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The Alaska BAR RAG

VOLUME 14, NUMBER 2 — *Dignitas, semper dignitas* — MARCH—APRIL, 1990

Don't despair when faced with an adversarial tank

There are ways around different personality styles that will work without rankling anybody

By Drew Peterson

Are the attorneys on the other sides of your cases driving you to distraction with their legal style? Is your adversary a nit-picker, insisting on wasting valuable, billable time on trivialities?

Or do you find yourself dealing with a Tank, who tries to run you over with an overly aggressive style; a take-no-prisoners approach to the practice of law?

It is likely that you will also find yourself dealing on occasion with excessively aggreeable counsel, who are always accommodating, but then fail to follow through on their promises, and never return their phone calls.

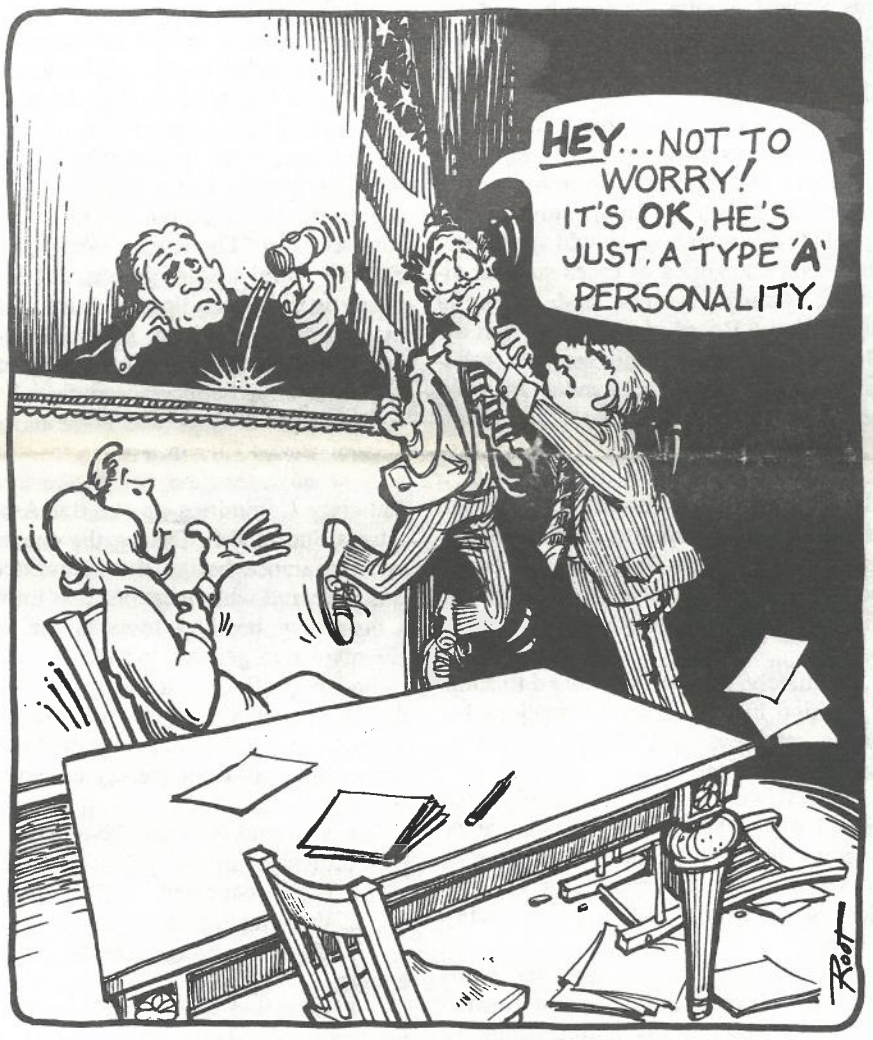
Perhaps you find yourself trying to cope with Grenades, who throw tantrums for no apparent reason.

Do any of these individuals sound familiar to you?

Well don't despair, you are simply dealing with differences in personality styles. There is indeed hope if you can learn how to recognize the personality styles of your adversaries, and how to adapt your own style to get the result that you want.

In the process of my continuing mediation education I have recently been listening to three different audio cassette programs on apparently different subjects. They are: Merrill and Reed, *How To Motivate People,* Listen USA, 1983; Dawson, *The Secrets of Power Negotiating,* Nightinggale-Conant, 1986; and Brinkman and Kirshner, *How To Deal with Difficult People,* Career Track, 1982.

While listening to the tapes, I realized that they were all talking about the same thing, although using different terms and with a different overall emphasis, as indicated by the titles of the programs.



The analysis set forth on the various tape programs was to consider individuals by their orientation along two different continuums, an emotional-nonemotional scale, and an assertive-passive scale. The scales result in four sectors, which look like this:

See graph, page 6

Each quadrant of the resulting chart is inhabited by individuals with certain common characteristics, while under stress each can result in different kinds of difficult people who the rest of us must learn how to deal with.

The Pragmatic. The cassette programs had different names for the residents of the different sections. The Pragmatic inhabitants of the northeast sector were also called Drivers, or Rulers. To these we should perhaps add the Managing Partner. These are our classic Type A personalities, prone to hard work, lots of energy, and heart attacks. They are driven to get the job done, whatever the job might be, in the most efficient and businesslike a manner possible.

Under stress the Pragmatics may turn into Snipers, Tanks or Know-It-Alls. Snipers are the people who take potshots at us from the sidelines, sarcastically ridiculing our best ideas.

When you meet a Sniper you need to confront him or her directly, to find out what is behind the attack. Tanks or

See SNIPERS page 6

Proposed changes to Bar rules and bylaws for MCLE discussed

The members of the Bar Association voted at last year's convention to refer the question of a minimum continuing legal education (MCLE) requirement to the Statutes, Bylaws, and Rules Committee, to draft a rule for the members to vote on by referendum.

The proposed changes to the Bar Rules and Bylaws which you see in this issue were drafted by the MCLE subcommittee of the Statutes, Bylaws and Rules Committee, with helpful comments from the CLE Committee, and were modified by the Board of Governors.

The Board has voted to present the rules to the members without a recommendation in favor of or against the proposed changes. The MCLE Committee has prepared this summary of the proposed rules' effects to help members review the proposal and decide how to vote.

What would I have to do if the rules were in effect?

You would have to take 24 credit hours of approved CLE in each two-year reporting period. At least 2 of these credit hours must be on ethics. This applies to all active members. (Rule 65(a)).

What is "approved CLE?"

You can count traditional CLE courses, in-house courses, teaching legal education courses, and writing legal articles published in law reviews or specialized journals towards the requirement. Listening to audio tapes or watching video tapes of approved CLE courses gives full credit; there is no supervision requirement. The rules describe how to get approval for the different CLE activities and the amount of credit hours given for each activity. (Rules 66 and 67).

See CLE page 11

The Convention is Coming

June 7 - 9, 1990 Anchorage!

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FROM THE PRESIDENT

Jeffrey Feldman

I wanted to say a few words in this column about the public's perception of lawyers and the bar association. But when I mentioned to a colleague that my next column in the Bar Rag would discuss the poor image the public all too often has of the profession, I was informed that such a column inevitably would be too boring.

"Your column was better when it was funny," he said. "Issues like the public's perception of lawyers are tiring. You need funny. You need sexy."

"Sexy?," I said. "You want the Bar Rag to be sexy?"

"Sexy would be good."

"How about if I start off sexy and then weave it into something that has to do with the public's perception of lawyers?" I asked.

"That would be OK. But how on earth are you going to get to issues of professional image and stature if you start off sexy?" he rejoined.

"Not sure," I said. "I'll find a hook somewhere."

o

We seem to spend no small amount of time these days regulating who is permitted to sleep with whom in society. I have had occasion to represent doctors, teachers, religious leaders and oil field workers, all of whom were charged, in one fashion or another, with engaging in allegedly impermissible sexual relations.

Some years ago I handled a case in which I had negotiated what I thought was a very advantageous plea bargain for a client charged with a sexual offense. I briefed the client about the proposed plea bargain on a Friday afternoon and sent him home over the weekend to consider his choices.

When he returned on Monday morning, he informed me that he had decided to reject the plea bargain. I was taken aback. The plea agreement was fairly lenient and my client's case was not particularly strong.

"Why," I asked him, "do you not want to take the plea bargain?"

He answered, "Because I thought about it over the weekend and came to the conclusion that this was just the Lord's way of testing the strength of my belief in him. The Lord is tempting me with this plea bargain, and I have to have the strength to trust him and turn it down."

"Well," I said, "you know, it's not really the Lord who is offering the plea bargain, it's Steve Branchflower."

He could not be persuaded. He said, "Makes no difference...I decided that I have to put my faith in the Lord and make this decision much the same way that Jesus would have."

"That sounds fine," I said, "but how do we know what Jesus would have done under these circumstances? Where is it exactly in the Bible that Jesus was charged with three counts of sexual assault in the first degree?"

The colloquy continued and apparently, at some point the heavens parted and the light shined through, as my client ultimately elected to proceed with the plea bargain, which clearly was the correct decision.

The issue of who gets to sleep with whom came before the Bar Association's Board of Governors last year. A request was made for a determination of whether it should be deemed unethical for an attorney to sleep with a client.

There was a wide range of opinion on this subject among the members of the Board of Governors. Some felt strongly that sexual relations between lawyers and clients was wholly unprofessional conduct and should be prohibited. This view, as I recall, was most vigorously espoused by Board Members who were married or otherwise sworn to monogamy. Others felt that the prohibition should apply only in certain categories of cases such as divorce, family matters and wrongful death. Some Board members felt that the Bar Association had no business regulating consensual sexual conduct between adults. I recall one member of the Board opining that it should not be deemed unethical for an attorney to sleep with a client, but that the attorney should not charge for it. I think this was meant humorously, but, the Board of Governors being a body prone to sometimes eclectic views, there is no way of knowing for certain.

Ultimately, the Board declined to adopt a position by which sexual relations between attorneys and clients would be deemed unethical.

Several weeks after the Board's decision, I was still having mightmares about opening the newspaper one morning to find a headline that read "Bar Association Says: OK For Lawyers to Screw Clients!"

Months later when I told my friend Howard Weaver, Editor of the Anchorage Daily News, of my apprehensions, he told me that my fears had been misplaced. He was of the view that such a headline never would have been printed as no one would have regarded a determination by the Board allowing lawyers to screw clients as "news," since it only served to confirm everyone's long held suspicions.

While Howard Weaver's wry observation was meant humorously, it reflects a perception of lawyers and the legal profession by the lay public that is genuinely disturbing.

Last fall, the Alaska Public Interest Research Group put on its annual follies, lampooning Alaska politics. During one of the intermissions, emcee Tim Huffman, who works by day for the State of Alaska, Department of Family and Youth Services, engaged in some light-hearted lawyer bashing. At each performance he would get no farther into his query than "What's the difference between a lawyer and ...," whereupon various members of the audience would shout out alternate and familiar punch lines:

"Professional courtesy."

"Skid marks in front of the rabbit."

"Not enough sand."

"A good start."

"A chicken clucks defiance."

This exercise served to demonstrate that the popular lexicon of lawyer-bashing humor has been fully assimilated by the collective consciousness. At some performances, the audience's familiarity with the punch lines was so great that things began to sound a little like performances of "The Rocky Horror Picture Show," with whole groups of people chanting the punch lines in unison, like a mass anti-lawyer ritual. It was all meant and taken in good fun, but there was a subtle message being communicated.

The same message was communicated several weeks later in a much less subtle way when I testified before the Senate Judiciary Committee on the Bar Association's Sunset Bill. During the course of my appearance before the committee, I was peppered with questions that implied a disturbing hostility towards the legal community in general and the Bar Association in particular. It became apparent that there was a great gap between how we, as lawyers, see ourselves, and how a significant portion of the lay community views us.

Lawyers tend to view themselves and their profession as:

1. Highly educated;
2. Very intelligent;
3. Knowing things that no one else knows;
4. Entrusted with a vital function of protecting the rights of individuals and preventing miscarriages of justice;
5. Hard working;
6. Reasonably compensated or under compensated, but not over compensated;
7. Honorable and honest.

A significant portion of the lay public views lawyers and the legal profession much differently. They would conclude that we are best described as:

1. Self serving;
2. Greedy;
3. Dishonest;
4. Overpaid;
5. Monopolistic;
6. Arrogant;
7. Obnoxious.

The gap between how we perceive ourselves and how a substantial portion of the public sees us is something that we cannot afford to ignore. It serves neither the interests of the profession nor the judiciary for significant portions of the citizenry to lack confidence in those charged as officers of the court with the responsibility for the administration of justice.

Some of our unpopularity may be the inescapable price we pay for engaging in an enterprise by which, by and large, only people who feel they have been injured or harmed in some fashion, or who are acused of causing someone else to suffer some injury or harm, seek our assistance.

Undoubtedly, there is a strong "shoot the messenger" component to lawyer-bashing by which people who rightly or wrongly feel aggrieved by the process by which they obtained or were denied justice channel their frustrations toward their legal counsel.

But, likewise, there may be measures that can be taken by which some of these feelings can be neutralized. The matter deserves serious thought and study, and I will ask the Board of Governors and the Alaska Supreme Court to consider appointing a joint bar-bench committee to work with the Alaska Judicial Council and examine and report on this issue.

THE EDITOR'S DESK

Ralph Beistline

As I have travelled around the state, I am continually asked about the secret of youth and why, after 15 years of legal practice, I have managed to keep the look of youth about me.

I have been asked if I had located the Holy Grail, or if the practice of law somehow slows the years. A friend in Anchorage suggested it was merely a matter of diet and exercise. A Juneau attorney claimed that youth is merely a matter of mind (if you don't mind, it doesn't matter). In Kodiak, I have heard it said that the secret of youth is merely good friends (who are as old or older than you), and in the Bush, I am told over and over again that clean air and a starry night well keep one young forever.

It has recently been observed, however, that generally those affiliated with the Bar Rag have an extra vitality about them--an exhuberance characteristic of youth--but coated with a serenity and maturity possessed only by the very wise. Could this affiliation provide the secret to eternal life?

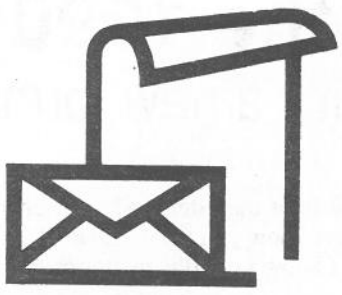
Coincidentally, we now have several vacancies on our editorial staff and are looking for contributors to the paper. Join with us and learn, as so many have before, the answer to this riveting question.

The Alaska BAR RAG

President Feldman has established the following schedule of board meetings during his term as president. If you wish to include an item on the agenda of any board meeting, you should contact the Bar office at 310 K Street, Suite 602, Anchorage, Alaska 99501 (272-7469) or your Board representatives at least three weeks before the Board meeting.

June 4-6, 1990
June 7-9, Annual Convention
Hotel Captain Cook, Anchorage

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



IN THE MAIL

Faxing and signatures

This fall there was an innocuous proposal afoot to amend ARCP 76(b) to require manuscript signatures of the party's attorney *appearing* in the case on all pleadings (as literally proposed only an appearing attorney could sign another's pleadings).

I jumped into the breach and fired off the enclosed letter (*see letter inside)* with enclosures proposing that a FAX certificate of having read the pleading also be satisfactory. I heard no more, and see no new rule. As I know you are a modern user of the FAX machine and hence I assume a proponent thereof, I bring this matter to your attention least it become lost somewhere in the court rules committee.

I think the proposal to permit a FAX certificate be attached to a pleading (in lieu of the current practice amongst sole practitioners of having their brethren sign as a courtesy) would be overwhelmingly, positively received by anyone concerned with form over substance in the practice of law, and the benefits to be gained would far outweigh any remote inconvenience. Alaska is already a leader in permitting FAX service. ARCP 5(b).

Could you please suggest this issue as an appropriate subject of comment in your various letters in the Bar Rag if the rules attorney has not already decided to rescind his proposal and adopt mine?[1]

--Gerald Markham

[1] Since writing this letter, I found time to do a little research, and suggest that it be noted that Rule 11 merely provides that a pleading be "signed" not "subscribed," only the latter term suggest a manuscript signature; the former does not. See *Black's Law Dictionary*, 4th (1957), pg. 1552 and cases cited, specifically, *Hagen v. Gresly* 34 N.D. 349, 159 NW 3 (1917). Although 5 Wright and Miller, *Federal Practices and Procedure*, Sec.1332 p. 497 states that a typewritten name is not sufficient, no case authority for that proposition is cited. See also, Browne, *Civil Rule 11: The Signature and Signature Block*, 9 Cap. U.L. Rev. 291 (1979). The only conceivable purpose behind a "manuscript" signature is either proof problems or problems of "solemnity" to emphasize the significance of the Rule 11 obligation. I suggest that there are no "proof" problems (unless a secretary accidentally files a pleading a boss on reflection decided to tear up), and solemnity is not greatly enhanced by a signature, but if it is a FAX signature, it is no less solemn.

Saddened by Fraties

I was touched by your marvelous(!) tribute to Gail Roy Fraties. (Bill Wilson of Little Rock told me of Gail's death, and later sent me a copy of your Bar Rag tribute.)

Needless to say, I was very sad to learn of Gail's death. Even though we had never met, we did exchange letters and a few phone calls--and he had promised to come to Dallas, but was never able to.

I am enclosing copies of the first 4 articles in a 6-piece series on humor in sentencing (of all things). They contain some things I think Gail would have liked (even though some "discrete" changes have been made in some of the language)--and, perhaps, reflect Gail's philosophy captured in the last paragraph of your tribute.

If the Bar Rag would like to publish these, I would consider this as my way of thanking Gail for all the enjoyment his columns gave to me--and to the other Dallas and Texas lawyers I shared them with.

Once again, thank you for your moving tribute to Gail. It made me realize, even more, how much I missed by not having the chance to meet him.

My very best regards.
--Jerry Buchmeyer.

(Ed. note: You'll find Mr. Buchmeyer's writings herein.)

Reader advises Samantha

Please get rid of that stupid, rather sexist depiction of women as superficial advice-givers called Samantha Slanders.

The whole concept is offensive to those of us who take the job of providing advice to those in need in a professional and thoughtful manner. The use of a woman to perpetuate this stereotypical image is unacceptable.

Don't you have something better to fill that space in the Rag--perhaps an intellectual analysis of Teenage Mutant Ninja Turtles and the Supreme Court?

--Sue Williams

Enjoy stories

I enjoyed Jeff Feldman's "Stories" in the November-December, 1989 *Bar Rag*. I am glad to see that he has, over the years, maintained his sense of humor and flawless writing style.

I appreciate receiving the *Bar Rag* and read most issues.

--Craig M. Cornish

Here's an undry proceeding

I would agree with commentators who would generalize that legal proceedings are apt to be dry and boring and the final orders worse. However, there are some exceptions, and I keep a copy of one of those exceptions posted on the wall next to my study desk so that after a particularly trying experience--such as explaining (?) to my clients for the fifth time why Kenai domestic relations cases are assigned to circuit-riding judges and therefore they should behappy that the fourth of fifth different judge has just made a ruling in their case, because they got a ruling-- I can refer to it.

It has never ceased to give me a better outlook on the system, and a better understanding of what the professional life of a judge must really be like. It also helps reinforce the oft-forgotten theory that under the somber robes lurks the remains of what was at one time humanoid!

The judgement on by wall reads as follows:

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT
KENAI

RON J. LAFLEUR,
Appellant

vs.

TERRY STONE,
Appellee

3KN-83-349 CI

DECISION ON APPEAL

Defendant's dog, Killer, during a fight,
Administered plaintiff's dog, Caine, a rib breaking bite.
For Caine's vet services, plaintiff paid a fee,
But defendant says, "Don't send it to me."
The lower court assessed Killer's owner 60 percent,
Having found him to that degree negligent.
Now Killer's owner claims the lower court erred,
In holding him liable for Killer's teeth bared--
Because of relevant evidence, there was a scarcity,
Of Killer's inclination to a vicious propensity.
This court concludes that the court below was right,
On all points now contested in this dog-fight.

Now Caine's owner's case is not without taint,
Since he failed to administer sufficient restraint,
So, with reckless intent Caine soiled Killer's territory,
By engaging in a certain practice excretory.
Killer's owner then observing some anger canine,
Restrained his dog just a brief period of time.
But, Caine's affront was so apparent,
That canine fisticuffs were inherent.
With a leap and a bound, Killer entered Caine's yard,
And chewed on Caine--awfully hard.

The lower court's rulings on these facts,
Were not clearly erroneous, given Killer's vicious acts.

This matter need not to the court below be returned,

And that court's judgement, for reasons stated, is AFFIRMED.

Dated at Kenai, Alaska this 23 day of January, 1985.

CHARLES K. CRANSTON
Superior Court Judge

It also helps me gain a new perspective on some of my own cases which sometimes appear to be "dogs," to note that service of the judgment was made upon my colleagues in the Kenai-Soldotna Bar, Robert Cowan and Allen Beiswenger.

--Phil N. Nash

Samantha Slanders

Advice from the Heart

Due to high fever, prior commitments, and volcanic eruptions, Samantha Slanders' column did not arrive in Anchorage prior to publication.

Ms. Slanders, however, was contacted telephonically as the Bar Rag went to press. She asked that we report in the Bar Rag that rumors of her involvement and pending marriage to Donald Trump are not accurate (TOTALLY).

The popular Ms. Slanders will be back with us for the next publication.

Mark Your Calendar!

FAMILY LAW CLE: MILITARY BENEFITS & QDRO'S
Monday, April 30, 1990
9:00 a.m. - 5:00 p.m.
Hotel Captain Cook
Anchorage
Sponsored by the Family Law Section

Registration fee: $110 CLE Credits 7.2

Speakers: Lt. Col. Edwin Schilling (USAF/Ret), an attorney now in private practice in Colorado and the author of the practice manual, "Division and Garnishment of Military Pay"; Nancy Blunck, Certified Financial Planner; Rose Kalamarides, Teamsters Pension Fund; and Stanley Howitt, Administrator and General Counsel, Alaska Electrical Trust Funds.

A brochure will be mailed to all Bar Members. To reserve a space now, call the Bar Office at 907-272-7469/fax 907-272-2932.

To fax or not to fax - it's the question of the 1990s

Alaska has been a pioneer of the telephonic deposition and now it's a new format

By Gerald Markham

I have been concerned lately about the proposed amendments to ARCP 76(b) concerning FAX documents and manuscript signatures; as I see it, as one of the most pressing procedural issues before the court system today.

As we all know, Alaska was the "pioneer" state to do away with the costly, inefficient and often inaccurate court reporter in favor of tapes at statehood.

We have pioneered telephonic depositions, telephonic conferences; (I even *tried* an entire case telephonically with a plaintiff in Kodiak and a defendant in Ketchikan but too poor to travel here); and video and audio tape depositions.

Most recently, this court amended ARCP 5(b) to allow for FAX service on opposing counsel. There is not an attorney in this state who does not have or is not considering going to FAX. The new FAX machines produce a "photocopy" that is not light sensitive. FAX is revolutionizing the way America generally, and Alaska particularly, does business.

The present proposal seeks to set this state back 20 years.

Who opposes FAX? Anyone who wishes to delay justice.

Who benefits by FAX? The "bush" client obviously, and the sole practitioner in the bush--particularly those who travel. It puts *us* on real time with Anchorage. Clients in the bush are already burdened enough by the horrendous travel expenses, not facing the corporate defendant who must frequently be sued in Anchorage, certainly be defended by Anchorage counsel, and if sued in the bush, will routinely disqualify the local judge to force as much of the case to be heard in Anchorage as possible. Also greatly benefited will be the bush client in need of a TRO.

Who will be hurt by FAX? Virtually no one. Photocopies of the FAX copy can currently be made before filing. Soon the "light sensitive" paper will be a thing of the past. Yes, there are minor "technical difficulties". This occurs now with the existing audio recording, telephonic proceedings and video depositions--but it is thought the value outweighs the occasional inconvenience. I can count on one hand the number of glitches with FAX to date. They will improve. 90% of the problem is the requirement of a manuscript signature anyway, (discussed infra).

What are the alternatives to FAX? Every attorney can go out and buy a cheap dot matrix printer and an expensive portable computer to go with a computerized office, and lug this around with him, have his secretary modem him the pleading, sign it, and mail his pleading to the court from wherever he is. (Presumably his secretary can still mail "unsigned" "copies" for service.) A "system" of this nature currently costs $10,000-$15,000.

A FAX machine costs $2,000 maximum, and can be rented virtually everywhere, especially in airports.

The computer system takes hours to learn to use, and then forces the traveling attorney to be inefficiently spending his time mailing the document (because of the manuscript signature requirement). The second alternative is to hire an associate attorney to sign your pleadings for you. The third is to come to an "arrangement" with other counsel to sign your pleadings for you. This has been done as a "courtesy" by almost every attorney in Kodiak for me, and visa versa. But the more one is out of town, the more disproportionate burden it is. An attorney's signature on a pleading carries Rule 11 consequences and potentially malpractice liability as well.

In my experience this "courtesy" is treated as being in the nature of a mere formality. The attorney doing the courtesy obviously does not have time to read the pleading, much less know whether Rule 11 has been complied with!

If the manuscript signature requirement is eliminated, this costly alternative is avoided. FAX review of the final draft can occur anywhere in the world. If the court desires to eliminate any confusion for Rule 11 problems that the attorney in fact reviewed and authorized for the filing of the document with the court, then it can require a FAX manuscript copy of the attorney's signature to be appended as an exhibit to the last page of the document certifying that the signing attorney has read a true and correct copy of the document, (which will probably have been FAXed to him). A "certificate" should be all that is required, not a verification--a notary is too hard to get when one is traveling. A certificate of counsel should suffice. The court could further require the FAX copy of the manuscript signature to bear the date of the FAX transmission, (almost all FAX machines do this), for later comparison to be sure that the attorney doesn't simply "make up a pile" of FAX signatures for the secretary to affix. (Attorneys can do that now by simply manuscript signing a "pile" of blank "last pages" and I'm sure many do.)

This is a tremendous technological advantage. I would point out further that the United States Surpreme Court no longer requires manuscript signature! On the contrary, you can FAX your U.S. Supreme Court brief directly to a company called Cockle Printing, at 2311 Douglas Street, Omaha, Nebraska and they will print the brief; and they technically don't know you from "Adam"!

I don't know how this matter came before the civil rules committee on October 5, 1989. I have been active in two cases (copies of pleadings attached) to accomplish FAX "signature" in a case by case basis.

I think the FAX machine is the greatest thing since canned beer. And I fail to see any drawbacks except the flimsy "light sensitive" paper. That *may* be a problem for court filing documents; but for a *one* page FAX signature on the last page (which could be photocopied for preservation purposes), it is not.

I certainly think there should be more discussion on this issue than what the civil rules committee appears to have given it. For now I would propose that ARCP 76(b) be amended to add:

> "(b) Signature. All documents, except exhibits, filed with the court, must bear an original manuscript signature of the attorney appearing for a party to an action or proceedings or of a person appearing in propria persona, or a certificate that the attorney or a verification of the party appearing in *propria persona* that he has personally read the pleading and he has directed that it be filed with the FAX copy of this certificate appended thereto."

In summary the age of FAX is at hand to the extent at least that it eliminates the need for the manuscript signature for now. Filing FAX copies directly with the court could be reserved for the future.

I strongly urge our court cut through the formalities and take advantage of this modern invention as it so frequently has in the past, to accommodate the particularly extended nature of our state and its distance and necessary frequent travel to the Lower 48 states and thereby become a model for the nation.

The foregoing are comments Mr. Markham submitted to Court Rules Attorney William T. Cotton late last year.

Notice of Public Meeting and Request for Comments

The Statute, Bylaws and Rules Committee of the Alaska Bar Association is currently reviewing the Attorney's Oath which is set forth in Alaska Bar Rule 5, section 3. Written comments would be appreciated by the Committee, but they must be received in the Bar Office by 5:00 p.m., Friday, April 13, 1990.

There will be a public hearing on this matter at the Bar Office at 1:00 p.m. on Friday, April 20, 1990.

Please call the Bar Office at 907-272-7469/fax 907-272-2932 for more information.

MUSINGS

Mickale Carter

March is Women's History Month.

In conjunction with this observation, Sen. Ted Stevens hosted the Alaska Woman '90s conference held in Anchorage at the Egan Center on March 3. Over 1000 Alaska women statewide participated.

The conference was planned and executed by the Woman's Education and Leadership Forum (WELF), with the guidance and assistance of Alaska volunteers. The local steering committee included Anchorage attorney Elizabeth Vazquez, of the Attorney General's Office. Also on the steering committee was JoAnna Knapp, wife of Anchorage attorney David Knapp, who is an associate at Perkins Coie.

Two Anchorage attorneys and a judge conducted one of the 13 workshops offered at the conference. Judge Karen L. Hunt and attorneys Sandra Saville and Elizabeth "Betsy" Sheley comprised the panel for "What You Don't Know can Hurt You: Know Your Legal Rights" workshop. The focus of the workshop, as indicated by its title, was women's legal rights in both professional and domestic areas. Judge Hunt is a Superior Court Judge for the Third Judicial District. Sandra Saville is a partner at the law firm of Kay, Saville, Coffey, Hopwood & Schmid. Elizabeth Sheley is an Assistant District Attorney. Many of the speakers and workshop leaders were local. However, others, regular WELF presenters, traveled from New York, Florida, Oregon, Missouri, Washington, and Virginia.

The workshop topics ranged from juggling family, career and self to handling stress with a sense of humor to how to speak so that others will listen.

Because I have no children and I do not feel particularly stressed and I know my legal rights, I decided to attend workshops that focused on developing job skills. Two of the workshops I attended were conducted by Ann Stone; The Art of Negotiating and Who Gets Ahead and Why. Ms. Stone owns her own Arlington, Va. direct response marketing agency, Ann Stone and Associates. Included in her client list is Donald Trump. She is on the board of several Washington D.C.-based organizations, which include the Renaissance Women and the Alexandria Chamber of Commerce.

Although the content of these workshops was very different, the theme was the same: In order to compete in a man's world, women need to get in touch with who they are.

One of the aspects of this self-realization is attempting to understand men, accomplished only by viewing male characteristics objectively.

For example, the "good ole boy" network is not a conspiracy to keep women down. Rather, it has as its genesis a continuation of the team sport activities men experienced in their youth. Another spin-off of team sports is that men as adults are better "team players" than women; men also do not take the rules of the game (and hence, of the business world) personally. Women, conversely, take everything personally.

This male bonding experience brings us to another theme of Ms. Stone's presentation: Women should not lament their difference from men. Women should, rather, attempt to capitalize on their differences. Men's youthful team sports activity enable them, as a general rule, to deal better with people in groups than they do in a one-on-one situation. This is just the opposite for women. Knowing this, women should strive to develop individual relationships with men, i.e., going to lunch with the men in her office one at a time. She should *not* attempt to break into the male good ole boy activity. The men will only resent her presence. (After all, having a girl present would make the boys feel like sissies).

To capitalize on their positive attributes, women must also be aware of their weaknesses, Ms. Stone believes.

As part of the workshop, the women participants listed some 27 typical female traits which they considered to be weaknesses. These included: too emotional, not assertive, not a team player, lack of confidence, sneaky, easily intimidated, fear of failure, hard but no smart workers, too many outside distractions including children and personal grooming, take things too personally, indecisive, too humble, too courteous, too eager to please and order takers.

The participants then were given the task of listing as many strengths. Being typical women, this task took a little longer. Nonetheless, the group came up with an equally long list which included the following: better communicators, intuitive, tenacious, good listeners, good jugglers, good organizers, people-oriented, honest, loyal, stamina, more flexible, more readily open to new ideas, more creative, live longer, healthier (due to the fact that more of the genetic disorders are carried by the male chromosome), better writing skills, attention to detail, good follow-through, accurate, and less perverted.

Ms. Stone provided a bibliography of books she believes provide insight to women who want to advance in their careers. These include, *Effective Woman Manager*, by Stewart; *Games Mother Never Taught You How to Play*, by Harragan; *Jane Trahey on Women in Power*, by Trahey; *The Managerial Woman*, by Hennig & Jardim; *Think Like a Man, Act Like a Lady, and Work Like Dog*, by Newton; and *Wishing Up*, Foxworth.

I also attended the How to Speak So Others Will Listen workshop, conducted by Marian K. Woodall. She is owner and president of Professional Business Communications, of Portland, a professional speech coach, and the author of two popular communications books, *Thinking on Your Feet*, and *Speaking to a Group*.

Ms. Woodall, like Ms. Stone, was candid in her assessment of female behavior. She stated that as a general rule, women talk too much, i.e., they use too many words. They also put question tags on the end of their sentences as if asking for approval. As a result people (men, children and other women) shut them off and do not listen to what they are saying.

Ms. Woodall's message: If women want to be listened to they must change their behavior. She gave several suggestions which would facilitate being taken seriously. Think about the message that you want to convey. Condense its essence to fifteen (15) words or less. WHen you present your position, state your point first in fifteen words or less. Then give one piece of supporting information. Then state that if anyone wants more information you would be glad to supply it.

Use your most forceful voice. If someone tries to interrupt you, do what men do, keep on talking. Do not stop and allow the other person to have the floor. This is a sign of weakness. Make sure that you use the vocabulary of your audience. If your presentation is not sensitive to the perspective of your audience, listeners will not know what you are talking about.

If you are attempting to be listened by by a single person, it is helpful to say the person's name before you begin your presentation. People tend to perk up and listen when they hear their own names. This will give you a window of opportunity. After all, you have to get their attention before they will listen to what you have to say.

It is the goal of WELF to make the conference an annual event in Alaska. The purpose of WELF is to help women understand the importance and "how-to's" of empowering themselves by becoming self-sufficient while staying true to themselves. WELF's aim is to help women acquire the self-sufficiency, confident decision-making, and personal success skills that we all need in order to meet our new challenges and demands in today's changing society.

From climbing the corporate ladder, to being a full-time wife, mother and home manager, to juggling family and finances as a single parent, WELF's message is always the same: "Women may not be able to 'have it all,' but women have all it takes to have what they want."

WELF's address is 918 16th Street, N.W., Mezzanine Suite, Washington, D.C. 20006.

Markham case illuminates protocol

I am enclosing a copy of an order which was recently entered in *Markham v. F/V Borland Drive*, No. A89-315 Civil. I think, and hope you will agree, that the order is appropriate for publication in the *Bar Rag*.

Sincerely,
H. Russel Holland

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ALLEN MARKHAM, Plaintiff,
vs.
F/V BORLAND DRIVE, *in rem*, Defendant.
No. A89-315 Civil
ORDER
(Validity of Local Admiralty Rule 4)

(REVISED FOR PUBLICATION)

Plaintiff commenced this action with a complaint for seaman's wages and breach of seaman's contract of employment under 28 U.S.C. S 1916. The action is solely one *in rem* against the *F/V Borland Drive*. Plaintiff filed with his complaint a motion for warrant of arrest *without* pre-arrest hearing. In accordance with this court's usual practice, this case and plaintiff's subject motion were referred to the United States Magistrate. The Magistrate has considered the motion for a warrant of arrest without a pre-hearing, and has served and filed a recommendation that the court relax Local Admiralty Rule 4 with respect to requiring a pre-arrest hearing for purposes of this case only.

The Magistrate's recommendation made provision for the filing of objections by the parties. Although plaintiff in substance prevailed on his motion, he nonetheless takes exception to the recommendation, insisting that the court should now hold the pre-arrest hearing process required by Local Admiralty Rule 4 to be inconsistent with Rules C(3) and E(4)(f) of the Federal Supplemental Rules for Certain Admiralty and Maritime Clailms, herein "Supplemental Rules".

The Magistrate's thoughtful analysis of plaintiff's motion for an arrest warrant without a pre-arrest hearing has convinced the court that there is indeed a problem with respect to the viability of Local Admiralty Rule 4(B) and 4(D). The court understand the Magistrate's reluctance to do more than suspend these local rules for purposes of this case. Superficially, such an approach solves plaintiff's immediate problem. However, such a result blunts what the court supposes to be the real purpose of this case--the revision of the court's local admiraltly rules, not the adjudication of any rights that the plaintiff may have. While the court is most appreciative of the sensitive fashion in which the Magistrate approached this matter, it feels constrained to pick the matter up and go further.

In the latle 1970's and early 1980's, a crisis of sorts developed in the admiralty practice as a consequence of such cases as *Alyeska Pipeline Service Co. v. Vessel Bayridge*, 509 F. Supp. 1115 (D. Alaska 1981), *appeal dismissed on other grounds*, 703 F.2d 381 (9th Cir. 1983), *cert. dismissed*, 104 S. Ct. 3526 (1984). In *Alyeska Pipeline*, this court invalidated Admiralty Rule C for the reason that this rule failed to provide the minimum procedural due process required by *Fuentes v. Shevin*, 407 U.S. 67 (1972), and *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). In *Mitchell*, the United States Supreme Court had held that procedural due process required that there be a pre-seizure judicial review, a prompt post-seizure hearing, and an opportunity to obtain the release of seized items upon the posting of adequate security. *Alyeska Pipeline*, 509 F. Supp. at 1120; *Mitchell*, 416 U.S. at 605-606. Local Admiralty Rule 4 was adopted in 1982 in order to provide a constitutional procedure for the arrest of vessels in the District of Alaska.

In its present form, Local Admiralty Rule 4(B) requires that requests for the issuance of a warrant for the arrest of a vessel be reviewed by a judge or magis-

See MARKHAM page 16

Discipline and attorney A

Attorney A received a written private admonition for revealing the confidences or secrets of a client. Attorney A told a friend, who was also a relative of his client, some of the content of the conversation with his client.

SOLID FOUNDATIONS

Mary Hughes

A few years ago Judge Justin Ripley requested that the trustees of the Alaska Bar Foundation make a donation to the National Judicial College (NJC).

A modest gift was made by the Foundation and ever since the NJC has provided reports to the Foundation with respect to not only its progress, but its curriculum.

In 1988 the NJC celebrated its 25th Anniversary and won the 1988 Foundation for the Improvement of Justice Award. Affiliated with the American Bar Association, the NJC provides countless programs to judges at all levels. Its mission is to improve the American system of justice.

Over 60 classes are scheduled for 1990 and the Foundation just received an ambitious summer program announcement. Continuing education includes courses relating to Managing the Complex Case, Introduction to Personal Computers in the Court, Judicial Writing, Case Management, and Administrative Law. Judges are also taught how to respond to current problems such as drugs and alcohol and AIDS.

As the foremost authority on continuing judicial education programs, the NJC will educate some 1,700 participants in 1990. It has continued to educate not only newly appointed or elected judges, but provided an ongoing education program for senior jurists. It has issued 23,600 certificates of completion to 10,137 judicial officers in its 25 years.

Justice Tom C. Clark is credited with the founding of the NJC. He had the vision and conviction to speak to his fellow jurists of judicial education:

"Two years ago, the use of the word 'education' in connection with the judiciary brought raised eyebrows and the shaking of heads. There was a fear that if judges admitted a need for seminars, they would be confessing inadequacy. Today, after the completion of over 300 judicial seminars attended by more than 2,000 state court judges, the skittishness against the tag 'education' has been converted into genuine enthusiasm for more knowledge and judicial administration through continuing education."

--Report by Justice Clark at 1963 ABA Annual Meeting, Joint Committee for the Effective Administration of Justice.

The trustees of the Foundation were pleased to be able to donate to the education of the judiciary at a time the Foundation knew very little of the NJC. It is obvious from the materials reviewed over the last years that judges throughout the country are very fortunate to have the capability of education at an institution such as the NJC.

SNIPERS: Add litigation specialist as well

Continued from page 1

Know-It-Alls are ready to run you over with their aggressive and non-emotional style.

In dealing with Pragmatics you need above all to stand your ground. And be sure that you have done your homework. If you expose any weakness they will discover it in a moment and discount your worth thereafter. But face them squarely and put up an intelligent fight and they may become your buddies for life. They will admire your intelligence in adapting to their particular outlook on life.

The Expressive. Individuals from the assertive-emotional quadrant are also referred to as Extroverted, or as Entertainers. To them let us add the Litigation Specialist. These individuals are assertive like the Pragmatics but unlike them they are emotional in their outlook on life. They are quick to take offense and are particularly concerned about prestige and appearances. If you are going to correct or criticize an Expressive be sure that you do it in private.

Under stress the Expressives may become Grenades, exploding for no apparent reason over some imagined slight. If you are nearby when a Grenade explodes the best thing that you can do is to try to calm them down. Once they return to their senses they will thank you for it, especially if you helped them avoid making an even bigger fool of themselves. They can also become Think-They-Know-It-Alls. Unlike the Pragmatic Know-It-Alls, however, who really may know it all, the Think-They-Know-It-All is most likely winging it when in such a mode.

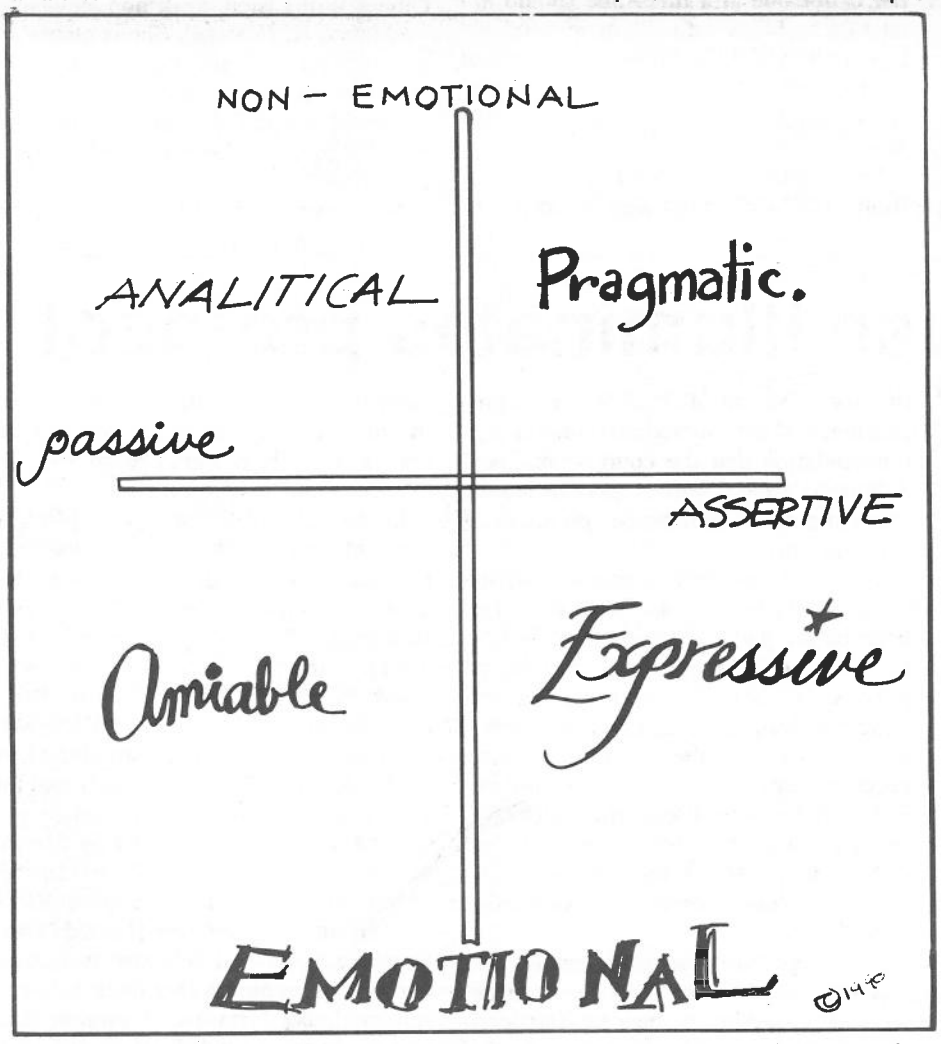
But again, be careful in correcting an Expressive in public. They tend to be charismatic and if challenged publicly they may just sell their foolish ideas. How many times have we seen a charismatic trial attorney sell a terrible idea to a jury or even to a judge?

The Amiables. The emotional non-assertive quadrant of the chart is inhabited by the Amiables, also known as Relators. To them we can perhaps add some, although certainly not all, of the General Practitioners.

You know the ones: The easy-going amiable lawyers with a substantial family practice who are just trying to help their clients through a hard time in their lives. This sector also encompasses many of the social workers, therapists, and doctors we deal with as expert witnesses, and who we often have such a hard time pinning down to a firm position. Amiables try to get along with everyone and are devastated when someone doesn't like them.

Under stress Amiables can become Yes people or Maybe people. Yes people are the ones who will agree to anything, but then seldom follow through on their promises: the promised return phone call is never made.

Maybe people are the ones who are afraid to make a decision because of fear that someone else will be offended.



Unlike the Yes people who are afraid to say no out of fear that they will hurt your feelings, the Maybe people are afraid to say yes for fear that they will offend someone else.

The way to deal with both Yes and Maybe people is to confront them directly to find out what they are concerned about and then try to alleviate their concerns, all the while assuring them that you hold them in high esteem. Point out the future consequences of their failure to decide or to carry through on their promises, and obtain their specific commitment to do so. Don't let up until you get their promise, and then reinforce it whenever you can. When working with an Amiable it is also wise to divide the work in such a way as to take as many of the action steps as you can upon yourself. Action steps are not the Amiables' strong suits, especially when the action might be resented by others.

The Analytical. In contrast to the other three quadrants the different tapes were all consistent in referring to the inhabitants of the northwest quadrant as Analyticals, no doubt because the term describes them so well. To them we can add the stereotypical Tax Attorney.

The Analytical quadrant also encompasses many of the accountants, engineers, scientists, and other technical people who we so often see as expert witnesses, who frustrate us with their fastidiousness.

Analyticals are engaged in a never-ending search for perfection, and they can never get enough factual data to satisfy themselves. They revel in facts and in the multi-varied analysis of those facts.

Under stress, Analyticals can become Chronic Complainers or No People. One of the tape programs says that under stress they will invite you to a "Whine and Sheese" party.

When dealing with such a complainer, the goal is to help them to switch back into a problem-solving mode. This involves asking them questions and listening carefully to their answers, without buying into their negativity.

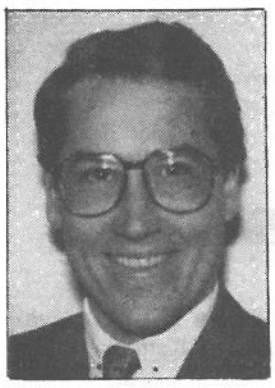
Dealing with stressed out analyticals is one of the most difficult jobs to accomplish, but it can be accomplished without bloodshed with sufficient patience and understanding.

And The Winner Is. A common first reaction to learning about the different styles of personality is to try to determine which is the better style. Not surprisingly, we all chose the style that is the most like our own. And the personality style opposite us on the chart is usually the one that irritates us the most. It is also where we often find our spouse. In fact, however, studies on the subject have demonstrated quite clearly that all four personality styles are important and that no one style is preferable to the others.

The best organizations, for example, are those where all four styles are represented and where there is a good interchange between individuals with different styles, and respect for the approach of others.

Similarly, it has been found that the best managers are those whose own personality styles are not apparent but who can adapt their own style to the individuals they are dealing with at the moment.

In motivating people, or in negotiating with them, the key to success is to recognize and respect the personality style of the individuals you are dealing with, and to adapt your own style to the style of your adversary. With study and practice, the understanding of personality styles can even assist us in dealing with those other difficult attorneys who are always driving us to distraction. That will ease the burden on our days so that we can go home to deal with the truly difficult people in our lives, our lovers and children.



ESTATE PLANNING CORNER

Steven T. O'Hara

As we have previously discussed, Congress has imposed a gift tax system (I.R.C. Sec. 2501 et seq.). This tax is perceived necessary as long as there is an estate tax, because otherwise there would be a giant loophole from estate tax. To avoid estate tax, the taxpayer would gift all property away before death.

As we have also previously discussed, Congress has also created the so-called unified credit. In general, the effect of the unified credit is to exempt transfers of up to $600,000 per donor from the imposition of any gift or estate tax, regardless of the donee (I.R.C. Sec. 2010 & 2505).

Congress has been threatening to reduce the unified credit substantially. Accordingly, it is generally advisable from a tax-minimization standpoint to use the unified credit now, before death, by making substantial gifts. In the vernacular, the thought is use it or lose it.

In addition, the exclusions from gift tax should be considered. Commonly-known is the $10,000 annual exclusion from taxable gifts (I.R.C. Sec. 2503(b)). As we have previously discussed, this exclusion is $10,000 per donor per donee per year.

Far less known is the exclusion for certain transfers for educational or medical expenses (I.R.C. Sec. 2503(e)).

This exclusion provides that a person will not be considered to have made a taxable gift if that person pays, on behalf of another, tuition to an educational organization or to a person who provides medical care, regardless of the amount of the payment.

This exclusion is in addition to the $10,000 annual exclusion (Treasury Regulation Sec. 25.2503-6(a)).

Direct payment to the educational organization or medical-care provider is required in order for this exclusion to apply (Treasury Regulation Sec. 25.2503-6(b)(2)).

For example, suppose grandfather wishes to pay the college tuition of grandchild, and suppose that tuition for one year is $14,000. If grandfather pays that tuition directly to the college, no taxable gift will result, and grandfather will still have his $10,000 annual exclusion to use with respect to that grandchild.

On the other hand, suppose grandfather does not pay the college directly. Instead, he writes a check to grandchild, who then pays the college. In general, under such circumstances, grandfather would be considered to have made a taxable gift of $4,000 (i.e., the amount in excess of the annual exclusion).

We have previously mentioned that Congress has also imposed a generation-skipping transfer tax system (I.R.C. Sec. 2601 et seq.). This will be discussed in future columns. Suffice it to say at this time that, in general, grandfathaer would also be considered here to have made a generation-skipping transfer (I.R.C. Sec. 2612(c), 2613(a)(1), 2642(c) & 2651(b)(1)).

By contrast, if grandfather had paid the college directly, the payment would not have been considered a generation-skipping transfer (I.R.C. Sec. 2611(b)(1)).

Just as the exclusion does not apply to indirect payments, so the exclusion does not apply to reimbursements. For example, suppose grandchild is injured in an automobile accident. He requires medical treatment, and although he has no medical insurance, he is able to pay the bill of $14,000 for the medical care. Grandfather then reimburses grandchild for the medical expenses paid.

In general, under such circumstances, grandfather would be considered to have made a taxable gift and a generation-skipping transfer (Treasury Regulation Sec. 25.2503-6(c)(example (4)) & I.R.C. Sec. 2612(c) & 2642(c)).

The exclusion does not apply to amounts paid for medical care that are reimbursed by medical insurance (Treasury Regulation Sec. 25.2503-6(b)(3)).

The exclusion is also not available for amounts paid for books, supplies, dormatory fees, board, or other similar expenses (Treasury Regulation Sec. 25.2503-6(b)(2)).

The educational organization must be qualified in order for this exclusion to apply. For these purposes, a qualifying educational organization is one that maintains a regular facultly and curriculum and has a regularly enrolled student body (Id.).

The medical expenses must also be qualified in order for this exclusion to apply. In general, qualifying medical expenses include expenses incurred for the diagnosis, cure, mitigation, treatment or prevention of disease, or for the purpose of affecting any structure or function of the body, or for transportation essential to medical care (Treasury Regulation Sec. 25.2503-6(b)(3)).

Amounts paid for medical insurance on behalf of another are also considered medical expenses for purposes of the exclusion (Id.). The transferor must, again, be careful to pay the insurance company directly.

REGULARLY SCHEDULED SECTION MEETINGS

SUBSTANTIVE LAW SECTIONS

ALASKA NATIVE LAW: Second Wednesday, noon, Bar Office.

BANKRUPTCY LAW: Last Tuesday of month, noon, Federal Bldg.

ECONOMICS OF LAW PRACTICE: First Tuesday, noon, Federal Bldg.

EMPLOYMENT LAW: Varies.

FAMILY LAW: First Thursday, noon, Board Room, Elevation 92.

INTERNATIONAL LAW: Third Tuesday, 12:30 p.m., Office of Lynch, Crosby & Sisson.

NATURAL RESOURCES LAW: First Monday, noon, Federal Bldg.

REAL ESTATE LAW: Third Thursday, noon, Bar Office.

TAX SECTION: Second Wednesday, noon, Office of Hartig, Rhodes, et al.

BAR PEOPLE

Jacob Allmaras, formerly with Artus, Choquette & Williams, is now with Hoge & Lekisch.....**Kevin Anderson**, formerly with Preston, Thorgrimson, is now with the legal department for the FDIC.....**Ames Luce** and **Dan Hensley** are now partners in the firm of Luce & Hensley.....**Conrad Bagne**, who was with the borough attorney's office in Barrow, is now with the Arctic Slope Regional Corp.....**Cynthia Ducey** is now with Guess & Rudd.

Paul Dillon, formerly of Birch, Horton, et. al., now has the firm of Dillon & Associates.....**Brian Easton** has transferred from the P.D.'s Office in Bethel to the Kenai Office.....**Duncan Fields** has joined the Kodiak office of Jamin, Ebell, Bolger & Gentry.....**Terry Fikes** has left Hughes, Thorsness, et.al., to work as an assitant D.A. in Anchorage.....**Barbara Franklin** is now with the Office of the U.S. Trustee.

Mary Geddes writes that she will be travelling in Central America until May 1.....**Lee Holen** is now practicing with **Chancy Croft**.....**Michael Gravo** who was with Jermain, Dunnagan & Owens, is now with Groh, Eggers & Price.....**Leone Hatch** is now with the A.G.'s office in Anchorage.....**Kristen Whitlock** has officially changed her name to **Amrit Kaur Khalsa**.....**Linda MacLean** has relocated from Tennessee and opened her own law office in Anchorage.....**Edward Merdes** and **Ward Merdes** have formed the firm of Merdes & Merdes.....**Jill Mickelsen** formerly with Delaney, Wiles, et.al., is now with Staley, DeLisio, et.al.

Helen Simpson and **Darryl Thompson** have formed the firm of Simpson & Thompson.....**James Hornaday** is at Iowa Wesleyan College in Mt. Pleasant, Iowa.....**Bill Meese** writes that he and his wife, Lynn, had twins Jan. 28.....the Trustees for Alaska, a non-profit environmental law firm, has hired **Sharon Sturges**, an attorney previously employed by the North Carolina lawfirm of Womble, Carlyle, Sandridge & Rice. She will handle wildlife and lands issues

The American College of Probate Counsel has announced that **George Goerig**, with the firm of Davis & Goerig of Anchorage, has been elected a Fellow of the College. This is an international association of lawyers who have been recognized as outstanding practitioners in the laws of wills, trusts, estate planning and estate administration.....Gov. Steve Cowper appointed **Beth Lauesen**, of Fairbanks, to the Board of Governors of the Alaska Bar on Jan. 9.

Jean Schanen writes that she has closed her law practice in Wasilla, and will be spending the majority of her time on an agricultural project in Belize, Central America, and the book she has written about it. When not in Belize, she will reside in Eau Claire, Wis.

Deborah O'Regan and **Ron Kahlenbeck** had a baby girl, Katherine O'Regan Kahlenbeck, 7 lbs., 9 ozs., on March 2.....**Terri K. Spigelmyer** and **Andy Hass** had a baby boy, Tyler James Haas, 7 lbs., 9 ozs., on Feb. 28.....**Konrad Alt** and **Maureen Kennedy** were married in Washington, D.C. on Jan. 14.

Anchorage attorney **William M. Walker** and Fairbanks attorney **Paul Cragan** recently became partners in the law firm of Hughes, Thorsness, Gantz, Powell & Brundin. Walker will practice in municipal government, representing the City of Valdez; Cragan represents communities and school districts. In addition, **C. Edward Sniffen, Jr., Vicki L. Bussard, David Burglin, Richard L. Musick, David F. Leonard, Jordan E. Jacobsen, Jacquelyn L. Parris, Linda J. Johnson, Jayne M. Gilbert,** and **Sheldon E. Winters** are now associated with the firm.

Lynn Allingham and Gregory Galik had a baby boy, Jonathan Paul Allingham Galik on Dec. 1, 1989, 8 lbs., 6 ozs.

Hyatt is selected boss of the year

The Anchorage Legal Secretaries Association, Inc., announced recently that Christine Foote Hyatt, partner at Hartig, Rhodes, Norman, Mahoney & Edwards, was selected as Boss of the Year at the 16th Annual Bosses Day Luncheon.

Ms. Hyatt is the first woman attorney to be selected for the award after being entered in the competition by her secretary, Debbie Bircher. Ms. Bircher's winning essay convinced judges--the Honorable Dana Fabe, Judge Superior Court; Douglas C. Perkins, 1988 Boss of the Year and Phyllis Rhodes, Clerk U.S. District Court--that Ms. Hyatt was worthy of the honor.

A Gold Pan and mug were awarded Ms. Hyatt who commented that it was time a woman attorney received the award. Her secretary received a gift certificate from Nordstrom.

Peterson joins group

Drew Peterson, has been accepted as a regular member of the Society of Professionals in Dispute Resolution.

The Society of Professionals in Dispute Resolution, headquartered in Washington D.C., is the largest international organization of neutrals engaged in the delivery of alternative dispute resolution services to the public. Qualifications for acceptance as a Regular Member (the Society's highest non-extraordinary level of membership) include a minimum of three years of substantial experience as a neutral practitioner engaged in the resolution of disputes for private or public parties or within or between organizations; related experience in teaching, training or research; or as an official or professional employee of a government or private dispute resolution agency.

Peterson has been a practicing attorney since 1972, engaged in private practice in Anchorage since 1980. His current practice is limited to family and general mediation cases only, including divorce and child custody mediation, mediation of small business disputes, alternative dispute resolution systems design, arbitration facilitation, minitrials, "med-arb" and "mediation of grievances" procedures, and consultations on dispute resolution alternatives.

Judge Litt will speak in Fairbanks on Supreme Court & contractors

The Honorable Nahum Litt, the chief administrative law judge with the U.S. Department of Labor, Washington, D.C., will be the keynote speaker at a program sponsored by the University of Alaska Statewide Affirmative Action office in Fairbanks in April. The title of his presentation is "The Supreme Court and Federal Contractors."

Litt is chief judge of the 100 Department of Labor judges who preside over trials arising from the enforcement of 73 federal statutes including the Davis Bacon Act.

The program, entitled "Affirmative Action and Government Contract Presentations," will be held at the University of Alaska Fairbanks April 18-20. For information on the program, call UAF Conferences and Institutes at 474-7800.

Former Fairbanksan was Nome's U.S. Attorney and long-time lawyer

Former Fairbanks resident Charles J. Clasby, 79, died Feb. 20 in Salem, Ore.

He was born June 25, 1910, in Big Lake, Wash., and graduated from the University of Washington with a law degree in 1933. He was admitted to the Washington Bar in 1934 and the Alaska Bar in 1937.

Mr. Clasby served as U.S. Attorney in Nome from 1939-42. He was the founder and past president of the Alaska Bar Association and served three terms as the Alaska state delegate to the American Bar Association. He was a fellow of the American Bar Association, and a member of the American College of Trial Lawyers.

Mr. Clasby practiced law in Fairbanks from the mid 1940's to the late 1960's. He was active in civic affairs, served on the Fairbanks City Council, and served on the boards of Wien Airlines and First National Bank of Fairbanks.

He married Hazel Bruce in 1939 and she died in 1962. He married Ethyl Gordon in 1964.

Mr. Clasby was a member of Rotary Club, Elks Club, and Pioneers of Alaska Igloo No. 4.

Survivors include his wife, Ethyl of Salem; sisters Inez Adams of Seattle and Ruth Hathaway of Olympia, Wash.; son Bob Clasby of Juneau; daughter Carolyn Lennon of Chester Springs, Pa.; daughter Liza Goettsch of Salem; son Frank Gordon of Seattle; and seven grandchildren.

Contributions may be made to the American Heart Association. Condolences may be sent to Ethyl Clasby at 3425 Deerfield Dr. South, Salem, Ore. 97302.

--From the Fairbanks Daily News-Miner.

BOY SCOUTS LOOKING FOR "LOST" EAGLES

The Midnight Sun Council of the Boy Scouts of America is looking for "lost" Eagle Scouts.

Nearly 1.2 million young men have earned the Eagle Scout award since 1912, but the Boy Scouts have lost track of a majority of Eagle Scouts aged 22 and over.

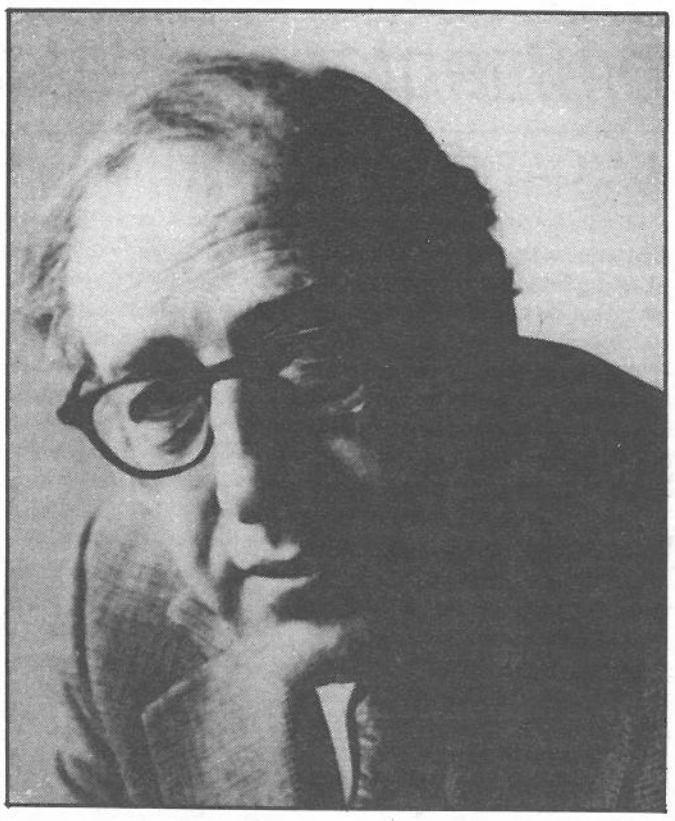
Adult Eagle Scouts who are not currently registered in Scouting should call the local Scout office at 452-1976.

Friendly will act as conference moderator

Fred Friendly, former CBS News president and currently Edward R. Morrow Professor emeritus at the Columbia University Graduate School of Journalism, will act as moderator for the 1990 Northern Justice Conference panel on "Problems of the Administration of Justice and Law Enforcement in the North" on June 7, 1990 at the Alaska Center for the Performing Arts.

This conference is jointly sponsored by the Alaska Bar Association and the Alaska Judiciary, is an expanded version of the Annual Alaska Bar Association Convention and will include participation by representatives from the Law Society of British Columbia, the Law Society of Yukon Territory and the Soviet Union.

This panel portion of the conference will follow the format of Friendly's PBS series on "The Constitution: That Delicate Balance" and his current program on "Ethics." Panelists from the three nations will respond to hypothetical cases posed by Mr. Friendly on the issue of Northern Justice problems.



Fred Friendly

Friendly, who began his broadcasting career in radio in 1937, went on to a close, professional 12-year partnership with Edward R. Murrow in 1948, and his friendship with Murrow continued until Murrow's death in 1965. Friendly produced "See It Now," with Murrow, a series which received 35 major awards, and also produced "CBS Reports," which garnered 40 awards.

Having started his career with CBS in 1951, Friendly went on to become President of CBS News from 1964-66. During that time, he produced programs like "Town Meeting of the World," global forums for international leaders and statesmen, and "Vietnam Perspective," a series on the Vietnam War and its impact on the American people.

In 1974, in response to a growing conflict in our society, Mr. Friendly initiated a series of conferences on the media, the law, and public policy while at the Ford Foundation, where he was Adviser on Telecommunications for 13 years.

In recent years, as Director of Media and Society Seminars, Friendly has continued to explore diverse topics. His landmark series, broadcast on PBS, have included, "The Constitution: That Delicate Balance" (1984), "Managing Miracles: Health Care in America" (1986), "The Presidency and the Constitution" (1987), and "Ethics" (1988).

In addition to Mr. Friendly's portion of the program, the 1990 Northern Justice Conference will include panels on "Northern Communities as Developing Nations--Environmental and Economic Problems" on June 8 moderated by The Honorable Barbara Rothstein, Chief U.S. Judge, Western District of Washington State, and "Northern Native Populations and the Law" on June 9, moderated by The Honorable William Matthew Byrne, Jr., U.S. District Judge, Central District of California. Saturday's closing session will be an open forum called, "On the Spot" and will give conference delegates a chance to ask what's on their minds.

Panelists will be representatives from the Soviet Union, Alaska, British Columbia, and Yukon Territory. Weyman Lundquist of Heller, Ehrman, White and McAuliffe in San Francisco will moderate this closing session.

For more information on the conference, please call the Alaska Bar Office, 907-272-7469.

New Math

Out far beyond the realm of thought
(where nothing was ever expected to be)
Dwell the creatures of Mandelbrot
Indefatigably spinning their filigree.

Matter they do; although matter they're not.
What does that matter? Wherever we see
Those fat, funny snowmen, we have been taught
First to factor our fractals by using a key.

For thousands of years, we were told to ignore
Those problems our formulas could not explain.
Now we have opened a mirror, instead of a door.
And the answers we find there are not of the brain.

--Harry Branson

continuing legal education continuing legal education

Board requests commentary on minimum CLE rule

The Board of Governors is publishing the proposed Minimum Continuing Legal Education Rule and solicits comments from the membership.

Comments will be considered by the Board of Governors at their next meeting on June 5 & 6, 1990. Please direct your comments to: Board of Governors, Alaska Bar Association, PO Box 100279, Anchorage, Alaska 99510. Ballots for the referendum on the proposed rule will be mailed to active members this summer.

RULE 64. Purpose

In order to promote high standards of competence and professionalism in members of the Association, the Association requires all its members to engage in Continuing Legal Education. These rules are intended to set minimum standards for Continuing Legal Education.

Comment: See Code of Professional Responsibility, Ethical Considerations 1-1 and 1-2.

RULE 65. Continuing legal education requirement.

(a) Requirement

Every active member of the Alaska Bar Association must complete at least 24 credit hours of approved continuing legal education (CLE), including 2 credit hours of ethics CLE, in each 2 year reporting period.

(b) Periods

The reporting period referred to in Rule 68 begins on the member's birthday, and ends the day before the member's birthday two years later. The first reporting period for a member admitted after the effective date of this rule will run from the member's birthday first following admittance. The first reporting period for a member admitted before the effective date of this rule is determined as follows:

1) The reporting period for a member born in an even-numbered year will begin on his or her first birthday following the effective date of the rule.

2) The reporting period for a member born in an odd-numbered year will begin on his or her second birthday following the effective date of the rule.

Comments: The requirement extends to every active member. Twelve hours of CLE per year is a middle of the road choice. Among the 30 states which have mandatory CLE in effect, the requirements range from 8 to 15 hours per year, with the majority choosing 12 or 15 hours. Spreading the MCLE requirement over a two year period encourages members to complete longer, more intensive programs, and lessens the reporting burden. Ethics is required because of its importance to the profession and its applicability to every member of the Association.

Under the provisions of Rule 68, members are required to report on CLE hours earned at the end of each 2 year reporting period. Subsection (b) explains how the reporting period is determined. To spread the administrative burden on the Bar Association, the reporting periods are tied to members' birthdays. This spreads the reporting over the calendar year. To spread the reporting over the two year cycle, it is necessary to divide those already admitted into two groups, and using the year of birth was as easy and random a method as any. To use an example, assume that Rule 65 became effective in January 1991 (see Rule 70, Transition). Member A, admitted in June 1991, with a birthday in December, would report in December 1993. For member B, admitted before 1991, and born in April 1950, the reporting period would begin in April 1991 (the first birthday following the effective date) and she would report in April 1993. For member C, admitted before 1991 and born in August of 1963, the reporting period would begin in August 1992 (the second birthday following the effective date) and he would report in August 1994. (Start-up is dealt with below in Rule 70, Transition.)

RULE 66. Approved continuing legal education

(a) The CLE requirement may be met either by attending approved courses or completing any other continuing legal education activity approved for credit under these rules. Teaching legal education courses, studying of audio or video tapes of approved CLE courses, writing published legal texts or articles in law reviews or specialized professional journals, and in-house continuing legal education courses may be considered for credit when they meet the conditions set forth in this rule.

(b) Approval Process.

The Continuing Legal Education Committee shall approve or disapprove education activities for credit. The Committee may delegate administration of these rules, including initial approval or disapproval of educational activities for credit, to the Continuing Legal Education Director. CLE activities sponsored by the Association are deemed approved.

(1) Sponsor's application for course approval. Course sponsors other than the Association shall submit an application for approval to the Director.

(A) The application shall be in the form prescribed by the Committee, and shall include identifying information, date and location of the course, the fee, the names and qualifications of the instructors, a complete description (or copies) of the materials to be distributed to the participants, and a detailed outline of the course presentation, including discussion of ethical considerations, if any.

(B) Sponsors seeking approval of in-house courses must in addition state the number of attorneys who will participate, whether the course is open to members not employed by the sponsor, and what precautions against interruptions will be taken.

(C) All approved courses must be open for monitoring by a Committee member or Association staff.

(D) Sponsors of approved courses may include in informational materials the statement: "This course has been approved by the Alaska Bar Association for hours of continuing legal education credit."

(2) Member's petition for credit hour approval. A member seeking approval of credit hours for activities other than courses shall file a petition with the Director on a form prescribed by the Committee.

(A) Teaching

Members teaching approved CLE courses do not have to petition for credit. Members teaching other courses must describe the course materials, its audience, the outline of the presentation, and the nature of the preparation required of the member.

(B) Publications

Members seeking credit for published legal articles or texts shall submit the publications.

(C) Members seeking credit for courses whose sponsors have not applied for approval shall submit the information required in (1).

(3) Approval and appeal. The Director shall respond in writing to a completed application or petition within 30 days of receipt. If the application or petition is denied, the Director shall state the reasons for denial. An aggrieved member or sponsor may appeal the Director's decision to the Committee within 15 days of receipt. Appeals to the Committee shall be conducted under procedures adopted by the Committee; appeals from the Committee may be taken to the Board.

(c) Standards for approval by Committee

1. The activity must be of intellectual or practical content and where possible include a professional responsibility component.
2. The activity must contribute directly to members' professional competence or skills, or to their education about their professional or ethical obligations.
3. Course leaders or lecturers must have the necessary practical or academic skills to conduct the activity effectively.
4. Each course participant in the activity must be provided with appropriate and thorough course materials which will assist the participant in learning the material and integrating it into his or her practice.
5. Courses must be conducted in a suitable setting conducive to a good educational experience.

Comments: (a) The committee believes that continuing legal education comes in many forms, and that credit should not be restricted to classroom programs. Recognition of alternate educational activities is especially important where members are geographically spread out, and where live courses are not available in every location. The committee has included credit for studying audio or videotapes of approved CLE courses without requiring supervision or testing. The committee believes that monitoring mechanisms would unduly restrict use of tapes, and should not be imposed unless abuses occur. Sponsors are encouraged to apply for course approval and members are encouraged to petition for credit approval in advance for the course or activity. However, seeking credit after the course or activity is permissible.

(b) This language paraphrases Section 7 of the ABA Model Rule, removing some specific restrictions, like writing surfaces, or available live faculty during video courses.

RULE 67. Number of hours approved

Credit hours will be given for approved CLE activities as follows:

(a) Courses: One credit hour per 60 minutes of in-classroom instruction, not including breaks, meals, or time spent reading materials. One credit hour per 60 mimutes of audio or videotape of an approved course.

(b) Teaching: 1 credit hour per hour of instruction or preparation for instruction up to a maximum of the total approved credit hours for the course.

Comment: Present Bar practice is to give course credit to members teaching or preparing materials for a cou-rse

(c) Legal publications: 10 credit hours to be pro-rated among authors, for law review articles and texts. 3 credit hours for articles in specialized professional journals.

(d) Carry-forward: A member may carry up to 12 excess credit hours forward to the next reporting period.

RULE 68:Reporting

At the end of each reporting period, each member will submit an affidavit on a form prescribed by the Committee listing the member's approved CLE hours earned during the reporting period, or carried over from the prior period, and designating the number of hours to be carried forward to the next reporting period.

See EDUCATION page 11

EDUCATION: Updating methods

A proposed rule adopting Minimum Continuing Legal Education for members of the Alaska Bar Association is published in this issue of the *Bar Rag* for the purpose of soliciting comments from the membership. If the proposed rule is adopted, it would require additional administrative functions by the Bar staff and would therefore have an impact on the Bar Associaiton budget. Largely due to the increased record-keeping responsibilities of MCLE, the Bar staff would increase by two full-time people: one administrative assistant and one secretarial/clerical person.

This staff increase will require office space expansion as well. Currently, the Bar Association office does not have the capability of expanding its space on the 6th floor of the Carr-Gottstein Building to house two new staff persons. The following options regarding office expansion are based on the assumption that there will be 24 live CLE programs per year and 2,400 active members participating in MCLE:

Option 1: Move the CLE Department to new space in the same building, but on a different floor. This option would require the duplication of existing equipment such as phones, copiers, printers, etc. and add greatly to the cost of administering the MCLE program. The total annual estimated expense budget for MCLE if the department moves to new space in the same building would be $358,127. The deficit after estimated program income would be $104,377. The cost to offset the anticipated deficit for this option would be approximately $44 per member per year.

Option 2: Move the entire Bar Association office to a new location to house all staff on one floor. The total estimated expense budget for MCLE if the entire office moves would be $328,382. The deficit after estimated program income would be $69,632. Cost to offset the anticipated deficit for this option would be approximately $29 per member per year.

Either option results in increased cost to the membership; however, the full office move is actually less expensive because there is no need to purchase/lease duplicate phone, copying and printer systems.

In the case of either option, the deficit could be met by several means, including increased bar dues, increased MCLE seminar registration fees, or a yearly affidavit filing fee per member to be paid when certifying compliance with the proposed rule.

continuing legal education continuing legal education

EDUCATION: A quick guide to CLE rules

Continued from page 1

How would I report?
You would file an affidavit (supplied by the Bar),on which you have listed the approved CLE credit hours you have taken. If you have taken more than 24, you may carry up to 12 credit hours over the next reporting period. (Rule 68).

When would I report?
You would file the affidavit every other year on your birthday. To spread the bar's processing workload out evenly, present members would be divided into two groups: people born in even-numbered years and people born in odd-numbered years. If you were born in an even-numbered year, your first two-year reporting period would start on your first birthday after the reporting section of the rules is in effect. For those born in odd-numbered years, the first reporting period would start on the second birthday after the effective date. (The Bar would notify members when their reporting periods started, and remind them prior to the periods' ending.) Members admitted after the rules are in effect would start their reporting periods at their next birthdays. (rule 65(b)).

Who would administer the rules?
The CLE Committee would be responsible for administering the rules; day to day administration would be handled by the CLE Coordinator. The Board of Governors would hear appeals from Committe decisions. (Rule 66, Article VII, Section 1(a)(2) of the Bylaws).

What would happen to a member who does not comply?
There is a 60-day grace period after the end of the reporting period. The member may request further extensions; the first 30-day request is automatically granted, and further extensions would be given for good cause shown. A member who persists in non-compliance is subject to suspension. Reinstatement requires compliance, payment of any accrued dues, and a fee in the amount of one year's dues. (Rules 69 and 61).

When would this program start?
First, the proposed rule must be voted upon by the members, under the provisions of Article IV, Section 13 of the Bylaws. If the vote is favorable, the rules will be sent to the Supreme Court. If the Court were to promulgate the Rules in their present form, they would become effective in two phases. Six months after promulgation, the rules covering approval of CLE activities would become effective. Eighteen months after promulgation, reporting periods for those born in even-numbered years and those newly admitted would begin as their birthdays came along. Thirty months after promulgation, reporting periods for those born in odd-numbered years and those admitted in the prior year would begin as their birthdays occurred. (Rule 70).

What would this cost?
According to estimates prepared by the Bar Association, bar dues will need to increase $44 per year per member to cover the increased staff and administrative costs of the program. Due to space limitations in the present Bar offices, adoption of the Rule will require moving or expansion of the present offices. The MCLE Committee believes that the fairest way to collect for the cost of the program is through Bar dues, since all members are affected. It is possible that some administrative costs could be defrayed by charging small fees for processing sponsors' requests for course aproval.

Please direct your comments to the Board of Govrnors or the MCLE Committee, in care of the Bar Association, PO Box 100279, Anchorage, Alaska 99510. Ballots for the referendum will be mailed after the annual convention in June.

VERDICTS AND SETTLEMENTS

Bailey and Dinnebeck v. Missionary Aviation Repair Center Inc., et al.

Defendants repaired plaintiffs' propeller; it came off after approximately 8 hours' flight. Plane crashed, plane lost. Personal injuries suffered. (broken bones, scars, pain and suffering, lost wages from employment and self-owned business.)

Verdict amount: $407,734 (Dinnebeck) $81,531 (Bailey)

Comments solicited for proposed changes

Continued from page 10

Comments: The "affidavit" reporting system used here is preferable to the "transcript" reporting systen, where the Bar Association maintains CLE records for each member, and sends a transcript to the member for verification at the end of the reporting period. First, the affidavit method is much less expensive, because only one filing per member, per two year period has to be processed. The transcript method would require a member report and Bar processing each time a member took a course. Second, the affidavit method, by requiring the member to keep his or her own records on CLE activities, encourages the member to take responsibility for preparing an educational plan, instead of reacting to Bar notices of credit hour deficits. The affidavit method is used by 18 of the 30 states which have MCLE rules in effect; 8 use the transcript method.

RULE 69: Non-compliance

(a) Within 30 days of the end of the reporting period, the Director shall send each member whose report shows that the CLE requirement has not been met (or who has failed to filea report) a notice of non-compliance. Within 60 days of the end of the reporting period, the member shall either remedy the non-compliance or submit an affidavit of compliance, if the transcript is alleged to be in error. If at the end of this 60 day period, the member is still out of compliance, suspension will be sought under Rule 61.

(b) Within 60 days of the end of reporting period, a member may file a written request for an extension of time for compliance, an extension of time to comply with a notice of non-compliance, or an extension of time to file a report. A request for extension shall be reviewed and determined by the Committee or by such of its members as the chairperson may, from time to time, designate. A member's first request for a 30 day extension shall be freely granted. Subsequent requests or requests for longer extensions shall be granted for good cause shown. The member shall be promptly notified of the decision by the Committee.

Comments: The object of this Rule is to encourage members to comply, not to punish them.

RULE 70: Transition

These rules shall become effective six months after approval by the Supreme Court, except that Rules 65, 68 and 69 shall become effective 18 months after approval. A member may apply approved CLE credit hours earned in the 12 months prior to the beginning of his or her first reporting period towards the requirement for that period.

Comments: The intent is to allow a gradual start-up period. The Bar would begin approving courses and activities for credit six months after the rule is approved. A year later, reporting periods would begin for half of the members. The first affidavit would be filed 3-1/2 years after the Rule is approved. The time periods can be adjusted in amount.

Comment on Funding: The Committee believes that the additional administrative expense of the MCLE program should be borne by all active members, through the mechanism of bar dues. Thus, no rule on this issue has been proposed.

Amendment to RULE 61
Suspension for Nonpayment of Alaska Bar Membership Fees and Fee Arbitration Awards or Non-compliance with MCLE Requirement.

(d) Any member who has not complied with Rule 65 within 90 days after the end of the reporting period shall be notified in writing by certified or registered mail that the Executive Director shall, after 15 days, petition the Supreme Court of Alaska for an order suspending such member for failing to complete the minimum continuing legal education requirement.

Upon suspension of the member under this section, the member shall not be reinstated until compliance has been achieved, a reinstatement fee in the amount of one year's bar dues and any dues accruing during supension have been paid, and the Executive Director has so certified to the Supreme Court and the clerks of court.

Amendment to Bylaws
Article VII Section 1(a)(2)

The Continuing Legal Education Committee, a 13-member committee responsible for preparing legal education seminars to the membership and for administering the minimum continuing legal education program.

Video Replay Schedule

REPLAY LOCATIONS:

JUNEAU LOCATION: Attorney General's Office, Conference Room, Assembly Building -- CLE Video Replay Coordinator, Leon Vance, 586-2210.

KODIAK LOCATION: Law Offices of Jamin, Ebell, Bolger & Gentry, 323 Carolyn Street -- CLE Video Replay Coordinator, Matt Jamin, 486-6024

FAIRBANKS LOCATION: Attorney General's Office, Conference Room, 100 Cushman, Ste. 400 -- CLE Video Replay Coordinators, Ray Funk and Mason Damrau, 452-1568.

REPLAY DATES:

***Residential Mortgage Reduction Under Bankruptcy Chapter 13** (Anch. 1/11/90)
Juneau: 2/3/90 9AM - Noon
Kodiak: 2/17/90 Beginning at 10 AM
Fairbanks: 3/23/90 9AM - 11 AM

***Civil Rule 90.3 -- Child Support** (Anch. 1/30-31/90, Fbx. 3/2/90, Jno. 4/10/90)
Kodiak: 3/10/90 Beginning at 10AM

***Basic Title Insurance** (Anch. 2/8/90)
Juneau: 3/3/90 9AM-12 Noon
Kodiak: 3/3/90 Beginning at 10AM
Fairbanks: 3/9/90 9AM-12 Noon

***Basic Estate Planning** (Anch. 3/30/90)
Juneau: 4/14/90 9AM-5PM
Kodiak: 4/21/90 Beginning at 10 AM
Fairbanks: 4/20/90 9AM-5PM

***Advising Clients Re Filing Chapter 11** (Anch. 4/7/90)
Juneau: TBA
Kodiak: 4/28/90 Beginning at 10 AM
Fairbanks: TBA

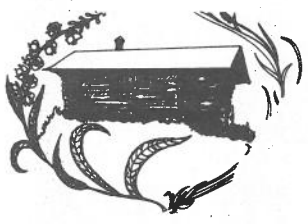
***Military Benefits & QDRO's** (Anch. 4/30/90)
Juneau: TBA
Kodiak: 5/12/90 Beginning at 10 AM
Fairbanks: TBA

*** A Lawyer's Guide to Writing Clearly & Persuasively** (Anch. 4/20/90 & Jno. 4/18/90)
Kodiak: 5/5/90 Beginning at 10 AM
Fairbanks: 4/27/90 9AM-5PM

*** Professional Responsibility and Ethics** (Anch. 9/21/90 & Fbx. 9/20/90)
Juneau: 9/29/90 9AM - 5PM
Kodiak: TBA

***Making and Meeting Objections** (Anch. 10/2&4/90)
Juneau: 10/13/90 9AM - 5PM
Kodiak: 10/20/90 Beginning at 10 AM
Fairbanks: 10/19/90 9AM-5PM

Please pre-register for all video replays. Registration cost is $35 per person and includes course materials. To register and for further information, contact MaryLou Burris, Alaska Bar Association, PO Box 100279, Anchorage, Alaska, 99510 -- phone 272-7469/fax 272-2932.



HISTORICAL BAR

Edited by Russ Arnett

The following is a portion of a speech by John Hellenthal at Anchorage on September 26, 1979, which Mr. Arnett had the pleasure of attending. John grew up in Juneau, the son and nephew of lawyers. At the time of his death, John had been admitted to the bar of Alaska just under 50 years.

....Up in the Interior, though, it was different. Judge James Wickersham had been appointed in 1900 and he traveled around to various lodges, schoolhouses and whatnot and held court because he felt the law should come to the people when it was impossible for the people to come to the courts. In fact, he started the floating court system in 1903. That lasted until about World War II.

I had the privilege of going on the floating court. They did it every two years. They would gather the court officials, the clerk, the typist, the Marshals, and some lawyers who had cases that they were interested in out in the Bush. The lawyers would have to pay for transportation, although this cost was relatively small because they went on a Coast Guard cutter.

They would leave Seward and they would go to Kodiak, which had no court at the time. They would hold court there, at Afognak, Squaw Harbor, Unga, places in the Aleutians that you do not hear of today, where they had fishing and fish-sorting.

There might be a herring reduction plant there or a place where they processed whales, and there the travellers would hold court.

Of course, the problems would have built up during the preceding two years and strange things would happen. It was a fascinating thing to do with justice, very raw elementary justice.

The court, the judge, and everybody would row ashore to some schoolhouse and set up the court and handle divorces, criminal trials, and jury trials.

Very curious things occurred in court. It was very typical to run into a bunch of people who wanted to be married to make sure because they had been married by someone like a postmaster or school teacher. They would hold a wedding certificate up so that maybe they ought to get another marriage. There would be some school teacher who would give them an elaborate certificate with cigar coupons on it and everything else. It looked extremely official. They would run into things like that.

They would go out to the Pribilof Islands and hold court there. There were a lot of naturalizations taken care of. Nowadays, with the airplanes, there is no further need for floating court, but it was a very unique thing, was typical of Alaska and it met a very well-known need.

We had some great lawyers here in Alaska, great.

Probably the most esteemed lawyer ever in Alaska was a fellow named John McGinn of Fairbanks. He was a brilliant little Irishman who spent his summers in Fairbanks and his winters in San Mateo. He made a great deal of money in mining law and in mining. He owned several mines in the Fairbanks area and he was wealthy, very wealthy. He had a mind like a steel trap. Everybody always spoke of John McGinn as the last word among lawyers.

L.V. Wray of Seward was a trained, skilled lawyer--I am speaking of the 20's and 30's and before--but he lived in Seward. He was not too interested in stoking it out with people. He was not real crazy about money and he was not too acquisitive so he was not the lawyer that John McGinn was.

Tom Donohoe from Cordova was Tony Dimond's partner. The father was. The son went to Stanford and was a brilliant lawyer. He later left the practice and went into the construction business. He was very successful at that...

Mirth may be in the eye of the beholder but there's always coffee

By Dan Branch

Recently I set out to prove that the barristers of Southeast Alaska can be funny.

For years we have all enjoyed the antics of the Tanana Valley Bar Association as reported in the *Bar Rag*. Jeff Feldman's November 1989 "From the President" column demonstrated that even Anchorage lawyers manage some humor from time to time.

Could Ketchikan be full of mirthless lawyers? I thought not.

My first stop in the quest was an eight-week murder trial. District Attorney Mark Ells, Michael Thompson and Galen Paine were trying to select a jury in Wrangell. The process was taking a very long time. Each day ended with little proof of progress. At a particularly frustrating moment in the process, Galen Paine asked the 46th juror for her opinion of *Catcher in the Rye*. Hearing this question, Judge Jahnke called counsel up to his bench.

"Change the subject, Ms. Paine," Judge Jahnke ordered. She did. Shifting gears, Galen then asked the juror what other books she had been reading lately.

The week in Wrangell dragged on with one juror after another being excused for cause. Finally, Mike Thompson resurrected his earlier motion to change venue to Ketchikan.

"These jurors," he said, "have carbuncles on the penumbra of fairness which they have not begun to scratch and won't until they begin the deliberation process." How many times have I wanted to say that? As usual, Mike's timing was flawless and the trial was moved to Ketchikan.

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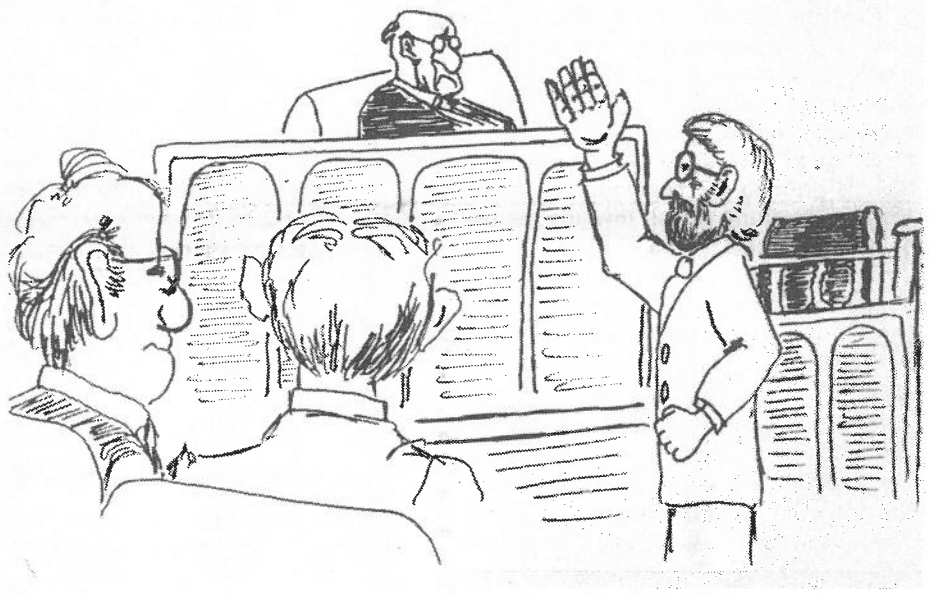
The attorneys are in Ketchikan now trying to select a jury. There was not much humor to report for the first three days of *voir dire* and I was beginning to look elsewhere when humor again visited the courtroom. Mike Thompson had just asked a prospective juror if he would give his client's testimony the same careful consideration he would give to the other witnesses.

Looking Mike straight in the eye, the potential jurist assured him, "I feel that our job as jurors is to hear and weigh all the evidence before we convict your clients." He was not excused for cause.



Branch's sketch from Ketchikan

Most Fridays at 9 a.m. you can find many members of the Ketchikan Bar Association sharing coffee at Charlie's Restaurant. I don't get down to coffee as often as I'd like. The one time I did attend, Ted King was showing his fellow attorneys the most recent drawing of the proposed Ketchikan Golf Course. Dick Whittaker looked at the drawing and listened carefully to Mr. King's progress reports.

When Ted was finished, Mr. Whittaker suggested that the bar association issue a formal proclamation in favor of public funding of the recreation area. It seemed like a good idea to me, but not to Mr. King. He knew what Dick knew--that such a proclamation would mean certain defeat for the golf course. Mr. Whittaker's motion failed.

Office dynamics are rich sources for humor. Our office, like all others, is run by the support staff. Without them, the lawyers would be in serious trouble. Take, for example, the coffee pot. In our office, it is always half full when I arrive at 8 a.m. It's taken for granted, like 1:30 arraignments and toilet paper in the bathroom.

One morning I stumbled into work only to find that Mr. Coffee was empty. "OK," I thought, "it's probably time to cut down on the caffeine, anyway."

The next morning brought another empty coffee pot. This time, I enlisted the aid of fellow coffee-drinker Mark Ells to locate some grounds. The cupboard was bare. That's when I learned about the rule against using petty cash to purchase coffee. Apparently the coffee drinkers are expected to bring in cans of coffee when we run out. I felt guilty about the whole deal and vowed to bring in a three-pound can of java the next day. Mark Ells made no such commitment but the gleam in his eye suggested that he was definately up to something.

The next morning I showed up at work with a three-pound can of Chase and Sanborn and a roll of paper towels. (The towels were an interest installment for my past indiscretion).

With the debt paid, I confronted Mark. Saying nothing, he produced a five-gallon can of Hills Brothers coffee grounds. It was definately a classy gesture, one that I wished I had made.

Once again the office pot is always full of black coffee. Things are back to normal. We all share the coffee-making duties and have barely managed to make a dent in Mark's giant coffee tin.

It's time to look for humor elsewhere.

THE MOVIE MOUTHPIECE

Edward Reasor

Boolie Werthan (Dan Akyroyd) stands with his mother, Southern matron Daisy Werthan) and her chauffer, the stalwart and wise Hoke Colburn (Morgan Freeman) in front of their mansion and 1948 Hudson car, in "Driving Miss Daisy."

What is difficult for a filmmaker to learn is that what he is really doing is painting on the large, white screen, with light, as opposed to canvas on oil. The images at times are the same, but there are images best made on canvas and others best shown visually by the camera.

Director Bruce Beresford is one of the few directors who has learned this lesson well. An Australian whose background is primarily in television, Beresford is a writer (the screenplay of "Breaker Morant"), an advertiser, a film editor with experience in Africa, and a director ("Tender Mercies").

If you want to see a camera paint, watch closely the scenes in "Driving Miss Daisy", where one or more people are looking at or standing close to a mirror.

In fact, the opening shot of "Driving Miss Daisy" shows Jessica Tandy as Miss Diasy Werthan, a highly independent Jewish matron, putting on a hat with the aid of a mirror. Following that task, she backs out the family car, across the neighbor's property, and down a seven-foot embankment. What better way can you visualize to introduce a 72-year-old Southern widow than by mirror and car?

Miss Daisy (an expression used in the South for all women, married, single, divorced) is not injured, but her businessman son Boolie Werthan, played to perfection by Dan Aykroyd, is concerned that she should not be driving her new 1948 Packard lest she really injure herself or someone else. So he hires a chauffeur, but it takes awhile before this white southern Jewish matron can become friends with the likable but black male chauffeur, played in his best acting part yet by Morgan Freeman. Hoke Colburn (Freeman) drives Miss Daisy everywhere and thus a friendship that will last all of 25 years is begun between a patient, unread black widower and an educated, former schoolteacher who is now a well-to-do widow in the changing American South of the early 1960s.

It's a fine idea. The screenplay is by Alfred Uhry, based on his own Pulitzer Prize winning play of the same name. Uhry based his play on the experiences of his own grandmother and her chauffeur, leading me to advise novice screenwriters once again that one should write about one's own life experiences and not by formula. What Uhry wanted to get across, in addition to the Civil Rights movement of the 1960s, was that some people come to terms with being victims of prejudice (here the chauffeur) and some people do not (the widow cannot understand why her synagogue has been bombed.)

One only has to look at Atlanta's history to find that this entertaining movie has relied rather accurately on the facts--in 1958 a Temple was bombed in Atlanta, disturbing that city's oldest Jewish congregation, and later in the film when Miss Daisy goes into the auditorium to see and hear Dr. Martin Luther King, Jr., while her chauffeur listens to the same talk outside on the car radio. That's real fact again. Dr. Martin Luther King, Jr. did give a speech in a ceremony in January, 1965 at the Dinkler Plaza Hotel, Atlanta.

Facts improve this film but this excellent picture is not a documentary. By losing the family car to the chauffeur, Miss Daisy has in fact lost some of her own independence. She now needs Hoke to "carry" her to Piggly Wiggly. This is a metaphor. The Southern White of this nation must learn (as should the Northern or Western White) to work with and at times depend on the black. Morgan Freeman originated the role of the chauffeur on stage. To say he is perfect in "Driving Miss Daisy" is to state the obvious. Jessica Tandy did not do the stage work, but at the time of the filming of "Driving Miss Daisy" she was 80 years old and had stage experience galore. Remember her as the original Blanche Dubois in "A Streetcar Named Desire"? This film doesn't sound like a stage play, however, because it is so cleverly put together that it relates not only the racial message but also the quiet, respectful attitude of older people, one for the other, regardless of race or economic position.

With Tandy in the part, Miss Daisy is a stiff-backed, educated, wonderful woman of quality who raised a fine Southern son while helping her now deceased husband to economic security. With Freeman in the part of chauffeur, we have an uneducated (he can't read the headstones in the cemetery she asks him to visit with flowers) but wise, experienced, crafty old man who knows how to ask for a raise, and keep things running smoothly (he reports to and is paid by Akroyd).

This is a quiet film where the director had the good sense to love the material and trust his two experienced actors.

There is one picnic scene where two red-necked state troopers ask Freeman for registration papers and etc., even though the car is stopped, off the road, and no probable cause for an infraction exists at all. We find ourselves worrying not only about the black chauffeur but also his white passenger.

It's there. Reach out and touch it, if you want, or sit back in the darkened theatre and wish them well without touching out.

In short, I like both Miss Daisy and Hoke. Both are thoughtful, caring people. Both are good, decent folks as those terms are used in everyday parlance. That's fine scripting, fine directing, and extraordinary acting.

There are some excellent shots of vintage cars, deliciously warm, long shots of a peaceful house on a warm sunny day, inside shots of a southern mill at work with quiet changes in improved technology as the story continwes chronologically, the years announced by auto license plates. There are so many wonderful cinematic techniques that move the story forward that I suggest you see this film more than once. It is impossible to catch it all the first time around.

Toward the end of the film, about midway through the third act, Miss Daisy says to her chauffeur: "Hoke, you're my best friend".

I say, director Beresford: this is your best film.

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NOTICE OF PUBLIC MEETING AND REQUEST FOR COMMENTS

The Statute, Bylaws and Rules Committee of the Alaska Bar Association is currently reviewing the Attorney's Oath which is set forth in Alaska Bar Rule 5, Section 3. Written comments would be appreciated by the Committee, but they must be received in the Bar Office by 5 p.m. Friday, April 13.

There will be a public hearing on this matter at the Bar Office at 1 p.m. on Friday, April 20, 1990.

Please call the Bar office at 907-272-7469, or fax 907-272-2932 for more information.

Judges are up for retention

Alaska judges must periodically appear on the ballot in order to allow the voters the opportunity to decide whether the judges should be retained in office. This occurs every 10 years for supreme court judges, every eight years for court of appeals judges, every six years for superior court judges, and every four years for district court judges. The Alaska Judicial Council is charged under Alaska statutes with evaluating judges up for retention elections and making recommendations to the voters.

An especially large number of judges are up for retention this year. As of now, nineteen judges will be on the ballot. (Judge Jones of Kotzebue, Judge Madsen of Kodiak, and Judge Zimmerman of Fairbanks have informed the Council that they do not intend to stand for retention.) The retention judges are:

APPELLATE
Justice Warren W. Matthews

FIRST JUDICIAL DISTRICT
Judge Walter L. Carpeneti
Judge Rodger W. Pegues
Judge Thomas E. Schulz
Judge Peter B. Froehlich

SECOND JUDICIAL DISTRICT
Judge Charles R. Tunley

THIRD JUDICIAL DISTRICT
Judge Victor D. Carlson
Judge Charles K. Cranston
Judge J. Justin Ripley
Judge Brian C. Shortell
Judge Elaine M. Andrews
Judge Martha Beckwith
Judge Ralph Stemp
Judge David Stewart
Judge Michael L. Wolverton

FOURTH JUDICIAL DISTRICT
Judge Richard D. Savell
Judge Herschel E. Crutchfield
Judge Jane F. Kauvar
Judge Larry C. Zervos

The Judicial Council will evaluate these judges based on information from three main sources. First, the Council conducts a survey of all active Alaska Bar members. The survey was mailed on February 21 and a follow-up survey was sent on March 9 to the attorneys who initially did not respond. Returned surveys must be received at Dittman Research by March 30 in order to be counted.

The survey this year will include all judges--not just those standing for retention. The Council hopes that providing survey results to non-retention judges will give those judges information about their strong points, advance warning of any perceived problems, and an opportunity for improvement before their retention elections.

Second, the Judicial Council will send a very similar survey to over 1,000 Alaska peace and probation officers. This second survey allows the Council, and the judges, to get a slightly different perspective of the judges' performance. The peace and probation officer survey this year also will include all judges.

Third, the Council aggressively will seek input from the public on the retention of judges. Jurors, witnesses, litigants, crime victims and other interested members of the public all have differing and valuable perspectives on the judges up for retention. The Council will seek public comments through public hearings, paid newspaper ads asking for public input, and public service announcements. Council staff will address various business and civic groups in order to encourage comments and make the public aware of the retention process.

The Council has established, on an experimental basis, a citizens' retention advisory committee in Anchorage to help the Council receive and evaluate public comments. The committee will conduct courtwatching, send out surveys to jurors and litigants, hold public hearings, interview the eight Anchorage judges up for retention, and, finally, send its recommendations to the Judicial Council.

The schedule for public hearings is:

1. *Third District*--Friday, Apr. 6, 3:00--7 p.m.
   Location: Anchorage Legislative Information Office at 3111 C Street with teleconference hookups at the LIO offices in Kenai, Mat-Su, Homer, Valdez, Kodiak and Seward.
2. *First District* - Monday, June 4, 8:00 - 9:30 a.m.
   Location: Juneau, Ketchikan and Petersburg LIO offices.
3. *Second and Fourth Districts* - Friday, May 11, 4:00 - 6:00 p.m.
   Location: Fairbanks, Barrow, Bethel, Kotzebue and Nome LIO offices.

Attorneys are invited to testify at these public hearings.

In addition to input from peace officers, attorneys and the public, the Council also evaluates various other sources of information. Among other things, the Council reviews information submitted by the judges themselves, APOC reports, any criminal records, peremptory challenge records, any public disciplinary charges or sanctions, and conflict of interest statements. The Council also may meet with the judges.

The Judicial Council will make its recommendations to the voters in June or July. The Council's evaluations and recommendations are printed in the Official Election Pamphlet. Because judges are not allowed by the Canons of Judicial Conduct to campaign for retention unless they are opposed, the Council's evaluation provides information about judicial performance that otherwise would be difficult to obtain.

Bench selected according to a merit system

Article IV, section 5 of the Alaska Constitution provides that the governor will select Alaska's justices and judges by appointing one or two or more persons nominated by the Alaska Judicial Council. The Council is made up of six non-paid citizen members--three non-attorneys appointed by the governor and three attorneys appointed by the Alaska Bar Association. The chief justice serves *ex officio* as the chairperson of the Council.

The merit system used to select judges in Alaska requires applicants for judicial vacancies to submit a detailed application to the Judicial Council. The Council reviews each applicant's education, professional experience, health, participation in community activities and criminal, discipline and credit records. It also asks each member of the Alaska Bar to evaluate the applicants' abilities and qualifications, and conducts further investigation as necessary. Finally, the Council usually holds a public hearing and invites applicants to an interview in the location of the judicial vacancy.

Following the public hearing and interviews, the Council meets to decide which of the applicants to nominate. The governor, applicants and media are notified immediately. The governor then has 45 days in which to make the appointment.

The upcoming year is likely to see an unusuallly large number of new judges selected across the state. This large number of vacancies is expected because many judges are up for retention elections this year, many judges now have served long enough to maxixmize their retirement benefits, and judges are relatively underpaid compared to what most could earn in private practice. Vacancies which have already occurred, or seem very likely to occur, are discussed below.

Juneau. Judge Pegues will retire at the end of August, 1990.

Sitka. Judge Craske, the superior court judge in Sitka, will retire as of July 1, 1990. The Judicial Council solicited applicants for this position on February 2 with a March 12 application deadline. Attorney surveys will be mailed on April 6. The surveys must be returned by April 30 to be counted. The Council will meet in Sitka on Monday, June 4 to hold a public hearing, interview the applicants, and decide which applicants to nominate.

Kenai. The governor signed legislation on February 20 creating a second superior court judgeship in Kenai. Applications for this position must be submitted to the Judicial Council by March 26. The attorney survey will be combined with the Sitka vacancy survey to save money and encourage a higher response rate. The survey will be mailed out on April 6 and must be returned by April 30. The Council will hold a public hearing, conduct interviews and make its decision in Kenai on Tuesday, June 5.

Kotzebue-Kodiak. Judge Jones, the superior court judge in Kotzebue, and Judge Madsen, the superior court judge in Kodiak, have notified the Judicial Council that they do not intend to file a declaration of candidacy to stand for retention this fall. Thus, unless either judge submits a resignation earlier, each position will become vacant 90 days after the election (February 4, 1991). The Council will solicit applications for these impending vacancies sometime late this summer.

Fairbanks-Homer/District Court. Judge Zimmerman has announced his retirment from the district court bench in Fairbanks, effective April 15, 1990. In addition, there is currently an acting district court judge serving in Homer. The Judicial Council will seek applicants for these two positions when and if directed to do so by the supreme court.

Court of Appeals. Judge Singleton of the Court of Appeals has been nominated by the Bush Administration as a federal district court judge. Assuming Judge Singleton's nomination is approved later this year by the U.S. Senate, the Council will be seeking applicants to fill Judge Singleton's position on the Court of Appeals.

Governors want amendments

The Board of Governors proposes the following amendments to Alaska Bar Rule 2:

Bar Rule 2: Eligibility for Examination

Section 1. Every general applicant for examination shall:

* * *

(b) Be a graduate *with the degree of Juris Doctor (JD) or Bachelor of Laws (LLB)* of a law school which was accredited or approved by the Council of Legal Education of the American Bar Association or the Association of American Law Schools when the applicant entered or graduated, or submit proof that the law course required for graduation *for either the JD or LLB degree* from such a law school will be completed and that a *JD or LLB* degree will be received as a matter of course before the date of the examination. Certified proof of graduation shall be sent directly from the law school to the Alaska Bar Association and received prior to the date of examination;

* * *

Questions or comments should be directed to Executive Director Deborah O'Regan at the Alaska Bar Association office, 310 K Street, Suite 602, Anchorage, Alaska 99501. 272-7469.

CLE Schedule

#27 March 30 7.2 cles	Basic Estate Planning	Egan Convention Ctr-Anchorage
#35 Apr 7 Half-Day	Advising Clients Re Filing Chapter 11	Sheraton Hotel-Anchorage
#31j April 10 Half-Day 4.4 cles	Civil Rule 90.3 - Child Support - LIVE REPEAT	Centennial Hall JUNEAU
#29j Apr 18 Half-Day	A Lawyer's Guide to Writing Clearly and Persuasively	Centennial Hall JUNEAU
#29a Apr 20 Full Day	A Lawyer's Guide -- LIVE REPEAT IN ANCHORAGE	Hotel Captain Cook-Anchorage
#36 Apr 30	Military Benefits & QDROs (date changed from May 1)	Hotel Captain Cook-Anchorage
#21 June 7-9 12 cles	1990 Northern Justice Conference & Annual Bar Convention	Anchorage-Hotel Captain Cook
#33f Sept 20	Professional Responsibility & Ethics	Regency Hotel FAIRBANKS
#33a Sept 21	Professional Responsibility & Ethics - LIVE REPEAT	Sheraton Hotel Anchorage
#14 Oct 2 & 4 AM Mini-Seminar	Making & Meeting Objections	Hotel Captain Cook

For further information on any of the above programs, contact the Alaska Bar Association, PO Box 100279, Anchorage, AK 99510, phone 907-272-7469 fax 907-272-2932.

New rules include procedural changes

The following is a set of proposed revisions to General Rule 3, of the Local Rules of the United States District Court for the District of Alaska. They are in the usual form--brackets around deleted material, italics for new material.

Under Rule 83 of the Federal Rules of Civil Procedure and General Rule 37(B) of the Local Rules of this District, the District Court may amend its Local Rules by action of a majority of the judges thereof, "after giving appropriate public notice and an opportunity to comment". On behalf of the Local Rules Committee for the District, I solicit the comments of the bar. By copy of this letter, we are requesting the editor of the *Alaska Bar Rag* to publish the proposed revisions in the *Bar Rag*.

In order to give the bar an adequate opportunity to comment, we will delay action until June 1, 1990. I assume that this will be plenty of time to publish in the *Bar Rag* and to bring the proposed revisions to the attention of the Board of Governors if you deem that appropriate. The Advisory Committee notes to Rule 83 of the Federal Rules of Civil Procedure suggests that notice to the bar is the kind of public notice contemplated, but we have the additional benefit in this state that the Board of Governors of the bar includes non-lawyers who can apply their own perspective.

We would appreciate any comments by May 10, 1990, so that we can give sufficient attention to them before acting. I request that the *Bar Rag* provide its readers with notice of this comment deadline as well.

-Andrew J. Kleinfeld Judge-

RULE 3

ATTORNEYS

A. Eligibility

(1) Any attorney at law, upon presenting satisfactory proof to the Clerk of this Court of having the requisite qualifications to practice as an attorney and counselor at law before the Courts of the State of Alaska, is eligible for admission to practice in the United States District Court for the District of Alaska except as provided in Rule 3A(2) following.

(2) No one serving as a law clerk or secretary to a member of this Court or employed in any other capacity under this Court shall engage in the practice of law while continuing in such position; nor shall such person, after separating from that position, practice as an attorney in connection with any case pending in this Court during his or her term of service, permit his or her name to appear on a brief filed in connection with any such case, or engage in any activity as an attorney or advisor in connection with any such case.

B. Procedure for Admission.

(1) All attorneys at law admitted to practice before the former District Court for the Territory of Alaska on February 20, 1960, shall be deemed admitted to practice in this Court without further procedure for admission.

(2) [Each applicant for admission shall file with the Clerk a petition stating residence, office address, and Court or Courts having admitted the applicant to practice and the respective dates of admission to those courts.] *Each applicant for admission shall file with the clerk a petition stating all names by which the applicant has been known, residence and office addresses, and the names and addresses of all courts before which the applicant has been admitted to practice. The petition shall state the dates of admission, and the dates of suspension or other such action on account of disability or otherwise in any of the jurisdictions or courts before which the applicant has practiced.*

(3) The petition shall be accompanied by proof of the requisite qualifications to practice as an attorney and counselor in the courts of the State of Alaska. *The petition shall be accompanied by proof of service on the Alaska Bar Association.*

(4) Such proof shall consist of a certificate signed by a justice or the Clerk of the State Supreme Court or the Executive Director of the Alaska Bar Association, and said certificate shall bear a date no more than ninety (90) days prior to the date of the application.

(5) [Upon receiving such proof, unless objection be raised thereto, the Court may enter an order admitting the applicant to practice in this Court and the Clerk shall issue a Certification of Admission.] *After a 20 day period for the filing of objections has elapsed, the court shall determine whether to order admission, and if admission is ordered, the clerk shall issue a certificate of admission. The court may, on its own motion or in response to an objection, make further inquiry of the applicant or others, and determine what response to objection, hearing, or other procedures are appropriate.*

(6) [In the event that an objection is raised, its sufficiency shall be determined within thirty (30) days.]

(7) An accepted applicant shall take and subscribe to the following oath:

I do solemnly swear (or affirm) that I will conduct myself as an attorney and counselor of this Court, uprightly and according to law; and that I will support the Constitution of the United States. So help me God. (I declare (or certify, verify, or state) under penalty of perjury that this foregoing is true and correct).

C. Nonresident Attorneys.

(1) [Only an active member of the Bar of this Court who maintains an office within the district may enter appearances for a party, sign stipulations, receive payment or enter satisfaction of judgment, decree or order. However, any member in good standing of the Bar of any United States Court, or of the highest Court of any state, territory, commonwealth, or possession of the United States, who has been retained to appear in this Court and who is not a resident of the State of Alaska, or does not maintain an office in said State for the practice of law, may be permitted after application, without previous notice, to appear and participate in a particular case. Such applicant shall designate in the application so to appear, a member of the Bar of this Court who maintains an office at the place within the District at which the action is pending for the practice of law. This member shall be one with whom the Court and opposing counsel may readily communicate regarding the conduct of the case and upon whom service may be made by the Court. The applicant shall also file with such application the address, telephone number and written consent of such designee, and a certificate of the presiding judge or Clerk of the highest Court of the state, territory, commonwealth, possession or Court of the United states where he or she has been admitted to practice, said certificate showing admission to such Court and that the applicant is in good standing therein. Said certificate shall bear a date no more than one (1) year prior to the oath of application.]

(a). Active members of the Bar of this Court may appear and act in all respects on behalf of parties, unless the Court finds good cause to require association with an active member of the bar of this court residinq in the place within the district where the case is pendinq.

(b) A member in qood standinq of the bar of another jurisdiction, who is not an active member of the bar of this court, may be permitted by the court to appear and participate on behalf of a party, but except on a showinq of good cause to the contrary, will be required to associate with an active member of the bar of this court. The court may permit a member in good standing of the bar of another jurisdiction, on a sufficient showing, to appear and participate without association with an active member of the bar of this court.

(c) A member in good standing of the bar of another jurisdiction, who is not an active member of the bar of this court, may be permitted upon motion to appear and participate in a particular case. If a motion in conformity with this rule is filed, the attorney applyinq may appear and participate as thouqh it had been approved unless the court orders otherwise, and approvals shall be deemed to be effective as of the time of filinq of the motion. The motion shall either designate a member of the bar of this court, in accord with the above subsections, or else show cause why, in accord with the above subsections, no association should be required. Motions for leave to participate without local counsel will not be approved as a matter of course, and if denied, the parties represented by non-local counsel will ordinarily be given a reasonable period within which to associate local counsel. Any attorney so appearinq shall become familiar with and shall conform to the Local Rules of the District and the Alaska rules governing professional responsibility.

(2) [An attorney thus permitted to appear may participate in a particular action or proceeding in all respects, except that all documents requiring signature of counsel for a part may not be signed solely by such attorney, but must bear the signature also of local counsel with whom associated.] *All papers served or filed in an action, including orders and other papers filed by the court, shall be served on all attorneys who have appeared therein, whether an active member of the bar of this court, or a nonresident attorney admitted pursuant to this section, except as otherwise provided by these rules or the Federal Rules of Civil or Criminal Procedure.*

D. Attorneys for the United States Government. Any attorney representing the United States Government (or any agency thereof) may appear and participate in particular cases in an official capacity without submitting a petition for admission. [If the Government representative is not a resident of the District of Alaska, then some resident member of this Bar or resident counsel for the government shall be designated for the purpose only of receiving service of notices and any other documents requiring service. Service of notice upon such designated resident counsel shall constitute service upon such nonresident attorney.] *If the attorney representing the United States is not a resident of this District, then the United States attorney's office in this district shall be associated initially, but upon application demonstrating good cause, association of the United States attorney within this district may be dispensed with.*

(E) [All nonresident attorneys admitted to practice in this Court are subject to the jurisdiction of the Court with respect to their conduct to the same extent as members of the Bar of this Court.]

(F) Appearances, Substitution and Withdrawal.

See APPEARANCE page 16

Those wild and crazy guys at the TVBA unveil further adventures

Feb. 3, 1990, Fourth of July Picnic

It was a cold and foggy night as attorneys and guests assembled at Raven Hall for the annual observance of our nation's birthday....The meeting was called to order by outgoing President Fleur Roberts' plaintive cries of, "Where's my presents? I don't want no stinkin' plaque with a gavel!"

....In response to Fleur's insistent requests, incoming President Dan Cooper presented Fleur with a print that he claimed to have purchased in Anchorage. In reality, the "print" was the top half of the Alascom calendar from 1988, matted and framed with the dates removed. Bob Noreen presented Fleur with a stinkin' plaque with a gavel and a certificate good for a Nordstrom weekend in Anchorage....Fleur introduced the incoming slate of officers: your undersigned as Secretary; Ron Smith as Treasurer; Gail Ballou as Vice President; and Dan Cooper as Maximum Leader (hereinafter M.L.) of the TVBA and Alaska Bar Association.

M.L. Cooper gave a very brief outline of his plans for our organization for the coming year. Cooper was wearing a crown, presumably a symbol of his Maximum Leadership, and VP Ballou was overheard to suggest that the Association would have to obtain a new and smaller crown when the mantle of power passes to her one year hence. M.L. Cooper told her not to worry about it as her head would doubtless grow into it....

--Christopher E. Zimmerman

Feb. 9, 1990

....There was not only nothing exciting on the agenda, there was nothing on the agenda. That being the case, discussion turned to the subject of the plastic flowers last sent to to Justice Rabinowitz and apparently kept or destroyed by him. Those of you who attend regularly may recall that the flowers were sent to the Justice when he was hospitalized some years ago and that he apparently destroyed them in a drug-induced rage. Since that time the Justice has been continuously asked to replace or pay for the flowers.

Judge Savell indicated that Justice Rabinowitz's lack of appreciation for our flowers was no justification for keeping or destroying them. He stated that he didn't appreciate his wife, but that he didn't destroy her. He did, however, keep her. Wives are obviously different than plastic flowers....The possibility of sending Xerox copies of plastic flowers in the future was briefly discussed as a way of cutting costs and avoiding hurt feelings....

--Christopher E. Zimmerman

Feb. 16, 1990

....Wayne Wolfe indicated that he had some gems of wisdom from the Bankruptcy Court to share with those assembled. He started by informing us that a selection had been made for the second Bankruptcy Judgeship. I understood that the gentleman's name was Ronald McDonald III (please correct me if I'm wrong). There were some comments about the candidate being a clown from Oregon. Someone asked if you were going to get a McDischarge in Bankruptcy soon. We look forward to a report with McNuggets of wisdom from the new Judge soon....

--Christopher E. Zimmerman

MARKHAM: Hearing required on pre-arrest

Continued from page 5

trate. If the court finds that a valid maritime lien exists and that personal jurisdiction cannot be obtained over the owner or operator of the vessel (or that pre-arrest notice has been waived), the court will issuse an order authorizing the issuance of an arrest warrant. On the other hand, if personal jurisdiction can be obtained over the owner or operator, the court is directed by Rule 4(B) to determine if exigent circumstances exist; and the basis for such a determination is spelled out. Only if such circumstances are established, does an arrest warrant issue without notice to the owners or operators of a vessel. If the court does not find exigent circumstances to exist, a pre-arrest hearing is required. Local Admiralty Rule 4(D) sets out the procedure and evidentiary burden on a plaintiff at the pre-arrest hearing. It is the pre-arrest hearing requirement of Local Admiralty Rule 4(B) which is the focus of plaintiff's motion.

Effective August 1, 1985, the United States Supreme Court amended the Supplemental Rules for the express purpose of dealing with the issuance of and proceedings following the arrest of vessels. Supplemental Rules C(3) and E(4)(f).

Supplemental Rule C(3) requires that a plaintiff's verified complaint and supporting papers be "reviewed by the court" for purposes of authorizing a warrant of arrest in an appropriate case. Rule C(3) further provides:

> If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impractictical, the clerk shall issue a summons and warrant for the arrest and the plaintiff shall have the burden on a post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed.

Supplemental Rule E(4)(f) then spells out the procedure for the release of a vessel from arrest after a "prompt hearing".

The Supplemental Rules are a part of the Federal Rules of Civil Procedure. Rule 83, Federal Rules of Civil Procedure, authorizes the promulgation of local rules by the district court in the following language:

> Each district court by action of a majority of the judges thereof may from time to time...make and amend rules governing its [1] practice not inconsistent with these rules.

In his motion, plaintiff argues that Local Admiralty Rule 4(B) and (D) should have been rescinded upon promulgation of Supplemental Rules C(3) and E(4)(f). Counsel notes, and the court is very much aware of the fact, that for several years now the court has been looking to an *ad hoc* rules committee made up of local admiralty bar members for guidance on the issue of the rules which are the subject of plaintiff's motion. That committee never produced a recommendation on this subject.

The court takes Rule 83 to mean what it expressly says--namely, that this court is empowered to adopt rules of practice which are "not inconsistent with these rules". The question before the court on the instant motion is thus: "are the provisions of Local Admiralty Rule 4(B) and (D) with respect to pre-arrest hearings inconsistent with Supplemental Rules C(3) and E(4)(f)?"

The case law under Rule 83 is sparse and not particularly informative as to how the phrase "not inconsistent" is to be interpreted and applied. *Colgrove v. Battin*, 413 U.S. 149 (1973), is instructive and explains *Miner v. Atlass*, 363 U.S. 641 (1960), an earlier case on the same subject. In *Miner*, the United States Supreme Court held that a district court lacked the power by local rule to fill a gap left in the General Admiralty Rules for discovery depositions in admiralty prior to the 1966 merger of the General Admiralty Rules with the Federal Rules of Civil Procedure. Emphasizing the point set out in *Miner*, the United States Supreme Court explained in *Colgrove*:

> *Amicus* also suggests that *Miner* should be read to hold that all "basic procedural innovations" are beyond local rulemaking power and are exclusively matters for general rulemaking. We need not consider the suggestion because, in any event, we conclude that the requirement of a six-member jury is not a "basic procedural innovation." The "basic procedural innovations" to which *Miner*, referred are those aspects of the litigatory process which bear upon the ultimate outcome of the liltigation and thus, "though concededly 'procedural,' may be of as great importance to litigants as many a 'substantive' doctrine..." (*Miner*,) 363 U.S. (641), at 650. Since there has been shown to be "no discernable difference between the results reached by the two different-sized juries," *Williams v. Florida*, (399 U.S. 78 (1970) at 101 (see also n. s15, *supra*), a reduction in the size of the civil jury from 12 to six plainly does not bear on the ultimate outcome of the litigation.
>
> *Colgrove*, 413 U.S. at 164 n.23.

In *Colgrove*, the District of Montana had adopted a local rule providing that trial juries in civil cases shall consist of six persons. In the face of a contention that the local rule was "inconsistent with" Federal Civil Rule 48, and therefore invalid by reason of Rule 83, the United States Supreme Court upheld the local rule.

Plainly a local rule which contradicts the express requirement of a Federal Rule of Civil Procedure would be "inconsistent" with those rules. In this instance, the local rule does not amount to an outright contradiction of the Supplemental Rules. The local rule is different from the Supplemental Rules. The local rule requires a procedure that is not necessary under the Federal Supplemental Rules.

Plaintiff argues persuasively that the difference between the local rules and the Federal Supplemental Rules is impermissible, and therefore inconsistent, because of some very practical considerations. If the defendant vessel sinks, is privately sold to a third party, or is arrested or made subject to a higher or equal but later lien, the instant claimant's rights may be prejudiced solely because of delay occasioned by the pre-arrest hearing process which the present local rules require, but which the Supplemental Rules do not require.

The Supplemental Rules do not expressly or by necessary implication call for implementing local rules. The Supplemental Rules appear entirely sufficient to serve their purpose without supplementation by additional local rules. The court's earlier adopted local rules having to do with pre-arrest proceedings do not in any material sense serve to carry out the subsequently adopted Supplemental Rules. The procedure under the local rules, while not in direct, overt conflict with the Supplemental Rules, place upon claimants procedural obligations which are beyond what is required by the Supplemental Rules and which may have an impact on the ultimate outcome of the case.

The court concludes that Local Admiralty Rule 4, insofar as the same requires pre-arrest proceedings different from Supplemental Rules C(3) and E(4)(f), is inconsistent with the Supplemental Rules. The court therefore concludes further that this court's pre-arrest hearing procedures must be suspended. Process for the arrest of vessels shall be considered by the court [2] and issued in accordance with Supplemental Rule C, and vessel arrests shall be subject to the release procedures set out in Supplemental Rule E(4)(f).

DATED at Anchorage, Alaska, this *20th* day of December, 1989.

Russel Holland
United States District Judge

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[1] Rule 83 continues with a provision that copies of local rules are to be furnished to the circuit judicial council and the Administrative Office of the United States Courts, in addition to being made available to the public. The process for promulgating local rules was addressed by Congress in 1988 in Title IV of the Judicial Improvements and Access to Justice Act (Pub. L. No. 100-702 (Nov. 19, 1988)). The latter act added a new paragraph (4) to 28 U.S.C. S 332(d), requiring the circuit judicial council to review periodically the local rules promulgalted by district courts in the circuit for consistency with the rules of practice and procedure. By the provisions of 28 U.S.C. S 2071(d) (as well as Rule 83), district courts are required to furnish circuit judicial councils and the director of the Administrative Office of the United States Courts with copies of their local rules.

[2] This holding is not intended to change the court's current practice of referring to the United States Magistrate for consideration those matters arising under the Supplemental Rules which must be determined by a judicial officer rather than the clerk of court.

APPEARANCE: Withdrawing counsel

Continued from page 15

(1) [All applications to a judge of this court for ex parte orders must be made in propria persona or by an attorney of this Court.] Corporations may not appear in propria persona.

(2) Whenever a party has appeared by counsel, such party may not thereafter appear or act in his or her own behalf in this action unless an order of substitution has been first entered by the Court, after notice to the attorney of such party and to the opposing party; except the Court may hear a party in open court, not withstanding the fact that such party has appeared or is represented by counsel.

(3) [No attorney shall be permitted to withdraw from a case in which such attorney has appeared as the sole counsel for a litigant except for good cause shown and upon written motion and notice of hearing thereof served by counsel upon his client not less than ten (10) days in advance of that hearing. However, this rule shall not apply where a litigant has other counsel ready to be substituted for the counsel requesting withdrawal or where the client expressly consents in open court or in writing to the withdrawal of said attorney.]

Withdrawal as counsel requires leave of the court. A motion for leave to withdraw shall be accompanied by: (a) written consent of the client; (b) substitution of counsel and formal appearance of substituting counsel; or (c) other showing of good cause. Any party or attorney may oppose the motion, and the court may deny such a motion even if consented to or unopposed. If the withdrawal would leave the formerly represented party without an attorney of record, the motion shall provide the party's last known address and telephone number, and the attorney proposing to withdraw shall arranqe a hearinq and qive the client at least twenty days written notice of the hearinq, unless he shows qood cause why such a hearinq should not be required.

G. Disbarment and Suspension.. Whenever it appears to the Court that any member of its Bar or any non-resident attorney permitted to appear or who has applied to appear has been disbarred, suspended from practice, or convicted of a felony, such attorney shall be suspended forthwith from practice before this Court and, unless upon notice mailed to his last known place of residence good cause to the contrary is shown within five (5) days, there shall be entered an order of disbarment, or of suspension, for such time as the Court fixes.

[(1) Any matter before the Court related to discipline, disbarment or suspension, may be referred by the Court for recommendations to a Committee on Discipline or to the United States Magistrate.]

H. Contact with Jury Venire.. No attorney admitted to practice before the United States District Court for the District of Alaska may seek out, contact, or interview at any time any juror of the jury venire of this court. No attorney without prior approval of the Court may allow, cause, permit, authorize or in any way participate in any contact or interview with any juror relating to any case in which the attorney has entered an appearance. This subsection shall be posted in the jury rooms of this District and jurors shall be instructed fully as to this matter.

Ethical issues draw Bar opinion

ALASKA BAR ASSOCIATION
ETHICS OPINION 90-1
Attorney Representing Dissenting Shareholders/Directors Communicating with Board of Directors without Consent of Corporation's Attorney

The Committee has been requested to give an opinion as to whether it is improper for an attorney who represents two corporate directors, in their individual capacity, in a shareholder derivative action to discuss matters relating to the pending litigation with other board members when the corporation is represented by both corporate counsel and retained litigation counsel who have not consented to the communication. It is the opinion of the Committee that the communication is in violation of Disciplinary Rule 7-104(A)(1) of the Code of Professional Responsibility.

Disciplinary Rule 7-104(A)(1) provides as follows:

> During the course of his representation of a client, a lawyer shall not:
> (1) communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has prior consent of the lawyer representing such party or is authorized by law to do so.

Attorney originally represented three dissenting shareholders who sued a corporation, three board members, and a corporate employee, on their own behalf and in the form of a shareholder's derivative suit, to set aside a corporate transaction. Two of the plaintiffs and the daughter of a third plaintiff were subsequently elected to the board of directors, along with other directors who shared their view. At the time in question, the board was deeply and approximately evenly divided on the propriety of the corporate transaction. The lawsuit was active. The corporation had a corporate attorney, and had also retained a separate litigation attorney to represent the corporation in the lawsuit. The board had also created a special litigation committee to determine what the corporation's position should be on the transaction in question. The committee's membership consisted of all available disinterested directors.

At a point when the litigation was very active, and important decisions needed to be made quickly, the attorney met with seven of the thirteen corporate directors. The attorney received a request to so meet from his client, who was one of the corporate directors and a plaintiff in the derivative lawsuit. This plaintiff/director was present at the meeting. The other six directors present at the meeting consisted of the director/corporate president who was the daughter of a plaintiff, an additional client/plaintiff/director, and four disinterested directors who were eligible for and subsequently appointed to the litigation committee. The attorney did not seek the consent of the corporate counsel or the litigation counsel prior to the meetiing, nor did the attorney notify either one that the meeting would take place.[1] The specific issue presented by this opinion request is the extent to which corporate directors are parties in litigation involving the corporation. A related question is how the ethical conduct of the attorney is affected by the principle that factions of a corporate board, such as dissenting directors or minority shareholders, have the right to obtain legal counsel of their own choosing to advise them or to represent their own interests.[2]

The corporation was an opposing party in the litigation. Therefore, so were its officers and directors, except those who chose to be plaintiffs.

ABA Informal Opinion 1410 (2/14/78) states:

> If the officers and employees that you propose to interview could commit the corporation because of their authority as corporate officers or employees or for some other reason the law cloaks them with authority, then they, as alter egos of the corporation, are parties for the purpose of DR 7-104(A)(1)...It accordingly is the opinion of this committee that no communication with an officer or employee of a corporation with the power to commit the corporation may be made by opposing counsel unless he has the prior consent of the designated counsel of the corporation, or unless he is authorized by law to do so.

The comment to Model Rule 4.2, which is essentially the same as DR 7-104(A)(1), states that the rule applies to communications with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization.

The Committee has previously addressed inquiries raising somewhat similar issues. In Alaska Bar Association Ethics Opinion No. 71-1, the Committee advises that:

> (A) attorneys may ethically communicate with employees of a governmental entity, so long as that communication is not made with employees of the entity who may reasonably be thought of as representing the entity in matters relating to the matter in controversy, and as long as the lawyer reveals to the employee his identity and representation and the connection between the representation and the communication.

Alaska Bar Association Ethics Opinion No. 72-2 involved interviews conducted by a member of the legal staff of the Alaska Department of Law with members of the governing body of an Alaska community to determine whether Alaska Legal Services had the authority to bring suits on the community's behalf. That opinion concludes that there was no justification for the contact. The opinion makes no distinction because members were contacted individually rather than as a body.

In Opinion No. 78-4, the Alaska Bar Association Ethics Committee interpreted DR 7-104(A)(1) to prohibit communication between a plaintiff's attorney and a claims representative of a defendant's insurer. Finally, in Ethics Opinion 84-11 the committee referred to Ethics Opinion 71-1 and the comment to Rule 4.2 of the American Bar Association Model Rules of Professional Conduct to determine that, under the factual circumstances presented, an attorney could communicate with the Juneau Teleconference Manager for the State of Alaska, without consent of State attorneys, because that employee was not a person having a managerial responsibility; that acts or omissions of that employee would not be imputed to the state agency or named defendants for purposes of civil liability; and the employee's statements would not constitute an admission on the part of the organization.

A three-factor test was developed by the Los Angeles County Bar Association in their Opinion 369 (11-13-77), to guide its members in the determination of whether an "employee" is a "party" under Disciplinary Rule 7-104(A)(1). The test adopted in that opinion is as follows:

> 1) whether the person has authority to negotiate or otherwise control corporate decisions regarding the litigation; 2) whether the person's position is such that an admission by him concerning the subject of the interview would be binding on the corporation; and 3) whether the person has access to confidential corporate information relevant to the subject of the interview. If these factors indicate the person is closely identified with management, the opposing attorney must have the prior consent of the corporation's counsel to conduct the interview.

Similarly, the Illinois Bar Committee, quoting from a 1984 Illinois appeals case said:

> ...a corporate party constitutes only those top management persons who have the responsibility of making final decisions and those employees whose advisory role is to top management, are such that a decision would not normally be made without those persons' advice or opinion or whose opinions in fact form the basis of any final decision.

Illinois State Bar Association committee on professional responsibility, Opinion 85.12 (4/4/86).

One of the most thorough and most recent discussions regarding the interpretation of DR 7-104(A)(1) is found in *Wright by Wright vs. Group Health Hosp.*, 103 Wash 2nd 192, 691 P.2d 564 (19[illegible]). That case involved a motion by Plaintiff's attorney in a personal injury case for a protective order declaring that he had the legal and ethical right to interview ex parte both current and former employees of the defendant so long as they were not management employees. In granting the protective order the court noted the distinction between the attorney-client privilege which would protect attorney communications with lower level employees from the ethical rule prohibiting an attorney from communicating ex parte with another represented party. The purpose for the latter rule is "to prevent situations in which a represented party may be taken advantage of by adverse counsel." The court also noted the policy conflict raised by DR 7-104(A)(1) where "(o)n the one hand there is the need of the adverse attorney for information which may be in the exclusive possession of the corporation and may be too expensive or impractical to collect through formal discovery and on the other hand, the corporation's need to protect itself for the traditional reasons justifying the rule."

Following a discussion of the various cases and opinions dealing with the rule, the court held as follows:

> We hold the best interpretations of "party" in litigation involving corporations is only those employees who have the legal authority to "bind" the corporation in a legal evidentiary sense, ie: those employees who have speaking authority for the corporation. This interpretation is consistent with the declared purpose of the rule to protect represented parties from the dangers of dealing with adverse counsel.

Id at 569. That language was included by the District Court for the State of Alaska in the complaint of *Korea Shipping Corp.*, 621 F. Supp. 164 and 167 (D. Alaska 1985).

> The rule grows out of a recognition that there is an 'imbalance in knowledge and skill' between lawyer and layman...(cites omitted). A related purpose of the rule is to "preserve the proper functioning of the legal profession" by insuring that in making decisions relating to a dispute, a client has the benefit of the advice of the legal experts he has employed to assist him.

Discipline Rule 7-104(A)(1) is designed to preserve the integrity of the client-lawyer relationship by protecting the represented party from the skill and knowledge of the opposing lawyer. *United States v. Jamil*, 546 F. Supp. 646 (E.D.N.Y. 1982); *Powell v. Alabama*, 287 U.S. 45 (1932); *In re Mussman*, 111 N.H. 402, 286 A.2d 614 (1971). The rule is to prohibit lawyers from taking advantage of persons who are represented by counsel. A layperson with retained counsel is entitled at all times to the advice and guidance of that person. *In re Atwell*, 115 S.W.2d 527 (,p/ 1938). The rule "shields the opposing party not only from an attorney's approaches which are well intended but misguided." *Abeles v. State Bar*. 510 P.2d 719, 108 Cal. Rptr. 359 (Calif. 1973).

The definition of a "party represented by counsel" is defined broadly for the purpose of DR 7-104(A)(1) in conformity with the purpose of the rule. *United States v. Jamil*, 546 F. Supp. 646 (E.D.N.Y. 1982), *United States v. Batchelor*, 484 F. Supp. 812 (E.D. Pa. 1980). Where the opposing party is a corporation, an officer or employee with authority to commit the corporation is considered a party.

It is not relevant that the contact was not initiated by the attorney. *United States v. Jamil*, 546 F. Supp. 646, 658 (E.D.N.Y. 1982), offers the following explanation why, under DR 7-104(A)(1), it is irrelevant who initiates the contact:

> ...DR 7-104(A)(1)...is not directed solely at protecting the defendant's rights. The ethical rule is also intended to enhance an entire profession's ability to perform its essential functions effectively through the protective screen it places around the client and the attorney-client relationship. This relationship may arise at any time; its existence does not depend upon the state of the investigation or adversarial proceedings. Once it is established, the attorney has assumed the duty to zealously and competently replace the client and he may be held accountable for faithful performance. See ABA Canons of Professional Ethics Nos. 6, 7 and 9. to assign him such broad responsibilities implies that he will have some measure of control over developments concerning his client, whether in the nature of investigation, discovery, settlement or otherwise. No attorney can insure that his client will not imprudently sign a release, for example, or divulge privileged information whether by reason or ignorance or susceptibility to undue pressure. The Code supplies the necessary restraint in order to make the attorney's duty tenable by controlling the conduct of the adversary's counsel. *Thus the communication prohibition remains operative even where a represented party requests or agrees to communicate in the absence of his own attorney with opposing counsel.* (citation omitted) (Emphasis added.)

It is clear that the duty of adhering to the Code of Professional Responsibility falls squarely upon attorneys, and not upon their clients who would have little or no understanding of the disciplinary rules or the rationale behind them. To say that an attorney is excused from this strict rule of non-communication when the adverse party approaches him only serves to circumvent the purpose of the rule.

In *Abeles v. State Bar*, 9 Cal.3d 603, 510 P. 2d 719, (Cal. 1973) an attorney received a public reprimand for a violation of a parallel California discipline provision. In that case, Stein was named as a plaintiff in his capacity as a business partner. At the defendant's request, Stein met with Abeles, the defendant's attorney. Stein told Abeles that he was not represented by the attorney of record and, at Abeles' request, signed an Affidavit denying he had authorized the filing of

See ABELES page 18

ABELES: A party represented

Continued from page 17

the action. *Supra* at 721. Stein later testified that he thought he was not personally represented in the lawsuit. Abeles testified that, because of previous work he had done, he thought Stein was his own client and that the plaintiffs' attorneys had filed an action without Stein's consent. The court found that:

> A "party represented by counsel" includes a party who has counsel of record whether or not that counsel was in fact authorized to act for the party. If the quoted words were interpreted to include counsel of record only if such counsel was in fact authorized to act for the party, harm could result to the attorney-client relationship and to the administration of justice. Under the latter interpretation an opposing attorney could deal directly with a party who was known to the attorney to have counsel of record, upon a subject of controversy with impunity in some cases, even though the counsel of record had actual authority to act for the party, since it might be impossible to show that the opposing attorney had knowledge ofr that authority and willfully violated rule 12. (*Supra* at 723)

The Committee recognizes the principle that a "faction" on a board of directors has every right to obtain legal counsel of its own choosing to represent that faction's own interests. (See *Evans v. Artek Systems Corp.*, 715 P.2d 788, 792-94 (2nd Cir. 1983); *Yablonski v. United Mine Workers of America*, 448 F.2d 1175, 1181 (D.C. Cir. 1971); *Financial General Bank Shares, Inc. v. Metzger*, 523 F. Supp. 744, 764-67 (D.D.C. 1981). In certain circumstances, persons affiliated with the corporation will have interests which are adverse to those of the corporation itself, and will need legal advice and representation from an attorney sympathetic to their cause and whom they trust, rather than from attorneys aligned with and loyal to the corporation or a different faction on the board. The fact that this principle exists, however, does not govern in this case. At the time of the meeting, four of the directors were supposedly "disinterested" directors who were subsequently appointed to the litigation committee.

Additionally, even if a non-client director desired to talk to the attorney, the ethical obligation is on the attorney to refuse to discuss the case with the non-client director.

In a situation such as present here, where a majority of the board apparently wanted to meet with the attorney, the attorney should not have met with the board. The board should have been advised to discuss the matter with its attorneys and reached an appropriate resolution as to how the matter should be handled. Such an approach fulfills the purpose of Disciplinary Rule 7-104(A)(1) in that it requires the board to seek the advice and guidance of its counsel, and protects the board from being taken advantage of, either in an intentionally improper or well-intended but misguided manner.

Approved by the Alaska Bar Association Ethics Committee on October 25, 1989.
Adopted by the Board of Governors on January 19, 1990.

[1] The Ethics Committee normally does not issue opinions with respect to past conduct. An exception is being made here at the specific request of the Board of Governors.

[2] In the situation under discussion, it is clear that the communication was on the subject of the representation. Additionally, there is no dispute regarding the attorney's knowledge that the corporation was represented by both a corporate and a litigation attorney, and that no prior consent was obtained or notice given to either with respect to the meeting.

ALASKA BAR ASSOCIATION
ETHICS OPINION 90-2
Ethical Obligations of the Attorney Hired by an
Insurance Company to Defend its Insured to the Insured
When Company Directs an Offer of Judgment

QUESTION PRESENTED

What are the ethical obligations of an attorney retained by an insurance company to represent its insured when the insurance company directs him to make an offer of judgment?

CONCLUSION

When an attorney is hired by an insurance company to represent the insured, the attorney initially meets his ethical obligations by keeping the insured apprised with regard to his activity in the case. Such apprisal should give sufficient notice to the insured so that the insured has reasonable opportunity to inform the attorney of any objection. If the insured makes no objection the attorney can assume tacit consent. However, if the insured instructs the attorney to not make an offer of judgment, the attorney is ethically obligated to honor those instructions.

AGREED STATEMENT OF FACTS

Attorney was hired by insurance company to represent its insured in a slip and fall case. The contract of insurance provided that the insurance company would control the insured's defense. At the direction of the insurance company, attorney made an offer of judgment. Attorney did not obtain the consent of the insured before making the offer.

DISCUSSION

A.B.A. Formal Opinion No. 282, decided in May of 1950 discussed the relationship among the insurance company the insured and the attorney hired by the insurance company to represent the insured. The opinion stated in pertinent part:

> Whenever the insured is served with the court process as a defendant, the contract of insurance expressly requires him to forward such process to the company so that the company may provide the means of defense. It is elemental that this includes retaining and compensating a lawyer at the company's expense.
> Under certain circumstances a person may, by contract, clothe another with power to retain a lawyer to conduct a defense. Especially may this be done when, as here, the power is coupled with an interest resulting from covenants of insurance. The essential point of ethics is that the lawyers so employed shall represent the insured as his client with undivided fidelity...
> There is express consent by the insured in the insurance contract to allow the insurance company to control his defense. Therefore, the attorney may reasonably assume when he is retained by the insurance company to represent its insured that the insured consents to the insurance company's handling of the litigation. Nonetheless, the insured is the attorney's client, and as such the attorney's fiduciary obligations lie with the insured. The attorney has a continuing obligation to keep his client, the insured, informed of activities in the case and the implications to the insured. The attorney may properly assume that the insured has given tacit consent to all indicated courses of action of which the insured has been given reasonable notice and to which the insured does not object. It is implicit that the attorney must inform the insured of his intended course of action sufficiently prior to his carrying out of the plan of action so that the insured has a reasonable time to inform the attorney of any objection.

In the question presented here the insurance company directed the attorney to make an offer of judgment. The attorney was then ethically obligated to inform the insured of his intent to make an offer of judgment. The insured thereby would have been on notice that if he did not wish an offer of judgment to be made that he should make his dissatisfaction immediately known.

If the insured informs the attorney that he does not wish the attorney to make the offer of judgment the attorney is ethically obligated to follow the insured's wishes. DR 5-107. The attorney is also obligated to inform the insured of the possible ramifications of this position, including the impact on coverage under the insurance policy. The attorney must inform the insurance company of the insured's desires and indicate to the company that the attorney cannot proceed on a course contrary to the desires of his client, the insured.

Approved by the Alaska Bar Association Ethics Committee on January 11, 1990.
Adopted by the Board of Governors on January 19, 1990.

Here it is, the voyages of the sentencing starship

By Jerry Buchmeyer

Let's just get Guideline Sentencing out of the way right at the start. Okay?

It's no Big Deal. You only need to know three basic principles about the Sentencing Guidelines in federal court. The first is this: Under the Guidelines, *every defendant will go to prison.*[1] The second thing is that there are still some crimes that are not adequately covered by the Guidelines.[2] And I forget the third principle.[3]

Now, on to more important things. Nothing--and I do mean *nothing*--is as difficult for a judge as *sentencing*. It drains you emotionally (who are *you* to pass judgment on a person's life and liberty?) It fills you with doubt (will any sentence deter anyone or anything?) It leaves you with uncertainties (will the sentence help...or hurt?)

And *this is just as it should be*: "those who are not moved by the agonies of the bad will soon cease to care for the suffering of the good." (Robert Ingersoll). But, despite this, there are some humorous things--some *very* humorous things--that happen in connection with sentencing. And that is the only explanation for the appearance of *et cetera* in the next several issues of the VOICE.[4]

The plea for mercy

DEFENSE ATTORNEY: You honor, with 85 previous acquittals, my client has a faultless record...and a 25-year jail sentence would jeopardize his job as a grocery bag clerk at Tom Thumb.

.....

DEFENSE ATTORNEY: This lady is able to self-rehabilitate herself and I believe truthfully, Judge, she may not be a Mexican-American or a Greek-American or an Italian-American, but *she still in my eyes was underprivileged because of her sheltered existence* and I think, Judge, she is getting over it and she has the wherewithal to understand that, but *I think a sheltered existence in a North Dallas home can be just as bad as being raised on the streets in the ghetto* and I truthfully believe that.
JUDGE: Thank you.

The defendant speaks

DEFENDANT: How come he kills a man and gets a year and I steal a horse and get two years?
JUDGE: There are some people who need killing. There are no horses that need stealing.

.....

DEFENDANT: Judge, I feel like a new bride.
JUDGE: What do you mean?
DEFENDANT: I know what's coming, but I don't know how long it's gonna be.

.....

INDIGENT DEFENDANT: I don't want *anyone* appointed to represent me at sentencing. *Jesus Christ is my advocate.*
JUDGE: I still think you should have local counsel.

The sentence

JUDGE: You are hereby sentenced to 1,000 years in the penitentiary and a $2 fine. (Defendant faints).

.....

JUDGE: (Upon sentencing the defendant for the 53rd time for public drunkenness): Sheriff, take this man out behind the courtroom and shoot him. (And early day form of shock probation.)

The defendant reacts

DEFENDANT: I was offered 5 years, and 8 months to plead guilty to all four cases.
JUDGE: I'm giving you a sentence which I think is appropriate. That's all I can do.
DEFENDANT: I think it sucks.

.....

JUDGE: I sentence you to 90 days in jail.
DEFENDANT: Your honor, may I address the Court?
JUDGE: Of course.
DEFENDANT: If I *called* you a son of a bitch, what would you do?
JUDGE: I'd hold you in contempt and assess an additional five days in jail.
DEFENDANT: If I *thought* you were a son of a bitch, what would you do?
JUDGE: In that case, I'd do nothing, because there's no law against thinking.
DEFENDANT: In that case, I *think* you are a son of a bitch.

See STARSHIP page19

Codes of bankruptcy and IRS interact

By: Thomas J. Yerbich

There are a number of areas in which the Bankruptcy Code ("BC") and the Internal Revenue Code ("IRC") interact. Many practitioners lack a working knowledge of either or both bankruptcy and tax law and, as a result, there are many misconceptions and, only too frequently, missed opportunities because the right questions are not asked.

This is the first of a series of articles designed not to make bankruptcy-tax "experts" out of the reader (in the opinion of the author there probably is no such animal, even if only for the reason that as soon as one learns the rules, Congress has a penchant for changing them) but, rather, to alert the general practitioner of those areas into which greater inquiry should be made and familiarize them with the general rules which apply to an individual taxpayer who also happens to be in or is planning a bankruptcy proceeding. This article addresses the bankruptcy estate and debtor as separate taxpayers. Future articles will discuss other factors that come into play in the discharge of debts and bankruptcy,

The bankruptcy estate of an individual debtor is a taxable entity separate from the debtor (IRC Sec. 1398); however, no separate taxable estate exists for partnerships or corporations [IRC Sec. 1399]. Thus, the trustee for an individual is required to prepare and file a federal tax return for the bankruptcy estate in any year in which the gross income exceeds the sum of the standard exemption under IRC Sec. 151(c) and the standard deduction for a married individual filing a separate return under IRC Sec. 63(c)(2)(D) [IRC Sec. 6012(a)(9)]. The 1990 floor amount is $3,750.

Just as the individual's prior tax returns are open for inspection by the trustee, any return of the estate is open to inspection or disclosure to the debtor. [IRC Sec. 6103(e)(5)].

Although the trustee must file a federal tax return for each taxable year, the trustee need not file a state or local income tax return until the conclusion to the case. [BC Sec. 728(b)]

There are several special rules which apply to bankruptcy estate taxation. This article will address those special rules as well as the general tax computation for a trustee.

I. Tax Computation

Subject to the various special rules discussed later in this article, taxable income of a bankruptcy estate is generally computed in the same manner as for an individual; the tax is is that specified for a married person filing a separate return. [IRC Sec. 1398(c)]

In addition to its own gross income, the estate includes any gross income of the individual that was not included in the gross income of the debtor prior to the commencement of the case and is, under the Bankruptcy Code, property of the estate. [IRC Sec. 1398(e)(1)]

Expenses paid or incurred by tlle estate are deductible or creditable by the estate in the same manner and to the same extent that they would have been deductible or creditable by the debtor if the debtor had continued in the same trade, business or activity and had paid or accrued the expense [IRC Sec. 1398(e)(3)]. Thus, if an expense paid or incurred would not be deductible by the debtor (e.g. capital expenditure or expenses related to the receipt of tax-exempt income), it is not deductible by the trustee. Also, the estate maintains the same tax accounting method (accrual, cash or hybrid) as was used by the debtor.

The trustee may also deduct all costs of administration allowed under BC Sec. 503 and all fees paid under chapter 123, Title 28, U.S. Code. Administrative expenses may be carried back three years (if estate has been in existence that long) or carried forward seven years (if estate lasts that long). This provision alleviates a problem which otherwise arise when unable to pay expenses until the end of the proceedings.

II. Tax Attributes

The bankruptcy estate succeeds to an individual debtor's net operating loss, capital loss, tax credits, and charitable contribution carry overs; recovery exclusions under IRC Sec. 111 (relating to recovery of bad debts, prior taxes, and delinquency amounts); basis, holding period, and character of assets (passing to the estate other than by sale or exchange); accounting method; and any other tax attributes for which regulations may provide. [IRC Sec. 1398(g); BC Sec. 346(i)] One should note, however, that the transfer by operation of law from the debtor to the estate is not treated as a "disposition" of the property for the purposes of any provision of the IRC assigning tax consequences to a disposition, and the estate is treated as the debtor would be treated with respect to such asset. [IRC Sec. 1398(f)(1)]

Attributes to which estate succeeds are determined as of the first day of the debtor's taxable year in which the bankruptcy case commences. To the extent that tax attributes are not used by the estate, they pass back to the debtor upon termination 0 the estate. [BC Sec. 346(i)(2)]. Furthermore, the debtor succeeds to the tax attributes of the estate upon termination of the estate. [IRC Sec. 1398(i)].

In the event the estate incurs a tax attribute which may be carried back (eg., NOL, certain tax credits), as distinguished from attributes passing from the individual debtor, these may be carried back to taxable years of a debtor that precede commencement of the case (IRC Sec. 1398(j) (2)), thereby generating a tax refund which is property of the estate (and, through it, the creditors) to reap the tax benefits rather than the debtor.

Some examples will illustrate the application of the tax attributes rules.

Example 1: Debtor has a NOL carry forward of $100,000. The estate has $50,000 in taxable income. The estate would acquire and use $50,000 of the NOL to offset its income and the balance would be passed back to the debtor upon closing of the case.

Example 2: Debtor has $100,000 in taxable income for carry back years and the estate incurs a NOL of $50,000. The estate could carry back the $50,000, obtaining a refund for the carry back year which would be property of the estate. No part of the estate incurred NOL would pass to the debtor.

Example 3: Debtor has no taxable income for prior carry back years and the estate incurs a NOL of $50,000. The NOL would pass to the debtor upon termination of the case.

Example 4: Debtor owns Blackacre with an adjusted basis of $75,000 which passes to the estate. The trustee sells Blackacre for $100,000. The estate realized gain of $25,000 from the transaction.

Example 5: Debtor owns Greenacre (a capital asset) with an adjusted basis of $100,000 which passes to the estate. Greenacre is sold by the trustee for $75,000. The estate realizes a loss of $25,000 and, assuming no other taxable transactions occur, the $25,000 capital loss will pass to the debtor upon termination of the case.

Example 6: The trustee recovers $5,000 on an obligation the debtor deducted on a prior return. The estate realizes income of $5,000 which is includable in the gross income of the estate.

III. Split-Year Returns

Under IRC s 1398(d)(2) an individual may elect to split the tax year in which the bankruptcy petition is filed into two short tax years: (1) a tax year beginning on January 1 (assuming the normal calendar year taxpayer) and ending the day before the petition is filed; and (2) a tax year beginning on the date the petition is filed and ending on December 31. The election must be made by the due date of the return for the first short-year (15th day of the 4th month following the date that the petition is filed).

The most significant special rules pertaining to short-year retunrs are the requirement that (1) tax liability for each short-year be determined on an annualized basis and (2) deductions be itemized (cannot use the standard deduction) [IRC Sec. 443]. As a result of these rules one cannot, by splitting the year, effectively increase the tax value of deductions or personal exemptions, or shift part of the income from the 28% bracket to the 15% bracket. For example, assume a salaried single taxpayer with adjusted gross income of $32,000, who does not itemize and files a bankruptcy petition on April 1. Taxable income through March 31: $8,000 - $500 (1/4 personal exemption) = $7,500 divided by 3 (months in short-year) multiplied by 12 = $30,000. The tax would be 1/4 of tax computed on taxable income of $30,000. Taxable income for second short-year: $24,000 - $1,500 (3/4 personal exemptions) = $22,500 divided by 9 (months in short-year) multiplied by 12 = $30,000. Tax would be 3/4s of tax computed on taxable income of $30,000. The end result is the same as if no "split-year" election is made.

Obviously the IRC Sec. 1398(d)(2) election is not for everyone. There are, however, several situations in which a "split-year" election may be beneficial to the client and should be looked at carefully. Some of these are: (1) A pre-petition, current-year tax liability which is either unfunded or underfunded by withholding or estimated tax payments. (By using the "split-year" election, may pass the tax liability to the bankruptcy estate.); (2) Debtor has unused general tax credits, capital loss or NOL carryforward, passive activity or investment losses not deductible in prior years. (Would otherwise pass to the estate and may be used to reduce or eliminate tax liability accruing pre-petition); (3) Average monthly gross income expected to increase/decrease significantly after the filing date so that even with annualization less taxes would be incurred; and/or (4) Substantial tax deductible expenses incurred pre-petition and not expected to recur, or expectation of substantially higher tax deductible expenses post-petition.

STARSHIP: You have to be careful out in the world

Continued from page 18

Let's be particularly careful out there!

A judge in the Provincial court of British Columbia sentenced a defendant to nine months in jail, but, after the defendant had left the courtroom, discovered that the maximum sentence for the offense was six months. So, the judge ordered that the defendant be returned to court that afternoon, for these additional proceedings:

> "I've been talking to the corrections personnel. And they tell me you were a model prisoner this morning. Now, I'm going to reward you for your exemplary behavior. Your sentence is hereby reduced to six months."

.....

The young defendant had pleaded guilty to a charge of possession of marijuana. Before passing sentence, the judge delivered a stern, very lengthy sermon on the dangers of drugs. He then asked the defendant if he had anything to say. The defendant pulled his wallet from his back pocket, flipped it open, held it in front of his mouth and said in a loud voice:

Scotty, beam me up!

Mr. Buchmeyer is a U.S. District Judge in Dallas, Tex., a regular reader of the Bar Rag, and a fan of the late Gail Roy Fraties, who inspired this series on sentencing.

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[1]However, there is Current Speculation that those defendants who are completely innocent will only receive six months under the Sentencing Guidelines.

[2]I ask you! What would the Guidelines Sentencing Range be for *Anthony Crew* of Ravenna, Ohio, who was charged with assaulting his brother in law with a 20-pound frozen turkey? (UPI, November, 1982). Or for the *business executive* in St. Petersburg, Fla., who was found guilty of mowing a dog? (AP sometime in 1982). Or for the *man in Dallas* who was standing by a freeway throwing plastic garbage bags filled with dead fish at passing cars? (Skip Hollandsworth's Dallas Week-Before-Last, 1982).

[3]I lie. Actually, the third thing is a Truly Embarrassing "musical" presentation I made at the Criminal Law Short Course back when I was an expert on Sentencing Guidelines (ie., *before* they went into effect). It's a mnemonic device which reduced the essentials of the Guidelines to an old Fred Asaire song, "The Hokey Pokey." If you follow the bouncing ball in Sec. 1B1.1 (General Application Principles), it goes something like this:

You put the guidline section from Chap. 2 in
You take the base offense level out
You apply the adjustments from Chap. 3
And you shake it all about

You put the criminal history stuff from Chap. 4 in
Take the guideline range from the Sentencing Table out
Then you do the *Ho-key Po-key*
And you turn yourself around
That's what it's all about!

[4]Some of the material from this Epic Series on Sentencing is from *Court Jesters* by Peter V. MacDonald, Q.C. (Methven, 1985); *It's Legal to Laugh* by Milton D. Green (Vantage Press, 1984); *Disorderly Conduct* by Jones, Sevilla and Velmen (W.W. Norton, 1987); and *The Howls of Justice* by Shafer and Papadakis (Harcourt, Brace, 1987).

THE RUSSIANS ARE COMING