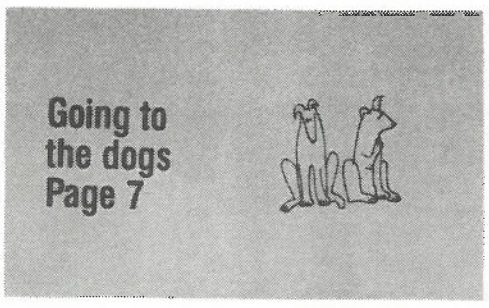

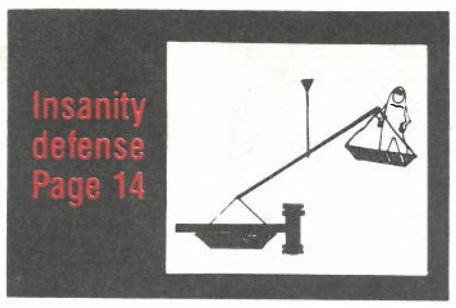

The Alaska BAR RAG

Vol. 10, Number 1 — *Dignitas, Semper Dignitas* — March, 1986 — $2.50

The Bachajani Express

Two years in an Israeli prison

By Alex Bortnick

Finally achieving the proper security clearance, I set off for my first day as Leftenant of the Prison Service in Ramle, then Israel's only maximum custody institution. Two bus rides left me off in a small town with a mile to walk. It rained.

Spending the first 48 hours meeting staff and inmates, and touring the seven separate, self-contained sections, it was easy to recognize the Romance languages and distinguish the Slavic ones, but what and wherefrom was the Bachajani dialect (remote area of Yemen)?

It was on the third morning that I popped around to the library. The inmate running that show was a German, quite happy to spend his entire day with me speaking in his fluent English. An electronic engineer by training, he had worked for Israel Aircraft Industries and before that for the U.S. Military in Germany. Unfortunately, he had done so on behalf of a country far removed from the Middle East, which netted him a lengthy term for spying. As we spent the day in his office sipping Turkish cofee, dozens of inmates came in to meet the new "Ingleezi" who was working there. Conversations developed with them about Middle Eastern History (my first degree), Criminology (my second) and Correctional Administration (my last) and what those programs entailed at American universities. Mostly, though, I just sat and listened to them for hours as the nature of prison life for 1,000 inmates, 63% of them PLO members, unfolded.

Alex Bortnick in happier times.

By the time I left the library in late evening I had complete details of an upcoming escape attempt; 3 lads planned to diddle the locks on their cell and the library doors, push out some rusting window bars and go down the wall on tied bedsheets. From the ground they would crawl through the shadows to the woman's prison, which occupied a corner of the complex. I had thought this was an affair of the heart, not then knowing the outer wall was under construction with a breach in it. I had also obtained full particulars on a cigarette lottery that had been operating throughout all the sections for the past 14 months, unknown to staff. Sharing some of the latest winners' 128 cigarettes, I wondered what else was being shared among the sections. More ominous was the information about coded messages that came through the call of the minaret, broadcast daily over the radio.

A recent escape attempt by three inmates had netted two of them as early and unscheduled discharge; the third got hung up on the barbed wire. The former two are no longer with us, one having been killed in a famous anti-terrorist raid and the other in a less famous raid. The third man, an Intelligence Officer from a neighboring country, played chess with me during subsequent years.

Another chess partner was the former

Continued on page 29

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

For golden friends I had

by The. Hon. Bev Cutler
Superior Court, Palmer

In memory of Barbara, Larry and Rick

I still get a lump in my throat when the jury enters the courtroom to return a verdict.

As a public defender, I dreaded those minutes. The D.A. stood there anticipating the kill. The judge secretly gloated. Even the in-court clerk looked smug as she took the paper from the foreman. Everyone in the courtroom was against us. And if by chance it were a Not Guilty verdict, suddenly I became the new criminal.

Time has changed my perception of judges and clerks, for obvious reasons. But public defenders have not changed. They are as tough as ever, and still as paranoid—though perhaps with good cause. Public defending is one of the most thankless tasks in Alaska. It also is one of the most inspired.

Recently a Palmer P.D. got a client out on bail Friday, only to find him back in for murder on Saturday. It reminded me of my first year at the agency when the identical thing happened to me. Twice. I was tempted to comfort the P.D. by noting that someone else would have gotten the man out on bail if he had not. But the P.D. didn't want solace. As far as he was concerned, his client was only *accused* of murder.

This is in the tradition of public defending as it has been, and as it should be—no apologies, no crying, and no guilty clients. All new P.D.s learn these precepts from their mentors at the agency. They also learn that victory is relative, that wit is survival, and that Cicero knew what he was talking about when he advised "When you have no basis for an argument, abuse the plaintiff."

I was thus encouraged over a decade ago by Larry Kulik, by Rick Lindsley, and especially by Barbara Miracle, who was the only woman in the agency when I signed on in the spring of 1975.

Alaska journey begins

I did not come to Alaska to work for the P.D. agency, but events seemed to push me in that direction from the moment I arrived.

The previous year I drove to Alaska on a whim—and in defiance of parental warnings that neither the trip nor the destination were appropriate for a lone female. Barbara Miracle came to Alaska a few years earlier, under similar circumstances. We both were from Washington D.C., from "establishment" families, and in fact had played basketball opposite each other at rival girls' schools. (I realize that given our heights, that sounds improbable!)

I had been attracted to Alaska by an ad on a bulletin board. Bob Hicks, then director of the Judicial Council, needed someone to do the grunt work on an LEAA-funded study of bail and sentencing for the court system. A law school soulmate urged me on, promising to come to Alaska if he ever graduated. It was spring and I hadn't decided what to do when school ended. I took the job, sight unseen. It was a perfect match.

Anchorage was a surprise, however. I had never seen so many used car lots. And the cars in them looked so American. I had anticipated a foreign place, or at least a city with more intrigue.

I followed directions to a green duplex on 12th between O and P. There I found Bob Hicks moving a washing machine, and Brian Shortell giving orders as to where it should go. Bob was in the process of moving outward and upward to Turnagain.

The green apartments were to become a prominent feature of those first years in Anchorage. Scores of law clerk and public defender parties were held there. They were inhabited at various interludes by Bob, Brian Shortell, Barbara Miracle, Margie Mock, and Chris Schleuss. My early familiarity with the area proved invaluable—after any party I always managed to find my way home.

Continued on page 12

President's column

Harry Branson

Board Elections

You have recently received nomination petitions for four Board of Governors seats to be filled in the Spring election. Two of these positions are from the Third Judicial District. One is from the First Judicial District and one is the statewide or at-large position. Those of you who are interested, or have friends who are interested in running for these positions, should be aware of the significant time and energy commitment that Board service entails.

The Board typically meets in Anchorage three to four times a year. In addition, the Board meets at the location of the annual convention before the convention begins. Each meeting can be expected to last two to three days. Full attendance at these meetings is both necessary to the work of the Bar and expected from all Board members. Usually, each meeting agenda contains enough work not only to fill the allotted time, but unless the meeting timetable is adhered to, to spill over into another meeting or a late night session. Typically, the Board builds its meeting schedule around working luncheons each day of the meeting.

In addition to attending the meetings, each board member is expected to spend several hours preparing for them by reading and digesting the several pounds of paper that go into each board packet, and discussing the issues contained therein with other board members and members of the Bar in their district prior to the meeting.

Occasionally, when circumstances demand, the Board may hold telephone conference calls or special shorter meetings, usually centered around one or two pressing issues.

Each board member is also automatically a member of the Discipline Board. At almost every meeting the Board must deliberate and act on several discipline matters.

Each board member is accountable to the Bar at large and to the public for the work and activity of the Bar Association. Board members can expect to regularly receive telephone calls from attorneys and from the public regarding Board action or inaction on issues the callers consider vital. Board members are expected to be well informed, not only on issues facing the Alaska Bar Association, but on matters concerning the profession generally. They may find themselves spending a not inconsiderable amount of time reporting on a variety of topics to a number of different entities, including, but not limited to, local bar associations and special interest groups.

In addition to all of this, board members are expected to actively participate in various Bar projects, either in the initial stages of development, or in an oversight or liaison capacity.

The people who are presently serving on the Board and most all of their predecessors known to me, have understood the nature and extent of this commitment and have made it willingly and usually enthusiastically despite the economic costs and interference in their personal and professional lives.

The work of the Board is extremely rewarding to its members. Attorney members are numbered among the most dedicated professionals in the state. The civilian or lay members selected by the Governor have been outstanding. To me it is a privilege and a great pleasure to work with people of this caliber.

Discipline

At our last Board meeting on January 9–10, 1986, discipline counsel informed the Board that they have been successful in substantially reducing their caseload during the past year. On December 31, 1984 there were 190 open case files. Twenty-eight percent (28%) of those cases had been carried from previous years. By December 31, 1985, the caseload had been reduced to 133 open files. Twenty (20) of those cases were carried over from previous years and still were under investigation. The expressed goal of the Bar Association is to bring its caseload under control so that there is no more backlog. By July 1, 1986 we can expect to have no case under investigation that is more than 6 months old.

Tort Reform

At its March meeting, (March 20–22, 1986), the Board will devote at least one-half day out of the projected three-day session to a hearing on the issue of tort reform. If possible, we hope to hear form all sides of this question. Representatives of the various special interest groups involved, including the tort reform and victims rights groups, a representative from the insurance sector, someone knowledgeable from the American Bar Association, and a member or members from each of the personal injury plaintiffs' and defense bars will be invited to attend and present their positions to the Board. The Board will then determine (1) whether it wishes to take a public position on the matter at this time, and (2) if so, what that position should be.*

Malpractice Insurance

Also on the agenda for the March meeting will be a presentation from Duke Nordlinger Stern, the Board's Risk Management Consultant on the subject of costs, present availability of lawyers professional liability insurance, and his efforts to find us the best coverage options at the best prices. While in Anchorage he will also be giving a scheduled CLE Seminar on preventing malpractice claims on March 21, 1986.

Lawyers Helping Lawyers

One of the most interesting and ambitious Bar projects of this or any year to date has to be the pilot program on substance abuse. At the January meeting of the Board of Governors, John Reese, the Chairman of a committee appointed to prepare and submit a proposal for dealing with substance abuse to the Board of Governors, along with John Abbott, Dave Roderick, Diane Vallentine, Nancy Shaw, Cliff Groh, Bruce Sherman and Michael Lindeman, met with the Board and recommended that the Board form a permanent committee designated the "Committee on Substance Abuse" with the following mandate.

1. To consider referrals from the criminal justice system and from discipline counsel of the bar association and make specific recommendations for treatment;
2. To act as a policy-making body in determining what efforts the Alaska Bar Association engage in to combat substance abuse and to make recommendations to the Board of Governors based upon its policy decisions;
3. To appoint committees or groups of lawyers to perform the following functions:
   a. to provide counselling and information to persons requesting such;
   b. to provide an intervention team leader at the request of persons requesting an intervention;
4. To coordinate efforts to combat substance abuse between the bar association and private providers of substance care (in-patient and out-patient care).
5. To generally help educate the Alaska Bar Association and its membership on substance abuse problems and assist members in overcoming their substance abuse problems.
6. To form whatever subcommittees are necessary to carry out the above mandate.

It was also recommended that the committee be composed of 7 lawyers and judges. The committee would be appointed by the Board of Governors of the Alaska Bar Association for initial terms of three years with staggered terms immediately following the initial three-year terms. Each committee member would serve at the pleasure of the Board of Governors.

The Board commended the members of the working committee for their obvious commitment and hard labor and unanimously voted to authorize them to proceed to set up the Substance Abuse Program as proposed.

CLE

Two recent CLE seminars in Anchorage played to packed houses. The Federal "Off the Record" program starring Chief District Court Judge James Fitzgerald was supported by a distinguished cast, including Judge Russel Holland, Judge J. Douglas Williams of the Bankruptcy Court, Magistrate John Roberts, U.S. Attorney Mike Spaan, JoAnne Myres, Clerk of the Court and attorneys Bill Bryson, Cabot Christianson, John Conway, Jeff Feldman, Mary Ann Foley, Olof Hellen and Mark Rindner. 138 attorneys attended the one-day session at the U.S. District courthouse in Anchorage.

On January 18, 1986 Irving Younger gave a one-day seminar on jury selection, and credibility and cross-examination. 186 attorneys were in attendance.

Coming up is a brand new series of CLE programs combining coffee, corn flakes and croissants (not to mention eggs, bacon and the usual breakfast fare) with continuing legal education. The program's official title is Evidence Mini-Seminar, "Breakfast Series." Around the Bar office, it's known as "The Breakfast Club." Between now and June, there is a scheduled meeting every month.

The Budget

Elsewhere in this august Journal, you will find a summary of the 1986 Bar budget. The Board wrestled with this beast for a couple of hours at the November meeting. It's a more optimistic budget than we had in 1985 when we projected a loss of $125,490. With astute management (and some luck) we came out $53,912 in the black. This year we are projecting a $68,415 loss. With astute management and lots more luck we may be able to have good news for you again next year.

New Member

With the appointment of Jan Ackerman, the new public member of the Board from Fairbanks, Alaska, the Board is now up to its full strength of 9 attorneys and 3 lay persons.

**This slightly outdated comment resulted from a brief delay in publication of the Bar Rag. See the May issue for an update—Ed.*

The editor's desk

My editorial concerning *The Dartmouth Review* didn't fly too well with one of my readers and friends [see Letters to Editor], and if half the things he told me in our telephone conversation are accurate, it's the editors of the *Review* rather than the college officials that have been outrageous. That's what I get for believing book reviews. In any event, the lesson to be learned is the same—freedom of thought requires that we let other people express their opinions, however unpopular, without attacking them for being bad guys.

The year I returned from Korea, in the old days before student protests had any effect on government policy, I thought I had seen enough unkindness and inhumanity to last me for a lifetime. However, it was at that time, in the summer of my twentieth year, that I escorted a young lady to the Monterey County [California] Fair, where I saw a vignette which for thoughtless cruelty still festers in my memory.

We were passing an amphitheater, where a crowd of friendly looking farm people were being berated by a large woman on stage. She had wrapped herself protectively around some poor little waif, who had apparently been trying to entertain the crowd with a song, and had been interrupted by real or imagined unruliness. In this dramatic posture, the self-appointed good samaritan was shouting defiance at the abashed audience, criticizing them for their rudeness to the little girl. The child, incidentally, looked as if she wanted to die of mortification—and probably never sang another note, publicly or privately, in her life.

I remarked to my companion that the audience looked nice enough and that these histrionics were a bit rough on the kid—whereupon she wrinkled her nose with distaste. "She does this every year," she said.

It is obvious that if you want to be the hero of a morality play, you have to set somebody else up to be the villain [in this case, the well meaning if vociferous audience with the little girl as a reluctant third party beneficiary]. We've all seen cases where even a slight departure from accepted behavior inspires someone who is anxious for public approval to pillary the offender. So long as they can demonstrate to the world at large that they are double-plus good-thinkers [*1984*, by George Orwell, see glossary], they don't give a damn whether or not the individual they are holding up for condemnation really meant any harm, is a bad person, or is simply mistaken in his or her facts. The object is not debate, but demonstrated conformity and public approval.

I am saying all this, because I have encouraged a lot of people to write for the "Bar Rag"—and some of them are going to express opinions that invite comment. The philosopher Emerson, in his famous essay on "Self Reliance," stated that "consistency is the hobgoblin of little minds," and went on to explain that we should feel free to change our minds frequently, depending on the nature and quality of evidence presented to us. As lawyers and students of evidence, we can agree. As advocates, perhaps, we are more inclined to stick to a position to the death rather than to betray uncertainty by listening courteously to the other side.

Jonathan Swift once remarked that "when a true genius appears in the world, you may know him by this sign—that the dunces are all in a confederacy against him." Hopefully the "Bar Rag" will continue to publish everybody's opinion—and perhaps we will have a flash of genius here or there. When that happens, let's consider our position carefully before we start ganging up on people.

Don't be frightened, children, it's only the Editor's bimonthly appeal for fairness and tolerance. AP and UP please copy.

—Gail Roy Fraties

The Alaska Bar Rag

Editor in Chief . . . . . Gail Roy Fraties
Editor Emeritus . . . . . Harry Branson
Spiritual Adviser . . . . . Hon. James Blair
Contributing Writers . . . . . Wendell Kay
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In the Mail

No Dartmouth Review

Gail Roy Fraties, Esq., Editor
Alaska Bar Rag
Alaska Bar Association
Suite 602
310 K Street
Anchorage, AK 99501

Dear Editor Fraties:

Your editorial in the November 1985 issue extolls the positive benefits from the Bar Rag becoming a fun-loving deflater of sacred cows by emulating the Dartmouth Review. Have you ever read the Dartmouth Review? It is decidedly not Monty Python's Flying Circus.

Far from being a light-hearted effort by a few "irreverent spirits" to "poke fun" at Dartmouth College's academic and social institutions, the Dartmouth Review is a single-minded, unfair, often vicious (as well as untruthful) assault on minorities, intellectual freedom, and the basic concepts of a liberal-arts education. The "traditions of freedom of thought and fair play" (which you were misled by Benjamin Hart's book to believe that the College had violated), are certainly not hallmarks of that newspaper.

I do not oppose poking fun at sacred cows, providing that *all* sacred cows are fair game and the Bar Rag gives equal access to all viewpoints. But I can only shudder when you cite the Dartmouth Review as exemplifying your editorial goals, because in fact it is little more than ideological hate-mail.

Sincerely yours,
Thomas E. Meacham
(Dartmouth College 1965)

Wanted: Anecdotes

Editor
Alaska Bar Rag
Alaska Bar Association
P.O. Box 279
Anchorage, Alaska 99510

Dear Sir or Madam:

As an outgrowth of a hobby of many years, I am in the process of compiling and editing a book on legal humor and miscellany.

I am writing to inquire whether you would consider printing the attached notice in a forthcoming issue of The Alaska Bar Rag.

The book hopefully will be of interest to many of your readers. It will consist of unusual legal opinions, humorous anecdotes, jokes and miscellany. All responses will be personally acknowledged and those used will be acknowledged in the book.

Unfortunately, I do not have funds to purchase advertising space for this project, unless it were a nominal amount. I wonder whether you would be willing to publish this notice as a human interest or service item. I would be happy to acknowledge your assistance in the preface to the book.

If you have any questions or desire any additional information, please call me at 202-885-2619 or write to Professor David E. Aaronson, American University Law School, Myers Hall 205, 4400 Massachusetts Avenue, N.W., Washington, D.C. 20016.

Thanking you very much for any consideration that you can give to what may be an unusual request. Looking forward to hearing from you, I am,

Sincerely,
David E. Aaronson
Professor of Law

LAW PROFESSOR SEEKS LEGAL HUMOR

Do you know of any humorous legal opinions, anecdotes, jokes, or miscellany? Contributions used will be acknowledged in a forthcoming book. Please send to: Professor David E. Aaronson, American University Law School, 4400 Massachusetts Avenue, N.W., Washington, D.C. 20016.

Revisionist history

Honorable Gail Roy Fraties
Editor, The Alaska Bar Rag
The Alaska Bar Association
310 K Street
Anchorage, Alaska 99501

Dear Gail:

I didn't know Dan Hickey had died or I'd have sent flowers. It wasn't until I read his unabashed eulogy in the November Bar Rag that I realized that "Ol' Devious Dan" must be deceased and hence entitled to this kind of shameless gushing by a couple of his former sycophants. Unless, of course, he is alive and well in far off Juneau and this is a "Dan Hickey for Governor" trial balloon?

Whatever its intended use, the bit of revisionist history by Guaneli and Stern (sounds like a New Jersey law firm) contains enough "doublespeak" to agitate the ghost of George Orwell. Strangely enough, Hickey's self-appointed propagandists seem to have overlooked what appears to be the one negative aspect of his welcome departure as "Chief Prosecutor and High Poobah." The ironic twist of fate which made Hickey stumble over his own elaborate Machiavellian web and which appears to have got him fired for the wrong reason—that he steered the Grand Jury towards recommending the impeachment of the Governor instead of simply indicting him. I have no reason to doubt that Hickey could have got a Juneau Grand Jury to indict Sheffield, or for that matter, the Pope or Mother Theresa. I am sure that, like this writer (who said so before the impeachment hearings circus began), Dan Hickey was capable of counting noses and to predict that there weren't nearly enough votes in the Senate to impeach the Governor—and most assuredly not nearly enough votes in the House to convict (probably no matter what the evidence—which was shaky to begin with.)

An indictment would have destroyed Sheffield. The impeachment proceedings may have saved him sufficiently to make him think, seriously, of running for a second term! So, as far as Sheffield was concerned, Hickey, who helped bail him out after the post-election shakedown junket to Houston, saved his bacon again. Of course, I wouldn't expect the dim bulbs in the Governor's office to comprehend this. And the net result—Mr. Hickey's departure from an ill-conceived post of too much secret power without corresponding accountability was a long overdue act of sanitation.

Sincerely,
Edgar Paul Boyko
Boyko, Davis & Dennis

MacKay witch hunt

Stephen J. Van Goor, Esquire
Discipline Counsel
Alaska Bar Association
310 K Street, Suite 602
Anchorage, AK 99501

Dear Mr. Van Goor:

On Sunday, November 17, 1985, the Anchorage Daily News carried an article indicating that you were seeking, on behalf of the Alaska Bar Association, to suspend Attorney Neil MacKay's license to practice law pending the outcome of the State's case against him.

We believe your actions to be grossly unfair and unjust, if taken at this time. The case against Mr. MacKay is being tried heavily in the papers; it is questionable whether he can obtain a fair trial in Alaska.

There is already a witch hunt by the press that smacks of McCarthyism. Your actions add fuel to the fire. There is a presumption of innocence for every person charged with a criminal offense. We, as lawyers, should not only be the first to recognize that presumption, but also should actively protect it.

Your publicly expressed rationale for seeking suspension is not applicable. That rationale as I understand it, is to avoid public mistrust of lawyers. Mr. MacKay is not an actively practicing lawyer and has not been for some time.

We urge you to reconsider your decision and to take no action against Mr. MacKay until and unless he is convicted.

Sincerely,
Wayne Anthony Ross
Attorney at Law
Thomas S. Gingras
Attorney at Law
Ross & Gingras

Attorney's premium doubles

December 23, 1985

Shirley F. Kohls
227 Irwin Street
Juneau, Alaska 99801

RE: Lawyers Professional Liability Insurance Extended Reporting Period

Dear Ms. Kohls:

Your Lawyers Professional Liability policy terminates as of:

12:01 A.M. December 30, 1985

You are insured only for claims reported up to that date. If you wish to be covered for claims reported after that date on covered acts occurring prior to it, you may purchase an "Extended Reporting Period Endorsement." Your coverage and deductible for the Extended Reporting Period will be the same as you had during your last policy period. You may purchase the Extended Reporting Period Endorsement by payment of the following amounts in accordance with Condition IV of the policy. We can offer:

3 Years Reporting	$1,849.00
6 Years Reporting	2,773.00
"Unlimited" Reporting:	4,160.00

Please note that this offer expires January 30, 1986 and cannot be purchased after that date. The premium for the Extended Reporting Period Endorsement must be paid in full by January 30, 1986.

We await your reply. Should you have any questions, please feel free to give us a call. Thank you for your past patronage and if we can be of service to you in the future, please advise.

Sincerely,
James M. Monares
Account Executive
Homestate Insurance Brokers
of Alaska, Inc.

December 31, 1985

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

RE: Errors and Omissions Insurance

Dear Ms. O'Regan:

I am writing this letter pursuant to our telephone conversation of December 19, 1985 regarding my Errors and Omissions insurance.

My professional liability policy with Homestate Insurance Brokers of Alaska, Inc. expires on December 30, 1985 at 12:00 a.m. for the year 1985 with limits of $2 million/$2 million and $1,000 deductible. I paid a premium of $1,849.00. This was upped $1,000 from the previous year with the same limits and deductible. Today, i.e., December 19, 1985, I had a call from Jim Monares of Homestate and he said that new insurance for that coverage with a $2,500 deductible will be $3,936. The minimum coverage of $500,000 with a minimum deductible of $2,500 would cost $2,797.

I told Homestate that I would not be renewing my professional liability and they subsequently sent me a letter showing the costs of extended reporting on my previous paid for policies. You will note that that cost is also unreasonable since the premiums had been paid throughout the years. I am enclosing a copy of their letter dated December 23, 1985 for your information.

I would urge the Alaska Bar Association to pursue the matter of cooperative insurance immediately and to come to a solution in the matter. I know that there are numerous lawyers in the Juneau area who are having the same problems that I am.

Keep in mind that I have never had a claim against me since I started private practice in 1963.

Very truly yours,
Shirley F. Kohls Law Offices, P.C.
Shirley F. Kohls

Editor's note: The information contained in Keith Brown's letter represents the current work of the Bar's Professional Liability Insurance Committee.

January 29, 1986

Shirley F. Kohls
Shirley F. Kohls Law Office
227 Irwin Street
Juneau, Alaska 99801

RE: Professional Liability Insurance

Dear Shirley:

The Alaska Bar Association has forwarded a copy of your letter relating to your premium increase for professional liability insurance. Unfortunately, your case typifies the situation confronting virtually every attorney practicing in Alaska today. There have been numerous premium increases within the past year and the market has deteriorated to the point where only National Union Fire Insurance appears to be currently seeking new accounts and writing coverage with acceptable limits.

I have just been advised that Fremont Indemnity, which was the other primary carrier available in this state, has limited its business to accepting renewals only. I am informed that as of June 1, 1986 Fremont will no longer be accepting renewal applications for Alaska business. This will leave National Union with a virtual monopoly on our insurance coverage. There may exist, from time to time, the possibility of other policies through Underwriters at Lloyd's and perhaps through a subsidiary corporation of the Crum & Forster group but these are not likely to be priced on any more favorable basis. I am further advised that in March of this year National Union will be filing for an additional 20% premium increase, so the situation is not going to get better on a short term.

The Alaska Bar Association's Professional Liability Insurance committee is in the process of evaluating the current malpractice crisis. In the process of examining the problem, it has become apparent that we are, in large measure, a part of the national trend and, in that sense, probably powerless to do much to improve the situation. Bear in mind that medical malpractice cooperative or captive insurers have done little better than the general market in this area. Across the board the insurance industry is levying major premium increases because of what have been labeled as the profligate underwriting practices of the previous five years.

We are investigating the possibility of a regional captive in which we would participate along with other state bar associations. At the present time, a multistate group of bar associations, largely spearheaded by the West Virginia and South Dakota bars, is actively working toward the establishment of such a carrier. However, the capitalization costs required for that kind of undertaking are immense and the survey that their respective memberships were undertaking costs $4,000.00 per state. In view of the data already obtained by your professional liability insurance committee, I could not in good conscience recommend to our bar association that we expend a similar sum of money for the multistate survey which I feel certain will demonstrate worse ratios than some of our counterparts.

We have already obtained substantial information regarding past claims from INAPRO which was the bar-endorsed carrier for many years. Although the statistics are susceptible to many interpretations, as are the statistics obtained from National Union Fire, they all suggest that a hefty premium increase is probably appropriate. We will be reviewing these statistics in detail with the bar's risk management consultant, Duke Nordlinger Stern; however, it will not be possible for us to meet with Mr. Stern until mid-March of this year. In addition, we will be conducting our own survey similar to that conducted four years ago. Upon our recommendation, the Board of Governors will seek a supreme court order mandating compliance with the bar-sponsored survey.

On the national front, the American Bar Association has funded a study to explore possible solutions to the crisis, including investment in professional liability carriers and reinsurers and the establishment of association-owned carriers. Even if such a project is successful, it is estimated that it will be at least two years before viable alternatives to the present situation are available. Most knowledgeable insurance industry specialists would suggest that we are in the middle of the extreme bottom of the cycle and that things are likely to begin to improve from this point forward, although perhaps not in the

Continued on page 30

Mr. Justice Dimond

The years in law

Former Justice Roger Connor continues his biographical portrait of his friend and colleague Justice John Dimond. For the article preceding this one, see the Alaska Bar Rag Volume 9, Number 3, November, 1985.

By Roger Connor

Second of two parts

John's first job as a lawyer was in the law offices of J. Gerald Williams in Anchorage. Shortly thereafter Mr. Williams was elected as the territorial attorney general. He moved to Juneau and took John with him as his primary assistant. Not long afterwards Tom Stewart also went on the staff.

People have often commented on the contrast between John and Mr. Williams. The new attorney general tended to be gregarious, extroverted, and at times flamboyant. John tended to be scholarly, quiet, perhaps a bit shy. But they made a fine team in protecting the legal interests of the territory.

Some work of great complexity and challenge descended upon John not long after he arrived in Juneau. This resulted largely from a major alteration of the territory's tax system by the legislature in 1949.

The tax system of the territory, up until 1949, has been well summarized by the late Ernest Gruening, who was then the territorial Governor:

> "Under it, vast categories of businesses and individuals, deriving substantial profits in Alaska, were either paying no taxes or negligible ones. Among those which paid no taxes whatever to the territory were steamship companies, air lines, bus lines, lighterage companies, banks, motion-picture theatres, oil companies, construction companies, garages and service stations, radio stations, newspapers, logging operators."[2]

Among other things, the 1949 legislature passed an income tax. It also changed the canned salmon tax from a modest charge per case to one based on the wholesale value of the entire pack. Much litigation swiftly followed, in which John was deeply immersed.

In the law reports John's name first appears in 1949 in connection with a case which challenged the validity of the Alaska income tax law. He appeared as assistant attorney general in defense of the law. Judge Folta held that the law was valid.[3] On appeal the Ninth Circuit affirmed the judgment.[4] He is next shown as counsel for the Territory in a series of cases attacking the constitutionality of a license tax on fishermen.[5] The tax was held valid by Judge Folta, but the Ninth Circuit reversed and held that the tax was invalid,[6] and the Supreme Court, with three justices dissenting, agreed with the Ninth Circuit.[7] In another case at that time a tax on fish traps was struck down.[8]

John appeared for the defense in litigation challenging the territorial property tax. The tax was held to be invalid by Judge Pratt,[9] but that judgment was reversed by the Ninth Circuit.[10] In a later case Judge Folta sustained the tax,[11] and the Ninth Circuit affirmed.[12]

At that time the Alaska Industrial Board determined workers compensation matters. John Dimond appeared in numerous appeals which were filed. His job was to defend the board's action.

Dimond enters practice

In 1953 John left his position and returned to Anchorage. He intended to enter law practice with his father, who was then leaving the bench. But his father died shortly thereafter. John and Bobbie moved back to Juneau, and John started a law firm as a solo practitioner.

John's practice covered a wide range of subjects. While in practice he also served for several years as the City Magistrate of Juneau and as the City Attorney for Douglas.

As time went on John had many appreciative clients. His opponents in litigation developed a great respect for him, as he was always a gentleman but was very thorough and well prepared in the cases he presented.

Katherine T. Hurley, now in the Alaska House of Representatives, helped in John's office during 1953 and 1954. She has said, "He gave as much time to people with small problems, and who could pay only small fees, as he did to those who might pay larger fees." According to her he felt strongly that the legal system should work as fairly toward those of limited means as toward the rich and powerful.

One good example of this is a worker's compensation case in which John represented the injured worker, a man named Carl Jenkins. At issue was a question of awarding temporary total disability benefits to one who had lost an arm and a leg. Only a few thousand dollars were at stake. John lost before Judge Folta.[13]

On appeal to the Ninth Circuit, John obtained only a partial modification of the judgment below.[14] He then petitioned the United States Supreme Court for certiorari, and it was granted. The case was argued there by John for the petitioners, and Frederick O. Eastaugh for the respondents. In an opinion by Mr. Justice Douglas, the court held in John's favor on all points.[15] Altogether the case consumed about five years of John's time. Yet he stuck with it because of his belief in the justice of his cause.

In 1956 John joined the firm of Faulkner, Banfield, Boochever & Doogan, and practiced there until his appointment to the bench.

During his years of practice John and Bobbie had three children: Anthony J. Dimond, II; Patricia H. Dimond (now Hinkelman); and Timothy R. Dimond. By the time of John's death there were nine grandchildren, of whom he was very fond and proud.

On to statehood

During the late 1950's the campaign for Alaska statehood was successful. Alaska had been in the status of a territory for over 100 years. It was now to be a full-fledged member of the Union. President Eisenhower signed the Alaska Statehood Act on July 7, 1958. An election was held that fall and William A. Egan was elected Governor. Formal statehood occurred on January 3, 1959. The new state operated under a transitional system whereby the former federal, but territorial, courts continued to function until the new state could organize its own court system.

In August of 1959 Governor Egan appointed the first Alaska Supreme Court. It consisted of Buell A. Nesbett as Chief Justice, and John H. Dimond and Walter H. Hodge as Justices.[16]

The first Administrative Director of the Alaska Court System was Thomas B. Stewart.

The new state had to develop an entirely new system of courts, with few existing physical facilities and on a rather low budget. Among the constitutional tasks of the Alaska Supreme Court was that of developing rules of procedure for all courts: civil, criminal, appellate, and administrative.

For a memorial tribute to John Dimond, former Chief Justice Nesbett wrote the following:

> Immediately after John Dimond and I were sworn in by Governor Egan on August 7, 1959 we met in a borrowed office in Juneau to commence planning to Alaska Court System. We had no judges, no courtrooms, no offices or furniture, no rules of court, relatively limited funds and were faced with the immediate prospect of having to decide appeals as soon as activation occurred.
>
> Until the Alaska Court System was activated in February of 1960 Justice Dimond worked night and day on almost every aspect of the organization with tremendous ability and utter selflessness.
>
> During the long and tedious process of extracting all procedure from three volumes of compiled laws and incorporating it into rules of court, Justice Dimond demonstrated scholarship and determination of the highest order. It is safe to say that without his quiet leadership our court system would not have been ready to efficiently assume its responsibilities only six months after the first justice was sworn in—and would not have become a model court system within three years.
>
> Alaska has lost a gentleman, a scholar and an accomplished jurist. It was fitting that he should have served the system he helped to organize with honor for the balance of his life.

Mr. Justice John Dimond as he was in February, 1970.

Major decisions

About John's judicial work, it is not possible to analyze or discuss in detail the opinions he wrote or the many thousands of cases in which he participated as a justice.[17] It is only possible to generalize. His decisions covered nearly every major area: constitutional law, criminal law, tort, contracts, and property law, to name only a few. Some of his decisions were in landmark cases in which new legal doctrines were developed. Many of these principles have been adopted by other jurisdictions. In that respect, John's judicial work at times had a nationwide effect.

One of John's opinions had to do with how loss of earnings should be determined in personal injury cases.[18] Scholars still examine and debate that case nearly 20 years afterward.[19]

One of the most trenchant and eloquent opinions that John wrote was his famous dissent in *Matthews v. Quinton*.[20] In that case a majority of the court declared constitutionally invalid the practice of allowing students of private schools to ride on public school buses.

John Dimond's dissent is a model of thoroughness, careful analysis, and clarity of expression. In emphasizing the practical necessities of the situation he pointed out:

> It is a matter of common knowledge that today's highways with today's motor vehicles are extremely dangerous, especially to children. Any rational person knows that hazards a child is subject to in walking long distances in extreme subzero weather, such as exists in the winter months in Fairbanks where this case arose. If proof is necessary, it can be found in the record. There was evidence of a dangerous thoroughfare, with no sidewalks where children had to walk in order to reach the parochial school. There was evidence of winter temperatures in the vicinity of sixty degrees below zero. There was the incident of first and second grade children walking over one mile from school in weather so cold that two little boys involuntarily urinated and the urine froze to their underwear and clothing. There were cases where other parochial school children suffered from frozen noses and toes.
>
> These dangers to children are real and not illusory.

Characterizing the majority conclusion as "harsh and unjust," he went on to say:

> In reviving the lifeless corpse of the Alaska Organic Act, the court ignores realities and establishes a harmful rule of constitutional interpretation. In concluding that the transportation of a child directly benefits a school, it disregards facts inescapable on the record of the Constitutional Convention, and assumes a state of facts that the record does not support. In expressing criticism of the school bus statute because literally "all" school children in Alaska are not afforded transportation, it unjustifiably imputes to the legislature fictitious motives, and usurps the legislative prerogative of determining what is appropriate or necessary for the public good . . . .
>
> In construing the constitution so narrowly and constrictively, it saps the strength and takes the meaning from the classic statement of human rights in the first article, that "This constitution is dedicated to the principles. . . that all persons are equal and entitled to equal rights, opportunities, and protection under the law. . . ." In permitting a child to ride a school bus only on the condition that he attends a public school, it has the coercive effect of restricting the natural right of parents, acting in accordance with their legitimate preferences, to direct the education of their children; and thus it disregards the fundamental theory of liberty which excludes any general power in the government to standardize the education of children.

He ended the opinion by discussing the concepts of liberty and equality of man which lie at heart of the American constitutional system. He wrote:

> This truly is the America idea—the American tradition. It is the reason for our nation' being; it has been America's strength. But today in Alaska that idea has become an abused phrase. The reality behind it has been obscured by the court's decision in this case; some of its power and meaning have been lost. Those persons who exercise their inherent right to direct the destiny of their children must now pay the price of being denied the equal rights to which the constitution says they are entitled.
>
> This court's decision is a grave injustice to many citizens of this state.

One factor which no doubt animated that opinion was John's broad concern for the well being of children. He knew, of course, that the law dealt only with limited aspects of child rearing, and that the influence of families, friends, teachers and others was primary in shaping the lives of children. But throughout his judicial career his opinions on the law pertaining to children show a great concern: that even if the law could do little for them in the positive sense, it certainly should not make their plight worse than it had to be.

His interest in children showed in other ways. For example, when he came home from his frequent, and often tiring, judicial travels, he usually reported to Bobbie on how the children of his friends and colleagues were doing. He felt that most of his adult friends could pretty well take care of themselves, but the children represented the hope for the future.

Capital move

Another of John's early opinions was significant for an entirely different reason: it subjected John and his family to irrational criticism, rebuke, and primitive hostility by certain segments of the public. The opinion was that renderd in the "capital move" case in 1962, *Starr v. Hagglund*.[21] The court held that the section of the Alaska Constitution which said, "The capital of the State of Alaska shall be at Juneau," was not a part of the permanent constitution. Therefore, it could be changed by law and did not require a constitutional amendment. At the time there was an initiative measure which would permit the voting public to move the capital to western Alaska.

When one reads John's opinion in retrospect it is a clearly reasoned interpretation of the constitution. But many persons in Southeastern Alaska, and particularly Juneau and Douglas, were infuriated by the decision. In many of their eyes John, because he lived in Douglas, was a "traitor" to the community.

Continued on page 22

The movie mouthpiece

Edward Reasor

Several readers have asked which two 1985 movies, soon to be released on video-cassette, are worth the purchase. With regard to movies of particular import to attorneys, I highly recommend "Agnes of God," and "Jagged Edge," either for purchase or viewing when the films return to Anchorage. "Agnes of God" is a mystery story that probes many elements of the human psyche. The seclusion and serenity of a Catholic nunnery are shattered when Sister Agnes is forced to stand trial for the death of a newly born child. Agnes, played by Meg Tilly, must first be mentally examined to see if she is fit to stand trial and the court appoints Dr. Livingston (Jane Fonda who does not quite strike me as the ordinary psychologist or psychiatrist). Through it all, Agnes is supported in part by the Mother Superior (Anne Bancroft). The conflict, which is fascinating for a trial lawyer to watch, is that between the psychiatrist (Fonda) and Mother Superior (Bancroft). This happens frequently in the modern Catholic world.

Fonda, the psychiatrist, instead of just doing her court appointed duty in determining whether or not the young nun is mentally competent and capable of assisting in her defense, or perhaps even determining if she understands the nature of the charges against her or whether she is capable of knowing the difference between right and wrong, sets out instead to solve the crime herself by steadily and at times viciously examining the naive, young, pious nun in an effort first to find the identity of the father and secondly what really happened. Agnes does not even remember the birth let alone the conception. She claims not to know about sex, has never seen a movie, or read a book.

The movie is directed by Norman Jewison, who gave us the beautiful movie "A Soldier's Story" and is based upon a very successful play written by John Pielmeir. The photography is excellent as Sven Nykvist, one of Europe's best cinematographers, catches the beauty and solitude of the devout Catholic world as opposed to the nervousness and irritability of the non-cloistered people summoned for the purpose of the non-canon law deliberations.

I can't for the life of me think of a better Mother Superior than Anne Bancroft. She is simply magnificent! She portrays a nun who was married before her vows for a period of approximately twenty-two years, perhaps not happily. As such, Bancroft's nun is both worldly and skeptical, a woman who loves her church but also who looks towards young Agnes to strengthen her beliefs in miracles and in the very existence of God himself.

In real life, Anne Bancroft is a devout Orthodox Jew, as is her popular producer husband Mel Brooks. Yet, her portrayal of convent life (which she controls down to every detail) and her excellent delivery: "Catholicism is not on trial here!"—is so powerful that I predict that she will be nominated for best supporting actress and maybe even best actress. She should win one or the other. In the end, Fonda becomes a caring psychiatrist, using every means including hypnosis, confrontation, and anger to free young Agnes from her personal past in an attempt to discover truth.

•

"The Jagged Edge" is wonderfully filmed; a rather mysterious movie, starring Glenn Close as an attractive-middle aged woman defense lawyer defending handsome Jeff Bridges, accused of murdering his extremely wealthy wife. This is a film that does exactly what movies are supposed to do: transport each and everyone of us out of our own shallow little world, our lawsuits pending or soon to be filed, our own fears and anxieity, and yes, our self-centeredness and show us the larger picture—other people's lawsuits.

The camera angles and movement in this film are exceptionally well done. It is very difficult to film courtroom scenes because the space is rather restricted, the central figure generally is the person talking, and normally only one person (unlike an opera) talks at once. Where to point the camera? Here the director had the good sense to let the people move and not the camera so there are no crazy zoom-lens shots, no rushed dolly back-and-forth movements, and very little montage. The courtroom scenes look real.

In retrospect the film may be rather hard on District Attorneys because it portrays the Chief District Attorney (Peter Coyote) as a politically ambitious young man who has in the past withheld discoverable items that tend to exculpate defendants and does so again in the case of the "Jagged Edge." Although we do not actually see the murderer we get the full gory details from the opening sequence where the wife is tied to the bed while her blouse is ripped open with a jagged edged knife, which becomes the deadly sexual weapon. Later during the trial we learn that another young lady was similarly sexually assaulted, including being cut around the nipples. It is a gruesome set of facts and one that causes headlines because Jeff Bridges' deceased wife owned the newspaper for which he worked as the editor.

Even before indictment, Bridges cooperates with the District Attorney, answering questions asked. The D.A. is convinced Bridges is guilty and when his associates protest that Bridges would not be capable of such murder, the District Attorney answers: "You're real smart, so you make it look like a Charles Manson killing. . . . If I was going to kill my wife that's the way I would do it." Gruesome thought, but then there are District Attorneys who sometimes fondly dream of killing their wives.

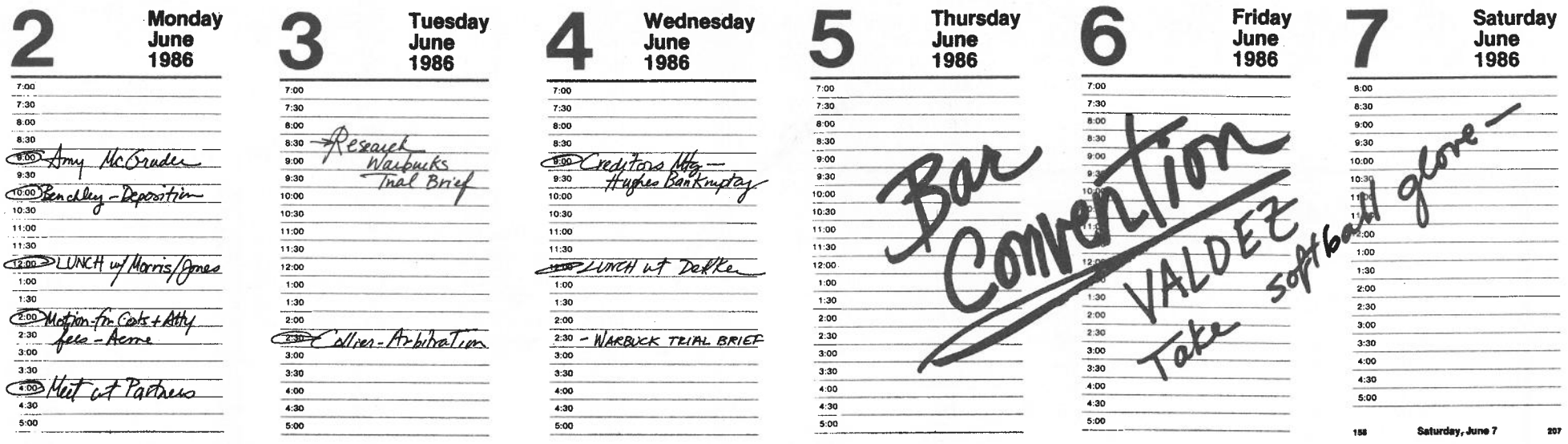
The newspaper has on retainer a group of corporate attorneys, who tell Bridges quite sincerely that the firm is composed of corporate lawyers who can barely handle a simple arraignment and that they are not capable of handling a murder trial. However, the firm does have a middle-aged bright woman associate, divorced with children, who was once the right hand assistant of the crusading D.A. The problem is that she has not practiced criminal law for four years and does not want anything to do with the case.

Close takes the case with some suspicion that perhaps Bridges is in fact the murderer. She even tells him that if she thinks he is guilty, she will drop out. She then hires a retired investigator (who was once the chief civilian investigator for the District Attorney's Office) and together they make a go of the defense. Frequently she tells whoever will listen "if he didn't do it I will get him off."

Why do women find the film "Jagged Edge" with its gruesome sexual brutality sequences and courtroom testimony concerning a sexual pervert more palatable than men? One obvious reason is that Glenn Close is an attractive woman, one other women relate to, and as an attorney she handles herself well, including certain courtroom cross-examination tactics we can all emulate. Moreso, because Close accurately portrays the extreme danger of a woman attorney falling in love with a client. This is not to say that the danger does not exist for a man who falls in love with a client (witness the number of attorneys who have married their divorced clients) but Close begins to wonder as she dates Bridges through the weeks of preparation, through the trial, and during the trial, whether he in fact loves her or is using her for his own means. Generally a man is less able to diagnose this sensitive inquiry.

No one really knows whether or not Bridges is the true murderer until the last five minutes of this fine film. I give my fellow film critics credit in not revealing the end because it would distract somewhat from your enjoyment. Suffice it to say that early in the film there are those who feel that without question Bridges is innocent (all of the newspaper staff and friends) and those who feel quite certain that he is guilty (including Close's retained private investigator).

The best sequences to look for include: A). Close having Bridges walk her through the house where the alleged murder occurred, asking him questions—"what happened then?" This is filmed from the point of view of the camera, so that you in fact are walking the same footsteps as the murderer, whoever he is. B). All scenes where Close takes notes during the investigation show her using a legal secretary's stenographer pad, not a legal pad, indicating that she is not ashamed of the fact that she once perhaps worked as a secretary. C). The first three kissing scenes between client and counsel; first with the lights on at his house, the second kiss at her house which her kids interrupt, and the third kiss, a rather sweaty, passionate one after racquetball. The third kiss is followed by a tenderly filmed love-making scene, where Close (perhaps not so surprisingly) is much more in control than Bridges and perhaps more skilled. D). Close's conversation with Bridges the day before the trial telling him how to dress, how to act, to be courteous, and above all to carry her briefcase to and from the courtroom so that the woman jurors will see that he is in fact a gentleman—illustrating that even woman attorneys appreciate that not all females have become completely liberated; and finally, E). the sequence in the middle of the trial where the learned judge pronounces in a loud voice; "I will tolerate no further disruptions in the courtroom." Actually, I didn't see any disruptions whatsoever, nor did any other movie viewer. This should remind all of us of the last case we tried before a certain Third Judicial District Court Judge who seems to think that everything is disruptive, unless of course it was his idea.



All my trials

Gail Roy Fraties

I've had occasion to remark in this column before that the mores and language of the street eventually affect everyone involved in the administration of justice. The other morning I had just finished using an electrifying (to civilians) expletive in a telephone conversation with a colleague in the Public Defender's office, and suddenly realized that a very proper witness (actually the victim) in the case I was preparing was still seated in the office. She was your standard little old lady, with blue hair and about two million dollars worth of jewelry discreetly displayed. I apologized, and she forgave me with a gentle smile.

"It's all right," she stated mildly. "I've been listening to your secretaries in the outer office most of the morning."

A reasonable alternative

Anyway, I attended a sentencing last year (Courtroom C, a/k/a "Charlie Court," Honorable J. Justin Ripley presiding) with opposing counsel, popular Public Defender Dan Hensley (now stationed in Juneau). It involved a woman who was charged with a couple of low range felonies for aiding and abetting her husband, who molested the children.

There were many mitigating factors, including the fact that she was a passive and somewhat unwilling participant, had been isolated from her friends and family in a remote area by the real bad actor in the family, and although she had cooperated in some of the acts, had tried to protect the children as best she could and reported her husband at the first opportunity.

The degree of her involvement required that she be charged, but our department was sympathetic toward her, and I concurred with Dan's eloquent plea for an SIS, which Judge Ripley, a compassionate man, imposed with his usual stern and impressive warning. The Defendant, as was the general plan, was suitably chastened—but not unduly ground up by the system, and all was well. Afterwards, Mr. Hensley and I discussed the matter, and I expressed a concern.

"There's only one thing that bothers me about this case, Dan," I said. "She said that she had to go along with the program because they were so far from town, and everything—but I think she had another option."

"What was that?" Dan wanted to know.

"Well, she knew that he kept a loaded pistol by the bedside. I think she should have shot him."

My friend studied me quietly for a moment.

"You know, Gail," he said, "sometimes I think you've been in this business too long."

An unspecified mitigator

Jerry Lewis Jordan hasn't been sentenced as yet, but I'm coming right up front with a mitigator. He's already been scared half out of his wits.

Mr. Jordan, a law-abiding citizen so far as I can tell (other than his one brush with the authorities) started having problems with the system on the 22nd day of November, 1985, at or near Anchorage, in the Third Judicial District, State of Alaska. He was seated in his vehicle on Barrow Street, near Fourth Avenue, and Officer Kitchen of the Anchorage Police Department observed him to be holding a piece of paper in his right hand, at which he was poking with a straw. Upon closer observation, APD Investigator Coles saw some white powder on the paper—and responding to a friendly inquiry from the police, poor Mr. Jordan threw the material all over the car.

He had apparently been attempting to snort up about a tenth of a gram of cocaine—and the officers scraped up enough from the seat cushions to get a positive ID by field test. The suspect admitted everything, and appeared in Courtroom B (Honorable Karl S. Johnstone presiding) the other afternoon for a change of plea. He is a diminutive but dignified black gentleman with a touch of gray in his hair, and had entered the court quietly with a friend some ten minutes before his hearing was scheduled to begin.

I wasn't aware of his presence, having just taken the verdict on a rather sordid and violent rape case. The in-court deputy, obviously relieved, congratulated me on the result—and I was in the midst of a law-and-order tirade.

"I'M GOING TO PUT THIS GUY AWAY WHERE THEY'LL HAVE TO FEED HIM VITAMIN D THROUGH THE PIPES," I said enthusiastically. "THIS IS THE KIND OF MAN WHO HAS TO BE ISOLATED FROM SOCIETY FOR A LONG PERIOD OF TIME SO THAT DECENT FOLKS CAN GET ON WITH THEIR LIVES WITHOUT BEING KILLED IN THEIR BEDS."

There was a furtive movement behind me, and I turned to see Mr. Jordan for the first time. Everything about him was pathetically small, except for his eyes. He was staring at me fixedly, and looked a good deal like one of those tiny nocturnal animals that are too frightened to come out in the daylight. It took me a moment to realize what was the matter with him.

"Are you Mr. Jordan?" I wanted to know.

He was able to nod, after glancing at his friend for moral support.

"Well, I'm not talking about you," I continued in what I hoped was a reassuring tone. "That was the trial we just finished."

He recovered his composure somewhat, and was able to go through his change of plea with the assistance of his able and persuasive counsel, Public Defender John Salemi. I can't speak for the Court, of course, but I know Judge Johnstone to be a very fair man—and as far as the District Attorney's Office is concerned, Mr. Jordan; relax—it's got to get better.

Just kidding, Mrs. Johnson. . . Mrs. Johnson?

It's bad enough, of course, when the prosecution does something like this unwittingly. This business makes you crazy enough, I regret to say, that an otherwise rational and responsible individual has been known to pull a stunt like that for the fun of it. My old friend, Sam Lavorato—with whom I prosecuted cases in Salinas, California, in the bad old days before the invention of fire—is a case in point. I remember it as if it were yesterday.

Sam had spent several days trying a strong-arm robbery involving a vicious assault by two young street hoodlums on an elderly husband-and-wife team. The defendants had separate trials, but the one that Sam tried had given the husband a severe beating while encouraging his partner (who complied as well as he could) to administer a similar one to the old lady. "Kill the bitch," was one of his milder instructions.

The Salinas Police Department, happily, intervened—and Sam achieved a conviction on his defendant for strong-arm, as well as for aiding and abetting an assault on Mrs. Victim. As is usual in these cases, both individuals were terrified of the defendant—and had made many inquiries before and during the trial concerning their safety if they testified against him. Sam was out of the office, for some reason, when the verdict came in, and the defendant was remanded to custody under heavy bail. I reported his success to him, however, and soon afterwards heard him on the phone in conversation with the old victims.

"Would you believe, Mrs. Johnson," he said, with a grin at me, "that the jury acquitted him on both counts?" He fell silent for a moment, and I could hear excited utterances over the phone. "Well, they did," continued Sam, calmly. "Furthermore, Judge Brazil ordered him to get in touch with you and your husband and see if you can't straighten things out." He then burst into a carefree laugh, and told her the truth.

"I really had her hyperventilating there for a moment," he said to District Attorney Bert Young later over coffee.

Mr. Young was understandably not amused.

"What in hell did you propose to do if she had a fatal heart attack?" he asked heatedly.

Sam was unconcerned. "I would have lied," he said.

Electric Dreams

"I had a dream about you the other night, Gail."

The speaker was adroit Anchorage defense counsel Mitch Schapira, a formidable opponent and amusing friend. "You were wearing that damned cape, and carrying your cane as well," he continued, "and I dreamed I made a motion to Judge Ripley, who was presiding over our case.

" 'If Mr. Fraties is going to dress like a clown,' I said, 'he should be required to go all the way and wear a beanie with a propeller on it.'

"It was so vivid," continued Mitch, "that it really had me going for a while. Then Judge Ripley granted my motion."

"I suppose the fact that he granted such a silly motion is what tipped you off?" I offered.

"No," Mitch replied, "the fact that he granted one of my motions at all." (They've had their moments.) "That startled me so much that I woke up."

Two stars from the D.A.'s Office

Anchorage trial attorneys are familiar with the Japanese restaurant across the street from the Courthouse, adjacent to the Keyboard. You are all well advised not to eat there if the management has any reason to suspect that you are connected in some way with the Anchorage District Attorney's Office. A story, of course, goes with it.

Anchorage District Attorney Victor Krumm used to like to eat there, and he recently invited several of us to accompany him. As he was paying the bill on the way out, he noticed a small sign—apparently written in Japanese (probably for the edification of the JAL crews who often stop at the Captain Cook).

"I wonder what that means," he wanted to know.

Assistant District Attorney Renee Erb offered a translation. "I think it says 'If you bring your dog in here, don't expect to get it out alive,' " she stated.

There was a strangled sound from one of the proprietors, who was checking us out.

Somehow Vic convinced the outraged lady that the remark she overheard concerned another, far-removed and esoteric legal subject. When we were back on the sidewalk, Chief Assistant District Attorney Bob Linton comforted him.

"Never mind, Vic," he said soothingly. "There are plenty of other restaurants in town."

Vic refused consolation. "You forget I've been in most of them with these idiots before," he replied.

Quotable Quotes

Anonymous defense attorney on the recent blessed event in the family of feisty and effective prosecutor Betsy Sheley, the head of the sexual assault unit in the Anchorage District Attorney's Office: "Thank God she had a boy."

•

Anchorage prosecutor, former Israeli soldier and scholar, Alex Bortnick—in a memo to Intake Officer George Schaefer: "George—do you realize that every time you get a cantankerous case at grand jury you send me one of these carve-him-into-a-eunuch-and-feed-it-to-the-camels memos?. . . as Muhammed once said: "B'illallum al-kahlam al-fahthi who-ah awal el awaleen. . . ."

•

Anchorage Superior Court Judge Seaborn J. Buckalew, with typical friendly interest, to juror who answered standard voir dire questions number 8 in the negative: "You know, Mr. Bradison, you're the first contractor we've ever had here that hasn't been involved in litigation."

•

Anchorage Superior Court Judge Peter A. Michalski, with a suspicious glance at TASC representative Marian Kowacki: "How did you say you pronounce that name?"

•

High school business law student, John Murk, in a paper written about his impressions of several local trial lawyers, to Anchorage attorney and teacher Dierdre D. Ford: "What is a nice woman like you doing in a bar like this?"

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IN MEMORIAM

The members of the Alaska Bar Association are saddened with the passing of three of its numbers in recent months. The Bar extends heartfelt condolences to the families of these fine professionals.

M. E. Monagle
December 1985

James E. "Ned" Neathery
January 1986

Dorothy D. Tyner
January 1986

Specializing in Dogs

By Myron Angstman

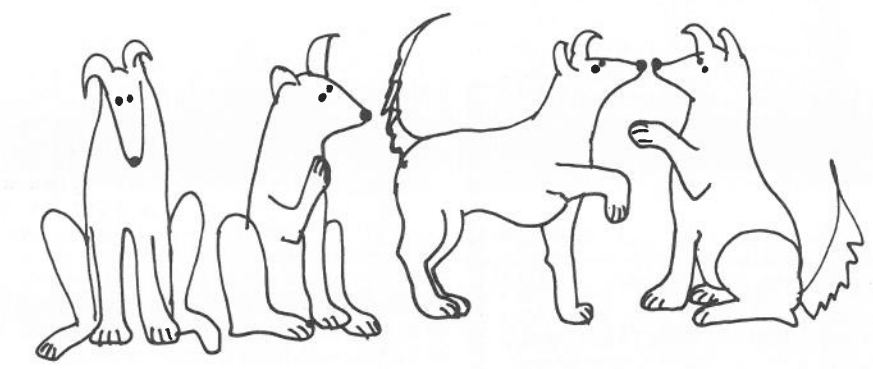
Was the editor serious when he asked for an article on dog mushing for this edition of the Bar Rag?

Surely a publication aimed at the legal community of Alaska should have more scholarly topics to discuss than sled dogs. However, a review of recent editions indicated that the Bar Rag takes a broad view of lawyerly pursuits; thus follows a description of one of Alaska's truly unique law offices located at Old Friendly Dog Farm in Bethel.

Angstman Law Office, Inc., consists of four lawyers, Douglas Dorland, Cathleen Connolly, Dale Curda and myself. A secretary, Ellen Spencer, and a part-time file clerk, Fannie Slaten, complete the staff. The office is housed in a log cabin situated at the edge of Bethel on the bank of a creek known as Brown Slough, next to my log home.

The office itself is rustic, both inside and out, but has many of the conveniences of other offices located in more urban settings such as a word processor. It is the pace of the law office, combined with the exterior trappings, which sets this office apart from most.

Two of the four lawyers, Dorland and myself, are actively involved in training and racing long distance sled dogs. We are not alone among Alaska Bar members who pursue the sport. At least five others, Dave Monson of Manley, Ken Hamm of Bethel and Dan Branch of Bethel, Vern Halter of Trapper Creek, and Connor Thomas of Nome have also competed in long-distance races. Halter is entered in this year's Iditarod.



Clients arriving at Angstman Law Office, Inc., can't help but notice that dogs are an important part of the operation. From 20–30 dogs are tied in close proximity to the front door of the office, often greeting customers with barks and howls. Since fall and winter training usually occurs during daylight hours, many times clients are able to observe a team being hitched and leaving the area while they wait for a legal service. Hitchup time is especially noisy, and the remaining office staff often watches the team leave.

The schedule of various employees relates closely to the dog race season. Dorland and I each work approximately half time during the fall and winter months to accommodate our training and racing schedules. Additionally, the office closes on the starting day of Bethel's biggest race, the Kuskokwim 300.

As many calls pertaining to dogs come into the office during the fall and winter as do calls pertaining to legal matters. That is not to say that the practice of law in Bethel is dull. In fact, our office has had a steady run of major cases over the years, including the defense of numerous homicides, and plaintiff's work in many wrongful death actions.

The combined efforts of the staff have left enough time after legal work is done to enable me to win some middle distance races, including the recently concluded Kuskokwim 300 which I won in a record-setting time in January. In that race, Dorland finished 16th giving us the claim as the first law office ever to have two lawyers finish in the money in the same long-distance dog race.

What attraction does dog mushing have for a lawyer? After spending the morning arguing on the phone with insurance defense lawyers from Anchorage or prosecutors from Bethel, a quiet run with a dozen non-complaining huskies is refreshing. Never mind that a musher spends 98% of his time looking at the south end of a bunch of dogs heading north.

Besides the recreational and competitive aspects of dog racing, in this area the sport provides exposure for an attorney which translates into increased clientele. Many times I have raced in communities where I normally would not travel. Villagers contact me either during or after the race to assist them with legal problems. Invariably their conversations begin with, "I saw you during the dog race." For example, I became Unalakleet's city attorney after sharing several campsites with a council member during the 1979 Iditarod.

In a bush location such as Bethel absence from one's business location for pursuits such as dog racing is commonplace. In fact, when clients call during training runs, rather than react with disappointment, the typical client of this office expresses encouragement for the upcoming racing season.

On the other hand, the informal nature of our legal practice leads to numerous late night and weekend calls from people who are not familiar with the idea of standard office hours. One gentleman stopped in June during our long summer months of daylight. He appeared slightly inebriated, and looked like he had spent a day or two partying. Upon completing a brief discussion, the gentleman asked for the time and was told it was 9 o'clock. "Would that be a.m. or p.m.?" he responded.

During one race in Minnesota, I took a brief half-hour stop at a checkpoint which happened to be a restaurant and bar near Grand Marais. While eating a bowl of soup, I received a call from my office regarding a proposed settlement on a case which was about to go to trial. Because the decision had to be made that day to avoid considerable travel expenses by the opposition, it was felt that I should be consulted. I considered the offer between that checkpoint and the next one, some 15 miles distant, whereupon I returned the call and recommended we should take the deal. Our client agreed, and the case was settled.

There is certainly precedent in this State for members of the Bar traveling by dog team. The accounts of Wickersham and other early day members of the legal profession describe long trips by dog team to conduct trials and other matters at outpost locations. While the use of dog teams for transportation is relatively rare in modern Alaska, the number of people who use them for racing and recreation is steadily increasing. At the same time, interest in the sport from non-participants is growing. In the recent running of the Kuskokwim 300 Sled Dog Race, Bethel Assistant District Attorney Scott Sobel was a checker in Kalskag. For years, Magistrate Craig McMahon was the checker in Aniak and of course, Bethel Superior Court Judge Christopher R. Cooke wrote the original Kuskokwim 300 song, "300 Miles On The Kuskokwim," which he sings at various race functions every year.

In answer to the often asked question, "What's a lawyer doing racing dogs?", my usual response is "What's a dog racer doing practicing law?"

Medical insurance survey

We have been exploring the possibility of obtaining a group medical program for Bar members and their employees. If successful, it could result in lower costs for all firms and better coverage for small firms, possibly including single-attorney firms.

We need your help in compiling information for use in negotiating with insurance companies.

The survey form does not require that you identify the name of your firm or its employees. Your assistance by completing and returning the survey by March 28, 1986 is appreciated.

If you are member of a law firm which employs more than one attorney, please give this survey to your law firm administrator for completion. Only **one** survey per law firm should be submitted. Firms with current medical plans can find most of the survey information (except possibly age) on their current carrier's monthly statement.

ALASKA BAR ASSOCIATION
MEDICAL INSURANCE SURVEY

Firm name (optional) _____

Please submit only **one** survey per law firm. Single-attorney firms should list the attorney as an "employee," as well as any staff.

1. Do you currently have a group health plan? Yes _____ No _____
2. How many persons does it cover? _____
3. Does it include dental? _____ vision? _____
4. Who is your insurance carrier? _____
5. What is the zip code of the street address?
6. Please list age and sex of employees, and whether or not they have dependents. If you are not sure of some information, put down a question mark. Attach separate list if necessary.

	Approx. Age	Sex	Any Dependents
1.	_____	___	_____
2.	_____	___	_____
3.	_____	___	_____
4.	_____	___	_____
5.	_____	___	_____
6.	_____	___	_____
7.	_____	___	_____
8.	_____	___	_____
9.	_____	___	_____
10.	_____	___	_____

Return to:
Alaska Bar Association, P.O. Box 100279, Anchorage, AK 99510

AIDS: Legal and Social Questions That Must Be Answered

By Russ Arnett

On November 18, 1985, there were 14,862 reported AIDS cases in the United States with 7,628 deaths. Projections of the doubling rate vary from nine to thirteen months. If a doubling rate of one year is used, the total reported cases in five years would be 475,584 and deaths would be 244,096.

The present medical cost of treating an average AIDS victim until death is $147,000 which involves hospitalization for 168 days. Because most of the victims are relatively young men, judicial rules for determining the economic loss of one victim would probably place the dollar loss three to four times greater.

The spread of AIDS would be minimized if it continues to be largely restricted to male homosexuals, intravenous drug users, hemophiliacs and infants born to infected women. However, in Central Africa where the disease is widespread and probably originated, AIDS is almost exclusively the result of heterosexual transmission. There appears to be increased heterosexual transmission in the United States, particularly by female prostitutes. The Centers for Disease Control reported 10 of 25 prostitutes in Miami showed positive AIDS test results and in Seattle 5 prostitutes in 92 tested positive.

Compulsory Testing

AIDS Has an unusually long incubation period of six months to five years or longer before symptoms develop. During this symptom free stage, the disease may be transmitted. Tests are available to determine whether an individual has been exposed enough to AIDS virus to produce an antibody against it, but the test does not tell whether the virus is still alive in the body or whether AIDS disease will develop. If society intends to minimize the spread of the disease, broad testing, at least of the high risk groups, is necessary. Positive findings should be followed by public health efforts to restrict spread of the disease by the victim by restricting their sexual contacts.

Voluntary testing would be most desirable. However, blood banks have found that a large proportion of those who showed positive AIDS antibody test results did not even pick up their results.

At present in the urban centers of Alaska there should be compulsory testing of prostitutes, a transient group who often come from areas of higher AIDS incidence than Alaska. Male homosexual prostitutes are more dangerous than female prostitutes. I see no requirement that a conviction of a criminal offense is necessary before compulsory testing can be imposed on prostitutes as long as the testing process is not used to further criminal prosecution. Alaska has a long if uneven history of testing prostitutes for VD. Consideration would be needed as to how the prostitutes would be identified, but "entrapment" should not make such tests illegal.

All jail, prison and juvenile detention facility inmates should be tested for AIDS at the time of booking. Jails have a particularly high rate of homosexual activity often engaged in by men who would not do so in the Free World. Drug abuse program clientele such as those in Treatment Alternatives to Street Crime should be tested.

An adequate public health program for AIDS should include broad testing of homosexuals, who constitute about 73% of the victims. It is desirable that testing of homosexuals be voluntarily. Perhaps this could be accomplished by providing incentives to voluntary testing. The key reason public health officials and society in general are reluctant to test homosexuals as a group is the fear it would appear to be persecution of a group already subject to discrimination. New York City has a third of the reported AIDS cases. Still, a New York City health official refused positive AIDS test results of New Yorkers tendered by the military. In New York City and San Francisco, gays are a potent political force. Many persons are fatalistic about the possibility that they may have a fatal disease and refuse to be tested because they fear the results. This fatalism may be a valid attitude as to themselves, but when the disease is contagious they should not spread it to others.

In the film industry, French kissing is in vogue. The Screen Actors Guild has written producers requesting that they be notified of any scene calling for intimate contact before it is filmed. Actors fear contracting AIDS in this manner although transmission by saliva has not yet been demonstrated. Other actors, who are gay or who have been exposed to AIDS, fear that their jobs may be jeopardized. How can actors give informed consent to open mouthed kissing if they have not received AIDS tests?

Medico-legal Aspects of AIDS in Alaska

PANEL DISCUSSION
Wednesday, March 15, 1986; 5:30 p.m. to 7:30 p.m.
Bar Association Conference Room, 310 "K," Suite 602, Anchorage

The Alaskan AIDS Assistance Association (AAAA), a nonprofit Alaskan corporation dedicated to disseminating up-to-date educational information on the presence of Acquired Immune Deficiency Syndrome (AIDS) in Alaska, its transmission, treatment, prognosis and other factors, as well as helping patients suffering from the syndrome, is presenting a panel discussion for members of the Alaska Bar Association concerning AIDS and legal needs of AIDS patients. The areas the panel will cover include the medical features of the disease, how it affects patients, the epidemic as it has touched Alaska and the probable future spread in this area, the AIDS test and its significance both to the patient and the public, legal needs which could be anticipated by "risk" groups and which arise upon onset of symptoms of AIDS or AIDS-related disability, and civil rights connotations of public reaction to the disease.

Dr. Frederick J. Hillman, founding member of AAAA, physician and family therapist, will moderate the meeting, adding his own comments on research and information he has compiled on the subject. The panelists will be:

Martin Palmer, M.D., also a founding member of AAAA and an Anchorage internist in private practice. Dr. Palmer was trained at Johns Hopkins and Tulane, and he will be devoting his discussion to the medical aspects of AIDS and observations he has made in treating afflicted patients.

Mary Lee Cook, RN, supervisor of the Sexually Transmitted Disease Clinic of Anchorage. Ms. Cook is not only a registered nurse, but she has a Master of Public Health degree. She will be discussing the AIDS test, the counseling involved and will give insights on the incidence of the syndrome in Alaska.

Bernard J. Dougherty, J.D., of Dougherty & Wallack, who will speak to the legal needs which concern both the patient and the patient's family, preparation in relation to business interests and settling estate questions. Mr. Dougherty has specialized in the areas of taxation, corporate and business law since 1974, having taken his J.D. from Georgetown University Law Center, Washington, D.C., in 1970 and being a member of the Virginia State Bar since 1970 and the Alaska Bar since 1974.

Allison Mendel, J.D., of Alaska Legal Service will be speaking on civil rights as it relates to the AIDS epidemic. She is a graduate of the University of California, Davis Law School, and is a member of the Bars of California, Washington state and Alaska. Before becoming affiliated with Alaska Legal Services, she served as a law clerk for Judge Betty Fletcher of the 9th Circuit in Seattle, and she specializes in anti-discrimination, equal employment and family law.

Submitted by Sylvia L. Short

The National Education Association supports the right of schools to require AIDS tests of students and teachers when there is "reasonable" cause to believe they may have been infected.

The military has adopted compulsory AIDS testing both prior to enlistment and of active duty personnel. Honorable discharge is given to AIDS victims presently in uniform.

One problem with universal AIDS testing is that when testing a very low risk population, you may have more false positives than true positives. The Centers for Disease Control opposes testing of the entire population. Pre-employment testing by employers fearful of medical and financial obligations to AIDS victims and testing by insurance carriers may some day approach this.

AIDS Carriers

In Florida an AIDS victim charged with prostitution was ordered to wear an electronic monitoring device to ensure her compliance with a house-arrest order pending arraignment. The judge told the press, "We have a hooker. We know she has AIDS. We can do something about it."

In Houston, four undercover police sought a 30-year-old AIDS victim, a male prostitute who had vowed to ignore the City Health's Director's order to abstain from sex.

In San Antonio city officials hand delivered letters to known AIDS victims warning them that they face felony charges if they continue to engage in sexual intercourse.

The yellow quarantine notice on the front door used in former years seems simple in comparison to AIDS quarantine problems. Though AIDS is far less contagious than most communicable diseases, restricting sexual practices which transmit the disease may be more difficult. Public health officials have experience locating persons with other venereal disease and getting them in for treatment and counseling. However, as there is no cure for AIDS, all public health officials can presently do when they identify an AIDS victim would, I suppose, be to attempt to get them to refrain from sex or to modify their sexual practices, in particular reducing the number of sexual partners. Some gay bathhouses provide education on "safe sex" practices which will inhibit the spread of AIDS. Owners argue closing them down will drive people underground and make it difficult to reach the people most in need of education. The use of condoms reduces the risk of AIDS transmission.

One hazard of relying upon self policing by AIDS victims is that AIDS often invades the central nervous system. Many, possibly a majority of AIDS victims, experience a progressive deterioration of cognitive functions, including judgment, and also experience motor dysfunction.

Plan of Action

There will be either a case by case approach to AIDS control by public health and law enforcement officials or a systematic and comprehensive program. We are fortunate in Alaska that we still have time to develop a comprehensive program.

The public process of adopting new state (AS 18.05.040) or municipal public health regulations for AIDS is the best way to proceed. Alaskan public health officials cannot develop an adequate AIDS program without public information and participation. The hazard of panic is overbalanced by the educational value of public participation.

An effective AIDS program must have support of the gay community, and it must be harmonized with constitutionally protected rights. For example, there are the conflicting needs of the public health officials to know who has been exposed to AIDS with the individual's right of privacy. Most individuals with AIDS antibodies will not develop AIDS, yet public knowledge of one's possessing AIDS antibodies could jeopardize the individual's employment, housing or reputation. However, public health authorities should have this information to treat and counsel the individual to discourage transmission. The regulations would need to include strict confidentiality requirements, a sort of AIDS Official Secrets Act.

It may develop through public hearings that AIDS victims or persons with AIDS antibodies should not be permitted in certain occupations. The Centers for Disease Control has published AIDS guidelines relating to employment risks and risk of transmissions. These guidelines should perhaps be adopted as regulations in Alaska. For example, AIDS may be spread by acupuncturists, tattooists and those who pierce ears with needles if they do not sterilize their instruments.

Gays are reluctant to submit to testing for fear of test results getting in the wrong hands. In Hawaii, the Venereal Disease Clinic has changed its policy regarding anonymity. In May 1985, when positive results were given to public health authorities, 59 persons submitted to voluntary tests. In October, 1985, after they adopted a policy of permitting anonymity, the number of voluntary tests increased to 278. Though this may argue in favor of not advising public health authorities of positive findings, this is not sound policy. Public health authorities are not the enemy and can only combat spread of AIDS if they can identify the victims. The approach must be to relieve the fears of the gay community by working with them to assure confidentiality and realistic measures to prevent spread of AIDS. Who could be more anti-gay than a gay individual who knowingly or negligently spreads AIDS virus within the gay community? Private contacts and negotiations by health authorities with the gay community must occur.

Legal protection of the rights of AIDS victims in employment, housing, confidentiality, personal freedom, the right to medical treatment, and funeral arrangements could be covered in the regulations or by legislation. If fears of the gay community are addressed and accommodated to the maximum extent possible, it is possible that gays may cooperate with testing and prevention regulations. Methods of testing, medical treatment, and hospice care for the dying, should be as charitable to AIDS victims as possible while still addressing the legitimate needs of protecting society.

Insurance testing and refusal to insure are problems best left to the Legislature and the insurance industry. Libel and slander actions and actions against persons who infect another are best left to the courts.

Enforcement of testing regulations through enforcible public health orders should be covered. The orders should not violate victims' rights, but long delays in the process or conduct by victims which endangers the health of others should not be countenanced. Transmission of the AIDS virus may be as lethal as a criminal's bullet.

'Exodus,' courtesy Anytown Vice

By Officer Jack Boots

Officer Boots discovers that there is more to a roundup than getting the little dogies to move along.

It was a real experience. Right in the middle of a near perfect spitshine on my Cochran jump boots, and not too delicately mind you, I was transferred; moved; assignment changed, with not so much as a by-your-leave.

"Transferred?" I bleated, "transferred?" The word formed with some difficulty as my face and lips caught up with the rest of my rapidly numbing body. "To where?" I queried, struggling with a surge of rising paranoia. I was rapidly constructing a psychic vignette of abject horror whose centerpiece was Officer Jack working in Community Services, dressed as Traffic Toad, the little frog character we used to tell the kids not to walk in the middle of the freeway or play between parked cars or take rides with strangers.

"Vice" came the pronouncement in a voice more suited to proclaim the Second Coming. A furtive glance in the direction of the squad room door informed me that the courier of these glad tidings was none other than the Shift Sergeant.

For the uninitiated, the Shift Sergeant is, in the police hierarchy, a minor deity, chosen for his rank and position from a class of subdeities known as the nez-brun. Aside from the three stripes which adorn both shirt sleeves, the Shift Sergeant is readily recognized by his sociopathic personality and his perfect spitshine.

"Vice?" I rasped, "but why?"

"I don't know WHY, Boots," came the reply, "but I suspect that they could use a guy whose best friend is a frigging police dog. Report to Lt. Broadhurst tomorrow, swing shift." The Shift Sergeant paused, picked a bit of imaginary lint from his shirt cuff and gestured toward Chainsaw, my K-9." And leave your fur-covered turd-generator at home." Having decreed my fate, he turned and walked back toward his office. Chainsaw, from his reclining position, raised his head slightly and with one eye fixed on the now vacant doorway, emitted a doggie zephyr as crisp and elegant as the report of a short-barreled .38. Amidst a swirl of loose papers and fluttering window blinds, I closed the grey metal door of my locker, resigned myself to the foibles of police management and headed home.

That night I dreamed I was trapped in a class of first graders while giving a lecture as Traffic Toad. They kept slapping the floor behind me to see how far I'd jump.

The following evening, I reported to Lt. Broadhurst at eight. Broadhurst asked me if I had any vice experience and I said no I hadn't so he said OK and told me that I would be a drover because you didn't need any experience to be a drover. When I asked him what a drover was he said he didn't have time to explain it, but that Officer Black in the next office would and to go see him. I found him in the neighboring office.

In no time at all, Black enlightened me as to the duties of the novitiate drover. "You," he explained, "are now a drover in the Red Light Riders; a hooker herder. See, the plan is this: We move them around town so when they're not where they used to be; then the people who complained about them being there before will think that they're gone until the people where they're at now discover they're there and complain. Then we move them to where they were before, except for when the anytown city fathers have some bit time out-of-town guys here who want to hold some big event, and then we have to sic the Swat Team on them and then they go hide on their own for awhile and come out when the big event is happening. Then we get to move them again. Understand?"

"Well," I said after taking a moment to digest this bit of tactical insight, "sounds like they we got a lot in common with the P.L.O."

Black put his hands on his hips, "Don't get funny, Boots—you got a better idea?" I didn't answer, but it seemed to me that we burned up a lot of gs and didn't accomplish much. There had to be a better way. . .

I spent the rest of the shift doing the familiarization thing with who does what when in Vice. Later on, I got to thinking about the hookers and the P.L.O.

They all have a lot in common. First, they've got history. Beaucoup history. Centuries/as a matter of fact. They're in the Bible together for crying out loud. Then, everybody wants to move 'em from where they are. They're both looking for a place to stay and to be left alone, so to speak. All they want to do is be Palestinians and hookers, respectively. It's not a tough job either. Oh sure, there are drawbacks like the Israelis putting a 500 lb. general purpose bomb through the side of your house during lunch because you blew up one of their school buses, or a trick who gets rolled waking up and shooting your face off, but every job has its risks, n'estee pas? Besides, they're willing to take the chances because they're just doing what they want to do.

Anyway, nobody wnats them around and the countries and states and towns pass laws saying so. Except Libya and Nevada. Why not, I thought, move the hookers to one of those places?

OK—Libya will gladly accept people who blow up other people primarily on religious and political grounds, right? But Libya isn't the right place because they won't take hookers for the same reasons. That leaves Nevada.

Nevada takes hookers, no sweat. They also take gangsters who help them with casino profits and really, these guys aren't known for their tact and diplomacy when somebody gets crossways to them. If it wasn't for them, there'd be a depression in the dynamite industry. So why not the P.L.O.—they'd be right at home, desert climate and all. And they'd be with people who have a lot in common with them, too. If we could move the hookers to Nevada rather than across town, our problem would be solved too. Everybody would be happy.

I began to feel smug—one day in Vice and I'd come up with a plan just as sound as the Red Light Riders, and solved the Middle East problem to boot.

As I was leaving the office, Black asked me if I had any questions about the Red Light Riders. I said that I had an idea, but for it to work, we had to convince Yassir Arafat to move to Carson City. He looked at me real funny.

The next day, Broadhurst sent me over to Community Services where I picked up the Traffic Toad outfit for me and a tadpole costume for Chainsaw.

Oh, by the way, did you hear that the Golan Heights won the Winter Olympics bid?

Board of Governors Schedule

The following is a list of the meetings of the Board of Governors during Harry Branson's term as president. If you wish to include an item on the agenda of any Board meeting, you should contact the Bar Office or your local Board member at least three weeks before the Board meeting.

June 2, 3 & 4, 1986 — Valdez

ALASKA BAR
News
M

Bar Plans Busy Spring CLE Schedule

The Alaska Bar Association, its CLE Committee and Substantive Law Sections have planned a busy spring CLE schedule. Course information and registration forms for the programs are sent to members approximately six weeks prior to the date of each program.

Mini-Evidence Seminars

There has been an enormous response to the 1986 Evidence Mini-Seminars "Breakfast Series." The five remaining programs are scheduled through June. We encourage you to check the schedule below and plan to attend these informative seminars. Don't delay—seating is still available, but limited.

Preventing Malpractice Claims—March 21

Duke Nordlinger Stern, risk consultant for the Alaska Bar Association, will present a half-day seminar on "Preventing Malpractice Claims," Friday, March 21, 9:00 a.m. to 12:30 p.m. at the Hotel Captain Cook.

Mr. Stern is a leader in the legal community's effort to reduce the malpractice experience. He has over 15 years experience in the field of attorney professional liability and has written or co-authored fourteen books and more than 90 articles on professional liability and law office management. Mr. Stern's ongoing analyses of state bars' and law firms' professional liability exposure confirms that a significant number of malpractice claims can be prevented through effective law office management and loss avoidance programs.

Mr. Stern is a Certified Association Executive, Certified Systems Professional and Certified Management Consultant, and serves as a member of the American Bar Association's Standing Committee on Lawyers' Professional Liability. He received his Ph.D. and M.B.A. in finance from the University of Missouri; his J.D. from Temple University; and his B.S. in economics from the Wharton School, University of Pennsylvania.

Wrongful Discharge—April 3

The Employment Law Section, chaired by Elizabeth I. Johnson, has scheduled a seminar on "Wrongful Discharge" for Thursday, April 3, 9:00 a.m. to 4:30 p.m. at the Hotel Captain Cook.

The seminar features guest faculty William W. Waldo, a partner in the Los Angeles law firm of Paul, Hastings, Janofsky and Walker. Mr. Waldo specializes in all aspects of employment and labor law, representing management. He has a recognized expertise in the developing area of wrongful discharge and has spoken extensively to management groups throughout the United States on numerous labor law topics.

The seminar will also include a panel discussion to discuss Alaska law and discovery or litigation techniques which may be particular to this state. Course and registration information will be sent to members in late February.

Law Office Economics—April 15

John Anthony "Tony" Smith, of the law firm of Smith, Robinson, Gruening and Brecht, and a member of the bar's CLE Committee, has arranged a luncheon seminar on "law office economics" for Tuesday, April 15, 11:30 a.m. to 2:00 p.m., at the Sheraton Hotel. The seminar, a "nuts and bolts" approach to the "dollars and cents" of law practice, will also feature Robert Ely of Robert Ely and Associates and Ron Bliss of Bradbury, Bliss and Riordan. Watch for program details in March.

Business Organizations—April 25

The Business Law Section, chaired by Ray Gardner, has planned a day-long seminar on "Business Organizations" for Thursday, April 25 at the Egan Convention Center.

This basic primer in business organizations is designed for new attorneys who have not practiced much in this area of law or for those more experienced attorneys who need a refresher course on the basics of business organizations.

Topics and speakers include Richard Johannsen (sole proprietorships), Bill Bankston and David Altenbern (partnerships), Ralph Duerre (corporations), David Wolf (Native corporations), Julius Brecht (securities), and Peter Brautigam (tax). Watch for registration materials in March.

Effective Legal Writing—May 17

R. Collin Middleton is organizing a full-day seminar on "Effective Legal Writing" for Saturday, May 17. As of this writing, Judge Brian C. Shortell has agreed to assist in conducting the seminar. Course description and registration materials will be mailed early in April.

1986 CLE Winter/Spring Schedule

Date	Time	Topic
March 3–10	3 morning sessions	Trial Techniques and Tactics (Kauai, Hawaii)
March 21	9:00 a.m.–12:30 p.m. The Hotel Captain Cook	Preventing Malpractice Claims (Duke Nordlinger Stern)
March 25	7:00 a.m.–9:30 a.m. The Hotel Captain Cook	How To Get Documents Into Evidence (Evidence Mini-Seminar, "Breakfast Series")
April 8	7:00 a.m.–9:30 a.m. The Hotel Captain Cook	Hearsay Objections (Evidence Mini-Seminar, "Breakfast Series")
April 25	9:00 a.m.–4:30 p.m. Egan Convention Center	Business Organizations (Business Law Section Seminar)
April 29	7:00 a.m.–9:30 a.m. The Hotel Captain Cook	Impeachment of a Witness (Evidence Mini-Seminar, "Breakfast Series")
May 20	7:00 a.m.–9:30 a.m. The Hotel Captain Cook	Liability and How to Present It (Evidence Mini-Seminar, "Breakfast Series")
June 17	7:00 a.m.–9:30 a.m. The Hotel Captain Cook	How to Present Damages (Evidence Mini-Seminar, "Breakfast Series")

For more information, call the bar office at 272-7469.

ABA eligible for credit union

We are pleased to announce that members of the Alaska Bar Association are now eligible for membership with Alaska USA Federal Credit Union. Accordingly, we wish to take this opportunity to provide you with information regarding the services and benefits available to Alaska USA members.

First, Alaska USA offers its membership a wide variety of savings programs. Our regular Share Savings Account has no minimum balance requirement and earns a 7% dividend, compounded and paid quarterly. In addition, members can take advantage of our Money Market Share Account, Savings Certificate and Individual Retirement Account (IRA) programs. These savings programs pay high dividend rates based on money market conditions and each is offered with no fees or service charges.

Our membership is also eligible to participate an a variety of loan programs, including Signature/Credit Line, automobile/truck, recreational vehicle and educational loans, to name only a few. Alaska USA prides itself on its competitive loan interest rates and its fast, convenient loan service.

In addition, Alaska USA also offers two convenient checking plans that pay divi-

Continued on page 21

APPROVED INCOME BUDGET

Account Name	1986 Approved
Membership Dues	$ 638,400
Admission Fees—Bar Exam	139,700
Admission Fees—Rule 81	0
Admission Fees—Attorney	20,000
CLE Seminars & Tapes	70,000
Substantive Law Sections	4,000
Addressing & Copying	16,000
Rule 81 Participation	18,000
Dues Installment Svc. Fees	6,000
Interest Income	60,000
Lawyer Referral Fees	53,700
The Alaska Bar Rag	11,440
1986 Annual Meeting	45,000
Discipline Cost Awards	2,000
State of Alaska	13,349
Miscellaneous Income	1,000
Penalties—Late Dues	5,400
	$1,103,989

APPROVED 1986 EXPENSE BUDGET

Dept. Main	Approved 1986 Budget
Administration	$ 257,795
Admissions	179,293
Board of Governors	70,579
Continuing Legal Education	116,787
Discipline/Bar Counsel	357,470
Fee Arbitration	8,890
Fee Arbitrations	23,883
Lawyer Referral Service	34,314
Legislative Review	0
Miscellaneous Departments	86,200
Substantive Law Sections	4,000
The Alaska Bar Rag	33,193
	$1,172,404

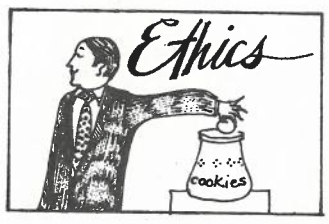
The Conflict Resolution Center is planning to conduct a raffle this spring, with a number of small prizes, and a grand prize of a first class Caribbean cruise for two (or equivalent). The names of the winners will be drawn at the Alaska Bar Association Convention in June. Winners need not be present. To receive more information, please call or write the Conflict Resolution Center at (907) 272-5922, 519 West 8th Avenue, Suite 210, P.O. Box 102105, Anchorage, AK 99510.

	Approved 1986 Budget
Total INCOME from All Sources	$1,103,989
Total EXPENSE from All Departments	$1,172,404
	$ (68,415)

ASSOCIATION
Notes

1986

Opinions adopted



Re: Guardian ad litem confidentiality

This Committee has been asked whether the legal or ethical duties of an attorney to preserve the confidences or secrets of his client extend to an attorney acting as a guardian ad litem who is told something by the child in confidence, or whether the attorney may reveal this information to the court. Further, the question has been presented whether the same standard applies to a non-attorney performing as a guardian ad litem supervised by an attorney.

It is the opinion of this Committee that the attorney is not bound by the normal duty of confidentiality, but rather should act within the context of the proceeding and be responsive to the reason for his appointment, namely the best interest of the child. The attorney's duty of confidentiality to a minor child-client must be exercised in accordance with the intelligence, experience, awareness or age of the child and in view of the purpose of his appointment. The scope of representation and the duty of confidentiality are important, however, they do not stand without limitation or common sense restraint. Additionally, because of the nature of the relationship and how it is perceived by the child, the attorney must warn the child that any statements made or positions taken by the child may be disclosed to the Court if the attorney deems such disclosure to be in the child's best interest.

First, the standard attorney-client scope of representation is limited. On one hand, a lawyer's fiduciary duty to his client is of the highest order. *Smoot v. Lund*, 369 P.2d 933, 936 (Utah 1962). The lawyer shall act with undivided loyalty and as the legal champion for his client. *Grievance Committee v. Natter*, 203 A.2d 82, 84 (Conn. 1962). On the other hand, a lawyer is not required to pursue objectives or employ means simply because a client may wish that a lawyer do so. ABA Model Rules 1.2. The professional judgment of a lawyer should be exercised within the bounds of the law, solely for the benefit of his client and free of compromising influences or loyalties. ABA Model Code EC 5-1.

Second, the duty of confidence is not without reasonable limitation. The obligation of a lawyer to safeguard client's confidences is based on the fiduciary relationship, and is essential to promote full disclosure of facts to the attorney. ABA Model Rules 1.6. The Model Rules concerning the principle of confidentiality differ from the corresponding provisions in the ABA Model Code. Compare Model Code DR 4-101. However, both the Model Rules and Model Code provide that the confidentiality rule is subject to limited exceptions. The lawyer's exercise of discretion requires consideration of such factors as (1) the nature of the lawyer's relationship to the client-child and (2) the interests of the child which might be adversely affected.

Third, the nature of the attorney-child relationship is similar to the general attorney-client association, and therefore analogous restrictions also apply. A guardian ad litem appointed by the court is "in every sense the child's attorney, with not only the power but the responsibility to represent his client zealously and to the best of his ability." *Veazey v. Veazey*, 560 P.2d 382 (Alaska 1977). The guardian is appointed with the authority to represent the child's "best interest in the legal proceeding." AS 25.24.310(c). The best interests of the child are paramount. Lawyers thus appointed should consider the child as their "client" but should handle the proceeding in the best interests of the child, even when their handling of the case is not consistent with the expressed wishes of the child. See Mass. Bar Assn. Ethical Opn. 76-1, 61 Mass. L.Q. 54 (1976).

Fourth, the nature of the lawyer's responsibilities must be exercised within the peculiar relationship between the lawyer-guardian and client-child. The normal attorney-client relationship does not directly apply when the minor child may not be capable of making important decisions. Indeed, the court may appoint the lawyer as guardian ad litem when it feels the child cannot adequately act in his or her best interest. Model Rules 1.14. The law recognizes intermediate degrees of competency. The duty of the lawyer may vary in accordance with the intelligence, experience, awareness or age of the child. Model Code EC 7-11. The lawyer shall consider all circumstances then prevailing and act with care to safeguard and advance the best interests of the client-minor child. See Model Code EC 7-12.

Fifth, the child often perceives the guardian to be the child's attorney, to represent the child's interest as the child perceives that interest to be. The guardian sometimes will take a position adverse to the position stated by the child. The guardian should explain his/her role to the child, in a manner consistent with the child's age and understanding. The child's natural trust and perception must not be abused. In that regard, a guardian should immediately explain his/her role to the child, including (1) the fact that the guardian's role is to determine what is in the child's best interest, (2) the fact that the guardian may take a position contrary to the child's wishes, and (3) the fact that anything the child tells the guardian may be disclosed to the court if the guardian deems such disclosure to be in the child's best interests. If the guardian does take a position adverse to the position of the child, the guardian must disclose the child's position to the court. That is so that the court is fully advised in the matter before it and also so that the court may take any other action appropriate under the circumstances, such as appointing an attorney to represent the child to assert the child's expressed position.

Lastly, the Committee believes these same standards apply to a non-attorney serving as guardian ad litem when supervised by a member of the bar. A lawyer is a representative of clients, an officer of the legal system and a public citizen having a special responsibility for the quality of justice. The lawyer shall seek the administration of justice and preserve the excellence of services rendered whether directly as guardian or only indirectly as supervisor for such a guardian. See Model Rules, Preamble.

In conclusion, the same reasons for the appointment of a guardian ad litem, namely the best interests of the child, also form the basis for the restraint placed on the duty of confidentiality. The lawyer appointed by the

Continued on page 24

Directory of Alaska Women Lawyers
Available for $2.50 from
Anchorage Association of Women Lawyers
P.O. Box 103682, Anchorage, AK 99510

Discipline imposed by bar

William H. Pittman was disbarred by Order of the Supreme Court dated December 18, 1985 but effective July 28, 1982 for a felony conviction. Mr. Pittman was convicted in 1982 of third degree assault by pointing a gun at a police officer.

Private Reprimand Imposed by Disciplinary Board

Attorney A received a private reprimand based on his neglect of a legal matter entrusted to him. The neglect resulted in the dismissal, for failure to prosecute, of personal injury claims. The reprimand was also based on the attorney's failure to inform his clients of the dismissal of their cases.

Attorney B received a private reprimand based on his neglect of several legal matters entrusted to him and his failure to inform clients of the status of these cases. Among other conditions, Attorney B will have his files reviewed for potential neglect problems by another member of the Bar.

Written Private Admonitions Imposed by Discipline Counsel

Attorney A, an associate in a law firm, received a written private admonition for failing to disclose to his client the fact that a partner had instructed him that the firm would not represent the client in litigation. The firm did not want to go to litigation because of a conflict with the personal interests of the partner.

Attorney B received a written private admonition for misrepresenting his ownership in a parcel of property to the opposing party. The admonition was also issued because Attorney B was not entirely candid in his disclosure to the Bar Association about the time frame in which he later divested his interest in the property.

Attorney C received a written private admonition for advancing the position of one client over the other. Attorney C failed to realize he was precluded from representing either client in the matter once irreconcilable differences emerged.

Attorney D received a written priva admonition for vulgar and abusive langua to a non-policymaking government er ployee in the course of a legal action invol ing the government entity.

Attorney E received a written priva admonition for practicing law while su pended for nonpayment of Alaska Ba Association dues and penalties.

Attorney F received a written privat admonition for conflict of interest becaus he represented the wife in a custody disput with her child's natural father, and then later represented the wife's new husband in a divorce action against the wife.

Attorney G received a written private admonition for failing to clarify and put into writing instructions for disbursement of funds before disbursing the funds for which he had a fiduciary responsibility.

Suspension

James F. Petersen is currently suspended from the practice of law in Alaska for non-payment of Alaska Bar Association dues and penalties. On January 21, 1986 the Alaska Supreme Court entered an order concerning two grievances filed against Mr. Petersen. The Court ordered Mr. Petersen to reimburse a former client and ordered that should Mr. Petersen be reinstated from his suspension for non-payment of Bar membership dues that he be suspended from the practice of law for 30 days. The Court added that any reinstatement of Mr. Petersen to the practice of law would also be conditioned upon his passage of the Multi-State Professional Responsibility Examination. In its decision and recommendation to the Court, the Disciplinary Board found that Mr. Petersen neglected a legal matter entrusted to him, intentionally failed to carry out a contract of employment entered into for professional services, and failed to answer a Request For Investigation or formal complaint in conformity with the Alaska Bar Rules as to each of the two grievances before it.

Don't Miss!

the 1986 Evidence Mini-Seminars "Breakfast Series"

April 8	Hearsay Objections	Judge James M. Fitzgerald
April 29	Impeachment of a Witness	U.S. Attorney Michael R. Spaan William P. Bryson
May 20	Liability and How to Present It	Sandra K. Saville L. Ames Luce
June 17	How to Present Damages	Sandra K. Saville L. Ames Luce

Seating still available!

All seminars will be held at The Hotel Captain Cook, 7:00–9:30 a.m., and will include breakfast. Cost is $20.00. Contact the bar office at 272-7469 for more information.

Golden friends

. . . . . continued from page 1

Law review classrooms

Barbara was already an Alaska legend when I arrived, though all she had done officially was be a law clerk for Justice Connor and then depart for Europe. We met when I took the Bar Review that winter with Steve Hart, who was Barbara's other self. Our bar review course was a tale in itself.

The class was small, only 18 people. Among the regulars in attendance were Mary Hughes and Dave Walsh. Among the irregulars were Tim Stearns and George Peck. Also in the class was Mark Weaver, the law school soulmate who finally graduated.

The bar review people didn't use bright, young, inspiring lawyers for teachers then. They used judges.

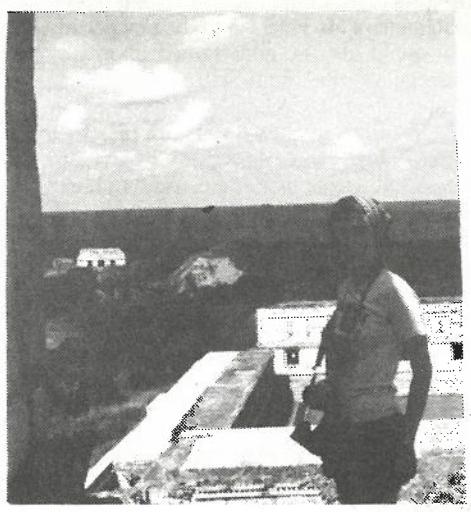
The night we were to learn about civil procedure, the judge arrived promptly at 7:00 p.m., armed with the blue book. His teaching method was to read the rules, out loud. He started with Rule 1. He stopped after each reading for a proper discussion of the rule. By 10 minutes to eight, it was apparent that we would not reach Rule 30 by midnight.

Steve passed us a note, suggesting that we leave right away to catch the beginning of *Five Easy Pieces* at the Polar Twins. He figured we could watch the whole movie and still get back in time, if we felt like it, for the last 60 or 70 rules. The record should reflect that we left but did not return that evening. Some people claim that my knowledge of civil procedure still has a few gaps in it!

At the P.D. agency

My first contact with the Public Defender Agency came when I decided to do some token interviews for the LEAA study. People had hinted that I could travel and see the state that way. Bob suggested that colorful interviews might be had with Justin Ripley, then an assistant D.A., and Larry Kulik, then a P.D. Unfortunately all I got to see when I interviewed them was Fourth Avenue.

The P.D. office was a bit intimidating. It had a side alley entrance, above the Fur Traders—a known target for burglars. I walked up an eerie staircase to a vacant receptionist desk. I sat down on a chair that apparently had seen a lot of use. I did not hear any voices.



Barbara Miracle atop a Mexican pyramid

It turned out that the office only appeared abandoned. The fort *was* manned—by Larry, Phil Weidner, Irwin Ravin (of *Ravin v. State*) and Bill Bryson. Due to a recent staff exodus, they were attempting to cover 12 courtrooms with only 4 lawyers. Alex Bryner, Bruce Bookman and Brian Shortell recently had left to form *Bookman, Bryner & Shortell.* Somewhat earlier Collin Middleton, Mike Rubinstein and Bob Wagstaff had gone off to form *Wagstaff, Middleton & Rubinstein.* For history buffs, the original Public Defender Agency, circa 1970, consisted of Vic Carlson, Jim Gilmore, Collin Middleton, and Frank Kernan.

I did eventually get to talk to Larry. His comments on the local judges' bail and sentencing practices were thought provoking, but not printable.

My interview with Larry was followed by a trip to Juneau, where I was blessed to receive an audience with Dan Hickey. Dan at the time was a mere D.A., with only one subordinate, Ivan Lawner. When I asked Dan about the sentencing process in Juneau, he swivelled back in his chair, puffed out his chest, pointed at himself, and said "You wanna know who makes the sentencing decisions down here? I make the sentencing decisions down here!" It may have been then that I decided to become a public defender.

Enjoying a fishing trip (1980) are (back, l to r) Kerry Barker, Marty Beckwith, Chris Schleuss, and Mark Rindner and (front) Barbara Miracle and Steve Hart.

Herb Soll, magnet

Not long afterward, I ran into Herb Soll. Some people will not believe this, but Herb was in the law library. He was not completely out of character however—he did have on his rose colored glasses.

I was hard at work, writing a report on sentencing that to my knowledge, no one except Barry Stern has ever read.

Some of you may have never heard of Herb, at least not until the recent rumor that he might return to the state to become chief prosecutor. Herb was the second person to head the public defender agency. Vic Carlson was the first. Herb later became a judge in the Mariana Island.

Herb was magnetic. So magnetic that right there in the library he talked me into accepting a position in the Kenai P.D. office, then a one-lawyer hangout, when I had neither been to Kenai nor been in court for so much as an arraignment. Fortunately an intern in the Anchorage office, Bob Cowan, wanted the position in Kenai and passed the bar just in time to get me a reprieve. We switched places.

Arrival at the P.D.'s

When I arrived at the agency for my first day of work a few months later, the irreverent remarks of Larry Kulik were still in my mind. Larry had quit the agency but was still knocking around the office, as most former public defenders do.

The place was not lacking for character. Larry was bragging about how he had been arrested in Federal Court the day before for making an off color comment about something Judge Plummer had done. Everyone agreed he was simply in the wrong place—the hallway of the Federal Courthouse—next to the wrong person—the G.S.A. guard.

The agency's offices had just moved to the state court building, to the area that now house Probate. Bill Bryson had snapped up the large office with the plush rug toward the back. It was the only one that would accommodate his classy furniture. The side rooms were occupied by Rick Lindsley, Frank Koziol, Olof Hellen, and Ben Esch. Ron Drathman took up at least two offices toward the front. I could tell Barbara's den by all the shoes under the desk.

The directory board listed Phil Weidner as the Appeals Division, but I was not introduced to anyone by that name. Later someone identified him for me as the guy hobbling around on a cane. I had thought he was a client.

Denizens of the defender agency

Rick Lindsley took me under his wing, figuratively of course. Otherwise, I would have been crushed. Rick had been a linebacker at Stanford. His stature bespoke this. I think it gave confidence to his clients and may have intimidated the opposition.

Rick was a person whose success with both jurors and clients derived from his ability to hide his intelligence. He was warm yet unyielding—practical but philosophical—and virtuous yet shrewd.

Rick was the instigator of the "Herb who?" jokes. He and Olof were recognized as the de facto heads of the office, because Herb always was off in Brazil, or Bali, or some other exotic place. Sometimes a lawyer would inquire as to where Herb was, or as to what advice Herb would give if there. With a perfectly straight face, Rick would answer, "Herb who?" He did not mean to malign Herb, but Rick had worked with Vic, and Vic had set a precedent for head P.D.s being down in the trenches like everyone else. Herb's strengths were in other areas, such as finessing the politicians in Juneau to get us money.

First trials

Misdemeanor attorneys like myself did not necessarily get offices (I shared with Bruce Abramson) but we did get files. In fact, Barbara generously gave me *all* of hers when I arrived because she was moving into felonies. As for training, Herb actually sat through a portion of my first jury trial with me. A portion.

Unfortunately he was not present at the outset when I most needed help in selecting the jury, having never seen that done before. An intern came to my rescue—Walter Share. Together we double-teamed Gene Cyrus until I found my sea legs.

Actually I had already had one trial, on my second day of work, but it had been a non-jury affair. It was before Judge Brewer. It followed on the heels of what was euphemistically called an in-chambers conference. The mad-dog prosecuting attorney, Mike Keenan, had insisted that my client plead to shoplifting a pair of sunglasses and a watchband from Penney's, total value $6, in exchange for 15 days in jail.

It might as well have been life. I was new. I was bold. My client had been unable to make bail because he was a Native from the bush. I told Keenan we'd go to trial the next afternoon if he'd let the defendant out on bail overnight to help me prepare.

Early the next day, Barbara urged me to send an investigator down to the Army-Navy store to see if it sold watchbands identical to the one in evidence. The investigator was to determine whether a customer could walk off with such a purchase in his shirt pocket, without a receipt. This was not merely fact-finding on Barbara's part, but bore some resemblance to the scenario the client had described in justifying his possession of the watchband.

I soon regretted the bail negotiation. My client had gone out and had a big evening. He fell asleep in my office promptly upon arrival. I wondered if it was ethical to spend your own money on a sandwich for a client. What the heck—I had the impression you could pull out all the stops for a trial. Restored, he made it up to the court room. He was awake when the witness from the Army-Navy store testified.

I then asked for a recess, to take my client out in the hallway to rehearse his testimony. I explained to him that I would ask where he got the watchband. He interrupted, volunteering that it came from "N.C." (now Nordstrom). I wanted to scream. "Don't you see I just had this fellow come down here to testify because you said . . . !" He must have seen the look on my face. "Naw" he corrected, "I don't like N.C. It came from Army-Navy store!"

We went back in. In retrospect, it doesn't seem likely that Judge Brewer really *listened* to the testimony. However, he found a reasonable doubt as to the watchband, though not as to the sunglasses, and sentenced my client to only 10 days in jail. Barbara couldn't believe it.

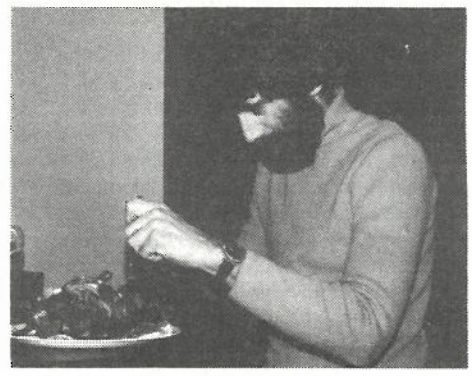
A new system

There was that year, as always, a new calendaring system being implemented by the court. The felony attorneys were divided into teams to accommodate it. There was the Occhipinti team, the Moody team, and what Barbara always referred to as Pete's team—Kalamarides.

The lawyers on the Occhipinti team vented their spleen by calling him "Ockee-pintee." This they had learned from Larry, who was his nemesis. As I got to know Larry, saw that his antagonism toward judges and others had a simple explanation. Larry was extremely gifted intellectually but got frustrated, to put it mildly, when dealing with those of more ordinary ability.

Occhipinti once threatened to come down off the bench and duke it out with Larry. The incident occurred during a jury selection. Larry as usual had been goading the judge with mistrial motions. Occhipinti had just finished explaining why the most recent motion had been denied. Larry remarked, "If you want to call that rationale process *reasoning*—." Occhipinti exploded. "Mr. Kulik, I have a mind to come down off the bench and get you!" There was a pause. "I agree now that you *have* prejudiced me in this case. . . . I'm going to grant your motion for mistrial." Larry looked deliberately vague. "What motion?" he inquired. "I'm perfectly happy with this jury!" It would have been an interesting match. They were both over six feet, and Larry was heavy set for a marathoner.

The self-appointed head of the Moody team was Ron Drathman. He and Moody went round the block a few times too, but in friendlier fashion.



Larry Kulik tastes the cook's dish.

Moody once ordered Ron and another lawyer to come backstage because Moody was disgruntled with the way they were dressed. Ron's shirt tails were all stuck out, and the other fellow had no tie. Moody was generously hunting through his office for an extra tie when Ron noticed that the judge himself was padding around in bedroom slippers. "Why we're in a fine fix!" quipped Ron. "We've got a P.D. with no coat, a lawyer with no tie, and a judge with no shoes!" Moody just grinned. He could ignore a good point out of court just as well as in!

How to continue, and other tricks

The first thing Barbara taught me how to do was move for a continuance. The second was how to get it non-op'd. This was bedrock strategy. As Phil Weidner pointed out, the State could hardly convict your client if you could keep him out of the courtroom.

Barbara was a master at continuances. I learned the meaning of the term state-of-the-art from reading her motions. If a defendant's key witness had not been subpoenaed, it was because our funds had been cut. If an investigator had not yet interviewed the victims, it was because they were recuperating in Hawaii the one day he called. If the client were a

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ABA board forms two new sections

Bankruptcy Law Section

In response to the growing number of bankruptcies and the growing number of attorneys who are now practicing bankruptcy law, a Bankruptcy Section of the Alaska Bar Association has been formed. The organization of the section originated with the circulation of a letter inviting interested attorneys to attend an organizational meeting on December 13, 1985. The Bankruptcy Court enthusiastically supported the concept, and circulated the invitational letter to all attorneys on its mailing list.

Many attorneys from Anchorage and some from Fairbanks expressed interest in the formation of the new section, and in attending monthly luncheons to discuss bankruptcy topics. It is hoped that the organization may assist the court in rule-making and in communications with the Bar.

At the organizational meeting, Bruce A. Bookman was elected chairperson, and David H. Bundy, Jan S. Ostrovsky, Sally J. Kucko, and Paul W. Pasley were elected to serve as the executive committee. The group was approved as a new section by the Board of Governors on January 9, 1986.

Economics of Law Practice Section

At the January 1986, meeting the Board of Governors approved the creation of an Economics of Law Practice section of the Alaska Bar Association. John R. Lohff sponsored this request. He told the Board of Governors his interest and enthusiasm for this section came from seeing a number of Alaska attorneys at the Fourteenth Annual Institute on Law Office Management in San Francisco, California, during June of 1985.

Larry Weeks, Board of Governors member from Juneau, Alaska, questioned whether the Alaska Bar Association could offer members anything with this section in view of the already fine materials available from the American Bar Association section on the Economics of Law Practice. Mr. Lohff pointed to the opportunity to share information on courses such as the Institute of Law Office Management in San Francisco, as well as the opportunity to share the expertise and experience of various Alaska attorneys with each other were definite benefits.

The new section was also viewed as a vehicle for education in a substantial number of areas already of interest to the Bar. These areas include trust account practices, use of paralegals, alternative dispute resolution methods, use of computers and word processing in the office, marketing practices of law firms, and "Bridging-the-Gap" from law school to private practicing attorney for new attorneys.

The Bar Association staff determined that the annual solicitation for new section members would include notice of this newly created section on Economics of Law Practice. It is hoped that interest is high enough to create a pool of interested attorneys to form an executive committee at the time of the annual meeting in Valdez. In the meantime the committee has been asked to help prepare materials for the "Bridge-the-Gap" program scheduled in September of 1986.

In related news Ron Bliss, Bob Ely and Tony Smith are working on a program on the "nuts and bolts" approach to Law Office Economics and building a law firm for April of 1986.

No Membership Fee!

The Bar Association staff determined that those members interested in joining either or both of the two new sections immediately would incur no membership fee until the annual membership renewal drive in April. (Those who signed up to join the Bankruptcy Section at the December organizational meeting, or who subsequently informed Bruce Bookman they wished to join, do not need to contact the Bar office. Your names will be added automatically to the membership list.) Those wishing to join either the Bankruptcy Law Section and/or the Economics of Law Practice Section should send a written request to the Bar office.

STATE OF ALASKA

Alaska Public Utilities Commission
Request for Letters of Interest

The Alaska Public Utilities Commission (APUC), an agency of the Department of Commerce and Economic Development, is compiling a list of attorneys who are qualified to provide professional contract services as a hearing officer for the APUC during Fiscal Year 1987 (July 1, 1986 through June 30, 1987). A Request for Proposals (RFP) is being prepared. It will be circulated as soon as approval to proceed is received from the State of Alaska Contract Review Committee.

Anyone interested in receiving a copy of this RFP should contact the APUC as soon as possible. Your name will be placed on the mailing list to receive a copy as soon as it is available. The contact is:

Peggy Tuttle, Executive Director's Office
Alaska Public Utilities Commission
420 L Street, Suite 100
Anchorage, Alaska 99501
Telephone Number: 276-6222, extension 114

Questions concerning this RFP can be addressed to Barbara Tennison, Administrative Assistant at 276-6222, extension 107.

The Alaska insanity defense—how crazy can you get?

by Cynthia L. Strout

The current state of Alaska law regarding the insanity defense is unsettled. This article outlines the standards now in effect for determining insanity, and the legal issues currently active in the courts. I will also discuss the practical problems of advising clients, from a defense perspective, regarding the defense. The issues involved are complex, and strike at the heart of the function of criminal law.

In 1982, the Alaska legislature rewrote the laws on insanity. It is generally accepted that this was in response to the *Meach* killings,[1] and, to a lesser extent, the verdict in the *Hinckley*[2] case. The two most significant changes were a new definition for insanity, and the addition of an entirely new verdict—the finding of "guilty but mentally ill" [GBMI]. An Alaskan accused of a crime who wishes to raise a defense regarding his mental state now arguably faces the most restrictive standards in the country.[3]

The insanity statute

The current formulation of insanity is found at AS 12.47.010(a):

> In a prosecution for a crime, it is an affirmative defense that when the defendant engaged in the criminal conduct, the defendant was unable, as a result of a mental disease or defect, to appreciate the nature and quality of that conduct.

The Court of Appeals has recently interpreted the meaning of this definition in *State v. Patterson*, 708 P.2d 712 (Alaska App. 1985), and *State v. Hart*, 702 P.2d 651 (Alaska App. 1985). In *Patterson*, the State has petitioned to the Supreme Court specifically on the issue of this definition. The State complains that the Court of Appeals broadened the meaning of the insanity test despite a legislative intent to narrow the definition. The Court of Appeals, relying on previous decisions interpreting the original Alaska insanity statute, formulated the test as:

> [a] defendant [is] not guilty by reason of insanity if he was incapable of "knowing the nature and quality of his act" and of "distinguishing between right and wrong" in connection with the crime charged.

Patterson, supra, at 716. Thus, the Court has re-established the older M'Naghten test as the current standard for insanity in Alaska.[4]

While the test enunciated by the Court of Appeals allows for an insanity defense, it is still a remarkably narrow test, and was criticized as such in 1973 by the Alaska Supreme Court in *Schade v. State,* 512 P.2d 907 (Alaska 1973). *Schade* adopted the ALI defnition of insanity. The Court there said, of the M'Naghten standard:

> . . .the test employed in *M'Naghten's Case* contains many defects and has been subjected to severe critical attack, especially during the last two decades. One of the main difficulties with the *M'Naghten* rule is that it assumes that mental illness is a mere failure of intellectual function, while modern psychiatry takes into account the affective aspects of human personality in diagnosing and analyzing the nature of mental and emotional illnesses. For this reason, the use of the *M'Naghten* test deprives the trier of fact of many of the insights yielded by modern psychiatry.
>
> There is widespread agreement today that in a modern age the *M'Naghten* rule works an injustice, as many types of serious mental illness do not relieve a defendant of culpability under that rule even though he may lack substantial capacity to understand the wrongfulness of his conduct or conform his conduct to the law. *Pope v. State,* 478 P.2d at 809, n. 10. . . . We are persuaded that the *M'Naghten* test is no longer acceptable.

Schade at 911, 912.

One of the major problems with the *Patterson* and *Hart* opinions is the Court's avoidance of the constitutional issues raised there. Both cases challenged the insanity law as violative of due process, equal protection and as imposing cruel and unusual punishment upon the mentally ill. The Court avoided these issues by noting that the state is still required to prove the requisite *mens rea* for the crime. This does not answer the constitutional challenges made. While the Court followed accepted doctrine in avoiding a constitutional issue if other grounds are available for reversal, it seems likely that the courts must grapple, at some point, with the harder questions. This is particularly true of the "Guilty but Mentally Ill" verdict the constitutional challenged to which the Court declined to decide.

The GBMI Verdict

Under the current law, when an accused raises an insanity defense, the jury is given the option of four separate verdicts: not guilty, guilty, guilty but mentally ill, or not guilty by reason of insanity. AS 12.47.040. This unprecedented requirement of an additional verdict is unique in criminal law, and violates basic precepts of constitutional law.

The GBMI standard is found at AS 12.47.030(a):

> A defendant is guilty but mentally ill if, when the defendant engaged in the criminal conduct, the defendant lacked, as a result of mental disease or defect, the substantial capacity either to appreciate the wrongfulness of that conduct or to conform that conduct to the requirements of law. A defendant found guilty but mentally ill is not relieved of criminal responsibility for criminal conduct and is subject to the provisions of 12.47.050.

A person who is found GBMI is sentenced as guilty and is entitled to mental health treatment. This is all GBMI means. This adds nothing to the law since all mentally ill incarcerated persons have long been entitled to treatment. *Rust v. State,* 582 P.2d 134 (Alaska 1978). The GBMI standard is the same as the ALI formulation which, until 1982, was the definition of insanity in Alaska. Thus, a mentally ill person who committed a crime in 1980, who met this test, would have been found *not guilty* by reason of insanity.

Today, that same person, with the same illness, would be found *guilty* but mentally ill.

The current law, by definition, imposes criminal sanctions upon a person who has been found lacking in the capacity to conform his conduct to the requirements of the law. A good example is the *Patterson* case cited above. Patterson is a young woman suffering from schizophrenia. One of her delusions was that three men were living in her family home and that they had sexually assaulted her three-year-old child. Ms. Patterson's mother had attempted to arrange mental health care for her, but Ms. Patterson had severe medical reactions to the psychotropic drugs prescribed for her. Ms. Patterson attempted to rob a local attorney, at gunpoint, after her attempts to borrow money at a bank and from her relatives were futile. Ms. Patterson felt the only way to escape the three men and save her baby was to get some money and leave her home. The attorney struggled with Ms. Patterson (who is about five feet tall) and held her until the police arrived. She was charged with robbery in the first degree.

At Ms. Patterson's trial, the psychiatrists and psychologists who examined her testified that she met both the ALI standard for insanity [the current GBMI formulation] and the older M'Naghten standard. Ms. Patterson was found guilty but mentally ill. Under the presumptive sentencing statute, she was subject to a seven-year presumptive jail term. Ms. Patterson has been incarcerated since her conviction. She has never been placed in a mental health treatment facility.

The result of the GBMI verdict is to incarcerate people suffering from legitimate mental illness. Under the very definition of GBMI, such people are unable, because of their mental illness, to control their conduct to remain within the bounds of the law. They are not, in a very real sense, responsible for their actions. Under current law, this makes no difference and the State jails them.[5] Is placing a person like Kim Patterson in jail for potentially a presumptive seven-year term[6] what we as a society desire?

Problems for Practitioners

The current state of the insanity law makes adivising criminal defendants regarding the defense extremely difficult. One major problem is trying to explain the differences between the NGI and GBMI verdicts. Another is finding a psychiatrist willing to read the insanity statute in a broader manner than it appears on its face. The most difficult decision, however, is weighing the risks involved in a trial wherein the trier of fact is given the option of the GBMI verdict. While the verdict in fact means nothing, juries are led to believe that it is some kind of middle ground or compromise verdict.

In fact, a defendant found GBMI is in a *worse* situation than if he or she had pled or been found simply *guilty*. A GBMI defendant is not eligible for parole, furlough, or work release. [AS 12.47.050(d)]. Thus, for example, Kim Patterson is not eligible for release to a halfway house for the mentally ill, nor for any other integrative community care program prior to her release. This makes advising a person with a potential insanity defense extremely difficult. A defendant may decide, given the unpopularity of the insanity defense among jurors, to forego a trial and simply plead guilty, to avoid the potential GBMI verdict. Particularly in major felonies, a defendant may wish to protect his or her possibilities of parole, and thus be forced to relinquish a potential defense.

For less serious crimes, such as property offenses or minor assaults, it would very nearly comprise malpractice to advise a client to raise an insanity defense. The client will almost certainly spend more time in some sort of locked facility than he or she would on a guilty plea.

Another major issue for the practitioner, but on outside the scope of this article, is the dearth of treatment programs available for the mentally ill in Alaska. Clients who have been to API would rather be in jail; community-based programs are nearly nonexistent. Private institutions are prohibitively expensive. Our jails are currently full of people who should more appropriately be treated in hospitals.

Conclusion

It seems likely that the courts will continue to grapple for some time with the issue of crime and mental illness. The current law is, in my opinion, unconstitutional. Misconceptions on the part of the public have caused the legislature to, in fact, destroy a legitimate and long-accepted exception to the class of persons defined as criminal. Whether the courts will have the courage to restore reason and humanity to the law remains to be seen.

[1]Mr. Meach was on a pass from API when he killed four teenagers. He had previously been found NGI on a murder charge. Mr. Meach raised an insanity defense under the old, broader insanity definition, and was convicted.

[2]John Hinckley shot and wounded President Reagan and several other people. He was found not guilty by reason of insanity and remains locked in a mental hospital.

[3]See *Guilty But Mentally Ill: Broadening the Scope of Criminal Responsibility,* 44 Ohio State L.J. 797, 810–11 (1983).

[4]A version of the M'Naghten test was Alaska's original definition of insanity. In 1973 in *Schade v. State,* 512 P.2d 907 (Alaska 1973), the Court followed the general trend in the State and federal courts and adopted the somewhat broader American Law Institute's (ALI) definition.

[5]The American Bar Association and the American Psychiatric Association have both formally disapproved of the guilty but mentally ill verdict.

[6]The sentencing judge in Ms. Patterson's case found a mitigator and reduced her sentence to three and one-half presumptive years to serve.

Golden friends

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woman, Barbara had a long list of unmentionable female problems that could be waved in the judge's face. No wonder the D.A.s dreaded getting a case with Barbara on the other side.

It was a snap to get a motion non-op'd back then. We waited for the assigned D.A. to leave the office for a few minutes, then gave the papers to Alice, our secretary, to take up the back stairs to Jim Gould. Our theory was that he would sign anything that Alice brought in because her presence distracted him completely. The only drawback to this procedure was that Alice often stayed up there a couple of hours. We were forgiving. We all liked Jim Gould tremendously, even if he was a D.A.

Rick's speciality was demonstrative evidence. I believe Rick is the only defense attorney in the world to get an onion into evidence in a first degree murder trial.

His client was female, and was charged with stabbing an ex-lover. She claimed he stormed through her door while she was peeling the onion. (As she shut the door in his face, the knife just happened to go through his checkbook and into his lung.) The key question was who opened the door first. Rick argued that no one could open a door with an onion in one hand and a large knife in the other. Naturally P.D. investigator Bob Kintzele selected a rather large onion for this purpose. The only difficulty was getting the exhibit sticker to stay on—the skin kept peeling off!

Ron Drathman showed us how to get our clients properly dressed for trial. He once urged an elderly black defendant charged with murder to wear his jail clothes to court on the morning of jury selection. Judge Kalamarides came unglued. "You can't try a man for first degree murder dressed like that!" he roared. He sent the jury back downstairs and ordered everyone at the defense table off to the nearest men's store, which happened to be Stallone's.

Ron directed the defendant to the $100 suits, but the defendant kept reaching for the $400 imports. When they got back to court, the jury had to be re-instructed as to who was the defense attorney and who was the defendant!

It was Larry who taught us how *not* to spring a trap on the opposition. Once Larry was so tickled with a ploy he dreamed up mid-trial that he started confiding it to everyone in the hallway who would listen. Unfortunately, one person willing to lend an ear was the D.A.'s mother.

Another time, Larry was chomping at the bit to expose prosecutor Bill Mackey, known to carry a gun. He was going to do it while the jury was present, in a case where a defendant recently acquitted of multiple murders was being tried for transportation of dynamite. He requested to approach the bench, with the idea of asking for a censure in a loud whisper, while pulling back Mackey's coat tail to expose the weapon. Upon arriving at the bench, Larry noticed a .45 of the judge's laying inches away, ready for action if needed. Larry sheepishly mumbled that he had nothing after all, and went slinking back to his table.

Rick Lindsley relaxes on the Alaska ferry.

We always needed tips on what to do when we were unprepared. Rick waxed inventive here too. In one Kenai misdemeanor, where he hadn't had time to read the file, he discovered on the morning of trial that his client had a hearing problem. Rick decided to holler his way through jury selection. This provoked Magistrate Jess Nicholas, who demanded an explanation. Rick calmly noted that his client could not hear unless he yelled. Nicholas thereupon dismissed the case, declaring that he was not going to tolerate a "yelling" trial.

Other P.D. antics

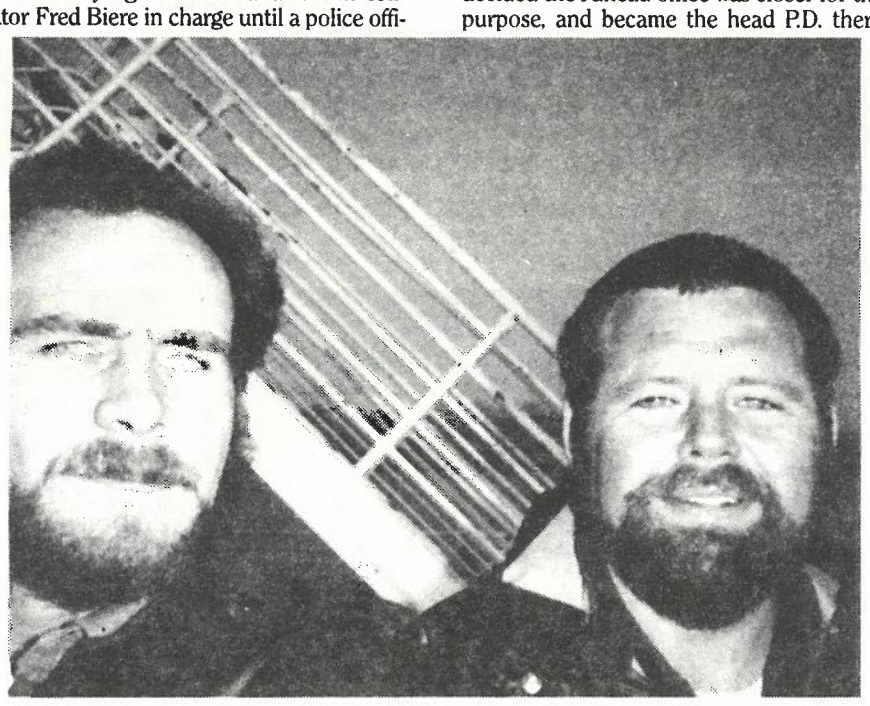
We never lacked for excitement. At one trial of Rick's, the defendant escaped from the courthouse in the middle of the night. It happened after an 11 p.m. verdict, when Judge Kalamarides remanded the poor chap to custody and then decided it was time to go home. The judge left Rick and P.D. investigator Fred Biere in charge until a police officer could get there.

The defendant decided he had to take a whiz. Fred decided he had to take a whiz too. Together, they went to a place in the courthouse where men do this.

There were two stalls. The defendant finished up quickly and walked out. Fred could not do much about it at the time—he had to "finish up" too. By the time Fred could get to the hallway, the defendant was nowhere to be found.

Some months later, the client turned himself in. He accounted for his absence on record by noting that he had not wanted to miss the intervening fishing season.

It was Rick and Bill Bryson who decided that P.D.s ought to have some time out too. Together they started the first rotation, then six-months on/six-months off. Rick and Liz had an apple farm in California that was their secret retirement haven. Eventually Rick decided the Juneau office was closer for this purpose, and became the head P.D. there.



Rick Lindsley (r) and Bob Kintzele enjoy a ferry trip to Juneau in 1983.

Bryson, of course, just traveled.

While Rick was on his first leave, Phil left to defend George Lustig on a federal drug charge. I think Phil was momentarily tired of dreaming up appellate arguments. Perhaps it was because the State had begun to tape record all drug buys and none of us could think of a way to attack them. (The *Glass* rationale had not yet been thought of. Most of us would have been too embarrassed to make that argument even if we had thought of it, for fear of getting laughed out of the courtroom! Phil now claims that he raised it several times, and that it was one of the frivolous motions they used to yell at him for.)

Barbara took over appeals from Phil when he departed. Once again, I inherited her files. I watched her finish her last trial, to see if I could get the flavor of her caseload and a handle on her style. Steve came with me to watch.

The charge was rape. It was 6:00 at night in Courtroom G, before Judge Singleton. As we walked in, the judge and lawyers were arguing over the last of the jury instructions.

Barbara was making an objection, probably her 300th of the trial. Singleton asked for grounds. Barbara flopped down in a huff, indignant that any judge would ask for grounds, especially at that hour. "I don't know!" she retorted. "I just object!" Singleton promptly ruled in her favor.

It was a good thing that Singleton couldn't read her thoughts, and that the courtrooms then did not have the sensitive mikes that they do now. A transcript probably would have contained a few four-letter words. Barbara was diminutive in size, but could make real men blush when the going got tough.

New entrant

My friend Mark ended up working at the agency too, having been in the right place at the right time when Ben Esch decided to move on. Mark greatly admired Barbara's audacity. From her he got the gumption to refuse to do misdemeanors, after only three weeks on the job. He couldn't seem to master the art of interviewing clients whose files contained neither a complaint nor a police report. He jumped right into felonies, with Barbara for guidance.

Barbara and Mark both subscribed to the theory that confidence came from having a *complete* case file, and spreading it all over your office, your car, and the breakfast table. Never mind that the omnibus hearing might start in ten minutes. Once I conceded to Mark that Barbara was living proof that clutter was a sign of genius. I have been paying for it ever since.

One felony that Mark and Barbara collaborated on was a treasure. It was another rape. In fact, three of them. (Later the case gave the Supreme Court the opportunity to reeducate us about joinder and severance.) Mark and Barbara were optimistic becuase only the first two counts had been joined for trial.

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Golden friends

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The defense, to all three, was alibi. In two out of three courts, the victims had said the rapist drove a brown car. In a different two out of three, the victims reported that the rapist was wearing white shoes.

The defendant's wife drove him to court on the morning of jury selection, in a brown car. Needless to say, he was wearing white patent leather shoes.

It was 9:45. They were due in court at 10:00. The only attorney in the office with size 9½ feet was Chris Rigos, who was more prudish than most. Mark tried to negotiate a trade. Barbara added her enthusiasm. She claimed to have once given her blouse to a hooker before a trial, because hers had buttons in the necessary places and the hooker's did not. Finally Chris gave in with a grin.

Chris spent the rest of the day in his stocking feet, however. He wasn't about to wear the client's shoes. Too bad neither Bruce Abramson nor Craig Cornish was around that day. Either one of them would have relished the opportunity.

Barbara had her own problems with shoes. There were always millions in her office, but two minutes before her Supreme Court argument in *Zehrung* she could not find two that made a pair. With the clock counting down to 15 seconds, Chris Schleuss found a matching one—in Barbara's in-basket.

Larry Kulik

Shortell's reign

Brian Shortell took over the agency toward the end of '75. He was a splendid boss, never getting in your way, but generally being there when there was a problem. When we were bursting with emotions, Brian remained impassive, almost nonchalant. His sanity came from sneaking out of the office frequently to carouse with Alex and Larry.

Brian attracted a lot of new faces, including Jeff Feldman, Eric Sanders, John Murtagh, and John Suddock. Grant Callow and Brant McGee showed up as interns, and Pete Mysing returned as a real lawyer.

Jeff Feldman was the first and only P.D. to go home every night at ten of five with his desk clean. He also wrote law review articles on the side. John Suddock and John Murtagh and the rest of us worked on Saturdays because we spent the time from 4:30 till 6:30 every night decompressing—i.e. telling court stories. It was fun, at least until we remembered we had to go to the jail on our way home. On Fridays there was always popcorn and beer. Folks from offices around town would stop by.

Eric was a study in contrasts. He wore a different suit to the office every day, yet managed to portray the resigned, macabre P.D. spirit at its best. He set a record in this department when he planned and hosted something called "Gary Gilmore's Last New Year's Eve Party," inviting all the D.A.s and half of the Anchorage bar.

Some people got John Murtagh and I mixed up. From the back that is, and only on Saturdays, when I tied my hair in a ponytail too. Naturally we all wore identical faded levis, but only John had a Wisconsin Indian Legal Services T-shirt.

Murtagh's shirt prompted us to create a T-shirt for ourselves. With the help of investigator Dave Suwal, we held a contest for this purpose. Mark created the winning design, which featured the scales of justice upsetting a portly police figure plagiarized from a Monopoly game "Get Out of Jail Free" card. Chris Rigos provided the slogan—"A reasonable doubt at a reasonable price." Second place went to a client of mine. She proposed a fist, with the middle finger uplifted, and the motto "The Public Defender. . .a helpful hand."

John Suddock was a steadying influence. He also had a forte that allowed him to last more years at the agency than most people. He excelled at taking naps. Some people thought he was just enigmatically quiet. This may explain the fine reputation enjoyed years later by the law firm of *Kulik, Suddock & Hart*. Frank Koziol had already proved that a P.D. could be quiet yet still effective, but that was because Frank was always working on the *Salazar* brief.

Days of parties

There were some great parties in those days. Perhaps the most (in)famous was held at Doug Pope's house—now the home of our illustrious mayor—immediately following the *Erickson* arguments. The statute of limitations probably has run. Another was Norman Besman's goodbye, where Colleen Ray met John Murtagh for the first time, just as he passed out face down in our dog's water dish. And there was a Halloween party, where Steve Hart came as Judge Moody, complete with glasses, robe, and bare ankles, and Barbara came as a defendant, dressed in jail blues, handcuffed to him.

Hidden talents came out at some of these events. Bruce Abramson did imitations of judges—Judge Brewer in particular—that merited an Oscar. Larry revealed himself as a gourmet cook. Larry was proud of himself in this regard, and justifiably so. Moreover, he took the presence of junk food as a personal affront, to the point where Barbara would bring the cheapest jug wines just to watch his reaction. Larry was so enamored of good food that while representing Charles Meach in his *first* case, in the 70's Larry ordered catered dinners from the Captain Cook to eat in the courthouse holding cell while they went over trial strategy. (Meach's father paid the bill.) Larry also entertained us with stories about how he had been a yellow cab driver—in Oakland—during law school.

Tom Findley (l) and Rick Lindsley join in discussion in Juneau.

Moving on

The fun always ended but the stream of clients never did. Their problems were endless. Their families were tactless. Every one expected victory. Worse, they trusted us to pull it off. The phones never stopped jangling at us. The D.A.s never stopped sniping at us. And the judges never stopped denying our motions. For these and other reasons, sooner or later most P.D.s move on.

Many depart by going out strong—leaving after handling a big case. I think now it's called burnout. Some attorneys, including Barbara and I, left less dramatically. We merely had new job offers.

I was swimming laps in the pool in the basement of the Captain Cook when the idea of applying for District Court came to me. It seemed time for a change. I was almost *tired* of Larry coming by on Friday afternoons to ridicule the cheap popcorn and store-bought onion dip. It was mid '77.

District Court Judge Dorothy Tyner had retired, leaving the Anchorage bench devoid of female verve. The agency seemed well supplied. We had Suellen Tatter, Chris Schleuss, Mary Ellen Ashton, and Debbie Smith. Nancy Shaw had made a return. Mary Killorin and Colleen Ray also were there in body and spirit though not yet on the payroll.

I got lucky. Thanks to the back-patting and stamp-licking of all of the above people, Governor Hammond was convinced that an ex-P.D. would not spring all the deadbeats from jail if appointed to the bench. Alex Bryner especially helped in this regard, by example.

Alex had been appointed to District Court by Hammond a few years earlier. Recently Alex had been called in the middle of the night to set bail on an armed robber. Groggily, he inquired of the police officer how much had been taken in the robbery. The officer thought it was $12.00. "Fine," said Alex, "I'll set the bail at $12.00." "Excuse me?" said the officer. "You heard me — $12.00!" bellowed Alex, and hung up the phone.

The defendant still was in jail at arraignment time the next day. Obviously it had been a reasonable bail!

It was hard to leave the agency. My last hearing was a Supreme Court argument I'd been waiting to do for six months. I was to be sworn in as a judge within a few days.

Fifteen minutes before the argument, I was staring at my office walls, fighting off the usual pre-argument jitters and trying to remember what the case was about. Barbara was giving me pointers. I received a sudden summons to the fifth floor. I thought this peculiar. It seemed a strange time to congratulate me and welcome me to the brethren of the judiciary. I now realize the Chief Justice likely hadn't read his calendar and may have had no idea I was about to appear before them.

Pride cometh before a fall.

I was ushered into the Chief's office. He proceeded to point out that the criminal code had not yet been revised to eliminate cohabitation as a felony, and that I would have to make immediate adjustments in my living situation so as not to compromise the integrity of the judiciary. . .! The shock was just what I needed to gather my wits. The argument went off without a hitch.

There still remained the "integrity" problem, however. Regardless of the obvious double standard, I was not up to a public battle. Moreover, at that stage of my career, it did not seem easy to ignore the directives of a chief justice.

I sought out Alex Bryner to cry on his shoulder. He was short on ideas, but did offer to waive the 3-day waiting period for a marriage license. I thought about it for at least a minute. Suellen had recently married Larry, and she'd survived. What the heck. Alex issued us a formal certificate, declaring that "hardship circumstances" existed.

It was September. Mark was in the midst of leaving for Cordova, where he and Jay Warner, then juvenile intake officer, had scheduled some children's proceedings so they could go duck hunting. Mark had been waiting for a month to try out a new gun. He didn't see any reason to change *his* plans. I barely made the plane.

Mary Wentworth married us a few hours later, after the children's proceedings but before any hunting. It was later summed up by Tom Tatka in the following release:

> The groom wore hip boots over L.L. Bean insulated hunting pants, an L.L. Bean utility belt, and an L.L. Bean plaid shirt with a Cabela camouflage jacket. The ceremony terminated case CP 414E, In the Matter of Mark Weaver, A Child in Need of Supervision. Mr. Buckalew Weaver, a canine from Anchorage, served as best man.
>
> The bride, when asked to comment on the ceremony, stated that her campaign had begun many months earlier, with the assistance and urging of many friends and associates. "I am deeply grateful to the many women's groups in Alaska who supported my candidacy for this position and to the many attorneys and people who aided me in this effort," she told reporters. When reminded that this approach to wedding plans seemed somewhat unusual, she corrected her statement by saying that she had prepared her comments for her upcoming swearing in as District Court Judge, and must have gotten the ceremonies mixed up.
>
> The groom was quite outspoken about the merits of the day's events. "I had six good wing shots this morning and Buck (the best man) performed admirably in recovering through marsh grass and water. The low clouds and scattered rain were helpful in keeping the birds down," he said. The groom was also enthusiastic about future prospects for the union. "I find the full and modified to be the most effective when coupled with the excellent craftsmanship of the Merkel. The combination of light weight and easy handling makes this far superior to a Browning. I fully expect to have a honker for Thanksgiving."
>
> The bride was attended in absentia by the Honorable Robert Boocheever, Chief Justice of the Alaska Supreme Court.

We returned to Anchorage the next day. I didn't dare miss the swearing in.

There was a celebration of both events at a party at Susan Connolly and Fred Biere's house in Fairview. Susan now is an insurance defense lawyer in Eugene. We barbecued everything under the sun until it was too late and too cold to stand outside. Larry arrived just as it was getting dark, carrying a tiered cake still warm from the oven, with frosting dripping down the sides. I'm certain it was a Julia Child recipe. There were two figurines on top of the cake. The bride wore black and the groom carried a shotgun. Regrettably, I couldn't keep them because they had been borrowed from Paul Bryner's toybox.

A few years hence, Steve and Barbara also ran off to Cordova to be married by Mary Wentworth, in September. It was the first and only trend I ever started.

More departures

When Barbara left the agency the following summer, there was less fanfare but certainly greater loss. Her farewell bash was hosted by Eric Sanders, whose successful negotiation of a bush case had just yielded a dozen fresh salmon. There was a huge crowd at Eric's not so huge house. Chris Schleuss, who lived next door, got stuck with the cooking, upon discovering that Eric's abilities were limited to sprinkling charcoal lighter on the

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Group life insurance update

The Alaska Bar Association would like to take this opportunity to remind you of the group term life insurance program available to you through the association. In particular you will be interested to learn that the cost of the basic plan has been reduced substantially (20–30% for younger ages). In addition the optional program was expanded to provide higher levels of coverage for members and spouses several years ago. The program consists of two parts.

First a basic amount of $50,000 for members under age 70. You are eligible to apply during the month of June 1986. Appropriate application forms will be sent to you this spring for the June enrollment. The quarterly rates for the $50,000 of basic group term life are:

AGE GROUP	QUARTERLY PREMIUM
Under 30	12.00
30–34	15.00
35–39	18.00
40–44	25.50
45–49	45.00
50–54	91.50
55–59	153.00
60–64	270.00
65–69	384.00

Once you are covered under the basic plan you are eligible to add to this coverage in units of $10,000 up to an additional $100,000. This optional coverage is also available to spouses or members. The monthly rates for the optional life insurance follow:

AMOUNT OF COVERAGE	MONTHLY PREMIUM						
	UNDER 40	40–44	45–49	50–54	55–59	60–64	65–69
10,000	2.00	3.50	4.50	7.00	11.50	17.50	26.50
20,000	4.00	7.00	9.00	14.00	23.00	35.00	53.00
30,000	6.00	10.50	13.50	21.00	34.50	52.50	79.50
40,000	8.00	14.00	18.00	28.00	46.00	70.00	106.00
50,000	10.00	17.50	22.50	35.00	57.50	87.50	132.50
60,000	12.00	21.00	27.00	42.00	69.00	105.00	159.00
70,000	14.00	24.50	31.50	49.00	80.50	122.50	185.50
80,000	16.00	28.00	36.00	56.00	92.00	140.00	212.00
90,000	18.00	31.50	40.50	63.00	103.50	157.50	238.50
100,000	20.00	35.00	45.00	70.00	115.00	175.00	265.00

Appropriate enrollment applications will be sent to you this spring with mailing of basic plan enrollment forms.

Any questions in the interim may be addressed to Gerry Downes, Insurance Administrator, Controller at the association's offices.

JOE RUDD SCHOLARSHIPS
1986–1987
Rocky Mountain Mineral Law Foundation

At the time of his death in an airplane accident in December of 1978, Joe Rudd was acknowledged as the preeminent natural resources attorney in the State of Alaska and was well-known nationally for his expertise. In recognition thereof, his family and friends and the Rocky Mountain Mineral Law Foundation have established the Joe Rudd Scholarship. The first scholarship grants were awarded for the academic year commencing in the fall of 1980.

(1) Purpose. The purpose of these scholarships is to encourage the study of natural resources law by well-qualified law school students who have the potential to make a significant contribution to the field of natural resources law.

(2) Eligibility. Second-year, third-year and graduate law school students are eligible to receive the scholarship; provided, however, that first-year law school students who can demonstrate a commitment to study natural resources law are also eligible to receive the scholarship.

(3) Field of Study. In order to be eligible, a law school student must be undertaking the study of natural resources law.

(4) Law Schools. The scholarship can only be used in connection with a program sponsored by one of the law schools which is a Governing Member of the Rocky Mountain Mineral Law Foundation:

University of Alberta
Arizona State University
University of Arizona
Brigham Young University
University of Calgary
University of California–Davis
University of California–Hastings
University of Colorado
Creighton University
University of Denver
Gonzaga University
University of Idaho
University of Kansas
Lewis and Clark College–Northwestern
University of Montana
University of Nebraska
University of New Mexico
University of North Dakota
University of Oklahoma
University of the Pacific–McGeorge
University of South Dakota
Stanford University
University of Texas
University of Tulsa
University of Utah
University of Washington
University of Wyoming

(5) Amount of Grants—$2,500–$5,000. These scholarships are to be awarded on an annual basis. Several scholarships are awarded each year, and it is estimated that the amount of these grants will be between **$2,500 and $5,000 per year.**

(6) Criteria for Selection. The following criteria will be used to determine the recipients of the scholarships:

(a) potential to make a significant contribution to the field of natural resources law;
(b) academic ability;
(c) leadership ability; and
(d) financial need.

This scholarship is open to all governing member law school students. Though some preference is given to Alaska residents and students, many past scholarship recipients have had no Alaska connection.

For further details and Applications Forms, contact:

Harris Saxon
Guess & Rudd
510 L Street, Suite 700
Anchorage, Alaska 99501

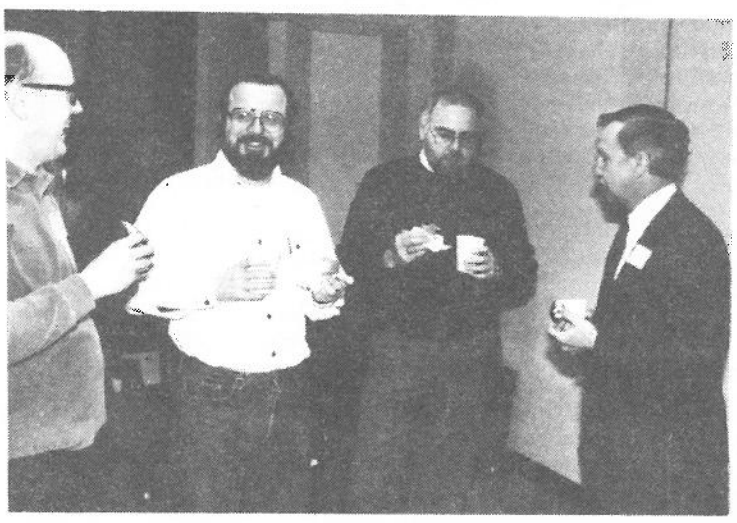
or:

Rocky Mountain Mineral Law Foundation
Fleming Law Building, Campus Box 405
University of Colorado
Boulder, Colorado 80309-0405
(303) 492-6545

DEADLINE FOR SUBMITTAL: April 1, 1986

Bar members attend Younger

Dick McVeigh, Mike Spaan and Bob Mahoney (l to r) huddle during Off the Record gathering.

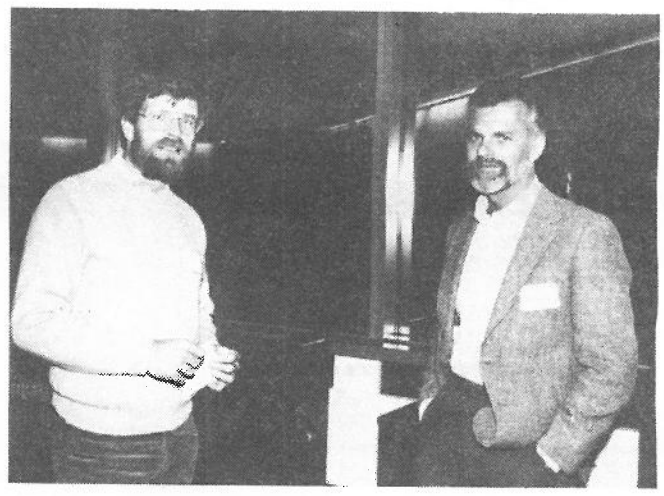


Judge J. Douglas Williams II, Bob Bundy, Jack Clark, and Bob Mahoney (l to r) take a break.

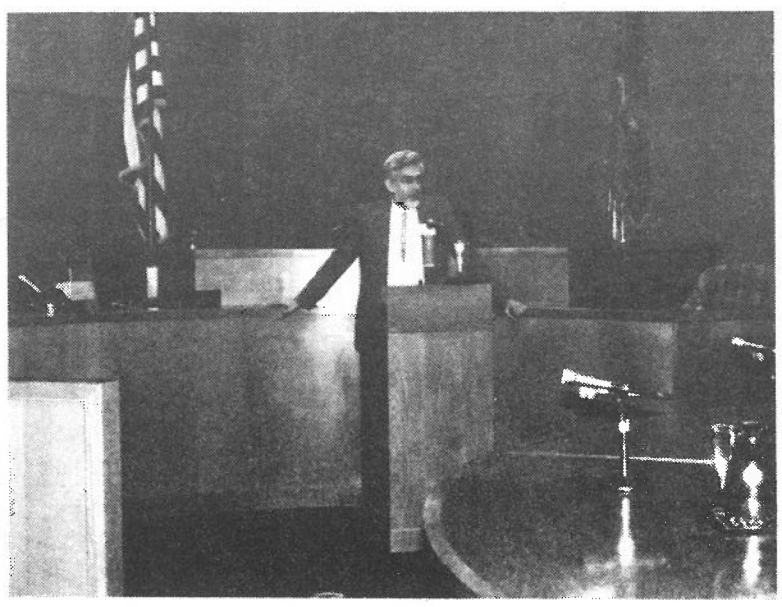
A crowded courtroom greets Off the Record speakers.

U.S. District Court Chief Judge James M. Fitzgerald takes the podium during Off the Record seminar.

Dick McVeigh, Ken Jarvi and Cabot Christianson (l to r) go off the record.

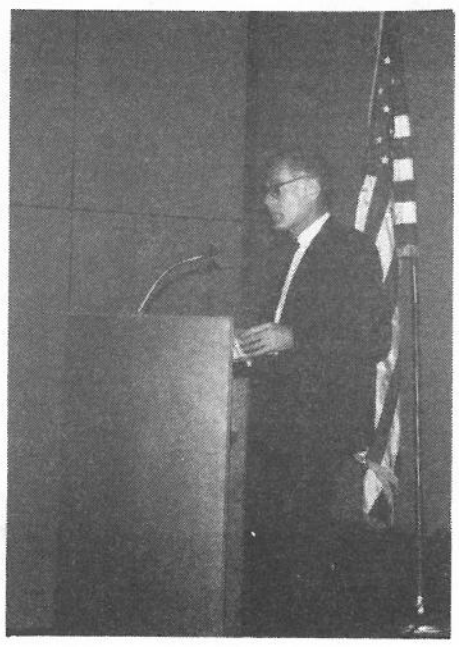


John Lohff (l) and Jim Stanley pose for the Off the Record camera.



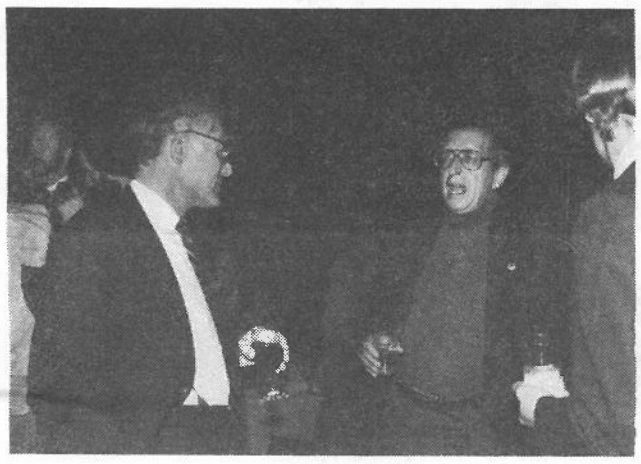
Judge Russel Holland, U.S. District Court speaks at Off the Record seminar.

federal Off the Record, seminars



Irving Younger addresses bar seminar.

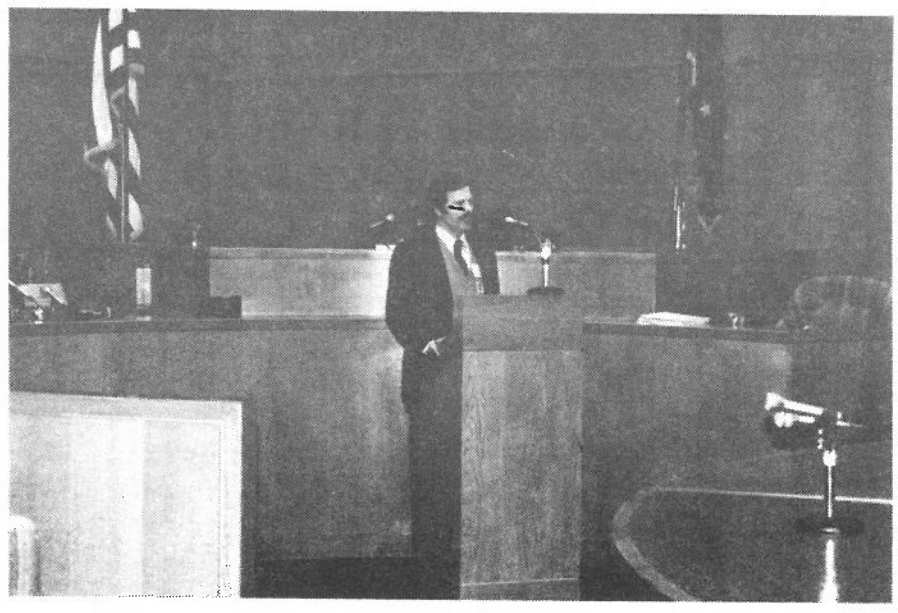
Tom Flippen (l) and Bob Wagstaff chat during a break in the Jan.. 1986 Irving Younger seminar.



Irving Younger (l) listens to James Shellow during seminar break.

Bob Bundy talks with Bethel's Laurie Otto during Irving Younger seminar.

Bar members (l to r) Bill Bryson, Olof Hellen, Maryann Foley, Jeff Feldman, Russel Holland, Mike Spaan, John E. Roberts and J. Douglas Williams II listen to a point at Off the Record session.



U.S. Magistrate John E. Roberts addresses Off the Record seminar.

Golden friends.....continued from page 16

barbecue pit. Among the highlights of the evening, people went upstairs to look at all the clothes in Eric's closets. It was better than shopping!

Barbara left to become an A.G. in Natural Resources. It was a step toward leading a calmer life and eventually becoming a mother.

We each thought it important to leave something of value behind at the agency.

Barbara left a black dress and red slip that had resided for years on the coat rod by the copy machine. It was the female equivalent of the tie that some lawyers hang in their office for emergencies. Always anticipating the next battle, Barbara probably thought that a client might need it some day.

I left next to the dress a stylish leather coat with fake fur trim that had been given to me by a defendant to show his appreciation. The coat had come in a plain paper bag with a Nordstrom's tag on it. The price was cut off, but the tag did not contain the secret code that the store puts on the back so that it can determine the price if the gift is returned.

Barbara had once represented the client too. We silently agreed he could not afford to shop at Nordstrom. Furthermore, all of his cases fell in the category of property crimes. We decided to leave that coat right out in plain view. If the D.A.s wanted it, they could come get it!

Memories of fondness

I don't remember a dull moment at the agency. The mix of people from all levels of society contributed to this. But what made it so stirring, almost intoxicating, was the hilarity and sport inspired by people like Barbara and Larry and Rick. Fearless themselves, they made the rest of us dare to try our hand.

I suspect I am not alone in being unable to think of the past without thinking of them. Other people knew them better, but few had greater need to look up to them.

Most of us at the agency then were young, both in years and in experience. We did not know what lay ahead. We did know that we had a job to do. That job required us to defend unpopular positions, often for losing causes, and often alone. Rick and Barbara and Larry taught us how to do that job well, and with imagination. They taught us to laugh while we did it. They gave us courage.

Now they are gone, abruptly and so unfairly. Their deaths have left us numb.

When it rains, it hails.

•

Larry Kulik died in May 1981, in a scuba diving accident in Hawaii. He was 36.

Barbara Miracle did in May 1985, after a plane crash in Turnagain Arm. Her two sons died also. She was 39.

Rick Lindsley died in June 1985, of cancer, at home in California. He was 38.

Larry Kulik acts the gourmand

Elaine Andrews (l) and Barbara Miracle at Barbara's house (1980).

Larry Kulik with his daughter Amanda

Credit union.....continued from page 18

dends. The Share Draft Account earns a 6% dividend, compounded and paid quarterly and the Investor Draft Account earns money market rates on a daily basis, compounded and paid monthly on accounts which maintain a balance of $2,000.00 or more. There are no fees for Share Draft or Investor Draft Accounts which maintain minimum monthly balances of $500.00 and $2,000.00, respectively. As an added benefit, Overdraft Protection is available from the member's Share Savings Account or Credit Line Loan.

These services are provided through Alaska USA's statewide system of branch offices and through complete mail and telephone service. In addition, Alaska Option automated teller machine service provides members with fast, convenient access to their credit union accounts at locations throughout Alaska and at Oak Harbor, Washington.

These and many other services are available to the members of Alaska USA. For additional information, please contact the credit union at its nearest office or call (907) 753-0505.

Random Potshots

John Havelock

It is now a commonplace that each lawyer picks jurors to get a panel biased to favor the client's perspective. The idea that a jury should be a cross-section of the community holds little currency around the court house. But from the point of view of community interests in justice, this is a mistake.

As the anniversary of the birth of Martin Luther King reminds us, we are a nation of minorities—of economic status, of educational attainment, of intelligence levels, of health status, of employment, of regional residence, of family status, of religion, and according to a great many other cuts that are used for some purposes of importance in our society. None of these discriminations however has the potential for destructiveness to the social fabric as ethnicity or race.

The peremptory challenge, as it is now designed and used, is the enemy of jury participation by racial and other conspicuous minorities. While there are some obvious, important values to be preserved in the peremptory challenge, these values should be weighed against the neglected interest of the whole society in participation in the jury process, particularly in criminal proceedings.

While use of the peremptory challenge is a valued tool for assuring a representative and impartial jury, it has no constitutional footing. In the United Kingdom, for example, the defense is given seven peremptory challenges by statute while the prosecution has none, without our relegating that system beyond the pall.

To put the worst case sharply: the Alaska system which permits the public to watch Eskimo or Black veniremen excused from the jury panel in a case involving an Eskimo or Black (or other minority) defendant on the virtually unbridled discretion of the prosecutor, gives too much away to the value of the peremptory challenge.

There is, of course, a considerable constitutional history to this problem that starts with *Swain* v. *Alabama,* (which has since been substantially eroded and is coming up for review this term last time I looked (*Abrams* v. *McCray*)) and that history has an Alaska counterpart in *Mallott* v. *State* and related cases (which at least cry out for review in the light of subsequent theoretical development in *Wheeler* and *Soares*).

Havelock Confesses

Confession: I have had 80% of a law review type of article by my desk on this subject for a couple of years but it gets harder and harder to get back to finish it. However, the merits of the proposal are so clear in relation to the evil addressed that the "Bar Rag" is a reasonable forum to present a modest proposal for reform. The Editor does not require citations or footnotes (having found in his own practice that he does very well without them) and the audience is too well informed to need them.

What I have to contribute to this debate is the observation that the cost of continued, protracted appellate litigation on this subject in Alaska, and in many other states similarly situated, and the underlying injury to the public interest while the wait goes on are unnecessary. The issue should not be addressed by waiting for a case to come along but through an exercise of court rule making power.

Rule Making Beats Adjudication

Why should the Court go through the torture of determining whether its rule violates a constitutional right when it can avoid the question by writing a better rule skirting even the constitutional penumbra?

In the adjudicative mode, the Court must pay the price of letting someone off, or at least face a new trial, in order to justify constitutional principle. Instead of looking at the application of a suspect rule to a particular case in litigation, through its rule making power, the Court can look for neutral principles applicable to a broad range of situations. The Court has a rules committee that could gather information on the subject and define the alternatives as a foundation step to the Court's deliberations. The change could be prospective, avoiding the hiatus that now occurs when uncertainty is introduced by a pending challenge. Rule making also is more flexible than constitutional edict.

The answer does not lie in throwing out the peremptory challenge but in giving the trial judge an independent power to assure the representative character of the jury rather than raising the issue only *in extremis* upon review.

Mechanics of Change

There are a number of ways in which the judge could be given that independent role. For example, it could be given to opposing counsel to contest a proposed peremptory challenge (while it is still unknown by the jury) whenever it is aimed at a member of a "cognizable group," as that term is used in constitutional litigation. If the challenge is contested, then the proposing counsel should be required to show a specific bias, as Justice Mosk described in *Wheeler,* "a bias concerning the particular case on trial or the parties or witnesses thereto." This rule might be relaxed to require the showing of a pattern of exclusion for groups which are well represented on the panel.

The specifics of how the discretion might be exercised might best come from the trial judges who must work with the mechanics of the jury selection. For example, it may be appropriate to adopt a "struck jury" system for appropriate cases, where the number of names drawn is equal to twelve plus the number of challenges to be allowed.

Whatever the mechanical specifics, at the general level, the judge must be empowered to oversee the exercise of the peremptory challenge and be permitted to disallow any of them, that are not well supported, if he believes that allowing the challenge will significantly impair the representative character of the jury.

Continued on page 23

The years in law

. . . . . continued from page 4

Mr. Justice Dimond

There were even some nasty incidents of physical abuse of his children and threats of physical violence to John.

If John was somewhat reserved and quiet before this incident, the ensuing public outrage toward him could only have made him more so. Of course, he is not the only judge who has had to suffer the scorn of persons who did not fully understand the basis of a decision. It is a bitter experience which many have had to endure. John bore up under these criticisms with dignity and courage, but it must have been painful.

A legal craftsman

About John's characteristics as a jurist, some observations should be made. Both as a lawyer and a judge he was a highly skilled craftsman of the law. His keen mind and his scientific training surely played a part. In his working methods he was thorough, efficient, and reflective. He always considered the arguments carefully before deciding an issue. Invariably he mastered the parts of the record which were pertinent to each appeal. He was diligent about getting his draft opinions out as soon after oral argument as possible.

John's judicial writing was clear and exemplified a good expository style. At times his writing had an apparent simplicity, but he was quite aware of the complexity which lay beneath the surface of many of the problems presented for decision. He was quite able to deal with technicalities, but he preferred to avoid them if it was possible.

Appellate courts engage in a good deal of writing of internal memoranda about draft opinions. John's internal memoranda tended to be written in clear, understandable language, and they could be highly persuasive. The historic norm, quite properly, is that internal memoranda are not published. But in John's case it means that some highly effective juridical work will go unseen.

He had a fine comprehension of philosophical problems, but he indulged in general philosophical speculation only to the extent that it was absolutely necessary to the decision at hand.

Sometimes I used to chide John about his philosophical methods: they resembled those of Aristotle and Thomas Aquinas (as updated by Jacques Maritain). He often used to say with a smile, "I think you're right." As time has gone by, I have realized that it certainly is better to think like Aristotle and Thomas Aquinas than not to think coherently at all. And perhaps it is better than falling into the analytical anarchy which pervades so much of modern philosophy.

Another aspect of John Dimond was his humanitarianism. Without being naive or gullible, he had a sensitivity and concern for those who were disadvantaged in our society. He was a great believer that the law should promote the humane use of human beings.

His basic kindness and gentility have been remarked upon so often that they are almost taken for granted.

An indefatigable jurist

During his first ten years on the court John never took a truly adequate vacation. He was constantly haunted by the spectre of the work undone. However, a set of interacting medical problems began to take their toll. After various surgical procedures in 1971, he was left so weak that he could not carry on any longer. He retired.

By 1973, he had regained his strength sufficiently that he returned periodically to serve as a senior justice and help out with the growing caseload. During the years of the Alaska oil pipeline construction boom the court was severely overloaded. John's efforts were greatly appreciated by the other members of the court.

John went on serving as a senior justice until the end, and was working on appeals at the time of his death. We may ask why he continued to work, to the limits of his strength, even during the later years when he could have rested from a lifetime of hard toil. One answer, of course, is habit. Another answer is that it was consonant with his personality traits. And as with most of us, it was important to be needed.

But there may be a more subtle reason for his going onward—the inherent fascination of the work itself. This has nowhere been better described than by the great Judge Learned Hand, who in 1927 said this:

> A judge's life, like every other, has in it much of drudgery, senseless bickerings, stupid obstinacies, captious pettifogging, all disguising and obstructing the only sane purpose which can justify the whole endeavor. These take an inordinate part of his time; they harass and befog the unhappy wretch, and at times almost drive him from that bench where like any other workman he must do his work. If that were all, his life would be mere misery, and he a distracted arbiter between irreconcilable extremes. But there is something else that makes it—anyway to those curious creatures who persist in it—a delectable calling. For when the case is all in, and the turmoil stops, and after he is left alone, things begin to take form. From his pen or in his head, slowly or swiftly as his capacities admit, out of the murk the pattern emerges, his pattern, the expression of what he has seen and what he has therefor made, the impress of his self upon the not-self, upon the hitherto formless material of which he was once but a part and over which he has now become the master.[22]

When Judge Hand spoke of being the "master" he meant it in same sense that one refers to one who is a master at carpentry, or science, or a master builder: one who has mastery over the materials with which he works and who gains satisfaction from being a fine craftsman. He said,

> ". . .Whether it be in building a house, or in planning a dinner, or in drawing a will, or in establishing a business, or in excavating an ancient city, or in rearing a family, or in writing a play. . . in all chosen jobs the craftsman is at work, and the craftsman, as Stevenson says, gets his hire as he goes."[23]

Some panegyric utterances

In October of 1985, a memorial ceremony was held in a court room in Juneau, with Chief Justice Rabinowitz presiding.

The first speaker was Judge Robert Boochever of the United State Court of Appeals, Ninth Circuit. He and John had practiced in the same law firm in the 1950's. Later they were colleagues for eight years on the Alaska Supreme Court. Judge Boochever stressed that, "He had an abiding concern that those who lacked influence, in the give and take of the political process leading to the passage of laws, have adequate protection in the courts." He then went on to describe two (of several) landmark constitutional decisions[24] written by John which predated those of the United States Supreme Court.

The next speaker was Justic Warren W. Matthews. He spoke of John as "an unusually thoughtful and reflective person."

> ". . .thoughtful in the sense that he would never fail to consider the consequences of the particular ruling that he was about to make, the consequences for the future. And he was an excellent writer. . . . He always used very simple words when simple words would do, and he did not use legal jargon. . . . He had a belief in the worth of the individual, personal choices, personal economy. He had a tremendous belief in the worth of a strong family as the basis of a healthy society. He had a distrust to some degree of the beneficence of large institutions and government. And he had a strong belief that law enforcement techniques had to be moral and straightforward. All of these themes are apparent in his opinions."

Senior Judge James A. von der Heydt of the United State District Court conveyed the condolences of the other judges of that court. He had known John for 34 years. He mentioned many of the same characteristics as did the other speakers.

The writer of this article covered some of the biographical details which have been set forth earlier.

Robert C. Erwin, who served on the Alaska Supreme Court for eight years and was a close friend of John Dimond, spoke next. He had to abandon part of his prepared remarks because the same topics had been discussed by other speakers. But he made some distinctive points. One was John's great interest in child development, and his marvelous ability to communicate with children and young people. Another point was that John's character traits made it possible for the people of Alaska to trust the new judicial system. In summing up he said,

> "The Alaska Court System reflects John Dimond and it will always do so because John made the court for a modern Alaska, and it will always bear his standard. . . . I will never walk into a courtroom without thinking of John."

Margot Knuth had been John's law clerk in the early 1980's. She stressed how much she had learned from working under him. For example,

> ". . .He always remembered that the State of Alaska is nothing more than a collection of individuals, and the labels 'appellant' and 'appellee' are just abstract terms for identifiable people."

By her praise she did not mean to imply that he was a perfect saint. Rather, "he was just your ordinary, run-of-the-mill saint."

Superior Court Judge Walter L. Carpeneti had also once been John's law clerk. After dwelling on John's perseverance and courage, he said,

> "His faith taught, and he truly lived the belief, that a different and higher entity endowed each of us, every person on earth, with inherent worth and with intrinsic dignity. And thus, for John Dimond, it was the business of the law and the duty of judges, and the duty of every one of us in our lives, to respect and uphold the inherent dignity of every other person."

Judge Carpeneti then quoted from a speech that John had made. It emphasized that one who judges others must retain a large measure of empathy and compassion. In John's own words:

> ". . .The jurist who is vested with the power and authority to administer justice among the persons that appear before him, seeking justice, must always remind himself that his authority is derived from the consent of those with respect to whom he exercises such authority, and that he is a servant of his fellow men and women, and not their master. There is no place in the judiciary for tyranny or pride or arrogance, the very antithesis of compassion and humility. . . . There is room only for a humane recognition of the dignity of men and women, regardless of their creed, their color, their race, or their situation in life."

Thomas B. Stewart, Senior Judge of the Superior Court, spoke next. He had known John since childhood. As he said,

> "The usual picture of John Dimond is of a tall, sometimes gaunt, quiet man of dignity, who might be seen walking slowly, erect, and alone on the streets of Juneau or Anchorage, weighted with cares and concerns of his high position on our highest court."

After hearing so many portrayals of the serious John Dimond, Judge Stewart spoke of the fun loving aspect of our late friend, and how, in the game of life, "He was always just a little ahead of me." There was one exception, however. At Thanksgiving dinner in 1946 at Delegate Bob Bartlett's home in Washington, D.C., Tom was able to put away four helpings of turkey, while John gave up after three.

At the close of this ceremony, Chief Justice Rabinowtiz spoke, among other things, of how John had been instrumental in diminishing some severe internal tensions that existed at certain times within the Alaska Supreme Court. He said, "John was the cement at the time when our court system at the very top could have blown apart."

At the beginning of the ceremony, the Chief Justice had announced that the state courthouse in Juneau will be named the John H. Dimond Courthouse.

Some joys and pleasures

To many persons John projected an image of someone who was austere and overly serious. Part of that image stemmed from his modesty and shyness, but part of it came from his concern about being misunderstood if he laughed too publicly about the foibles of other human beings. In private, among person with whom he felt relaxed, he often laughed about some of the absurdities of the human drama about him. He was particularly amused by some of the colorful personalities who had been part of the scene in earlier Alaska.

Religion is an intensely personal thing. It played a large part in John's private life. But for him it was not merely a set of duties and obligations, it was a source of positive joy. During his years as a lawyer and judge he often served as an acolyte at early morning Mass. He did it because he enjoyed it.

For many years he was a mainstay of his tiny parish church in Douglas, doing physical maintenance there as well as participating in the services.

Even for him, adherence to his ancestral faith required some difficult adjustments. When the Roman Church required Mass to be said in English rather than Latin it was not an easy thing for him. As a youth he had been deeply infused with the Latin language and the old liturgy—for him it had intimate personal meaning. It was also difficult for him when the church encouraged the entire congregation to sing at Mass and other services. He had been a member of an outstanding glee club as a university undergraduate. He had a fine baritone voice, and he was quite sensitive to musical textures. It was difficult for him to hear large numbers of people singing off key and out of time. Somehow he learned to put up with it.

Part of John's religiosity as an adult was related to his experiences in the military service. He once told me that on the day that he lay wounded in a putrescent swamp on Bougainville, bleeding heavily, he was absolutely certain that he would then die. When he survived, he vowed that he would cherish each day that he was given, and live as fully as possible according to the values that meant the most to him. One of those values was the practice of his religion.

Not many know, though it is no secret, that in his later years John was ordained as a eucharistic minister. This meant that he administered communion to the sick, the lame, and the elderly. Once again, he did it because it gave him joy.

John's musical tastes ran heavily to classical works. He spent a good deal of time in his later years listening to his favorite composer, Wolfgang Amadeus Mozart. His reading pleasures were mostly in the fields of biography and history.

One of his lifelong enjoyments was walking and hiking in the natural beauty of Alaska. During many years, he was a great hiker of the Perseverance trail behind Juneau. (It seems fitting that he should want to hike to an old mining camp named "Perseverance.") In his later years, as his physical capacity diminished, he went more often to the old mining area of Treadwell, south of Douglas. He often took his children, and later his grandchildren, with him, visiting with neighbors along the way.

He greatly enjoyed playing golf when he could get free to engage in it.

In his later years, his grandchildren would come by and "shout him out." They would come bursting into the house crying, "Papa John, Papa John, take us for a hike!" His large eyes would light up. He would don a coat—and a sturdy pair of size 14 boots—and off they would go.

* * *

Both as a jurist and a person John left a great legacy to Alaska and its people. If, as Alexander Pope said, "the last Word is the Word that lasts longest," then John Dimond will have a lot to say for many years to come.

[1](Ed note: Footnote number 1 appeared in the first part of this article).

[2]E. Gruening, *The State of Alaska*, 317 (N.Y. 1954).

[3]*Alaska Steamship Company v. Mullaney*, 84 F.Supp. 561 (D.C. 1st Div. Alaska 1949).

[4]*Alaska Steamship Company v. Mullaney*, 180 F.2d 805 (9th Cir. 1950).

[5]*Martinsen v. Mullaney*, 85 F.Supp. 76 (D.C. 1st Div. Alaska 1949); *Anderson v. Mullaney*, 91 F.Supp. 907 (D.C. 1st Div. Alaska 1950); *Pacific American Fisheries, Inc. v. Mullaney*, 191 F.2d 137 (9th Cir. 1951); *Pacific American Fisheries, Inc. v. Mullaney*, 105 F.Supp. 907 (D.C. 1st Div. Alaska 1952).

[6]*Anderson v. Mullaney*, 191 F.2d 123 (9th Cir. 1951).

[7]*Mullaney v. Anderson*, 342 U.S. 415 (1952).

[8]*P.E. Harris & Company v. Mullaney*, 87 F.Supp. 248 (D.C. 1st Div. Alaska 1949).

[9]*Hess v. Mullaney*, 91 F.Supp. 139 (D.C. 4th Div. Alaska 1950).

[10]*Mullaney v. Hess*, 189 F.2d 417 (9th Cir. 1951).

[11]*Hess v. Mullaney*, 102 F.Supp. 430 (D.C. 1st Div. Alaska 1952).

[12]*Hess v. Mullaney*, 213 F.2d 635 (9th Cir. 1954).

[13]*Chugach Electric Association, Inc. v. Alaska Industrial Board*, 122 F.Supp. 210 (D.C. 1st Div. Alaska 1954).

[14]*Alaska Industrial Board v. Chugach Electric Association, Inc.*, 245 F.2d 855 (9th Cir. 1957).

[15]*Alaska Industrial Board v. Chugach Electric Association, Inc.*, 356 U.S.20 (1958).

[16]Walter Hodge was appointed as United States District Judge not long after that. He was replaced by Harry O. Arend. In 1965, Justice Arend was replaced by Jay A. Rabinowitz. The next change was in 1968 when the court was expanded to five members. At that time, the writer and George F. Boney were appointed to the court.

[17]This could well be the subject of several articles of a more "legalistic" nature. It would require a considerable amount of time and scholarly effort to discuss and summarize John's contributions to the growth of law and the development of Alaska's legal system.

[18]*Beaulieu v. Elliott*, 434 P.2d 665 (Ak. 1967).

[19]See, e.g., R. Parks, "The Evaluation of Earning Loss in Alaska Courts: The Implications of *Beaulieu* and *Guinn*," 2 Alaska L. Rev. 311 (1985). The author of that article concludes that empirical evidence supports the assumptions on which *Beaulieu v. Elliott* was based. Id., 336. What this means is that to the extent that the assumptions underlying *Beaulieu* were based on intuition or a "hunch," the hunch, in the main, turned out to be correct.

[20]362 P.2d 932 (Ak. 1961).

[21]374 P.2d 316 (Ak. 1962).

[22]L. Hand, Commencement Address, "The Preservation of Personality," Bryn Mawr Alumnae Bulletin (Vol. VII, No. 7), pp. 7–14 (Oct. 1927); reprinted in *The Spirit of Liberty; Papers and Addresses of Learned Hand*, (N.Y. 1952), pp. 30–46.

[23]Id.

[24]*Application of Park*, 484 P.2d 690 (Ak. 1971); *Alexander v. City of Anchorage*, 490 P. 2d 910 (Ak. 1971).

Potshots.....continued from page 21

Racially founded unfairness is surely still among the most serious problems of the justice system. The appearance of fairness is spoiled for all to see when the only Black or Native person is removed from a panel of jurors considering judgment on a person of the same race or where the converse case arises in Barrow and the only non-Eskimo person is removed from the panel for no apparent reason. Important as the peremptory challenge is, it is not sacrosanct. Fine tuning of the rule can preserve its usefulness while eliminating a persistent blight on the justice system.

POST SCRIPT. So help me, when I delivered the above to the editor, I had no idea that Irving Younger would make the Wheeler-Soares revision to the peremptory challenge the feature of his trial practice CLE here in Anchorage on Saturday Jan. 18.

By way of more precise reference, Younger noted that the U.S. Supreme Court will be reviewing the question in *Booker* v. *Jabe*, cert. granted Oct. 29, 1985. Mr. Younger, a realist, a former prosecutor (and former everything else), made no bones about the practical need of the trial lawyer to use racially founded stereotypes as a basis for considering peremptory challenges so long as the opportunity exists. His views are expanded upon in "Unlawful Peremptory Challenges," from the 1982 "The Judges Journal," American Bar Association, reprinted in the CLE materials.

Everything in Mr. Younger's presentation supports, from my point of view, the urgency of having the issue approached from the point of view of rules revision instead of litigation.

There is in Mr. Younger's article a red herring. The Wheeler-Soares doctrine arose in a context where the prosecutor declined to state his reasons for the apparent, systematic exclusion of Blacks. Mr. Younger suggests that under a Wheeler-Soares regime, the prosecutor will offer reasons such as, "blacks will be prejudiced against the prosecution in this case," etc. Of course, this is not the case.

Prosecutors will say, "the man crossed and uncrossed his legs on voir dire, your honor, which I believe is a sure fire indication of his prejudice," etc. Whatever rule modification we come up with, it is hopeless to let it turn on the state of mind of the prosecutor. The narrow doctrinal basis that Professor Younger proposes (prosecutorial duty to seek justice), would force this result. No, I still believe that, considering contemporary standards of justice, we cannot permit the use of peremptories to destroy the random approximation of a community's racial diversity on the jury. We are, after all expounding on a constitutional policy founded in bloody history. Neither the bar nor the body politic can afford to provide on the jury a snug, last home for officially sanctioned racism in American life.

The best way to solve our problem without an awesome amount of doctrinal fumbling in litigation is by rule. A rule does not have to worry about the niceties of its doctrinal foundation. A rule can draw a bright line through doctrinal haze. A rule can grant a potent discretion to the trial judge which will soon slow the stream of hairsplitting appeals.

Professor Younger closes rhetorically by asking whether there isn't something to be said for a system that has done the job for centuries. Those are centuries of institutionalized racism, Professor Younger, and the job done so well included keeping Blacks in their place.

Midwinter bar meeting discusses insurance crisis

By Donna C. Willard
Executive Council,
National Conference of Bar Presidents

At the midwinter meeting of the American Bar Association in Baltimore, one of the hottest topics among state and local bar leaders was the malpractice insurance crisis. Rates for coverage are on the increase with premiums rising from 100% to 800% around the country if policies are attainable at all. Furthermore, premium dollars are buying less. Exclusions are being broadened and, in some instances, costs of defense are being included in policy limits. Industry officials do not anticipate any improvement until at least sometime in 1987.

At a meeting of small unified bars, chaired by Harry Branson, President of the Alaska Bar Association during the sessions of the National Conference of Bar Presidents, the subject of malpractice insurance dominated the discussion. Seven of the smallest bars, including Montana, South Dakota and West Virginia, have jointed together to form a regional captive insurance company to provide coverage for their members.

One of the most exciting new programs being sponsored by a bar association was unveiled by the New Jersey State Bar. Its sight and life program, utilizing a small card which can be attached to a drivers' license, encourages the donation of parts of the body upon death.

At relatively little expense, the New Jersey Bar is conducting a public awareness campaign via public television and radio. Its brochures, including a perforated universal card, have been placed in offices, libraries and hospitals throughout the state.

The National Conference was also visited by Chief Justice Warren Burger who is urging state and local bar associations to actively participate in the celebration of the Bicentennial of the Constitution. He reported that reproductions of a painting commemorating the signing of the Constitution would be sent to bar associations for framing and placement in the schools of each state.

Other topics on the bar presidents' agenda included discipline, mandatory C.L.E., law office management, helping the victims of crime, professionalism and tort system reform. The last subject sparked considerable debate since it has become increasingly apparent that the medical profession has mounted a full-scale attempt in legislatures nationwide to alter the traditional system of justice in this area. Integrated bars which ordinarily do not lobby on such controversial issues are becoming increasingly active.

The theme of the program for members of the National Conference of Bar Foundations was law-related education for youth. Examples of programs and learning experiences for students were presented as were models for use by the bar foundations in their home states.

The House of Delegates of the American Bar Association which met the last two days of the convention addressed a two-inch stack of reports and recommendations on such diverse topics as the proposed intercircuit federal panels, more liberalized advertising, tort reform, uniform laws with respect to the terminally ill, amendments to the uniform limited partnership act and the involvement of minorities in the profession.

My year in Hawaii, or Paradise Lost

By Peter Gruenstein

Many of my friends thought it would be easy going to Hawaii for a year. They were wrong.

The challenge of living wild and free in Hawaii began soon after our arrival on the Big Island in February. What to do? Some friends predicted that I would, within weeks, go stark mad from boredom; a few wisely counselled that I find a project I could tackle with some energy. I was worried. Then I recalled someone's suggestion that I devote myself to golf with the zeal with which Mike White used to practice law, before his early retirement.

So I worked very hard at golf, a game I had largely abandoned since high school when one of my clubs wrapped itself around a tree growing in the heavy rough. I practiced hard. I carefully studied the rules, only slightly less obscure than the Alaska Rules of Civil Procedure. Indeed, I was struck by the importance of the mental element in both golf and litigation.

I learned how to position myself on the green so that my opponent would just glimpse me out of the corner of his eyes on his backswing before striking his putt. I learned that if my opponent was two up on the 8th hole, if I complimented his hip turn, by the 10th hole he would be thinking about nothing but his hips and would be regularly slicing his woods into the lava rocks. I learned that if I struck a putt too strongly, rather than simply telling my opponent that, I should remark on how fast the greens were today so that my companion's next putt would be sure to be six feet short. I learned to play with numerous golfing companions. I learned that golf could be a cruel game—some days you got good bounces and some days you got bad ones. That helped me miss Judge Moody less.

I also learned to stop trying to explain to my older daughter that "fore" is not really my favorite number.

But even with my unflagging devotion to golf I found after several weeks in Paradise there was an intellectual void in my life. Later I identified the void as resulting from the absence of that stimulation which comes from reading appellate decisions. So I decided to undertake an academic pursuit with vigor—American history. And I read books I hadn't dreamt of reading since college. I frolicked through four-inch biographies of Mark Twain, Douglas MacArthur, Lyndon Johnson, Lincoln, Clarence Darrow, and Thomas Jefferson, and still there was something missing. I thought that sharing my intellectual discoveries with my new golf friends might help but I was discouraged when Aaron Burr was assumed to be a rookie pro on the PGA tour. At last, I concluded there was simply no substitute for a good majority opinion of the Alaska Court of Appeals with a stiff dissent.

There were other problems too: Getting used to telling if it was night or day by whether the sun was up; having to look at people as out-of-shape as myself walking around without shirts on; never being able to correctly pronounce the name of a town or street; learning that "haole" is not a term of endearment; being able to look at a sunset without a glass in my hand; accepting that cockroaches have rights too; and trying to convince a four-year-old that playing in the snow in the dark is also fun.

But, ultimately, I came to the realization that, by both training and temperament, we lawyers are compelled to take life seriously, and that not much serious stuff happens at temperatures above 70 degrees Fahrenheit. Which may make Alaska a mecca for the practice of law.

Ethics decision

. . . . . continued from page 19

court to effect justice is not bound by the normal duty of confidence if he believes information gained from the child should be revealed to assist the court in achieving the best interests of that child.

Adopted by the Alaska Bar Association Ethics Committee on September 12, 1985.

APPROVED BY THE BOARD OF GOVERNORS ON NOVEMBER 8, 1985.

Re: Fee charges for both attorneys' time in intraoffice conferences

The Alaska Bar Association, and the Ethics Committee, have received various inquiries regarding the decision of the fee arbitration panel in file No. FA-83-58, which was reported in Volume 9, No. 3, The Alaska Bar Rag, at Page 3 (November, 1985). The summary of this decision stated that clients should not be charged for both attorneys' time in intra-office discussions.

The decision of the fee arbitration panel in File No. FA-83-58 was made based on the facts and circumstances of that particular case. There is no per se rule regarding billing practices that clients should not be charged for both attorneys time in intra-office conferences. The propriety of such charges depends upon the facts and circumstances of each particular case. In fact, in most cases where two or more attorneys in a single office perform work on a single case, the client is benefited from the work of all attorneys, which necessarily includes certain intra-office conferences. Under such circumstances, it would not be improper to charge for both attorneys' time. (See DR2-106 for standards applicable to fees for legal services.)

Adopted by the Alaska Bar Association Ethics Committee on December 10, 1985.

APPROVED BY THE BOARD OF GOVERNORS ON JANUARY 10, 1986.

Re: Disclosure of Client Names by Public Officials Pursuant to Campaign Disclosure or Conflict of Interest Statutes

The Committee has been requested to give an opinion regarding the ethical propriety of identifying legal clients pursuant to provisions of applicable financial disclosure laws. We have also been asked whether an attorney has an ethical duty to consult with each client prior to disclosure of his identity and whether a duty exists to seek an exemption from disclosure requirements.

It is the opinion of the Committee that an attorney who holds, or is a candidate for, public office may disclose the identity of clients when that information is required by applicable disclosure laws without obtaining the consent of the client, unless the client is likely to be embarassed or suffer other detrimental effects by such disclosure as a result of other facts or circumstances known to the attorney. Prior to disclosing the identity of clients, the attorney must become sufficiently informed with regard to the services rendered and related facts to permit a reasoned decision as to whether disclosure of the clients' identity may cause embarrassment or other adverse effects to the clients.

The request presented to the Committee relates to attorney members of the Alaska Judicial Council. Under Article IV, Section 8, of the Alaska Constitution, three of the members of the Alaska Judicial Council are private attorneys. AS 39.50.200(p)(15) includes the Alaska Judicial Council in the definition of "State Commission or Board" as used in the Alaska conflict of interest statute. That statute requires each member of a State commission or board to file a statement within 30 days after taking office, giving information regarding income sources and business interests. As defined by statute, the "source of income" of a person self-employed by means of the sole proprietorship, partnership, professional corporation of a corporation in which the person, the person's spouse or children, or a combination of them, holds a controlling interest, includes the client of the proprietorship, partnership or corporation.

Disciplinary Rule 4-101(B) prohibits a lawyer from knowingly revealing a confidence or secret of the client. The terms "confidence" and "secret" are defined by DR 4-101 as follows:

> "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

The attorney-client privilege, as set forth in Rule 503 of the Alaska Rules of Evidence, protects "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client." The rule does not specifically include or exempt the identity of a client, and no guidance is given by commentary to the Rules of Evidence or Alaska cases interpreting the rule.

In the absence of specific Alaska authority, we must be guided by interpretations from other jurisdictions. The general rule in other jurisdictions is that the identity of the client is not protected by the attorney-client privilege. A case in point is *Chamberlain v. Missouri Elections Comm.*, 540 S.W.2d 876, 880 (Mo. 1976), which was an action for declaratory judgment and injunction to prevent enforcement of the requirements of the Missouri Campaign Finance and Disclosure Law. The attorney plaintiffs in that case claimed that the disclosure requirements infringed upon the attorney-client privilege. The applicability of the privilege was denied by the court with the following comments:

> We believe that insofar as the disclosure requirements of these subsections are concerned, the attorney-client relationship generally will remain inviolate. We say this because the well-established rule is that *identity* of a client is not within the scope of the privilege. [Citations omitted] There is a very narrow exception to this rule: e.g., the identity of a client may be shrouded and the privilege recognized "when so much of the actual communication has already been disclosed that identification of the client amounts to disclosure of a confidential communication." *N.L.R.B. v. Harvey*, 349 F.2d 900, 905 (4th Cir. 1965).

See generally, Annot., "Disclosure of Name, Identity, Address, Occupation or Business of Client as Violation of Attorney-Client Privilege," 16 A.L.R.3d, 1047 (1967).

In those cases where the identity of the client has been determined to fall within the "narrow exception," the rationale appears to be a finding by the court of circumstances analogous to the definition of a client "secret" under DR 4-101(A) where disclosure would be embarrassing or likely detrimental to the client.

Although a few courts have indicated that a client's request that identity not be disclosed is sufficient to create an attorney-client privilege with regard to that information, the facts in those cases, almost without exception, involve situations where other information from the client has been communicated with the client's consent, and disclosure of the client's name would have a serious detrimental effect on the client or cause the client embarrassment. In the absence of such circumstances, the identity of the client, which is essential to the creation of the attorney-client relationship, is not confidential or secret information, even when the attorney has been requested not to divulge that information.

The Committee is, therefore, of the opinion that an attorney may, without consulting the clients, disclose the names of clients who have paid $100 or more to the attorney's firm, if the attorney is required by law to disclose firm clients as "sources of income," unless the nature of the services provided or other circumstances known to the attorney reflect the possibility that disclosure would be embarrassing or likely to be detrimental to the client.

It should be noted that the applicable regulations in 2 AAC 50.100 accommodate those concerns. Subsection (a) states in part that:

> Disclosure of another persons name in a report is not required and should not be made where that disclosure alone would likely result in disclosing sensitive information which the person would want to keep private and which, if made public, would tend to cause substantial concern, anxiety or embarrassment to a reasonable person.

Subsection (a)(5) of that regulation specifically provides for the non-disclosure of the name of a married client who seeks legal assistance without a spouse's knowledge, if disclosure would likely cause substantial embarrassment or opprobrium.

Subparagraph (d) of the regulation recommends that self-employed individuals apprise clients not exempted by section (a) of the reporting requirements under law and the options available under the regulations, which include the opportunity to claim an exemption from the disclosure requirements.

An attorney who is a public official subject to the disclosure requirements with regard to identity of clients has an ethical obligation to become sufficiently familiar with the services provided, or to be provided, to the firm's client and the nature of the attorney engagement so that an informed decision can be made as to whether disclosure of the client's identity would constitute action prohibited by DR 4-101. If a decision is made that the identity of the client is or may reasonably be considered to be subject to the attorney-client privilege or a secret prohibited from disclosure, the attorney must consult with the client to determine whether the client will consent to the disclosure, and if not, the attorney must seek an exemption under the applicable regulations and statutory provisions.

Adopted by the Alaska Bar Association Ethics Committee on November 7, 1985.

APPROVED BY THE BOARD OF GOVERNORS: November 8, 1985

Where reform is really needed

by Ames Luce

Alaska is presently experiencing an "insurance problem" which affects many different segments of our business community: day care centers, air taxi operators, municipalities, bar owners, fishermen, lawyers, doctors and others.

Even insurance professionals admit the "crisis" was caused, in large part, by the way the casualty insurance industry conducted its business in the last seven or eight years. The tort system is not at fault.

The size of verdicts and settlements from personal injury litigation did not change during this period, after inflation is taken into account. In fact, there has been only one plaintiff's verdict against a doctor in the last ten years in the Third Judicial District.

Casualty insurance companies traditionally make most of their profits from the investment of insurance premium dollars and reserves which they create for anticipated losses. There is intense competition to cut prices and obtain those premium dollars for investment when interest rates are high. Moreover, companies are tempted to write policies for poor risks.

During the late '70s and early '80s, insurance companies had little concern that the premiums they were charging might be inadequate to pay for the claims losses being experienced. The interest they earned on their reserves covered any residual losses and turned a healthy profit as well. Little concern was directed to loss experience evaluation and risk management.

With interest rates plummeting recently, insurance companies have been unable to earn the huge investment income they enjoyed earlier. Premium and reserve interest income have not covered the claims as presented. In 1984, insurers collected fewer premium dollars than they did in 1979, without accounting for inflation.

If insurance companies had maintained a responsible rate structure for casualty insurance, and if state regulators had ensured that companies did not undercut their competition to unhealthy levels, no insurance crisis would exist.

The rising/declining interest rate cycle is nothing new to the insurance industry; a comparable trough in the cycle occurred in the mid '70s. Starting in 1969, insurance company investments—and profits—rose dramatically until the early 1970s when interest rates began to drop. In 1975, interest rates were again at a low point and insurance companies were calling for legislative relief.

Even our own state insurance commissioner, John George, candidly said in September:

> The insurance companies have shot themselves in the foot; they were too aggressive in their competition to get accounts. But we, the public, have got to save them regardless of how they got there. Part of the blame lays with regulators who have failed in the past. They did not insure that rates charged by insurance companies were "adequate."

But what has been proposed—insurance regulation or reform? The AMA and the insurance industry have spearheaded an 11-point "tort reform" package. As is too often the case, the cloak of reform has been used to cover the true nature of the beast. "Tort reform" is an evil and opportunistic attempt to abolish the basic rights of many injured people in this state.

Why should not we have effective insurance regulations, addressing the real problem, rather than the emasculation of the tort system, developed in over 200 years of common law decisions? Is it not an insurance crisis we are facing rather than a tort crisis?

Legislation must be directed to the root of the problem. Reform in four areas will be required:

1. Enactment of laws requiring full and complete disclosure of income, expenditures, profits, claims paid, reserves, and defense costs for all insurance companies doing business in Alaska;
2. Enactment of laws establishing a state emergency insurance pool to provide both primary and reinsurance to those businesses which cannot obtain it;
3. Enactment of laws prohibiting the cancellation of insurance or change of an insurance premium during the term of the contract, and providing for reasonable notice of cancellation;
4. Establishment of a consumer advocate within the Department of Insurance to represent the rights and interests of policy holders.

These proposals address the very heart of the present crisis. They would provide information to encourage intelligent underwriting decisions and rate setting. The insurance industry can no longer be permitted to conduct its business in such a cyclic way, setting us up for periodic insurance crises.

We Alaskans have a proud history of equality, and an abhorrence of special interest influence. A society is not to be judged by how it treats its rich, its powerful, its famous or its privileged, but rather by the understanding and compassion with which it treats its less fortunate, its ill and its injured. They have few champions, but their cause may be both just and fair. Let's not change our tradition now.

Some facts about tort reform

by Rick Friedman

Do Americans sue more often than citizens of other nations?

No. According to a recent survey, when compared with citizens of other industrialized nations, Americans are really quite normal in terms of their tendency to sue, ranking in the same range as citizens of England, Ontario, Canada, Australia, Denmark, New Zealand. (*Source:* Galanter, Marc, "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society," 31 U.C.L.A. L. Rev. 4, 55–56 (October, 1983).

Are we more likely to sue than we used to be?

No. When the population increase is taken into account, there is no indication that Americans are now more likely to sue than they used to be. (Galanter, *supra.* p. 40, fn.1; Selvin and Ebener, "Managing the Unmanageable: A History of Civil Delay in the Los Angeles Superior Court, The Institute for Civil Justice, Rand Corporation (1984), p. 34.) What then of statistics that show nearly twice as many civil actions were filed in federal district courts in 1983 as in 1977? As Professor Galanter explains:

> One third of this whole increase consisted of a jump from 600 to 41,000 cases filed by the federal government to reclaim overpayment of veterans' or Social Security benefits or to collect on student loans. The next largest gain was an increase from 3,000 to 20,000 in claims to restore disability payments cut off by the Reagan Administration. . . *these numbers reflect specific social and political events and don't point to any across-the-board increase or decrease in litigiousness.*

("Americans' 'Litigation Binge' Is a Myth," U.S. News & World Report (November 1984, emphasis added)

Are verdicts getting larger, are juries running wild?

There is not much data on this issue, but what there is, is being misused by critics of our judicial system. Most statistics come from Jury Verdict Research, Inc. (JVR). JVR itself notes its statistics are incomplete, and that it is more likely to catch large than small verdicts. Additionally, its statistics do not include defense verdicts—that is, where no money is awarded. While there were 360 verdicts of $1 million or more in 1983, JVR states:

> While an award of one million dollars or more may appear unreasonable at first glance, these are generally made to seriously injured plaintiffs, and the jury's decision to grant such a verdict is usually based upon testimony presenting legitimate computations of the plaintiff's projected lost earnings and the medical expenses necessary to sustain him for life.

JVR goes on to state that most million-dollar verdicts are awarded to plaintiffs who are permanently paralyzed, brain damaged, are killed, or who have lost a leg, arm, or both. JVR concludes:

> The overwhelming majority of million-dollar verdicts are awarded in cases where the plaintiff has been seriously injured or is completely disabled and may require medical care for life. . .[I]t should always be remembered that awards of this magnitude remain unusual and are rarely considered the norm.

Most statistics citing rapid increases in the size of verdicts do not take account of rapid inflation, or medical costs—which are rising even faster than the inflation rate.

Are medical malpractice claims more frequent than they used to be?

Yes. Medical malpractice claims over the last decade have grown at most, at an annual rate of 3.4 percent. Why? The Florida Governor's Task Force on Medical Malpractice concluded:

> The increase in malpractice actions can be attributed to a variety of factors. With health insurance and government funding, more people have access to medical care. Technological advances have increased the risks of iatrogenic injury. Care is being rendered in a variety of locations and the number of providers has not only increased but care by specialty has increased. There are significantly more variables, more actors, more settings, more procedures, and more risks.

"Toward Prevention and Early Resolution, Report and Recommendations of the [Florida] Governor's Task Force on Medical Malpractice," (April 1985) p. 34.

Has the size of medical malpractice claims increased?

Yes. St. Paul insurance company reported a growth rate in the size of claims which averaged 8.4% for the years 1981–1984. Keep in mind, however, that a large portion of medical malpractice verdicts reflect a significant amount for victims' past and future medical expenses. During this same time period, the Medical Cost Index (MCI) grew at an annual average rate of 10.5%, and the national health care expenditures (HCE) grew at an annual average rate of 13.3%. In short, nothing indicates that awards are growing at a greater rate than the damages they are meant to compensate.

By the way, researchers have consistently found that, by and large, jury verdicts in malpractice claims are based primarily on rational decisions about actual injuries to malpractice victims, and, in fact, generally *undercompensate* the victim of medical carelessness. (Danzon, "The Frequency nad Severity of Medical Malpractice Claims," The Institute For Civil Justice, Rand Corporation (1982) p. 7; "Medical Malpractice Claims: Synopsis of the HEW/Industry Study of the Medical Malpractice Insurance Claims," Health Care Financing Administration, U.S. Dept. of Health Education and Welfare, HCFA-02108 (1979) at p. VI-3.)

Are medical malpractice insurance prices the cause of rising health care costs?

No. Total malpractice insurance premiums paid in 1984 amounted to approximately one-half of one percent of the amount Americans spent on health care that year. (A.M. Best's Casualty Loss Reserve Development 1985; Gibson, "National Health Expenditures, 1983," 6 Health Care Financing Review 1 (Winter 1984).) In fact, since 1976, the cost of malpractice insurance has been steadily declining as a percentage of total health care costs. (Statistical Abstract, People's Medical Society (February 1985), A.M. Bests, *supra.*) In 1983, the average American spent nearly $1,500 on health care, (Gibson, "National Health Expenditures, 1983," *supra.*), of that, only $6.08 went to malpractice insurance premiums. (A.M. Best's, *supra.*)

Are malpractice premiums placing an unreasonable burden on physicians?

No. In 1984 the average Amercian physician spent only 2.9% of his or her *gross* income (currently estimated at around $200,000) on medical malpractice insurance. (Kirschner, "Is Your Practice Begging for More Money?," Medical Economics 214, 230 (November 12, 1984)) This is slightly more than the 2.3% spent on "professional car upkeep," but quite a bit more than the 1.2% spent on continuing education. (Id.) Even neurosurgeons, who pay the highest percentage of gross income of any specialty, are spending only 5.8%. (Id.; *See also,* Danzon, Duke University, "Evalution of the Current Malpractice System," Abstract of presentation delivered at The Urban Institute's National Medical Malpractice Conference, Feb. 21–22, 1985). Fifty-seven percent of doctors spend less than $5,000 on malpractice premiums, while only 12% spend over $15,000. (Kirschner, *supra.* at p. 229.)

Do lawsuits against doctors serve any purpose besides compensating victims of malpractice?

Yes. It has been estimated that as many as 10 percent, or 50,000 of America's doctors are impaired, or unable to practice medicine with reasonable skill because of physical or mental illness, or excessive use of drugs or alcohol. ("Impaired Physicians: Medicine Bites the Bullet," Med. World News, July 24, 1984.)

A very small percentage of doctors are responsible for a disproportionate number of malpractice claims. For example, a study by the Florida insurance commissioner revealed that, from 1975 through 1982, a group of "repeaters," comprising only 0.7% of the total number of Florida physicians, were responsible for 24% of the claims in which payments were made. The good doctors subsidize this careless minority. If you are a bad driver, your insurance goes up. If you are a bad doctor, the insurance of all doctors in your field goes up—good and bad pay the same-size premium.

State medical disciplinary boards are generally ineffective in weeding out doctors who pose a threat to disciplinary action per one thousand doctors. (Wolfe, Sidney M., M.D., et al., "Medical Malpractice: The Need for Disciplinary Reform, Not Tort Reform," Public Citizen Health Research .Group, 1985.) Only the threat of civil suits seems to have any deterrent effect on the small minority of careless physicians. As a past president of the Federation of State Medical Boards of the United States has stated:

> A by-product of the malpractice situation, related indirectly to medical discipline, is its deterrent effect. It is sad but true that many physicians practice more carefully than they did in the past because they have one eye on the potential litigant. Malpractice becomes one of the most important disciplinary weapons in medicine—distasteful as the idea may be to physicians—so be it.

(Derbyshire, "Malpractice, Medical Discipline, and the Public," Hospital Practice (Jan. 1984). Or, as stated by other medical commentators:

> Litigation, beyond providing a means to redress the loss and suffering caused by carelessness, signals potentially negligent individuals that it will cost them more to be careless than to invest in an appropriate level of prevention. . .the malpractice system exists to discipline the occasional physician who does not (or cannot) protect his patients.

(Schwartz, William B., M.D., "Doctors, Damages and Deterrence," 298 New England Journal of Medicine 1282 (June 8, 1978).)

Is the insurance industry in financial trouble?

No. With the exception of 1974, the assets of the insurance industry have grown each year since 1955. From 1978–1985, the net worth of the property casualty insurance industry increased $36 billion, from $35.4 billion to $71.4 billion—almost a 102% increase, $7.6 billion of this gain occurred just in the last 12 months.

Between 1976 and 1983, the profitability of commercial liability insurance showed a rate of return of 19%, compared to a rate of 13.5 for American industry as a whole. The stock exchange reflects this economic health. As A.M. Best's noted in January of 1986: "While the DOW Industrials Average has made headlines by surpassing the 1500 mark (a 25% gain for the year), Best's Index of property/casualty [insurance] companies has jumped 50% at this writing. . ." (Best's Review, Property/Casualty Insurance Edition, January 1986).

What then is the "insurance crisis" all about?

Robert Hunter, an actuary, former Federal Insurance Administrator, and president of the National Insurance Consumers Organization, probably said it best:

> I do not believe that there is a tort crisis across the nation. I believe we are witnessing joint action by insurers intended to create an atmosphere where rates can be put too high and legislators will be intimidated into action designed to take away victims' rights and to allow wrongdoers to go unpunished.

(Testimony before the Wisconsin Commissioner's Special Task Force on Property/Casualty Insurance, 12/18/85)

Tort reform bill pending in Juneau

HOUSE BILL/SENATE BILL
IN THE LEGISLATURE OF THE STATE OF ALASKA
FOURTEENTH LEGISLATURE—SECOND SESSION
A BILL

For an Act entitled: An Act adopting various tort reforms; amending Alaska Rules of Civil Procedure 7, 11, 49, 52, 58, 68 and 82; and providing for an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*Section 1. AS 09 is amended by adding a new chapter to read:

CHAPTER 17. LIMITATIONS ON CIVIL LIABILITY

Sec. 09.17.010. NONECONOMIC AWARDS.

(a) In any action for injury based on negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life and other nonpecuniary damage.

(b) In no action shall the amount of damages for noneconomic losses awarded to any plaintiff exceed two hundred fifty thousand dollars ($250,000).

Sec. 09.17.020. PERIODIC PAYMENTS. (a) In any action for injury or damages, a superior court shall, at the request of any party, enter a judgment ordering that amounts due the judgment creditor for losses to be suffered in the future be paid to the maximum extent feasible by periodic payments rather than by a lump-sum payment if the award equals or exceeds fifty thousand dollars ($50,000) in future damages. In entering a judgment ordering the payment of future damages by periodic payments, the court shall make a specific finding as to the dollar amount of periodic payments which will compensate the judgment creditor for such future damages. The court may order that fees to the attorneys of the plaintiff be paid as a lump sum and not in periodic payments; in such event, the amount of any fees paid as a percentage of recovery shall be computed on the present value of the recovery including periodic payments. As a condition to authorizing periodic payments of future damages, the court shall require a judgment debtor who is not adequately insured to post security adequate to assure full payment of such damages awarded by judgment.

(b) In all actions involving a claim for damages for losses to be suffered in the future where any party has requested periodic payments be utilized as provided in subsection (a) above, the court shall instruct the jury to answer special interrogatories, or, if there is no jury, shall make findings indicating:

1. Each plaintiff for whom damages for future losses are found.
2. Each element of damages for future loss.
3. The amount per week, month or year of each such element of damages for future loss.
4. The number of weeks, months or years for which damages are found each element of future loss.

(c)(1) The judgment ordering the payment of future damages by periodic payments shall specify the recipient or recipients of the payments, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Such payments shall be subject to modification only in the event of the death of the judgment creditor. However, money damages awarded for loss of future earnings shall not be reduced or payments terminated by reason of the death of the judgment creditor, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately prior to his death. The court which rendered the original judgment, may, upon petition of any party in interest modify the judgment to award and apportion the unpaid future damages in accordance with this subdivision.

(c)(2) In the event that the court finds that the judgment debtor has exhibited a continuing pattern of failing to make the payments, as specified in paragraph (1), the court shall find the judgment debtor in contempt of court and, in addition to the required periodic payments, shall order the judgment debtor to pay the judgment creditor all damages caused by the failure to make such periodic payments, including court costs and attorney's fees.

(d) Following the occurrence or expiration of all obligations specified in the periodic payment judgment, any obligation of the judgment debtor to make further payments shall cease and any security given pursuant to subdivision (a) shall revert to the judgment debtor.

(e) As used in this section:

(1) "Future damages" includes damages for future medical treatment, care or custody; loss of future earning capacity; or any future noneconomic loss.

(2) "Periodic payments" means the payment of money or delivery of other property to the judgment creditor at regular intervals.

(f) A certified copy of any judgment or order of the superior court of this state issued pursuant to this section may be recorded with the District Recorder of any Judicial District in this state, and from the date of such recording shall become a lien upon all real property in such Recording District owned by the judgment debtor at the time or which he may afterward acquire, for the respective amounts and installments as they mature (but shall not

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Tort bill.....continued from page 25

become a lien for any sum or sums prior to the date they severally become due and payable) which liens shall have, to the extent herein provided and for the period of 10 years from such recording, the same force, effect and priority as the lien created by recordation of a money judgment.

(g) Whenever a certified copy of any judgment or order of the superior court issued pursuant to this section has been recorded with the District Recorder of any Recording District, the expiration or satisfaction thereof made in the manner of an acknowledgment of a conveyance of real property may be recorded.

Sec. 09.17.030. CONTINGENT FEE AGREEMENTS. (a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage based on negligence in excess of the following limits:

(1) Forty percent of the first fifty thousand dollars ($50,000) recovered;

(2) Thirty-three and one third percent of the next fifty thousand dollars ($50,000) recovered;

(3) Twenty-five percent of the next one hundred thousand dollars ($100,000) recovered;

(4) Ten percent of any amount by which the amount recovered exceeds two hundred thousand dollars ($200,000).

Such limitations shall apply regardless of whether the recovery is by settlement, arbitration or judgment or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind.

(b) If periodic payments are awarded to the plaintiff pursuant to AS 09.17.020, the court shall place a total present value on those payments based upon the projected life expectancy of the plaintiff and include this amount in computing the total award from which attorney's fees are calculated under this section.

(c) For the purposes of this section "recovered" shall refer to the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim. Costs of medical care incurred by the plaintiff and the attorney's office overhead costs or charges shall not be deductible disbursements or costs for such purpose. Any amount awarded as punitive or exemplary damages shall not be included in the amount recovered for purposes of this section.

Sec. 09.17.040. COLLATERAL SOURCE RULE. (a) In the event the defendant so elects, in an action for personal injury, he may introduce evidence of any amount paid or payable as a benefit to the plaintiff as a result of the personal injury pursuant to the United States Social Security Act, any state or federal income disability or worker's compensation act, any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, and any contract or agreement of any group, organization, partnership, or corporation to provide, pay for or reimburse the cost of medical, hospital, dental, or other health care services. Where the defendant elects to introduce such evidence, the plaintiff has paid or contributed to secure his right to any insurance benefits concerning which the defendant has introduced evidence.

(b) No source of collateral benefits introduced pursuant to subdivision (a) shall recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant.

Sec. 09.17.050. EFFECT OF CONTRIBUTORY FAULT. In an action based on fault seeking to recover damages for injury or death to person or harm to property, contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

Sec. 09.17.060. APPORTIONMENT OF DAMAGES. (a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under AS 09.17.070, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under 09.17.070; for this purpose the court may determine that two or more persons are to be treated as a single party.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to a reduction under AS 09.17.070, and enter judgment against each party liable on the basis of rules of several liability. For purposes of contribution under AS 09.17.050, the court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

Sec. 09.17.070. EFFECT OF RELEASE. A release, covenant not be sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge another person liable upon the same claim unless the release, covenant not to sue, or similar agreement so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of AS 09.17.060.

Sec. 09.17.080. *DEFINITION.* In this chapter "fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

AS 09.17.090. *PUNITIVE DAMAGES.* In all cases, whether in tort, contract or otherwise, in which the plaintiff seeks damages, any such damages which may be adjudged against the party defending the claim for punitive, exemplary or vindictive purposes shall be awarded to and accrue wholly to the benefit of the State of Alaska and deposited in the general fund when paid.

AS 09.17.100. *ITEMIZED VERDICTS.* In every case where damages for injury to the person are assessed by the jury the verdict shall be itemized so as to reflect the monetary distribution among economic loss and non-economic loss, if any, and further itemized so as to reflect the distribution of economic loss by category, such itemization of economic loss by category to include: (a) amounts intended to compensate for reasonable expenses which have been incurred, or which will be incurred, for necessary medical, surgical, x-ray, dental, or other health or rehabilitative services, drugs, and therapy; (b) amounts intended to compensate for lost wages or loss of earning capacity; and (c) all other economic losses claimed by the plaintiff or granted by the jury. Each category of economic loss shall be further itemized into amounts intended to compensate for losses which have been incurred prior to the verdict and amounts intended to compensate for losses which will be incurred in the future.

AS 09.17.110. *VERIFICATION OF CLAIMS.* Every complaint cross-claim and counterclaim brought in any court in this state shall be signed by the claiming party and the attorney of the claiming party under oath and shall bear a statement that the persons signing the said claim reasonably believe the statements made therein are true. Upon a finding that an allegation so made is untrue, and upon motion of any defending party against who such an untrue allegation is made, the person signing the said claim shall be compelled to show cause why the person so signing the claim should not be held in contempt of court.

Sec. 09.17.120. APPLICABILITY. This chapter applies to all causes of action accruing after the effective date of this chapter.

*Sec. 2. AS 09.55.580 is amended to read:

ACTION FOR *WRONGFUL DEATH.* (a) When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had the person lived, against the latter for an injury done by the same act or omission *and if the decedent is survived by a spouse, children or other dependents.* The action shall be commenced within two years after the death, and the damages therein shall be the damages the court or jury may consider fair and just. The amount recovered, if any, shall be exclusively for the benefit of the decedent's spouse and children when the decedent is survived by a spouse or children, or other *actual current economic* dependents. When the decedent is survived by no spouse or children or other *actual current economic* dependents, [the amount recovered shall be administered as other personal property of the decedent but shall be limited to pecuniary loss] *the action shall be dismissed.* When the plaintiff prevails, the trial court shall determine the allowable costs and expenses of the action and may, in its discretion, require notice and hearing thereon. The amount recovered shall be distributed only after payment of all costs and expenses of suit and debts and expenses of administration.

(b) The damages recoverable under this section shall be limited to those which are the natural and proximate consequence of the negligent or wrongful act or omission of another.

(c) In fixing the amount of damages to be awarded under this section, the court or jury shall consider all the facts and circumstances and from them fix the award at a sum which will fairly compensate for the injury resulting from the death. In determining the amount of the award, the court or jury shall consider but is not limited to the following:

(1) deprivation of the expectation of pecuniary benefits to the beneficiary or beneficiaries, without regard to age thereof, what would have resulted from the continued life of the deceased and without regard to probable accumulations of what the deceased may have saved during the lifetime of the deceased;

(2) loss of contributions for support;

(3) loss of assistance or services irrespective of age or relationship of decedent to the beneficiary or beneficiaries;

(4) loss of consortium;

(5) loss of prospective training and education;

(6) medical and funeral expenses.

(d) The right of action granted by this section is not abated by the death of a person named or to be named the defendant.

*Sec. 3. AS 09.10.070 is amended to read:

Sec. 09.10.070. *Actions to be brought in two years.* No person may bring an action (1) for libel, slander, assault, battery, seduction, false imprisonment, or for any injury to the person or rights of another not arising on contract and not specifically provided otherwise; (2) upon a statute for a forfeiture or penalty to the state; or (3) upon a liability created by statute, other than a penalty or forfeiture; unless commenced within two years from the date of the act or omission which gave rise to the claim, irrespective of the age or competency of the claimant or the failure of the claimant to discover the claim.

*Sec. 4. *AS 45.45.010 is amended to add a new subsection as follows:*

(i) Prejudgment interest on an obligation adjudged due in a court of this state begins to accrue on the date service of a complaint is effected.

*Sec. 5. *AS 09.30.065 is repealed and re-enacted as follows:*

Sec. 09.30.065. *Offers of judgment.* On or before the 60th day following the filing of an answer in a civil action, and on the fifth day following the day discovery closes as ordered by the court, the party defending against the claim may serve upon the party making the claim an offer to allow judgment to be entered in complete satisfaction of the claim against that defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the claiming party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn and evidence of that offer is not admissible except in a proceeding to determine the form of judgment after verdict. If the judgment finally entered on the claim as to which an offer has been made under this section is not more favorable to the claiming party than the offer, the claim shall bear no interest whatsoever from the date of the offer to the date of judgment.

*Sec. 6. AS 09.60.010 is amended to read:

Sec. 09.60.010. *Costs allowed prevailing party.* (a) Except as otherwise provided by statute, the supreme court shall determine by rule or order what costs, if any, including attorney fees, shall be allowed the prevailing party in any case.

(b) Notwithstanding subparagraph (a) above, no court of this state shall have jurisdiction to award attorney's fees to a prevailing party in an action sounding in tort in the absence of a specific finding that the party at fault acted with malice, in bad faith or with reckless disregard of the rights of another in causing the injury sued on.

*Sec. 7. AS 09.16 is repealed.

*Sec. 8. AS 09.17.020 and AS 09.17.050 enacted in sec. 1 of this Act have the effect of amending Alaska Rule of Civil Procedure 7 by setting a time limit on the filing of the motions allowed in AS 09.17.020–09.17.050.

*Sec. 9. AS 09.17.050 and AS 09.17.100 enacted in sec. 1 of this Act have the effect of amending Alaska Rule of Civil Procedure 49 by requiring the jury to answer the special interrogatories listed in AS 09.17.050 and AS 09.17.100 regarding the amount of damages and the percentages of fault to be allocated among the parties.

*Sec. 10. AS 09.17.050 enacted in sec. 1 of this Act has the effect of amending Alaska Rule of Civil Procedure 52 by requiring the court to make specific findings regarding the amount of damages and the percentages of fault to be allocated among the parties.

*Sec. 11. AS 09.17.020, AS 09.17.050 and AS 09.17.050 enacted in sec. 1 of this Act has the effect of amending Alaska Rule of Civil Procedure 58 by requiring the court to include a specific item in its judgment.

*Sec. 12. AS 09.17.110 enacted in sec. 1 of this Act has the effect of amending Alaska Rule of Civil Procedure 11 by

Fee arbitration rules proposed

The Fee Arbitration Rules are being updated and redrafted. The new rules have been reviewed by the Board of Governors and the Supreme Court. Before submitting the rules for final adoption, they are being printed here so that the membership may comment. The Supreme Court specifically requests review and feedback on proposed Rule 35(c)(iii), which deals with the computation of expenses in contingency fee cases. Please address all written comments to Susan Daniels at the Alaska Bar Association.

Part III
Rules of Fee Arbitration Resolution

Rule 34. General principles and jurisdiction

(a) **Fee Dispute Resolution Program Established.** It is the duty of the Alaska Bar Association to encourage the amicable resolution of fee disputes between attorneys and their clients which fall within the Bar's jurisdiction and, in the event such resolution is not achieved, to arbitrate and determine such disputes. To that end, the Board of Governors (hereinafter "Board") of the Alaska Bar Association (hereinafter "Bar") hereby establishes through the adoption of these Rules of Fee Dispute Resolution (hereinafter "Rules"), a program and procedures for the arbitration of disputes concerning any and all fees paid, charged, or claimed for professional services by attorneys.

(b) **Mandatory Arbitration for Attorneys.** Arbitration pursuant to these Rules is mandatory for an attorney when commenced by a client. For the purpose of these Rules, a "client" includes any person who is legally responsible to pay the fees for professional services rendered by an attorney.

(c) **Fee Disputes Subject to Arbitration.** All disputes concerning fees charged for professional services by an attorney are subject to arbitration under these Rules except for:

(1) disputes where the attorney is also admitted to practice in another state or jurisdiction and (s)he maintains no office in the State of Alaska and no material portion of the legal services were rendered in the State of Alaska, unless (s)he appeared under Alaska Civil Rule 81;

(2) disputes where the client seeks affirmative relief against the attorney for damages based upon alleged malpractice or professional misconduct; or

(3) disputes where the fee to be paid by the client or on his or her behalf has been determined pursuant to State statute or by a court rule, order or decision.

(4) disputes over fees which were charged more than six (6) years earlier, unless the attorney or client could maintain a civil action over the disputed amount.

(d) **Attorney Jurisdiction.** Any attorney admitted to the practice of law in Alaska, or any other attorney who appears, participates or otherwise engages in the practice of law in this State, unless exempted under Section (c)(1) of this Rule, is subject to the jurisdiction of the courts of this State, the Board of Governors of the Alaska Bar Association, and these Rules of Attorney Fee Dispute Resolution.

(e) **Duty to Assist.** Each member of the Bar has the duty to inform any member of the public who has a fee dispute of the existence of the Fee Dispute Resolution Program. Each member of the Bar has the duty to cooperate with and assist Arbitration Counsel for the Alaska Bar Association (hereinafter "Arbitration Counsel") in the efficient and timely arrangement for and disposition of fee arbitrations. This duty to assist Arbitration Counsel extends to the staff of the Alaska Bar Association, and to the staff of any entity outside the Association designated by the Board to assist in or assume administration of the Bar's Fee Dispute Resolution Program.

(f) **Venue.** Fee dispute arbitration in this State will be divided into the following three (3) areas:

(1) Area 1—the First Judicial District;

(2) Area 2—the Second and Fourth Judicial Districts combined and;

(3) Area 3—the Third Judicial District.

Venue will lie in that area in which an attorney maintains an office or in the area in which tne legal services for which fees were paid, charged, or claimed occurred. The parties may, by stipulation, agree to a different venue.

(g) **Immunity.** Members of the Board, members of Area Fee Dispute Resolution Divisions, members of the Executive Committee, Arbitration Counsel, Bar staff, and the staff of any entity designated by the Board to assist in or assume administration of the Bar's Fee Dispute Resolution Program are immune from suit for conduct in the course and scope of their official duties as set forth in these Rules.

Rule 35. Fees for legal services; agreements

(a) **Basis or Rate of an Attorney's Fee.** An attorney's fee will be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

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

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

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

(4) the amount involved and the results obtained;

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

(6) the time limitations imposed by the client or by the circumstances;

(7) the experience, reputation, and ability of the attorney or attorneys performing the services; and

(8) whether the fee is fixed or contingent.

(b) **Written Fee Agreement.** When the attorney has not previously or regularly represented a client, the basis or rate of the fee to be charged, including any fee of retainer or initial deposit, should be communicated to that client in writing, before or within a reasonable time after commencing the representation. In the absence of a written fee agreement, the attorney must present clear and convincing evidence that the basis or rate of fee exceeded the amount alleged by the client.

(c) **Contingent Fees.** A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by Section (d) of this Rule, or by other law or court rules or decisions. A contingent fee agree-

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Fee arbitration.....continued from page 26

ment will be in writing and will state the method by which the fee is to be determined, including:

(i) the percentage or percentages that shall accrue to the attorney in the event of settlement, trial or appeal;

(ii) litigation and other expenses to be deducted from the recovery; and

(iii) that such expenses are to be deducted before the contingent fee is calculated.

Upon conclusion of a contingent fee matter, the attorney will provide the client with a written statement reporting the outcome of the matter and, if there is a recovery, showing the amount of the remittance to the client and the method of its determination.

(d) **Prohibited Attorney Fee Agreements.** An attorney will not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof, except an action to collect past-due alimony or support payments; or

(2) a contingent fee for representing a criminal defendant in a criminal case.

(e) **Fee Divisions Between Attorneys.** A division of fees between attorneys who are not in the same law firm may be made only if:

(1) the division is in proportion to the services performed by each attorney or, by written agreement witl: the client, each attorney assumes joint responsibility for the representation;

(2) the client is advised of and does not object to the participation of all the attorneys involved; and

(3) the total fee is reasonable.

Rule 36. Arbitration counsel of the Alaska Bar Association

(a) **Powers and Duties.** The Board will appoint an attorney admitted to the practice of law in Alaska to be the Arbitration Counsel for the Alaska Bar Association (hereinafter "Arbitration Counsel") who will serve at the pleasure of the Board. Arbitration Counsel will:

(1) with the approval of the Board, employ and supervise attorneys and other administrative support staff as needed for the performance of his or her duties;

(2) supervise the maintenance of any records;

(3) aid members of the public in filing petitions for the arbitration of fee disputes (hereinafter "Petitions");

(4) deny a Petition if it appears that the matter:

(i) is not subject to arbitration under these Rules;

(ii) does not involve an attorney subject to the jurisdiction of these Rules; or

(iii) was not timely filed, in accordance with the provisions of Rules 34(c)(4) and 40;

(5) accept Petitions in accordance with the procedures set forth in Rule 40;

(6) process all Petitions in accordance with the procedures set forth in Rule 40;

(7) select an Arbitrator or Arbitration Panel to arbitrate and determine a fee dispute;

(8) rule upon challenges for cause pursuant to Rule 37(g);

(9) accept for filing documents submitted by parties for consideration by Arbitration Counsel, an Arbitrator, or Arbitration panel pursuant to these rules; and

(10) perform other duties as set forth in these Rules or as assigned by the Board or the Executive Committee of the Fee Dispute Resolution Program (hereinafter "Executive Committee").

(b) **Arbitration Forms.** Arbitration Counsel will furnish forms which may be used by any person to petition the Bar for the arbitration of his or her fee dispute. The forms will be available to the public through the Office of the Bar.

(c) **Denial of Arbitration.** Any Petition for fee arbitration denied by Arbitration Counsel will be the subject of a summary prepared by Counsel and submitted to the Executive Committee. The names of the parties involved will not be provided in the summary. Arbitration Counsel will promptly communicate disposition of the matter to the client and the attorney.

(d) **Record Keeping.** The Arbitration Counsel will maintain records of all Petitions processed and maintain statistical data reflecting:

(1) the amount of the fee in dispute;

(2) the status and ultimate disposition of each arbitration, including any amount by which the fee is reduced;

(3) whether the matter resulted in a referral by the Arbitrator or Arbitration Panel to Discipline Counsel of the Bar for possible discipline action against the attorney; and

(4) the number of times each attorney is the subject of a petition for fee arbitration, including the amount and ultimate disposition of each dispute.

(e) **Quarterly Report to the Board and Executive Committee.** Arbitration Counsel will provide a quarterly report to the Alaska Supreme Court, the Board, and the Executive Committee, which will include information about the number of Petitions filed and arbitrations concluded during the quarter, the status of pending Petitions, the dispositions of concluded arbitrations, and the amount of the disputes involved. The names of the parties involved will not be provided in the report.

(f) **Delegation of Responsibility.** Arbitration Counsel, with the approval of the Board, may delegate such tasks as (s)he deems appropriate to other staff of the Alaska Bar Association and/or to the staff of any organization or entity outside the Association retained or employed by the Board to assume or assist in the administration of the Bar's Fee Dispute Resolution Program. Any reference in these Rules to Arbitration Counsel will be deemed to include any persons, organizations or entities delegated responsibility, whether in whole or in part, for the administration of the program.

(g) **Disposal of Files.** Arbitration Counsel will destroy files of arbitrations (5) five years after they are closed.

Rule 37. Area fee dispute resolution divisions; arbitration panels; single arbitrators

(a) **Appointment of Area Division Members.** Members of Area Fee Dispute Resolution Divisions (hereinafter "Area Divisions") will be appointed by the President of the Bar (hereinafter "President") subject to ratification by the Board. One Area Division will be established in each area defined in Rule 34 (f). Each Area Division will consist of:

(1) not less than six members in good standing of the Bar, each of whom maintains an office for the practice of law within the area of fee dispute resolution for which (s)he is appointed; and

(2) not less than three non-attorney members of the public (hereinafter "public member"), each of whom resides in the area of fee dispute resolution for which (s)he is appointed, is a United States Citizen, is at least 21 years of age, and is a resident of the State of Alaska.

Area Division members (hereinafter "arbitrators") will each serve a three year term, with each term to commence on July 1 and expire on June 30 of the third year. A member whose term has expired prior to the disposition of a fee dispute matter to which (s)he has been assigned will continue to serve until the conclusion and disposition of that matter. This continued service will not prevent immediate appointment of his or her successor. The President will appoint a replacement to fill the unexpired term of a member who resigns prior to the expiration of his or her term.

(b) **Failure to Perform.** The President has the power to remove an Area Division member for good cause. The President will appoint, subject to ratification by the Board, a replacement attorney or public member to serve the balance of the term of the removed member.

(c) **Assignment of Arbitration Panel Members for Disputes in Excess of $2000.00.** Arbitration Counsel will select and assign members of an Area Division to an Arbitration Panel (hereinafter "Panel") of not less than two attorney members and one public member when the amount in dispute exceeds $2000.00. In addition, Arbitration Counsel will appoint an attorney member as chair of the Panel.

(d) **Arbitration Panel Quorum.** Three members of a Panel created under Section (c) of this Rule will constitute a quorum, one of whom will be a public member. The Panel chair will vote except when an even number of Panel members is sitting. Each Panel will act only with the agreement of a majority of its voting members sitting on the matter before it.

(e) **Assignment of Single Arbitrator for Disputes of $2000.00 or less.** Arbitration Counsel will select and assign an attorney member of an Area Division to sit as a single Arbitrator when the amount in dispute is $2000.00 or less.

(f) **Conflict of Interest.** An arbitrator will not consider a matter when:

(1) (s)he is a party or is directly interested;

(2) (s)he is a material witness;

(3) (s)he is related to either party to the dispute by blood or affinity in the third degree;

(4) (s)he has been previously or is currently retained by either party as an attorney or has professionally counseled either party in any matter within two years preceding the filing of the Petition for fee arbitration; or

(5) (s)he believes that for any reason, (s)he cannot give a fair and impartial decision.

(g) **Challenges for Cause.** Any challenge for cause of an arbitrator assigned to an arbitration must be made by either party within 10 days following notice of assignment to arbitration, unless new evidence is subsequently discovered which establishes grounds for challenge for cause. The challenge will be ruled upon by Arbitration Counsel. If Arbitration Counsel finds the challenge well taken a replacement arbitrator, if needed, will be appointed by Arbitration Counsel from the appropriate Area Division.

(h) **Peremptory Challenge.** Within 10 days of the notice of assignment to arbitration, either party may file one peremptory assignment to challenge. Arbitration Counsel will at once, and without requiring proof, relieve the challenged arbitrator of his or her obligation to participate and appoint a replacement, if needed, from the appropriate Area Division.

(i) **Powers and Duties of Arbitrators.** In the conduct of arbitrations under these Rules, arbitrators, sitting as a Panel or a single Arbitrator, will have the powers and duties to:

(1) take and hear evidence pertaining to the proceeding;

(2) swear witnesses, who will be examined under oath or affirmation on the request of any party to the dispute or by an arbitrator;

(3) compel, by subpoena, the attendance of witnesses and the production of books, papers, and documents pertaining to the proceeding, and consider challenges to the validity of subpoenas;

(4) submit a written decision to Arbitration Counsel, in accordance with Rule 40; and

(5) interpret and apply these Rules insofar as they relate to their powers and duties. When a difference arises among Panel members concerning the meaning or application of any Rule, the matter will be decided by a majority vote. If that is unobtainable, the matter in question will be referred to the Executive Committee.

(j) **Panel Chair Duties Take Precedence.** The powers and duties of arbitrators described in Section (i) of this Rule accrue first to the arbitrator appointed chair of the Panel and will be performed by the chair unless another panelist is designated by the chair to act in his or her stead or the chair determines that the full Panel will consider and rule on the particular issues in question before it. The chair of a Panel, or a single arbitrator, will preside at the arbitration hearing. (S)he will judge the relevancy and materiality of the evidence offered and will rule on all questions of evidence and procedure except as described in Section (i)(5) of this Rule.

Rule 38. The executive committee of the fee dispute resolution program

(a) **Definition.** The President will select one (1) attorney member from each Area Fee Dispute Resolution Division, and one (1) public member from Area 3, who together with the Bar's President-Elect will constitute the five (5) member Executive Committee of the Fee Dispute Resolution Program. The Arbitration Counsel will serve in an ex-officio capacity and will be a non-voting member of the Executive Committee. The Board or Arbitration Counsel may orally or in writing direct the submission of any matter to the Executive Committee. The votes on any matter may be taken in person or by conference telephone call.

(b) **Quorum.** Three (3) voting members of the Executive Committee will constitute a quorum at any meeting.

(c) **Powers and Duties.** The Executive Committee will have the powers and duties to:

(1) review the general operations of the Bar's Fee Dispute Resolution Program;

(2) review the summaries of denials of Petitions prepared by Arbitration Counsel;

(3) formulate rules of procedure and determine matters of policy not inconsistent with these Rules;

(4) in accordance with Rule 37(j)(5), hear and determine questions regarding the interpretation and application of these Rules; and

(5) approve forms developed by Arbitration Counsel to implement the procedures described in these Rules.

(d) **Meetings.** The Executive Committee will meet at least biannually and may meet at such other times as it deems appropriate, either in person or by conference telephone call. Minutes outlining the actions taken by the Executive Committee during its meetings will be the responsibility of the Arbitration Counsel and will be available to the Board, members of Area Divisions, Bar members, and to the public, except that the Executive Committee will meet in executive session when discussing a specific Petition or arbitration proceeding.

Rule 39. Notice of right to arbitration; stay of proceedings; waiver by client.

(a) **Notice Requirement by Attorney to Client.** At the time of service of a summons in a civil action against his or her client for the recovery of fees for professional services rendered, an attorney will serve upon the client a written "Notice of Client's Right to Arbitrate," which will state that:

You are notified that you have a right to file a Petition for Arbitration of Fee Dispute and stay this civil action by completing the enclosed form and sending it to the Alaska Bar Association, P.0. Box 100279, Anchorage, AK, 99510. If you do not file the Petition for Arbitration of Fee Dispute within 30 days after your receipt of this notice, you will waive your right to arbitration.

Failure to give this notice will be grounds for dismissal of the civil action.

(b) **Stay of Civil Proceedings.** If an attorney, or the attorney's assignee, commences a fee collection action in any court, the client may stay the action by filing notice with the court that the client has requested arbitration of his or her fee dispute by the Bar within 30 days of receiving the Notice of the Client's Right to Arbitration. This notice will include proof of service on the attorney or the attorney's assignee.

(c) **Stay of Non-Judicial Collection Actions.** After a client files a Petition, the attorney will stay any non-judicial collection actions related to the fee in dispute pending the outcome of the arbitration.

(d) **Waiver of Right to Request or Maintain Arbitration.** A client's right to request or maintain an arbitration is waived if:

(1) the attorney files a civil action relating to the fee dispute, and the client does not file a petition for arbitration of a fee dispute within 30 days of receiving the "Client's Notice of Right to Arbitrate" pursuant to Section (a) of this Rule; or

(2) after the client received notice of the fee dispute resolution program, the client commences or maintains a civil action or files any pleading seeking judicial resolution of the fee dispute, except an action to compel fee arbitration, or seeking affirmative relief against the attorney for damages based upon alleged malpractice or professional misconduct.

Rule 40. Procedure.

(a) **Petition for Arbitration of Fee Disputes.** Fee arbitration proceedings will be initiated by a client by filing a Petition with the Arbitration Counsel on a form provided by the Bar. The Petition will be in writing, signed by the client (hereinafter "Petitioner"), seeking resolution of the fee dispute with his or her attorney (hereinafter "Respondent"), and will contain the following:

(1) a statement by the Petitioner of the efforts made to attempt to resolve the matter directly with the Respondent.

(2) a statement by the Petitioner that (s)he understands in filing the Petition that the determination of the Arbitrator or Panel is binding upon the parties; that the determination may be reviewed by a superior court only for the reasons set forth in AS 09.43.120 through AS 09.43.180; and that the determination may be reduced to judgment; and

(3) a statement of the dollar amount in dispute and the reasons in as specific language as possible, (s)he disputes the fee.

(b) **Petition Review.** Arbitration Counsel will review each Petition to determine if:

(1) the Petition is properly completed;

(2) the Petitioner has made adequate attempts to informally resolve the dispute, and;

(3) the Petition, in accordance with Rule 36(a)(4), should be denied.

Arbitration Counsel may return the Petition to the Petitioner with an explanation if (s)he determines that the Petitioner has not adequately attempted to resolve the dispute or if the Petition is otherwise incomplete. The Counsel will specify to the Petitioner what further steps need to be taken by him or her to attempt to resolve the matter informally or what portions of the Petition require additional clarification or information before the Bar will accept the Petition. If Arbitration Counsel determines that the Petition should be denied, (s)he will promptly notify the Petitioner.

(c) **Petition Accepted; Notification.** If Arbitration Counsel accepts a Petition, (s)he will promptly notify both the Petitioner and the Respondent of the acceptance of the Petition and that the matter will be held in abeyance for a period of ten (10) days in order for both parties to have the opportunity to settle the dispute without action by an Arbitrator or Panel. The notice will include a copy of the accepted Petition and will advise both parties that if the matter is not settled within the ten (10) day period that it will be set for arbitration.

(d) **Respondent Answer to Petition Not Required.** No response to a Petition is required or expected of the Respondent and all material allegations contained in the Petition are deemed denied.

(e) **Assignment to Arbitration.** If, at the end of the ten day period, Arbitration Counsel has not been informed that the matter has been settled, in accordance with Rule 37(d) or (f), (s)he will select and assign an Arbitrator or Arbitration Panel from the members of the appropriate Area Division to consider the matter.

(f) **Notice of Arbitration Hearing.** Arbitration Counsel will, at the time the Arbitrator or Arbitration Panel is assigned, and at least twenty (20) days in advance of the arbitration hearing, mail written notice of the time and place of the hearing to the Petitioner and Respondent. The Notice of Arbitration Hearing will indicate the name(s) of the Arbitrator or Panelists assigned to hear the matter and will advise the Petitioner and Respondent that they are entitled to:

(1) be represented by counsel, at his or her expense;

(2) present and examine witnesses;

(3) cross-examine opposing witnesses, including examination on a matter relevant to the dispute even though that matter was not covered in the direct examination;

(4) impeach a witness, regardless of which party first called the witness to testify;

(5) present documentary evidence in his or her own behalf;

(6) rebut the evidence presented against him or her;

(7) testify on his or her own behalf, although even if a party does not testify on his or her own behalf, (s)he may be called and examined as if under cross-examination;

(8) upon written request to the Arbitrator or chair of the Panel, and for good cause shown, have subpoenas issued in his or her behalf, as provided in Rule 37(i)(3);

(9) challenge peremptorily and for cause any arbitrator assigned, as provided in Rule 37(g) and (h); and

(10) have the hearing recorded on tape.

(g) **Continuances; Adjournments.** Continuances will be granted only for good cause and when absolutely necessary. An application for continuance will be made to the Arbitrator or Panel chair. Application must be made at least ten (10) days prior to the date for hearing unless good cause is shown for making the application for continuance subsequent to that time. Nothing in this section, however, will preclude an Arbitrator or Arbitration Panel from adjourning an arbitration hearing from time to time as necessary, for good cause shown, at the request of either party.

(h) **Telephonic Hearings.** A party may appear or present witness testimony at the hearing by telephonic conference call. The costs of the telephone call will be paid by the party unless the Bar, in its discretion, agrees to pay the costs.

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Foundation thanks contributors

Thank You!!!

The Trustees of the Alaska Bar Foundation thank all the members of the Alaska Bar Association who have donated to the Foundation through the dues check off. As of December 31, 1985, 48% of the Alaska Bar members who had paid their dues had contributed to the Foundation! The funds raised from the dues check off will be used to subsidize the Alaska Legal Net Program and particularly the Zenith line.

A special thank you to the members of the Juneau Bar Association for their work on the John Dimond Endowment. The Bar Foundation received very generous donations from members of the Juneau Bar Association for the endowment. The Trustees are looking forward to working with the Juneau Bar Association to determine an appropriate utilization of the endowment funds.

IOLTA

The Alaska Bar Association's Code of Professional Responsibility charges us with the responsibility of ensuring access to justice to those unable to afford it, promoting improvements in the efficient and fair administration of justice, and assisting in the understanding of our legal system by the public at large.

Historically, members of the legal profession have willingly shouldered these and other important public responsibilities. Notwithstanding conscientious work on the part of many, the best efforts of professional and charitable organizations have proven inadequate. The need for legal services, education on legal issues and support for improvements in the administration of justice is greater now than ever. Failure to meet these needs will erode respect for the rule of law as well as the legal professional and detrimentally effect our whole society. In response to this need the IOLTA concept was born. IOLTA is an acronym for Interest On Lawyers' Trust Accounts. It is a method of generating revenue on otherwise unproductive funds and using that money to fund law-related activities.

What is an Interest On Lawyers' Trust Accounts (IOLTA) Program?

It is a program promulgated by either court rule or legislative enactment. The program give lawyers a new option for depositing small or short-term client funds so that the funds may generate interest for charitable purposes.

Normally, administrative costs and tax procedures make it impractical for lawyers to invest those client funds in a separate, interest-bearing account in the name of the client. Instead, it has been cost effective and practical to commingle those funds in a non-interest-earning checking account. Lawyers are prohibited under court-imposed rules of ethics from earning interest for themselves on their commingled client escrow accounts.

Under an IOLTA program, lawyers can pool all small and short-term client funds into an interest-bearing NOW account. The interest is channelled by financial institutions to a charitable and tax-exempt entity, such as the Alaska Bar Foundation, which allocates the interest to legal aid and other law-related public service programs approved by either the court or the legislature.

Has this program been operated successfully elsewhere?

Yes. The idea was pioneered in Florida under the leadership of the former chief justice of the Florida Supreme Court, Arthur England. As of December 1, 1985, 38 states had adopted a version of the Florida model, and the program is under consideration in nearly every other state.

How does the program affect current trust fund practices of lawyers?

It doesn't. Hopefully, lawyers have always used sound discretion in determining whether a particular trust fund was of sufficient size or duration to place it in a separate, interest-bearing account. The lawyer's responsibility and fiduciary discretion do not change in any way under an IOLTA program.

Does this program deprive clients of their interest money?

No. An IOLTA program does not utilize money from all client trust deposits—only the ones which do not earn interest for clients anyway. No client is deprived of any practicable income opportunity as is evidenced by the fact that under current trust accounting practice, nominal, and short-term deposits are placed in noninterest-bearing accounts.

Can lawyers who participate in an IOLTA program continue to invest trust fund monies on behalf of clients?

Of course. Large short-term client deposits or modest long-term deposits may continue to be invested in an interest-bearing account that will benefit the client, rather than an IOLTA account. The lawyers should always be guided by the client's best interest.

What are nominal or short-term client funds?

A lawyer's good faith judgment is always critical to this relative issue. For example, the receipt of $100,000 on day for disbursement the next day would not be a nominal amount but it would be short term.

Likewise, if it would cost approximately $50 in service charges plus the attorney's administrative costs to establish and maintain a separate interest-bearing account for each client's deposit, it would take 335 days to earn $50 on a $1,000 deposit, 69 days on a $5,000 deposit and 12 days on a $30,000 deposit. Therefore, if an attorney received $1,000 for eventual disbursement to the client, it would take nearly one year for that sum to earn sufficient interest to justify opening a separate interest-bearing account for the client.

What kinds of nominal and short-term funds are included in lawyers' trust accounts?

They can be derived from any different sources. For example, they may be escrow funds held until the satisfaction of some contingency or cash advances made by clients for court costs and other expenses. Lawyers also routinely receive such funds from clients in connection with real estate sales, contract negotiations and settlement of lawsuits. The principal dollar volume of lawyers' trust accounts may stem from "float," i.e., money that has passed hands but is awaiting clearance of checks, a process that may take as many as four to five days and sometimes a little longer.

Historically, where have these trust accounts been deposited?

They have been held in noninterest-bearing checking accounts separate and apart from all other funds belonging to the lawyer. Under DR9-103 of the Code of Professional Responsibility, trust accounts may never be commingled with the lawyer's own funds, except for a nominal amount deposited by the lawyer to guard against service charges.

Could the lawyer invest these funds in an interest-bearing account and pocket the interest?

No. That would be unethical and illegal. Lawyers have always been barred from earning interest for themselves on their client trust funds because the lawyer is a fiduciary of the trust accounts and should neither derive any personal benefit from them nor appear to be deriving personal benefit from them.

Financial institutions are responsible, at least quarterly, for transmitting interest income and reports to the foundation. The reports include the name of the lawyer or law firm and the rate of interest. The reports include the name of the lawyer or law firm and the rate of interest.

Will the financial institutions participate in an IOLTA program?

It is expected that virtually every financial institution will participate in IOLTA as a public service. They are already doing so in almost every state. Leading financial institutions have already stated that they would participate in IOLTA.

It should be noted that participation in IOLTA will not affect deposits of all other lawyer and law firm funds, including large trust funds established in the name of individual clients and law firm checking accounts. Moreover, financial institutions will continue to have the "float" of commingled trust account funds. They will simply now pay interest on those funds as they now pay interest on all their NOW accounts. Thus, participation in IOLTA will not in any way interfere with the working relationship between a law firm and its financial institution.

What are the tax consequences if I participate in an IOLTA program?

The Alaska Bar Foundation or like organization is exempt from federal income tax and it is the Foundation that receives the interest income. Therefore, neither the lawyer nor the client suffers any adverse tax consequences. The Internal Revenue Service has issued revenue rulings that the interest earned on nominal or short-term client escrow funds that are paid over to a bar foundation pursuant to an IOLTA program are not includable in the gross income of either the clients or the lawyer.

Are all types of law firms eligible to participate?

Yes. The Federal Reserve System has issued a ruling that NOW accounts may be used in an IOLTA program by any law firm—sole practitioner, partnership or professional corporation—and for all deposits held in trust for individuals, partnerships, profit and not-for-profit corporations, and others.

Once the funds are received by the tax exempt entities such as the bar foundation, what may they be invested in?

Currently, the parameters established by existing Internal Revenue Service rulings permit four general types of uses of funds by bar foundations: (a) providing legal services to the indigent and mentally disabled, (b) providing law student loans and scholarships, (c) providing law-related educational programs for the public, (d) supporting projects designed to improve the administration of justice, and (e) for such other programs for the benefit of the public as may be specifically approved from time to time by the court or legislature.

In the spring of 1985, both the Board of Governors of the Alaska Bar Association and the Trustees of the Alaska Bar Foundation passed resolutions endorsing a voluntary IOLTA concept and recommending its adoption by the Alaska Supreme Court.

Fee arbitration

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(i) **Arbitration Without Hearing.** If both parties, in writing, waive appearances at an arbitration hearing, the matter may be decided on the basis of written submissions. In such case, Arbitration Counsel will give each party suitable time to present his or her case in writing and to respond to the assertions of the other. If the Arbitrator or Panel, after reviewing the written submissions, concludes that oral presentations by the parties are necessary, a hearing will be scheduled; otherwise, the Arbitrator or Panel will render the decision on the basis of the written submissions.

(j) **Written Evidentiary Submissions Allowable.** Either the Petitioner or the Respondent may submit a written statement under oath in lieu of or in addition to presenting evidence at the arbitration hearing. Such written statements must be filed with Arbitration Counsel at least ten (10) days prior to the date set for hearing. The other party may, within three (3) days prior to the hearing date, respond to the party's written statement. The other party may also require the party filing the written statement to appear at the hearing or be available by telephone conference call and be subject to cross-examination, in which instance notice of the intention to cross-examine must be filed with Arbitration Counsel, and served upon the party whose presence is required within five (5) days prior to the hearing date. Such notice must be made in good faith and not made with an intention to cause delay or inconvenience. The Arbitrator or Panel may award expenses of appearance if it determines that the notice of intention to cross-examine was filed solely for the purpose of causing delay or inconvenience.

(k) **Affidavit Submissions.** Either the Petitioner or Respondent may submit written affidavits by witnesses on their behalf in lieu of or in addition to presenting evidence at the arbitration hearing. Such affidavits must be filed with Arbitration Counsel and served on the other party at least ten (10) days before the date set for the hearing. The other party may require the witness filing the affidavit to appear at the hearing or be available by telephone conference call and be subject to cross-examination, in which instance notice of the intention to cross-examine the witness must be filed with the Arbitration Counsel and served on the party on whose behalf the witness would appear, within five (5) days prior to the hearing date. Such notice must be made in good faith and not made with an intention to cause delay or inconvenience. The Arbitrator or Panel may award expenses of appearance if it determines that the notice was filed solely for the purpose of causing delay or inconvenience. It will be the responsibility of the party on whose behalf the witness is appearing or giving telephonic testimony to insure the availablility of that witness.

(l) **Appearance.** Appearance by a party to the dispute at a scheduled arbitration hearing will constitute waiver by that party of any deficiency with respect to the giving of notice of the arbitration hearing.

(m) **Failure of a Party to Appear.** In spite of the failure of either party to appear at the scheduled arbitration hearing for which they were provided notice, the Arbitrator or Panel will proceed with the hearing and determine the dispute upon the basis of the evidence produced. If neither party attends, the Arbitrator or Panel may terminate the arbitration by deciding that neither party is entitled to any relief.

(n) **Evidence.** The Arbitration hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence will be admitted if it is the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule to the contrary. Irrelevant and unduly repetitious evidence will be excluded.

(o) **Attorney-Client Privilege.** The rules of privilege are effective to the same extent that they are recognized in a civil action, except that the Respondent may reveal confidences or secrets of the client to the extent necessary to establish his or her fee claim.

(p) **Subpoenas; Costs.** In accordance with Rule 37(i)(3) and Section (f)(8) of this Rule, an arbitrator will, for good cause shown, issue subpoenas and/or subpoenas duces tecum (hereinafter "subpoenas") at the written request of a party. The cost of the service of the subpoena and the transportation of the witness shall be borne by the party requesting the subpoena to be issued. Any person subpoenaed by an Arbitrator or the chair of a Panel or ordered to appear or produce writings who refuses to appear, give testimony, or produce the matter(s) subpoenaed is in contempt of the Arbitrator or Arbitration Panel. The Arbitrator or Panel chair may report such contempt to the superior court for the judicial district in which the proceeding is being conducted. The court shall treat this in the same manner as any other contempt. Costs may be assessed in the case of a party's contempt. The refusal or neglect of a party to respond to a subpoena shall constitute cause for a determination of all issues to which the subpoened testimony or matter is material in favor of the non-offending party, and a final decision of the Arbitrator or Panel may be based upon such determination of issues.

(q) **Decision of the Arbitrator or Arbitration Panel.** The Arbitrator or Arbitration Panel will make its decision within thirty (30) days of the close of the arbitration hearing. The decision will be based upon the standards set forth in these Rules and the Alaska Code of Professional Responsibility. The decision will be in writing and need not be in any particular form; however, the decision will include:

(1) a preliminary statement reciting the jurisidictional facts, including that a hearing was held upon proper notice to all parties and that the parties were given the opportunity to testify, cross-examine witnesses, and present evidence;

(2) a brief statement of the dispute;

(3) the findings of the Arbitrator or Panel on all issues and questions submitted which are necessary to resolve the dispute;

(4) a specific finding as to whether the matter should be referred to Bar Discipline Counsel for appropriate disciplinary proceedings; and

(5) the award, if any.

The original of the decision shall be signed by the Arbitrator or members of the Arbitration Panel concurring in the decision. A separate dissent may be filed. The Arbitrator or the Panel chair will forward the decision, together with the file and the record, to Arbitration Counsel who will then serve a copy of the signed decision on each party to the arbitration.

(r) **Confidentiality.** All records, documents, files, proceedings and hearings pertaining to the arbitration of any dispute under these Rules will be confidential and will be closed to the public, unless ordered open by a superior court upon good cause shown, except that a summary of the facts, without reference to either party by name, may be publicized in all cases once the proceeding has been formally closed.

(s) **Modification of Decision by the Arbitrator or Panel.** On application to the Arbitrator or Panel by a party to a fee dispute, the Arbitrator or Panel may modify or correct a decision if:

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Bachajani express

.....continued from page 1

Archbishop of Jerusalem, Hilarion Capucci. He always won, but played to practice his English with me. Often discussing politics and social issues, he never mentioned his getting caught at the Lebanese border with a car trunk full of explosives and arms, none of it for church purposes. Apparently he enjoyed these chats; years later I received a copy of an unsolicited letter he had written. When I had it translated from his French into English, I found it to be a complimentary letter of recommendation to several law schools to which I had applied in England and the U.S. He was later released from prison on condition he stay away from the Middle East (assurances were given from the highest quarters.) Shortly thereafter, I saw him on T.V. visiting American hostages in Iran with his PLO friends.

Learning aobut the PLO was itself an experience, since most of the information came from the resident membership. I had studied about it in University, along with Arabic and history of the area, religion and politics, but I hadn't talked with any of that group. They had maintained, by and large, their organizations within the prison. Thus, religious Muslims would pass their sentenced time with other religious Muslims; former members of Arafat's al-Fatah organization would fraternize with others of that group, often upgrading their average third-grade education; and those who had belonged to the Popular Front or the Democratic Popular Front of Habash, Jibrill and others would hang out with only others of such groups. The latter were often Marxist in orientation, far more dangerous and better educated.

Education played an interesting role in the prison. Aside from the government voc-tech courses there were British self-study courses known as "external student programs." These led to a GED or college degree from the University of London. As the only native English speaker on staff I became involved with the programs, and proctored some examinations within the institution. Every security offender would daily proclaim his desire to study, be he college graduate or illiterate. The "word" had come down from outside that all security inmates would utilize their time so as to exit the facility with more than they had upon entering it. Although this was easy enough to do, almost no one actually studied; they just harped about it constantly.

A big work strike came about in my third month, when the new work centre opened inside the prison. Prior to the new centre all sections of the prison were largely self-contained, each with its own sleeping, eating, recreation and work facilities. There was minimal interaction of inmates from different sections. The new centre, by contrast, was designed to accommodate inmates from all sections. It included four new plants and dining facilities within a compound inside the prison. Since inmates would be mixed together, additional time was allotted from the daily schedule to allow for security procedures, including frisking and checking anything and anyone coming in or going out. This time did not impact any free time previously allotted to inmates.

I had learned that periodically the security inmates would make some sort of protest, and we were about due. The opening of the new work centre provided the opportunity. Although most security offenders had been working at something (to alleviate boredom and earn wages for coffee, chocolates, and canteen items), the leadership of the security inmates decided no one would work in the new centre. The reason was quite clear: anything produced by their labors, be it books in Braille or furniture for toddlers, would materially assist the economy of a country they were sworn to destroy. They decided on a work strike.

Things are explained diplomatically in the Middle East. On the surface their leadership politely told the staff that they could not work in the new centre because it required additional time away from their rooms, which detracted from their studying. Equally tactful, the warden informed all of them in return that a work strike would result in three months lockup status, with no family visits, mail or other privileges. After individually explaining the consequences to each inmate, the prisoners pleasure was asked. Unanimously they chose to strike; unanimously they went into lockup, all very voluntary and without tension. Now the staff had well over 40% of the inmates locked up for 23 hours a day, with meal service provided and an hour to exercise in the hot sun, in staggered shifts. The lockup could end for any inmate whenever he wished.

It is the nature of that Byzantine world that when only two inmates know something it can perhaps remain secret for a time, but when three know, the warden also knows. The strikers had left some of their number at work, so as to pass information in to the strikers. Those passing information developed the opinion, which they duly passed to the strikers, that at the end of the three months the staff would relent if the strike was renewed. The staff would first question each inmate, bluffing each one with the proposition of three more months in lock down. In due course the three months were ended, the strikers were informed a renewed strike meant three more months locked up and each was individually asked his pleasure. They unanimously called the bluff and unanimously learned the warden was not bluffing. The only change during the next three months was that all those previously outside passing information joined their comrades for 23 hours a day.

At the end of six months the organizations were in disarray. They remained divided for the next year as new leaders jockeyed for position to replace the now discredited ones and dissipated their energies fighting one another. It must be stressed that this entire affair occurred with absolutely no tension or problem whatsoever, and most security inmates couldn't wait to get to the work centre to alleviate boredom and earn canteen money.

Entebbe is a well-known word to some, given the spectacular hostage rescue of July 4th, 1976. The hijackers had demanded the release of some 40 terrorists being held in several countries, over 30 of them in Israel and most of those in my prison. When the security offenders on that list got the news through Israel television and radio, they promptly wrapped up their gear in blankets and prepared to go.

On July 4th I was enroute to Jerusalem to see the U.S. Bicentennial celebration, and parked at the airport to avoid the traffic in the capital. As I walked past the terminal the planes with the rescued hostages came in for landing and the resulting party in the terminal, which I promptly joined, was indescribable. So too was the shock the Arab prisoners were in for the next two weeks, after which they unwrapped their gear and went back to work.

An interesting aspect of all this is the fact that although I was an officer on staff, there was, to my face at least, the typical Arab hospitality and graciousness I had seen outside the prison. My background and American degrees, particularly my knowledge of Arab history, such as it was, allowed countless opportunities to discuss the politics of the region and the PLO organization with some of its leadership. It presented the opportunity to gain an insight into their beliefs and the basis for them. It also provided a practical and immediate benefit to my work. Because of the innumerable jealousies among the various groups, they all practiced the philosophy that "the enemy of my enemy is my friend." They constantly complained to me about what so-and-so was doing. Thus I received a steady stream of information about what was going on out of earshot and gained a fairly complete picture of what they were up to.

Sex and violence are always uncomfortable topics. These problems did exist, but were remarkably rare. Inmates, be they Arab, European or Jewish, would let met know that various prisoners should be transferred to another wing or room. Invariably, these were younger lads recently arrived, or the weaker persons, and it was understood that they should be in certain rooms where other, more experienced inmates, could look after things. In my several years there we had one escape and only three or four incidents of concern, including a threat, a stabbing (intra PLO dispute) and a stabbing that enabled a dangerous felon to transfer to a hospital for surgery, and from which escape was more easy to arrange. An around-the-clock guard shift at the hospital by an officer, non-com and correctional officer, as well as a policeman, all with uzis, precluded any problem until the inmate recovered sufficiently to return to the prison hospital.

Informing a man that his mother, father or child had died was never easy but always my responsibility. Sometimes a man would be let out to visit a dying relative or attend a funeral. Our one escape occurred on such a home visit, when my "client" took off through the bathroom window. He was last observed running through an orange grove with guards in pursuit, on the road to Morocco. The poor bloke would have to cross through Libya first, and he wasn't an Arab. On occasion a terrorist would be allowed out for such an event, even without a guard—rare, but it did occur, conditioned on his giving his word to return. They always returned, it being a point of honour.

Honour also required an Arab male to kill a female of the family if it was suspected that she dishonoured the family name. A younger brother and cousin would bonk sis on the head and plonk her down the well, where she would be discovered days later when the animals got sick. At times an old grandfather would take the blame, as his days were numbered and the younger men had bigger numbers. More than one grandfather living out his days in prison fingered his worry beads and shared coffee with me. While it was never admitted, grandfathers (being old time farmers) do not poison their wells.

Sometimes we would get an Arab criminal (as opposed to security inmate). Espousing no political philosophy, having no life goal and not seething at the surface with hatreds, they would come in via a quick trip for a job in town, away from the watchful eye of the village elder. The job, however, was illegal, and known in English as burglarly, robbery or some other minor mayhem. An Arab prowling in your house in the Middle East is always cause for concern. It surprised me that such inmates often came from villages. I had thought that traditional village society was anchored in the "hamula," the extended family, which formed the basis of all kinship affiliation. From my schooling I had supposed such a lifestyle would act as a strong deterrent to criminal behavior, as villagers seemed comparatively more resigned to fate and did not actively seek to manipulate their environment, by ripping off gas stations for instance. As villagers also seemed to hold more strongly to the tenets of their faith, I expected to find them in prison less than Arabs from the city, who were more exposed to a secular lifestyle and a more rapid change in traditional values. In my limited experience, however, that was not the case.

In such circumstances I passed a couple years of my life. My memories include the prisoner's game of tying bits of metal to a rat's tail and sending it through the pipes at 3:00 a.m. The racket echoed throughout the prison and drove the guards bonkers. Also well-remembered was our premier jailhouse lawyer, who also happened to be an expert forger. He made a small slip on one expertly forged official seal—he did it in non-waterproof ink. Sitting around a court of inquiry discussing his latest complaint over a cup of coffee, he inadvertently spilled some on his document. There was a moment's silence as we all sat around watching his seal drip away down the page. I last saw him in solitary, happily whiling away his time forging new seals.

As our prison was near the airport, we held people being deported from the country for a few days. These included people from Eritrea, who had fled the war in Ethiopia and found their way illegally into Israel. One day I noticed security inmates giving the Eritreans a bit too much coffee. Arab courtesy mandated offering a cup of coffee, a cigarette and a piece of chocolate; common sense mandated not giving away tins of coffee, cartons of cigarettes and packages of chocolate. As the deportee's quarters were in view of my window I kept an eye on things and played out a hunch. The Eritreans, all of them being deported to Italy, would leave with messages written on the insides of their pockets, sealed in their shoes and concealed in other more creative but less comfortable locations. I chatted up the next lot, and from then on the material usually went out, but with a xeroxed copy left behind. Often I would receive post cards for several months from the deportees, thanking me for showing an interest in their welfare and comfort, things they had not known since fleeing Ethiopia. On occasion I wrote petitions to allow some to remain as resident aliens, and will shortly be visiting some on my next trip over.

In my last month there I took a little lad on pass and bought him a drink after a day at the beach. Only after drinks were served did I realize that there were no tourists in the bar, we were surrounded by sailors from a foreign merchant marine, all of them with scars and a three-day growth. In fact, we were in a brothel. It wasn't even a decent looking brothel, just one of those seedy looking places you see in an old Sidney Greenstreet movie and I was glad I hadn't worn my uniform. The little lad I was escorting was to drunk to go upstairs and too scared to do anything if he could get upstairs, so I eventually brought him back to prison. As he had polished off a fair amount of Arak (Ouzo in the raw) on the way, I had to literally carry him through the portals over my shoulder as he sang lustily, off key.

Parading past a returning work crew, I marched through their cheers to deposit my client with the officer of the day. The next day I was invited to a lecture in public relations by the warden, over dinner in an Arab restaurant in town, while watching the belly dancer. Salt of the earth, that warden. I was invited by every inmate to Turkish coffee without regard to race, creed, color or political affiliation daily, and was still on a caffeine high all summer long while touring Europe enroute to law school.

Mr. Bortnick, formerly of the King County Prosecutor's Office in Seattle, is presently an Assistant District Attorney in Anchorage.

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(1) there was an a of figures or a mistake in the description of a person, thing, or property referred to in the decision;

(2) the decision is imperfect in a matter of form not affecting the merits of the proceeding; or

(3) the decision needs clarification.

An application for modification shall be filed with Arbitration Counsel within twenty (20) days after delivery of the decision to the parties. Written notice of the application for modification will be served promptly on the opposing party, stating that objection to the application must be served within ten (10) days from the receipt of the notice of the application for modification.

(t) **Confirmation of an Award.** Upon application of a party, and in accordance with the provisions of AS 09.43.110 and AS 09.43.140, the superior court will confirm an award, reducing it to a judgment, unless within ninety (90) days either party seeks through the superior court to vacate, modify or correct the award in accordance with the provisions of AS 09.43.120 through 140.

(u) **Appeal.** Should either party appeal the decision of an Arbitrator or Panel to the superior court under the provisions of AS 09.43.120 through AS 09.43.180, the appeal shall be filed with the clerk of the superior court in accordance with Appellate Rules 601 through 609, and notice of such appeal will be filed with Arbitration Counsel.

(v) **Binding Award Against Respondent Attorney.** If an arbitration award is made against the Respondent attorney, unless the award is appealed pursuant to Section (u) of this Rule, the award is final and binding after the expiration of thirty (30) days from its issuance. If appealed, the award shall be final and binding upon affirmance or dismissal by appellant of the appeal, unless otherwise ordered by the superior court.

(w) **Suspensions for Nonpayment of an Award.** Failure to pay a final and binding award will subject the Respondent attorney to suspension for nonpayment as prescribed in Alaska Bar Rule 61 (c).

Rule 41. Service

Unless otherwise specifically stated in these Rules, service shall be by personal delivery or by certified mail, postage paid, addressed to the person on whom it is to be served at his or her office or home address as last given to the Bar. The service is complete three (3) business days after mailing. The time for performing any act shall commence on the date service is complete.

Rule 42. Informing the public

Blank copies of the petition form and explanatory booklets prepared by the Arbitration Counsel shall be provided to the clerks of courts in every location in the state.

In the Mail

. . . Continued from p. 3

immediate future. With that in mind, it does not appear at the present time that we would be well advised to form our own captive and, indeed, the costs of securing adequate reinsurance for such a program are probably beyond the bar's ability.

Although I realize this letter may sound as if the situation is hopeless, in point of fact, I don't believe that it is. It appears that market conditions will improve within the next two years and that additional markets should make themselves available, albeit somewhat slowly. Unfortunately, I don't see any slackening of premium rates in the interim. Based on the experience of doctor-owned malpractice insurers, I have little reason to believe that a lawyer-owned insurance company could do much better than a privately owned company given current market conditions. The principal problem appears to be the availability of reasonably priced reinsurers.

Please be assured that your committee will continue to look at possible remedies to this most perplexing situation. All of us have been faced with similar premium increases, some even more outrageous than the ones quoted in your letter. The cost is obviously one that is ultimately going to be borne by our clients and, in that regard, will serve to increase the price of legal services that are probably already far too expensive for the average citizen.

It may be possible for the American Bar, working on a national level, to help stabilize the market to protect against such sharp swings in premium rates such as have been occurring during the past year; relief, however, is not readily at hand. If you are interested in the conclusions of our committee, please let me know and I will arrange to see that you have a copy of our report following our meeting with the bar's risk management consultant in March.

If you have any other questions about the availability or costs of insurance, perhaps one of our committee members will be able to assist you.

Very truly yours,
Keith E. Brown

Agency notes increase

February 3, 1986

Mr. Keith Brown
Hagans, Brown & Gibbs
310 K Street, Suite 704
Anchorage, AK 99501

RE: National Union Fire Insurance Co. Rate Change

Dear Keith,

National Union Fire recently declared a rate increase that would result in an approximate premium per attorney of $3,800 with a limit of $1 million and a deductible of $1,000. This, of course, contemplates no potential or past claims.

The $5 million limit is still subject to the same minimum premiums as before. Because of those minimums I hesitate to indicate a premium level. For firms of six or less attorneys, there will essentially be no change in premium at this limit of liability due to the minimums.

If you are circulating this rate increase in the "Bar Rag" I would like to suggest that it be done in a positive tone. Although it is an increase in premium, it has been clearly shown through INAPRO and National Union claim figures that substantial rate increases have been warranted. It would seem appropriate to communicate this information to the members. Also, National Union has been the only company to provide coverage to the Alaska bar members through two very difficult market turns.

Keith, sorry for the delay in providing this information. Please feel free to call me with any questions.

Sincerely,
Bayly, Martin & Fay of Alaska, Inc.
Chris Randall
Account Executive

Suspended drivers

January 20, 1986

"Alaska Bar Rag"
Alaska Bar Association
310 K Street
Suite 302
Anchorage, Alaska 99501

Dear Editor:

This letter to Art Snowden contains important information for all attorneys who represent clients charged with drivers license suspension/revocation cases. Perhaps you could include the body of this letter in the next "Bar Rag."

Sincerely,
Natalie K. Finn
Presiding District Court Judge

December 23, 1985

Arthur H. Snowden II
Administrative Director
Alaska Court System
303 K Street
Anchorage, Alaska 99501

Dear Mr. Snowden:

This division has been dealing with several unhappy (to put it mildly) members of the public concerning suspension of their driving privileges under the mandatory insurance law following court charges being reduced from violation of AS 28.15.291 (DWLS) to AS 28.15.011 (no valid OL). If what these people are telling us is true, it appears they are not being completely informed by the court and prosecutor when the agreement to reduce charges from DWLS to no valid OL is discussed.

AS 28.20.240 reflects a license action will continue beyond the imposed time period until proof of financial responsibility for the future (SR-22 Insurance) is provided. In most instances when an individual is charged with DWLS because they failed to obtain SR-22, the court and prosecutor are advising the person the charge will be reduced to no valid OL if the person will obtain an SR-22 and get their license reinstated. The person then obtains an SR-22 (which is expensive insurance for most of them because of their driving record), pays a $100.00 reinstatement fee, and gets their licensa reinstated.

This division receives notification from the court that the individual has been charged with DWLS (a 10 point violation), and did not provide the court with proof of insurance as required by AS 28.22.230. Under the mandatory insurance law if an individual is charged with a six or more point violation, and was uninsured at the time, we are mandated by law to suspend their driving privileges. The fact a person was not convicted as charged does not eliminate the suspension.

I realize the negotiated reduced charge prevents the mandatory ten-day minimum jail sentence, and the additional one-year license revocation. However, I feel the person should be advised of the mandatory insurance suspension prior to accepting the plea to the lower charge. After they receive the mandatory insurance suspension notice from DMV, their main reaction is they feel they've been had by accepting the reduced charge, paying out the insurance and reinstatement money, and still losing their license. They all indicate no one told them they would be suspended under the mandatory insurance law if they comply with what was asked of them to have the charge reduced. They further indicate they are unable to obtain a refund for the insurance that covers them during a period of time they cannot drive due to the mandatory insurance suspension, and feel it is unfair that they will have to pay an additional $100.00 reinstatement fee.

It would be appreciated if the judges and magistrates could be advised of the above so they could take whatever action they feel is appropriate when these type of cases come before them.

Thanks in advance for any assistance you can render.

Sincerely,
Bill Brown
Chief of Driver Services
Department of Public Safety
Division of Motor Vehicles

Defense reponds

Dear Editor:

Jury selection in *State v. Peel* has apparently caused the circulation of a new round of misinformation concerning the defense representation of John Peel. In an effort to inject a few facts into what has become a debate in the legal community, I have prepared the following history.

Mr. Peel was arrested in his home town of Bellingham, Washington on an eight-count homicide charge in September, 1984. A local attorney, Mike Tario, was retained by the family to represent Mr. Peel on the extradition issue. Mr. Tario initiated discussions with several well-known private Alaskan defense counsel. Mr. Peel's family and friends pooled their resources and obtained loans to pay a modest (in retrospect, ridiculously low) fee to Phillip Weidner.

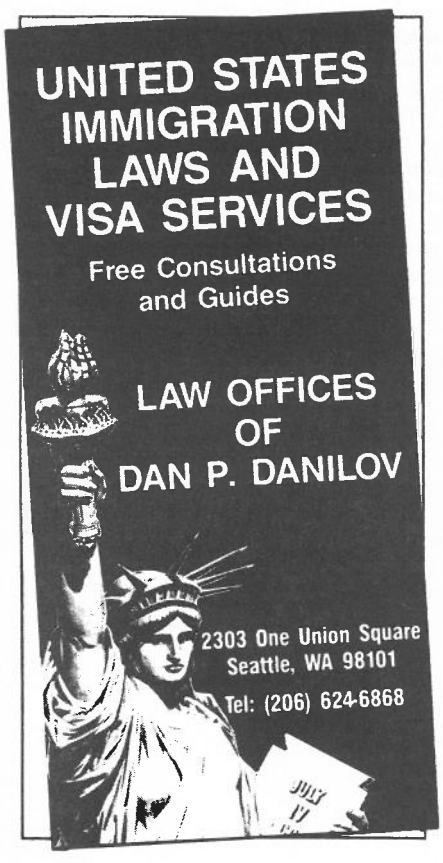
Upon Mr. Peel's return to Alaska, Mr. Weidner filed a conditional entry of appearance and requested public counsel appointment for Mr. Peel. Mr. Peel had no income because he was incarcerated and was indigent. The Public Defender Agency was appointed to represent Mr. Peel, but withdrew within days because of a clear conflict of interest.

Judge Schulz then appointed the Office of Public Advocacy in late November, 1984. At that time, the OPA had been taking cases for less than two weeks and had but one staff attorney besides myself. Given our anticipated caseload and the fact that only three Anchorage OPA staff attorneys would eventually be engaged in criminal defense work, I had no alternative but to assign myself to the case. It was obvious that at least two defense counsel would be essential to provide effective representation to Mr. Peel. I knew that I did not have sufficient contractual funds in the OPA budget with which to contract with an experienced defense attorney to assist Mr. Weidner in the defense of the case. The cost of such a contract would have been well in excess of $100,000 as the contract attorney would have had to divest him or herself of nearly all other cases.

Both judgments have proven correct. Our current caseload is overwhelming the three Anchorage staff defense attorneys and OPA had to obtain a $435,000 supplemental appropriation in order to pay court-appointed and contract attorneys in May, 1985.

Mr. Weidner's commitment to the case has saved the State the fees that would have been charged by a second contract attorney. Had he not been retained by the Peel family, OPA would have had to contract for a second attorney. Mr. Tario's participation in the case has been largely limited to bail hearings a year ago. The prosecution has had one district attorney and one assistant district attorney working virtually full-time on the case since its inception. Further, the Department of Law has retained a contract prosecutor to assist in trial preparation and to act

Continued on page 31



More Letters.....

as a third trial prosecutor.

While it is true that John Peel is free on a $1.16 million bond, his appearance is secured almost entirely by property bonds posted by some 14 family members and friends. These property bonds represent equity in family homes and thus the life savings of many people. Several thousand dollars have been raised to help pay Mr. Weidner's expenses through John Peel Defense Fund activities.

The *Peel* case is surely the most factually and legally complex criminal case ever tried in the State of Alaska. Nobody ever said due process comes cheap. it is enormously expensive and cumbersome. But I've always believed that the rights we accord a citizen accused of a heinous crime are the surest measure of our sense of justice.

Our Constitution guarantes John Peel the effective assistance of counsel. The OPA's mandate is to implement that guarantee in a cost-effective manner. I hope this letter answers some of the questions that have been raised regarding Mr. Peel's representation and serves to correct the surprisingly inaccurate "facts" currently in circulation.

Sincerely,
OFFICE OF PUBLIC ADVOCACY

Brant McGee
Public Advocate

Death of a lawyer

March 11, 1986

Managing Partner
Jermain, Dunnagan & Owens
Attorney at Law
3000 A Street, Suite 300
Anchorage, Ak. 99503

Subject: Death of Howard Trickey

Dear Sir:

In 1984 your firm, representing Helen Fagerstrom, filed suit against me. We have agreed, in principle, over a year ago to a settlement proposed. Several of your lawyers have worked on the case (you keep losing them) and since the departure of Mr. Thomas M. Daniel I have been informed by phone that Mr. Howard Trickey is back on the case. The only problem with this is that Mr. Trickey is dead. I know that he is dead because no one, not even a lawyer who had very, very sloppy habits could go as long as this with as many phone calls as I have made, and not return a call. Not one!

In conclude that Trickey is dead and you guys are keeping it a secret. Why, I don't know, but you are doing a pretty good job of it. Even Mr. Trickey's secretary is in on it. She is good at saying that he is out of town and will be back on Monday or that he is in a meeting or some such thing, and that she will have him return the call. If he were alive he would surely have called back by now.

I am sure that you have your reasons for not telling people that Mr. Trickey is dead. Have you guys checked to see if what you are doing is legal? Think of his family. You will have to tell them sooner or later.

Don't worry, I won't tell anyone what you are doing. My main concern is getting this issue resolved. Perhaps you have a live lawyer in your firm that you could assign to this case.

May I hear from you??

Sincerely,
Nome 2000
M.T. Killion
General Partner
P.O. Box 195
Fairbanks, Ak. 99707

Mr. Trickey, who was good-natured enough to allow us to publish this gem, informs the Bar Rag that he has not—as yet—returned Mr. Killion's call.

—Ed.

The Alaska Bar Rag

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MAIL TO:

The Alaska Bar Association
310 K Street, Suite 602
Anchorage, Alaska 99501

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On the record

Fast track rule for Third Judicial,

MEMORANDUM

To: All Counsel, Third Judicial District
Info: Chief Justice Rabinowitz
All Alaska Supreme Court Justices
All Third Judicial District Trial Court Judges
Other Interested Persons
From: Presiding Judge Douglas J. Serdahely
Date: January 15, 1986
Re: "Fast Track" Rule

By now, many of you may be aware of our "Fast Track" calendaring project for civil (non-domestic) cases in the Anchorage Superior Court. The provisions of the new calendaring scheme have been embodied in a new Civil Rule which the Alaska Supreme Court has reviewed and tentatively approved, and presently intends to adopt, effective February 24, 1986.

With this memorandum, we wish to explain key features of the new Rule and to invite any comments you may wish to make prior to the Supreme Court's adoption of this Rule.

The Problem—Facts

Our efforts to streamline the processing of appropriate civil cases began with our recognition of a growing case delay problem (and related litigation costs and expenses problem) with civil cases in the Anchorage Superior Court. We asked the Alaska Judicial Council to examine this problem, and their findings are summarized below.

More specifically, at the present time, we have approximately 6000 (non-domestic) civil cases pending in the Anchorage Superior Court. This figure includes the approximately 3800 cases which were filed or reopened last ~~fiscal year.~~ The remaining 2200 cases constitute the current "backlog" of previously filed and pending civil cases.

Our civil case load is increasing, as case filings for this fiscal year are up. We are currently estimating that approximately 4200 new civil cases will have been filed by the end of this fiscal year, reflecting an increase in filings of approximately 10.5% over last year's filings.

According to the Judicial Council study of 1984 civil cases, it is presently taking up to 3 years to dispose of 90% of our pending civil cases (excluding older cases dismissed for lack of prosecution). More specifically, approximately 60% of our civil case load has been pending without trial for 18 months or less, while the remaining 40% of the cases have been pending without trial for more than 18 months.

Additionally, very preliminary studies suggest that in approximately 65–75% of our civil cases, counsel estimte or calendar 10 days of trial time or less, while in approximately 25% of the cases, counsel estimate or calendar more than 10 days of trial time. This latter 25% of cases may, however, account for as much as 55% of total trial time estimated or calendared.

In the past, all cases have, for calendaring purposes, been undifferentiated by complexity or trial time required. Each of the six Civil Division Superior Court judges individually calendared all cases, and carried between 900–1100 civil cases per judge. Thus, both shorter and longer or more complex cases have been mixed together, with the result being that at least some modest cases have been "parked" behind complex cases for years awaiting trial time on the calendar.

Research and Background

To deal with this case delay problem, an ad hoc Civil Litigation Simplification Committee was created in Anchorage earlier last year, and Superior Court Judge Milton Souter was appointed Chairperson thereof. Supreme Court Justice Daniel Moore and various trial counsel served on the Committee. The Committee or members thereof held meetings and/or discussion sessions with groups such as the Anchorage Bar Association, the Defense Counsel of Alaska, Inc., the Alaska Academy of Trial Lawyers, insurance company representatives, and numerous individual attorneys. Conferences were also held with the Alaska Supreme Court, and the National Center for State Courts was consulted.

Research and literature on expedited or economic litigation projects around the country were also reviewed, including a report on the Washington, D.C. Superior Court's complex/simple case tracking system. Further, members of the Committee personally examined what may be the most successful "Fast Track" project in the country—the Phoenix, Arizona expedited litigation project.

As mentioned, the Alaska Judicial Council was asked to examine the case delay problem at the outset of this experiment, and to monitor and report on the success of the project during the forthcoming 1 to 2 years. The American Bar Association's Lawyers' Conference Task Force on the Reduction of Litigation Costs and Delay, has also been invited to monitor and evaluate this project.

The Proposed Solution—Provisional "Fast Track" Rule (Civil Rule 16.1)

From the foregoing efforts, the following proposed Superior Court "Fast Track" Rule, Civil Rule 16.1, was developed for civil cases. Copies of such Rule and related forms are enclosed.

Generally, the main objective of the "Fast Track" rule is to reduce delay (and attendant costs and expenses) in the settings and calendaring of civil cases for trial. We hope to process cases requiring relatively limited trial time (10 trial days or less) in 12–14 months from the date of filing to the date of trial. Lengthier pretrial periods would be established for more complex cases on a case-by-case basis. Cases to which the "Fast Track" Rule would not presumptively apply are identified more specifically in the enclosed administrative order, 3AN-AO-86-01. Depending upon actual experience with the new Rule, these objectives may be modified in the future.

Key features of the new Rule are:

1. All pending and future civil (non-domestic) cases will be calendared in accordance with their complexity and/or trial time required. Case-characterization forms will be utilized for the purposes of identifying and assigning cases.

2. Two calendar tracks will be adopted: a "Fast Track," for cases requiring less than 10 trial days, and other, individually tailorized tracks for more complex cases requiring greater than 10 trial days.

3. Responsibility for the management and movement of cases on the "Fast Track," from date of filing to date of trial, will be assumed by the Court System. Non "Fast Track" cases will also be supervised and managed more closely by the Court system.

4. Presently, three Superior Court judges, Judges Ripley, Souter and Michalski, will be assigned to the "Fast Track" calendars. More judges may be added in the future, as may be necessary. The remaining Civil Division judges will maintain complex case calendars. All judges' calendars will remain on an individual calendaring basis.

5. "Fast Track" cases will be calendared at a higher overset ratio than non-Fast Track" cases. Where more than one "Fast Track" case per judge remains to be tried for any given week, such case will be reassigned to another trial judge, so that the trial date will remain valid. Reassignment of regular and/or pro tem judges to try overset "Fast Track" trials will receive the highest of priorities in order to assure the integrity of the trial dates.

6. Requests for continuances of trials will normally be denied unless truly good cause therefor is shown.

7. Rule 16.1 makes some changes in the discovery rules and other Civil Rules. Thus, for example, the Rule requires the automatic production, without request therefor, of discoverable documents.

8. A revised Pretrial Order will be issued in "Fast Track" cases. Some elements of the former Pretrial Order have, however, been incorporated into the new "Fast Track" Rule.

9. In order to be set for trial, a case must first be on the "Active Calendar," meaning that a Motion to Set a civil case for trial and Certificate of readiness must have been filed. Before a Motion to Set and Certificate can be filed, however, witness lists and exhibits must have been exchanged. Trials will be set within approximately 3–4 months of the Trial Setting Conference.

10. Cases in which no Motion to Set and Certificate of readiness have been filed within 9 months from the date of filing will be transferred to an "Inactive Calendar." Written notice of the transfer of the case to the inactive calendar will be sent by the Court Clerk to all counsel. If no Motion to Set and Certificate have been filed within 2 months after the issuance of such Notice, or no continuance for good cause has been granted, the action will be dismissed.

11. To illustrate hwo the "Fast Track" Rule is intended to operate, a time-line diagram is enclosed.

Review and Modification

We wish to emphasize that the foregoing "Fast Track" Rule is experimental in nature, and will be adopted by the Alaska Supreme Court for a provisional period of two years.

We will be evaluating this project on an ongoing basis throughout the next year. The Standing Committee on Civil Rules, chaired by Justice Moore, will collect valuable feedback on the project. The Alaska Judicial Council, and the ABA Task Force, will assist us in evaluating the new Rule.

Your comments, criticisms and reactions to this effort are also invited—indeed, encouraged. In this regard, any comments you may wish to make regarding Rule 16.1 and the relevant forms, prior to the formal adoption and implementation of the Rule, should be sent to either Justice Moore or myself before February 15, 1986.

After a reasonable trial period has occurred, and evaluations have been concluded, we may continue, modify or abandon such Rule as may be appropriate.

District Court

At the moment, we will be implementing the "Fast Track" Rule in the Anchorage Superior Court only. There presently does not appear to be a major case delay problem with the processing of civil cases filed in Anchorage District Court. We will, however, be closely monitoring the District Court civil case load and processing time, and may, if appropriate, implement a similar "Fast Track" program for District Court civil cases in the future. In this regard, the effects which the recently raised jurisdictional limits in District Court may have on the civil case load in that court will be carefully examined.

Conclusion

Ultimately, the success of our "Fast Track" project will depend upon support from the bar. The foregoing changes in the procedures for calendaring civil cases will, no doubt, cause a certain amount of disruption and inconvenience for all practitioners—at least at the outset of this program. Yet, we are hopeful that the bar in this Judicial District will find, as did the members of the bar in Phoenix and elsewhere, that the "Fast Track" project is in their interest as well as in the interest of the clients they represent. The savings to the litigants effected by reduction in litigation delay and expenses should be substantial, if we are successful in this venture.

In all events, your support, understanding and cooperation are sincerely appreciated. We look forward to working with you on this project.

Thank you.

Fast track order

IN THE SUPREME COURT
FOR THE STATE OF ALASKA
ORDER NO. _____

Adding for two year period experimental Civil Rule 16.1 referred to as the "Fast Track Rule" relating to reducing litigation delay.

IT IS ORDERED:

Alaska Rule of Civil Procedure 16.1 is added as follows: Rule 16.1. Special Procedures for Reducing Litigation Delay.

(a) **General.**

This rule has been adopted by the Alaska Supreme Court on a provisional basis for the purpose of enabling trial courts in designated locations to adopt special procedures for the reduction of delay in civil litigation. More specifically, it is the intent of this rule to resolve more swiftly and in a less costly manner the majority of civil cases.

(b) **Cases to Which Rule Applies.**

(1) Civil cases to which this rule shall presumptively apply shall be those civil cases identified in an appropriate administrative order issued by the Presiding Judge of the Judicial District in which this rule has been invoked.

(2) Cases filed after the adoption and implementation of this rule will be assigned to appropriate calendars promptly after they are filed. For this purpose, plaintiffs and/or their counsel shall file and serve with their compalints a "case-characterization form," to be provided by the Clerk's Office. Such form shall indicate the type of case, number of parties, estimated trial time and other pertinent information.

Any party objecting to the plaintiff's characterization of the case may file and serve an opposition to plaintiff's case characterization, along with the answer or responsive pleading. Such opposition shall specifically set forth defendant's characterization of the case, estimate of trial time and number of parties and other related information.

(3) Contested case characterizations and/or calendaring assignments shall be promptly resolved by the Presiding Judge of the Judicial District in which this rule has been invoked. The Presiding Judge may request a recommendation from the trial judge to whom the case was initially assigned. The decision of the Presiding Judge on the issue shall be final.

(c) **Motion to Set Trial and Certificate.** A Motion to Set Trial may not be filed until 105 days after service of the summons and complaints. A party seeking to obtain a trial date must serve and file a Motion to Set Trial together with a Certificate, signed by counsel, stating:

(1) That the issues in the case have actually been joined;

(2) That all parties have completed discovery or will have a reasonable opportunity to do so within the next 60 days;

(3) That the procedure for listing witnesses and exhibits and providing exhibit copies, as set forth in paragraph (d) of this Rule has been completed;

(4) Whether trial by jury has been timely demanded;

(5) The estimated number of days for the trial, including estimates for each party's case and for jury selection;

(6) The names, addresses and telephone numbers of all attorneys and *pro se* parties who are responsible for the conduct of the litigation;

(7) Which, if any, statute or rule entitles the case to preference on the trial calendar;

(8) That the parties have complied with paragraph (k) of this Rule.

(d) **Witness and Exhibit List and Exhibit Copies.** A party desiring to file a Motion to Set Trial must first serve on all other parties and file with the court a list of witnesses and exhibits and copies of exhibits expected to be used at trial. Evidence to be used solely for impeachment is excepted. This service and filing may not occur until 90 days after service of the summons and complaint. Within 15 days after service of the witness and exhibit list and exhibit copies all other parties shall file their lists of witnesses and exhibits and exhibit copies. For good cause shown, the trial court may extend the foregoing time period for the filing of parties' witness and exhibit lists and exhibit copies. After all necessary filings under this section are made or the time for such filings has expired, any party may serve and file a Motion to Set Trial and Certificate under paragraph (c) of this Rule.

(3) **Opposition Certificate.** Within 10 days after a Motion to Set Trial and Certificate have been filed any other party may file an Opposition Certificate. It shall not exceed two pages in length. The Opposition Certificate shall identify the specific statements in the Certificate which are objected to and provide a concise statement of reasons for the objection.

(f) **Active Calendar.** If an Opposition Certificate has been timely filed, the court shall decide without oral argument the motion and opposition. Where the opposition is without good cause, the assigned judge shall immediately set a trial setting conference date on the earliest calendar opening within at least 60 days. A later date may be set only where good cause therefor is found in the Opposition Certificate. If an Opposition Certificate has not been filed, the court shall proceed as if the opposition is without good cause.

(g) **Inactive Calendar and Dismissal.** Where a Motion to Set Trial and Certificate have not been filed within 270 days after the service of the summons and complaint, the case shall be transferred to the Inactive Calendar by the clerk of the court. The clerk shall promptly notify counsel in writing of the transfer. All cases which remain on the inactive calendar for more than 60 days shall be dismissed, unless within that period: (1) A proper Motion to Set Trial and Certificate is filed; or (2) the Court on motion for good cause orders a case continued on the inactive calendar for a specified additional period of time. Notwithstanding Civil Rule 41(b), the dismissal does not operate as an adjudication upon the merits unless a previous dismissal has been entered by the court under this rule, or by the plaintiff or parties under Civil Rule 41(a)(1). If a case dismissed under this rule is filed again, the court may make such order for the payment of costs of the case previously dismissed as it may deem proper, and may stay the proceedings in the case until the party has complied with the order.

(h) **Setting for Trial.** The trial shall be calendared for the first available date within at least 120 days following the trial setting conference held pursuant to paragraph (f) of this rule. Preference shall be accorded cases entitled by law to priority on the trial calendar and cases estimated to require not more than two hours of trial. Counsel and *pro se* parties shall be provided not less than 60 days advance written notice of the trial date.

(i) **Continuances.** When a case has been set for trial no continuance of the trial may be granted except on motion and for extraordinary good cause.

(j) **Amendments to Pleadings.** Motions to amend pleadings shall be made as provided in Civil Rule 15.

Continued on page 33

comment invited

IN THE TRIAL COURTS
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

In the Matter of:)
)
INVOKING PROVISIONAL)
CIVIL RULE 16.1 FOR)
CERTAIN CIVIL (NON-)
DOMESTIC) CASES PENDING)
AND TO BE FILED IN THE)
SUPERIOR COURT OF THE)
THIRD JUDICIAL DISTRICT)
AT ANCHORAGE.) 3AN-AO-86-01

ORDER

1. Pursuant to ¶(b)(1) of Civil Rule 16.1, the terms of such Rule are hereby invoked for the following civil (non-domestic) cases pending and to be filed in the Superior Court for the Third Judicial District, at Anchorage:

(a) All cases requiring 10 days of trial time or less, except those listed in ¶(2) of this Order.

2. Civil cases to which Rule 16.1 shall presumptively not apply include those cases requiring more than 10 days of trial time and/or complex or complicated civil cases which do not lend themselves to expeditious calendaring procedures, such as the following types of actions:

(a) Professional malpractice actions.
(b) Class actions.
(c) Derivative shareholder suits and security law actions.
(d) Products liability actions.
(e) Cases challenging the constitutionality of rules and/or statutes.
(f) Civil cases involving unusually active pre-trial discovery and/or motion work.
(g) Reapportionment and election-challenge cases.
(h) Labor disputes.
(i) Other cases as determined by the Presiding Judge to be unsuitable for expedited resolution.

DATED at Anchorage, Alaska, this _____ day of _____, 1986.

DOUGLAS J. SERDAHELY
Presiding Judge
Third Judicial District

COPIES TO:

All Supreme Court Justices
All Third Judicial District Trial Court Judges
All Third Judicial District Counsel
Area Court Administrator Al Szal
Clerk of Court
Superior Court Calendaring Office

I certify that on _____ a copy of the above was mailed to each of the attorneys and/or individuals at their address of record.

Secretary/Clerk

CIVIL CASE CHARACTERIZATION FORM

I. a. PLAINTIFFS DEFENDANTS

b. Attorneys (firm name, and telephone number) Attorneys (if known)

II. CAUSE OF ACTION (brief statement)

III. NATURE OF SUIT:
a. Place an X on one line only:
___ Contract
___ Personal Injury
___ Real Property
___ Personal Property
___ Other, explain:
___ Civil Rights
___ Prisoner Petitions
___ Forfeiture/Penalty
___ Labor

b. Place an X on one of the following lines if applicable:
___ Professional malpractice action
___ Class actions
___ Derivative shareholder suits and security law actions
___ Products liability actions
___ Cases challenging the constitutionality of rules and/or statutes
___ Civil cases involving unusually active pretrial discovery and/or motion work
___ Reapportionment and election-challenge cases
___ Labor disputes

c. Total trial time currently estimated:
___ 10 trial days or less
___ More than 10 trial days

IV. RELIEF REQUESTED IN COMPLAINT:
INJUNCTIVE ___ Yes ___ No
DEMAND $
JURY DEMAND (check YES only if demanded in complaint)
___ Yes ___ No

V. PREVIOUS FILING
Has this case ever been previously filed and dismissed without prejudice under Civil Rule 16.1(g) or 41(a)? ___ Yes ___ No
If yes, state the case name, number and date of dismissal below:

VI. RELATED CASE(S) IF ANY:
(see instructions)
Case Name _____
Judge _____
Case No. _____

DATE: _____

Signature of attorney of record

Print or type name here

Attorney(s) for _____
(plaintiff or defendant)

Alaska Court System Form No. _____

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

_____)
_____)
Plaintiff,)
vs.)
_____)
_____)
Defendant.)
_____)
Case No. _____

ORDER INVOKING CIVIL RULE 16.1

IT IS HEREBY ORDERED that the special procedures set forth in Civil Rule 16.1 are invoked in this action.

IT IS HEREBY FURTHER ORDERED that plaintiff shall forthwith serve a copy of this Order on all other parties.

If, in the opinion of any party, said procedures are inappropriate in this action, said party may seek relief under paragraph b(3) of said Rule.

ENTERED this _____ day of _____, 198___.

Judge of the Superior Court

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

_____)
_____)
Plaintiff,)
vs.)
_____)
_____)
Defendant.)
_____)
Case No. _____

MOTION TO SET TRIAL

Having complied with the provisions of Civil Rule 16.1(c), (d), and (k), _____ (name or party moving to set) hereby moves to set this case for trial.

Attached hereto is the signed Certificate required by Civil Rule 16.1(c).

DATED this _____ day of _____, 19_____.

Attorney for _____

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

_____)
_____)
Plaintiff,)
vs.)
_____)
_____)
Defendant.)
_____)
Case No. _____

CERTIFICATE (C.R. 16.1(c))

The undersigned hereby certifies that the following facts are true:

1. That all issues in this action have actually been joined.

2. That all parties have completed discovery or will have a reasonable opportunity to do so within the next 60 days.

3. That the procedure for listing witnesses and exhibits, plus exchanging copies of exhibits, as set forth in Civil Rule 16.1(d), has been completed.

4. Trial by jury has been timely demanded.
___ Yes ___ No

5. The number of days necessary for the trial in this case is:
___ days for plaintiff(s)' case
___ days for defendant(s)' case
___ days for third party plaintiff(s)' case
___ days for third party defendant(s)' case
___ days for other party(s)' case(s)
___ days for jury selection

6. The names and addresses and telephone numbers of all attorneys and *pro se* parties who are responsible for the conduct of this litigation are as follows:

7. Preference on the trial calendar is claimed?
___ Yes ___ No Statute or rule under which preference is claimed? _____

8. That the parties have complied with the mandatory discovery exchange provisions of Civil Rule 16.1(k).

DATED: _____

Attorney for _____

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

_____)
_____)
Plaintiff,)
vs.)
_____)
_____)
Defendant.)
_____)
Case No. _____

NOTICE OF TRANSFER TO INACTIVE CALENDAR AND OF INTENT TO DISMISS

This case has been on file with the court for 270 days without a Motion to Set Trial and Certificate having been filed pursuant to Civil Rule 16.1(c).

Therefore, notice is herewith given pursuant to Civil Rule 16.1(g) that this case is hereby transferred to the Inactive Calendar and that all claims, counterclaims, third party claims and cross claims in this case shall be dismissed without prejudice on the 61st day following the service of this Notice unless prior to that date a valid Motion to Set Trial and Certificate are filed or the court, on motion and for good cause, orders the case continued on the Inactive Calendar. In cases which have been previously dismissed under Civil Rule 16.1(g), or by the plaintiff or parties under Civil Rule 41(a), dismissal shall be with prejudice on the 61st day following the service of this Notice unless prior to that date a valid Motion to Set Trial and Certificate are filed or the court, on motion and for good cause, orders the case continued on the Inactive Calendar.

DATED: _____

Clerk of Court

By: _____
Deputy Clerk

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

_____)
_____)
Plaintiff,)
vs.)
_____)
_____)
Defendant.)
_____)
Case No. _____

ORDER OF DISMISSAL WITHOUT PREJUDICE

This case has remained on the Inactive Calendar for 60 days without a Motion to Set Trial and Certificate having been filed pursuant to Civil Rule 16.1(c).

Therefore, pursuant to Civil Rule 16.1(g), IT IS HEREBY ORDERED that all claims, counterclaims, third party claims and cross claims in this case are dismissed without prejudice.

ENTERED at Anchorage, Alaska, this _____ day of _____, 19_____.

Judge of the Superior Court

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

_____)
_____)
Plaintiff,)
vs.)
_____)
_____)
Defendant.)
_____)
Case No. _____

ORDER OF DISMISSAL WITH PREJUDICE

This case has been previously dismissed, without prejudice pursuant to Civil Rule 16.1(g) or 41(a), has been refiled and has remained on the Inactive Calendar for 60 days without a Motion to Set Trial and Certificate having been filed pursuant to Civil Rule 16.1(c).

Therefore, pursuant to Civil Rule 16.1(g), IT IS HEREBY ORDERED that all claims, counterclaims, third party claims and cross claims in this case are dismissed with prejudice.

ENTERED at Anchorage, Alaska, this _____ day of _____, 19_____.

Judge of the Superior Court

Fast track order . . . . . *continued*

(k) **Discovery.** Each party shall furnish to the other parties, without formal request or motion or court order therefor, the following items or information otherwise discoverable under Civil Rule 34, and shall do so not later than 75 days after service of the summons and complaint.

(1) All relevant contracts and all written and recorded communications, memoranda and notes which contain evidence relevant to the interpretation of such contracts and any claimed breaches thereof.

(2) All written documents evidencing any general, special, and consequential damages being claimed.

(3) All written and recorded statements from parties and witnesses.

(4) All investigative reports.

(5) All photographs of persons, objects, scenes and occurrences in issue.

(6) All diagrams prepared by parties, witnesses and investigators, which portray objects, scenes and occurrences in issue.

(7) Federal income tax returns for the preceding five years from all parties claiming past or future damages for lost income or income producing ability.

(8) Insurance policies and binders.

(9) Expert witness reports.

All other discovery shall be governed by the provisions of the Alaska Civil Rules, and shall have been completed by the deadline set forth in the pretrial order issued in each case.

(l) **Conflict with other Civil Rules.** In cases in which this Rule has been invoked, the provisions of this Rule shall supersede the provisions of any other Civil Rule in those instances in which a provision of this Rule conflicts with a provision of another Civil Rule. In all other instances, however, the provisions of all other Civil Rules shall remain in full force and effect.

(m) **Forms.** The clerk's office shall develop and disseminate all appropriate forms for the implementation of this Rule.

Such forms shall include the Case Characterization Form, Notice of Transfer to Inactive Calendar and of Intent to Dismiss, Order of Dismissal with Prejudice, Motion to Set Trial, Certificate of Readiness, Order Invoking Civil Rule 16.1, and modified Pretrial Order.

DATED: _____

EFFECTIVE DATE: _____

Chief Justice Rabinowitz

Justice Burke

Justice Matthews

Justice Compton

Justice Moore

NASTY, VILE, BRUTISH, & SHORT
ATTORNEYS AT LAW
(A MULTINATIONAL CORPORATION)
2604 PINSTRIPE ROAD, FLOORS 3 AND 4
ANCHORAGE, ALASKA 99512
CABLE ADDRESS: MEGABUCKS

RELEASE

FOR AND IN CONSIDERATION of the payment of $_____, the undersigned hereby releases, discharges, forgets about, and by these presents does for his heirs, executors, dwarfs, administrators, assigns, invisible friends, neighbors, blood-brothers, and other persons, release, acquit, back-off from, and otherwise forget about, his insurers, both individually and jointly, specifically and generally, and in any other capacity, firms, corporations, provisional governments, partnerships, Tupperware distributorships, of and from any and all damages, causes of action, blames, demands, nagging, whining, faking, simpering, malingering, loss of use, expenses, compensation, made-up-pain, and any other thing or claim whatsoever on account of, or in a way growing out of, any injuries allegedly sustained on or about the _____ day of _____, 198___, at _____.

The undersigned acknowledges that the case of Lason v. State, 12 S.2d 305 has been explained to him by his attorney. It is acknowledged that this case deals with the sexual habits of an Indian War veteran and has nothing to do with the facts of this case. Nevertheless, the protection of that case, if any, is specifically waived.

The undersigned acknowledges, understands and assumes all chances or hazards that said injury or damages may substantially worsen in the future, may be greater in degree than presently described, and may be different in kind or character. Specifically, the undersigned realizes that although sustaining only a minor bruise and paper cut at the present time, various parts of the body could at some future time fall off. These parts include, but are not limited to, hands, arms, face, ears, eyes, teeth, nose, and brain. However, the undersigned acknowledges the existence of that risk, and that things could even turn out worse, and nevertheless accepts the above-mentioned payment and gives this release notwithstanding the paltry amount of money being received at the present time.

All the terms and conditions of this release have been reflected upon without haste or undue regard. This is true even though the release was written in haste.

The undersigned does not rely upon any statements or representations made by any person, firm, horse-trader, or corporation hereby released, or any agent, physician, doctor, lawyer, or insurance representative or other person acting on his behalf, except that he has relied upon the advice of his attorney that his case may, in fact, be a real dog.

It is the intent of the undersigned to release all individuals, firms, corporations, governments, criminal syndicates, sewing circles, and any other and all entities against whom he might have made a claim, demand, or suit. This is true even though failure to making such prior demand may have been stupid and resulted in a smaller settlement. Nevertheless, the undersigned waives all advantages therefrom.

The undersigned understands that this release does not constitute an admission of liability on the part of anybody, witnesses included. In fact, the defendants specifically deny any wrongdoing or misconduct on their part. This is true even though several defendants have recently been sentenced to jail for the acts alleged, have secreted away their assets, and have otherwise attempted to flee the jurisdiction. Nevertheless, this settlement agreement shall not be considered an admission.

WITNESS my hand and face this ____ day of _____, 1986.

_____

NASTY, VILE, BRUTISH, & SHORT
ATTORNEYS AT LAW
(A MULTINATIONAL CORPORATION)
2604 PINSTRIPE ROAD, FLOORS 3 AND 4
ANCHORAGE, ALASKA 99512
CABLE ADDRESS: MEGABUCKS

J. B. Dell strikes again

NASTY, VILE, BRUTISH, & SHORT
ATTORNEYS AT LAW
(A MULTINATIONAL CORPORATION)
2604 PINSTRIPE ROAD, FLOORS 8 AND 9
ANCHORAGE, ALASKA 99512
CABLE ADDRESS: MEGABUCKS

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STUART W. VILE (1961-1979)
LOUIS M. BRUTISH (almost dead)

LEONARD P. SHORT
(OF COUNSEL)

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* Admitted in Washington Only
** Admitted in Washington and Alaska
† Admitted in the District of Columbia and Alaska
†† Admitted in New York only
††† Wears pleated trousers

January 15, 1986

William V. Solitare
807 Alleyway Street
Suite 109 (Left Half)
Anchorage, Alaska 99701

Dear Mr. Solitare:

At this time we are making our final settlement offer in the amount of $10,000. This one time offer shall be open ten days from the date of this letter, after which it shall be withdrawn forever. Please have your client sign the enclosed release and return it to me and I will issue a check. If your client does not settle, she is going to have to sue. Believe me, it will be expensive (we have already ordered an extra shipment of paper for the next six months).

Have a nice day.

Very truly yours,

George S. Trueblood

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Would the Anchorage attorney who prepared an inheritance type document for Gladys Greenfield in 1982, 1983 or 1984, please contact attorney George A. Dickson, 276-7887.