pro bono component. The way to inspire others to incorporate pro bono work as part of their practices is for individuals to lead by example and for firms to make it possible for associates to take on pro bono projects.

Take the time to read ABA Model Rule 6.1 and send in your comments. Then get involved and stay involved.

Editor's Column

When new worlds collide: Barrag.com

☐ Thomas Van Flein

In the last month the Bar Rag has had its books unexpectedly audited. (And if it wasn't for those meddling kids none of this would have happened). As most of you know, for years we have been able to make our most important decisions outside of the public eye, and our spending has gotten a little out of control according to some self-appointed "watchdogs." Our public financial statements did not exactly reflect what was occurring on the street. Not that anyone objected—not even our accountants. Truth be told, it was their idea in the first place to list all of our expenses as assets and they were the ones who first convinced us how our compensation had not kept up with the marketplace for CEO's. Plus, our friends and family members, I mean our independent board members, agreed, so, it was pretty much unanimous.

And what expenses there were! The staff meetings in Vegas, or the fine art collection that somehow was purchased by the Bar Rag but ended up in the various homes of Bar Rag staff are particularly memorable. The generous bonuses we raked in after every "successful" issue. Now it seems, there are questions, and we are not happy about all of this sudden scrutiny. Nobody understands just how difficult it is to be a high level executive at a major media publication. The stress of another deadline, the pressure of another noon lunch meeting or the dilemma of how to word a headline is too much for many. We had no choice but to pay what may seem, to the uninformed, as exorbitant salary and benefits, but to those of us who truly know, it was not excessive but well earned. Trust us on that. Many on the Bar Rag feel underpaid and one or two junior executives looked visibly disappointed when this year's "Fun in the Sun" work meeting was booked in Kauai instead of Bali.

Let me explain how we reached our salary decisions. I am certain that after you understand our reasoning, you will be placated and this whole "investigation" will be dropped and we can get back "work" and using your money the way we see fit. In setting my salary and benefits at the Bar Rag, and those of our top executives, we first turned to other media conglomerates for guidance. Our thinking was, if it is good enough for Time-Warner and its board of directors, how could we go wrong? In 2001, AOL/Time-Warner CEO Gerald Levin made $77,374,633 in total compensation and he has another $127,421,550 in unexercised stock options from previous years. That seemed reasonable to us. Some of our board members even wondered out loud how he could make ends meet, but we concluded with some coupon clipping and bargain hunting, he could make do.

We also factored in performance. The Bar Rag has never made a profit. Although the ink may look black as you read this, believe me, it's all red back at headquarters. But, in 2001, average corporate profits were down 35% and average stock values were down 13%. At the same time, median corporate CEO pay increased 7%. So we concluded that performance should not be tied to our pay rate since that was how it was done on Wall Street. Plus, think of the tax savings! Also, we need more money to give us incentive to work harder in order to, well—spend more money, which is what we have to do in order to beat the terrorists. So, if you question our benefits, you are just letting the terrorists win.

You may compare your own earnings to our Bar Rag compensation package and feel that something is amiss. Do not be alarmed. Since 1980, we note (and *Business Week* reports) that the average pay of regular people increased just 66 percent, while CEO pay grew an astounding 1,996 percent. That should explain why our Bar Rag compensation packages are so lucrative and your take home pay is less then a signing bonus for a minor league outfielder. We hope that this information will help ease your concerns now that you know we were just following the lead on Wall Street and doing what our "consultants" told us.

Some of you may still be unhappy with this flagrant misuse of your bar dues. And maybe you will want a new editorial and executive staff and have us terminated. We actually beat you to the punch on that one as well. Our employment contracts have termination clauses that require a substantial cash payment, payable over the next 20 years, if we are terminated without cause. If we are convicted of any crimes or other wrongdoings or terminated for cause, the payout is double. So let us go if you think you can afford it. We hope you do. There is a little spot in a non-extradition country where the Bar Rag has its retirement villa, and we would not mind a good reason to spend some quality time there.

The Alaska BAR RAG

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Thomas J. Yerbich
Rick Friedman

Contributing Cartoonists
Bud Root

Design & Production:
Sue Bybee & Joy Powell

Advertising Agent:
Details, Inc.
507 E. St., Suite 211-212
Anchorage, Alaska 99501
(907) 276-0353 • Fax 279-1037

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Bar Letter

Satterberg demonstrates Tanana Valley spirit

I was pleased to learn that Bill Satterberg was doing his part to narrow the "Tetlow gap" with Anchorage by arranging for his arrest in a Fairbanks courtroom. It's always heartening to see someone demonstrate that old Tanana Valley spirit. A Fairbanks colleague subsequently gave me a "Free Willy" bumper sticker at the recently-conducted Bar convention. I was sorely disappointed, however, to discover that Bill had been released from custody with all charges dropped, thereby depriving me of an opportunity to exercise my First Amendment rights by displaying the sticker. I was wondering if Bill couldn't arrange to be re-arrested — perhaps for a longer period of incarceration? Failing that, could we bring back Harry Davis and have a "do-over" with Judge Blair presiding?

—Gregory S. Fisher

A (politically correct) Pledge in the 9th Circuit[1]

I pledge[2] allegiance, consistent with my situational ethics,
to[3] the flag (retaining my right to burn it)
of the United, but unequal, States of America[4]
and to the Democratic Republic for which it allegedly stands,
one Nation, under the higher power of my belief[5],
indivisible (with the exception of political & ideological tactics),
with liberty and justice for all, born and unborn[6],
regardless of their race, creed, religion, gender, sexual preference, citizen status or ability to pay.

FOOTNOTES

[1] The original Pledge of Allegiance was written in 1892 by Francis Bellamy (1855-1931), a Baptist minister in Boston. A Christian Socialist, his theme in his sermons, novels and articles described how the middle class could create a planned economy with political, social, and economic equality for all. His friend (and parishoner) Daniel Ford first published the pledge in his family magazine, the Youth's Companion, in September of 1892. That same year, Bellamy was chairman of a National Education Association committee that was preparing the celebration for Columbus Day in the schools. He developed a school program focused on a flag-raising ceremony and a flag salute--his Pledge of Allegiance. And the rest, as they say, is history, as use of the pledge

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5th Circuit IOLTA rehearing a no-go

Continued from page 1

Appeals, sitting *en banc*, held in *Washington Legal Foundation v. Legal Foundation of Washington* that the IOLTA program in that state is constitutional. In an 11-1 decision, the 9th Circuit held that, although interest in IOLTA accounts is property, no taking occurred in violation of the Fifth Amendment and no compensation was due.

A month earlier, the 5th Circuit panel held 2-1 in the Texas case that there is a *per se* taking when the interest is swept from IOLTA accounts because the state permanently has appropriated plaintiff William Sumners' interest income against his will. Clients have no choice about whether the interest from their funds goes to IOLTA because Texas lawyers are required to participate in the program, Judge Rhesa Hawkins Barksdale said in the panel's Oct. 15, 2001, majority opinion.

The panel's decision reversed a 2000 ruling by U.S. District Judge James Nowlin of Austin, Texas, who found the program constitutional.

"Our victory stands," Richard Samp, chief counsel for the Washington Legal Foundation, says of the 5th Circuit's decision not to hear the case *en banc*. But Samp says he thinks the Supreme Court will have to decide the case because of the split in the circuits.

SAMP SAYS HE THINKS THE SUPREME COURT WILL HAVE TO DECIDE THE CASE BECAUSE OF THE SPLIT IN THE CIRCUITS.

Basing its decision on an "ad hoc" analysis, the 9th Circuit held that the state of Washington may adjust the rights of a few individuals for the benefit of the public so long as its actions are reasonably necessary to achieve a substantial public purpose. The 5th Circuit panel reached its conclusion through a per se analysis, an approach that, according to the 9th Circuit's opinion, is inappropriate when the property is money.

"The 5th Circuit [panel] forged new and uncharted territory on Fifth Amendment jurisprudence," says TEAJF Chairman Tate.

Darrell Jordan, TEAJF's attorney and a Hughes & Luce partner in Dallas, says he expects a petition for a writ of certiorari to be filed with the Supreme Court this week.

"We're pleased with the posture of our case as it came out of the 5th Circuit," Jordan says. The 7-7 vote and Wiener's dissenting opinion help, he says.

Torres, TEAJF's executive director, says the group filed a motion to stay the mandate with the 5th Circuit on Wednesday. "We will continue to operate business as usual until we exhaust all appeal remedies," she says.

James Paulsen, a South Texas College of Law professor who has been involved in a legal battle over IOLTA in the state courts since 1998, says the 5th Circuit's decision not to hear the case en banc adds to lawyers' confusion over what to do with regard to their accounts. "If there was widespread confusion before, there should be widespread consternation now," he says.

On Thursday, the Texas Supreme Court declined to hear *Paulsen v. State Bar of Texas*, in which Paulsen had asked the court to clarify state property law. Paulsen had argued that the U.S. Supreme Court misstated state law in Phillips. The State Bar agreed with Paulsen on that point in a brief filed in the Texas Supreme Court.

Jordan says he had not counted on Paulsen's argument in the state court system for relief on the IOLTA issue.

The courts have focused on the Washington Legal Foundation's argument that IOLTA violates the Fifth Amendment's taking provision. Samp says that if the plaintiffs lose on that argument, they will argue that the program violates the First Amendment rights of lawyers' clients by forcing them to contribute to programs that assert positions with which they disagree.

Bar Employee Spotlight

A special thanks to Karen Schmidlkofer, Controller, (R) and Candi Goard, Accounting Assistant, for making the Bar office move to new space so smooth!

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The position is temporary, 35 hours per week, at $12.00/hour. This clerkship is expected to last no more than three months, to run throughout the fall of 2002. Travel expenses covered by AkCLU. No benefits will be provided. Call 258-0044 for information on how to apply. EOE.

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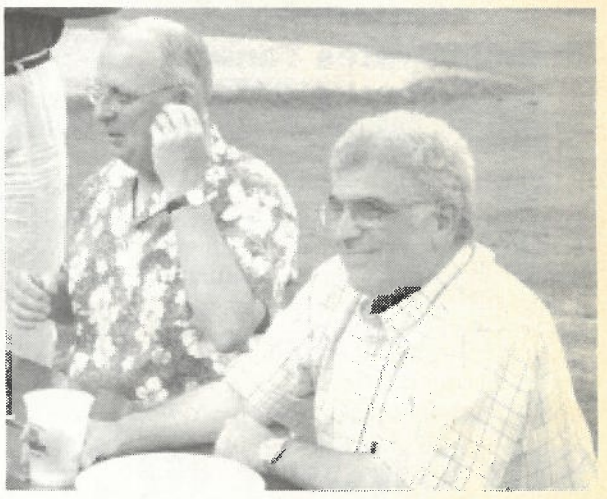
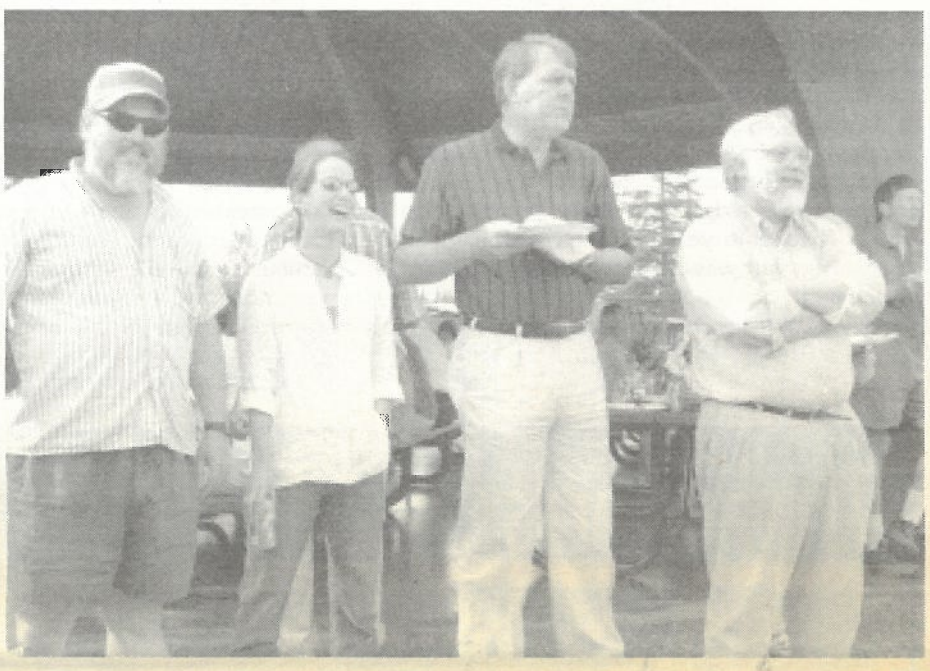
Tanana Valley Bar Picnic

The TVBA annual Christmas picnic (we have our Fourth of July party in January) was held at the Moose Creek Pavillion in Alaskaland on Friday, July 12. All attorneys, (regardless of TVBA dues paying status), office staff, court staff and families were invited to attend. The TVBA provided beverages, a pig, hot dogs and hamburgers.

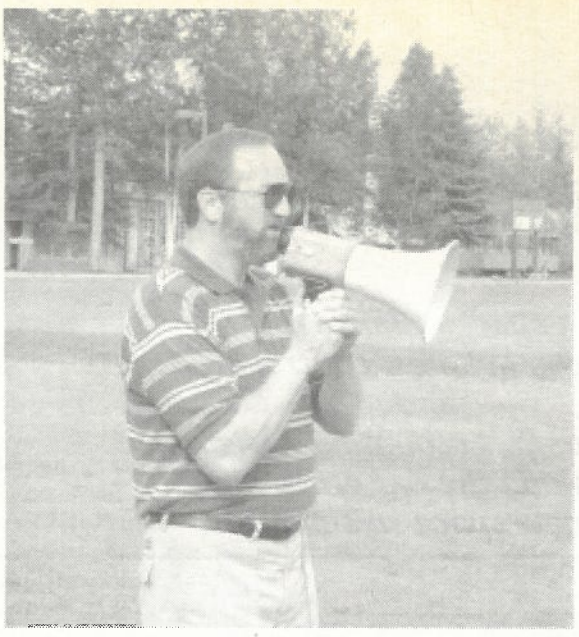


Terry Hall and Andy Kleinfeld enjoy the festivities.



Ken Covell, Kat Kinkade, Gene Gustafson and Ray Funk watch the games.

Ken Covell lobs an egg in the egg-toss game.



Ralph Beistline presiding over the annual egg-toss.

Judge Richard Savell takes a rest.

Niesje Steinkruger participates in the egg-toss.

Photos by Lori Bodwell

'People skills' are the hard skills

In offices across the nation, the core skills of managing people, active listening, problem solving, and relationship building, are often discounted or marginalized as non-essential. They are referred to as "soft skills." These *intangible* skills seem harder to quantify relative to other skills geared toward specific financial, technological and procedural operations which can be easily measured and monitored.

Regardless of where you work, consistent and superior business results are a function of *how people relate to each other*, i.e., with clients, with customers, with suppliers and with others. *How people relate* includes the ability to communicate directly AND respectfully, the ability to give, receive, and respond to feedback without getting defensive, and the ability to resolve conflict AND maintain trust. While you may concur with this premise, what is actually *being done* to address the "how we relate" quotient inside your organization?

As a consultant and coach to many Fortune 1000 companies, I have noticed that lower standards of conduct have become commonplace inside most organizations. Complaining, victim mentality, blaming patterns, and that veteran morale-buster, gossip, have become a normalized part of many corporate cultures. We tolerate, accommodate, compensate for and avoid that which we don't know how to deal with and we do it in the name of expediency and efficiency.

For anyone who has ever endeavored to have the more difficult conversations, they know that these *skills truly are the "hard skills."* Can you tell someone that their performance is not meeting expectations without them getting defensive? Can you ask a coworker with a loud and obnoxious voice to tone it down without inciting a conflict? Can you "manage up" and hold own your manager accountable for higher standards of leadership without being rebuked?

Interpersonal issues are to organizational morale like weeds are to gardens. Each day, more weeds. If attended to directly and promptly, the garden thrives and plants continues to grow. If ignored or left alone, weeds will eventually take over the entire garden. When we don't know how to do something OR don't feel confident in our ability to be successful, we avoid addressing the interpersonal and organizational "weeds."

FOR EVERY HOUR YOU SPEND UPGRADING YOUR ADMINISTRATIVE, PROCEDURAL, AND TECHNICAL SKILLS, CONSIDER MATCHING THAT EFFORT WITH AN EQUAL INVESTMENT IN TRAINING AND DEVELOPMENT IN "PEOPLE SKILLS."

There is a cost. When walls go up, communication, innovation and productivity go down. According to a Gallup Organization study that synthesized twenty five years worth of interviews with more than a million employees: "the single most important variable in employee productivity and loyalty turns out to be not pay or perks or benefits or workplace environment. Rather, the relationship between employees and their direct supervisors."

Furthermore, high turnover and loss of good people costs organizations untold millions of dollars. In their book, *First, Break All the Rules: What the World's Greatest Managers Do Differently* (Simon & Schuster, 1999), Marcus Buckingham and Curt Coffman write: "People leave managers, not companies." How many quality employees have left for greener pastures? How much does it cost your organization to attract, recruit, interview, orient, train, and get a new employee up to speed?

Want to become a high-performance organization? Invest in your own, and your organization's, people skills. For every hour you spend upgrading your administrative, procedural, and technical skills, consider matching that effort with an equal investment in training and development in "people skills." Follow the lead of such companies as Hewlett Packard, IBM and Motorola, who realize that training their people to weed is the quickest way to a healthier, happier, and more profitable garden.

Interested in developing your people skills? Some opportunities that are immediately available to you are these people skill workshops:

• Getting Through to People: Advanced Influence Skills & Strategies for the Legal Profession, Tues., Sept. 10, 1:00 p.m. - 5:00 p.m., Anchorage Downtown Marriott, 3.75 CLE Credits.

• Time Mastery for Lawyers: Ways to Prioritize Your Productivity & Satisfaction, Wed., Sept. 11, 8:30 a.m. - 12:30 p.m., Anchorage Downtown Marriott, 3.75 CLE Credits.

The author says he's a people skills expert and professional "weed-whacker" from Santa Barbara, CA.

Problems with Chemical Dependency? Call the Lawyers' Assistance Committee for confidential help

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Bar People

Gyfteas joins Pradell & Associates

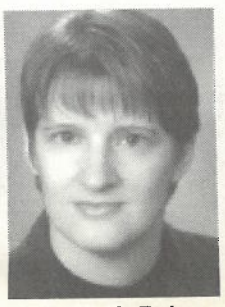
Laura Gyfteas

Pradell and Associates is pleased to announce that Laura Gyfteas has joined the firm.

Ms. Gyfteas is a paralegal who previously worked for the firm beginning in 1996 as a file clerk and legal secretary. Most recently, she has been employed as a designer of custom draperies at JC Penney. The firm is pleased to welcome her back as a paralegal. Pradell and Associates is a law firm whose practice includes domestic and criminal law, as well as personal injury. The firm is located downtown at 1009 W. 7th Avenue, at the corner of 7th and K streets.

Former criminal prosecutor joins Peterson Russell Kelly

Peterson Russell Kelly, PLLC, announced that Elizabeth A. Baker has joined the firm as a litigation associate. Baker comes to Peterson Russell Kelly after serving 5 1/2 years as a criminal prosecutor. She joins the firm's commercial litigation group, bringing with her 10 years of legal experience.



Elizabeth Baker

Baker is an experienced litigation attorney having tried close to 100 bench and jury trials at both the Municipal District and Superior Court levels. With a legal career spanning 10 years, Ms. Baker has handled matters involving civil litigation, criminal law, and family law. She is experienced in all aspects of litigation, including case analysis and strategy, jury and bench trails, mediations, settlement conferences, depositions, and has conducted all aspects of discovery.

She received her J.D. in 1992 from Marquette University Law School, Milwaukee, Wisconsin where she was awarded the American Jurisprudence Award for International Law. She received her B.A. (Majors in Criminal Justice and Political Science; Minor in sociology) in 1989 from Gonzaga University, Spokane, Washington.

Freeman & Watts relocate

Effective June 1, the law firm of **Freeman & Watts** has relocated its offices to the Willis Insurance building, just south of its former location. The firm's new address is 4220 B Street, Suite 202, Anchorage Alaska 99503. The firm will continue to emphasize its practice areas of construction litigation and claims, labor and employment law (management), business and commercial law, personal injury, real estate, and military law. Freeman & Watts is looking forward to its new tenancy with Willis Insurance and the Alaska Support Industry Alliance.

Robert Wagstaff has been accepted for a one-year graduate law degree program at Oxford University in England. Classes start Oct. 1 and run through the following June. The degree is titled, "Bachelor of Civil Law" or "BCL." Wagstaff will be principally studying history of English law, jurisprudence and civil liberties. He will be keeping his office in Anchorage open.....**Gregory S. Fisher** has been admitted by examination to the Arizona Bar Association and effective September 2002, will be joining the Chambers of the Honorable Barry G. Silverman, United States Court of Appeals, Ninth Circuit, in Phoenix, Arizona.

Did You File Your Civil Case Reporting Form? Avoid A Possible Ethics Violation

A reminder that civil case resolution forms must be filed with the Alaska Judicial Council as required by the Alaska Statutes and the Alaska Court Rules. The failure of an attorney to follow a court rule raises an ethics issue under Alaska Rule of Professional Conduct 3.4(c) which essentially provides that a lawyer shall not knowingly violate or disobey the rules of a tribunal. Members are highly encouraged to file the required reports since compliance avoids the possibility of a disciplinary complaint.

Anchorage Superior Court Judge Dan Hensley appointed presiding judge for Third Judicial District

Chief Justice Fabe announces the upcoming appointment of Superior Court Judge Dan A. Hensley of Anchorage as Presiding Judge of the trial courts in the third judicial district. Judge Hensley will replace current Presiding Judge Elaine Andrews upon her retirement on September 6, 2002. Judge Andrews has served as third district Presiding Judge since July 8, 1996. Judge Andrews was first appointed to the Anchorage bench in 1981 as a district court judge; in 1991 she was appointed to the Anchorage superior court.

Chief Justice Fabe stated, "Judge Andrews has dedicated her career to public service, and her contributions cannot be overestimated. She is an experienced and intelligent jurist and a thoughtful and pragmatic administrative judge. As presiding judge of the busiest district and court in the state, Judge Andrews has worked hard to improve the administration of justice in our state. I am confident that Judge Hensley will continue Judge Andrews' efforts to direct court operations in the third judicial district diligently, fairly, and with an eye towards continuous improvement of court services."

Judge Dan A. Hensley was appointed to the superior court in Anchorage in 1997. He has an undergraduate and law degree from the University of Kansas. Prior to his appointment to the bench, he was engaged in the private practice of law. Judge Hensley also served as a felony trial attorney and supervising attorney for the Alaska Public Defender Agency, and as an attorney in the Solicitor's Office for the U.S. Department of the Interior in Washington, D.C. and Anchorage. Judge Hensley is a member of the court's Judicial Education Committee and is a Magistrate Training Judge.

The Chief Justice of the Alaska Supreme Court appoints a presiding judge for each of the four judicial districts. The appointments are for a one year term, and cover a calendar year period. Judge Hensley will serve as Presiding Judge for the remaining portion of Judge Andrews' current term (ending December 31, 2002) and he will be eligible for reappointment for successive years.

In addition to regular judicial duties, the presiding judge has the administrative responsibility to supervise the assignment of cases and administrative actions of judges and court personnel, keep current the business of the courts, review and recommend budgets, and review the operation of all trial courts to assure adherence to statewide court objectives and policies.

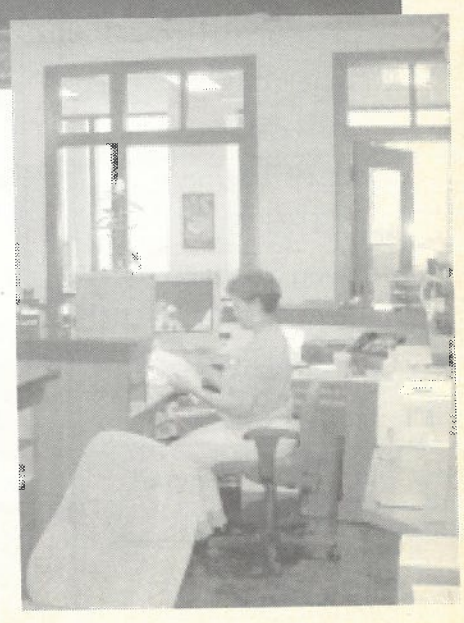
The third judicial district is administered from Anchorage. The district covers south central Alaska, extending from the Canadian border to the end of the Aleutian Island chain. The district includes 15 court sites, ranging in size from single magistrate locations to the Anchorage trial court, which alone handles almost half the workload of the Alaska Court System.

Anchorage office of Heller Ehrman moves to new location

The local Anchorage office of the law firm Heller Ehrman White & McAuliffe LLP has relocated to a new downtown location. The new address, 510 L Street, Suite 500, will give the growing office room to expand in the future. The office phone (907) 277-1900, and fax number (907) 277-1920, will remain the same.

Since 1989, Heller Ehrman has been serving the legal needs of its Alaska clients from its Anchorage office. Today, the local office, comprised of Jim Torgerson, Andy Behrend, Jon Ealy, Peter Reckmeyer, and Aaron Schutt, represents oil, gas and energy producers, healthcare providers, transportation firms, Native corporations, the insurance industry, governmental entities, financial institution, and numerous other firms and individuals. Heller Ehrman looks forward to many more years of service to its clents and the community from its new downtown Anchorage location.

Bar Association Relocates



The Alaska Bar Association's new offices overlook downtown Anchorage, in the Atwood Building at 550 W. 7th Ave. that was found at significantly less cost (45 percent below the bar's previous location on L Street). Above, the new entryway to the bar offices and a workstation.

All my trails ☐ Rick Friedman

"The opposite of love is not hate, but the relentless pursuit of the rational mind."

— Josh Karton, actor, philosopher, and former driving instructor on "Beverly Hills 90210," purporting to quote Dostoyevsky.

Ever vigilant in protecting your bar dues, the Board of Governors commissioned a study of *Bar Rag* readership to determine whether the expense of publication is justified. The two year, 258 page report concluded that the average readership of any given issue of the *Bar Rag* is 43. The readership breaks down into three major groups:

1. Authors of articles appearing in the *Bar Rag;*

2. Bar members publicly censured in a particular issue, and those that turned them in; and

3. Judges reading the post-convention issue to see pictures of themselves eating *hors d'oeuvres* in banquet rooms.

There was actually a fourth group of "readers," discussed in appendix D to the report. There is sharp spike in readership of the *Bar Rag* when the issue containing the 25th anniversary pictures is published. That's the issue showing 25 year-old pictures of distinguished judges and senior partners, back when they looked like geeky junior high students. The report's authors concluded that the group of people looking at these pictures could not properly be considered "readers," since they disclaimed any interest in or knowledge of the contents of the articles—claiming to only look at the pictures. (Termed "The Reverse *Playboy* Effect" by the authors.)[1]

THERE IS SHARP SPIKE IN READERSHIP OF THE *BAR RAG* WHEN THE ISSUE CONTAINING THE 25 TH ANNIVERSARY PICTURES IS PUBLISHED.

The most interesting aspect of the study is the large group of lawyers who claimed not to have read a single issue of the *Bar Rag* since Gail Fraties stopped writing his column, *All My Trials*. Even more troubling is that 68% of all Alaska lawyers admitted to the Bar during or after 1990, have never *heard* of Gail Fraties.

WHO WAS GAIL FRATIES, AND WHY SHOULD I CARE?

Gail Roy Fraities was one of the best trial lawyers Alaska ever produced. At various points in his career, he was a criminal defense attorney, a prosecutor, a plaintiffs' lawyer, and a superior court judge.[2]

I don't claim to be an expert on Gail Fraities. I shook his hand once, saw him partying at a strip club in Ketchikan (once), and watched him select a jury once.

It was the mid-eighties. An unusually grisly and highly publicized murder case had been moved to Sitka in an attempt to secure the defendant a fair trial. I rushed over to watch the master select a jury.

When I came into the courtroom, Gail was standing before the jury. Imagine my surprise when I heard Gail start asking jurors about their signs—as in, "I'm a Taurus, what's your sign?" As I said, this was the mid-eighties. Disco was long dead. Even jokes about astrology were considered hopelessly outdated. Using this line in a bar, you would have about as much chance of success as Eric Sanders convincing a Republican President to appointment him judge. I squirmed in embarrassment for Gail. It would have been more appropriate for him to show up in paisley bell-bottoms and a headband.

And then a funny thing happened. The jurors smiled and started talking. The temperaments, judgments and intellectual prowess of Libras and Aquarians were carefully weighed and discussed in great detail. Anecdotes about those wacky Geminis were exchanged.

And then another funny thing happened. Gail started emphasizing the importance of reasonable doubt. He talked about it as if it belonged etched in stone as the 11th commandment. He talked of the defendant's right to a fair trial, his right not to testify—why it was fair *and imperative* not to hold it against him if he chose not to. It was artful, compelling. But Gail was the prosecutor. He went on and on about the state's heavy burden of proof, and the presumption of innocence. By the time he was done, everyone in the courtroom just knew that nobody in the world cared more about protecting the defendant than Gail Fraties. And, of course, if Gail was prosecuting, and asking for a conviction, it must be because the defendant absolutely needed to spend the next several decades in prison. The defendant must have felt the same way; the next morning he pled guilty to second degree murder.

GAIL'S GENIUS WAS IN TEACHING HOW TO TAKE OUR JOBS SERIOUSLY, WITHOUT TAKING OURSELVES OR EACH OTHER TOO SERIOUSLY.

My primary knowledge of Gail comes from reading his columns while I was a young, impressionable lawyer. From that vantage point, Gail's genius was in teaching how to take our jobs seriously, without taking ourselves or each other too seriously. A difficult lesson that we all need to relearn from time to time—and some never learn. I like to think he lived his life that way as well.

FROM GAIL'S SUMMER OF 1980 COLUMN:

"Many of my readers will probably be interested to learn that in the latest Bar poll one of the candidates was a fictitious name, entered as a control by the Judicial Council. This was done as a result of a complaint by a disappointed subject of a former poll, a Trappist monk who had never been in Alaska, but was nonetheless characterized as "unqualified," "diseased," "depraved," and "unfit to practice law" by 179 Alaska lawyers who claimed personal knowledge of and acquaintanceship with him. Information is unavailable concerning the fictitious individual mentioned above, other than the fact that his is one of the nine names that went up to the governor."

WILL THE BOARD OF GOVERNORS KILL THE BAR RAG?

It is too soon to tell.

Why Me?

The editor's first thought for saving the *Bar Rag* was to republish Gail's articles, and hope no one would notice they are twenty years old. That plan was rejected, and the rest of the story will have to wait until another column. As all 43 of you probably already know, the *Bar Rag* has strict column length limits. (*But see,* Any column by Bill Satterberg.[3]) Let me just close by outlining some of the subjects we will tackle in future columns (not necessarily in order):[4]

1. More excerpts from Gail's column.

2. Diversity jurisdiction. (I'm not kidding.)

3. Emotionally stunted judges.

4. Appellate delay.

5. News and gossip from around the state.

6. Cool contests, such as, "The most Ridiculous Federal Courthouse in America."[5]

Speaking of cool contests, we might as well start with one right now. In one paragraph, answer the following three questions: Who is the fastest runner on the Alaska Supreme Court? How do you know? And, what is the significance of that fact? The winner gets a $50 gift certificate to *The Look*. Requests for anonymity will be respected—but then I get to keep the gift certificate.

[1] An astute reader might question why the authors included group #3, above, as a group of readers. The judges, too, appear to only be looking at the pictures. In fact, as footnote 25 on page 224 points out, while it is the *hors d'oeuvres* pictures which gets judges to open the newspaper, once opened, 37% continue to listlessly turn the pages while listening to oral argument, voire dire, or court administration presentations. Another 28% have their clerks "brief" the *Bar Rag*. (The study does not disclose why.) One judge reportedly has the *Bar Rag* translated into Sanskrit (Can you guess who?). After much discussion of the *Daubert/Coon* criteria, the study concludes that 28% plus 37% is more than a preponderance of the evidence, thereby qualifying as "readership."

[2] He probably did some civil defense work as well, but for obvious reasons, this is not something he discussed publicly.

[3] Like most rules, regulations and customs of the Alaska Bar Association, there is a "Fairbanks exception," to this rule as well. This will be the topic of a future column.

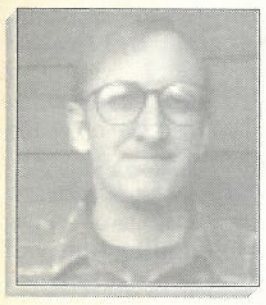
[4] This is not the royal "we," as used by some judges, but "we," as in, all 44 of us—the *Bar Rag* readers and me.

[5] I already have dibbs on the new federal courthouse in Phoenix, so you'll have to do better than that.

ECLECTIC BLUES

Browsing post-war history

☐ Dan Branch



In the summer of 1946 District Court Judge Anthony "Tony" Dimond sat at his desk in Anchorage pounding out a decision about agency and fish in Seldovia. In Juneau, Judge Joseph Kehoe opened the door to public education in the Southeast Village of Kake. Their published decisions may be found in the pages of Volume 11 of Alaska Reports.

Judge Dimond was called upon to settle a dispute between Ed Fjeldahl and the Homer Co-op Association. Fjeldahl wanted payment for halibut he delivered to the co-op. The co-op claimed that they were merely the agents for a fellow named Terranova and that he had to pay for the fish. Judge Dimond ruled for Fjeldahl. (*Fjeldahl v. Homer Co-op Ass's.,* 11 Alaska 112).

Judge Dimond found the Homer Co-op Association was made up largely of farmers with a few fishermen thrown in. Most resided at or near Homer which he described as a farm settlement on the north shore of Kachemak Bay. In 1945 they decided to get into the fish marketing business, selling fish caught by their members.

Through its manager, Sol Brososky, the Co-op contracted to sell silver salmon and other fish to Terranova. The contract price for silvers was 17 cents a pound. (This is 2 cents more a pound than that paid for Lower Cook Inlet silvers in 2002.) Judge Dimond found Sol Brososky to be "an enthusiastic extrovert who, in his optimistic and exalted vision, could discern only the coruscating and seductive brilliance of the sun shining on the summit of the gloriously refulgent Mountain of Success. The mere suggestion of caution or possible failure was evidently repugnant to him and whenever any question arose concerning payment for the fish being supplied by the plaintiffs he promptly and almost reprovingly gave the necessary assurances."

IN THE END, THEY PAID OUT MORE TO FISHERMAN THAN THEY RECEIVED FOR THE FISH.

Mr. Brososky's sunny outlook apparently brought the Association to ruin. The contract with Terranova gave the Association full responsibility for payment of the fishermen in exchange for a profit margin of 10%. In the end, they paid out more to fisherman than they received for the fish.

The Association, tried, without success, to avoid responsibility for the Brososky contract but Judge Dimond would have none of it because "any corporation which gives such power to its general manager...is ordinarily bound by his actions."

In an attempt to salvage something from the mess, the Association tried to have Fjeldahls' claim reduced by 19.3% on account of fish spoilage. The judge refused to award this consolation prize because the fish was fresh when Fjeldahl passed them on to the Association. In the end, the association of farmers had to pony up $1983.27, interest, and $750 in attorney fees.

Judge Dimond's decision gives an interesting glimpse into life on the Kenai following the Second World War. A group of folks, optimistic enough to farm near the Homer Spit, decided to get into the even riskier fish-buying business. They must have fallen under the spell of the fast talking Sol Brososky. Angered or desperate, they hired two lawyers to get out of their legal obligations.

THERE AREN'T MANY JUDGES WHO WOULD SPICE UP A CONTRACT CASE BY DESCRIBING BROSOSKY AS AN "ENTHUSIASTIC EXTROVERT" WITH "EXALTED VISION."

The decision also gives a glimpse of Judge Dimond's personality. There aren't many judges who would spice up a contract case by describing Brososky as an "enthusiastic extrovert" with "exalted vision." Judge Dimond is part of Alaska's history. In 1955, the territorial legislature declared November 30 of every year "Tony Dimond Day." You can find out why by reading Chapter 133 of the 1955 Session Laws of Alaska.

A decision in, *In re Kake School District*, 11 Alaska 186, provides more post war history. In the case, Nome based Judge Kehoe considered a petition filed by the residents of Kake for the creation of a school district. The petition was opposed by P.E. Harris Corporation, which operated a salmon cannery near the village. The corporation didn't want to pay school taxes and argued that they shouldn't be included in the school district because ½ mile of "wilderness" that was only occupied by one Indian family separated them from the village.

Judge Kehoe didn't buy the cannery's argument, finding, "To confine the incorporation to the actual limits of the town of Kake seems unreasonable for every town, village or settlement has need of areas not actually occupied by houses, especially in Alaska where so much that sustains life comes from the wilderness, the waters and the unsettled areas adjacent thereto." The judge noted that, "when one thinks of the settlement of Kake, with its population of Indian families whose livelihood the Court notices judicially comes largely from the sea and the forest, it is not unreasonable to associate that settlement with a cannery which uses the product of the toil of the Indian Inhabitants of Kake and which, indirectly benefits by their education."

Volume 11 of Alaska Reports contains other interesting decisions. In one the judge ruled that Indian's right of occupancy of the lands is sacred (*Miller v. US*). In another the court found that property rights were not affected by the sale of Alaska to the United States. (*Bolshanin v. Zlobin).* In another, the judge found that a man is liable at common law for necessaries furnished his wife, with or without his consent. (*Moller v. Moller*).

Differences exist in state and federal rules

Similar rules, dissimilar results: A brief survey of some actual or potential distinctions between rules of evidence and civil procedure governing practice in Alaska state and federal courts

BY GREGORY S. FISHER*

INTRODUCTION

Alaska's rules of civil procedure and evidence are patterned after analogous federal rules, and (where appropriate) state courts will look to federal rules for guidance as to how to construe and apply state provisions.[1] However, notwithstanding the close relationship between state and federal rules, significant differences exist that may trap unwary counsel. The purpose of this short article is to briefly summarize eight of the more significant differences between identical or substantially similar rules of evidence and civil procedure governing practice in Alaska state and federal courts. A complete review of all differences is not possible. Accordingly, obvious differences such as verdict unanimity, peremptory challenges of judges, jury pool composition, conduct of voir dire, and other rules are not discussed. Similarly, differences between lesser or minor rules that seldom affect practice are ignored. Instead, the focus of this article is on relatively major rules of evidence or civil procedure, identically or similarly worded, which are interpreted and applied in contrary manners. This article implies no criticism of the underlying policy concerns that have resulted in identical or similar rules being applied in dissimilar manners. Instead, the sole purpose is to identify significant differences that may affect practice in the expectation that such an exposition may prove beneficial to counsel.

RULE 56: STANDARD FOR SUMMARY JUDGMENT

Both state and federal rules provide for essentially identical summary judgment procedures familiar to all members of the bar. Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law."[2] However, notwithstanding the apparent similarities, state and federal courts apply different tests for analyzing the merits of summary judgment motions.

NOTWITHSTANDING THE APPARENT SIMILARITIES, STATE AND FEDERAL COURTS APPLY DIFFERENT TESTS FOR ANALYZING THE MERITS OF SUMMARY JUDGMENT MOTIONS.

Under federal standards, the moving party need not present evidence; it need only point out the lack of any genuine dispute as to material fact.[3] Once the moving party has met this burden, the non-moving party must set forth evidence of specific facts showing the existence of a genuine issue for trial.[4] All evidence presented by the non-movant must be believed for purposes of summary judgment and all justifiable inferences must be drawn in favor of the non-movant.[5] However, the non-moving party may not rest upon mere allegations or denials, but must show that there is sufficient evidence supporting the claimed factual dispute to require a fact-finder to resolve the parties' differing versions of the truth at trial.[6] Significantly, "the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case."[7]

The Alaska Supreme Court has rejected the federal standard for analyzing the substantive merits of summary judgment motions.[8] The substantive evidentiary standard that governs a case does not control the trial court's analysis.[9] Instead, "if there [is] any evidence sufficient to raise a genuine issue of material fact . . . , such evidence . . . suffice[s] to prevent relief in the nature of summary judgment regardless of the standard of proof to be used at trial."[10] Moreover, as Justice Eastaugh observed in one recent concurrence, a self-serving or conclusory denial may well be sufficient under Alaska law to create a genuine issue of material fact.[11]

The net effect is that summary judgment is much easier to secure in federal court than in Alaska state court. Although most attorneys, at some level, seem aware that summary judgment is easier to obtain in federal court, they may or may not fully appreciate the underlying principles that engineer this phenomenon.

RULE 56: THE TRIAL COURT'S RESPONSIBILITY TO REVIEW THE RECORD ON SUMMARY JUDGMENT

Another critical difference between summary judgment procedures in state and federal court is how trial judges discharge their respective obligations when ruling on summary judgment motions.

The Alaska Supreme Court has emphasized that trial courts have an affirmative obligation to review the entire record before ruling on a motion for summary judgment.[12] Even if a party fails to bring relevant evidence to the trial court's attention, the court must "examine the record before determining that no genuine issue of material fact exist[s]."[13] Presumably, state judges abuse their discretion if they fail to examine the entire record. However, even if failure to search the record does not constitute an abuse of discretion, it is clear that such failure may well result in reversal if the record contains evidence creating a genuine issue of material fact. Alaska trial courts are responsible for ferreting out those facts.

Federal courts follow a radically different rule. In federal court, litigants "chop their own wood." The nonmoving party must include and clearly cite all relevant evidence that is being relied upon to oppose a motion for summary judgment.[14] The trial court may, but need not, review the entire record before ruling on a motion for summary judgment. Judge Kleinfeld, a Ninth Circuit Judge and perhaps Alaska's leading jurist, instructs that federal district courts have no obligation to search the record for evidence supporting the non-moving party, and may grant summary judgment even if evidence existed on the record that would have otherwise precluded relief if the non-moving party fails to adequately bring that evidence to the district court's attention.[15]

The upshot is that non-moving parties in federal court must be careful to not only develop a record that will defeat summary judgment, but must also take care to adequately and accurately supply citations for the district court's review. The district court need not look any further than the papers on its desk, and only then if they are appropriately cited. Counsel primarily practicing in state court may not appreciate this critical difference.

RULE 56(F): DISCOVERY CONTINUANCES

Both state and federal rules include similar provisions for seeking discovery continuances. However, actual practice differs. Under Federal Rule of Civil Procedure 56(f), as construed and applied in the Ninth Circuit governing practice in Alaskan federal courts, the burden is on the party requesting a continuance to set forth the particular facts expected to be discovered.[16] The party must submit affidavits setting forth particular facts which additional discovery will develop, establish why the additional discovery would preclude summary judgment, and explain why the party cannot immediately provide the necessary information to preclude summary judgment.[17] The failure to comply with Rule 56(f)'s requirements is sufficient grounds to deny a request for a continuance.[18]

BOTH STATE AND FEDERAL RULES INCLUDE SIMILAR PROVISIONS FOR SEEKING DISCOVERY CONTINUANCES. HOWEVER, ACTUAL PRACTICE DIFFERS.

In contrast to the fairly strict federal requirements, Alaska courts interpret the identical state rule more liberally. A non-moving party's request for a discovery continuance should be "freely granted,"[19] and need not comply with the rule's technical requirements. Thus, a party may be entitled to a discovery continuance even if no affidavit is filed.[20] In fact, no formal motion need be filed, and the rule itself need not be cited or invoked.[21] The only requirement under Alaska law is an unambiguous request for a discovery continuance.[22] Ironically, Alaska courts have explained its standard as being based on federal principles militating in favor of liberally permitting discovery continuances.[23] Counsel familiar with, and relying upon, standards used for Alaska's Rule 56(f) may discover to his or her dismay that, in fact, a different rule is observed in federal court.

RULE 37: LITIGATION-ENDING DISCOVERY SANCTIONS

Both state and federal rules provide that sanctions may be imposed for discovery-related violations, and further specify that such sanctions may include striking pleadings or entering default judgment against the offending party.[24] Both state and federal rules are also interpreted to limit trial courts' discretion to order litigation-ending sanctions for discovery abuses. A key difference, however, is the extent to which trial courts' discretion is thus constrained. Under Alaska's Rule 37, trial courts act with limited discretion when ordering litigation-ending sanctions.[25] Such sanctions may not be entered "without first exploring 'possible and meaningful alternatives to dismissal.'"[26] "If meaningful alternative sanctions are available, the trial court must ordinarily impose these lesser sanctions rather than dismissal with prejudice."[27] As a consequence, litigation-ending sanctions for discovery abuses are relatively rare in Alaska state courts.

In contrast to state practice, federal courts do not view the availability of less-drastic alternatives as a controlling factor when imposing sanctions under Rule 37. Instead, the availability of less-drastic alternatives is an important factor to consider, but only one of five factors, and–properly construed–not controlling one way or the other.[28] District courts may enter litigation-ending sanctions notwithstanding the availability of less-drastic alternatives if the remaining four factors militate in favor of dismissal.[29] Although "the range of [a district court's] discretion is narrowed, and the losing party's noncompliance must be due to willfulness, fault, or bad faith"[30] when dismissal as a discovery sanction is imposed, the district court's discretion is reviewed under the traditional abuse of discretion standard.[31]

Litigation-ending sanctions are not common in either state or federal court. However, the ultimate effect of the different tests used in state and federal courts is that there is a far greater likelihood of dismissal for repeated discovery abuses in federal court. Counsel primarily active in state court may be surprised to learn that the availability of less-drastic alternatives offers no escape hatch in federal court.

RULE 41(A)(1): VOLUNTARY DISMISSAL

Both state and federal rules contain similar provisions permitting plaintiffs to terminate actions once without prejudice by filing an appropriate notice before an answer or motion for summary judgment is filed.[32] However, these similar provisions are differently interpreted with respect to when plaintiffs' right to voluntarily dismiss an action is terminated. The federal rule is literally construed. Generally, only an answer or motion for summary judgment terminates the right to seek voluntary dismissal. A 12(b)(6) motion may also terminate the right if it is converted to a motion for summary judgment. Elsewise, plaintiffs in federal court may voluntarily dismiss actions even after Rule 12 motions to dismiss have been filed,[33] or following removal from state court. By way of example, in *Miller v. Reddin,*[34] the Ninth Circuit held that plaintiffs' right to seek voluntary dismissal was not terminated even though the district court had heard oral argument on a motion to dismiss four days before the notice was filed, and announced a tentative ruling.[35]

In contrast to the federal standard, voluntary dismissal is precluded in Alaska state courts once issues are joined by any means.[36] In *Miller v. Wilkes,*[37] the Alaska Supreme Court held that a plaintiff's right to voluntarily dismiss a case was terminated once the defendant filed a memorandum and supporting affidavit opposing a preliminary injunction. The rule is not limited to its terms, thereby creating the potential for additional methods or means by which a plaintiff's ability to volun-

Continued on page 11

Differences exist in state and federal rules

Continued from page 10

tarily dismiss a case may be terminated.

RULE 403: PREJUDICE

State and federal rules expressly provide for different standards to evaluate whether or not relevant evidence should be excluded on grounds of prejudice. However, although the rules are expressly different, inadvertent confusion may arise because the difference is slight. Under Alaska Rule of Evidence 403, relevant evidence "may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[38] Under the federal standard, the probative value of such evidence must be *substantially* outweighed by the danger of unfair prejudice and related concerns.[39] The Alaska Commentary suggests that no material differences were intended or should arise by application of Alaska's rule. However, at face value, the rules set different thresholds implying different standards. The true significance of this distinction arises in the interplay between Rule 403 and other rules such as 404(b), 609, 702, and 703.

STATE AND FEDERAL RULES EXPRESSLY PROVIDE FOR DIFFERENT STANDARDS TO EVALUATE WHETHER OR NOT RELEVANT EVIDENCE SHOULD BE EXCLUDED ON GROUNDS OF PREJUDICE.

RULE 404(B)(1): OTHER ACT EVIDENCE

Both state and federal rules limit propensity evidence bearing on character. However, both permit such evidence subject to an appropriate 403 analysis if the evidence relates to "other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[40] The federal rule is a rule of inclusion, meaning that such evidence would be admissible unless its sole purpose was to show criminal propensity.[41] By contrast, Alaska's rule was long-deemed to be a rule of exclusion, meaning that such evidence was limited to the specific exceptions of the rule and carried a presumption that its prejudicial impact outweighed its probative value.[42] In 1991, the Alaska Legislature enacted an amendment which, among other points, clarified that Alaska's Rule 404(b)(1) should be a rule of inclusion.[43] However, notwithstanding the amendment, anecdotal evidence suggests that the Alaska courts have been slow to shrug off the past–colloquially, "the song is over, but the melody remains."

ANECDOTAL EVIDENCE SUGGESTS THAT THE ALASKA COURTS HAVE BEEN SLOW TO SHRUG OFF THE PAST -- COLLOQUIALLY, "THE SONG IS OVER, BUT THE MELODY REMAINS."

For example, in *Calapp v. State,*[44] Alaska's Court of Appeals held that, in a theft prosecution, evidence of prior convictions for forgery and theft offered to show knowledge that goods were stolen should have been excluded because there was no factual similarity between the charged offense and the prior crimes.[45] Writing for the court, Judge Coats concluded that, absent such factual similarity, the evidence did nothing but show the defendant's criminal propensity.[46] Then-Judge (now Justice) Bryner dissented, pointing out that the court's holding conflicted with federal precedent establishing that factual similarity was not a necessary predicate when seeking to admit evidence of other crimes to show knowledge or reckless disregard for whether or not goods were stolen.[47] Judge Mannheimer concurred in the opinion, but agreed with the dissent that factual similarity between prior and charged offenses was not necessary to show knowledge.[48] Instead, Judge Mannheimer construed the relevant inquiry as being whether "the prior act was one which would tend to make the existence of the defendant's knowledge more probable."[49] The problem, in Judge Mannheimer's view, was that the state had simply failed to explain how or why the prior convictions pertained to knowledge or reckless disregard for whether goods were stolen or not.[50]

I imply no criticism of any of the respective opinions in *Calapp,* but rather simply use the opinion for illustrative purposes to demonstrate what I believe to be latent tension shaping the court's interpretation and application of Rule 404(b)(1). One might be tempted to read the court's opinion as perhaps turning on Alaska's Rule 403. However, the court very clearly reached no further than the question of threshold relevance. With its insistence on factual similarity between charged and other offenses to show knowledge, Judge Coats' opinion is best-understood as embracing concerns more closely aligned with rule of exclusion principles. Coming 7 years after the 1991 amendment, the opinion therefore offers some support for the contention that Alaska courts may still be shaking out principles to govern its relatively new rule of inclusion.

RULES 702 AND 703: DAUBERT

Under Federal Rule of Evidence 702 as applied by *Kumho Tire Company, Ltd. v. Carmichael,*[51] and *Daubert v. Merrell Dow Pharmaceuticals, Inc.,*[52] each trial judge acts as an evidentiary "gatekeeper" to ensure both the reliability and relevancy of expert testimony.[53] In fulfilling this gatekeeping responsibility, the trial judge must first determine whether a proposed expert's testimony will assist the trier of fact understand or determine a material fact in issue before admitting the expert's testimony.[54] The trial judge must conduct "a preliminary assessment of whether the reasoning or methodology underlying the tesimony is . . .valid and whether that reasoning or methodology properly can be applied to the facts in issue."[55] Many different factors may be assessed in determining whether proposed expert testimony satisfies *Kumho / Daubert,* including but not limited to (1) whether the hypothesis or opinion has been objectively tested, (2) whether the opinion has been subjected to peer review, (3) whether there is an established error rate affecting the methodology or technique in question, and (4) whether or not the methodology is generally accepted.[56] These factors are "helpful, not definitive."[57] The trial judge need not consider all four factors in every case, and may consider other factors he or she deems relevant.[58] Ultimately, a trial judge's gatekeeping responsibility is defined by "the particular circumstances of the particular case at issue."[59]

Alaska has now adopted *Daubert* to replace the previously-applied *Frye* test.[60] However, it remains to be seen how closely Alaska courts will follow federal interpretations. Indeed, in its most-recent opinion addressing the subject, the Alaska Supreme Court in *John's Heating Service v. Lamb* characterized *Coon* as reflecting a "move" away from the previous governing standard derived from *Frye v. United States* and to a standard derived from *Daubert v. Merrell Dow Pharmaceuticals, Inc."*[61] Reflecting neither a complete rejection of *Frye* nor a total embrace of *Daubert,* the *Lamb* court's characterization may imply (perhaps) that Alaska intends to craft a hybrid approach to analyzing the admissibility of expert testimony. This observation finds some support in both *Coon* and *Lamb.* The *Lamb* court explained *Coon* by declaring that *Coon*'s intent was to adopt *Daubert* in the belief that the net effect would result in more expert testimony being included, thereby advancing Alaska's "liberal admissibility standard for expert witness testimony."[62] However, as some experts have suggested, *Daubert*'s actual effect may prove more restrictive, and exclude more expert testimony, especially with respect to certain forms of forensic evidence previously admitted under *Frye.*[63] Consequently, there is some tension (recognized or not) between the rule's purpose or goals and its actual impact. At this juncture, little more can be said on the subject except to note that we await further instruction from the Alaska Supreme Court.

CONCLUSION

No brief study could properly analyze all implications attending the issues discussed in this article. Furthermore, a comprehensive survey of all differences between state and federal rules is beyond the scope of this article. However, the eight distinctions briefly reviewed in this article tend, on balance, to have a greater impact on the substantive merits of cases, and how cases are litigated. The purpose here has been to merely identify those distinctions for the benefit of the bar.

FOOTNOTES

[1]*See, e.g., Kessey v. Frontier Lodge, Inc.,* 42 P.3d 1060, 1063 (Alaska 2002); *Brown v. Lange,* 21 P.3d 822, 825 n.7 (Alaska 2001); *State v. Coon,* 974 P.2d 386, 391, 394 (Alaska 1999) (by implication).

[2]Fed. R. Civ. P. 56(c); *see also* Alaska R. Civ. P. 56(c).

[3]*Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986).

[4]*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-9 (1986).

[5]*Id.* at 255.

[6]*Id.* at 248-9.

[7]*Id.* at 255-56.

[8]*See Moffatt v. Brown,* 751 P.2d 939, 943-44 (Alaska 1988).

[9]*See Meyer v. State,* 994 P.2d 365, 367 & n.9 (Alaska 1999).

[10]*See In Matter of J.B.,* 922 P.2d 878, 881 n.4 (Alaska 1996).

[11]*See Meyer,* 994 P.2d at 369 (Eastaugh, J., concurring).

[12]*See Power Constructors, Inc. v. Taylor 7 Hintze,* 960 P.2d 20, 28 (Alaska 1998); *American Rest. Group v. Clark,* 889 P.2d 595, 598 (Alaska 1995).

[13]*Clark,* 889 P.2d at 598.

[14]*See Carmen v. San Francisco Unified School Dist.,* 237 F.3d 1026, 1029-31 (9th Cir. 2001).

[15]*See id.*

[16]*Brae Transp., Inc. v. Coopers & Lybrand,* 790 F.2d 1439, 1443 (9th Cir. 1986).

[17]*Maljack Productions, Inc. v. Goodtimes Home Video Corp.,* 81 F.3d 881, 888 (9th Cir. 1996); *United States v. One,* 917 F.2d 415, 418 (9th Cir. 1990); *Mackey v. Pioneer Nat'l Bank,* 867 F.2d 520, 523-24 (9th Cir. 1989); *Hancock v. Montgomery Ward Long Term Disability Trust,* 787 F.2d 1302, 1306 n.1 (9th Cir. 1986).

[18]*Brae,* 790 F.2d at 1443 (holding that "[f]ailure to comply with the requirements of Rule 56(f) is a proper ground for denying discovery and proceeding to summary judgment).

[19]*Kessey v. Frontier Lodge, Inc.,* 42 P.3d 1060, 1063 (Alaska 2002).

[20]*Id.*

[21]*See Parson v. Marathon Oil,* 960 P.2d 615, 618 (Alaska 1998); *Gamble v. Northstore Partnership,* 907 P.2d 477, 486 (Alaska 1995).

[22]*Gamble,* 907 P.2d at 485.

[23]*Kessey,* 42 P.3d at 1063.

[24]*See* Fed. R. Civ. P. 37(b)(2)(C); Alaska R. Civ. P. 37(b)(2)(C).

[25]*See Sykes v. Melba Creek Mining, Inc.,* 952 P.2d 1164, 1169 (Alaska 1998).

[26]*Hikita v. Nichiro Gyogyo Kaisha, Ltd.,* 12 P.3d 1169, 1176 (Alaska 2001) (quoting *Underwriters at Lloyd's London v. The Narrows,* 846 P.2d 118, 119 (Alaska 1993).

[27]*Arbelovsky v. Ebasco Servs., Inc.,* 922 P.2d 225, 227 (Alaska 1996).

[28]*See Payne v. Exxon Corp.,* 121 F.3d 503, 507 (9th Cir. 1997).

[29]*Id.* (by implication).

[30]*Id.*

[31]*Id.* at 508.

[32]*See* Fed. R. Civ. P. 41(a)(1); Alaska R. Civ. P. 41(a)(1).

[33]*See Concha v. London,* 62 F.3d 1493, 1506 (9th Cir. 1995).

[34]422 F.2d 1264 (9th Cir. 1970).

[35]*Id.* at 1265-66.

[36]*See Miller v. Wilkes,* 496 P.2d 176, 178 (Alaska 1972), *overruling on other grounds recognized by, State v. Johnson,* 958 P.2d 440, 444 (Alaska 1998) and *Bromley v. Mitchell,* 902 P.2d 797, 804 (Alaska 1995).

[37]496 P.2d 176 (Alaska 1972).

[38]Alaska R. Evid. 403.

[39]*See* Fed. R. Evid. 403.

[40]Fed. R. Evid. 404(b)(1); Alaska R. Evid. 404(b)(1).

[41]*See United States v. Castillo,* 181 F.3d 1129, 1134 (9th Cir. 1999) (opinion by J. Sedwick).

[42]*See Oksoktaruk v. State,* 611 P.2d 521, 524 (Alaska 1980); *Bolden v. State,* 720 P.2d 957, 959-60 (Alaska App. 1986).

[43]*See* Ch. 79, § 1 (c) SLA 1991; *see also Pavlik v. State,* 869 P.2d 496, 498 n.1 (Alaska App. 1994) (discussing amendment); *Velez v. State,* 762 P.2d 1297, 1300 (Alaska App. 1988)..

[44]959 P.2d 385 (Alaska App. 1998).

[45]*Id.* at 388.

[46]*Id.*

[47]*Id.* at 391-92 (Bryner, J., dissenting).

[48]*Id.* at 389 (Mannheimer, J., concurring).

[49]*Id.* (quoting *United States v. Ramirez-Jiminez,* 967 F.2d 1321, 1326 (9th Cir. 1992).

[50]*Id.* at 391.

[51]526 U.S. 137, 119 S. Ct. 1167 (1999).

[52]509 U.S. 579, 113 S. Ct. 2786 (1993).

[53]*Kumho,* 526 U.S. at 147-48, 119 S. Ct. at 1174; *Daubert,* 509 U.S. at 589, 113 S. Ct. at 2786.

[54]*See Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1228 (9th Cir. 1998).

[55]*Daubert*, 509 U.S. at 592-93, 113 S. Ct. at 2786.

[56]*Kumho*, 526 U.S. at 149-50, 119 S. Ct. at 1175; *Daubert*, 509 U.S. at 593-94, 113 S. Ct. at 2786-87.

[57]*Kumho*, 526 U.S. at 151, 119 S. Ct. at 1175.

[58]*Id.*

[59]*Id.*

[60]*See State v. Coon,* 974 P.2d 386, 394, 402-03 (Alaska 1999).

[61]*John's Heating Service v. Lamb,* ___P.3d ___, 2002 WL 959940 at *6 (Alaska May 10, 2002).

[62]*Id.*

[63]*See, e.g.,* Michael J. Saks, "At the Daubert Gate: Managing and Measuring Expertise in the Age of Science, Specialization, and Speculation," 57 Wash. & Lee L. Rev. 879, 880, 895-97, 899-900 (2000); Paul C. Giannelli, "The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories," 4 Va. J. Soc. Policy & L. 439, 442 (1997); Barry C. Scheck, "Scientific Evidence After the Death of Frye," 15 Cardozo L. Rev. 1959, 1960 (1994).

Mr. Fisher notes that the opinions and views expressed in this article, along with any mistakes, are solely the author's and do not reflect the views or opinions of any court or employer with whom the author has been associated.

ALASKA STATE COURT LAW LIBRARY

New on the Alaska Court System Website

The Alaska Court System website – **www.state.ak.us/courts** – underwent a major redesign in April and now sports a new look. The site was also reorganized and has new navigational aids. Law library staff are responsible for the court website, and our webmaster welcomes your comments at webmaster@courts.state.ak.us.

• Sign up for the appellate court slip opinion notification service. Find more information on the *Appellate Courts* page at www.state.ak.us/courts/appcts.htm.

• Take a look at the *Family Law Self Help Center* page at www.state.ak.us/courts/selfhelp.htm, which has numerous family law resources and will soon have an extensive collection of family law forms.

Attorney Computer Research Program

The law library's attorney research program is now available in 17 law library branches statewide.* Alaska Bar members can use the library computers to retrieve and KeyCite documents from Westlaw, and to search headnote databases. Visit the Alaska Bar's website at www.alaskabar.org for a tutorial. Check the Bar's online CLE calendar for the next Online Research and Document Retrieval CLE seminar.

** Available in Anchorage, Barrow, Bethel, Dillingham, Fairbanks, Homer, Juneau, Kenai, Ketchikan, Kodiak, Kotzebue, Nome, Palmer, Petersburg, Sitka, Valdez and Wrangell.*

Law Library Catalog Coming Soon to the Internet

The law library catalog will be available on the internet this fall. The new catalog will let you search the library's holdings from your home or office to see if the library owns books on the topic you're researching. If the book you want isn't available at your local law library, contact Anchorage library staff to request that pages be faxed or mailed to you. Library staff can also obtain items that aren't available at any of our branches using a nationwide interlibrary loan system. Visit the *Law Library Services and Policies* page at www.state.ak.us/courts/libinfo.htm for more information about library services available to Alaska Bar members.

Anchorage Law Library News

- The Anchorage Law Library has revised its checkout policy for Alaska Bar members and their authorized representatives. You can now check out materials in the treatise collection, unbound law reviews, and Alaska appellate briefs for three days. You can still check out second copies of materials in the treatise collection and bound law review volumes for 7 days.

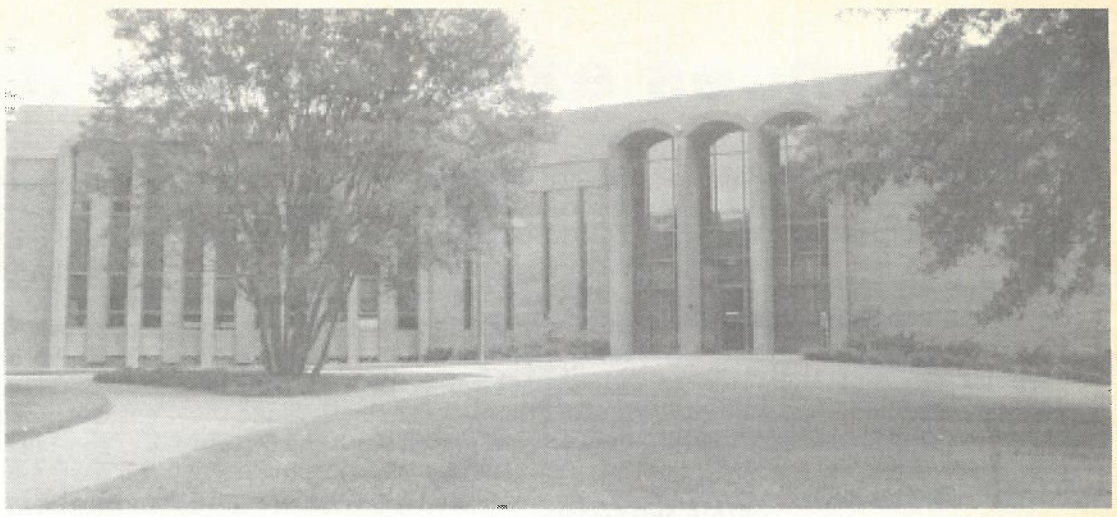
- Because of a reduction of available funding in the Alaska Court System Fiscal Year 2003 budget, the court system is restructuring library hours. As of July 1, 2002, library hours are:

  Sunday ..... Noon – 5:00 p.m.
  Monday through Thursday ..... 8 a.m. – 6 p.m.
  Friday ..... 8 a.m. to 4:30 p.m.

  The library will be closed Saturdays and holidays.

NOTICE
FROM U.S. DISTRICT COURT

Due to the interference that Cell Phones are causing with the electronic equipment in Courtrooms, effective immediately Cell Phones will not be permitted in the U.S. District Court Courtrooms.



The National Center for State Courts, Williamsburg, VA.

Reforming the Civil Justice System

By John H. Pickering

Only a small minority of Americans — 7 percent — can find much good to say about how the legal system handles the staggering 15 million civil cases processed in our state courts each year. Civil litigation has become excessive, critics say, driven by merit-less lawsuits and capricious damage awards. In addition, our justice system favors rich individuals and corporate America, at the expense of low and middle-income people.

Now more than ever, the public's opinion about the justice system is critically important to the integrity of our justice system. And, it is incumbent on those of us in the legal profession to figure out a way to improve it.

One way that holds the most promise for finding workable solutions is through The National Center for State Courts.

In 2000, The National Center for State Courts (NCSC) launched a Civil Justice Reform Initiative to address the very issues that have contributed to the erosion of the public's trust and confidence in the civil justice system, such as cost, complexity, court delay, and lack of predictability of civil procedures. The National Center is an independent, non- profit organization headquartered in Williamsburg, Va., with the sole mission of improving judicial administration. Founded in 1971 by the chief justices of all our states, and with the support of the Chief Justice of the United States Warren E. Burger, The National Center provides research, education, and hands-on assistance to the nation's 16,000 state courts.

The National Center's Lawyers Committee is supporting the Civil Justice Reform Initiative by working with the leadership of the bench and bar to identify the problems we believe impact the effectiveness of our current system. Our goal is to provide balanced input that encourages common ground and communicates the concerns of all constituents -- litigants, attorneys, judges, and the public.

This Reform Initiative is a multi-year effort that will review case settlement and trial practices, and study ways to improve management of complex litigation and streamline civil court processes. To establish a national agenda for civil justice reform, The National Center is focusing on the following areas:

• **Discovery**. In cooperation with the Conference of State Chief Justices, The National Center has formed a research strategy to address discovery of data in electronic databases and records. This project will include a study of costs and the development of an educational/ training module for national judicial education.

• **Judicial Selection**. In December 2000, The National Center coordinated the landmark national Summit on Improving Judicial Selection, which brought together nearly 100 state chief justices, legislators, judges, members of the bar, and court-reform advocates who developed a Call To Action statement that outlines suggestions to reform the election structure, campaign conduct, voter awareness and campaign finance. The National Center conducted a follow-up conference in 2001, which focused on judicial campaign conduct and the First Amendment.

• **Complex litigation.** The National Center currently is evaluating the Centers for Complex Litigation pilot program of the Judicial Council of California to determine its impact on the adjudication of business cases. NCSC staff also is working with the Federal Judicial Center to develop and implement a mass tort curriculum for state and federal judges and to assess the feasibility of using uniform protocols.

• **Jury Reform**. Through its Center for Jury Studies, The National Center is the leading national authority on juries and jury innovation. The National Center helps state courts expand juror participation and service, improve jury management operations, and improve juror comprehension. Last year, The National Center co-sponsored with Chief Judge Judith Kaye and the New York State Unified Court System the first-ever national Jury Summit, which discussed innovations in jury management. The National Center also is conducting a project to identify the most promising technologies for jury management, including juror summoning and qualification and monitoring the make up of the jury pool.

The Civil Justice Reform Initiative is only one aspect of The National Center's work. In its three decades of service, NCSC has helped state courts reduce backlogs and delay, improve public access, bring technology into courtrooms, improve jury systems, make informed decisions about court operations, and understand the demands of management and leadership in the state judicial system. By promoting performance standards, evaluating innovative practices, and providing much-needed comparative information, The National Center for State Courts is producing measurable benefits for local courts across the country.

Following is a brief look at some of The National Center's ongoing projects that could have far-reaching effects in your state:

• The National Center is developing a model policy on public access to court records, which will serve as a blueprint for all state courts as they move to electronic filing of court records.

• The National Center has taken the lead in the area of domestic violence to ensure court orders are recognized across state lines.

• The National Center serves as staff to the Consortium for State Court Interpreter Certification, which maintains tests in numerous languages, supervises the writing of new tests, and trains members in procedures for proper test administration.

The National Center is essential to improving our civil justice system and to the successful operation of our state courts, where approximately 98 percent of our nation's litigation is handled. To carry on this important work, The National Center needs, and deserves, the support of lawyers throughout the nation.

To learn more about joining the Law Firm Program, the Lawyers Committee, or to receive the 2001 annual report, contact Barbara Kelly, director of development at 800-616-6110, or bkelly @ ncsc. dni. us. For more information about NCSC's Civil Justice Reform Initiative, visit www. ncsconline. org

NEWS FROM THE BAR

Board considers pro bono rules change

The Board of Governors invites member comments concerning the following proposed amendment to Alaska Rule of Professional Conduct 6.1.

At its May 2002 meeting, the Board voted to publish the American Bar Association's latest revision to Model Rule of Professional Conduct 6.1 regarding pro bono service. The text below shows the current wording of Alaska Rule of Professional Conduct 6.1 as modified by the latest ABA version. The current "Comment" would be replaced in its entirety with the revised "Commentary."

Please send comments to: Executive Director, Alaska Bar Association, PO Box 100279, Anchorage, AK 99510 or e-mail to info@alaskabar.org by August 9, 2002.

ALASKA RULE OF PROFESSIONAL CONDUCT 6.1
PROPOSED AMENDMENT ENCOURAGING 50 HOURS OR MORE OF PRO BONO SERVICE A YEAR
(Additions underscored; deletions have strikethroughs)

Rule 6.1 Pro Bono Publico Service

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should ~~render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.~~ aspire to render at least 50 hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the 50 hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

~~Comment~~

~~The ABA House of Delegates has formally acknowledged "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice. This rule expresses that policy but is not intended to be enforced through disciplinary process.~~

~~The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do.~~

~~The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid officers, lawyer referral services and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services.~~

Commentary
(American Bar Association Commentary for revised Rule 6.1)

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The American Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually. States, however, may decide to choose a higher or lower number of hours of annual service (which may be expressed as a percentage of a lawyer's professional time) depending upon local needs and local conditions. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remained unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

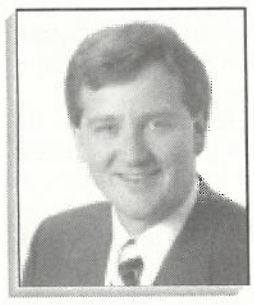
[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] Law firms should act reasonably to enable all lawyers in the firm to provide the pro bono legal services called for by this Rule.

~~[11]~~ [12] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

Legislature toughens drunk driving law

☐ Dave Donley



This year's legislature produced new, even tougher drunk driving laws for Alaska. House Bill 4, sponsored by Rep. Norman Rokeberg, made many substantive and technical changes to current laws against driving while impaired. The final legislation included two insurance related provisions added in the Senate Finance Committee. The first extended the time a person convicted of DUI must maintain proof of financial responsibility (often referred to as SR22 insurance).

AS 28.20.230 was revised by adding a new subsection to read:

"(c) Notwithstanding any other provisions of this chapter, a person convicted of driving under the influence of an alcoholic beverage, inhalant, or controlled substance in violation of AS 28.35.030, or convicted of refusal to submit to a chemical test of breath under AS 28.35.032, shall maintain proof of financial responsibility for the future for (1) five years if the person has not been previously convicted; (2) 10 years if the person has been previously convicted once; (3) 20 years if the person has been previously convicted twice; (4) for as long as the person is licensed to drive under AS 28.15 if the person has been previously convicted three or more times. In this subsection, "previously convicted" has the meaning given in AS 28.35.030. "

Second, a provision was added requiring drivers to have proof of motor vehicle liability insurance in their possession when driving. Most motor vehicle owners are required to maintain such insurance already and insurance companies already provide proof of insurance cards for insured to carry in vehicles. This requirement goes into effect on July 1st, 2002 but I support and anticipate an educational campaign and phased in enforcement. Note that the new law provides for no fine if proof of insurance is subsequently provided. Another element of this new requirement is the authorization of enforcement by local government.

AS 28.22 was revised by adding a new section which reads:

"(a) A person shall have proof of motor vehicle liability insurance in the person's immediate possession at all times when driving a motor vehicle, and shall present the proof for inspection upon the demand of a peace officer or other authorized representative of the Department of Public Safety. However, a person charged with violating this section may not be convicted if the person produces in court or in the office of the arresting or citing officer proof of motor vehicle liability insurance previously issued to the person that was valid at the time of the person's arrest or citation.

(b) A municipality may adopt an ordinance (1) requiring a person to display a decal on the person's motor vehicle indicating compliance with (a) of this section; or (2) that is substantially similar to (a) of this section and may impose a penalty for violating the ordinance as provided under AS 29.25.070.

(c) In this section, "proof" means a copy of the insurance policy or certificate of self-insurance that is in effect or a printed card or electronic certification from an insurance company, insurance agent, insurance broker, or surplus lines broker that a policy that complies with AS 28.22.011 is in effect. "

Over the years, many Alaskans have advocated that proof of insurance be required at time of registration of a motor vehicle. While urban areas strongly support this concept, rural areas generally do not; making it very difficult to develop a statewide consensus on the issue. Allowing optional stronger local enforcement of mandatory automobile insurance may be a way around this impasse. These new provisions are a step in that direction.

Alaska Bar Association 2002 CLE Calendar

Date	Time	Title	Location
August 7	4:30 – 6:30 p.m.	Off the Record with the 9th Circuit Court of Appeals CLE #2002-006 1.5 General CLE Credits	Anchorage Downtown Marriott Hotel
August 9	12:00 – 1:30 p.m.	Off the Record with the 9th Circuit Court of Appeals CLE #2002-006 1.5 General CLE Credits	Fairbanks Westmark Fairbanks Hotel
September 10	1:00 –5:00 p.m.	Getting Through to People: Advanced Influence Skills & Strategies for the Legal Profession CLE #2002-024 3.75 General CLE Credits	Anchorage Downtown Marriott Hotel
September 11	8:30 a.m. – 12:30 p.m.	Time Mastery for Lawyers: Ways to Maximize Your Productivity CLE #2002-025 3.75 General CLE Credits	Anchorage Downtown Marriott Hotel
September 12	9:00 a.m. – 12:15 p.m.	Ethics is Not a Multiple Choice Question: A Mandatory Program for New Lawyers in Alaska CLE #2002-888B 3.0 Ethics CLE Credits	Anchorage Hotel Captain Cook
September 20	AM – half day	How to Perform Internet Legal Research: Finding Free and Low Cost Resources CLE #2002-026B CLE Credits TBA	Fairbanks Chena River Convention Center
September 24	AM – half day	How to Perform Internet Legal Research: Finding Free and Low Cost Resources CLE #2002-026A CLE Credits TBA	Anchorage Hotel Captain Cook
October 4	AM – half day	U.S. District Court Rules Update CLE #2002-018 CLE Credits TBA	Anchorage Location TBA
October 23	Full Day	15th Annual Alaska Native Law Conference CLE #2002-008 CLE Credits TBA	Anchorage Hotel Captain Cook
December 12	8:30 – 10:00 a.m.	Ethics at the 11th Hour CLE #2002-016 1.5 Ethics Credits	Anchorage Hotel Captain Cook

QUOTE OF THE MONTH

"Law and justice are not always the same."

— Gloria Steinem

ESTATE PLANNING CORNER

Avoid greed in planning

☐ Steven T. O'Hara

Nearly a century ago Northwestern University had a professor by the name of Arthur Andersen. He worked in the accounting field. He was a man of integrity, and he would not compromise his integrity when rendering an opinion about a company's books.

In 1913 he founded an accounting firm that is now in crisis for allegedly ignoring accounting practices that made Enron Corporation's books look favorable. Professor Andersen, who died in 1947, must be spinning in his grave over the allegations of corruption being leveled against the firm that bears his name.

Professor Andersen established "four cornerstones" for the firm — "provide good service to the client; produce quality audits; manage staff well; and produce profits for the firm" (Brown and Dugan, *Andersen's Fall From Grace Is a Tale of Greed and Miscues*, *Wall St. J.*, June 7, 2002, at A6, Col. 1). According to one accountant who worked with Arthur Andersen, the firm changed over the years "to the point that making profits eventually dwarfed all else" (*Id.*). He and other partners in Arthur Andersen would joke "that the four cornerstones were really 'three pebbles and a boulder'" (*Id.*).

Arthur Andersen and its former lucrative client Enron Corporation are yet another reminder that when greed enters the equation, the result may be unsound planning that leaves broken financial lives in its wake.

New ABA roadmap booklet provides guidance for helping litigants without lawyers

The number of people tackling their own legal problems, especially family-related, without the services of a lawyer has increased dramatically in recent years. In response to the concerns and challenges raised by pro se (for oneself) representation, the American Bar Association has just released "Litigants without Lawyers: Courts and Lawyers Meeting the Challenges of Self-Representation," a Roadmap booklet that provides a quick and easy overview of pro se issues.

This 32-page booklet provides bar associations, courts, and the public with plain-language information about pro se issues, specific examples of how various localities address those issues, and an extensive list of resources available from the ABA and other organizations. It is not a handbook for individuals who choose to represent themselves, but rather a description of the ethical and practical challenges self-representation raises and the solutions that courts and the legal profession are implementing to meet those challenges.

Among the solutions suggested are self-help centers and web sites, "unbundled" legal services, guidelines and protocols for judges and court staff, and court-based referral services. The booklet also describes model pro se programs in six states.

"Litigants without Lawyers" is the 12th in a series of "how to get there" Roadmaps booklets published by the ABA Coalition for Justice. Patricia A. Garcia, former president of the New Orleans Bar Association and consultant to the ABA Coalition for Justice, is the author.

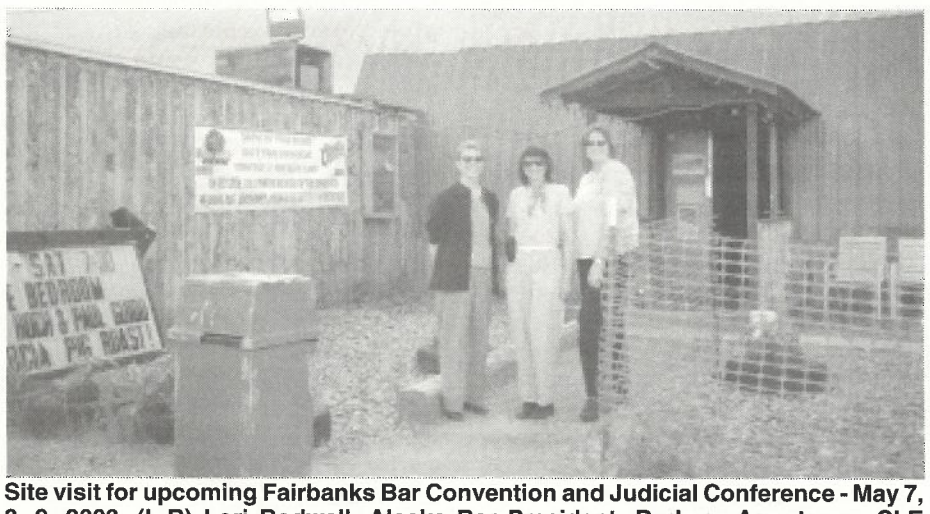
"Litigants without Lawyers" is available from the ABA Service Center at 800/285-2221 (Product Code 3460011) or via the Roadmaps Web site, http://www.abanet.org/justice/roadmaps.html, for $5 plus shipping/handling. Quantity discounts are available.

The mission of the ABA Coalition for Justice is to promote confidence in the justice system by engaging the public as partners with the bench and bar in specific projects to improve the system. For further information, contact Paula Nessel, ABA Coalition for Justice, at 312/988-5450 or paulanessel@staff.abanet.org.

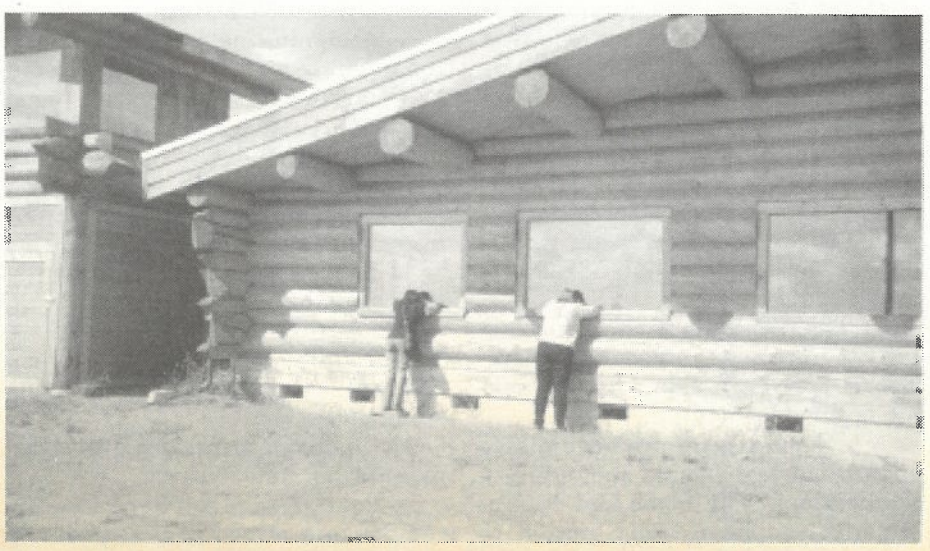
The American Bar Association is the largest voluntary professional membership association in the world. With more than 400,000 members, the ABA provides law school accreditation, continuing legal education, information about the law, programs to assist lawyers and judges in their work, and initiatives to improve the legal system for the public.

2003 Convention in Fairbanks! Wednesday, Thursday, Friday, May 7, 8, 9

The Alaska Bar Association Annual Convention & Alaska Judicial Conference will be in tThe Golden Heart City. Circle the dates now!



Site visit for upcoming Fairbanks Bar Convention and Judicial Conference - May 7, 8, 9, 2003. (L-R) Lori Bodwell, Alaska Bar President; Barbara Armstrong, CLE Director, and Rachel Batres, CLE Coordinator in front of the Blue Loon.



Peering into Mushers' Hall — how many judges and lawyers can we fit into this place? (L - R) Anita Ward, Alaska Court System Administrative Assistant to the Director and Rachel Batres, Bar CLE Coordinator.

HI-TECH IN THE LAW OFFICE

Law firms at risk from IT project disasters

By Martin Stalnaker & Peter Kelly

INTRODUCTION

We've all heard about high profile, costly IT project disasters. As reported by the Los Angeles Times, in the 1990s, California produced more government computer failures than any other state, with nearly $500 million wasted on abandoned systems. Just about everyone remembers the debacle at the new Denver International Airport — due to software and technical problems with the computerized baggage handling system, the airport opened two years late, with the baggage system costing $85 million more than the original estimate.

Do law firms' IT projects ever go that far wrong? The numbers are smaller, the public interest is less, but yes, there are disasters. Two recent examples, both from top firms include:

— The Financial Management System which is still not formally accepted three years after going live — for the very good reason that it doesn't yet produce balance sheets that balance.

— The firm that tried unsuccessfully to implement a new billing system for two years, before finally seeking outside assistance.

Most such disasters or near misses go unremarked even in the industry publications. The firms and suppliers involved have every reason to avoid publicity. But given that disasters do happen, how can you prevent them from happening at your firm?

COMMON CAUSES OF PROJECT FAILURE.

Research and surveys on failed IT projects indicate that there are common themes in every doomed project. Topping the list: bad planning or management, and failure to align project goals with high-level firm strategic goals. Often problems begin with a poor decision on the selection of one project versus another. This is further compounded during the implementation phase. Examples include:

— Ignoring business plans and priorities by selecting low priority, low benefit projects.

— Failure to consider expected project costs and the resulting benefits to be received.

— Choosing in-house development without adequately considering the alternatives.

— Selecting projects that are not well defined and lack clear goals.

— Selecting projects because they are technically state-of-the-art or are unproven.

OTHER LEADING REASONS INCLUDE:

— Assigning inexperienced project managers to highly complex projects.

— Trying to take the "big bang" approach, instead of breaking the project into manageable phases, each with clear goals and visible benefits.

— Lack of project sponsorship by upper management.

— Lack of buy-in by a representative group of users.

— Over commitment by vendors.

— Failure to have a comprehensive project plan with viable milestone dates.

— Inadequate project oversight, monitoring, and controls.

— Poorly tested software, missing components, or lack of quality assurance of converted data.

— Inability to identify the ultimate source for accountability and decision making.

— Assignment of inexperienced or overly committed staff to the project team.

DO THE RIGHT PROJECT

A project that doesn't fit with the firm's business or IT strategy is likely to fail — either directly or by disrupting other projects. How could this ever happen? A group of users, perhaps a practice group or an office, may insist on buying their own system that is inconsistent with the firm's overall strategy. Or there might not even be an IT strategy.

Similarly, projects that are not aligned with the goals of the firm are poor choices. If a firm has a strategic goal to establish an office to better serve a large client, then choosing to implement a system that meets the unique needs of that client vs. using the firm's standard application may be a worthwhile investment.

Another type of "wrong" project is the mis-scoped project. An overly ambitious team may take on an all-encompassing, fully integrated system in a single two- or three-year project. Large projects should be broken down into several sub-projects, each of which can be completed and deliver noticeable benefits within six to twelve months.

By contrast, an under-scoped project can be equally problematic. For example, restricting the scope of an implementation to only provide what the old system did, can lead to unimpressed users and skeptical management. After all, the reason the firm bought the system was to take advantage of all the new features, such as electronic forms automation, improved management reports, and browser-based functionality. The key is to establish a phased implementation approach when the initial project plan is developed. Consensus must be gained among management and the project team as to the scope and expected results at each major milestone.

START THE PROJECT RIGHT

If a project is to be successful, it needs to begin with a good start. The essentials are the project team and its link to the business and the project plan.

THE PROJECT TEAM

Putting the wrong people on the project team seems an obvious mistake — but it happens. Putting in the right people, but not giving them enough time to do their jobs is more common. In particular, firm staff are often expected to be part-time team members, and at the same time continue with their full-time daily duties. Their time commitments and priorities should be clearly identified so that the team members, their managers, and the project manager all have the same view. Month-end or year-end activities can bring a project to an unexpected halt if resources are not properly planned and allocated.

Perhaps the most important team member is the project manager (PM). The PM should develop the project plan and update it as the project progresses. On many projects there are two or more project managers involved — e.g., from the firm, the software vendor, and a consultant. In these cases each PM's responsibilities should be clearly defined and the firm should not place sole reliance on only the vendor's PM.

THE STEERING COMMITTEE

The project team must communicate with the business. If circumstances change during the project — whether for internal reasons (e.g., slippage on project tasks) or external reasons (e.g., changes to the business) — the business needs to be informed and give direction to the project.

But who or what is "the business"? Ideally, and often in practice, the business is represented by a project Steering Committee, consisting of managers and led by a project champion. The project champion, or sponsor, is frequently the firm's executive director or an appointed member of a committee, such as the management, technology, or finance committee. If there is nothing approximating to such a committee, or if the appointed members never seem to show up at meetings, this is a clear sign that management sponsorship and oversight are lacking. This can place the project at high-risk for failure.

Continued on page 17

NOTICES

1. Effective September 2, 2002, Judge John W. Sedwick will become Chief Judge of the District Court for the District of Alaska.

2. Joseph W. Miller has been appointed Magistrate Judge for the U. S. District Court in Fairbanks. Magistrate Judge Miller will be sworn in Friday, August 16, 2002 at 1:30pm in the District Courtroom at the Federal Building/U. S. Courthouse in Fairbanks.

3. The current Local Court practice in Anchorage, Fairbanks and Juneau requiring that an attorney file a Motion requesting approval to use the court's Digital Evidence Presentation System [DEPS] has been rescinded. However, the Court will require that a Notice of Intent to use the DEPS equipment be filed with the court at least one week before the intended date of use.

4. The Court has revised the Local Court Rules to be effective October 1, 2002. The revised Local Court Rules will be available from Book Publishing Company [201 Westlake Ave North, Seattle, Washington 98109]. The Local Rules can also be found on the U. S. District Court Web Page [www.akd.uscourts.gov] under Local Rules. The following Local Court Rules have been revised:

Subject	Miscellaneous General Order Number
Habeas Corpus Rules	866
Admiralty Rules	867
Criminal Rules	868
Bankruptcy Appeal Rules	869
Magistrate Judge Rules	871
Civil Rules	873

5. The Court has also revised the Plan for the Administration of the Petit and Grand Jury for the District of Alaska. A copy of the Jury Plan can also be found on the U. S. District Court Web Page [www.akd.uscourts.gov] under Local Rules.

NOTICE OF AMENDMENTS TO LOCAL RULES
U.S. DISTRICT COURT, DISTRICT OF ALASKA
U.S. BANKRUPTCY COURT, DISTRICT OF ALASKA

The United States District Court and the United States Bankruptcy Court, District of Alaska, have adopted amendments to the following local rules of practice and procedure ***effective October 1, 2002***:

Local Rules (Civil)
Admiralty
Bankruptcy
Bankruptcy Appeals
Criminal
Habeas Corpus
Magistrate Judge

The amended rules may be reviewed at: State Court Libraries in Anchorage, Juneau, Fairbanks and Ketchikan; U.S. Courts Library in Anchorage; U.S. District Court Clerk's Office in Anchorage, Fairbanks, Juneau, Ketchikan, and Nome; U.S. Bankruptcy Court Clerk's office in Anchorage; or on the web at the U.S. District Court Home Page http://www.akd.uscourts.gov or the U.S. Bankruptcy Home Page http://www.akb.uscourts.gov

Upcoming AK Bar CLE (2002-018): Update on US District Court and US Bankruptcy Court, District of Alaska Rules, Friday, October 4, 2002, Morning Program, Hotel Captain Cook. *Watch for the brochure!*

HI-TECH IN THE LAW OFFICE

Law firms at risk from IT project disasters

Continued from page 16

THE PROJECT PLAN

For the project plan, don't just think of a high-level bar chart depicting the timeline. The project's business objectives must be clearly defined and measurable in terms of outcomes — e.g., increased billings, reduced costs, or client satisfaction. Costs must be estimated and project risks should be analyzed and mitigated. But the core of the project plan is the work breakdown structure — what tasks are needed? By whom? How long do they take? What other tasks do they depend on?

Developing the work breakdown can be a daunting prospect for a project lasting many months and involving many different departments and people. But there is no substitute for getting to grips with the detail — the larger the planning task the more it needs doing. And the first draft is never right. It must be reviewed by all parties that have a stake in the project in order to gain consensus and help ensure that all known tasks have been addressed.

THERE IS NO SUBSTITUTE FOR GETTING TO GRIPS WITH THE DETAIL -- THE LARGER THE PLANNING TASK THE MORE IT NEEDS DOING.

The only exception is that, at the beginning, it may be truly impossible to plan the entire project to the same level of detail. For example, there may be a decision halfway through the project, upon which the planning of subsequent tasks depends. Fair enough — as long as the detail is added promptly when it can be.

RUN THE PROJECT RIGHT

Many project disasters have started out from the right place but gone wrong mid-stream. And disasters don't happen in a single day — they accumulate from many acts or omissions, each small at the time. Below is a list of 15 warning signs that you may be headed for project a disaster.

15 WARNING SIGNS OF IT PROJECT FAILURE

1. Open communication becomes absent.
2. End-user buy-in and enthusiasm are lacking.
3. Little or no communication from management regarding project goals and how the organization will be affected.
4. Implementation dates are inflexible, even in light of significant outstanding issues.
5. Management sponsorship is lost
6. Project managers don't understand users' needs.
7. Goals and scope are not well-defined.
8. Project changes are poorly managed; scope creep.
9. Chosen technology changes.
10. Business needs change.
11. Project lacks adequate resources with the appropriate skills.
12. Best practices and lessons learned are ignored.
13. Resistance by the project team to an independent audit.
14. Benchmark goals are not met.
15. Project costs escalate, with no end in sight.

While the following guidelines cannot guarantee success, if followed they will greatly reduce the risk of disaster.

KEEP TO THE PLAN BUT REPLAN IF NECESSARY

The initial project plan probably has some slack — spare time to do non-critical tasks. It's easy to use up slack early on in the project, promising always to speed up later. The PM must resist slippage vigorously — and must be supported in his or her efforts by the project sponsor — as those doing the slipping may resist equally vigorously being managed.

But, the plan going forward should always be realistic. If tasks have slipped and cannot be quickly pulled back, then the project plan must be reworked AFTER addressing any underlying issues. It's no use charging on, as one firm did, until there are three months to go before the scheduled live date of a new, custom-built system, and the developers have actually delivered no software.

UPDATE AND ENRICH THE PLAN CONSTANTLY

Track progress on the plan. If the detail of planned tasks changes, reflect this on the plan. And where work was impossible to plan fully at the beginning, add the missing detail to the plan as soon as possible.

MANAGE ISSUES AND RISKS

If a disaster does happen, it will undoubtedly result from known project issues or risks that were not addressed. A risk can be understood and accepted at one point and then, apparently suddenly, become an insurmountable issue that breaks the project. An experienced PM will be aware of this danger and will try to ensure that issues and risks are identified, assigned to individual "owners" and constantly monitored. Occasional reviews by an independent person outside the project structure can flag issues and risks that the project manager and team have become too comfortable with or have overlooked.

COMMUNICATE

Regular, open communication is essential at all levels of the project organization. Often, commercial or cultural issues may inhibit open communication, leading to unpleasant surprises. Sub-teams or individuals can be reluctant to admit they are having problems.

The project manager should report project status to the Steering Committee or project sponsor periodically. Ideally this will occur in-person, but it can also be accomplished with a written status report. Status should be reported monthly at the minimum, or more frequently as project circumstances dictate. Similar progress reporting by sub-team leaders to the PM is equally important. Project team meetings should be conducted as needed throughout the project. It is common for the project manager and sub-team leaders to meet weekly during critical points in the project.

CONCLUSION

Despite a project manager's best effort, an IT project can still run into trouble. As a fallback, the project manager should be prepared to challenge his or her, and others', existing assumptions and always be aware that something may have already gone wrong, but not (yet) resulted in disaster.

Disaster avoidance may seem to be a rather negative mission for a project manager. But given that so many IT projects fail to significantly meet their original objectives, and that some are truly disasters, understanding what can go wrong, how it can happen, and how to prevent it from happening are surely key ingredients for success.

About the Authors:

Martin L. Stalnaker is a shareholder, and works in Baker Robbins & Company's Houston office. Peter Kelly is a senior associate in Baker Robbins & Company's London Office.

Articles on pages 16 - 18 originated in The TechnoLawyer Community News Service, a free online community in which legal professionals share information about legal technology and practice management issues, products, and services. To join The TechnoLawyer Community, visit the following Web site: http://www.technolawyer.com

Mystery writer revealed

In the last issue of the *Bar Rag*, one of Lester Miller's colleagues wrote a memorial remembrance of Miller's long-time law cases. J. Anthony "Tony" Smith submitted the eulogy

HI-TECH IN THE LAW OFFICE

Getting more from your word processor

BY CAROL L. SCHLEIN

INTRODUCTION

During the heyday of WordPerfect 5.1 for DOS, many consultants, myself included, earned substantial fees from clients to customize their word processor. Before the Windows versions of word processors, macros were required for such mundane operations as printing addresses onto envelopes.

While I still have a few clients happily puttering along with old macros and merge forms, most firms have either migrated to a recent Windows version of WordPerfect or made a transition to some flavor of Microsoft Word. Notwithstanding this transition, many firms do not use the full potential of their modern word processor. With a small investment of time, your word processing software can do more of the work and save you and your staff valuable time.

CUSTOMIZING THE DEFAULT TEMPLATE

Both WordPerfect and Word come with a default template and settings when a blank document is opened. To make more frequently needed functions available, invest some time to customize this default template.

Whenever you customize software, whether in your word processor, practice management program, or billing program, focus first on the 80 percent of documents you regularly create. Even if you think each one is unique, closer examination reveals common elements in portions of every document or every document of a specific type.

For example, even if you have no standard letters, every letter will have the same margins, the date will be in the same location, the inside address will be in a similar spot, and your signature section should be the same. Creating a form letter with those basic elements will shorten the process of creating new correspondence.

Similarly, changing the margins to match the majority of documents your firm prepares will also increase your turnaround time. Take a close look at the steps your staff performs when creating documents to find other functions to streamline.

TAKE A CLOSE LOOK AT THE STEPS YOUR STAFF PERFORMS WHEN CREATING DOCUMENTS TO FIND OTHER FUNCTIONS TO STREAMLINE.

1. Finding the Templates

In WordPerfect, the default template is called wpxus.wpt, where X is the version of WordPerfect being used. Depending on the operating system, the location of this file will vary. You can find your default template by looking under Settings, choosing Files, opening the Template tab and reviewing the name and location on the line identified as Default Template. To edit the Default Template in WordPerfect, press CTRL+T to open templates or projects. >From the drop down list, scroll to "Custom WP Templates." The default will have the description "Create a blank document." On the right side, choose Options, then Edit WP Template.

In Word, the default template is called normal.dot. Like its WordPerfect counterpart, it holds the default settings for new blank documents.

2. Customizing Toolbars

When you examine the list of features available within your word processor, you will find you generally use the same functions repeatedly. Placing shortcuts or icons for those frequently used functions onto your default template's toolbar will go a long way toward making your word processor easier and more efficient.

Look closely at all options on the pull-down menus before customizing your toolbar. You even may want to make a list of the functions you perform most frequently that don't have shortcut keys associated with them. These are the logical candidates for inclusion on the toolbar.

For some reason, neither Corel nor Microsoft places icons for frequently used functions like printing envelopes or labels on their default toolbars. While some details differ between the two programs, a right click on a toolbar will give you the option to edit the toolbar buttons. Before starting, you may want to copy the shipping version and edit the name of the copy to designate it as your firm's custom toolbar. You can drag and drop icons from the toolbar to delete icons that you'll never need. (It baffles me why vendors choose to include icons for drawing or inserting a graphic while omitting the obvious icon for formatting and printing an envelope or preparing mailing labels.)

3. Customizing Menus

You also can make other changes to your default template such as editing the pull down menus to attach macros and other commonly used functions, and to reorganize menu items so that your firm's favorite functions are readily available. Additionally, you can edit the keyboard shortcuts in both programs. For example, older versions of WordPerfect used the F11 key for the Reveal Codes function. In the later Windows versions, the F11 key is used to insert a graphic file, a feature law firms rarely use. Editing the F11 key to Reveal Codes may make document troubleshooting easier for your staff.

TO START USING YOUR WORD PROCESSING SOFTWARE MORE EFFECTIVELY, POLL YOUR STAFF TO FIND OUT WHAT THEY'RE USING AND NOT USING.

4. Inserting Document Paths

For many firms, finding documents still causes headaches. In both word processing programs, you can edit the header or footer (the text that appears at the top or bottom of every page) of your default template to include the document's path and file name. By doing this, each time you save a new document, the header or footer will automatically include the document's location and file name.

Imagine a misplaced piece of paper in your office. Now imagine it has an indication of where it belongs and where it came from. Of course, if you're accustomed to using the longer file names, you may want to rethink either your folder or naming structure.

MORE CUSTOMIZATION: OPEN FILE, AUTOCORRECT, AND MORE

Within both programs, you also can change settings pertaining to the Open File dialog screen to allow you to see file dates and sizes or remember the last folder you opened. The steps differ in Word and WordPerfect as well as in the various versions so you may want to consult the online help file to learn how to configure your Open File options.

AutoCorrect in Word and Quick Words in WordPerfect are among the most underutilized features. The concept is that you highlight formatted text, such as your standard signature block, then choose AutoCorrect or QuickWords from the pulldown menu. You will be given the opportunity to assign an abbreviation such as VTY (Very truly yours) with initials to represent that block of text. When you want to use your signature block or other phrase, simply type your abbreviation.

Just remember not to use real words. One trick I have found effective is to precede every abbreviation with the accent key in the upper left corner of a standard computer keyboard. Using this symbol enables you to control when you want to expand your abbreviation and when you simply want to type something that happens to be the same as your abbreviation.

Many more opportunities for customization exist, including setting up documents with automatic page numbers, cross references, merges, sorting, table formatting, and automated tables of contents and tables of authorities. To get started, read the "What's new" section of the Help files to reviews a list of features added to your word processor since its last version. While many of them won't be of particular interest to lawyers, there are a few slick features that have surfaced in the past few renditions.

For example, Corel WordPerfect versions 9 and 10 (part of Corel Office 2000 and 2002 respectively) include the ability to simultaneously save a WordPerfect file in both PDF and HTML formats. Some other useful functions include Word's Document Map for navigating long documents and WordPerfect's real time preview of formatting changes to see what the document will look like before committing to the actual change. WordPerfect also added AutoScroll in version 9 to quickly browse through a document as if you had a mouse with a wheel. You also may want to explore some of the options for tracking versions of documents when soliciting edits or comments from partners or clients.

CONCLUSION

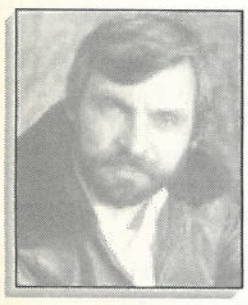
To start using your word processing software more effectively, poll your staff to find out what they're using and not using. Consider treating them to lunch so that they can share their tips and tricks. Through exercises like this, you can create a manual of best practices and also customize everyone's software. A small investment of time now could pay dividends for years to come.

The author is president of Law Office Systems in Montclair, a training and consulting firm specializing in law firm automation. She formerly chaired the Computer and Technology Division of the ABA Law Practice Management Section.

Comments on a Bar Rag article?
Write the editor,
or e-mail us at info@alaskabar.org

Range of handheld systems in the legal environment

☐ Joe Kashi



Lawyers gravitate to mobile equipment -- after all, we're frequently on the go and need to immediately research some legal question, redraft a document or pick up our messages and communicate with others.

Hand-held and subnotebook computers have become mature product categories and, with a few exceptions like the Fujitsu P-2110, the newest models tend to be incrementally better, less expensive variants of already proven systems. This month, we'll examine a range of handheld systems that work well in the legal environment as well as a few subnotebook computers that combine full Windows capability, high performance, and the smallest possible form factor.

Both handheld systems and subnotebook computers have their uses and their proponents. Realistically, though, handheld and subnotebook systems *fill* complementary needs even as these product lines slowly converge- handheld systems are sporting color displays and faster processors while subnotebook systems are becoming even smaller and lighter. Despite this converge, you'll still need a subnotebook system or full-size notebook computer to execute the full gamut of Windows application software and only a handheld system will comfortably fit in your pocket when you want to travel unencumbered.

HANDHELD AND SUBNOTEBOOK SYSTEMS FILL COMPLEMENTARY NEEDS EVEN AS THESE PRODUCT LINES SLOWLY CONVERGE

HANDHELD SYSTEMS OUTLOOK

Hand-held systems are gaining market share - sales are expected to rise about 25% in 2002, even as Palm has been facing increasing challenges in the hardware market. Palm's 2001 hardware market share fell from 50% to 38%, but the Palm operating system remains dominant. Further, complicating the short term sales forecast for hand-held systems is the likely sales slowdown as customers wait for Xscale and palm OS5 products to ship and mature.

In the meantime, expect to see higher end hand-held systems shipping with 802.11b WiFi wireless Ethernet and Palm OS5 and Pocket PC 2002 operating systems becoming increasingly focused upon the large business enterprise as better color displays, wireless Ethernet and higher performance chips proliferate into the hand-held market space.

One of the most interesting, versatile and expensive handheld system currently shipping is **Handspring's Treo 270**, a combination of a high end PDA and a 3rd generation cell phone. The Treo 270 is about the size of a wallet and weighs less than six ounces. Currently shipping versions of the Treo 270 combine Palm's OS4, a high resolution 4096 color screen, 16 MB DRAM, a QWERTY keyboard, wireless connection to the Web and to electronic messaging, and high end cell phone capabilities.

At $279, the **Palm m130** is the least expensive color PDA with an expansion slot. It includes a backlit 2"X2" display that works reasonably well indoors but which tends to wash out in bright sunlight. The M130's lithium battery is topped off each time you put the device in its included USB syncing cradle.

Specs:
33 MHz Motorola Dragonball VZ, 8 MB standard DRAM, no keyboard, 160 x 160 color screen resolution, Palm OS, IrDA, 0.9" thick X 4.8" H X 3.1" W, Weight 5.5 ounces

Palm's m515 is a color display derivative of the Palm V and usually retails for around $325. The primary improvement incorporated in the m515 is its 2.25" x 2.25" screen, which has a maximum 160 x 160 pixel TFT screen that's capable of displaying up to 65,536 colors and sharply rendered text under most lighting conditions. Unlike the m130, the m515 can be easily upgraded, thanks to its flash memory.

Specs: 33 MHz Motorola Dragonball VZ CPU, 16 MB DRAM, Palm OS, IrDA, 0.5" thick, 4.5"H, 3.1"W, weight 5 ounces, voice recording, Palm Expansion Card Slot for MultiMediaCard and SD expansion cards (which add extra memory, standard modem, data backup and distribution, eBooks, games, or reference works such as a road atlas or dictionary), no keyboard

Both Palm units include MGI PhotoSuite Mobile Edition and DataViz's Documents to Go that allow you to create and work with Word- and Excel-compatible files and to view PowerPoint files.

Comparable to the Palm m515 in price and general quality, **Sony's Clie PEG-T615C** uses a higher resolution 2.25" x 2.25" , very high quality TFT screen. The Sony, however, includes some useful additional controls that make navigation among screen items much easier. The Sony Clie also uses the Palm OS and similarly ships with DataViz's Documents to Go but does not accept Palm's widely available SD expansion cards. This is an excellent quality PDA unless you really need SD expansion, in which case the m515 makes more sense.

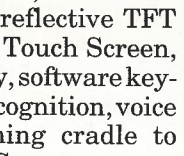
Specs for Sony CLIE PEG-N615C: 8 MB DRAM, Palm OS, no keyboard or micorphone, screen resolution 320 x 320 pixels, 65,536 colors, USB and IrDA, memory stick expansion, 0.68" thick x 4.75" H x 2.87" W, weight 6 ounces

Sony's CLIE PEG-NR70 Handheld usually retails for about $400 to $450 and is more of a convergence handheld that combines significantly expanded multimedia entertainment capabilities with regular PDA functions and data entry either by traditional PDA stylus or a QWERTY keyboard.

Specs for Sony CLIE PEG-NR70 - CPU 66 MHz, 16 MB DRAM, Palm OS, IrDA and USB, Memory Stick expansion, 0.7" thick x 5.5" H x 2.87" W, weight 7 ounces

Although Microsoft's Windows Pocket PC 2002 operating system hasn't caught on to the same degree as the Palm OS, there are several similarly small Pocket PC systems that are well worth considering.

HP's Jornada 568 ships with 64 MB DRAM, 32MB of ROM, a 103 MHz data bus and the 206MHz StrongArm processor. This is a capable handheld system whose functionality is closer to traditional notebook computers. The Jornada 565 includes MP3 capability, a non-backlit reflective 240 x 320 pixel TFT color screen that can display 65,536 colors and software to work with and share digital photos. The Jornada 565 usually retails for about $540. The Jornada handheld series includes an IrDA port, a USB synching cradle, and can accept optional expansion hardware that allows wireless Internet access. HP includes Windows Pocket PC 2002 OS and handheld editions of the basic Microsoft Outlook, Word, Internet Explorer and Excel software. Weight 6 ounces.



HP'S JORNADA 720 IS JOE'S PERSONAL FAVORITE AMONG WINDOWS PDAS

Whether **Compaq's iPAQ H3835** handheld survives the HP-Compaq merger remains to be seen, but it should. This relatively powerful system, which retails for about $50,0 has some very nice specifications and is a very usable system.

iPAQ H3835 Specs: 206 MHz Intel Strong ARM 32-bit RISC CPU, 64 MB RAM, 32 MB ROM, 240 x 320 pixel 2.25" x 3" color reflective TFT screen, 65,536 colors, Touch Screen, touch-sensitive display, software keyboard, handwriting recognition, voice recorder, USB synching cradle to standard Windows PC.

HP's Jornada 728 is the neatest example of the growing convergence that we've seen between PDAs and full-powered computers. The Jornada 728 weighs a mere 1.1 pounds but includes a real keyboard and a 6.5" 240 x 640 pixel color LCD screen with 2D hardware acceleration and 65,536 colors. The 728 includes a 206 MHz Intel StrongARM 32 bit RISC processor, 64 MB SDRAM, and a 51 MHz data bus. HP's included lithium battery is rated for 9 hours useful life. I/O ports include a fast 115.2 Kbps serial port, plus single USB, IrDA, and an RJ-11 jack for the built in 56K modem. Audio capabilities include a standard speaker and microphone, a stereo audio jack, and a voice recorder. The Jornada 728 run Microsoft's Windows for Handheld 2000 operating system, version 3.0 and includes the Pocket versions of Microsoft Word, Excel, PowerPoint, Access, Outlook, and Internet Explorer. Wireless Internet hardware is available but optional. This system isn't quite a desktop replacement, primarily because of the lack of a high resolution video I/O port although the USB port theoretically allows one to connect a separate USB keyboard and CD-ROM. The Jornada 728 retails for $999.

The next step up the size vs. functionality scale are **Sony's VAIO C1 PictureBook** and Fujitsu's P1110 LifeBook. Both of these systems use lighweight magnesium alloy cases and TransMeta's new Crusoe processor whose very low power requirements make it particularly suitable for subnotebook computers that need to squeeze as much battery life as possible from necessarily small, light batteries. Each weighs about 2.2 pounds and is remarkably compact given its robust functionality. Sony and Fujitsu both allow the purchaser to choose between home and professional versions of mainstream Windows XP. The Sony C1 includes a low end digital camera and more multimedia and I/O options but costs about $600 more than the P1000. Recommendation: If you want a very compact system oriented toward multimedia, then go with the Sony C1. On the other hand, if you're primarily interested in a very compact but competent business computer at a very good price, then go with the Fujitsu.

Sony C1 PictureBook Specs: CPU Crusoe TM5800 733 MHz processor with 512 KB cache, Memory: 128 to 256 MB SDRAM, Internal I/O: PCI bus with AGP video bus, Display: 8.9" UW-SXGA (1280 x 600) TFT, ATI graphics chip, 8 MB video SDRAM, Multimedia: MIDI, MPEG1, MPEG2, MPEG4 and JPEG support, MPEG2 encoder, Hard Disk: 20 GB, External 16x CD-ROM drive is standard, Floppy disk: Optional external 1.44 MB, 3.5", Modem: Internal 56K V.90 modem, Keyboard: 86 key QWERTY, Pointing device: Stick-type, Built-in stereo speakers and monoaural microphone, Battery options: standard through optional quad capacity batteries rated for 2 to 15.5 hours, One type II PC Card expansion sloy, I/O ports: VGA output, USB, IEEE1394 Firewire, RJ-11 phone jack, audio in, headphone, Memory Stick, RJ-45 Ethernet, AV out, AV in, Size: 1.2" H x 9.9" W x 6.0" deep.

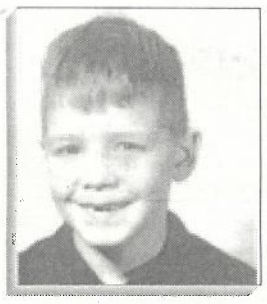
Fujitsu's P1110 ultralight starts with the same 733 MHz Crusoe processor and 8.9" TFT screen as the Sony C1 but omits some of the Sony's multimedia capabilities. On the other hand, a basic but competently equipped P1110 starts are only $1,299 and is quite a bargain. The P1000 and its somewhat larger and more powerful sibling, the P2110, have captured quite an array of awards since their November 2001 introduction. Although too large to be considered a PDA, these systems are definitely small enough to pack into any brief case. When used with the optional high capacity battery, a Fujitsu P series subnotebook computer should run all day with light usage on a single battery charge.

Fujitsu P1110 Specs: CPU: 733MHz Crusoe™TM5800 Display: 8.9" wide-format 1280 x 600 XGA TFT with touch screenMemory: 256MB SDRAM standardHard Disk: 20GB standard, 30 GB optionalFloppy Disk: External USB 1.44 MB 3.5" a $20 optionModem: Internal 56K V.90Networking: Integrated 10/100 Ethernet standard, 802.11b WiFi Wireless Ethernet a $50 option, Pointing Device: stick-type and also touch screen/stylus, Operating System Options: Windows XP Home, XP Professional, Windows 2000 Professional.

TALES FROM THE INTERIOR

Potheads

☐ William Satterberg



Of all of the criminal clients I have represented over the past 25 years, the most entertaining are still my "Potheads." I can write about my Potheads without concern. This is because most Potheads will not read this article. Even if they do, most will scarcely remember it. Those who do will simply giggle.

Potheads are interesting people. Many have become famous doctors, lawyers, judges, and even United States Presidents.

Whereas much of the criminal ilk is unsavory, Potheads are socially acceptable creatures. Admittedly, Potheads often need to shower more than the next person, but that is not unusual for many Fairbanksans, Potheads or not. Potheads always seem to emit a strange odor. Nevertheless, other than their sometimes questionable hygiene and the fact that Potheads will eat all of your office's donuts and brownies while waiting for an appointment that was actually scheduled for the previous week, Potheads are otherwise very sedate. In fact, they are so sedate that they regularly fall asleep in our reception area.

Lately, I have been adopted by the Potheads. It is because we have handled several cases involving marijuana searches, seizures, and persecutions. To further our exposure, the firm has the ignominy of being reported twice in *High Times Magazine*, the official Pothead almanac. As the local Pothead law firm, we have a following of dedicated hemp heads, who are absolutely convinced that we believe in the normlcy of their cause. In fact, even the spelling of norml has now been changed on our computers. A self-ordained expert on the subject, I will offer some observations on the typical pot case, if such a typical case really exists.

A marijuana case usually begins in one of three ways. Setting aside the famous *Ravin* case, during which perhaps the then best-loved attorney in Alaska allegedly plopped a packet of pot on the desk of the investigating police officer and demanded to be busted, most marijuana cases begin either with a "knock and talk," a search warrant, or a client who allows the arresting officer on an unrelated case to remove the long, round "squishy thing" from their "left front pants pocket." So many pot pipes have purportedly felt like a "weapon" during police pat down searches that the legislature should enact a five day waiting period before somebody can buy a pot pipe. On other occasions, however, I suspect that the "squishy thing" has sometimes given rise to a much closer police/citizen relationship.

THE GREATEST CULPRIT CAUSING THE DOWNFALL OF ALASKA'S POT PRODUCER IS "ANONYMOUS TIP."

The greatest culprit causing the downfall of Alaska's pot producer is "Anonymous Tip." Anonymous Tip is the most common do-gooder in Alaska. Judicial officers apparently believe that Anonymous Tip is truly a reliable person. More than any other police officer, Anonymous Tip deserves full credit for having busted the bulk of the marijuana users in Alaska.

No one has ever met Anonymous Tip. Once Anonymous Tip has made his or her call (never recorded), the police move in. Usually, the officers simply walk up to the back door of some person's residence. (After all, why go to the front?) Invariably, they "smell" the "strong odor commonly associated with growing marijuana" "emanating" from a "vent" at the "rear" of the residence. The astute officer, who obviously has a high degree of personal familiarity with the growth of marijuana, consumption, and the ability to detect various smells, distinguishing them from catnip, watermelon, and other products, then recites a well-practiced liturgy to a court that the officer is able to determine that a large marijuana grow is within the hermetically-sealed residence. Because, by law, the police must establish a threshold level of plants in cultivation in order to obtain the usually routinely obtained search warrant from the local magistrates, the officer must then opine that a criminal quantity of plants were smelled growing in the basement of the residence, behind two locked doors, four rolls of visqueen, and an unclean litterbox. Given this compellingly strong basis for probable cause, a bleary-eyed magistrate normlly will issue a search warrant (note that I did not say "red-eyed"). Gleefully, the officers will be off in a posse of Ford automobiles with all sorts of toys to make their entry into the premises.

WITH TIME, THE OFFICERS HAVE BECOME MORE AND MORE AGGRESSIVE WITH RESPECT TO THEIR ABILITY TO SMELL MARIJUANA.

With time, the officers have become more and more aggressive with respect to their ability to smell marijuana. Recently, I had a case where two North Pole City Police officers were able to testify that they were able to smell only five six-inch tall, growing infant marijuana plants in a locked hot water heater room behind a closed door. As a further testimonial to their capabilities, the hot water heater room was located downstairs in a small house, which had the exterior entrances closed, as well. The house, in turn was wrapped in visqueen. Much to the officers' olfactory abilities, they both testified that they were able to smell these notorious growing plants from well over 100 yards away, at the same time that my client was barbecuing salmon in the backyard with a load of garbage yet to be emptied in his nearby pickup truck. According to the officers, another indication which substantiated their uncanny conclusion was that their canny K-9, as well, had been sniffing the air in search of some odor that was attracting its attention.

In cross-examination, the dog's officer partner agreed that his dog, in addition to being trained to smell various narcotics, would also key in his family's kitchen on such other contraband as chicken, steak, ribs, and anything else which grabbed the dog's nose, including garbage. Prepared for the occasion, I asked the police officer to produce his dog in court. I figured that we could have a courtroom demonstration. The officer indicated that the dog had taken the day off. Unbeknownst to the officer, I had spent the lunchtime at Fred Meyers, and had purchased fried chicken, barbecued ribs, and a hot link, which were in my briefcase. I planned to put the dog to the ultimate test, watching the dog paw frantically at my briefcase in search of the drugs that would obviously be inside. Besides, it was a deductible, client expense. The evidence was not wasted at the end of the day.

Because I had been snookered with respect to putting the dog to the test, I opted for the consolation prize. The officers' pride in their collective ability to detect the smell of marijuana from over 100 yards away was truly amazing. I explored their proboscitory prowess and asked each how he had learned to differentiate the smell of growing from smoked marijuana.

The exclusionary rule was in effect. The first officer announced on cross-examination that he had been able to smell growing and smoked marijuana "while at the police academy." I couldn't resist the urge. "Ever smoked it before?" I innocently asked. Much to the officer's credit, although he gave me a rather large smile, he announced that he had done it "while in high school." He then volunteered that he was seventeen at the time, whereupon I reminded him that it was probably illegal, even then, for a seventeen-year-old to smoke pot. Cross-examination finished, the officer was then excused. He retired to the back of the courtroom to watch the rest of the show.

The second officer also bragged about his prowess in smelling growing marijuana. By then, it was obvious to officer number one that the trap had been set. Predictably, he was able to sit in the back of the courtroom and giggle when I asked the second officer how he, too, had been able to learn about the smells of marijuana. Once again, the answer was the tried and true, "I learned it in the police academy" response. And, once again, I inquired about his extra-curricular activities, rephrasing the question somewhat, to ask, "And when was the *last* time you smoked marijuana, officer?" The officer responded that it was "In the seventies." Much to both officers' credit, although they acknowledged that they had, in fact, smoked the prohibited substance several years ago, I personally think that, perhaps, their use of the product had possibly clouded their recollection of just how recently the experimentation had occurred. Either that, or they enjoyed the experience so much that they are still able to smell a party from over 100 yards away. (Even in college, I used to hate people with noses like that. They simply would never leave you alone when you were trying to prepare for the next day's classes.)

From the constitutionalist's perspective, the previously mentioned attack is the legally preferred method, since it requires the issuance of a search warrant to protect citizens from unreasonable searches and seizures. However, it is the second approach, discussed below, which works faster and relieves the officer of finding the requisite "detached" magistrate.

The second method of obtaining access starts much the same as the first method. Anonymous Tip once again has made the phantom phone call. However, rather than awakening a magistrate, the officer casually approaches the residence just like any other neighbor. The officer then politely bangs on the door with his fist for ten minutes. In time, the occupant, Pothead, comes back to reality, answers the door, thinking that the guest is just another Amway zealot. Introductions soon prove otherwise.

Pothead, always wanting to be cooperative, invites the officers inside. Pothead then proudly shows the officers around the house, bragging about the scores of plants under cultivation.

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TALES FROM THE INTERIOR

Potheads

Continued from page 20

In one case, a client was so proud of his grow that, when the officers finally declared after two hours that they had completed their search and had seized all of his brand new plants, he helpfully added that they had missed a large amount of his previously harvested product. To prove this, he promptly produced a sizeable stash from an overlooked dresser drawer. It took a long time before I convinced my indignant client that the possession of a certain amount of marijuana constituted a serious criminal act and was not something to be boasting about. It took even longer to explain to him that a return of the evidence was out of the question.

IT TOOK A LONG TIME BEFORE I CONVINCED MY INDIGNANT CLIENT THAT THE POSSESSION OF A CERTAIN AMOUNT OF MARIJUANA CONSTITUTED A SERIOUS CRIMINAL ACT AND WAS NOT SOMETHING TO BE BOASTING ABOUT.

The previously-described "knock and talk" search is the most effective. The impromptu visit creates havoc for the defense attorney because there usually is no suppression motion readily available. The search is a consent search. When challenged in court, the officers simply announce to the judge that they knocked on the door and were cordially welcomed in to have tea and brownies.

The final marijuana bust comes in conjunction with an unrelated investigation or arrest. Not surprisingly, I have yet to have any marijuana users picked up for serious domestic violence incidents. Instead, I have found them pulled over for the occasional DWI charge, only to find that they registered well below the illegal level on the Datamaster instrument after failing all known field sobriety tests, but still did well with respect to the quantity of squishy material in their pants pockets. In such cases, the officer engages in the obligatory "officer safety" pat down search, feels the ubiquitous large, squishy lump, and removes it as a dangerous weapon. Sometimes, the squishy lump turns out to be a baggie of marijuana. Other times, much to the officer's surprise and/or occasional disgust, it has nothing to do with marijuana, and is exceptionally hard to remove no matter how repeatedly the officer tugs on it.

There is a defense available with the body search cases when the search is incident to an arrest and without permission of the client. Presuming that the client has announced an intention to bail out, a non-consensual search that is for something beyond weapons ordinarily is illegal.

I LATER LEARNED THAT REGULAR DRUG USE ALSO AFFECTS A CLIENT'S SHORT-TERM MEMORY.

As a case in point, I recently had a phone call from a DWI arrestee. During our discussion, I explained that he could avoid posting bail by waiting until the arraignment at 1:30 the next afternoon. I also advised him that he would be subject to search if he remained in jail overnight. I told him that he may want to bail out if he had any concerns about such a search. Immediately, the client began chanting the mantra, "Bail out! Bail out! Bail out!" Recognizing that these statements would have caused panic in a World War II B-17, I concluded that my client probably had a very good reason for his claustrophobia. He continued to chant the mantra all the way to the jail. Appropriately alerted, the officer still violated my client's civil rights and searched him. As expected, the officer found contraband which soon ended up in the waste can over my client's protests. To add insult to injury, the officer told my client that it was his "lucky day" — that he had obtained some rare legal advice, and that he should gladly pay his attorney's bill. I later learned that regular drug use also affects a client's short-term memory.

Then there was the traffic law abiding Pothead who came to me with an accusation of having just under a pound of the prohibited product in his possession when he was finally stopped by the police after a rather long, but law-abiding pursuit. As matters developed, the officer originally was seeking only to alert my client to an equipment violation. My perceptive client, who had been arrested many times before, however, recognized that many of his equipment violations had expanded into arrests in the past. This time, he was taking no chances.

Once the officer activated his beacons, my client embarked upon a wild, but legal goose chase. He never exceeded the speed limit. He always obeyed all traffic signs. He always used his turn signals. And, eventually he stopped and exited his vehicle at gunpoint. In the process, about one mile of circuitous travel had taken place. An inventory search of the vehicle located just under one pound of product - barely within the misdemeanor limits.

As trial approached, I decided to reenact the "chase." I could not believe the officer's representations that it took almost a mile to stop my client, especially when my client claimed he first saw the officer even before the overheads and siren were activated. My client and I religiously followed his path. To my surprise, the officer was within one-tenth of a mile of his estimate of the length of the chase. "Why," I asked, didn't you stop right away?" The response was refreshingly innocent - "I had to get it under a pound, didn't I?"

According to my client, he actually welcomed jail after his arrest, although he apparently didn't remember the first day or so. The food was good and plentiful, and he found his cellmates to be hilarious.

If growing marijuana is seized, the police dry and weigh the product. This is so they can file multiple charges, rather than simply charge the defendant with growing plants. The second count is based upon aggregate weight. The federal agents avoid this issue by simply claiming, under law, that each plant has an equivalent aggregate weight value in kilos.

In one felony case based upon an overabundance of plants, after processing, I was able to argue successfully that the police had destroyed the evidence. Because the final weighed amount was substantially less than one pound, I claimed that only a misdemeanor should enter. The jury, half of whom appeared to be Potheads, readily agreed.

In another case, when I asked to see the roots and stems of harvested plants, I was told that I could inspect them at the State Trooper warehouse. When I arrived, the warehouse yard was swarming with angry police officers, armed with tape recorders, videocameras, notepads, and other instruments of destruction. Alledgedly, someone had cut through the cyclone fence and broken into the locked storage area. Fortunately, my client had an airtight alibi. He was still in jail. The pieces and stems of numerous marijuana grows indiscriminately littered the yard. It clearly was an embarrassing time to have any defense attorney visit. Chain of custody was a thing of the past. Although the officers blamed the crime upon Potheads, my personal opinion was that the trespasser was that overactive German Shepherd drug dog donated by the Fairbanks Rotary. Certainly, canine predisposition, motive, and opportunity all existed. Anyone will tell you that these are the key elements for any crime.

THERE IS REALLY NO WAY TO IDENTIFY WHO IS OR IS NOT A POTHEAD. POTHEADS COME FROM ALL WALKS OF LIFE. SOME WEAR SHORT HAIR, SUITS, AND ARE PRESIDENTIAL MATERIAL -- DEMOCRAT OR REPUBLICAN.

A felony conviction in Alaska for marijuana possession can be based upon exceeding a certain number of plants, or by exceeding a weight limit. The federal law, however, applies differently. Recently, in a federal prosecution, the dedicated agents based their case upon "root balls." These root balls were literally nothing more than pieces of shredded plant root hairs often one inch or less in total length. Much to my concern, the felonies commanded ten years of presumptive time based upon evidence which otherwise would have been laughed out of state court. In my frustration for overcharging, I began to understand the fear and governmental distrust exhibited by the citizens of Ruby Ridge, Idaho, and Waco, Texas, although I am not yet ready to relocate to Tok, Alaska.

No legal discussion would be complete without an evaluation of the trial itself. A marijuana trial is an interesting event. Often, the prosecution resolves Pothead cases with a plea bargain. I believe it is because the prosecution does not want to present the evidence to an Alaskan jury. Historically, an Alaskan jury of peers has voted approximately fifty percent to support the legalization of marijuana for various purposes. The same citizenry may very well support legalization of possession for use once again. A way to avoid this accountability, of course, is to grossly overcharge the case. Such decisions, unfortunately, often question intellectual honesty.

Because of overcharging, pot prosecution plea bargaining is expected. Moreover, not only is plea bargaining expected, but, because many Potheads are anxious to retain their Alaska Permanent Fund Dividend checks, which can be lost with a felony conviction, plea bargaining usually occurs.

In fact, the Alaska Permanent Fund Dividend (PFD) has affected plea bargaining substantially. As a side benefit, the Alaskan PFD recipient also has the unfortunate exposure of being called for jury duty. Statistically, not as many pot smokers necessarily are able to remember to vote as they are to pick up their PFD checks. What this means is that Alaska's voting returns do not accurately reflect the actual amount of Potheads who will serve on a jury when told that a failure to appear will sacrifice their coveted PFD stash money. In fact, my own, admittedly informal studies reveal that over fifty percent of the jurors, not to mention many lawyers and judges, have either used or are still using marijuana to varying degrees. Just ask attorney Bill Clinton. (But don't hold your breath for legalization any time soon. Where Clinton never inhaled, Bush reputedly never exhaled.)

What this PFD phenomenon also means is that a triable case can be presented if plea bargaining fails. The defendant can literally daydream through the process, which often does happen. The expectation is that the verdict often still will be either a hung jury or an outright acquittal.

Following the rare conviction, the biggest penalty most Potheads face, at least from their perspective, is not the conviction record or even the jail time. It is that the evidence will be forfeited and burned in an indoor incinerator with a tall smokestack. Although I always attempt to explain to my Potheads the consequences of the criminal process, they usually just giggle and smile. Fortunately, my Potheads take the entire experience much less stressfully than others. More than once, when I have disclosed the penalties for conviction, the response has been a "Far out, Dude!" The response has happened so often that I now also answer to "Dude."

Finally, a warning is in order. There is really no way to identify who is or is not a Pothead. Potheads come from all walks of life. Some wear short hair, suits, and are presidential material — Democrat or Republican. Others are disguised as little old ladies with arthritis, college students, real estate agents, and the occasional religious fundamentalist. So — "Look to your left, look to your right. The person sitting next to you is probably a Pothead." The same inability to stereotype is not true, however, about drug cops. Usually, they are quite easily identified. They ordinarily have long, greasy hair, (with the exception of one Fairbanks agent who has shaved his head entirely bald). They also wear earrings through various body parts, gold chain necklaces, dye their hair blond, dress in grubby street clothes, and usually drive donated Ford vehicles. They are easily recognizable as drug officers for those reasons. As such, tell your Potheads that, if they see anyone like that on the street, stay away. And, if your Potheads are asked about marijuana use, tell them to keep their silence. Most likely, the inquisitors are drug cops or future presidential hopefuls.

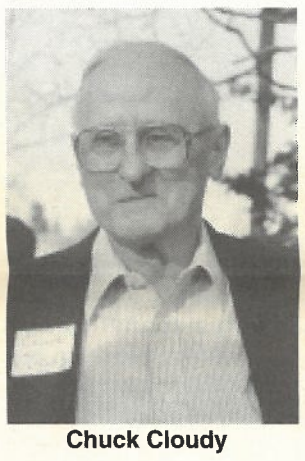
Alaska's judicial pioneers attend reunion of Territorial Lawyers

Continued from page 1

by his father D. B. Stewart, who brought his family to Juneau in the early 1900s. The elder Stewart, who was always known as "D. B.," worked as an engineer for the Alaska Juneau Mining Company. He eventually became the commissioner of mines, first for the territory and the U.S. Government, and eventually for the new state. It was D. B. who convinced the first U.S. Army general assigned to Alaska in 1940 that the bases at Fort Richardson and Fort Wainwright should be heated with Alaska's abundant coal rather than oil, which had to be shipped many slow miles from Outside.

After growing up in Juneau, Stewart obtained a degree from the University of Washington and then joined the army. His first assignment was to help liberate Kiska Island in the Aleutians from the Japanese who, as it turned out, had pulled out two weeks before the Americans arrived. Stewart spent the final weeks of the war fighting in Italy, where the battles were fierce and the casualties high.

Stewart saw by this time that America's primary adversary in the future would be Russia and he wanted an education that would prepare him for that eventuality. He obtained a masters in international studies from Johns Hopkins School of Advanced International Studies in Washington, D.C., where he specialized in Russian studies. He then entered Yale Law School from which he graduated in 1950.



Chuck Cloudy

When Stewart sought work in the state department addressing the Russian problem, however, his plan was foiled by a lack of funding for the work he was prepared to do. Senator Joe McCarthy had already decided how to address the Russian threat and he was doing it his own way.

Stewart returned to Juneau. He passed the Alaska Bar in 1951 while he clerked for U.S. District Court Judge George W. Folta, Sr. After three-years as an assistant U.S. attorney, Stewart served a term as representative in the 1955 territorial legislature, which authorized Alaska's constitutional convention. The legislature appointed Stewart Executive Director of the Statehood Committee. After the convention was convened in 1955, Steward was elected Secretary to the convention, and he subsequently assisted the Statehood Committee organize the vote on the constitution.

Bob Ely reminded Stewart of their joint trip during this period to New Jersey, which had just revamped its entire state government, including drafting a new constitution. Judge Dimond had asked Ely, an Alaska district attorney at the time, to assist Stewart in managing the drafting of the constitution. The leaders of that process in New Jersey agreed to share their experience with the Alaskans. As a result, the articles of Alaska's constitution that govern organization of the executive branch and court administration are patterned after New Jersey's constitution.

After the constitution was approved in 1956, Stewart opened a private law practice in Juneau and was elected to a two-year term in the first state senate. In 1960, Judges Nesbett and Dimond appointed Stewart Alaska's first state court administrator. As such, he was largely responsible for organizing the Alaska Court System. The job required him to move to Anchorage for six years.

At the end of his tenure as court administrator, Stewart returned to Juneau where he served as superior court judge for fifteen years. He continues to preside over settlement conferences and maintains an office in the state court building in Juneau. During recent years he has been appointed by Governor Knowles to preside over the summit meeting on the subsistence dispute and more recently to sit on the governor's committee on tolerance. Judge Stewart reportedly has been dubbed by his admirers Thomas "Jefferson" Stewart because of his enormous contributions to the establishment of Alaska's state government.

Also attending the dinner from out of town were former Alaskan Allan McGrath, who now lives in his original home state of New York; Jamie Fischer from Kenai; Fairbanks lawyers Charlie Cole and Barry Jackson; and Chuck Cloudy of Ketchikan.

McGrath and former New Yorker Roger Cremo recalled upon meeting that the last time they saw each other many years ago they were representing opposing parties in a civil case. They dined out together during the trial, settling the case over dinner, and recalled their waitress referring to them as "that New York bunch." McGrath mentioned that he now lives across the street from Lincoln Center.

Barry Jackson said he came to Alaska in 1957, while he still was studying law at Stanford, to see if there might be an opportunity here for a young lawyer. He managed to get a job clerking with Territorial Judge George Forbes. When Jackson passed the bar in 1959, there were about 20 lawyers in Fairbanks and about 100 lawyers in Anchorage.

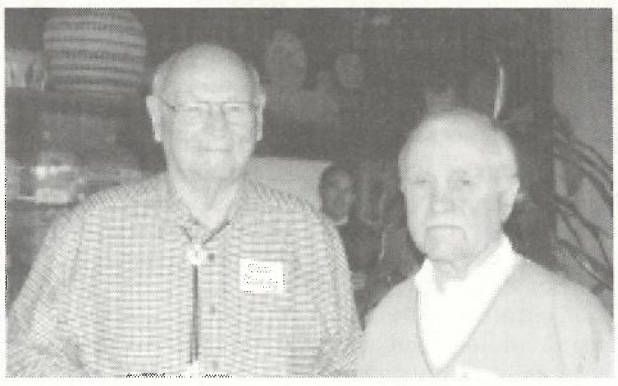
Jackson shared stories about the early days in the Fairbanks courts with Robert Wagstaff, who attended the dinner as a guest. Wagstaff worked as an assistant district attorney in Fairbanks for his first two years out of law school. He and Jackson both had stories about attorneys pressed into service in criminal matters who found themselves unable to recognize which of the men in the courtroom was their client. One of these attorneys had to ask Wagstaff, the prosecutor, to point out the client; the other hapless lawyer had to ask the judge.

Jackson also recalled bringing an action against the state to require that compensation be paid to lawyers who were appointed by the court to represent criminal clients. He lost. He tried making a similar argument to obtain fees for representing the Athabascan tribes from the Nelchina area before Congress during passage of the Alaska Native Claims Settlement Act. He lost again. This time the financial impact of losing was much greater.

Jackson did eventually act as counsel to the Native corporation formed by his tribal clients, however. Jackson worked with his client to choose a memorable name that suggested the corporation was prepared to do business worldwide, and especially with Japan. He was pleased with the name chosen by the Native leaders: Doyon. The word means "big" in Tlingit, which is close to the Athabascan language. Jackson suggested adding "Limited" to convey an international status. He also had learned during his stay in Japan after his World War II military service that "n" is the only consonant that can be found at the end of a word in the Japanese language.

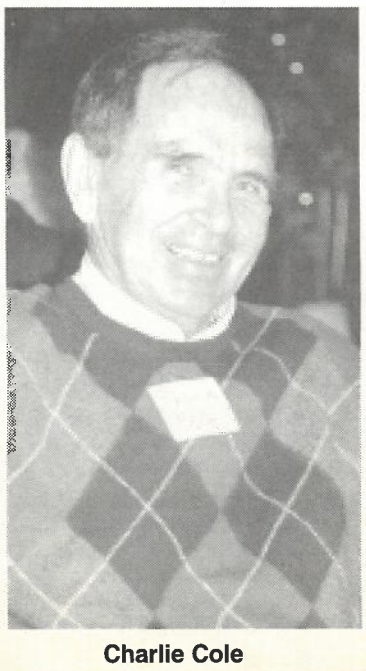
Virgil Vohaska compared notes with Jackson about practicing law in Nome during the early days of statehood. Fairbanks and Nome had cultural similarities that allowed Fairbanks lawyers to fit into a Nome courtroom. You could spot an Anchorage lawyer every time, Vohaska said.

Continued on page 23



Dan Cuddy (L) and Roger Cremo.

Judge James and Verna von der Heydt.



Charlie Cole

Mahala Dickerson

Territorial Lawyers

Territorial Lawyers, May 2002. Mahogany House, Anchorage

Continued from page 22

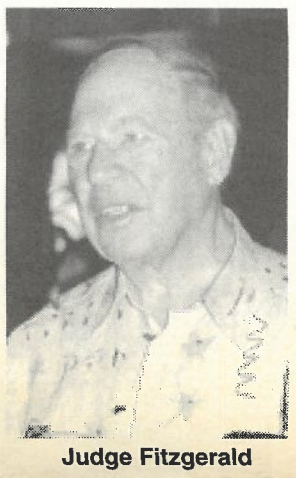
Vohaska described Nome as a delightful place to live during those years even though much of the social life took place in bars. Several young women were employed as teachers in the small Catholic school, however, and every man in town had his eye on them. One of Vohaska's favorite day-off activities was taking friends on a drive to Council, which was far enough inland for temperatures to reach 80 degrees and for trees to grow. The draw of Council must have been strong: getting there required crossing 22 streams, actually 21 streams and the Nuikluk River. He learned from painful experience that you only crossed the river when you could see the tops of *both* rocks at the common fording spot.

Roger Cremo admits to delighting in well-embellished stories. His stories on this occasion focused on the late George Grigsby, who was, in Cremo's eyes, the smartest lawyer who has ever practiced in the state of Alaska. He was also one of the most persistent, at times outrageously so. Grigsby's father was appointed United States Attorney in Nome during territorial days. When the senior Grigsby was sent back East for a period of some months on another assignment, he suggested to his son George, who had just graduated from law school, that he come to Nome to replace his father in his absence. George was happy to do so.

The U.S. Attorney's office, however, did not accede to this plan and appointed an interim U.S. Attorney to replace the senior Grigsby. The interim appointee proceeded to conduct his grand jury proceedings in the courtroom and handed in his true bills to the judge. Undaunted, Grigsby called his own grand jury in a room behind the Board of Trade bar. Grigsby then appeared in court and handed the judge his true bills as well. The court accepted true bills from both.

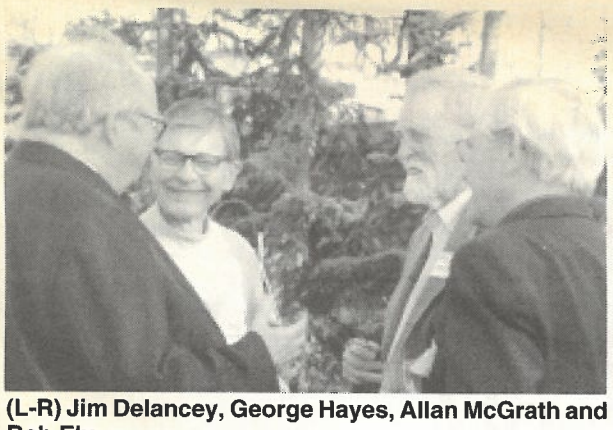
Grigsby's persistence did not pay off as well when he attempted to serve as Alaska's delegate to the United States Congress. Grigsby ran for delegate and apparently lost, but contended he actually had won. Thus, when the elected delegate headed for Congress so did Grigsby. When Alaska's delegate was asked to rise during the opening session of Congress, the duly elected delegate stood up. So did Grigsby. The Congress assigned the question of which of the two men was the legitimate Alaska delegate to a committee. The committee took almost the entire session to reach a determination. Grigsby spent most of that time playing poker with a colorful, well-known Senator. Near the end of the session, the committee reported to the House members that it had determined to seat the person actually elected to the office and not Grigsby. The committee also announced, however, that the delegate's per diem already had been paid out to Grigsby.

Cremo under-stands that Grigsby argued 12 cases on behalf of criminal defendants before the United States Su-preme Court and won them all. On one occasion, Cremo told Grigsby, whom he always called "Mr. Grigsby," that he considered him the smartest lawyer in the state. In response, Grigsby pointed to a photograph on the wall nearby and said, "No, there is the smartest lawyer in the state." The picture was of a group of some 30 lawyers then practicing in Nome. Grigsby singled out the face of one David Finke and told Cremo that Finke had been sought out by Al Capone to defend him at trial in the income tax evasion case that finally put Capone behind bars. Capone had lost faith in the some twenty lawyers he had hired before trial and picked instead a lawyer from Nome, Alaska to defend him in one of the most famous criminal trials of the period.



Judge Fitzgerald

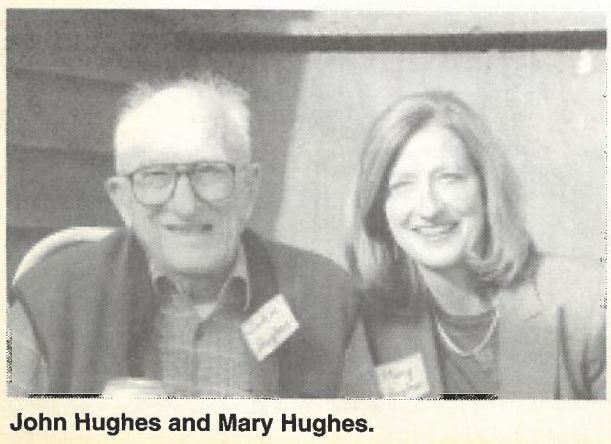
The stories recounted by Cremo, Jackson, Vohaska and Judge Stewart are just a sampling from the treasure trove of memories held by Alaska's longest-practicing lawyers and judges and often shared at the Territorial Lawyers Dinner. The Bar Historians Committee hopes to preserve at least some of these fascinating reminiscences by continuing the oral history project begun several years ago by local lawyer Pam Cravez. Anyone who would like to participate in the project or to suggest that an oral history be taken of a particular subject should call Tim Lynch 276-3222.



(L-R) Jim Delancey, George Hayes, Allan McGrath and Bob Ely.

Photos by Cynthia Fellows

Judge Tom Stewart (L) and Virgil Vochoska.



John Hughes and Mary Hughes.

IN THE SUPREME COURT OF THE STATE OF ALASKA

In the Disability Matter Involving:	)	
	)	Supreme Court No. **S-10449**
Kenneth D. Lougee,	)	**Order**
	)	Date of Order: **5/6/02**

ABA Membership No. 8111111
ABA File No. 2001B004

Before: Fabe, Chief Justice, Matthews, Eastaugh, Bryner, and Carpeneti, Justices

On consideration of the joint motion by bar counsel and the respondent for the respondent's transfer to disability inactive status, dated 12/12/01,

IT IS ORDERED:

The motion is **Granted.** Respondent Kenneth D. Lougee is transferred to disability inactive status *nunc pro tunc* April 3, 1997 until further order of this court.

Entered at the direction of the court,
Clerk of the Appellate Courts
/s/ Marilyn May

Loophole closer has uphill fight

By Mary Jo Pitzl
The Arizona Republic

Henry Camarot grew up on the main streets of the Hell's Kitchen neighborhood of New York. He fought in the Philippines in World War II.

And he prosecuted prostitutes in an Alaskan frontier town.

All of which should provide good training for his current fight. Closing loopholes in Arizona's sales-tax code and persuading lawmakers to extend the tax to various services.

So far it's Loopholes, 2, Camarot, 0.

But the tenacious septuagenarian lawmaker from Prescott is far from giving up.

The freshman Democrat has been snipping and trimming his controversial House Bill 2409 on the fly, willing to scale it back to win votes, but refusing to give up on the principle of ending tax loopholes.

It's not far, he says, that some goods are sold tax-free simply because a lobbyist was able to persuade lawmakers to carve out an exemption. Services also should be taxed, argues Camarot (pronounced Cam-ah-ro). He makes a blanket exception for food and medical services, but says everything else is fair game.

It's got business lobbyists howling and many of his colleagues, particularly Republicans, scowling.

But even his opponents admire Camarot for his doggedness.

Rep. Jake Flake, R-Snowflake, called Camarot a "bulldog" for pushing the issue.

Camarot's seatmate, Republican Linda Binder of Lake Havasu City, said she's confident he will hold lawmakers' "toes to the fire" on the issue. She held his bill last week at his request, although Democrats are trying to force it to a full vote of the House. The state's budget crisis makes Camarot's crusade all the more timely.

He credits Gov. Jane Hull and Sen. Ed Cirillo, R-sun city West, for inspiring him. The two raised the issue of tax loopholes while talking about how to get more money for teacher salaries, Camarot recalled.

That piqued his curiosity and led to his special study committee last summer that identified more than $900 million that could be collected by closing loopholes and instituting a tax on services.

Camarot calls the resulting document his "bestseller," and freely distributes it. But the tax treatise strained the resources of the House's copy shop, which no longer will crank out copies of the 64-page report.

Camarot said the vociferous opposition to his proposal (it died last year and is not moving this year) doesn't make him shy from the issue.

At 78, Camarot is the oldest Arizona lawmaker.

"I suspect I'm the oldest freshman in the country," he said with a shrug.

He moved to Arizona in 1995, settling in Sun City West with the idea of making that his winter home, while maintaining his summer residence in Seattle. But after a summer of trying to handle the 52-foot-long lines on the sailboat he and his wife, Betty, docked on Seattle's Lake Union, he gave up the idea of a floating summer home. The couple moved to Prescott to be close to one of their daughters and to escape the desert heat.

Camarot spent nearly a quarter-century in Alaska, moving there in the state's territorial days as an assistant U.S. attorney.

He made a legal name for himself for prosecuting the denizens of Creek Street, a road in Ketchikan that took its name from a waterway and was famous for its houses of prostitution.

"It's the only street in the U.S. where men and fish go to spawn," he joked.

After directing Alaska's legislative council through the transition to statehood, he went into private practice. He became general counsel of Alaska Airlines after he represented the company's CEO on a charge of shooting a bear. Camarot got him off on a technicality.

Arizona's shenanigans at the state Capitol inspired him to leave retirement in 2000 and take on the controversial District 1 incumbent, Barbara Blewster. He beat her by nearly 4,000 votes.

He'll decide by mid-month whether to seek a second term.

A (politically correct) Pledge in the 9th Circuit

Continued from page 3

subsequently spread through the schools across the land as a daily ritual.

[2] Ballamy's original pledge read:
I pledge allegiance to my Flag and
the Republic for which it stands,
one nation, indivisible,
with liberty and justice for all.

[3] "to" the Republic was added by Bellamy in October, 1892 (an author's edit.)

[4] In 1923 and 1924, the National Flag Conference, under the leadership of the America Legion and the Daughters of the American Revolution, changed the Pledge's words "my Flag" to "the Flag of the United States of America." Bellamy reportedly opposed the change to his Pledge, but was ignored. The pledge received official recognition by Congress on June 22, 1942, when the Pledge was formally included in the U.S. Flag Code. The official name of The Pledge of Allegiance was adopted in 1945

[5] After a campaign by the Knights of Columbus, Congress added the words "under God" to the Pledge on Flag Day, 1954. Being dead, it is unclear what Bellamy, a minister by profession, might have thought of this change. In his later years, he decried the bigotry of the church and did not attend.

[6] Revision actually proposed by pro-life advocates.

--Sally J. Suddock