INSIDE

Movies, taxes, estate planning, more taxes, love in spring, American Bar Association action, child support

if you want to see your sheep
it Will cost you $400 billion.
No cops
we aren't afraid to get our hands a little dirty.
Fat-Free Frank

READ ALL ABOUT IT
TVBA loses sheep!

Page 21

$2.00

The Alaska BAR RAG

MARCH-APRIL, 1992 — *Dignitas, semper dignitas* — VOLUME 16, NO. 2

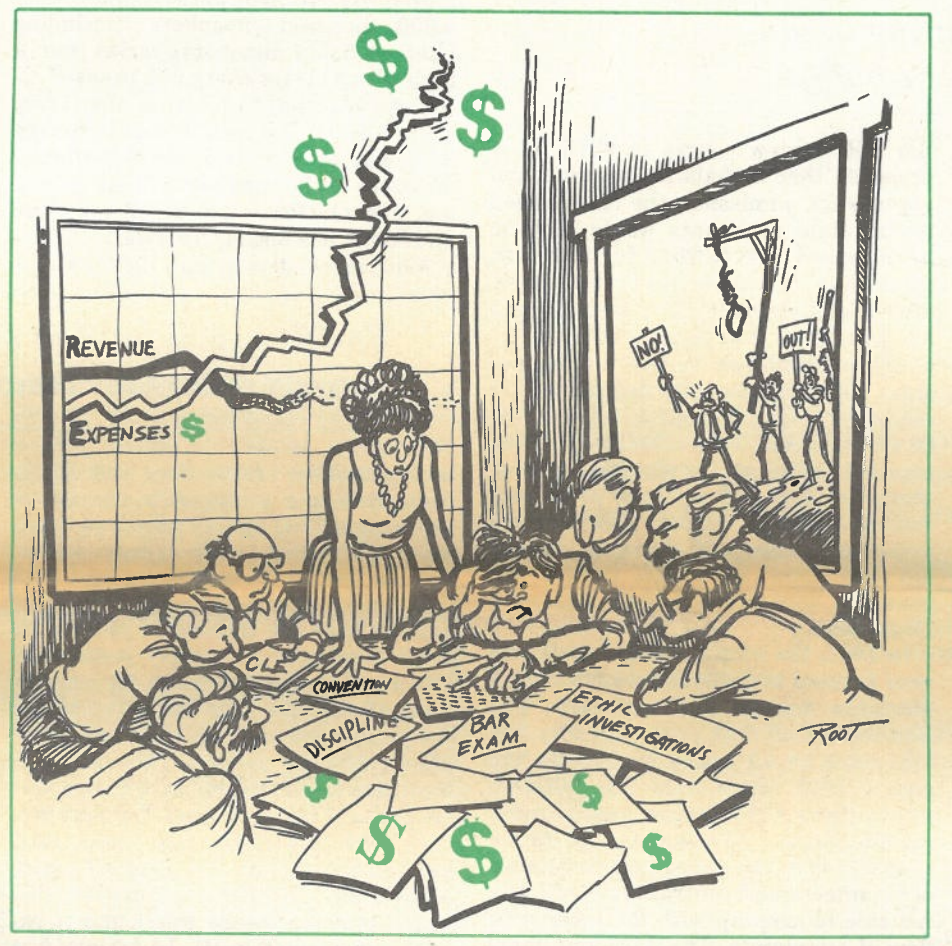
Special committee recommends dues increase

Blue ribbon group investigates costs, revenue

The Alaska Bar Association's Board of Governors has reviewed a series of recommendations developed by a special Blue Ribbon Committee appointed to investigate dues and fees charged by the association. Members of the committee were Harold M. Brown, Keith E. Brown, Karen L. Hunt, Larry R. Weeks, and Daniel E. Winfree.

During its meeting in Anchorage March 20, 1992, the Board agreed to publish the Blue Ribbon Committee's report for comment by members of the Bar.

The following is the final report and recommendations of the committee, as amended by the Board.



Introduction

The Alaska Bar Association (Bar) is a unified bar with a current membership of 2,956; of this total 2,488 are active practitioners. In 1980 membership dues were increased from $180 to the current level of $300 (plus a $10 lawyers fund for client protection). This increase was expected to be sufficient for 3 years after which dues would be increased again. Due in large part to unanticipated growth in the state population and its economy during construction of the pipeline, membership in the association increased from 1,316 active members (including judiciary) in 1980 to where it is today. High interest rates coupled with increased revenues from a growing membership resulted in the creation of a cash surplus over time. By 1988, the surplus had reached $439,000.[1] However by 1989, the ordinary expenses of the association exceeded its revenue and surplus had to be used to pay operating expenses. This was due, in part, to growth of both programs and staff. But during the same period, interest rates were declining and "active" membership growth was decreasing to a range of 70 to 80 per year. By 1989, Bar expenses exceeded revenue by $33,000. By 1990, expenses exceeded revenue by $102,000. By 1991, expenses exceeded revenue by $125,000. In 1992, expenses are projected to exceed 1992 revenues by $145,000. At this rate, the cash surplus will be exhausted by the fourth quarter of 1992. Even if the Board should reverse its present conservative policies and eliminate the equipment and working capital reserves, they too would be exhausted by the first quarter of 1994.

In September the Board of Governors appointed a committee of five (5) to review Bar operations and make recommendations as to what, if any, modifications should be considered in functions performed, services provided or dues charged. This committee has met on several occasions. It has reviewed hundreds of pages of reports, budgets, data compilations, financial statements, records and other documents and has interviewed senior staff members in an effort to gain a full appreciation of the functions performed by the Bar and the costs related thereto.

Executive Summary

At the present rate of expenditure, the cash surplus of the Alaska

Another view: See page 10

Bar Association will be exhausted by the fourth quarter of 1992. All cash reserves will be exhausted by the first quarter of 1994. After considerable review, your committee makes the following recommendations to the Board.

1. All admission fees should be increased by 10% effective January of 1993. $25 should be charged for an application packet. Applicants should be charged a finger print processing fee of $50.

2. The Board of Governors should request that the Alaska Court System include in its budget submitted to the legislature approximately $100,000 per annum to defray the increasing costs associated with discipline.

3. A fee should be charged for all fee arbitration based on the following schedule:

Continued on page 2

Comments urged for discipline

In the November-December 1991 issue of the *Bar Rag*, the Board of Governors called for comments on a major revision of bar rules, providing that grievances which are accepted for investigation by bar counsel will, with limited exceptions, be available for public review.

were published in their entirety. The Board urges members of the bar to review these revisions, reprinted in this issue, for comment and suggestions.

Rule 11. BAR COUNSEL OF THE ALASKA BAR ASSOCIATION.

(a) Powers and Duties.

The Board will appoint an attorney admitted to the practice of law in Alaska to be the Bar Counsel of the Alaska Bar Association (hereinafter "Bar Counsel") who will serve at the pleasure of the Board. Bar Counsel will

• • •

(12) in his or her discretion, upon a finding of misconduct and with the approval of one member of an Area Division, impose a written [PRIVATE] admonition upon a Respondent;

(c) Dismissal of Grievance.

Any grievance dismissed by Bar Counsel will be the subject of a summary prepared by Bar Counsel and filed with the Board. [THE

Continued on page 15

VOTE FOR BOARD BY APRIL 10

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

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

• Blue Ribbon committee finds little waste

Continued from page 1

5% of all amounts in controversy up to $10,000; 3% for amounts between $10,000 and $500,000; and 2% on all amounts over $500,000.

4. The scope of the Alaska Bar Foundation's authority should be enlarged so as to allow IOLTA funds to be expended for CLE, the Alaska Law Review and The Bar Rag.

5. Annual Alaska Bar Convention fees should be placed at a level designed to recover a significant portion of convention related expenses.

6. Current bar dues of $300 which have been in effect for twelve years should, effective January 1993, be increased to $450.

Discussion

In 1980, there were 1,316 active members of the Bar. They were served by a seven (7) person staff employed in providing the three primary functions of the Bar — admissions, discipline and continuing legal education. As membership increased, the number of staff increased. In 1981, a lawyer referral receptionist was added to the staff. In 1982 and 1983, an assistant bar counsel and second discipline secretary were hired. In 1984 and 1985, accounting and administrative assistant positions were added. A part-time assistant bar counsel was hired in 1988 to assist the two full-time discipline attorneys. In 1990, discipline staff was enlarged again to include a legal assistant, and, in 1991, the part-time assistant bar counsel position was converted to full-time, bringing the number of full-time Bar employees to fourteen (14). With the exception of an accounting assistant hired in 1984 and an administrative assistant hired in 1985 to serve multiple functions, all staff increases between 1981 and today have directly related to the discipline function of the Bar.

As membership and staffing levels increased, so did the Bar's budget.

As membership and staffing levels increased, so did the Bar's budget. In 1980, the budget was $481,406. In 1991, it was $1,394,564. While no new basic programs have been instituted by the Bar, all functions and programs have been significantly expanded and refined over time. The Bar today bears little resemblance to the Bar of 1980. To appreciate these changes and the costs associated with them, each primary function and each program should be examined separately.

Admissions

The cost of admission has grown from $53,685 to $169,623 over the eleven (11) years since the beginning of 1981. In that year admissions comprised 9.9% of the budget. In 1991, admission expenses comprised 12.2% of the budget. While the average number of applicants per year over time has fluctuated, over the past several years it has remained at a relative level of one hundred forty (140) to one hundred sixty (160) a year. Assuming one hundred sixty (160) applicants in 1991, the average admission expense per applicant was $1,098. Revenue generated from fees charged to take the exam ($700), including re-applicant ($400), reciprocity ($1,000) and Rule 81 ($100) fees, average $660 per applicant. In 1980, the Bar relied upon California Bar examiners to prepare and grade most of the generic law questions that comprise the essay portion of the exam. Since 1982, the Bar has taken complete responsibility for the essay portion of the exam. Except for 1982 and 1985, admission related expenses have exceeded admission related revenues in every year from and including 1981.

Can admission related expenses be reduced?

No. After review of this function and the expenses related thereto, your committee does not recommend modification of the admission process or procedure.

How does Alaska compare with the way they do it outside?

For one thing, Alaska pays its exam graders $40 per hour, a cost approximating $29,000 annually. In some jurisdictions, bar exam graders are paid nothing and in others, economies of scale result in admission revenues covering all expenses related thereto. Alaska's fee for admission is all-inclusive. Other jurisdictions charge separate fees for processing finger prints ($43 in Alaska) or for an application packet. But comparisons between Alaska and other jurisdictions are not easy because in some states, all or a portion of the expenses related to admission may be paid by the public or "absorbed" by local lawyers who as officers of the court provide services on a voluntary basis.

Should admission fees be increased?

The fee for a first-time applicant is $700. Generally applicants participate in a Bar review course. The cost of the Bar BRI review course is $875. It is projected that to balance revenue and expense for admission, the fee charged to first-time applicants would have to be increased 31% to $917 in 1992 with significant increases annually thereafter (*See* Exhibit A). The fees charged for first-time Bar applicants are already amongst the highest in the nation. Nevertheless, we recommend a modest increase of approximately 10% in all admission fees effective in 1993, together with an application packet charge of $25 and a finger print processing fee of $50. Based upon current projections, this will decrease annual net loss from admission related expenses by approximately $23,800.

Discipline

In 1981, the number of Bar staff persons devoted to discipline was two (2); a discipline counsel and secretary. The Bar started off that year with fifty-five (55) cases in an active status. By the end of 1983, there were one hundred ninety-three (193) active cases under consideration. Obviously, discipline counsel (with the occasional assistance of volunteers and contract counsel) was not able to keep up with the increasing flow of complaints. The discipline function of the Bar has been analyzed and modified from time to time by respective Boards of Governors (*See* the historical analysis by Bar Counsel Steve Van Goor with attachments appended hereto as Exhibit B). Most recently, the Board of Governors approved an increase in discipline staffing level, a change in the manner in which complaints are handled and a change in reporting methodology, all of which is designed to promote efficient resolution of complaints. As a consequence of these and other changes over time, the cost of discipline has grown from $114,392 in 1980 to the $457,324 projected for 1992. Costs associated with discipline, which consumed 15.7% of 1981's budget, will account for 31.5% of the budget projected for 1992.

Can discipline related expenses be reduced?

It is possible that the need for 3 full-time bar counsel will diminish over time. How likely that is is difficult to project. Changes in the manner in which the discipline function is carried out sufficient to significantly affect expenses related thereto would have to include a down-sizing of discipline staff. This type of change would be substantive in nature and would involve policy considerations uniquely within the province of the Board of Governors. Other suggestions included requiring the payment of attorney's fees and related costs incurred in connection with discipline proceedings and charging a fee for the filing of a complaint, but there appears already to be a mechanism for an award of fees and costs to the Bar. As a practical matter, efforts expended in recovering fees and costs may not be sufficiently productive to deserve serious consideration. No jurisdictions call for the payment of a fee upon the filing of a complaint, out of fear, we suspect, that the imposition of such a fee might discourage the filing of a complaint or be interpreted by the public as encouraging that result.

What are the costs related to discipline outside?

Unified Bars with less than 5,000 licensed or active members include Alaska, Hawaii, Idaho, Montana, North Dakota, South Dakota, New Hampshire, New Mexico, Nevada, Rhode Island, West Virginia and Wyoming. 1989 data collected by the American Bar Association reflects that discipline costs per attorney in Alaska ($143) was exceeded only by Hawaii ($144). The 1991 Bar budget pegs discipline costs per attorney at $165. By way of contrast, California's discipline costs per attorney in 1989 was $305.

The number of discipline counsel employed by unified bars of less than 5,000 licensed members (including Utah at 5,038 members) varies from a high of one (1) for every 961 licensed attorneys (Alaska) to a low of one (1) for every 3,800.[2] The next closest to Alaska is Hawaii at one (1) discipline attorney for every 1,188 members. Rhode Island has one (1) for every 1,333 members and Idaho has one (1) for 1,441.[3]

Alaska's relatively high discipline attorney/member ratio does not imply that there are a disparate number of complaints filed against Alaskan attorneys. Reporting methodology varies, but our review of such case load data that exists seems to indicate that for smaller bars the number of complaints made (contacts) per active member in this state is about average for associations of our size. The same is true for the percentage of complaints remaining after screening and the ratio of active members to complaints in which probable cause is found to exist. For example, the 1989 American Bar Association data indicate that the ratio of active Alaska Bar members to complaints in which probable cause was found to exist is approximately 1%. In Arizona it is 2%; in Arkansas it is 2%; in Delaware it is 1%; in Hawaii it is .9%; in Maine it is .9%; in Mississippi it is .8%; in Nebraska it is 1; in New Mexico it is 1.4%; in Rhode Island it is 1.2%; in South Dakota it is 3%; in Utah it is 5%; and in Wyoming it is 1.6%. What may vary is the time required to process a case from beginning to end. Alaska, with its high bar counsel/member ratio, is now processing complaints more efficiently than most other jurisdictions.

The financial burden should not rest entirely upon the members of the bar.

It is difficult to determine with any specificity what percentage of the budgets of these other jurisdictions are dedicated to the discipline function. Some state bars charge a separate "discipline fee" and in other jurisdictions the cost and function of discipline is undertaken by the court system or some other entity and may be ultimately funded by the legislature.

Having examined what data there is, we have concluded that there are no significant discipline cost savings steps that can be recommended. Of course, we could save money by cutting discipline staff or reducing salaries. However, the Board of Governors has adopted a policy calling for a strong disciplinary effort as being in the best interests of the public and the association. Salaries and benefits paid to discipline staff do not appear out of line with salaries and benefits paid to attorneys in similar positions in either the public or private sector.

We think the Board of Governors should consider requesting the court system to include in its budget approximately $100,000 per annum to defray the increasing costs associated with discipline. The rationale for such a request would be four-fold.

1. Prior to 1981, monies were appropriated by the legislature to the court system to partially fund the discipline function of the Bar.

2. Only 1% (approximately) of all claims filed by the public result in a finding of probable cause to believe that a violation has actually occurred. Under these circumstances, the public should share in the expense.

3. In many jurisdictions, discipline is a function of the court system and is paid for by the public with varying degrees of volunteer service being required of attorneys as officers of the court. In this case, the financial assistance requested represents less than 7% of the association's annual budget or less than 25% of the projected costs of discipline for 1992. The bulk of all costs will remain the responsibility of the membership.

4. In 1992, the Bar will dedicate 58% of its revenue from dues to the function of discipline. The benefit to the public is indisputable. The financial burden of such an effort should not rest entirely upon the members of the bar.

Fee arbitration

Expenses associated with fee arbitration have risen steadily from the program's inception. In 1991, the Bar association spent $46,221 on fee arbitration. No revenue is generated by this program. Five "outside" jurisdictions charge fees to defray the costs of providing such a service (*See* Exhibit C). We recommend that the Bar charge a fee for all fee arbitrations based on the following schedule:

5% of all amounts in controversy up to $10,000; 3% for amounts between $10,000 and $500,000; and 2% on all amounts over $500,000.

Bar association staff, relying on historical data, have estimated that adoption of such a schedule would generate an-

Continued on page 3

The Alaska BAR RAG

The *Alaska Bar Rag* is published bimonthly by the Alaska Bar Association, 310 K Street, Suite 602, Anchorage, Alaska 99501 (272-7469).

President: Elizabeth "Pat" Kennedy
President Elect: Barbara J. Blasco
Vice President: Beth Lauesen
Secretary: Philip R. Volland
Treasurer: Daniel E. Winfree
Members:
Jeffrey M. Feldman
J. John Franich, Jr.
John Murtagh
Michael A. Thompson
John B. Thorsness
Patricia Browner
Ethel Staton
Executive Director:
Deborah O'Regan
Editor in Chief: Ralph R. Beistline
Editor Emeritus: Harry Branson
Contributing Writers:
Julie Clark
Robert Noreen
James M. Bendell
Dan Branch
Drew Peterson
Mickale Carter
Mary K. Hughes
Edward Reasor
Art Robson
Michael J. Schneider
Daniel Patrick O'Tierney
Steven T. O'Hara
Thomas J. Yerbich
Design & Production:
The Alaska Group
Advertising Agent:
Linda Brown
750 W. Second Ave., Suite 205
Anchorage, Alaska 99501
(907) 272-7500
Fax 279-1037

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

Increase is 'less than a good cup of coffee'

Continued from page 2

nually approximately $27,110 in income.

Continuing legal education

The expenses of CLE have exceeded revenues generated by that program in every year since 1980. On the other hand, since 1980 there has been a 44% increase in the number of programs afforded to the membership. While Bar member attendance at CLE programs has declined by 11%, non-member attendance has increased by 27%.

1991 CLE expenses exceeded 1991 revenues income by $105,658. Although a consistent pattern has not developed, we think that revenue from CLE as a percentage of CLE expense has been in decline over recent years. For example, in 1986, CLE income was 85% of expenses, in 1987 it was 66%, in 1988 it was 80%, in 1989 it was 66%, in 1990 it was 63% and in 1991 it was 48%.[4] Anyone can speculate as to the cause of this phenomenon but we think it most likely that attendance at BAR CLE programs is being affected by stiff competition from outside. That is...from seminars now being offered by private companies specializing in such presentations.[5] Given this most recent development, we think the Board of Governors might consider a review of the current CLE program to see if it should be tailored in any significant respect. Whether such a review would result in significant savings is another question.

Can CLE expenses be reduced?

In order to "break even" on CLE presentations the costs of a full-day seminar in 1992 would approximate $191.[6] The costs of such a seminar would increase each year thereafter. The costs of halfday seminars and library tapes would likewise be increased. CLE in some jurisdictions like Arizona and Utah pays for itself or is the object of a specific "fee" assessment. Although it is unclear, we do not believe that many jurisdictions subsidize their CLE programs from general bar revenue. On the other hand, Alaska, from a geographical perspective, is indeed unique. The bulk of live CLE programs are presented in Anchorage although great efforts are made to make both live and taped performances available in other areas of the state. It is a fact that 32% of all in-state practicing attorneys live and practice outside of Anchorage and it is also statistically clear that non-Anchorage attorneys do not, for whatever reason, participate in CLE to the same extent as those in Anchorage. We are not convinced that attorneys in Anchorage would willingly bear the burden of a CLE program operated on a break-even basis. It is not a question of equity or providing preferential treatment to the Anchorage attorney as much as it is a question of what a limited market will bear given the cost associated with presenting any CLE in Alaska. We feel that in order to assure that all members of the Bar have a reasonable opportunity to participate in CLE, whether live or taped, CLE should continue to be subsidized from general Bar revenues.

Are there other sources for funding CLE?

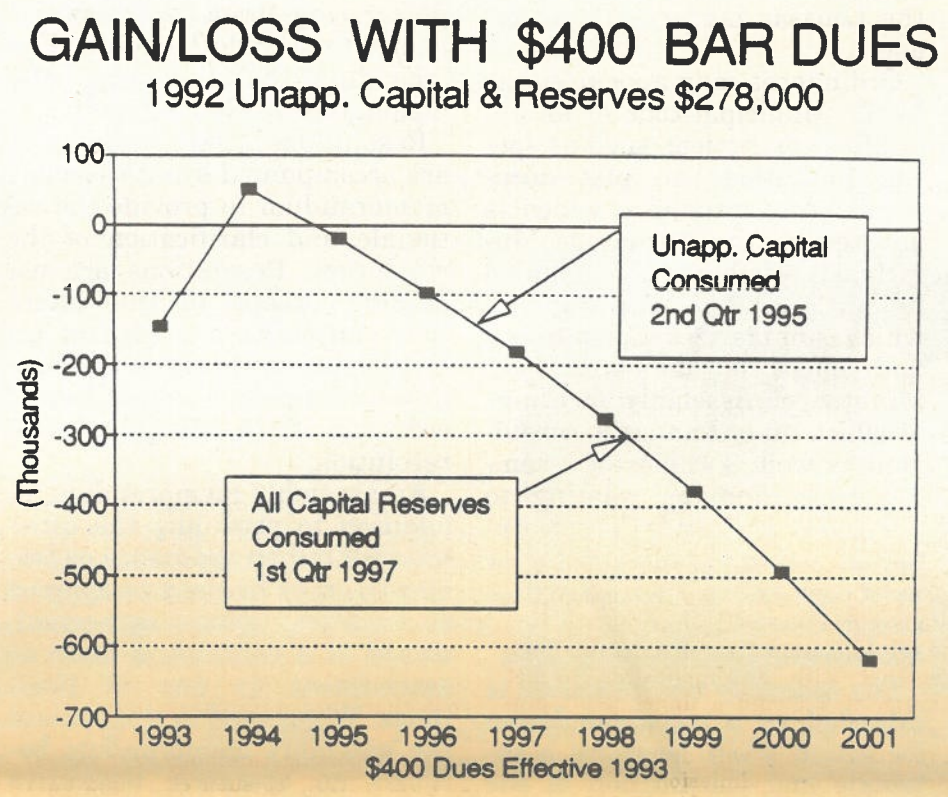
In some jurisdictions CLE is the responsibility of a Bar foundation and in others, as we mentioned earlier, special CLE fees are assessed. CLE fee assessments probably occur most frequently in mandatory CLE jurisdictions. We believe the Board of Governors should consider whether the Alaska Bar Foundation is an appropriate funding vehicle for continuing legal education costs. Continuing legal education falls within the purview of the Foundation's charge. The use of IOLTA funds may be appropriate for this program.

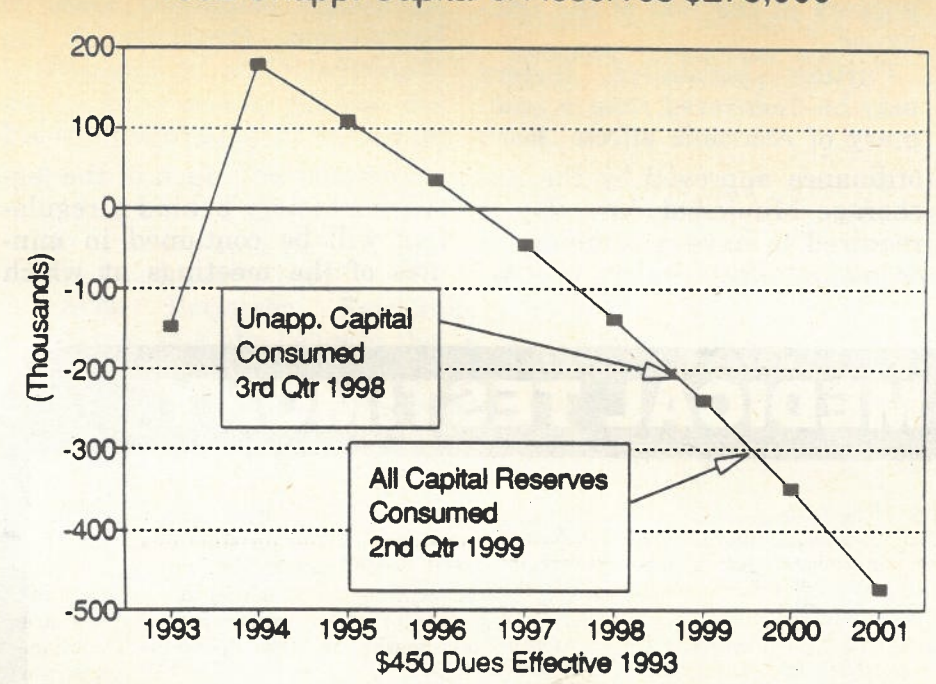
In California, a CLE "passport" program has been developed which essentially allows attorneys or firms to purchase a personal or transferrable pass to attend all CLE programs presented by the Bar during a given period. A copy of a brochure describing this program and its fee structure is attached as Exhibit D. We think the Board of Governors might consider such a program on an experimental basis.

The Bar Rag and The Law Review

A recent Bar survey reflects considerable support for both the Bar Rag and the Law Review. Revenues from the Bar Rag approximate 35% of its expense. There is no revenue from the Law Review. The net "loss" from both approximates $52,000.

Article 3 of the Alaska Bar Foundation Articles of Incorporation deals with the purposes for which the Bar Foundation was organized (*See* Exhibit E). Financial support of both or either the Bar Rag and the Law Review is authorized under this article. The Bar Foundation's IOLTA balance sheet for October 31, 1991 indicates that $149,642 is available in that account alone to fund such programs as the Bar Rag, the Law Review and CLE. We recommend that the Board of Governors take whatever steps are necessary to enlarge the scope of Bar Foundation authority so as to include the Bar Review, The Bar Rag and CLE amongst those things that can be funded with IOLTA funds. We recommend that the Board of Governors seek funding from the Bar Foundation for the cost of some or all of those operations on an annual basis. We also recommend that all section reports be published or distributed with an edition of the Bar Rag. Distribution of section "news" reports with each edition of the Bar Rag would result in 1993 savings of $4,740.





The convention

Every other year the annual Bar convention takes place in Anchorage. When this occurs, revenue from the convention is most likely to equal or exceed convention expense. Otherwise the annual Bar convention rotates between Fairbanks and Southeast. When the annual convention is held outside Anchorage, convention expenses are more likely to exceed convention revenues. Every president elect expends considerable energy improvising a provocative issue or seeking an attractive speaker to help promote convention attendance. Occasionally an issue galvanizes the Bar. More often than not, the key to financial success of the convention is participation by the judiciary, the Department of Law and the Public Defender's office. Each of these organizations hold annual in-house meetings and if such meetings could be held simultaneously with and in close proximity to the Bar convention, their participation would enhance convention revenue and make the convention all that more interesting. But their ability to sponsor these expensive programs depends upon funding from the legislature and it has been difficult in recent years to count on attendance by these important groups.

We do not recommend any particular changes in convention format. We certainly don't think the convention should always be held in Anchorage to save money and we don't think that convention attendance will be promoted by "bargain rates." Convention fees should be placed at a level designed to recover a significant portion of convention related expenses. Every effort should be make to dove-tail the convention with the annual meeting of the judiciary with encouragement to those other important groups to hold their "get togethers" at the same time.

Should we raise annual dues?

With few exceptions, the recommendations made by your committee do not represent substantial reduction in expense or increase in revenue. Contribution by the court system to the cost of discipline is dependent upon legislative appropriation. It would be naive to presume that the court system will aggressively pursue this appropriation at the expense of its own in-house needs. For that reason, we approach the issue of a dues increase without assuming a contribution from the court system. If the Bar Foundation Trustees assume responsibility for the expenses related to the Bar Rag and Law Review, then a saving of $52,500 would occur. But this savings is offset over time in other categories by inflation and growth of membership requiring commitment of additional resources. Besides, the Bar Foundation may not wish to make a long-term funding commitment to the Bar. Fee arbitration revenue will help defray expanding resource commitment over time to that program but will not otherwise serve to reduce significantly projected budgetary shortfalls.

Staff projections based on certain assumptions (*See* Exhibit F) reflect consumption of all cash reserves by the first quarter of 1994 (*See* Exhibit G) unless dues are increased. For all the reasons previously discussed, a dues increase is inevitable.

Bar staff have projected sufficiency of various dues levels over time (*See* Exhibit H). We recommend that annual dues, effective January 1, 1993 be increased to $440 per annum, plus $10 per annum for the lawyers fund for client protection. This sum should provide the Bar with a stable funding base for a period of at least five (5) years.

Expenses projected each month in 1992 average $121,000. Many outside jurisdictions have adopted policies calling for the establishment of cash reserves. Idaho, for example, maintains enough of a reserve to fund three (3) months of operations and $180,000 worth of equipment replacement.[7] Any surplus generated in Alaska should be used to establish and maintain a similar level of reserve.

The increase your committee proposes is justified for the following reasons:

1. The growth of Bar related expenses will far outstrip Bar related revenue over time unless dues are increased.

2. Bar dues of $300 will have been in effect for twelve (12) years by the time any increase in dues is approved.

3. Other Bars have combined dues and fees at higher or similar levels. Connecticut is $640, the Virgin Islands*[8] is $600, Delaware is $500, California* is $478, Hawaii* is $410, and Utah* is $350.

4. Other organizations, although dissimilar, call for sizable dues commitments from their members. For example, members of the Alaska State Medical Association (a voluntary organization with a membership of approximately 48% of the physicians licensed to practice in Alaska) pay dues of $650 a year. Full-time teachers belonging to the Alaska branch of the National Education Association (NEA) pay $634 per annum, and members of the general government bargaining unit — the Alaska State Employees Association — pay annual dues of $336. Neither teachers nor state classified employees enjoy incomes as high as those generally associated with the practice of law.

5. The increase contemplates only $11 more a month in dues than is currently paid. Without intending to trivialize the impact of this increase, it is approximately $.36 a day, or less than

Continued on page 8

Researching local laws? Here's a primer

BY SCOTT A. BRANDT-ERICHSEN

From time to time attorneys may find themselves involved in a case which deals with provisions of local law such as municipal ordinances. Local provisions may come into play in the course of building contract disputes from the perspective of applying the local building code, or in tort matters in the context of conduct in violation of an ordinance. While few practitioners spend a majority of their time working with issues which touch on municipal legislation, most practitioners can benefit from understanding how to get the most from municipal provisions when they apply.

As with many statutory provisions, municipal ordinances are often unclear on their face and may be clarified through a resort to the legislative history. For the Municipality of Anchorage, extensive legislative history information is available, although access to the information is not widely understood. This article explains the methods to access Anchorage legislative history. For other communities similar methods may be utilized. A brief consultation with the Clerk for the appropriate local government unit can identify the form in which local legislative history is available.

The Municipality of Anchorage has five separate types of legislative documents with varying levels of binding authority. The highest is the Municipal Charter. The three types commonly used by the Assembly are municipal ordinances (whether codified or not), municipal resolutions, and assembly memoranda. Finally, the Municipal Code of Regulations is a legislative type promulgated by an executive or administrative group and approved by the Assembly.

Charter and ordinance

For researching Charter information or legislative history of the Anchorage Municipal Charter, the primary sources are the Charter Commission minutes and tapes. Copies of the Charter Commission minutes are lodged with the Municipal Clerk's Office, the Anchorage Loussac Library and the Consortium Library at the University of Alaska, Anchorage. Copies of tapes of the Charter Commission meetings are located in the Alaska collection at the Loussac Library in Anchorage.

Ordinances may appear either in the Municipal code or as uncodified restrictions such as special limitations on plat documents. Any ordinance which is adopted by the Anchorage Municipal Assembly is accompanied by an assembly memorandum which summarizes the purpose and effect of the ordinance. Minutes of Assembly meetings at which an ordinance is considered as well as copies of assembly memorandums relating to particular ordinances are maintained either on microfiche or hard copy in the Anchorage Municipal Clerk's Office.

Memoranda and resolutions

The assembly memorandum is intended as a recommendation for action which provides a rationale and clarification of the proposal. Occasionally this plain statement of the intent behind an ordinance may reveal a different intent than that which appears in the text of the ordinance..

Further legislative history may be discovered from a summary of economic effects. Each ordinance approved by the Anchorage Municipal Assembly is required to have a summary of economic effects unless the Assembly waives the requirement. This summary is intended to state the anticipated financial impact on the community. Where the application of an ordinance has a financial impact grossly inconsistent with this statement of economic effects, the intended level of financial impact may be relevant.

The second method by which the Anchorage Assembly may legislate is through assembly resolutions. A resolution is utilized as a statement of official position or as a method for appropriating funds. A resolution is also the legislative method for amending the Anchorage Municipal code of Regulations.

Resolutions, like ordinances, are accompanied by an assembly memorandum to provide the rationale and clarification of the resolution. Resolutions are not binding except to the extent they authorize a course of action, approve regulations or appropriate funds. No statement of economic effects is required for a resolution.

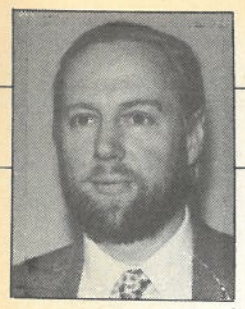
An assembly memorandum, in addition to providing the rationale behind an ordinance or resolution, may be used to approve a contract, grant agreement, award of a contract, a lease or amendment to any of these items. When used in this context the assembly memorandum becomes an operative legislative document.

Municipal code

The final form of municipal legislation in Anchorage is the Anchorage Municipal Code of Regulations. Provisions in the Municipal Code of Regulations are initially proposed by an administrative department, board or commission. Much of the legislative history behind a regulation will be contained in minutes of the meetings at which the applicable board or commission considered the issue. After arriving at a consensus, the board, commission or executive department forwards a resolution to the Assembly for the adoption of appropriate regulations. In the event that the regulations provide for a fine or penalties which require an ordinance for implementation, the Assembly adoption of the regulations must be by ordinance. In either case, an assembly memorandum will accompany the proposed regulations explaining the rationale behind the proposed regulations.

If an issue acted upon by the Anchorage Municipal Assembly is of such importance that it is worthwhile to obtain a transcript or tape of the exact proceedings before the Assembly, tapes of all Anchorage Assembly meetings are stored in the Municipal Clerk's Office. Copies of these tapes may be obtained for a fee of $6 per tape.

Other communities may have different procedures for handling municipal legislation, but it is likely that some documentation of municipal legislative intent is available in most cases. If a client approaches you with a claim which may be effected by local municipal provisions, the information which may be obtained through examining the legislative history of those provisions is often worth the effort.



GETTING TOGETHER

By Drew Peterson

It is all well and good to talk about principled negotiations, where everybody looks for a win - win solution. But what about those negotiations that we all experience where the adversary is a truly difficult person? What if they have no interest in mutual problem solving, but are looking only to bowl you over with their stubbornness? What if you want to say yes, but they will only say no?

Roger Fisher and William Ury of the Harvard Negotiation Project started a minor cottage industry with the success of their bestseller *Getting To Yes.* (Penguin Books, 1981). The latest sequel is by William Ury alone, entitled *Getting Past No - Negotiating with Difficult People* (Bantam Books, 1991).

Ury says there are five barriers to cooperation with a difficult person. They are: "...*his* negative emotions, *his* perceived power, and *your* reaction." Taking each barrier in turn, the strategies of *Getting Past No* are: 1.) Don't react, 2.) Disarm your opponent, 3.) Change the game, 4.) Make it easy to say yes, and 5.) Make it hard to say no.

Going to the balcony

The first step in *Getting Past No* is not to react to the other side's negative tactics without carefully thinking things through.

Three initial reactions to being attacked are to strike back, to give in, or to break off the negotiations altogether. The first two reactions are usually destructive, while the third comes with a high cost, even though it may be the best eventual outcome in some circumstances. Ury presents a fourth option, which he calls "going to the balcony." Going to the balcony means deliberately distancing yourself from your natural impulses and emotions. Instead of immediately reacting, you step back, collect your wits, and try to see the situation objectively.

On the balcony you can identify the interests underlying both your own and your adversary's current positions. You can identify your best and worst alternatives to a negotiated agreement, and if possible those of your adversary as well. You can then decide whether you want to continue with the negotiations or break them off.

Going to the balcony is the best strategy for initially dealing with the three most common tactics of difficult people. They are stonewalls, attacks, and various kinds of tricks. The first step in dealing with such tactics is to identify them. Most of the success of these tactics depends upon your not knowing what is being done to you. Distancing yourself, if only for a moment, is the best way to give yourself the time necessary to recognize such tactics for what they are.

There are numerous ways to which one can go to the balcony. Counting to ten, or 100, is one simple method. Just saying nothing is often the best response in the middle of heated negotiations. Or go back and review the discussion, to make sure you understand it and to give you time to think things through.

Asking for a break is another possibility. Even such simple things as taking notes or appearing a little obtuse about the discussions can slow down the negotiating process. The essential rule is not to let yourself be hurried; to not make any important decisions until you have thought things through.

Step to their side

The second step of *Getting Past No* is to step to your adversary's side of the negotiating table. Treat your adversaries with respect, no matter how they may be treating you. Listen actively to what they are saying. Paraphrasing and asking for corrections is a simple method of making sure that you understand, while also letting your adversaries know that you are listening respectfully. It is important to acknowledge your adversary's point, even if you do not agree with it.

Acknowledging the other side's feelings is also helpful, as long as you do so sincerely and in an uncondescending way. It is important to remain calm and confident while also treating the other side with courtesy. Agree with as much as possible, but without conceding. There are usually many issues that you agree upon, in addition to those few that you do not. In this way you can "accumulate yeses." Each yes you obtain builds that much more momentum for a complete agreement.

It is also important to tune in to your adversary's wavelength through the negotiation process. Most people relate to things through either visual ("I see what you mean"), auditory ("I hear what you are saying"), or kinesthetic ("I have a good feel for that") terms. If you are able to relate to things in similar ways, it will increase your rapport and their respect for you.

Finally, negotiating side by side means to express your views without provoking. Ury talks about changing from a *either/or* to a *both/and* mindset. In this way you can acknowledge the other side's view and, without challenging it, express a contrary one. Similarly he suggests changing *buts* to *yes . . . and,* and using *I-statements* instead of *you-statements.* I-statements focus on your needs, concerns, feelings and desires, not on your adversary's shortcomings.

Change the game

The third step of *Getting Past No* is to reframe confrontational tactics and attacks in a form that directs attention back to the problem of satisfying both sides' interests. Even if your adversaries are not trying to solve the problem, act as though they were. Such reframing works because every message is subject to different interpretations. If you interpret the message received in a positive way the other side will often go along.

Strategies for reframing include asking problem solving questions, like "why," "why not" or "what if." Asking for your opponent's advice can be particularly helpful. Asking "what makes that fair?" can be a good start to discussing standards of fairness. Questions should be open-ended. And don't be afraid to use silence thereafter. The discomfort of silence will often get you answers that would otherwise be resisted.

The toughest tactics to reframe are dirty tricks. Such tricks take advantage of common assumptions made in good-faith negotiations. Thus a primary concern is to identify such tricks before they harm the negotiating process. Once identified, it may be best to play along with them. That is to say, "Play dumb like a fox." By asking clarifying questions and making reasonable requests based on the assumptions included in the trick, you often can turn the situation to your advantage. For example, having repeatedly assured you that there is nothing to worry about as to a certain promise, your adversary will find it very hard to resist a provision for full security.

If dirty tricks continue to present themselves in the negotiation process, however, it will then become necessary to formally negotiate about the rules of the game. Ury's formula is to first bring the issue front and center, doing so as much as possible in a non-accusatory way. Then you may need a full-fledged negotiation about the rules of the game. Negotiate about the process just as you would about the substance, namely by identifying the underlying interests, generating options for how best to negotiate, and then agreeing upon standards of fair behavior. Without directly questioning your opponent's honesty, discuss the fairness of particular tactics. Once you have agreed on the rules you can return to negotiating over the substance in a more constructive and productive manner.

Build them a golden bridge

The forth step of *Getting Past No* is to make it easy for your adversary to say yes. Ury quotes Sun Tzu's advice to "build your adversary a golden bridge to retreat across." According to Ury, there are four main reasons for impasse, namely:

— Not my idea
— Unmet interests
— Fear of losing face, and
— Too much too fast

Instead of pushing your opponent towards an agreement, Ury suggests that you do just the opposite. You need to draw in the direction that you want your adversary to move. You do this by reframing a retreat from your adversary's position as an advance towards a better solution.

Ury tells the story of how Steven Spielberg, as a teenager, converted a neighborhood bully into a friend by casting him in a homemade movie as a war hero. Similarly, to build your opponent a golden bridge you need to involve him in the search for a mutual solution. Ask for and build upon your opponent's ideas, as much as possible. Ask for constructive criticism. Offer your opponent a choice. Satisfy his unmet interests, as much as possible.

To avoid impasse, it is necessary to jettison three common assumptions: that your opponent is irrational and can't be satisfied; that all he basically wants is money; and that you can't meet his needs without undermining yours. Usually none of these things is true. But remember to not overlook basic human needs. And don't assume a fixed pie. There are usually some low-cost high-benefit trades that can be made.

It is extremely important to help your opponent to save face. Many a mutually agreeable deal has been lost when this did not occur. Help your opponent to back away without backing down. You can do this in a number of ways. Show how circumstances have changed. Ask for a neutral third party recommendation. Point to a standard of fairness. Ury asserts that you should actually write your opponent's victory speech, figuratively if not literally, as a way of pulling him towards the solution that you want to reach.

And go slow in the final critical moments. Often a rush to the finish will scare off an otherwise willing negotiator. Being sure of clarity during the essential final steps will also help avoid future disagreements.

Bring them to their senses, not their knees

The final step of *Getting Past No* is to make it hard for the other side to say no. This is perhaps the most dangerous of the steps in Ury's analysis, because when all else fails the temptation is to abandon the problem-solving game and return to the power game. The power paradox, however, is that the harder you make it to say no, the harder you also make it to say yes. We can win the battle and lose the war by destroying an important relationship.

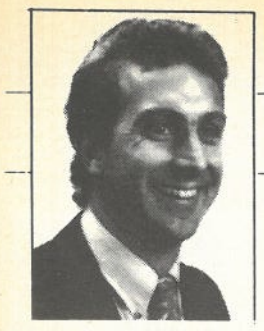
Ury's formula is to use power constructively rather than destructively. Instead of using power to bring our opponents to their knees, to obtain victory, we can use power to bring them to their senses; to find mutually satisfactory solutions.

Power can be used to educate your opponents, until they recognize that the best way to satisfy their interests is to cross your bridge. Educate your opponent to the consequences of failing to agree. Ask reality-testing questions. Warn, but don't threaten. Demonstrate your own best alternatives to a negotiated agreement (BATNAs). You may even need to begin to implement such alternatives, but keeping the door open to continued discussions as you do so. If you do deploy your BATNAs, remember to use the minimum power necessary to accomplish the job.

Certainly you can and should use your own power to neutralize your opponent's attacks. Tapping the force of coalitions with third parties can often be an effective way of doing so, without being overly threatening. Forge coalitions with other interested parties. Use third parties to stop attacks. You can also use third parties like mediators, to help the negotiation process. Even when you can win, you should negotiate. Let your opponents know that there is a way out of the power game if they are interested.

If you are looking for a long term relationship, and an agreement that will last, it is particularly important to aim for mutual satisfaction rather than victory.

Resist the temptation to bring the other side to their knees. Bring them to their senses, instead.



JURISPRUDENCE

By Daniel Patrick O'Tierney

With tax season upon us, it seems timely to report on a recent Supreme Court decision regarding sales taxes and the liquor industry. The case has serious implications for future taxation by local governments throughout the state. For more details, read on.

In *Lagos, et al v. Sitka,* the Alaska Supreme Court determined that existing law prohibits a municipality from taxing alcoholic beverages at a different rate than that for other commodities.

The facts of the case are straightforward and were not at issue. The challenge for the Court was determining the Legislature's intent when it amended the statute governing sales taxes on alcohol in 1985, and expressly prohibited communities from establishing sales taxes applicable only to alcohol AS 04.21.010(c).

At issue in the case was the validity of a Sitka ordinance which exacted a 4 percent consumer sales tax upon alcohol IN ADDITION TO the 4 percent already levied on the sales of all commodities.

The City and Borough of Sitka had included the additional tax on alcohol in response to a ballot proposition passed by the Sitka voters. The resulting revenue was to be dedicated toward the prevention and treatment of alcohol and drug abuse in Sitka.

However, various business owners and businesses which sold alcohol challenged the legality of the ballot proposition and the ordinance. They argued that state law prohibits a discriminatory sales tax rate on alcohol. The lower court disagreed and proceeded to grant summary judgment to Sitka. The alcoholic industry appealed.

On appeal, the parties reargued the same issue: whether the language of the statute which explicitly bars imposition of a sales tax solely on alcohol also prohibits taxing alcohol sales at a different (higher) RATE than that applied to other commodities.

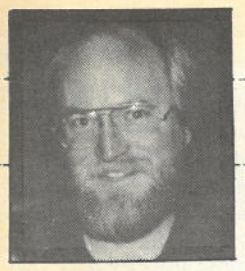
The Alaska Supreme Court considered the legislative history of the statutory provision and noted a degree of ambiguity. The Court also considered a related provision which grandfathered the higher alcohol tax rate then in effect (1985) in the communities of Craig, Juneau and Kotzebue. The Court unanimously concluded that the Sitka ordinance violated the statute by taxing alcohol sales at a 4 percent higher rate than sales made on other commodities.

In short, the Court concluded that the Legislature intended to prohibit discriminatory sales taxes, whether in the form of rate differentials OR solely affecting alcoholic beverage sales. By implication, the likely outcome may be a shortfall of expected revenues for any local governments which currently tax alcohol sales at a higher rate than other items. Further, even the three communities with the grandfathered (higher) alcohol tax rate will not be able to raise the alcohol tax in the future unless the rate for other commodities is raised to the same level.

Interestingly, the City of Fairbanks currently has an alcohol sales tax (5 percent) which is LOWER than its bed tax (8 percent). Arguably, under a literal reading of the Court's decision in the Sitka case, any alcohol tax must be EQUAL TO the sales tax on other commodities. Otherwise, the rate would be differential and, presumably, invalid.

As of this writing, no legislation has been introduced that would amend existing law to explicitly provide for a differential tax rate for alcohol sales. Meanwhile, those who advocate a sin tax on alcohol users to pay for the social problems associated with alcohol misuse and abuse will have to settle for a tax rate equal to that imposed on any other commodity.

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



Torts

By Michael Schneider

Introduction

Most of us have seen it too many times. A claim is made or a lawsuit is filed against a client who believes that insurance is in place that should cover the claim or suit.

A review of the policy and related insurance documents suggests that the client's point of view is well founded. Nevertheless, the "good hands," "good neighbor," or "on your side . . . " people decide to deny coverage, defend, or investigate only upon a broad reservation of rights, and, to further exhibit their concern over your client's plight, bring suit against your client in federal court for declaratory relief. The client, having paid monthly for the "peace of mind" born of a good insurance program is bewildered at best and financially devastated at worst. The client is facing litigation on at least two fronts and, win, lose, or draw, can expect to pay significant attorney's fees. A.R.C.P. 82 will do no more than partially mitigate this situation, and then only after the fact. If this scenario is besetting any of your clients, you'll love the landmark case from Washington state that I will discuss in the paragraphs that follow.

Insurers: Beware the Supplementary Payments Clause!

Olympic Steamship Co. v. Centennial Insurance Co., 811 P.2d 673 (Wash. 1991) was decided by the Supreme Court of Washington in late May of 1991. A claim had been made against Olympic by certain salmon packers, alleging that Olympic had damaged certain cans of salmon warehoused in Olympic's facilities. Olympic tendered the claim to its insurance company, Centennial. Centennial denied coverage. Olympic sued Centennial. Centennial's coverage denial was determined to be without merit, and the trial court awarded attorney's fees to Olympic. The trial court made the fee award, previously unprecedented under Washington law, in reliance upon supplementary Payments paragraph D of Centennial's insurance policy. The paragraph in question provided that:

> "The Company will pay, in addition to the applicable limits of liability: . . . .
>
> * * *
>
> reasonable expenses incurred by the insured at the Company's request in assisting the Company in investigation or defense of any claim or suit . . . ."

Id. 680-81.

While the salmon packers never actually sued Olympic, the court held that their claims for reimbursement provided a sufficient basis for an award of attorney's fees under the language of the supplementary payments clause in Olympic's policy issued by Centennial.

> "Other courts have recognized that disparity of bargaining power between an insurance company and its policyholder makes the insurance contract substantially different from other commercial contracts. *Hayseeds, Inc. v. State Farm Fire & Casualty*, 352 S.E.2d 73, 77 (W. Va. 1986). When an insured purchases a contract of insurance, it seeks protection from expenses arising from litigation, not 'vexatious, time-consuming, expensive litigation with its insurer.' 352 S.E.2d at 79. Whether the insured must defend a suit filed by third parties, appear in a declaratory action, or as in this case, file a suit for damages to obtain the benefit of its insurance contract is irrelevant. In every case the conduct of the insurer imposes upon the insured the cost of compelling the insurer to honor its commitment and, thus, is equally burdensome to the insured. Citations omitted.

Id. at 681.

The court reasoned that the philosophy expressed in the preceding quotation, coupled with the terms of Supplementary Payments paragraph D, supported its decision to grant an award of attorney's fees. It further reasoned that the allowance of such an award would encourage prompt payment of claims citing *Hayseeds, Inc. v State Farm Fire & Casualty,* 352 So. 2d 73, 79 (W. Va. 1986).

The Washington supreme court went on to expressly overrule *Farmers Ins. Co, v. Rees*, 638 P.2d 580 (Wash. 1982), wherein the same court had previously held that a wrongful denial of coverage would not subject a carrier to liability for the insured's attorney's fees and that such a claim could only be founded upon breach of the duty to defend.

Alaska Law: We're Most of the Way There Already

Our supreme court has, on many occasions, concluded that the "all costs" provision of the typical supplementary payments clause means that Civil Rule 82 attorney's fees taxed as "costs" of the action against the losing party are covered by the insurance contract, even where such coverage extends benefits to the insured far beyond the policy limits. See for example *Liberty National Ins. Co. v. Eberhart*, 398 P.2d 997, 999 (Alaska 1965), *McDonough v. Lee*, 420 P.2d 459, 463 (Alaska 1966), *Weckman v. Houger*, 464 P.2d 528, 529, 530 (Alaska 1970), and *Continental Ins. Co. v. Bayless & Roberts, Inc.*, 608 P.2d 281, 285, n. 5 & 6, 291, n, 15 (Alaska 1980), *Salmine v. Canagin*, 645 P.2d 148, 150, n. 8, (Alaska 1982), and *Schultz v. Travellers Indemnity Co.*, 754 P.2d 265, 266, 267 (Alaska 1988).

The disparity of bargaining power between the insured and the insurance company focused upon by the Washington court in *Olympic* has long been recognized by the Alaska Supreme Court as the rationale behind the rule that an insurance policy is a contract of adhesion and will be construed to provide "the coverage which a lay person would have reasonably expected, given a lay interpretation of the policy language." *See Stordahl v. Government Employees Ins. Co.*, 6564 P.2d 63, 66 (Alaska 1977), *O'Neill Investigation v. Illinois Employers Ins. of Wausau*, 636 P.2d 1170, 1177 (Alaska 1981), and *Stewart-Smith Haidinger, Inc. v. Avi-Truck, Inc.*, 682 p.2d 1108, 1118 (Alaska 1984).

There can be little doubt that our supreme court recognizes the problem recently solved by the Washington Supreme Court in the *Olympic Steamship* case:

> We note potential problems in Criterion's selection of "independent" counsel for Velthouse. *See San Diego Navy Federal Credit Union v. Cumis Ins. Society,* 162 Cal. App. 3d, 358, 208 Cal. Rptr. 494, 506 (1984) (an insurer proceeding under a reservation of rights must allow the insured to select its own counsel at the insurer's expense). However, we express no opinion on this issue at this time.

See Criterion Ins. Co. v. Velthouse, 732 P.2d 180, 181, n. 2 (Alaska 1986).

In the insurance bad-faith context, our supreme court has held that a claimant is entitled to all actual detriment proximately caused by a carrier's wrongful conduct. *See State Farm Fire & Casualty Co. v. Nicholson,* 777 P.2d 1152, 1158 (Alaska 1989). Our supreme court has addressed attorney's fees as an element of recoverable damages in a bad-faith case in only one matter since Nicholson. In *Alaska Pacific Assurance Co. v. Collins*, 794 P.2d 936 (Alaska 1990), the supreme court determined that Collins could not be awarded attorney's fees *incurred during his bad-faith litigation with AlPac. Id.* at 1148-49. Collins had also been awarded attorney's fees incurred by him in defending a separate claim that AlPac should have arguably defended at its expense. The fee award for the separate claim required reversal for other reasons set forth in the opinion. Nowhere in the opinion did the supreme court specifically criticize the fee awarded for defense of the separate claim. Instead, the court indicated that Collins could not obtain attorney's fees incurred in the bad-faith litigation *and in addition to Rule 82 attorney's fees that the trial court had awarded regarding that same litigation. Id.* at 949. The issue of whether or not attorney's fees are recoverable as an element of damage in bad-faith litigation is currently before the supreme court in *Hillman v, Nationwide Mutual Fire Ins. Co.*, Supreme Court Case No. S-4555. Briefing in that case should be complete within the next number of weeks.

Conclusion

The Supreme Court of the State of Washington has elected to put some teeth behind its public policy pronouncements regarding an insurer's obligations to its insured. Alaska common law extended exposure for a partial award of attorney's fees pursuant to A.R.C.P. 82 long before the recent Washington decision and provides a perfect foundation for extending the Alaska rule consistent with this landmark Washington case.

• Dues increase would begin in 1993

Continued from page 3

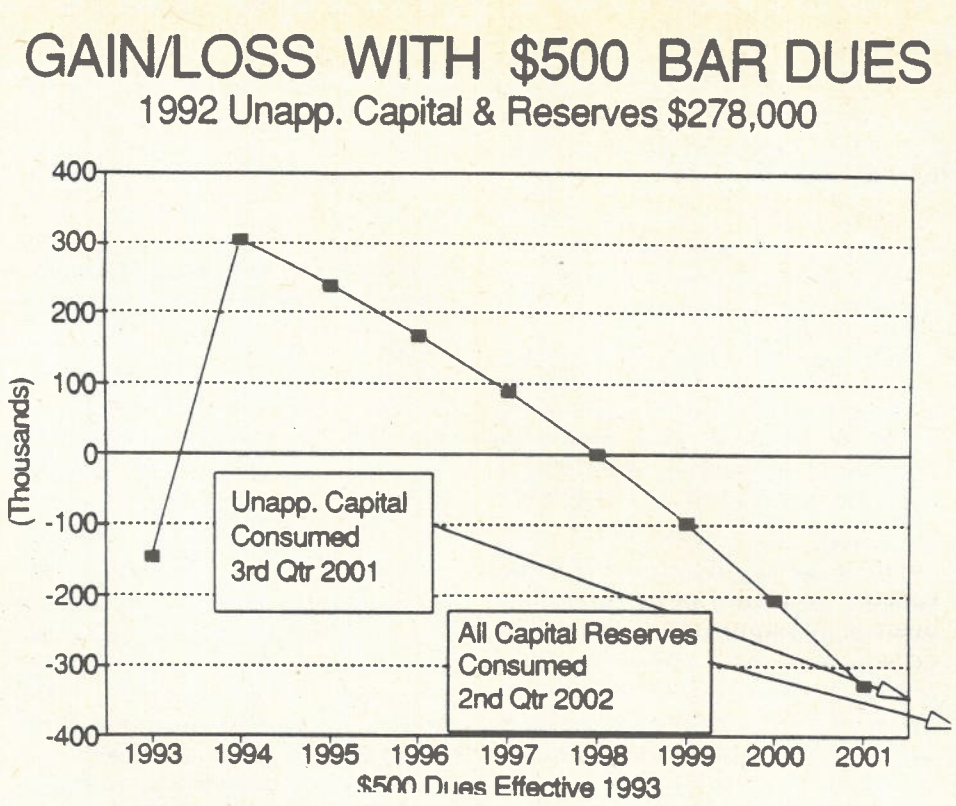
the cost of a good cup of coffee. Assuming approval of a dues increase to the $450 level, the cost of practicing law in Alaska will approximate $1.23 a day, which is less than a large order of fries at your favorite fast food restaurant.

FOOTNOTES

[1]For clarity, all figures used in this report are approximations. In 1986, the Board of Governors, following the lead of many other bar associations and the recommendation of its auditor, created an equipment replacement reserve of $50,000 and a working capital reserve of $200,000. The amounts reserved are not included in this figure.

[2]South Dakota, which has a 1/2 time discipline counsel to handle complaints against 1,900 licensed attorneys.

[3]These figures, which should be viewed with caution, were taken from several data sources, most of which were compiled by the American Bar Association. Alaska Bar Association staff in the course of this review verified some of these figures but at the same time, confirmed discrepancies not only in the numbers recited but in the methodology employed in reporting the statistics. In any event, the figures concerning bar membership above reflect total membership, both active and inactive. Using active membership figures only, the ratio of discipline counsel to active members in Alaska becomes 1 for every 829 attorneys, while Hawaii's is 1 for every 953 attorneys. Using only active in-state membership as a criteria, then the ratio for Alaska becomes 1 discipline counsel for every 702 active in-state attorneys.



[4]CLE income as a percentage of expense in 1984 was 48%.

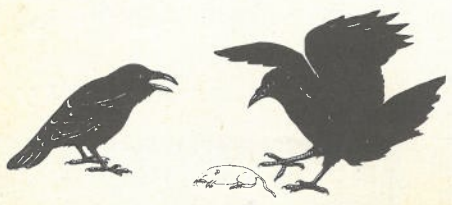
[5]The revenue to expenses ratio is also affected by increased printing costs, mailing costs, hotel meeting space and food service.

[6]Assuming current attendance remains steady.

[7]The committee recommends that Bar staff seek the advice of members of the association knowledgeable in computer science *BEFORE* making computer related expenditures from the reserve account.

[8]*Unified bar association.

For a copy of the referenced exhibits, contact Deborah O'Regan at the bar office.



NEXT MONTH: More dues commentary, Convention news, state court trends, more on the ABA Midyear Meeting, a new West Side Bar, and the return of the Editor, President, and Mickale Carter.

In Memorium

Ed Merdes: Fairbanks country lawyer

BY RALPH BEISTLINE

Ed Merdes stood out from the crowd. As a lawyer he excelled. Although Ed liked to introduce himself as just a "country lawyer," his legal skills were instinctive and well tuned. His courtroom style was both unique and effective. Ed would respond to a favorable ruling by the court with a friendly "That's Right, Your Honor" and would totally charm jurors.

Ed's legal career in Alaska began in 1951 when he served as a law clerk in Juneau, and continued until his death on December 5, 1991. At that time he was an active partner in the Fairbanks law firm of Merdes & Merdes which he operated with his son Ward. During his 40-year career Ed worked briefly for both the State of Alaska and the City of Fairbanks. He served in the Alaska legislature and loved politics. Mostly though, Ed was a "country lawyer."

Merdes, however, was far more than a lawyer. He was a genuinely good person. He always exhibited warmth, friendliness and energy. He was an integral part of the Fairbanks community and possessed a deep love for the State of Alaska.

Ed was also a dedicated family man. He was very proud of his wife and children and spoke often of how he taught his sons to pitch by putting up an old tire in his back yard and then paying them five cents for each ball they could get through the tire.

Ed Merdes

Ed was also concerned about the youth of the community and was very active in the Boy Scouts of America. He directed much of his energies to expanding scouting into the Bush and the Native communities and was very persuasive as he enlisted others to assist him in this cause. In addition, Ed was a strong supporter of community athletics; he was also active in his church and in innumerable community projects.

In its editorial of December 10, 1991, Ed was described as "a man of smiles and action" by the Fairbanks Daily News-Miner.

Certainly a fitting description for Ed Merdes was the type of person that would always have an encouraging comment to make and who could generate inspiration with the wink of an eye.

In recent years Merdes would appear occasionally on television in 60-second spots entitled "The way I See It." Although many others expressed their views in this forum, Merdes' excitement and energy seemed to leap from the screen and would always leave the viewer with a smile.

Ed's funeral was held in Fairbanks, on December 10, 1991. Keynoted speakers included Governor Walter J. Hickel and others who expressed admiration and respect for this dynamic civic leader.

Although Ed will be missed, his life served as an inspiration to many. Certainly Alaska is better for having known him.

Letter

I enjoy reading the *Alaska Bar Rag*. The current format presents a wide range of interest in a painless—frequently amusing fashion. I consider it a sign of mental health and maturity that Alaska Bar members can see the humor in many situations. Unlike some Bar Association publications—(did I mention I'm also a member of the Oregon Bar?) I do not have to force myself to slog through the *Alaska Bar Rag*.

Keep up the upbeat format.

Beverly St Sauver

Pioneer Eastaugh served Southeastern

Services for longtime Juneau attorney and community leader Frederick Orlebar Eastaugh were held 2:30 Friday, February 21 at the Northern Light United Church in Juneau. A reception followed at the Juneau Yacht Club, Aurora Boat Basin.

Mr. Eastaugh, 78, died February 17 at his Auke Bay home.

In Memorium

Born in Nome in 1913, Eastaugh spent his childhood in San Francisco and Seattle. He received his B.A. from the University of Washington in 1937. He worked his way through college as a freight clerk and purser on the passenger liners of the Alaska Steamship Co. That work rekindled his love of Alaska. He was an accountant for Pan American World Airways in Juneau, Fairbanks, San Francisco, and Seattle from 1940 to 1946.

He met his future wife, Carol Robertson, in 1933 in Juneau while he helped build St. Ann's Hospital Harris Street addition. They married in Seattle August 8, 1942.

While working for Pan Am in Seattle, Fred Eastaugh was a registered law clerk for Medley & Haugland. In 1946 Eastaugh and his family returned to Alaska where he became a registered law clerk for R.E. Robertson. He passed the Alaska bar examination and became an associate with Robertson & Monagle in 1948; in 1958, he became a partner in Robertson, Monagle & Eastaugh. He served as senior partner, director and managing partner of that firm and retired in 1988. He was admitted to the Alaska District Court in 1948, the United States Court of Appeals for the Ninth Circuit in 1956, and the United States Supreme Court in 1958. His practice encompassed corporate, mining, fishing, timber, municipal and probate law.

He was a Fellow and life member of the American Bar Association Foundation, was a member of the American College of Probate Counsel, was for seven years a Commissioner on the National Conference of Commissioners for Uniform State Laws, was a member of the Rocky Mountain Mineral Law Foundation from 1968, had been a delegate to the Ninth Circuit Judicial Conference, had been municipal magistrate for Juneau 1950-55, was Juneau Municipal Attorney 1955-62, and was a trustee for the Pacific Legal Foundation 1983-86. At the time of his death, Mr. Eastaugh was a member of the advisory board of the Juneau branch of the National Bank of Alaska.

He was honorary Norwegian Vice Consul and Consul for Alaska 1951-86, was consular agent and Vice Consul for the Republic of France 1953-85, and was Alaska delegate to the Union of Forest Research Organizations Congress in Oslo, 1975.

He had a long-standing interest in mining, probably originating in the early Nome mining activities of his father, Edward Orlebar Eastaugh, and his granduncle, both graduates of the Cornish School of Mines in England. He was a member of the Alaska Miners Association from 1960 and the Northwest Mining Association from 1976. He became a director of the Alaska Miners Association in 1989. He became director of Alaska-Dano Mines Corporation in 1958, and president of that company in 1971. In 1991 Eastaugh was appointed to the State Minerals Commission. He was well known in national mining law circles.

Eastaugh was a member of the Alaska Territorial House of Representatives from 1953-54. He served as president of the Univesity of Alaska Southeast and served on its first advisory board. He was Past Exalted Ruler of Elks Lodge 420, a member of the Washington chapter of Alpha Delta Phi fraternity, and was president of the Alaska Chamber of Commerce 1955-56. Eastaugh was instrumental in coordinating the first territorial symposium on the future of Alaska oil development. He was a commissioner of the Joint Federal-State Land Use Planning Commission 1974-76, was a commissioner on the Oversight Committee for Alaska National Interest Lands under ANILCA 1984-86, and chairman of the Juneau Planning Commission 1955-62. He was active in the Republican party and had served as a delegate to the National Convention.

Eastaugh developed his lifelong interest in photography while sailing on the Alaska Steamship lines. His photographs were exhibited in a one-man show at the Seattle Art Museum in 1934. In 1929, he began skiing, a sport he avidly enjoyed for 50 years. He skied on Mt. Baker in the early years of Washington skiing, in the old Douglas Ski Bowl in Juneau, and in Idaho, Colorado and Europe. In 1975, he won a Bronze medal in a NASTAR race at Elkhorn-Sun Valley in what may have been the only ski race he ever entered. He was one of those instrumental in developing Eaglecrest Ski Area in Juneau and the road that led to it. He also enjoyed tennis, swimming and gardening.

Fred Eastaugh also had a lifelong love of the sea. He built a small boat at age 12 and sailed it in the Alameda-San Francisco Bay area. He was one of six founders of Seattle's Corinthian Yacht Club in 1942 and built a 22-foot Storey Sharpshooter from plans in 1957 and took it up the Taku and Stikine Rivers. A member of the River Rats, Eastaugh later owned one of the first recreational sailboats in Juneau.

Eastaugh received an honorary Doctor of Humanities from the University of Alaska 1982, the Royal Order of St. Olav, Knight, First Class in 1969, and a private audience with King Olaf in 1976, Outstanding Alaskan award from the Alaska State Chamber of Commerce 1978, Outstanding Community Citizen from Juneau Chamber of Commerce 1980, Man of the Year from Juneau Rotary Club 1971, and various legislative citations.

He is survived by his wife, Carol, his two children, Robert Eastaugh of Anchorage and Alison Farnan of Juneau, his daughter-in-law, Patricia Ann Eastaugh, and two grandchildren, Carol Hughes Eastaugh and John Frederick Eastaugh, and several nieces and nephews.

Pallbearers were Doug Ackley, Jim Clark, Bill Corbus, Dale Henkins, Neil MacKinnon, Mary Nordale, Bill Schmitz, and Tom Stewart. Governor Walter J. Hickel, Lt. Governor Jack Coghill, Senator Ted Stevens, Senator Frank Murkowski, Elmer Rasmuson, Phil Holdsworth and John Sandor served as honorary pallbearers.

In lieu of flowers, the family suggests donations in his memory to Hospice of Juneau (3256 Hospital Drive), Virginia Mason Medical Center (Office of Development, P.O. Box 34935, Seattle, WA 98124) or to charities of the donor's choice.

Former Alaska leader helped rebuild Valdez

Judge Harris R. Bullerwell, 84, died Nov. 21, 1991, at his home in Rockland, Maine after a long illness. He was a noted lawyer and judge, with a career in both Alaska and Maine.

Born at Boston, Mass., Oct. 22, 1907, he graduated with honors first in his class at Portland University Law School in 1950. He attended Judges College, Reno, Nev.

At the age of 78, he took a tax course at the University of Florida graduate school. He was a partner in the law firm LaBlanc & Bullerwell from 1950 to 1961 and taught Bar Review from 1950 to 1959, which included all subjects.

Mr. Bullerwell was judge of Westbrook Municipal Court with concurrent jurisdiction with Superior Court from 1954 to 1958 and was admitted to practice by the Supreme Court of the State of Alaska in 1962.

He served as city attorney in Fairbanks and was the legal advisor for Valdez after the 1964 earthquake. He was on the planning board that made the new Valdez as it is today.

Mr. Bullerwell also served as city attorney for Ketchikan and was appointed the first permanent district court judge at Wrangell Petersburg Court. He held court in the Indian village of Kake, with his robe over a heavy overcoat and gloves, and a State Trooper beside him with a side arm. Soon after, he had the trust and respect of the village.

Once, while in a serious conversation with an attorney he was driving to the airport, he suddenly realized he had passed a school bus. He returned to court, notified the Chief of Police, called his Clerk of Court, had a trial, and fined himself the maximum penalty of $100. This made the newspapers in the lower 48 states through an Associated Press story, and resulted in several interviews.

For a hobby, he built houses in the places he lived in Alaska, and continued his building projects after he retired to Maine in 1976. He finished his last one in his 80th year.

During World War II, he served as a Chief Boatswain's Mate in the Coast Guard, aboard the *Arundel* from 1942 to 1945.

He was a member of the Cumberland, American, Tanana, Ketchikan, Maine and Knox County Bar Associations and the National Council Juvenile Court Judges.

Vote: April 10

Inactive bar 'disenfranchised' by Board

BY ROBERT MULLANEY

In the past year, several articles in the *Bar Rag* have addressed the Alaska Bar Association's financial woes. Apparently, these articles were intended to serve as "notice" to the Bar's 2,400 active members, warning them months in advance to expect an eventual increase in annual dues. The degree of the Bar's solicitude toward its active members makes sense. After all, the Bar should try to keep its active members informed about economic issues that affect both the Bar's budget and the members' own wallets.

In stark contrast, one article seems conspicuous by its absence from the pages of the *Bar Rag,* an article that would be of direct interest to the *inactive* members of the Bar. On December 19, 1990, the Board of Governors amended the Alaska Bar bylaws to double the annual dues for inactive members from $75 in 1990 to $150 in 1991. This 100 percent increase in dues made Alaska's inactive dues the highest in the nation. At the same time, the Board decided not to raise dues for active members, leaving those dues at their current level of $310, a level that has remained constant since 1981.

No article in the Bar Rag even attempted to offer any justification or explanation for the dramatic increase in dues for inactive members. My review of the Board's decision strongly suggests the reason for the lack of an explanation — there simply is no justification for the Board's action. The motive for the Board's action, on the other hand, is readily discernible: It is easier to double fees for inactive members, who are afforded no representation under Alaska law, than it is to face political accountability by increasing dues for active members by even an insignificant amount.

The disenfranchised inactive members

In December 1990, when inactive dues were increased by 100 percent, there were approximately 2,416 active members and 456 inactive members of the Alaska Bar. According to the Bar Association, 88 percent of the inactive members lived outside the State of Alaska.

Alaska law requires that the nine attorney members on the Board of Governors be active members; the other three members, who are not attorneys, are appointed by the Governor. (AS § 8.08.040). Inactive members are not only ineligible to serve on the Board, but also *may not vote* for members of the Board of Governors or officers of the Bar Association. (AS §§ 8.08.040, 8.08.060). While active members have the power under AS § 8.08.090 to modify or rescind any bylaw or regulation adopted by the Board of Governors, inactive members have no such power.

As illustrated below, this general lack of representation for inactive members raises a fundamental question of the Bar association's political accountability to its inactive members. The December 1990 decision to double the dues for inactive members without explanation demonstrates that the Board has ignored its fiduciary duties to the Bar's inactive members.

The board that couldn't shoot straight

In October 1990, the Board struggled with the 1991 budget, which had a projected deficit of $215,870. At that time, the Bar had a cash surplus of about $320,000. Several Board members expressed discomfort with the projected deficit and sought ways to reduce its size. Board members discussed a potential increase in dues for active members. While there was general agreement that a dues increase in the future appeared likely, the Board did not want to raise dues while the Bar still had a surplus. Several members mentioned 1992 as the target year for an increase, while others believed that the increase could be postponed until 1993 or later. There appeared to be a general consensus that the active members should be put on notice that an increase in dues was under active consideration by the Board.

In fact, the Bar's President, Daniel Cooper, addressed this issue in the *Bar Rag* in January 1991. According to Mr. Cooper, part of the increased strain on the Bar's budget came from the need for increased staff to deal with attorney discipline issues, and part was due to increased costs for Continuing Legal Education ("CLE") Programs, which the Bar subsidized. He concluded his column with the message from the Board: Active members can expect a dues increase in 1992 or 1993. Another Board member Dan Winfree, repeated the same message to active members in the *Bar Rag* in May 1991.

Needless to say, the Board did not exhibit the same kind of concern or restraint regarding fees for inactive members. The following excerpt from the transcript of the Board's meeting on October 27, 1990, demonstrates the cavalier manner in which the Board approached this issue:

Unidentified Speaker: You got almost 500 people paying inactive dues right now?

Unidentified Speaker: Yes.

. . .

Unidentified Speaker: We've got $50,000 sleeping there.

. . .

Unidentified Speaker: We increased the inactive dues to $150.00.

. . .

Unidentified Speaker: ... That will give us $34,350.00.

Ms. O'Regan: And I think you should realize that some people will resign from the association if we raise our dues...

. . .

Unidentified Speaker: Then we get $700 when they reapply for...
(Laughter)

Of course, $700 is the amount that an inactive attorney who had resigned would have to pay for the Bar exam and character investigation needed for readmission to the Bar.

What was the justification for the dramatic 100 percent increase in fees for inactive members? Were inactive members, 88 percent of whom live outside Alaska, flocking like lemmings to subsidized CLE classes? Was there a sudden increase in disciplinary actions against inactive members, who are forbidden to practice law in the state? Were inactive members, who receive the *Bar Rag* six times a year, suddenly an enormous drain on the Bar's resources?

In a written response to my inquiry, Deborah O'Regan, the Bar's Executive Director, stated the obvious: "There was not a study done to determine the amount of increase in dues for inactive members, rather it was the result of a discussion and vote at a Board of Governors meeting." My review of the transcript of the Board's "discussion" at its October 1990 meeting revealed that the Board displayed the same level of disregard for inactive members as is evident in the excerpted material above.

In fact, the Board's main interest at the October 1990 meeting was the potential obstacle of notice required to change the bylaws. Ms. O'Regan informed the Board members that the proposed increase in dues for inactive members would not be effective for 1991 because the Bar Association had already printed up the dues notices. In response, the Board decided to reprint the dues notices for inactive members. Ms. O'Regan then pointed out the necessity of amending the bylaws to increase the inactive dues, which required published notice. As she explained, the notice could be published in the November 1990 *Bar Rag*. After allowing one month for comments, the Board would have to approve the dues increase at its January 1991 meeting. Unfortunately, dues notices had to be mailed before January 1.

The Board would not allow such procedural niceties to stand in the way. With no opposition, the Board agreed to publish notice in the November 1990 *Bar Rag*, to allow 30 days for comments, and to hold a telephonic conference on December 19, 1990. The Board's decision to raise the dues was a foregone conclusion:

Ms. O'Regan: And meanwhile, we'll have printed up the dues notices already, assuming that you're gonna pass it regardless of the comments you get.

Unidentified Speaker: It's not that we made up our minds.
(Laughter)

In a telling exchange at the December 19 Board meeting, one Board member asked: What was the reasoning behind the proposed increase?" Another member responded simply: "*To raise money*." (emphasis added.) Sometimes reality is better than fiction.

The June 1992 Bar Convention: An Opportunity to Achieve a Fair Dues Structure

At the June 1992 convention in Anchorage, the Board of Governors will again address the budget issue. In the interim, the Board has appointed a "Blue Ribbon" committee to look into the possibility of a dues increase for 1993. It is probably a safe bet that no inactive members sit on the committee.

Presumably, the issue of an increase in annual dues for active members will be on the agenda at the June Bar convention. Active members on the Board will have the opportunity to debate the merits of an increase. Active members of the Bar can vote to modify or rescind the Board's action if they disagree with it, and can vote for Board members who will represent their interests.

Inactive members are not protected by any of these democratic safeguards. We were subjected to a 100 percent increase in dues with no political recourse. On behalf of the Bar's inactive members, I ask the Board squarely to face its responsibility and to reduce the dues for inactive members to an amount that reflects our fair share of the budget. Alaska's inactive dues need not be the highest in the country. Despite recent increases in the cost of postage, the *Bar Rag* just can't cost that much to mail to us. Some of us might even be willing to forego the pleasure of receiving the Bar Rag's scintillating restaurant and movie reviews in exchange for a return to reasonable annual dues.

Estate Planning Corner

By Steven T. O'Hara

Term vs. Cash Value Life Insurance

In 1991, the Charles J. Givens organization came through Alaska proclaiming its strategies for financial success. One of its strategies is for clients to buy term life insurance, rather than life insurance that develops a cash value.

According to Charles J. Givens, "[Cash value life insurance] is a plan where your money goes into a 'hole,' never to be seen again" (C. Givens, Charles J. Givens Financial Library 2-22 (1991)). He also states: "Anybody who tells you anything different from what you'll learn [about insurance in this manual], no matter how well-meaning, is lying to you . . ." (*Id.* at 2-4d).

The decision of what type of life insurance to buy is not as simple as Mr. Givens would have his clients believe. The choice is a personal decision, dependent on case-by-case facts.

Consider a client who is 33 years of age. She is a single mother, with two young children. One child is disabled and may never be self-supporting.

The client has a secure, well-paying job, and she believes she would be able to afford the premiums on a cash value insurance policy. Despite her wealth, both current and projected, she believes her family needs insurance on her life in the amount of $250,000. She believes this is a long-term need, perhaps lasting her entire working life.

Under such circumstances, with a secure income and yet a long-term insurance need, the client may prefer cash value life insurance.

If the client purchases $250,000 of non-participating term insurance, the initial annual premium, including disability waiver, will be approximately $330. (This quote and the other costs and projections discussed in this article were obtained from one of the 10 largest U.S. insurance companies and will vary from the quotes and projections of other companies.) It is projected that by the time she reaches age 65, she will have paid a total of $36,000 in premiums. Her policy will have no cash value, and her coverage will cease if she discontinues paying premiums.

By contrast, if the client purchases $250,000 of cash value life insurance, the initial annual premium, including disability waiver, will be approximately $2,650. (This quote is for a traditional whole life insurance product.) It is projected that by the time she reaches age 65, she will have paid a total of $29,000 in premiums—$7,000 less than the premiums payable under the term insurance. (The projections do not take into account the time value of money —for example, that money is paid at different times under the policies.)

Moreover, she can expect to have a substantial cash value, which accumulated tax free (D. Westfall & G. Mair, *Estate Planning Law and Taxation* at 5-5 (2nd ed. 1989)). Projected cash value at age 65 is approximately $167,000, while the guaranteed cash value at age 65 is approximately $110,000. With excess dividends purchasing paid-up insurance, it is projected she will then also have approximately $358,000 of life insurance. It is projected that dividends will have long since exceeded premiums, so she will not have to worry about losing the coverage.

In other words, for this writer the decision concerning what type of life insurance to buy is not black and white. It is generally dependent on two basic issues. First, can the client afford the large initial premiums of cash value insurance? Under no circumstances should the client compromise the need for a certain amount of life insurance with the desire to purchase a cash value policy.

Second, how long will the insurance be needed? After deciding this issue, the client should run the numbers based on realistic projections and see which policy is less expensive over the period the insurance is needed.

Related to the issue of how long the insurance will be needed is the argument that the client can earn more money by purchasing term insurance and investing, on her own, the money she saves in lower premiums. This is one of Mr. Givens' arguments, and it is a good one, provided the client actually invests the premium savings rather than spends it. Human nature being what it is, some clients prefer the forced-savings aspect of cash value life insurance.

Also related to how long the insurance will be needed is the client's attitude toward risk. Risk in this area includes not only that the client may be unable to accumulate, on an after-tax basis, sufficient resources to meet her and her estate's liquidity needs, but also the risk that she will drop needed coverage in later years when the term insurance becomes expensive. A risk averse client may wish to acquire and pay up a cash value policy while she can, so in later years she will not have to worry about losing the coverage.

As important as the choice of what type of insurance to buy is the choice of from what company the policy should be bought. The policy's projections are only as credible as the assumptions on which they are based, including the company's ability to obtain a consistently high investment yield.

As minimum "due diligence" in evaluating an insurance company, the client should obtain the company's ratings. There are a variety of rating companies available: A.M. Best Company (908-439-2200), Duff & Phelps, Inc. (312-263-2610), Moody's Investors Service, Inc. (212-553-0300), Standard & Poor (212-208-8000), and Weiss Research, Inc. (407-684-8100).

Not all insurance companies are rated by all raters, but a conservative client will want to review as many ratings as are available. The ratings will be of assistance in determining what further due diligence, if any, is advisable.

NOTICE: The newly formed West Side Bar Association invites members of the bar to its luncheon discussions at noon Monday through Friday in the banquet room of the Keyboard Lounge in Anchorage.

Ethics opinions

Opinion governs conflict of interest in estates

ALASKA BAR ASSOCIATION ETHICS OPINION NO. 91-5

Ethical Obligation of an Attorney to Withdraw After Undertaking Dual Representation of Estates With Factually Conflicting Positions in Existing Litigation

QUESTION PRESENTED

What are the ethical duties of an attorney, when the attorney after undertaking representation of a client in personal injury litigation, undertakes representation of the estate of a potential tortfeasor for the purpose of preserving the claims that the estate of the potential tortfeasor might have had against a third party in order to assure a source of recovery for the original client?

CONCLUSION

An attorney may not represent parties, including estates, against each other in the same litigation regardless of motivation. Such conflicts may not be waived. Since each "client" is entitled to the undivided loyalty of counsel, withdrawal from the representation of one will not suffice. Attorney must withdraw from representing both clients.

STATEMENT OF FACTS

Attorney was retained by the victim of a two-car collision. The client was without fault and suffered property damage and personal injury in amounts which the attorney valued at between $50,000 and $100,000.

The second car was operated in an allegedly reckless manner by an intoxicated minor. There were two other intoxicated minors in the car. The driver and one passenger were killed. The surviving occupant suffered serious head injuries. The driver was without insurance. Discovery disclosed that the alcohol was purchased from a liquor store by the driver and that all of the minors had paid for the alcohol. Suit was filed against the surviving minors, the estate of the driver, and the estate of the deceased passenger as well as the liquor stores involved.

In evaluating the case, the Attorney concluded that none of the surviving individuals would be able to pay meaningful damages. Depending upon how fault was allocated, the Attorney concluded that his client might not be able to recover all of his damages against the liquor stores involved. The Attorney however concluded that if he sued the estate of the deceased passenger, his client might recover from the estate, if a dram shop suit was brought by the estate against the liquor stores.

Attorney contacted the mother of the deceased passenger, advised her of the fact that two liquor stores had been implicated and encouraged her to file suit on behalf of the estate of her son. The Attorney also advised the mother that the statute of limitations would run in two days. The mother asked the Attorney to speak with her daughter who was more sophisticated and worked for a lawyer. Attorney contacted the daughter, informed her of the statute of limitations and the fact that he was amending his client's complaint to include a count against her brother's estate. No estate had then been opened. Attorney told the deceased's sister that it would be possible for his client to open an estate as the client was a creditor but that it would be easier if someone from the family made application. The sister told Attorney that she did not think that she had time to hire a lawyer before the running of the statute of limitations.

Attorney agreed to prepare the papers, opening the estate and appointing the sister as personal representative. He would then file a complaint on behalf of the estate against the liquor stores. It was anticipated that Attorney would then withdraw from the representation of the estate because of the conflict between the estate and the original client which was suing the newly opened estate. Attorney accomplished these steps.

Attorney asked the sister to find a new attorney. She indicated that she thought that her boss would handle the matter. After a delay of five months, Attorney contacted the sister, who advised that she would send papers allowing the attorney to withdraw with her consent and that she was abandoning both the estate as well as the claim. Sister said that the subject was too painful for the family and that she thought that the Attorney's conduct in contacting her was wrong. Sister and her family intend to oppose Attorney's continued representation of his original client.

The complaint filed on behalf of the estate was never served. The Attorney now wishes to have the guidance of the Ethics Committee as to his duties, having found himself in this situation.

DISCUSSION

Generally speaking, a lawyer may not represent two opposing parties in litigation no matter how benign the circumstances. Consent of the parties is irrelevant.[1] See American Law Institute Restatement of the Law Governing Lawyers Tentative Draft No. 4, Chapter 8 Section 209, Comment C (4/10/91). Numerous provisions of the Code of Professional Responsibility support this proposition.

DR 5-105 requires an attorney to decline or withdraw from representation when it is likely that the exercise of his independent judgment will be adversely affected. DR 5-105(C) states that a lawyer may represent multiple clients, "if it is obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment." In a Formal Opinion 91-2, the committee published its view that a lawyer for an estate represents the personal representative and can in fact advise the personal representative in disputes with beneficiaries. Here, it is clear that Attorney's first duty (rightfully so) was to the original personal injury plaintiff. The personal representative for the Estate had the right to an independent evaluation of the merits of the claim against the estate as well as the merits of the claim made on behalf of the estate. It would be impossible for the lawyer suing the estate to give independent, candid advice. Whatever advice was given would of necessity be tainted by the desire to provide a corpus to pay damages to the original client. Likewise, EC 5-1 provides that "The professional judgment of a lawyer should be exercised...solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients nor the desires of third persons should be permitted to dilute his loyalty to his client."

Nor is an agreement to limit the nature of services controlling. Attorney has a duty under DR 7-101 to represent the interests of the estate vigorously within the bounds of law. The agreement contemplated that at least for some initial period, Attorney would represent the estate in its dram shop action. A lawyer cannot undertake to file a complaint without undertaking the responsibility of moving the matter forward. The problem is that independent counsel may well have taken a different view of the merits of the separate actions and may well have advised the client to sue other entities or take other actions to preserve the estate. The client, who was the personal representative, is entitled to the best advice of the lawyer and is entitled to look to that lawyer to do his or her personal best to protect the interests of the estate.

The conflict of interest mandates withdrawal from all representation.

> Courts will disqualify counsel in an adversary proceeding when: (1) the moving party was previously represented by the attorney whose disqualification he now seeks; (2) the matters embraced within the pending lawsuit are substantially related to the matter or the cause of action on which the attorney previously represented the moving party; and (3) the attorney is representing an adversary of the movant party in the pending suit.
>
> *First American Carriers, Inc. v. Kroger,* 788 S.W.2d 742 (Arkansas 1990).

It is interesting to note that in *First American*, the conflict was inadvertently created and the Court accepted the fact that the law firm was totally innocent of improper behavior. In this case, all three conditions would be met should the Estate move to disqualify counsel.

Justification for this position within the Code of Professional Responsibility would include the duty under DR 4-101 to preserve the confidences and secrets of a client as well as the duty to withdraw under DR 2-110(B)(2). Attorneys have a duty to avoid even the appearance of impropriety under DR 9-101. Accordingly, it is the view of the committee that Attorney should withdraw totally from the representation of either client.

[1]There is a minority view holding that in the case of no-fault divorce where there are no issues of alimony, custody, child support or property division, the same lawyer with consent may represent both spouses. Hazard and Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* (2d ed. 1990), Section 2.2:204. See also District of Columbia Rule of Professional Conduct 1.7, Comment <16>. The committee has not considered the circumstances under which a lawyer may represent both spouses in a Dissolution filed under the Alaskan Act. Needless to say, if there are disputes as to any issue, a lawyer may not represent both spouses.

Approved by the Alaska Bar Association Ethics Committee on October 3, 1991.

Adopted by the Board of Governors on October 25, 1991.

ALASKA BAR ASSOCIATION ETHICS OPINION NO. 92-1

Failure to Disclose Representation By Class Counsel

The Committee has been asked by Bar Counsel whether it is proper for an attorney to solicit clients in a class action without disclosing to the potential clients that they are members of a class represented by class counsel.

As the Committee understands the facts involved in this matter, the potential clients were members of a certified class in a large, multiparty class action. These individuals were contacted by an attorney during the "opt-out" period after class certification, and entered into contingent fee agreements with the attorney for representation in the case as "individual" plaintiffs. The attorney did not disclose to the clients that they were members of a class certified by the Superior Court, nor did the attorney disclose that the Superior Court had already approved representation of their class by another law firm.

During the "opt-out" period, class members may withdraw from the class and hire individual counsel. Civil Rule 23(c)(2). The decision on "opting-out" is important, and a class member may decide to seek legal advice from independent counsel before deciding one way or the other. The class member may want an opinion from an attorney other than class counsel, may not understand the options, may want to consult his or her usual attorney, or may be cautious about representation by class counsel for other reasons.[1]

Given the class members' important interests in making a fully informed decision on "opting-out," the Committee firmly believes that an attorney contacted by a class member about individual representation in a class action must disclose the option of representation by class counsel with the prospective client.

The attorney must fully and candidly discuss the benefits and drawbacks of class representation as compared to those of proceeding independently. *See*, Comment, Model Rule 2.1, "Advisor," *ABA Annotated Rules of Professional Conduct*, (1984 ed.) at 187 ("A client is entitled to straightforward advice expressing the lawyer's honest assessment").

The attorney's interests in obtaining a new client cannot override the obligation to fully disclose the merits of representation by class counsel. *See* EC 5-1 ("The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties") *and* DR 1-102(A)(4) ("A lawyer shall not...[e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation").

The facts presented indicate that the attorney failed to disclose to the class members that they were represented by class counsel. The Committee understands that the attorney contacted the class members very shortly after the class was certified. They may have been unaware that the class had been certified, and equally unaware that class counsel had been appointed.

The Committee concludes that the attorney's failure to fully explain all the options available to the class members was improper. The attorney had an obligation to candidly disclose to these potential clients that their class had been

Continued on page 13

Ethics opinions

Use of phone recordings applies to co-counsel

Continued from page 12

certified, and to discuss whether their interests might be better protected by "opting-in," as opposed to choosing individual representation.

[1]The committee believes that a lawyer representing individual plaintiffs in a class action may communicate with other members of a certified class about the class action during the "opt-out" period without violating DR 7-104(A)(1). *See* ABA Model Rule 4.2. "Communication with Person Represented by Counsel," *ABA Annotated Model Rules of Professional Conduct*, (1984 ed.) at 268.69 ("Rule 4.2 is intended to preserve the integrity of the client-lawyer relationship by protecting the represented party from the superior knowledge and skill *of the opposing lawyer*) (emphasis added). The interests of class members who "opt-out" compared to those who "opt-out" are not, in the committee's view, "opposing" or "adverse" within the meaning of these rules. *Compare, Impervious Paint Industries, Inc. v. Ashland Oil et al.*, 508 F.Supp. 720, 722 (W.D. Kentucky, 1981) ("defendants' counsel must treat plaintiff class members as represented by counsel, and must conduct themselves in accordance with both sections of DR 7-104").

Approved by the Alaska Bar Association Ethics Committee on January 9, 1992.

Adopted by the Board of Governors on January 17, 1992.

ALASKA BAR ASSOCIATION ETHICS OPINION NO. 92-2
Use of Legally But Surreptitiously Recorded Telephone Conversations

QUESTION PRESENTED

Does an attorney's use of the transcript of a telephone conversation to impeach a witness violate the ethics code if another attorney surreptitiously recorded the conversation in violation of DR 1-102(A)(4) of the code?

CONCLUSION

An attorney may not ethically use a transcript of a telephone conversation with knowledge that another attorney surreptitiously recorded it because the use involves the attorney in the conduct that made the original act of recording unethical under DR 1-102(A)(4).

STATEMENT OF FACTS

Attorney A shares office space with Attorney X and was co-counsel with Attorney X on a case. Without Attorney X's knowledge, Attorney A recorded telephone conversations surreptitiously in violation of DR 1-102(A)(4), which prohibits conduct involving dishonesty, fraud, deceit, or misrepresentation. Alaska Bar Ass'n Ethics Opinion 78-1. Attorney X did not know about the recordings until they were complete. Attorney X had the recordings transcribed and used them in cross-examination.

DISCUSSION

Disciplinary Rule 1-102(A)(4) prohibits conduct involving dishonesty, fraud, deceit, or misrepresentation. This rule has been interpreted to prohibit surreptitious recording of telephone conversations even if the recording is legal. Alaska Ethics Opinion 78-1 (relying upon American Bar Association Opinion No. 337). Because Attorney A committed an unethical act when he recorded the conversation, Attorney A may not use the recording in litigation even though the evidence was legally obtained and admissible. The question is whether this proscription extends to co-counsel who is innocent of the initial ethical violation. It is the view of the committee that it does.

The ethical prohibition against surreptitious recording of telephone conversations is almost universally followed. ABA Formal Op. 337 (1974). *See also In re Anonymous Member of the South Carolina Bar*, 322 S.E.2d 667 (S. Caro. 1984); *Colorado v. Wallin*, 621 P.2d 330 (Colo. 1981). Even if the conduct is legal and the recording is admissible, an attorney may not participate in making the recording. The reason is that the conduct involves deceit and misrepresentation, violates standards of fairness, and inhibits candor. Haw. Op. 30, November 30, 1988. The practice is also said to "offend ones sense of honor and fair play." 41 Tex. B.J. 580 (Ethics Op. 392, 1978); Mo. Inf. Op. 7, Mo. Bar Bull. (May 1978).

It seems obvious that an attorney should not be able to exploit co-counsel's unethical conduct at trial. However, a competing consideration is the truth-seeking function of a trial. That function probably would be promoted by use of a surreptitious recording at trial. Another competing consideration is an attorney's obligation to represent the client zealously within the bounds of the law.

One commentator believes the prohibition should be reexamined in light of these considerations and advocates the use of surreptitious recordings in certain circumstances in criminal proceedings. The commentator argues that such evidence, which commonly is used by prosecutors, also should be available to defense counsel. A. Abramovsky, Surreptitious Recording of Witnesses in Criminal Cases: A Quest for Truth or a Violation of Law and Ethics, 57 Tul. L. Rev. 1 (1982), One state, Arizona, does allow surreptitious recording to avoid perjury or develop impeaching evidence when one party to the conversation consents. Arizona Op. 90-2 (Mar. 16, 1990) (such recordings are a reality of modern criminal practice and should be available to the defense because prosecutors use them).

At present in Alaska, however, the rule is that recording a telephone conversation without the consent of all parties is unethical. Because it is the rule, the use of that recording by co-counsel also should be unethical. Use of the recording by co-counsel is as much a violation of notions of fairness and as likely to inhibit candor as the original act of recording. The fact that only one of the counsel participated in the recording should not make its use ethical. Using the recording even without participating in its making involves Attorney X in the "conduct involving dishonesty, fraud, deceit, or misrepresentation." DR 1-102(a)(4). We therefore find that use of a recording of a telephone conversation that was made in violation of DR 1-102(A)(4) by one who has knowledge that it was recorded surreptitiously by an attorney is itself a violation of DR 1-102(A)(4).[1]

[1]Attorney X's knowledge is important because only intentional misconduct is covered by DR 1-102. In re. Simpson, 645 P.2d 1223 (Alaska 1982).

Approved by the Alaska Bar Association Ethics Committee on December 5, 1991.

Adopted by the Board of Governors on January 17, 1992.

CHICAGO BAR EXAM

BY BOB NOREEN

Welcome to da Chicago Bar Exam. You'll have 10 seconds to respond to da questions. Please answer out loud. Debivik, you'll have 15 seconds 'cause you uncle is from my precinct.

QUESTION I:

As a new lawyer, you're offered two jobs, one as negotiator for Chicago's streets and sanitation, and da other as negotiator for Chicago's football team. Who pays more?

"Da Bears"

Dat's correct, but only by a small margin.

QUESTION II:

You represent da City of Chicago. Some hoods from da South Side let all da animals out of da Lincoln Park Zoo. To best minimize liability, which animals go back in der cages first?

"Da Bears"

QUESTION III:

Some cops arrest public bathers at da Montrose St. Beach by da lake. Some had der swimming suits on, some had them off. You are da city prosecutor; who can you convict?

"Da Bares"

Dat's good...now da rapid fire portion. You have 10 seconds to answer dez three successive questions:

Mr. X, Mr. Y and Mr. Z left da Bulls game and each was stopped by da cops while driving erratically.

X had alcohol on his breath.

Y got soused at O'Toule's Tavern on Division St. before he went to da game, and he ran over a pedestrian. He had no insurance.

Z was being jumped by his girlfriend because he had just given her a diamond engagement ring.

Question 1: In da case of X, what has affected his breath?

Question 2: In da case of Y, who else do you sue on behalf of da pedestrian?

Question 3: In da case of Z, who will you reprasent in da collection case for da diamond?

"Da Beers"
"Da Bars"
"DeBeers"

Dat's good...youse guys all passed, so step up and get you tickets punched.

TVBA Treasurer's Report, Feb. 21

Study examines Alaska child support cases

BY EMILY READ AND GINNY FAY

A recent study commissioned by the Child Support Enforcement Division shows that Alaska has made significant progress in standardizing child support orders, but that proportional disparities in awards exist when examined by community, type of case and type of award establishment procedure.

The purposes of the study were to examine the overall impact of Alaska Civil Rule the 90.3 on the establishment of child support orders and to analyze differences in relative support obligations where they exist. Rule 90.3 requires that an income and custody-based formula be employed in all situations in which the financial support of children is at issue.

Issues of child support adequacy, fairness, and sufficiency in enforcement have become key topics of public debate. Among other concerns, critics have charged that the courts treat divorcing parties inequitably, that many awards are inadequate, and that low award amounts and the failure to pay full or partial support by many obligors result in huge costs to the welfare system. Through a series of amendment to existing legislation, states have been required by the federal government to enact mandatory guidelines for use by judges and administrative officers responsible for establishing child support. In response to this mandate, Civil Rule 90.3 formed.

Civil Rule 90.3 of the Alaska Civil Rules of Procedure, was adopted by the Alaska Supreme Court in August 1987 with four central purposes: first, to ensure that child support orders adequately meet the needs of children, subject to parental ability to pay; second, to promote consistent awards among families similarly situated; third, to simplify and increase the predictability of the support determination process; and fourth, to ensure that Alaska courts comply with state and federal law.

Under Rule 90.3, in cases of sole or primary physical custody, the annual financial obligation of the noncustodial parent is equal to the product of that parent's adjusted annual income up to $60,000 and (income multiplied by .20 for a single child; .27 for two children; .33 for three children; and an extra .03 for each additional child).

Regardless of income, under Rule 90.3 the noncustodial parent must pay a minimum amount of $50 per month. The rule applies equally to the judicial and administrative arenas. In cases in which the physical custody of children is shared, the rule requires that the modified formula be used to calculate the obligation each parent has toward the support of his/her child(ren). In a similar manner, Rule 90.3 provides for adjustments in payments during periods of extended visitation and for a variety of other compelling reasons, including obligor impoverishment, large families, income of children, and extraordinary expenses.

The Alaska study

Divorce, dissolution and other domestic relation cases filed during 1989 in the Superior Courts of Anchorage, Fairbanks, Juneau, Bethel, and Nome were sampled for inclusion in this study. Only those cases which involved the custody of children and those cases finalized by the courts at the time of data collection were included. The term "sample" is used figuratively because in Juneau, Bethel and Nome, all such cases were included in the study. For Fairbanks, between 25 and 35 per cent of all cases (depending upon case type) were sampled for inclusion, and for Anchorage the figure was between 17 and 30 per cent. Four hundred thirty-five (435) court cases served as the primary database for the report.

To facilitate a comparison between judicially established support orders and administratively established orders, 171 Child Support Enforcement Division (CSED) administrative cases were also included for analysis. Administrative establishment procedures are initiated by CSED when child support is due the obligee but has not been established judicially through a divorce, dissolution, or other domestic relation case. Seventy-five of the administrative cases involved the establishment of paternity; the remaining did not.

Because Rule 90.3 applies to judicially and administratively established child support orders, questions about discrepancy or continuity in the establishment process were also entertained.

To determine award amounts, Rule 90.3 requires that parties submit detailed income affidavits which cover income sources and deductions and allow for forward calculation of each parent's financial obligation. Unfortunately, a significant proportion of court cases did not contain income affidavits of any type. The extent of missing financial data varied by location and type of case. But statewide, the absence of these data was greater for maternal income (32 percent) than for paternal income (26 percent). Because of the importance of income data in setting child support orders, it was significant that large numbers of cases were missing a financial affidavit for one or both parties. Cases with absent income information could not be included in the analysis of income and relative awards (Table 1).

Data from the court cases were analyzed by location for Anchorage, Fairbanks, Juneau, and Bethel/Nome, as well as together for a "statewide" portrait. The administratively established cases were examined as two groups—paternity or nonpaternity—depending primarily upon whether the parents of the children were ever married.

In administrative cases, the establishment of paternity (if necessary) is often the first step in the process of establishing child support. Paternity may or may not be contested.

This study also examined court cases based on whether the case involved a recipient of the Aid to Families with Dependent Children (AFDC) program and whether the case was administered by the Child Support Enforcement Division (CSED).

Sample characteristics

The study found the following general characteristics within the study sample.

• Mothers received physical custody of children in 72 percent of court cases, fathers in 15 percent. Physical custody was shared or split in 11 percent.

• Statewide, fathers were named the support obligor in 81 percent of cases, mothers in 18 per cent.

• The support of one child was involved in 55 percent of court cases statewide, two children in 32 percent, and three children in 10 percent. One case involved the support of eight children, while several cases involved the support of an unborn child of the marriage.

• Final visitation arrangements for the noncustodial parent were "reasonable" or "liberal" in 60 percent of cases, and were restricted to a specific schedule in 16 percent. Extended visitation agreements were made in 11 percent of the court cases. In 1 percent of cases supervised visitation was ordered or the court required that the parent not be under the influence of drugs or alcohol at the time of visitation.

• The obligor parent was ordered to maintain medical insurance for children in 38 percent of court cases. Approximately 15 percent of custodial parents were ordered to provide medical insurance coverage. Medical coverage was conditionally ordered of the obligor parent in an additional 26 percent of cases. In these cases insurance was ordered if a policy was available at a reasonable cost.

• One-quarter of child support orders in the court cases contained a provision for an automatic cost-of-living increase, and future court reviews were ordered in 5 percent.

• Spousal maintenance was ordered in 7 percent of cases. These cases were characterized by higher obligor income levels and longer marriages, and most were divorce, rather than dissolution, cases. The median amount of these orders was $300 monthly, most of which extended for a duration of one year.

• In the court divorce cases, the mother was represented by an attorney in 87 percent of cases; the father in 66 percent.

Income

The study relied upon averages in examining parental incomes, award amounts, and proportional obligations. Averages, however, are susceptible to "outliers" such as extraordinarily high or low incomes and award amounts. For example, Rule 90.3 requires the imposition of a $50 per month support payment regardless of how small the obligor's income may be. For those obligors declaring a Permanent Fund Dividend check as their only income, the minimum payment would produce a high award to income ratio, thereby having a disproportionate effect on group averages reflecting percentage of incomes awarded to child support.

• In calculating net incomes, fathers were more likely than mothers to declare allowable income deductions. Only on the expense of work-related childcare did the number of deductions by mothers exceed those of fathers.

• The average annual net income of fathers, statewide, was $22,818, with a high average figure of $25,181 in Nome and Bethel cases and a low of $20,369 in Fairbanks.

• The average statewide net income of mothers was $13,588, a figure that was 60 percent of the average net paternal income. The average net income of mothers was lowest in Nome and Bethel, at $11,606, and highest in Anchorage, at $13,927.

• The ratio of mother-to-father net incomes was lowest in Bethel and Nome cases, where the incomes of mothers averaged 46 percent of the fathers'. In Fairbanks, this ratio was highest, at 67 percent.

• For court cases involving the support of one child, the statewide obligor net income was $17,520 and the average monthly support order was $286, or 20 percent of the net income—exactly what Rule 90.3 requires.

• Support awards varied by type of legal procedure. In the case of one child, for example, the average obligor income in a dissolution cases was $14,472 and the average monthly award was $258, or 21 percent of obligor income. The average obligor income in a divorce

Continued on page 23

Table 1. Average Child Support Awards by Number of Children, 1989

	One Child				Two Children				Three Children			
	N[1]	Average monthly child support	Average annual obligor income[2]	% income to child support	N[1]	Average monthly child support	Average annual obligor income[2]	% income to child support	N[1]	Average monthly child support	Average annual obligor income[2]	% income to child support
Guideline	—	—	—	20%	—	—	—	27%	—	—	—	33%
Court cases												
"Statewide"	64	$286	$17,520	20%	33	$454	$22,244	24%	13	$627	$24,736	30%
Anchorage	45	$295	$16,680	21%	23	$497	$23,559	25%	11	$738	$26,905	33%
Fairbanks	22	$272	$19,350	17%	14	$362	$15,060	29%	3	$361	$12,671	34%
Juneau	38	$308	$19,628	19%	17	$494	$22,615	26%	3	$464	$19,340	29%
Nome and Bethel	6	$213	$18,548	14%	4	$368	$19,986	22%	—	—	—	—
Administrative cases												
Nonpaternity[3]	51	$206	$12,373	20%	31	$335	$14,901	27%	11	$265	$9,360	33%
Paternity[4]	67	$348	$20,887	20%	8	$275	$12,200	27%	—	—	—	—

1. Number of cases is based upon the number of cases with income data.
2. Average obligor's income is the average annual net income.
3. Nonpaternity cases are cases in which the parents were married.
4. Paternity cases involve children born out of wedlock.

Source of data: Anchorage, Fairbanks, Juneau, Nome and Bethel Superior Court records; 1989 computer records of the Child Support Enforcement Division, Alaska Department of Revenue.

New rules open discipline to public

Continued from page 1

NAMES OF THE PARTIES INVOLVED WILL NOT BE PROVIDED IN THE SUMMARY.] Bar counsel will communicate disposition of the matter promptly to the complainant and Respondent.

• • •

(e) Quarterly Report to court and Board.

The Bar Counsel will provide a quarterly report to the Court and the Board providing information about the number of cases filed and closed during the quarter, the status of pending cases, the disposition of closed cases, and the subject of the grievances received. [THE NAMES OF THE RESPONDENTS WILL NOT BE PROVIDED IN THE REPORT.]

Rule 12. AREA DISCIPLINE DIVISIONS AND HEARING COMMITTEES.

(b) Powers and Duties of Area Division Members.

Upon selection and assignment by the Executive Director of the Bar (hereinafter "Director"), Area Division members will have the powers and duties to

• • •

(2) review requests from Bar Counsel to impose [PRIVATE] admonitions upon Respondents pursuant to Rule 22(d);

• • •

(7) rule on motions for protective orders pursuant to Rule 22(b).

Rule 16. TYPES OF DISCIPLINE AND COSTS.

• • •

(b) Discipline Imposed by the Board or Bar Counsel.

When Bar Counsel has made a finding that misconduct has occurred, the following discipline may be imposed:

(1) [PRIVATE] reprimand in person by the Board, pursuant to Rule 10(c)(8); or

(2) written [PRIVATE] admonition by Bar Counsel, pursuant to Rule 11(a)(12).

• • •

(d) Conditions.

Written conditions may be attached to a [PRIVATE OR PUBLIC] reprimand or to a [PRIVATE] admonition. . .

Rule 21. PUBLIC ACCESS TO DISCIPLINARY PROCEEDINGS.

(a) Discipline and Reinstatement Proceedings.

[AFTER THE FILING OF A PETITION FOR FORMAL HEARING, HEARINGS HELD BEFORE EITHER A HEARING COMMITTEE OR THE BOARD WILL BE OPEN TO THE PUBLIC.] *When a grievance is accepted for investigation under Rule 22(a) after (effective date of rule change), the files maintained by Bar Counsel and the Director pursuant to these rules will be open for public review under policies adopted by the Board except for the following:*

(1) the attorney work product of Bar Counsel and his or her staff; and

(2) information covered by a protective order issued pursuant to Rule 22(b). This includes information which is the subject of a motion for a protective order while the motion is pending.

This Rule will not be interpreted to allow public access to disability proceedings described in Rule 30 *or to grievance matters which were not accepted for investigation, or which were dismissed or closed by private discipline prior to (effective date of rule change) or to deny the Alaska Judicial Council confidential information about attorney applicants for judicial vacancies.*

(b) Deliberations.

The deliberations of any adjudicative body will be kept confidential.

[(c) BAR COUNSEL'S FILES.

ALL FILES MAINTAINED BY BAR COUNSEL AND STAFF WILL BE CONFIDENTIAL AND ARE NOT TO BE REVIEWED BY ANY PERSON OTHER THAN BAR COUNSEL OR AREA DIVISION MEMBERS APPOINTED FOR THE PURPOSES OF REVIEW OR APPEAL UNDER THESE RULES. THIS PROVISION WILL NOT BE INTERPRETED TO:

(1) PRECLUDE BAR COUNSEL FROM INTRODUCING INTO EVIDENCE ANY DOCUMENTS FROM HIS OR HER FILES;

(2) PRECLUDE BAR COUNSEL FROM PROVIDING THE BOARD, THE COURT, OR THE PUBLIC WITH STATISTICAL INFORMATION COMPILED PURSUANT TO RULE 11(E), PROVIDED THAT THE NAME OF THE RESPONDENT IS KEPT CONFIDENTIAL;

(3) DENY A COMPLAINANT INFORMATION REGARDING THE STATUS OR DISPOSITION OF HIS OR HER GRIEVANCE; OR

(4) DENY THE PUBLIC FACTS REGARDING THE STAGE OF ANY PROCEEDING OR INVESTIGATION CONCERNING A RESPONDENT'S CONVICTION OF A CRIME;

(5) DENY THE ALASKA JUDICIAL COUNCIL CONFIDENTIAL INFORMATION ABOUT ATTORNEY FOR JUDICIAL VACANCIES;

(6) PRECLUDE A COURT FROM REVIEWING IN CAMERA A CONFIDENTIAL FILE UPON A DISCOVERY REQUEST MADE PURSUANT TO CRIMINAL RULE 16(B)(7), AND FROM EXERCISING DISCRETION AS TO WHETHER TO RELEASE RELEVANT INFORMATION FROM THE FILE TO COUNSEL PURSUANT TO CRIMINAL RULE 16(D)(3).]

[(d) DIRECTOR'S FILE.

THE FILE MAINTAINED BY THE DIRECTOR, ACTING IN HIS OR HER CAPACITY AS CLERK, WILL BE OPEN FOR PUBLIC REVIEW.]

Rule 22. PROCEDURE.

[(b) CONFIDENTIALITY.

COMPLAINANTS AND ALL PERSONS CONTACTED DURING THE COURSE OF AN INVESTIGATION HAVE A DUTY TO MAINTAIN THE CONFIDENTIALITY OF DISCIPLINE AND DISABILITY PROCEEDINGS PRIOR TO THE INITIATION OF FORMAL PROCEEDINGS SUBJECT TO BAR RULE 21(C). IT WILL BE REGARDED AS CONTEMPT OF COURT TO BREACH THIS CONFIDENTIALITY IN ANY WAY. IT WILL NOT BE REGARDED AS A BREACH OF CONFIDENTIALITY FOR A PERSON SO CONTACTED TO CONSULT WITH AN ATTORNEY. A RESPONDENT MAY WAIVE CONFIDENTIALITY IN WRITING AND REQUEST DISCLOSURE OF ANY INFORMATION PERTAINING TO HIM TO ANY PERSON OR TO THE PUBLIC.]

(b) Protective Orders.

(1) Upon motion, information in the Bar Counsel's or Director's file, which would otherwise be open for review under Rule 21(a), may be kept confidential from the public or from a party to the grievance. The motion shall be granted only if disclosure of the information to be protected would expose attorney-client confidences of any person or subject any person to an unwarranted invasion of privacy. Where a claim of invasion of privacy is made, it must be balanced with the public interest in disclosure.

(2) Information which could be subject to a motion for a protective order shall not be included in the Bar Counsel's or Director's file open for review until the person whose confidences or privacy may be affected has had at least 5 days notice that it will be made public so a protective order may be sought.

(3) The Director shall appoint a member of the Area Division to hear and rule on the motion, unless a Hearing Committee has already been appointed. In that case, the Hearing Committee shall rule on the motion under subsection (k). Motion procedure shall follow the provisions of Civil Rule 77 to the extent practicable.

(4) The protective order shall be tailored in extent and duration to give maximum disclosure consistent with the need for the order. The order may apply to any or all aspects of a grievance, including hearings, and it may apply to all parties. Any violations of a protective order may be punished by sanctions, including the Supreme Court's finding the violator in contempt of court.

(d) Imposition of [PRIVATE] Admonition or Reprimand.

Upon a finding of misconduct, and with the approval of one Area Division member, Bar Counsel may impose a written [PRIVATE] admonition upon a Respondent. A Respondent will not be entitled to appeal a [PRIVATE] admonition by Bar Counsel but may demand, within 30 days of receipt of the admonition, that a formal proceeding be instituted against him or her before a Hearing Committee. . .

In the discretion of Bar Counsel (s)he may refer a matter to the Board for approval and imposition of a [PRIVATE] reprimand by the Board. . .

Rule 24. DISCOVERY; SUBPOENA POWER; WITNESS COMPENSATION.

(a) Subpoenas during Investigation.

At any state of an investigation, only the Bar Counsel will have the right to summon witnesses and require the production of records by issuance of subpoenas. Subpoenas will be issued at the request of Bar Counsel by any member of any Area Division. Subpoenas will be served in accordance with Rule 23. Any challenge to the validity of a subpoena so issued will be heard and determined by any member of any Area Division. [ALL SUBPOENAS ISSUED UNDER THIS SECTION WILL CLEARLY INDICATE ON THEIR FACE THAT THEY ARE ISSUED IN CONNECTION WITH A CONFIDENTIAL INVESTIGATION AND THAT IT IS REGARDED AS CONTEMPT OF COURT FOR ANY MEMBER OF THE ALASKA COURT SYSTEM, A PROCESS SERVER, OR A PERSON SUBPOENAED TO IN ANY WAY BREACH THE CONFIDENTIALITY OF THE INVESTIGATION. IT WILL NOT BE REGARDED AS A BREACH OF CONFIDENTIALITY FOR A PERSON SUBPOENAED TO CONSULT WITH AN ATTORNEY.]

Rule 25. APPEALS; REVIEW OF BAR COUNSEL DETERMINATIONS.

(b) Admonition not Appealable.

A Respondent cannot appeal the imposition of a written [PRIVATE] admonition . . .

PROPOSED CHANGE TO BAR RULE 33.2

These Rules will take effect January 1, 1985. Rule 21 will only apply to those formal proceedings filed after the effective date of these Rules. *Amendments to Rules 21 and 22 made by Supreme Court Order (Number) apply to grievances filed after (the effective date of the amendments.)*

Solid Foundations

By Mary Hughes

Access to justice is a concept with which many of us have struggled with for some time.

For over a decade, politicians have deemed it appropriate to cut public funding of programs which provide a minimal access to justice for some. During the same period of time, pressure has come to bear on the private sector to fund the public deficit and make further contributions by way of time (pro bono service).

Recognizing the crisis not only in funding but also in effectively providing access to justice, the American Bar Association's Consortium of Legal Services and the Public planned and sponsored the Conference of Access to Justice in the 1990s in June of 1989. The conference report was just released by the ABA.

Conference deliberations encompassed an extensive array of subject areas including:

On defining access to justice: The conference determined that "access to justice" and delivery of legal services should not simply be viewed as access to an attorney or the judicial process or individual representation. For both low- and moderate-income Americans, many different approaches to services need to be reviewed.

On need for a right to counsel for civil matter: A right to counsel at public expense in civil matters for indigent persons was supported with an acknowledgment of serious impediments. Looking at such a concept as a long term goal, it was suggested that the ABA as well as state and local bar organizations begin evaluation thereof.

On a comprehensive national legal needs study: A sophisticated national survey was strongly supported in order to develop sound policies and resource allocation principles.

On the need for public education: The provisioning of consumer information relative to the legal system was seen as a lower priority but still of import.

On the need for an effective entry point: Present initial contact resources available were seen by the Conference as inadequate. More effective allocation and development was deemed necessary.

On early substantive intervention: Implementation of more effective intake systems whereby a knowledgeable staff, with the time and expertise, may be able to resolve a legal problem expeditiously was supported. A legal "hot-line" staffed by attorneys was used as an example. Such a concept was contrasted to a receptionist whose goal is to screen out cases rather than to attempt to resolve issues.

On lawyer referral services: Substantive screening before referral was viewed as the only way in which a referral service can function effectively. Again, the Conference focused on the provisioning of effective legal advice at the earliest possible time.

The genuine concern of the Conference in the promotion of access to justice was evident throughout its report. However, thelofty goals, some of which are described above, not only require the dedication of the ABA and local and state bars but each one of us, as lawyers. Our pro bono efforts and money are needed to fulfill the objective of EC 8-3:

> The fair administration of justice requires the availability of competent lawyers. Members of the public should be educated to recognize the existence of legal problems and the resultant need for legal services, and should be provided methods for intelligent selection of counsel. Those persons unable to pay for legal services should be provided needed services....

In Alaska, support of the Alaska Pro Bono Project is essential to provision legal services to Alaskans who are disadvantaged. Lawyer and law firm enrollment in the Alaska IOLTA program, which in 1991-2 provided one hundred percent of the Alaska Pro Bono Project's funding, would also appear imperative. It costs nothing and provides those needed funds for the ever-increasing demands for legal services.

Drug cases increase in state courts nationwide

Courts in some areas of the country, especially in urban areas, must deal with the increasing number of drug cases that comprise their dockets. In Cook County, Illinois, nearly half of the felony cases pending in criminal court involve defendants charged with drug offenses. It is estimated that between 50 to 85 percent of the males and 44 to 87 percent of the females arrested in New York City test positive for drugs. Attorneys in Boston also assert that there are too few judges in too few courtrooms to handle the increasing number of drug-related cases.

In response to this problem, new court and case processing procedures have been promulgated, and drug courts or courts with special drug sessions have been established. In Pierce County (Washington) Superior Court case management techniques are used to help reduce the amount of time required of the courts to resolve drug cases. Simple and complex drug cases are separated based on their management requirements, and judicial procedures and time limits are assigned to the cases to expedite case disposition and to efficiently use court resources. Continuances are only granted under compelling circumstances. In Seattle, prosecutors are deputizing volunteer lawyers from private firms to act as pro bono prosecutors in drug cases. In New Jersey, 20 trial court judges were recently reassigned to hear and dispose of an estimated 2,000 drug cases. Drug courts have been established in New York City, Jersey City, Dade County, Florida and Cook County, Illinois. Proponents of drug courts claim that it enhances the prosecution of drug cases, uses court personnel efficiently, and insures the consistency of drug case sentencing.

Various techniques that have been used to try to effectively manage felony drug cases include time standards for expedited case processing; early prosecutorial screening and charge decisionmaking (experienced prosecutors and rapid lab test turnaround capacity are needed); early appointment of defense counsel: early and open discovery; early resolution of motions; firm trial dates; effective trial management (pre-trial preparation, minimized interruptions, full trial days); and effective use of management information (monitor case processing times, monitor continuance rates, identify problems).

The foregoing article was distributed by the National Center for State Courts and the State Justice Institute. The organizations compile the annual "Report on Trends in the State Courts," where 98 percent of cases are heard. Other trends will be covered in future issues of the Bar Rag.

ABA covers many topics at midyear meeting

BY DONNA WILLARD

The city of Dallas, Texas hosted the American Bar Association's 1992 Midyear Meeting from January 29 through February 4. The meeting was highlighted by the release of the "ABA Blueprint for Improving the Civil Justice System." The report, prepared by a working group representing a number of Association entities, examined and expanded upon the "Agenda for Civil Justice Reform" released at the 1991 Annual Meeting by Vice President Dan Quayle.

In releasing the ABA Blueprint, President Talbot "Sandy" D'Alemberte noted that the Vice President's agenda did not go far enough in examining two of the most important problems facing the justice system—long term underfunding and lack of access for the poor and middle class. President D'Alemberte reminded the House of the saying of Justice Learned Hand, who once said that if democracy were to be preserved there must be one commandment: "Thou shalt not ration justice."

The House also was privileged to hear remarks on Tuesday morning, February 4, from the Chief Justice of the United States. The Chief Justice spoke about his recent activities looking at the future of the federal courts. Specifically, he asked the ABA for assistance in fighting legislative efforts which would expand the workload of the federal judiciary by the enactment of legislation creating new federal causes of action. He also thanked the ABA for helping to ensure adequate salaries for the federal judiciary.

ADMINISTRATIVE LAW MATTERS

1. Rules of Evidence for Administrative Agency Adjudications

The House defeated a resolution supporting the enactment of uniform rules of evidence for certain formal adversarial adjudications of federal administrative agencies. The proposal was for rules to be modeled after the Federal Rules of Evidence and which would replace what are now more than 280 different sets of regulations controlling the admissibility of evidence in such proceedings. Opponents argued against a mandated provision, arguing for further examination before adopting any such rules.

2. Rules of Evidence for Administrative Agency Adjudications

The House *approved* a resolution by the Federal Bar Association encouraging federal agencies to examine whether rules of evidence patterned after the Federal Rules of Evidence should be utilized in certain administrative adjudications. This resolution is a related recommendation to the one immediately above, but is not mandatory.

3. Agency Rulemaking Impact Analyses

The House *approved* a resolution urging that the Executive Branch and Congress exercise restraint with respect to required rulemaking impact analyses under which agencies now operate. The resolution urges such restraining in the overall number of analyses, that both branches assess the usefulness of both existing and planned impact analyses, and that they ensure that agencies adhere to both the ABA and the Administrative Conference of the United States' recommendations pertaining to such impact analysis requirements. The report reflects that because some currently required reviews are not, and should not, be taken seriously, this retention of these requirements may diminish the importance of other reviews.

4. Retroactive Legislation and Rules

The House *approved* a resolution recommending that, as a matter of public policy, retroactive legislation and retroactive rules that impose new legal duties and liabilities be avoided. Even where federal agency has statutory authority to adopt such retroactive legislative rules, it should do so only after determining that the need for retroactivity clearly outweighs the costs imposed and that it is otherwise fair under the circumstances. The resolution also provides that where the agency authority to adopt retroactive rules is unclear, courts should not presumptively disfavor them where the rule protects one who relied on a rule subsequently declared invalid or where it confers benefits without imposing duties or liabilities. The resolution specifically does not address civil rights statutes.

ANTITRUST LAW MATTER

The House *defeated* a resolution opposing certain portions of proposed Congressional omnibus crime legislation relating to telemarketing fraud. While supporting the purposes of the legislation which are to enhance the ability of the FTC to combat telemarketing fraud, it opposed enforcement by state law enforcement officials and any provision which would expand the venue provisions of Section 13 of the FTC Act. Opponents of the resolution argued that all 50 States' Attorneys General were united in seeking to assist the FTC in combating telemarketing fraud. The legislation would maximize enforcement resources and create an effective enforcement regime by giving the Attorneys General the flexibility and discretion to combat the fraud as it is discovered.

CITIZENSHIP EDUCATION

The House approved a resolution reaffirming the ABA's support for citizenship education in elementary and secondary schools. It also urges the support of effective citizenship education in public policy at the federal, state and local levels.

CIVIL RIGHTS MATTERS

1. Sexual Harassment

"The House *approved* a resolution urging the ABA to recognize that sexual harassment is a serious problem in all types of workplace settings, including the legal profession, and constitutes a discriminatory practice which must not be tolerated in any work environment. It further urges the ABA to educate the profession as to the scope and harm of such sexual harassment, and that the profession take a leadership role in providing education toward eradicating sexual harassment. Finally, the resolution calls upon the ABA itself to endeavor to insure that all Association staff work in a professional atmosphere free of discriminatory practices, including sexual harassment.

CRIMINAL LAW MATTERS

1. Amendment to ABA Standards for Criminal Justice

The House *approved* the first of five resolutions proposed by the Criminal Justice Section urging the adoption of the February 1992 black letter amendments to Chapter Three, "The Prosecution Function" of the Second Edition, *American Bar Association Standards for Criminal Justice*. These amendments represent the culmination of over three years of work by various ABA entities. The ABA's Model Rules of Professional Conduct are a primary source of changes in these revised standards.

2. Juvenile Justice and Delinquency Prevention Act

The House *approved* a resolution supporting the reauthorization of the Juvenile Justice and Delinquency Prevention Act, but also urging Congress to conduct comprehensive public Hearings to determine the Act's effectiveness and to examine its future goals and objections. This latter condition includes guarantees of juveniles' right to counsel, a commitment to alternatives of confinement, and strict Congressional oversight of the Act and its implementation. The ultimate goal is an aggressive, well-targeted federal role that will alleviate current problems in this country's juvenile justice system.

3. Illiteracy Among Criminal Offenders

The House *approved* a resolution urging the various components of the criminal justice system to take steps to increase literacy among criminal offenders and supporting mandatory adult basic education programs for criminal offenders. The resolution lists certain terms and conditions under which such mandatory literacy programs should be established to ensure high quality programs and coordinated efforts within the different factions of the criminal justice system, i.e., within prisons, jails, in community corrections programs, and for individuals on parole.

4. Adult Community Corrections Act

The House of Delegates *approved* a resolution urging each State and territory to enact an Adult Community Corrections Act. Using the "Model Adult Community Corrections Act" of May 9, 1991, as an example, its goal is to facilitate the establishment of a comprehensive adult community corrections program. The United States now has the highest per capita imprisonment rate of any industrialized country in the world. Cognizant of the lack of sentencing options available to trial court judges, this resolution seeks to ensure that a wide variety of criminal sanctions are available to match the wide array of criminal behavior.

5. Federal Rules of Criminal Procedure

The House *approved* a Criminal Justice Section resolution urging the Judicial Conference to recommend amendments to the Federal Rules of Criminal Procedure which would make four rule changes. The specific changes would be to: 1) Rule 16(a)(1)(E) concerning the timing of *Brady* disclosures; 2) Rule 16(a)(1)(A) as to the scope of Rule 16 "statements" for organizational defendants; 3) Rule 17(c) addressing the procedure for issuance and return of pretrial subpoenas *duces tecum*; and 4) Rules 16(a)(1)(D) and (b)(1)(B) mandating pretrial disclosure by both sides of intent to call experts for use in cases-in-chief.

6. International Criminal Court

A resolution by the Task Force on an International Criminal Court concerning the establishment of such a Court was withdrawn.

FAMILY LAW MATTERS

1. Guardians ad Litem

The House *approved* a resolution urging that every state and territory assure that each abused and neglected child be represented by a trained guardian ad litem. It also urges bar associations and law schools to become involved in setting standards of practice and in providing multi-disciplinary training for such guardians ad litem. Finally, the resolution encourages each jurisdiction to develop guidelines to determine when the appointment of the guardian ad litem is necessary to protect the best interests of the child.

2. Award of Survivor Annuities to a Former Spouse

The House deferred a resolution recommending that state and territorial marital property laws be amended to give their courts power to award a survivor annuity to a former spouse. While federal law recognizes state court orders for survivor annuities, not all state courts have held that they have the power to issue such orders. Such authority is considered necessary to assure security for divorced spouses of federal employees. The matter was deferred at the request of the Taxation Section.

3. Garnishment of Wages for Attorneys Fees and Costs

The House *approved* a Family Law Section resolution recommending that the Social Security Act be amended to authorize the garnishment of wages and pensions for attorneys' fees, interest, and court costs in connection with child support and alimony orders without the necessity for the Court Order specifying that they are actually for child support or alimony. The purpose is to bring the regulations in line with perceived legislative intent which no where ties the ability to recover these costs through garnishments to specific language in an order deeming them to be alimony or child support.

4. Survivor Annuities for Civil Servants

The House also *approved* a resolution recommending that 5 USC 8341(f) be amended to permit payment of a survivor annuity to the surviving spouse of a terminated civil service or Congressional employee covered by the Civil Service Retirement System who dies entitled to a deferred annuity. At present, no survivor annuity is payable to an employee so situated from the time that person leaves the civil service until such time as that person is eligible to retire and applies for the annuity payment. This resolution seeks to remove what is, in essence, a penalty upon surviving spouses of former civil servants who have died before becoming eligible to receive benefits (normally age 62).

5. Innocent Later Spouse Survivor Benefits

A resolution was *approved* which recommends payment of survivor benefits under both the Civil Service Retirement and Federal Employees Retirement Systems be made to the innocent later spouse of a covered employee who was not divorced from a previous spouse. The purpose is to address the inequity that results where an employee remarries where his/her first marriage has not been legally dis-

Continued on page 18

A snowy tale of spring romance in the '60s

BY DAN BRANCH

It's Springtime in Ketchikan. The rain has tapered off a bit and purple crocus blooms are showing alongside the Tongass Avenue tunnel. Robins and tulips can't be far behind. The sun will be shining next. It's enough to turn the attention of even grownups to love.

My friend Mike spoke of love the other day. When he brings the subject up he is usually under the spell of his latest *femme fatale*.

This time, he didn't describe the swish of his new love's hair against the folded back hood of her Helly Hanson parka, or the outline of a dainty ankle gracefully revealed on the surface of her tight-fitting cannery boot. Instead, Mike transported both of us with words to the naval base on the Spanish coast where he first met Mandy.

Mike was a young naval aviator at the time, defending Europe from monolithic communism. Six months later he would fly carrier jets over the jungles of Viet Nam.

His Spanish tour involved touch-and-go landings by day and reconnoitering the tourist singles bars at night. During an evening maneuver, Mike spotted Mandy's athletic lines.

Mike made a smooth bar approach and soon had permission to sit next to the target. They struggled at first for a conversation topic. Mandy was a student at Smith College taking a semester off to broaden herself. Mike was looking for something less demanding. He was about to give up when conversation turned to Mandy's favorite sport—skiing.

Mandy loved to clamp on skis, glide down the fall line of an advanced run and christie her way to the lodge. Mike didn't understand these ski terms but he saw the fire that grew in her eyes when she spoke them. "I love to ski too," He lied. ""Great," she said, "Meet me at Garmisch next week and we'll share the slopes."

Hoping to share a featherbed instead, Mike quickly agreed to the plan. The next morning he arranged for leave and bought a train ticket to Germany. Mandy left the day after for Nice.

Mike spent his time without Mandy studying the sport of skiing. He checked out a book from the base library and practiced the sharp turns that would, he hoped, move him down the slopes and into the heart of his lover. Snow was hard to find in southern Spain so Mike tied on his combat boots and jumped up and down on a chair. This provided hours of entertainment for his roommate who from then on referred to Mike's chair as "the mogul." Too soon it was time to board the northbound train to Mandy.

Mike rode the rails for 26 hours. He didn't have enough money for a berth so he shared the trip with five strangers in a budget sleeping car. During the day the passengers sat three abreast on bench seats. At night a porter pulled down six narrow sleeping ledges to form triple bunk beds on each side of the compartment.

Mike didn't sleep much on the train. His first night a beautiful blond from Finland kept him up until two in the morning with a series of sauna stories. He spent the next night arguing democracy with a new age British communist from Leeds. Mike was in tough shape when the train pulled into Garmisch.

Looking up into the high mountains surrounding the Bavarian town, Mike secretly hoped that Mandy would be a no show. But she was there with apres ski boots on.

After dropping off Mike's luggage at a bed and breakfast, the young lovers boarded a bus to the ski slopes.

When they arrived at the ski fields Mike knew he would die.

Mandy popped on her ski gear and promised to wait for him at the top of chair lift four.

"We can warm up the Danzig run and then try our skill on Antwerp and Warsaw," she said as she glided toward the lift line. Mike, a student of war in the 2Oth century, didn't appreciate the idea of naming the ski runs after German war victories. (After all, they were also Allied defeats).

My friend stalled around the ski rental shop for an hour asking pointless questions about the equipment. Finally Hans, the manager, forced him to try on a set of leather buckle boots. Poles and skis came next.

Somehow Mike mounted his skis and grunted his way to the ski lift line. He watched the other skiers casually hop out in front of the moving chair and then sit back as it lifted them up and over the ski slope. Mike graciously allowed 30 people to go ahead of him until the lift tripped a circuit breaker. This stopped the line of chairs and allowed Mike to plop his bottom down on one before it regained momentum.

"That wasn't so bad," he thought as he rode to the top of the hill. On the long ride Mike considered the next step—getting off the chair lift. He watched the skiers in front of him disembark and learned to his horror that he would have to leap off the moving chair and actually ski down a mean looking little hill before reaching level land. Courage failed him at the top so he rode the chair back down the hill. "Maybe next time," he told the lift operator as he passed him on his way back up the hill.

Mike didn't hop off that time or any other. He rode the lift for 45 minutes until the operator stopped the lift so he could get off at the base of the hill. Defeated by ignorance, Mike returned the ski equipment to Hans and retreated to the lodge.

Fortune smiled upon him when he turned his ankle negotiating the steps into the bar. The resulting limp helped him convince Mandy that he had been taken off the hill in a ski patrol toboggan.

Over dinner that night Mandy tried to take Mike's mind off his injury by relaying a delightful story about some fool who rode the chair lift for two hours because he didn't know how to get off of it. Painful as it was, Mike accepted this as confirmation that his little lies had worked.

Mike ended his story there. When I asked him if he enjoyed other successes with Mandy he refused to answer. I guess he is too much of a gentleman to kiss and tell, even on a nice spring day.

DIAL
800-478-7878

FOR CLE & BAR INFO

The Alaska Bar Association now has an 800 information number thanks to the Alaska Bar Foundation. The outgoing tape message on this number gives you the Bar office hours, address, phone, fax, upcoming CLEs, and other program information—such as the Bar Exam and MPRE dates and locations.

If there is other information that you think would be helpful to have on this tape, please call Barbara Armstrong, CLE Director, at the Bar office at 272-7469.

• American Bar Association report

Continued from page 17

solved. Current law allows benefits to be paid to only one spouse. An analogous problem under Social Security was recently resolved to authorize payment to both spouses in appropriate circumstances.

HEALTH CARE MATTERS

1. Euthanasia

The House defeated a resolution by the Beverly Hills Bar Association recommending that all jurisdictions enact statutes permitting voluntary aid in dying to terminally ill persons who request such aid in ending their own lives. The resolution recommended that such statutes provide minimal safeguards including a provision that such aid be provided only by trained and licensed medical doctors or physicians, and that any person, entity or institution may, for moral or ethical reasons, be permitted to decline to provide such assistance to a terminally ill person. The principle argued on behalf of its proponents is that such measures would preserve control over the life and death decision for a dying person. Opponents argued that such a provision goes one step too far, and that it is not an issue in which the ABA should become involved. Others argued that such a resolution would be fraught with coercion. The members of the judiciary who are in the House abstained from voting.

2. Organ and Tissue Donations

The House *approved* a resolution supporting efforts to educate the public, the legal community and clients about the critical need for organ and tissue donations. It further urges coordinated efforts with the medical community and others involved in organ and tissue transplantation. Finally, the resolution urges all states to enact the 1987 version of the Uniform Anatomical Gift Act with an amendment to that Act providing that an agent under a durable power of attorney may be granted authority to effectuate the principal's document of donation.

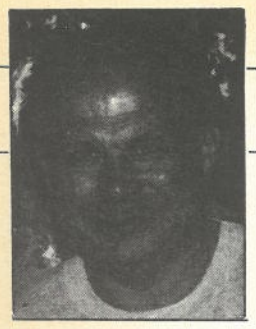
3. Long-Term Care Needs

The House *approved* a resolution supporting the adoption of specific federal, state and territorial legislation, regulations and other initiatives which encourage the appropriate use of private insurance, employment related benefits and other mechanisms to address the long term care needs of our aging population. Specific legislation includes possible tax law changes and interpretations to foster the development of long-term care benefit mechanisms, better enforcement of existing consumer protection laws to protect consumers in this area, and the initiation of public and private options to fund and deliver both home and community based long-term care.

4. NIH Research on Women's Health Issues

The House *approved* a resolution supporting federal legislation to include women and minorities, where appropriate and feasible, in all National Institutes of Health clinical trials and to appropriate funds for the NIH to study certain ailments affecting women. The resolution further supports legislation to permanently authorize an NIH Office of Research on Women's Health and to create contraceptive and fertility research centers. Finally, the resolution also supports legislation to permit carefully regulated, federally funded fetal tissue transplantation research under specifically stated restrictions.

Next issue: International law, judiciary, legal profession and other matters.



Movie Mouthpiece

By Ed Reasor

I have yet to meet a woman attorney who hasn't read Pat Conroy's book *The Prince of Tides*.

Of those who have seen the movie as well, the opinion seems to be unanimous that the movie only tells half the story—that the novel still has inside its covers another film about the same characters.

I have met several male attorneys who have not read *The Prince of Tides* (including yours truly), although they have seen and enjoyed the film. It becomes important because *The Prince of Tides* has been nominated for seven separate Academy Awards, one of which is for best screenplay from materials previously published (the screenplay writers are Pat Conroy and Becky Johnston). The novelist (*The Lords of Discipline*) turned screenwriter with help.

Is this to say that *The Prince of Tides* is a woman's film? True it stars Barbra Streisand as a woman psychiatrist (Barbra also directed), helping a would-be-suicide (Melinda Dillon), but more screen time is devoted to the victim's twin brother, Nick Nolte (who was nominated as Best Actor) than to the female characters: Streisand, (who received no nomination); Blythe Danner (who plays Nolte's southern wife); or Kate Nelligan, who plays the ambitious wife of a shrimper and matriarch of the clan. Nelligan has been nominated for Best Supporting Actress.

The film's sound begins generally in the first person singular, a voiceover by Nolte, an unemployed high school football coach. He's been asked to come to the Big Apple to help Streisand unwind the myriads of torment inside his brilliant sister, whose last attempt at suicide was for real. We view beautiful cinematic change from the sea tides of the Carolinas to the tides of people in New York City.

Who's crazy anyway?

Dillon, as Nolte's sister, actually loved NYC before her suicide attempt, writing a successful book of poetry, and enjoying the noise and commotion of the city because it was nothing like the quiet solitude of her childhood. Or was it?

Early in the first reel we learn that the shrimper's wife was not much of a mother to either twin, brother or sister, both of whom now in adult life still suffer from some terrible tragedy that happened while with their mother in early childhood. What effect does seriously flawed parenting have on children? Mother has now remarried a rich old Southern man and seems above all the hassle her grown children are now causing her. Why does Nolte hate her and why does his sister want to end it all? The reason is shocking and quite realistic.

The Prince of Tides seemingly is about the power of tides to set a biological rhythm from the dark days of our childhood, ebbing and flowing with our emotions, as we make mistakes and yet mature.

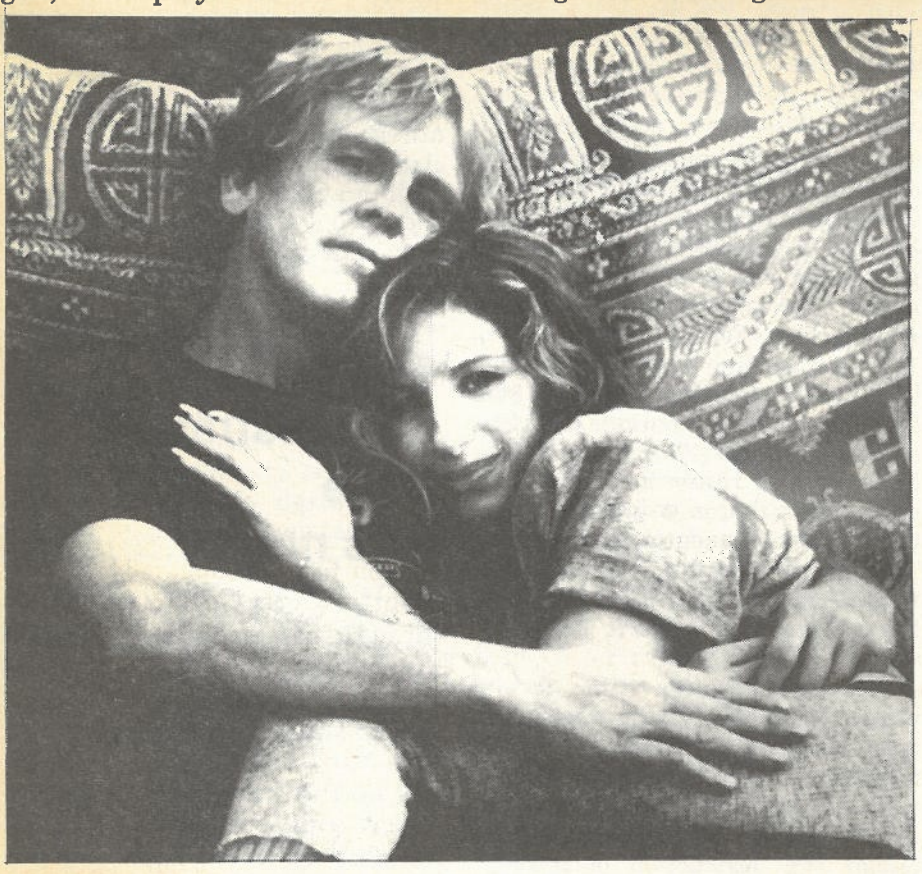
It's a bit ambitious: There's the love story of country-bumpkin Nolte having an adulterous affair with the very sophisticated and intelligent Streisand; there's Nolte the man finding the reason for his self-destructive behavior in the noisiest city on earth and by memory overcoming obstacles he erected to serenity; and then there's the teacher-student story, when Nolte helps Streisand's musical son learn to tackle and understand the manly game of football. (The son is actually played by Streisand's real son, Jason Gould, and he is, in fact, quite good. He looks a lot like his father Elliot, but follows the directions of mom like this was his fifth or sixth movie — a welcome surprise).

The cinematography in *The Prince of Tides* is outstanding, winning for Stephen Goldblatt an Oscar nomination. This, coupled with the Oscar nomination for best art direction by Steven Grahan, makes perfectly good sense. The tides and shrimping techniques as well as sunset disappearances are breathtaking. Couple that with the Oscar nomination for best original score, the haunting music of violins, contrasted with Southern remembrances and this is indeed an enjoyable film.

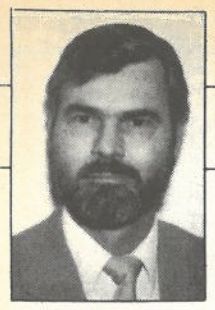
It is also a bit Freudian, one where a realistic hero (Nolte) must go back to the ghost of his past and overcome it so that he can enjoy his freedom in the present. *The Prince of Tides* is not the Best Picture of 1991 (although, yes, it was nominated for that too), nor is Nolte the Best Actor, (although a nomination in that category suggests that he might be). Robert De Niro in *Cape Fear* is by far superior, but women did not like *Cape Fear*. Many avoided the film altogether.

In *The Prince of Tides*, Nolte ends the film as a Southern man who must go back to his wife and children, continue as high school coach while at the same time forgiving and loving his erring parents, leaving the more attractive Streisand in NYC to help other victims. Wow! No wonder women attorneys love this film.

Lila (Kate Nelligan), the ambitious wife of a shrimper and matriarch of the Wingo clan, watches the sun set with her children (l. to r.) Luke (Grayson Fricke), Savannah (Tiffany Jean Davis) and Tom (Justen Woods) in *the Prince of Tides*, a Columbia Pictures release.



Tom Wingo (Nick Nolte) a Southern high school teacher, and Susan Lowenstein (Barbra Streisand), a New York psychiatrist, fall in love when they are brought together by a crisis involving Tom's twin sister.



BANKRUPTCY BRIEFS

By Thomas Yerbich

Three major areas of nondischargeable taxes frequently overlooked when initially interviewing clients regarding bankruptcy are the failure to file returns [11 USC § 523(a)(1)(B)(i)], fraudulent return and a willful attempt to evade or defeat taxes [11 USC § 523(a)(1)(C)].

In obtaining background information, nearly every attorney checks to see when taxes were assessed to determine applicability of the 240-day rule. However, just because a tax has been assessed for a particular taxable year does not necessarily mean that the taxpayer filed a return. The Internal Revenue Service could have prepared a "dummy" return for the taxpayer to facilitate processing of proposed assessments after the Service had determined the taxpayer's income from sources other than a taxpayer filed return [26 USC § 6020(b)]. Not infrequently tax, as well as bankruptcy, practitioners ask the question "if the IRS has filed a return on the taxpayers behalf more than 2 years ago, is the tax dischargeable"? Unfortunately for the taxpayer client, the answer is NO.

Every reported decision addressing the issue has held that a "forced filing" by the Internal Revenue Service *does not* constitute a filed return sufficient to permit discharge under § 523(a)(1)(B). [*In re Chastang*, 116 BR 833 (Bkrtcy.M.D.Fla. 1990); *In re D'Avanza*. 101 BR 787 (Bkrtcy.M.D.Fla. 1989); *In re Hofmann*, 76 BR 764 (Bkrtcy.S.D.Fla. 1987) - fact assessment was more than 13 years previously for tax year more than 18 years ago held to be irrelevant; *Matter of Crawford,* 115 BR 381 (Bkrtcy.N.D.Ga. 1990); *In re Pruitt*, 107 BR 764 (Bkrtcy.D.Wyo. 1989)]. This holding has also been extended to state taxing authorities. [*In re Haywood*, 62 BR 482 (Bkrtcy.N.D.Ill. 1986)] Yet, it has been held that where a taxpayer signs a form "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment," unaccompanied by schedules, constitutes the equivalent of filing a return by the taxpayer if the Service has already prepared a summary of the taxes due and owing and debtor confirms those assessments of tax liability were correct. [*Matter of Carapella*, 84 BR 779 (Bkrtcy.M.D.Fla. 1988); *cf.* 26 USC § 2060(a); *In re Haywood, supra*].

The second frequently overlooked area is the fraudulent return. Initially, the practitioner should review the taxpayer's assessment record to determine if a civil fraud penalty has been imposed; if so, the issue of nondischargeability under § 523(a)(1)(C) will unquestionably become an issue.

However, absence of a civil fraud penalty does not necessarily render otherwise nondischargeable taxes dischargeable, irrespective of whether or not the assessment is the result of an audit. Interpreted in light of 11 USC § 102(5), § 523 (a)(l)(C) must be read in the disjunctive. Thus, even if the returns are not fraudulent in and of themselves, if the taxpayer's conduct constitutes a willful attempt to defeat or evade taxes, the third part of the trilogy is brought into play and the taxes nondischargeable. [*In re Gilder*, 122 BR 593 (Bkrtcy.M.D.Fla. 1990); *In re Fernandez*, 112 BR 888 (Bkrtcy.N.D.Ohio 1990)]

There are few decisions of the bankruptcy courts construing the willful evasion element of § 523(a)(1)(C). In addition, the distinction between willful evasion and fraud in the context of the Internal Revenue Code becomes somewhat blurred. This stems in part from the difference between the civil penalty for tax fraud [IRC § 6653(b)] (there being no specific civil penalty for tax evasion) and the distinctly different and separate treatment given to criminal tax evasion [IRC § 7201 - $100,000 fine and 5 years imprisonment] and tax fraud [IRC § 7207 - $10,000 fine and 1 year imprisonment].

The Tax Court has historically treated the civil tax fraud penalty of IRC § 6653(b) as including a specific intent to evade a tax believed to be owing [*Habersham-Bey v. Commissioner*, 78 T.C. 304 (1982)]. At least one bankruptcy court has held that the precedents construing IRC § 6653(b) provide persuasive guidance for construing the "willful evasion" element of § 523(a)(1)(C) [*In re Gilder*, 122 BR 593 (Bkrtcy.M.D.Fla. 1990); see also *In re Carapella*, 105 BR 86 (Bkrtcy.M.D.Fla. 1990); *In re Kirk*, 98 BR 51 (Bkrtcy.M.D.Fla. 1989)].

One interesting argument that has arisen in this arena is whether a willful attempt to evade payment falls within the nondischargeability ambit of the "willful evasion" element of § 523(A)(1)(C). Surprisingly, there is a split of authority on this issue.

In *In re Gathwright* [102 BR 211 (Bkrtcy.D.Ore. 1989)], the bankruptcy court, comparing § 523(a)(1)(C) with IRC § 7201, held that, while § 7201 specifically proscribed willful attempts to evade payment, § 523(a)(1)(C) did not. Thus, the *Gathwright* court reasoned, in the absence of any indication that Congress intended different meanings for the phrases in the different codes, evidence of a willful attempt to evade or defeat payment was irrelevant to a determination of nondischargeability under § 523(a)(1)(C).

In *In re Jones* [116 BR 810 (D.Kan. 1990)], the district court rejected *Gathwright* holding that a willful attempt to evade payment rendered a tax nondischargeable under § 523(a)(1)(C). In rejecting the *Gathwright* approach, *Jones* cited several bases. (1) The language "in any manner" was sufficiently broad to include attempts to evade payment. (2) Misgivings about using a criminal statute to interpret a civil statute, even though exceptions to discharge are to be strictly construed in favor of the debtor. (3) Would render the language superfluous because, without including an attempt to defeat collection, it was hard for the court to conceive how a debtor could willfully attempt to evade or defeat a tax without also filing a fraudulent return. (4) Common meaning of the term "evade" with respect to taxes includes "failure to pay." (5) the legislative history of the 1966 amendment to § 17(a)(1) of the Bankruptcy Act which rendered for the first time some tax obligations dischargeable, clearly indicated an intent to provide relief for the financially unfortunate but not to create a tax evasion device.

With respect to this issue, the author must concur with the *Jones* rationale. What the *Gathwright* court fails to address is how a "willful attempt to evade payment" does not also constitute a "willful attempt to evade or defeat a tax." It seems to the author to be illogical to assume that Congress, intentionally or unintentionally, intended to discharge tax liability where the debtor has reported the tax as due but "willfully attempted to evade taxes" by taking deliberate and affirmative action to avoid collection. This is true whether through uncooperative or obstructive conduct intended to thwart or mislead the Revenue Officer or an out-and-out concealment of assets [*U.S. v. Mollet*, 290 F2d 210 (2nd Cir. 1961)].

The following (neither all-inclusive nor exhaustive) is a synopsis of those frequently encountered activities that the courts have found supported the imposition of a civil fraud penalty or a finding of guilt in criminal tax evasion cases. The existence of any of these factors should serve as a "red-flag" alerting the practitioner to the very real probability that the Service may challenge discharge of otherwise dischargeable tax liabilities.

The most common is, of course, omission of income [*Conforte v. Commissioner*, 74 TC 1160 (1960) *rev'd on other issues & appeal dism'd* 692 F2d 587 (9th Cir. 1982) *stay den.* 459 US 1309]. This includes a failure to report personal expenses paid by a corporation [*U.S. v. Proner*, 405 F.2d 943 (2nd Cir. 1969) *rev'd on other grounds* 395 US 823 (1969)], or a consistent pattern of substantial understatements of income [*Lollis v. Commissioner*, 595 F2d 1189 (9th Cir. 1979)]. Claiming false deductions [*Price v. Commissioner*, 88 TC 860 (1987)] or false exemptions [*Daniels v. Commissioner*, TC Memo 1981-58] may also result in a denial of discharge. Filing a W-4 claiming either excessive exemptions or to be "exempt" [a gambit long popular with Alaskan's] is also indicative of fraud [*Habersham-Bev v. Commissioner, supra*].

Yet another area ripe for a nondischargeability finding involves books and records: failure to maintain records [*Lollis v. Commissioner, supra*]; maintaining a double set of books and records and/or the destruction of records [*Spies v. U.S.*, 317 US 492, 63 SCt 364 (1943)]; or ignoring books and records in preparing one's return [*U.S. v Cramer*, 447 F2d 210 (2nd Cir. 1971) *cert. den.* 404 US 1024].

Another problem fact situation involves the taxpayer who fails to file returns for several years then files them all at once [frequently because someone from the Service, perhaps a Special Agent from CID, was making inquiries]. The usual excuse is that, because the taxpayer had missed a few years, the taxpayer continues to fail to file for fear of prosecution for past failures to file. This excuse is usually rejected and the pattern of failure to file treated as an indicium of fraud [*Lord v. Commissioner*, 525 F2d 741 (9th Cir. 1975)].

In defending a nondischargeability action brought by the Service, always bear in mind that the burden is on the Service to establish by a preponderance of the evidence that the elements making the tax debt nondischargeable exist, in particular "willfulness." "Willfulness" does not exist simply because the taxpayer/debtor was negligent, ignorant, careless or even stupid. Moreover, good faith reliance on professional advice or an honest difference of opinion as to the proper application of the tax code is a valid defense [*Estate of Spruill*, 88 TC 1197 (1987)].

Where there is a substantial tax liability, reliance on the "3-year/2-year/240-day" rule can lead to an unpleasant shock when the Service trundles out § 523(a)(1)(B)(i) [the debtor did not file a return] or § 523(a)(1)(C) [the debtor filed a fraudulent return or willfully attempted to evade or defeat the tax]. When the client learns that a tax liability the client was told would be discharged is not, in fact, discharged, the ensuing scene in the attorney's office can be best described as something less than pleasant. Although clients detest anyone, even their own attorneys, delving into such areas, it is best to ask the tough questions early or risk being caught flat-footed and embarrassed later. You can bet your bottom dollar that the Service probably knows the answers so you had best be prepared to tackle the issues yourself. Finally, if you are not conversant with tax law, associate or consult with a tax specialist — it may just save not only your client from a massive case of heartburn, but your malpractice carrier as well!

Alaska Administration Code gets new publisher

Butterworth Legal Publishers, through its subsidiary Equity Publishing, was recently awarded the contract to publish the Alaska Administrative Code. The April issue of the Register will be the first to be published under the new four-year contract. Equity Publishing has been publishing statutes and administrative codes for forty years. Butterworths has been a major legal publisher since 1818 in England with offices all over the world. The U.S. offices of Butterworths were established in the early 1980s. You may reach the Equity Division of Butterworths by calling 1-800-637-5012.

TANANA VALLEY BAR

Dirty rotten kidnapping shocks Fairbanks

BY ALY CLOSUIT &
BAR RAG STAFF

Members of the Tanana Valley Bar Association, assisted by the Alaska State Troopers sort of, have launched a worldwide investigation to solve the felonious kidnapping of the TVBA mascot, Miss Embraceable Ewe, aka Surely the Sheep. She also is known as Caressable Ewe.

Meanwhile, the TVBA has agreed to raise the $400 billion in ransom demanded by the kidnapper (or kidnappers.) "I think we'll raise it; it will just be a matter of time," said a TVBA member who wished to remain anonymous.

The inflatable mascot disappeared from the TVBA Fourth of July party on or about Jan. 31, 1992. Miss Ewe, the well-loved symbol of the TVBA and companion of local attorney Dick Madson, initially was believed to have left the party on her own, but foul play was suspected Feb. 28, when Vice President Chris Zimmerman and Treasurer Bob Noreen received ransom notes and a photograph of the victim. Investigation was immediately shifted to Anchorage, when sharp eyes identified the blindfolded Miss Ewe standing naked on a sheepbox outside the Anchorage ourthouse.

Noreen does not support payment of the ransom. "How do we know this is our sheep," he demanded of members Mar. 4. "But as TVBA treasurer I accept the responsibility for raising the funds to cover the ransom...I believe that the best solution is to ask the divorce attorneys of Alaska to pledge their accounts receivable. This, alone, should cover the ransom."

Zimmerman also does not support payment of the kidnapper's demands, believing that this is the TVBA's opportunity to trade up to an inflatable doll.

"Just pay the money--I want her back," pleaded Madson.

"We're just devastated about it," said Madson in a *Fairbanks Daily News Miner* interview earlier this month. "She was wonderful. She just stood up there and was very dignified," he said. "She reminded us of what our real function in life was."

Two suspects are under investigation: Seth Eames, director of the Alaska Legal Service Pro Bono program, Anchorage; and former Maximum Leader Dan Cooper, who was the last person to be seen with the sheep alive.

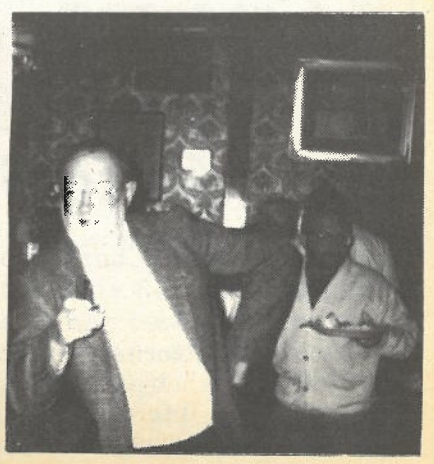
Cooper denies personal involvement with the crime, charging that the allegations against him are a direct result of "mass hysteria."

Eames reportedly was the only out of town guest at the Fourth of July party, and also denied the allegation to the *News Miner*.

Poor sheep, blindfolded in Anchorage so she wouldn't know where she was in February.

The Ransom Note.

NEW EVIDENCE
SURFACES FROM
CONCEALED CAMERA



Seth Eames lurks in the background (the bearded partygoer in photo at right) at the TVBA Fourth of July picnic. Meanwhile, Dick Madson (far right) guards the sheep from the bar while Dan Cooper takes her for a spin on the dance floor.

"I'm not an attorney. I don't like attorneys. I wouldn't hang around with attorneys if my life depended on it," he told the newspaper, insisting he was not at the party, but in Hawaii, instead.

New evidence, however, places him at the scene of the party on the night in question. Eames also reportedly told the TVBA that if the ransom were not delivered quickly he would "send her back a little piece at a time." He later claimed that his statement was "only a joke."

Arlys Borjesson, Fairbanks coroner, said she believes that a crime has been committed in connection with the disappearance and probable death of Miss Ewe. Unless otherwise directed, she plans to file a petition and hold a presumptive sheep death hearing. Cooper, who also serves as a D.A. in Fairbanks, said his office is screening the case for possible presentation to the Grand Jury on charges of kidnapping, extortion, violation of state grazing regulations, and cruelty to animals.

Spymaster Dick Burke, who has not been seen since the receipt of the ransom notes, reportedly is on a mission pertaining to "highly sensitive negotiations," according to a reliable member of the TVBA who asked not to be identified.

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION
IN RE:
ADOPTION OF BABY BOY CUMBERLEDGE
Register Number: 45376
Relinquishment Number: 752

DECREE NISI

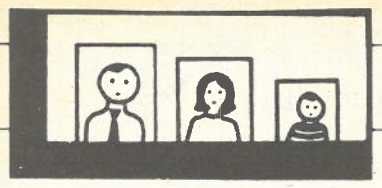
AND NOW, February 24, 1992, it appears to this Court that the said Lorne Lewis is the natural father of Baby Boy Cumberledge at issue herein, and that he has for a period in excess of six months evidenced a settled purpose of relinquishing parental rights to the said child and has refused or failed to perform his parental duties.

IT IS THEREFORE ORDERED that a decree nisi is entered involuntarily terminating the parental rights of the said Lorne Lewis to Baby Boy Cumberledge.

Notice of the entry of this decree nisi shall be published in the Anchorage News and the Alaska Bar Rag, once, in each publication.

Exceptions may be filed within ten (10) days of the publication of the notice of the entry of this decree nisi by any party to the findings of fact, discussion, or decree nisi. If no exceptions are filed then a final decree shall be entered in this matter.

BY THE COURT:
/s/ Thomas T. Frampton, Judge



People

Kristen Bomengen is now with the A.G.'s office in Juneau..... **Mary Ellen Beardsley**, formerly with Routh, Crabtree & Harbour, is now with the A.G.'S office in Anchorage.....**Ethan Berkowitz** is now with the D.A.'s office in Anchorage.....**David Crosby** is now with Wickwire, Greene, Crosby & Seward in Juneau.....**Brent Cole**, formerly with the D.A.'s office, is now with Brena & McLaughlin.....**Joanne Grace** is now an assistant A.G. in Anchorage.

Phyllis Hartke, formerly of Dahl & Hartke, is now with Wade & DeYoung.....**S. Ramona Longacre** is now with the State Farm Claims Office.....**Anthony Lombardo** has relocated to LaHabra, CA.....**Mindy McQueen** has moved from the D.A.'s office in Anchorage to the D.A.'s office in Fairbanks.....**D. John McKay** is now with the firm of Rice, Volland & Gleason.....The firm of Middleton, Timme & McRay has been changed to **Middleton, Timme & Luke**.....**John McConnaughy**, former assistant municipal prosecutor in Anchorage, has opened his own law office.

Erin Marston, formerly with Stafford, Frey. et.al., is now with Koval & Featherly.....**David Ruskin** and **Mary Louise Molenda** have formed the firm of Ruskin & Molenda.....**Stuart Cameron Rader** is now an associate with McNall & Rankine.....**David Stebing**, formerly with Bradbury, Bliss & Riordan, is now with the Commercial Section of the A.G.'s office.....**Helen Simpson** and **Darryl Thompson** have dissolved their partnership and are now sole practitioners.

C.J. Seidlitz has opened her own law office in Anchorage.....**Linda Thomas** has opened her own law office in Anchorage.....**Cesar Velasquez**, former assistant municipal prosecutor in Anchorage, is now with the Alaska State Housing Authority.....**Ben Walters** has closed his legal practice and is now with the Office of Special Prosecutions and Appeals.....**Marshall Witt** has relocated to Salt Lake City, UT.

Gary Vancil and **Linda Walton** currently of Kailuakona are the proud parents of a new baby girl, Stephanie, born January 23, 1992. Gary says she looks like him.

VOTE! **Watch for Board of Governors ballots.**

Gissberg to Fish and Game

Attorney General Charlie Cole announced March 3 that John G. Gissberg has been named senior assistant attorney general assigned to the Department of Fish and Game. He will concentrate on international salmon treaty negotiations and other international agreements between ADF&G and foreign governments.

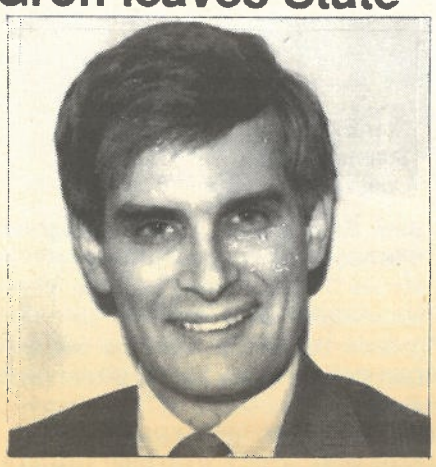
"Only someone with John's stature, credibility and experience in international relations could give Alaska the advantage we need in our negotiations with foreign governments and other states," said ADF&G Commissioner Carl Rosier.

"John's presence is going to be missed in the Department of Law," Cole said. "But I think we have to balance our parochial desires with the needs of the state as a whole."

Gissberg's transfer is to take place immediately, Rosier said, because of the press of on-going salmon treaty negotiations with Canada and other Pacific northwest states.

--Office of the Governor

Groh leaves State



Cliff John Groh

Cliff John Groh has joined the law firm of Hicks, Boyd, Chandler & Falconer as an associate attorney. Groh recently served as a special assistant to the Commissioner of Revenue of the State of Alaska. Groh graduated magna cum laude from Harvard College in 1976 and received his law degree from the University of California at Berkeley (Boalt Hall) in 1985. Upon admission to the Alaska Bar Association, Groh practiced as an Assistant District Attorney until December of 1987.

Groh's practice will focus on service to Hicks, Boyd, Chandler & Falconer's municipal and construction clients. The addition of Groh makes Hicks, Boyd, Chandler & Falconer a seven-attorney firm.

Botelho is deputy A.G.

Attorney General Charlie Cole recently announced the appointment of Bruce Botelho of Juneau to be his Deputy Attorney General.

"I am pleased to appoint Bruce to this extremely critical position," Cole said. "His experience with a broad array of legal issues and other branches of government will be an extremely valuable asset in his capacity as Deputy Attorney General."

Botelho, 43, is a lifelong Alaskan who, in addition to working as an Assistant A.G., served three years as Mayor of the City/Borough of Juneau. He has considerable experience working on natural resource issues, including back tax and royalty settlements. Cole said Botelho's legal background would be very helpful as Alaska pursues the state's rights lawsuits announced by Governor Walter J. Hickel in his state of the state address

The Deputy Attorney General is the equivalent of a deputy commissioner and is responsible for the day-to-day supervision of the activities of the Department of Law.

Cole said the appointment is effective immediately.

--Office of the Governor

NOTICE OF VACANCY

H. Russel Holland, Chief Judge for the District of Alaska, has been authorized for the past three years to have a temporary emergency law clerk to assist him in handling the *Exxon Valdez* oil spill litigation. He must now find a replacement for the career law clerk who has filled that position but will be moving out of Alaska this summer. Judge Holland is taking the unusual approach of announcing the vacancy in the *Bar Rag* because of its circulation within the federal judiciary and because of the atypical aspects of the job. He would be especially interested in someone who has worked or is working for a federal judge at the JS/13 or JS/14 level, or above, for at least two years.

To say that the job offers a lot of challenges and a lot of responsibility needs no explaining. Judge Holland is seeking a very special person to fill this position: someone able to do a great deal of independent analysis, someone with exceptional writing skills, and preferably someone who has experience with complex federal litigation.

It is a "temporary" position in that it is tied to the *Exxon Valdez* oil spill litigation. Judge Holland can only offer the position for one year at a time, but there is at least an expectancy that the position will be available for several more years. Within the next sixty days or so, Judge Holland anticipates finding a replacement who could move to Anchorage in late July or early August (the day certain to be determined).

Inquires by serious, qualified individuals may be made by calling FTS-868-5621.

• Child support

Continued from page 14

procedure with one child was $24,166, and the average award was $341, or 17 percent of obligor income.

• Administratively established awards averaged 20 percent of obligor net income in cases with one child, 27 percent with two children, and 33 percent with three children, an exact replication of the guidelines.

• The disparity between establishment procedures persisted in cases with more children. Awards in court cases involving two children averaged 24 percent of obligor net income; with three children, the awards in court cases averaged 30 percent of obligor income. Both of these figures fall below the 90.3 guidelines.

• The percentages of obligor income ordered in child support also varied considerably among the study locations: in Anchorage court cases, the average award involving the support of one child was 21 percent of obligor income; in Fairbanks the proportion was 17 percent; in Juneau, 19 percent; and in Nome and Bethel, 14 per cent.

AFDC and CSED cases

The study also examined awards in families receiving public assistance.

• The average child support court order in cases involving a recipient of the Aid to Families with Dependent Children (AFDC) program was 28 percent lower than the average award in non-AFDC court cases. This disparity, however, is income based, with the income of APDC families being substantially lower.

• In 35 percent of the court cases, child support was to be paid through CSED. In the judicially established cases, there was no significant difference in support orders between cases administered by CSED and those cases not handled by the agency.

Economic impact of divorce

In calculating the post-divorce finances of families, the study assumed that child support would be paid by the obligor and received by the custodial parent. Current information on support arrearages from CSED indicates that there are large numbers of support obligors in Alaska that do not make full payment on their monthly child support obligation. This nonpayment or underpayment, in turn, affects the custodial family's financial well-being. Nevertheless, the income and support data from court cases were examined as indicators of the post-divorce financial health of families.

• In cases in which the mother was awarded physical custody, her family's per capita income declined an average 28 percent from its pre-divorce level. This decline generally took place even when full payment of support was assumed and was due to the consistently higher earnings of the father which, after divorce, were no longer at the disposal of the custodial family. The average decline in custodial family income would be greater if nonpayment was considered. In contrast, the post-divorce per capita income of the noncustodial parent—the father in these cases—increased an average 54 percent.

• In court cases in which fathers were awarded physical custody, the

Continued on page 24

NOTICE

IN THE SUPREME COURT OF THE STATE OF ALASKA

In the Disciplinary Matter Involving:	)	Supreme Court No. S-4931
SHARYN G. CAMPBELL,	)	ORDER
Respondent.	)	

Member No. 7812151

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

A judgment having been entered on January 21, 1992, noting that Sharyn G. Campbell was found guilty of the crime of Credit Union Fraud, in violation of 18 U.S.C. §1344; False Entries in Books or Records, in violation of 18 U.S.C. §1006; and Aiding and Abetting, in violation of 18 U.S.C. §2; and a copy of this judgment having been forwarded to the clerk of this court under Alaska Bar Rule 26(c); and it appearing to the court that this conviction involves a serious crime under Alaska Bar Rule 26(b); and good cause appearing,

IT IS ORDERED:

1. Under Bar Rule 26(a), Sharyn G. Campbell is suspended from the practice of law, effective immediately. This suspension shall continue in effect pending final disposition of the disciplinary proceeding initiated by reason of this conviction.

2. Under Bar Rule 26(f), this matter is referred to Bar Counsel for the Alaska Bar Association for the initiation of a formal proceeding before a hearing committee.

3. Sharyn G. Campbell shall comply with the notification requirements of Bar Rule 26(i) and Bar Rule 28.

Entered by direction of the court at Anchorage, Alaska on February 14, 1992.

CLERK OF THE SUPREME COURT
/s/Jan Hansen

Alaska Legal Services Corporation

would like to take this opportunity to thank the following generous contributors who responded to our 1991 fundraising drive. Thanks to them, we were able to raise $21,544.59! We would like to thank the following people for all their support.

PATRONS

Timothy R. Byrnes
Thomas & Carol Daniel
James B. Gottstein
Robert & Elizabeth Hickerson
James E. Hutchins
Michael I. Jeffery
Jenson, Harris & Roth
Jim N. Leik
Sitka Bar Assocation
Kathleen Strasbaugh

CONTRIBUTORS

Artus, Choquette & Williams, P.C.
Barbara J. Blasco
Joel H. Bolger
Barbara K. Brink
Roger L. Brunner
John F. Clough III
Carolyn Crinkley
D. Elizabeth Cuadra
Maryann E. Foley
Gruenberg & Clover
Andrew R. Harrington
Heller, Ehrman, White & McAuliffe
Hoge and Lekisch
J. P. Holbrook
James L. Hopper
James R. Jackson, Jr.
James L. Johnston
Marc W. June
Jonathon A. Katcher
Henry C. Keene, Jr.
Andrew J. Kleinfeld
Donald W. McClintock
Annalee McConnell
James D. Mery
Grant B. Pankhurst
Arthur H. Peterson
John L. Rader
Colleen A. Ray
Sandra K. Saville
Grace Berg Schaible
Schendel & Callahan
Alan L. Schmitt
Sonosky, Chamber, Sachse & Miller
Michael A. Thompson
Bryan P. Timbers
Marcia Vandercook
Young, Sanders & Feldman, Inc.
Larry C. Zervos

DONORS

Lawrence A. Aschenbrenner
Ralph Beistline
Birch, Horton, Bittner & Cherot
Gregg B. Brelford
Teresa L. Brimner
Ronald H.Bussey
Larry D. Card
David S. Case
Randall S. Cavanaugh
Linda M. Cerro
Warren C. Christianson
Allen T. Compton
William T. Cotton
William T. Council
Susan D. Cox
Donald L. Craddick
Teresa B. Cramer
Mason Damrau
Robert A. Evans
Walter T. Featherly III
Sarah J. Felix
Martin Friedman
Sharon Gleason
Carol Greenberg
Alan R. Hartig
Susan T. Hartigan
Hedland, Fleischer, Friedman, Brennan & Cooke
Karen R. Hegyi
Richard A. Helm
Donald D. Hopwood
James D. Kentch
Robert W. Landau
Margie MacNeille
Blythe W. Marston
Mary Alice McKeen
Michael Sean McLaughlin
Peter A. Michalski
Thomas G. Nave
Deborah O'Regan
Bessie (Ruth) O'Rourke
Gregory M. Olson
Owens & Turner
Roger W. Pegues
Gregory P. Razo
Dickerson Regan
William D. Rozell
Steven Sacks
A. William Saupe
R. Scott Taylor
Stephen J. Van Goor
Ann G. Vance
Leon T. Vance
Vincent T. Weber
Larry R. Weeks
Teresa E. Williams
Richard H. Wollenberg
Robert H. Zeigler, Sr.

FRIENDS

Brenda E. Ballachey
Daniel N. Cadra
Alicemary Closuit
Louisiana W. Cutler
Pamela Finley
James E. Fisher
M. J. Grande
Eric P. Jorgensen
Mary A. Kancewick
Elizabeth Page Kennedy
Theresa M. Lauterbach
G. Blair McCune
Carol Jane Seidlitz
Richard H. Shaykin
Amy Skilbred
Eric Smith
Michael J. Stark
Thomas B. Stewart
Susan L. Urig
Valerie Van Brocklin
Jennifer K. Wells
Michael M. Wenig
Paula J. Williams

ALASKA LEGAL SERVICES CORPORATION
1016 West Sixth Avenue, Suite 200 • Anchorage, Alaska 99501
(907) 276-6282

• Child support

Continued from page 23

post-divorce custodial family per capita income remained relatively unchanged, increasing an average of 1 percent. Yet the noncustodial mother still experienced an average 11 percent decline in her per capita income.

Exceptions to 90.3

• In approximately 10 percent of the court cases, reductions in monthly child support orders were made for long visitations.

• Exceptions to the 90.3 guidelines were made in 22 percent of the court cases. The most common exceptions related to obligor impoverishment and shared physical custody of children.

Comparison with previous studies

In a study of 1988 child support cases administered by the Alaska Child Support Enforcement Agency (CSED), Ginny Fay reported that an average 17 percent of obligor income was ordered for support for fair cases in which one child was involved. (Fay, "Economic Impact of Alaska's Child Support Court Rule 90.3 on Family Income," Alaska State Legislature, Legislative Research Agency, May 1, 1990. In this study, the judicial support orders found in 1988 CSED cases were analyzed.) The current court case data show a statewide figure of 20 percent. For two children the earlier study showed an average 22 percent of obligor income was ordered in support; the 1989 court data show a figure of 24 percent. And in cases with three children the 1986 study found an average 19 percent of obligor income was ordered in support; the newer court data show an average of 30 percent. While the data in the current study are not directly comparable to those in the earlier study, it is notable that the 1989 data appear to show consistent increases in proportions of obligor income ordered in support.

Comparison of the current data to a 1987 Alaska Women's Commission Study which examined pre-guideline support orders shows large increases in support amounts (Baker, Family Equity at Issue: A Study of the Economic Consequences of Divorce on Women and Children, Alaska Women's Commission, October 1987). Adjusted for inflation, the average 1985 child support order was approximately half the amount of the current post-guideline order.

A central purpose of this study was to offer an assessment of the degree to which Rule 90.3 has been implemented in Alaska. Overall, average child support awards have increased; yet despite these gains, custodial families—largely headed by women with lower earnings—continue to experience decreases in their per capita financial resources. (The disparities between male and female earning capacities, however, are not the focus of child support reform, and do not fall within the domain of guideline remedy).

Conclusion

Comparisons of child support awards across community, type of case, and establishment procedure show that proportional disparities exist. One of the central purposes of guidelines such as Civil Rule 90.3 is to minimize this variation. In Alaska, support obligations established within the administrative process of CSED generally reflect a rigorous application of the guidelines; in these cases average awards exactly replicate the guideline proportions. The awards in court cases reflect a more lenient series of applications that produce average obligations below the proportions mandated in Rule 90.3. Yet even if Alaska has not achieved complete implementation of the support guidelines, the new data give evidence of significant progress.

•

A fuller exploration of the study summarized in this article can be found in Child Support in Alaska: An Examination of the Effectiveness and Impact of Alaska's Child Support Guidelines, a joint effort between the University of Alaska's Justice Center and the Alaska Women's Commission.

[Readers interested in a more detailed discussion of the sample and weighting procedures should refer to the published report available at the Child Support Enforcement Division.]

Make plans now for the Annual Convention June 4-6, Anchorage