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LEISURE READING

Tasty trials in Tok, crossword puzzle, Arctic war game dangers, parties & people.

$2.00

The Alaska BAR RAG

VOLUME 17, NO. 2 — *Dignitas, semper dignitas* — MARCH-APRIL, 1993

Litigation reform: The public wins

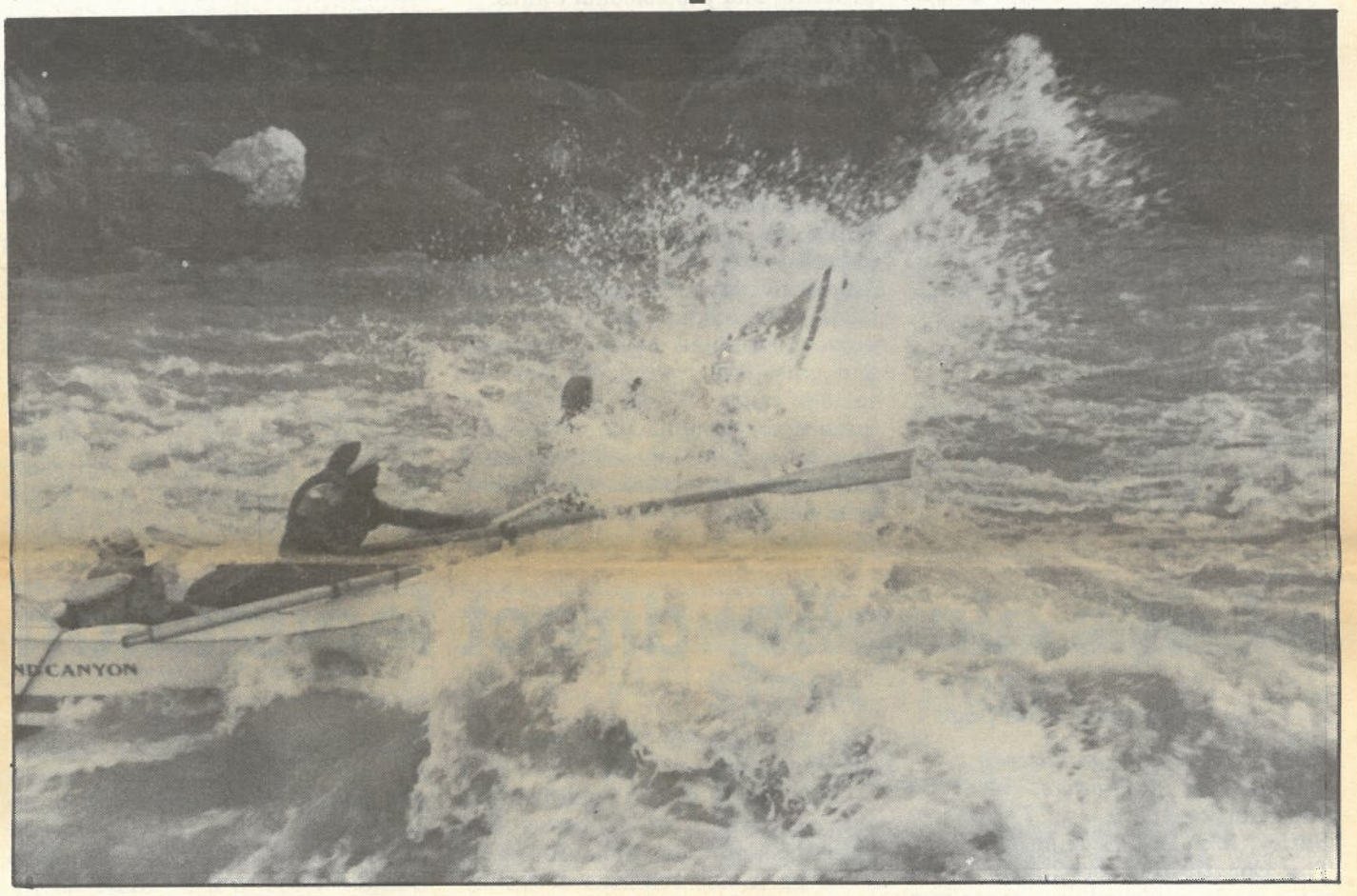
A Special Committee of Lawyers and Judges Examines the Need for Change

By Karl S. Johnstone

Over half a century ago, the Federal Rules of Civil Procedure were adopted for the purpose of bringing about the just, speedy, and inexpensive determination of every action. Discovery was permitted to provide each side relevant information in order to facilitate settlement and, if the case did not settle, to avoid a trial by ambush. Judges were not expected to participate to any great extent in discovery procedures and, for a while, the process worked.

Today, trial, which was the focus of dispute resolution many years ago, is but the tip of the litigation iceberg. Discovery has become the main event in litigation. The price of this event is greatly increased cost, and delay.

Reform is now being considered in Alaska. Chief Justice Daniel A. Moore, Jr. has appointed a Special Alaska Bar Association Committee to study and investigate the Alaska rules and propose revisions to achieve discovery reform. Nine lawyers and two judges have been appointed from Anchorage, Fairbanks, Juneau, and Ketchikan. The lawyers selected have experience in plaintiff, defense, and commercial areas of practice. The committee's charge is to propose rules providing a reasonable alternative to some forms of discovery and, in so doing, reduce cost and delay and provide greater access to the courts.



Matt Claman captures the spirit of the rapids in the Grand Canyon's Colorado River. (Story, page 12).

The Alaska committee is examining a major rules revision providing for a mandatory system of initial and continuing reciprocal disclosures. Instead of a party having to extract information through tedious and costly depositions, interrogatories, and production requests, the parties would be required to turn over all information pertaining to the case, good or bad, and continue doing so as the information is obtained.

Also being examined are time limits on depositions and restrictions on the number that may be taken. Since disclosure would eliminate much of the conventional means of gathering information, additional limitations may restrict the number of

Continued on page 15

Is direct legislation limited to the rich?

By Scott Brandt-Erichsen

In the last 2 years the constitutional rights to initiative, referendum and recall, guaranteed by Article IX of the Alaska Constitution, have come into play in 5 separate instances in the Municipality of Anchorage alone, and have been exercised many times in other parts of the state. The 5 attempts by the citizens of Anchorage to exercise their petition rights have resulted in 4 separate lawsuits and the expenditure of tens of thousands of dollars in attorney's fees.

The apparent propensity for direct legislation or recall to detour through the courts en route to the ballot raises a question of whether the constitutional right to direct legislation or recall of officials is, in effect, a right limited to those citizens who are able to litigate their position. The current statutory procedures have apparently been ineffective in allowing the exercise of these rights without the expensive resort of the courts.

Litigation relating to initiatives and referenda tends to focus on whether the subject of the particular initiative or referendum qualifies as an appropriate topic for direct legislation. *See McAlpine v. University of Alaska*, 762 P.2d 81 (Alaska 1988); *Alaska Conservative*

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President's Column

By Barbara J. Blasco

I am pleased to report that the new Alaska Rules of Professional Conduct are on the road to adoption. Members of the Model Rules Committee met with the Supreme Court in early January for nearly three days and together they reviewed the proposed rules from start to finish. We understand that a final version of the rules which incorporates the changes requested by the justices is very close to final adoption. Given the importance of this project for members of the Alaska Bar Association as well as the effort and time involved in getting it accomplished, I thought an historical overview of the project would be in order.

The Model Rules of Professional Conduct were originally adopted by the American Bar Association House of Delegates in August of 1983, and were amended in 1987, 1989, 1990 and 1991. The Alaska Bar Association committee work began on the Model Rules in March 1984. Although the Model Rules Committee met on a fairly regular schedule at first, progress on the rules gradually slowed.

Work on the Model Rules began again in earnest when Robert Bundy was appointed chair of the committee in late 1985. In addition to Mr. Bundy, committee members included John Lohff, Robert Mahoney, David Mannheimer, John Murtaugh, John Reeder, Jr., and bar counsel Steve Van Goor and Susan Daniels. Committee membership reflected a cross-section of the Bar's membership with members from large, medium, and sole private practice firms, a lawyer working for a major corporation, and a lawyer in government practice. The fields of practice represented on the committee were equally diverse: general civil practice, criminal law, trial practice, corporate law, criminal appellate practice, and professional ethics.

Through 1986 to June 1987, the committee generally met every two weeks. Committee members focused first on the rules they believed would be the most controversial and then went through the remaining rules in numerical order. While the committee felt that the overall "restatement" approach the American Bar Association had taken was sound, there were improvements to be made in language and cross-referencing between the various rules. Where possible the committee sought to eliminate "hortatory" language and replace it with clear statements of required behavior.

The fruits of the committee's labors were compiled in a draft of the Proposed Alaska Rules of Professional Conduct presented to the Board of Governors in June 1987. Not surprisingly, members of the Board had questions and concerns about the language in a number of proposed rules. As a result, a Board committee was formed to undertake a review of the proposed rules and formulate alternative language.

Over the following two years, the Board of Governors considered the suggestions made by the board committee together with input from members of the Model Rules Committee. There were at least 50 separate rules, under eight major classifications, for the board to review and agree on. Finally, in August 1989, the Board published its proposed rule in a special insert in the Alaska Bar Rag. In October, 1989, the Board took final action on the proposed rules and in November 1989, they were submitted to the Alaska Supreme Court for final review and adoption.

As mentioned at the outset, the Model Rules Committee met with the Supreme Court in January of this year to review the proposed rules. In the course of that review, the Court requested the rationale behind the Committee and Board variations from the Model Rules as adopted by the American Bar Association. The discussion which followed was highly constructive. We understand that a final version of the proposed Alaska Rules of professional Conduct will be adopted very soon. We are hoping that the new rules will be included in the July edition of the Alaska Rules of Court.

We are hoping that the new rules will be included in the July edition of the Alaska Rules of Court.

While we don't at present know the exact language which will be adopted by the Supreme Court, it is safe to say that the members of the Bar can expect clearer guidance in the new Alaska Rules of Professional Conduct in such areas as communications with clients, confidentiality, conflict of interest, imputed disqualification, litigation and trial conduct, advertising, and the reporting of professional misconduct. In addition, the new rules will be the subject of a CLE presentation this spring.

On behalf of the Board of Governors, I would like to thank all of the folks who have devoted their time, efforts and talent to this important project. Thank you for a job well done!!

• Let's simplify direct legislation

Continued from page 1

Political Action Committee v. Municipality of Anchorage, 74t P.2d 936 (Alaska 1987); and *Thomas v. Bailey*, 595 P.2d 1 (Alaska 1979). The Constitution precludes initiative and referendum measures which 1) make or repeal appropriations, 2) dedicate revenues, 3) enact local or special legislation or 4) create courts, define the jurisdiction of courts or prescribe their rules. There is also a common law limitation prohibiting the initiative from extending to administrative measures. *See* Dicta in *Wolf v. Alaska State Housing Authority*, 514 P.2d 233 (Alaska 1973).

In recall litigation the focus may be either on the adequacy of the grounds for recall (*see Meiners v. Bering Strait School District,* 687 P.2d 287 (Alaska 1984) and *McCormick v. Smith*, 793 P.2d 1042 (Alaska 1990)) or the qualifications petition signers or sponsors. The Supreme Court has done almost as much as it can in terms of setting out rules of law for interpreting initiative provisions and evaluating the limitations on initiative, referendum, and recall petitions. However, the degree of clarity provided by supreme court opinions does not appear to procedurally keep petitions out of court, or keep the court costs to a minimum where petitions end up in court.

Recognizing that more often than not initiative, referendum or recall petitions are targeted for judicial review, the constitutional right to initiative, raferendum and recall would seem much more "user friendly" if there were an inexpensive and prompt process for review and ruling by an impartial entity concerning issues relating to the propriety of the subject matter and issues related to the validity or accuracy of signatures and/or sponsors of petitions. Such a procedure could bring greater finality at an early stage in the process.

Without an inexpensive procedure readily available to the general public, the constitutional right to initiative, referendum or recall easily becomes a right which may only be exercised through expensive court proceedings. Such proceedings do little to improve the reputation of attorneys, or the respect for and credibility of the legal system in the eyes of the public.

Proposed Amendment to Bar Rule 2, Section 2(c) Relating to Reciprocity Eligibility

(Additions italicized; deletions bracketed and capitalized)

Rule 2. Eligibility for Examination

Section 2.

(b) Attorneys admitted to the practice of law in other states, territories or districts without taking a written examination will not be eligible for admission under this section. An applicant may not be admitted to the practice of law under this section if he or she has taken and failed to pass an Alaska Bar Examination except as provided below or engaged in the unauthorized practice of law in Alaska. *An applicant who has previously failed an Alaska Bar Examination may be eligible if the applicant has lawfully engaged in the practice of law for at least five of the seven years immediately preceding the date of the application, provided that such five years of practice shall have occurred subsequent to the applicant's last failed Alaska bar examination.*

The Alaska BAR RAG

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Letters

Be ethical out there

I recently concluded a case where the opposing counsel, before filing suit, sent a few pages of unsolicited medical records to a local "consultant" and a short letter requested an opinion from the consultant. No call to retain the consultant preceded the correspondence, nor was a retainer enclosed with the letter. The "consultant" returned all of the material unreviewed with a request for a signed fee agreement and an advanced retainer. There was no further response.

A few months later, I retained the consultant by making the necessary financial arrangements, providing him with a complete array of records to review, and also requested an opinion.

When I sought to use the consultant as an expert, my opponent screamed conflict, and argued that the earlier presentation of records constituted retention. The consultant vigorously denied he was previously retained or that there was any conflict of interest, because no financial arrangements had been made before the records were sent and the unsolicited records were returned without review. Unfortunately, the case was settled before the superior court judge ruled on my motion to clarify the issue.

In my opinion, my opponent never intended to retain the consultant; only to create a conflict to prevent use of the consultant by his opposition. This conduct is reprehensible and is unethical under DR 7-102(A)(1); an attorney, in representing his client, shall not "harass or maliciously injure another." Sending unsolicited records to a consultant for the purpose of creating a conflict is an underhanded cheap shot. However, this conduct has backfired because it has alienated the consultant, who is the most qualified expert in a very limited field of experts. In the future, even if appropriate arrangements were made for retention, I doubt the consultant will ever work with my opponent. Thus, his future clients will suffer the consequences. Is there a lesson in this? How about "cheap shots don't pay."

Elliott T. Dennis
Pletcher, Weinig, Moser & Merriner

More Bar polls

Congratulations of a sort to the Bar Association, which took an advisory poll of members on the Law Review recently. Let's have more votes by members, please, but could these future votes be real instead of advisory, fair instead of biased?

Supposedly the Board of Governors now holds all power, so all votes of members are advisory only. If true, perhaps that should change? Democratic institutions in a democratic society, yes?

Here is what was unfair about that advisory vote or survey:

1) the positive vote was listed on top, negative on the bottom, but people so often just vote for the top choice that the State of Alaska uses a very elaborate choice rotation system, so that each candidate appears on top on an equal number of ballots; so far as is known, this survey used no such position rotation system;

2) the supposedly neutral statements for and against keeping the Law Review were biased in this way: the "pro" side used 82 words to make 5 arguments in 7.3 lines; the "con" side was given only 32 words to make 3 arguments in 3.1 lines;

3) the "pro" side alleged that only the Law Review reviews Alaska Supreme Court decisions — an argument proved untrue in nearly every issue of the Bar Rag, which usually does the same;

Nor were other options offered as choices — such as Law Review publication once a year, or publication only for libraries and for individuals paying extra. But the Law Review represents only a small part of the Bar Association budget.

Let's see the whole budget, please. Let's have binding mail ballot votes on the larger parts as well. For example, some members would like to vote on — but not necessarily "for" — continued subsidies for CLEs. Others might vote to end costly 'physical' bar conventions they can too rarely afford to attend, substituting teleconferences instead. Still others might want a chance to vote on plans which, while fast-tracking discovery or trials, also cut law firm size and lawyers' incomes. Let's survey — or, better yet, vote! — on those items, too.

Still, congratulations on a beginning — there is far to go.

Joe Sonneman, Esq.

P.S.: Correction to my prior letter, which said Massachusetts inactive fee was $25; actually, Massachusetts attorneys practicing outside that state pay $27.50 and inactives pay ZERO.

A good doctor

I have had occasion to see a recent copy of The Alaska Bar Rag, and I liked it a lot. The articles were interesting and (you'll pardon the expression) judiciously spiced with humor.

As you can tell from my letterhead, I do not qualify for membership in the Bar Association. (Some of your members might refer to me as either "the enemy," or "lunch.")

Jeffrey A. Partnow, M.D.

Kill the cocktail humor

With the plethora of lawyer jokes out there, I was incredulous and dismayed to see the illustration "The Budding Lawyer" on the front page (and repeated on page 6!) of the January-February 1993 *Alaska Bar Rag*. This placement is a depressing reminder to woman attorneys that the dark days of practicing law in a good ol'boy profession are not so distant. Wake up. This type of "cocktail humor" died (or should have died) with the closing of the Playboy Club.

To think that a new editor approved this placement for his banner edition is a bad omen indeed. Please cancel my subscription immediately.

Sharon Sturges

P.S. It wasn't even funny.

Abolish naked art

I opened to the front page of my January-February 1993 edition of the *Alaska Bar Rag*, to find a large cartoon drawing of a naked woman staring coquettishly over her shoulder at a man staring at her behind, with the caption "THE BUDDING LAWYER." My immediate reaction was embarrassment, anger and disappointment. After some reflection, my initial reaction has intensified.

Please cancel my subscription.

Kirsten Tinglum

Offended by cartoon

Allowing a picture of a nude female to be printed on the cover of a newspaper for an association which is half women is distasteful and probably not correct behavior in 1993. Why would a man in a position of authority support the degradation of women?

The only sense I could make out of it was that respect for women is something that must remain "private" like a friendship with a black in the South prior to the 60's (another error in thinking). That is not an appropriate attitude for *The Bar Rag* even if the Editor is a male. The cover insults half of the association members. Publishing that cover was not in good taste.

Well...that's what I think about the picture, Maybe I'm the only one who was offended — but I doubt it.

Mary Jane Sutliff

No sexual exploitation

Please accept this letter as my formal protest regarding the blatant sexual exploitation in "The Budding Lawyer" illustration. It was highly offensive and did not contribute to the article's content. And a front page spread for emphasis? What more needs to be said.

I appreciate "freedom of speech" and humor as much as the next person, but contributing to the portrayal of women in this manner does no honor to men, women or our legal profession.

If this is the quality of journalism that will continue, I object to the expenditure of my bar dues to support this "rag."

Rosa Garner

Is this 'Penthouse?'

I was surprised to receive the February edition of the Alaska Bar Rag featuring an illustration on the cover that would be right at home on the pages of such august publications as Soldier of Fortune or Penthouse. Was it supposed to be funny? You owe the women members of the bar an apology.

G. Nanette Thompson

From the Editor

I want to thank each of you who wrote or otherwise contacted me personally to provide critical comment regarding the cartoon on the front page of the last edition of the Bar Rag. Your point of view will be taken into consideration in the future.

Michael J. Schneider

P.S. Several of you requested that your subscriptions to the Bar Rag be cancelled. The Bar Rag may be like that stuff you get in the mail from Publishers Clearing House that shows up whether you really want it or not. I'll see what I can do, however.

Another editor takes the rap

The Bar Rag's managing editor also replied to individuals who were concerned with the cartoon selection in January:

I'm writing in response to the letter to the editor you wrote to the *Bar Rag* Jan. 27, in which you objected to the "Budding Lawyer" cartoon that appears in the current issue of the Rag.

While I regret that you were offended by the cartoon, the culpability was not Mike Schneider's. As successor to Ralph Beistline as editor in chief of the *Bar Rag*, Mike came into the loop very late in the production process of the January-February issue.

As you might know, each *Bar Rag* issue generally features a cartoon on page 1, illustrating some aspect of the contents. This particular issue, it was my judgment that Mr. Satterberg's article had the best potential for illustration. (The thought of a hapless student being thoroughly nonplused by his first experience with a live model in art class was humorous in its context.)

We attempted to place the illustration in its proper context by referring the reader to the article on page 6.

In hindsight, we probably erred in our instructions to the artist in the depiction of a nude form in the background of the illustration.

In any event, please be aware that Mr. Schneider was not on board when the cartoon subject was selected and commissioned. Nor was he yet on board when most of the copy was typeset and layed out before it went to press. He was on the job during the final pre-press review, and did enquire about the cartoon subject. I persuaded him that the story it illustrated was not off-color nor sexist in any way.

I regret that the cartoon's motive was misconstrued. We'll try to be more sensitive in the future.

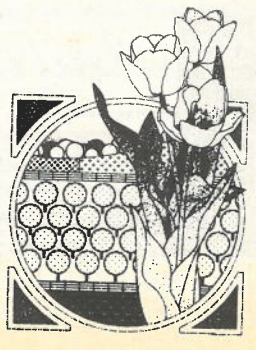
Sally J. Suddock
Managing Editor

The author liked it

I thoroughly enjoyed the artistic talents which accompanied the article in the January/February issue of the *Bar Rag*, and would be honored if the same artist might perhaps produce a rendering of the antics of the courthouse in Tok.

William R. Satterberg, Jr.

(Ed. note: Wish granted. See page 5)



Estate Planning Corner

By Steven T. O'Hara

Life Insurance Ownership

Life insurance is often sold on the premise that it is tax free, which is generally true in the income tax area (I.R.C. Sec. 101). If the life insurance is not properly owned, the family depending upon it could be subject to estate taxes of as much as 50 percent of the death benefit (I.R.C. Sec. 2001(c) & A.S. 43.31.011). If the family is in a generation-skipping tax situation, the aggregate estate and generation-skipping tax rate could be well above 50 percent (*Id.* & I.R.C. Sec. 2641).

Thus the ownership of life insurance, like the ownership of any major asset, should be well thought out. There are generally four alternatives for the typical married couple: ownership by the insured, ownership by the insured's spouse, ownership by the insured's adult children, and ownership by an irrevocable trust. Each alternative has advantages and disadvantages.

Consider a mother and father domiciled in Alaska. They are legally married and both U.S. citizens. They have three adult children. They have no debts and own their own home, worth $150,000, as tenants by the entirety. They also own other assets, worth a total of $350,000 and which are generally illiquid, as joint tenants. They have no assets outside Alaska and currently no life insurance.

Under current law, with aggregate assets of less than $600,000, mother and father do not face the prospect of leaving estate taxes to be paid on the death of either or both of them (I.R.C. Sec. 2010). But suppose the family has determined that it would be advisable to have insurance on father's life that pays a death benefit in excess of $100,000. Now the family needs to consider estate taxes in structuring the ownership of the life insurance because mother and father's total assets could exceed $600,000.

Insured As Owner. If father owns the insurance on his life, he will have the advantage of control, which may be particularly important if the insurance accumulates a cash value. He would be able to borrow against the cash value and, of course, change the beneficiary designation from time to time.

On the other hand, if father dies owning the insurance, the death benefit would be included in his gross estate for estate tax purposes (I.R.C. Sec. 2042). This inclusion could subject his family to estate taxes. For example, suppose mother predeceases father and then father dies. Under such circumstances, his gross estate could exceed $600,000 (being the total value of the death benefit, home and other assets), resulting in estate taxes due (I.R.C. Sec. 2001 & A.S. 43.31.O11).

As another example, suppose mother survives father but that she is in fact *not* a U.S. citizen. Under such circumstances, father's estate could owe estate taxes because it would not be entitled to a deduction for transfers to mother (including the life insurance death benefit) unless made through a special trust designed to eliminate mother's ability to avoid transfer taxes by moving her assets outside the country (I.R.C. Sec. 2056(d) & 2056A).

Spouse As Owner. If mother owns the insurance on father's life, she would also have the advantage of control. But the estate-tax disadvantage would generally still be there on the death of the last to die of her and father. For example, suppose father predeceases her. She would then own all of the family assets as the surviving tenant, plus she would be considered the owner of the life insurance death benefit. So on her subsequent death, her gross estate could exceed $600,000, resulting in estate taxes due.

If mother predeceases father and she has a basic Will giving everything to father outright, then he would become the owner of the insurance (unless he disclaims the insurance pursuant to I.R.C. Sec. 2518 & A.S. 13.11.295). If he subsequently dies owning the insurance, his gross estate could exceed $600,000 (being the total value of the death benefit, home and other assets), again resulting in estate taxes due.

Children As Owners. If the insurance on father's life is owned by his three adult children, the estate-tax disadvantage would generally be removed but only after sacrificing control. Neither father nor mother would have a right to any cash value, and mother would generally not have a right to the death benefit.

If one of the children predeceases father, one-third of the insurance could then be owned, depending on the circumstances, by the child's spouse, the child's minor children, or mother and father as heirs, none of which may be intended or desirable. The bankruptcy or divorce of one of the children could also disrupt the family's plan for the life insurance.

Trust As Owner. If the insurance on father's life is owned by an irrevocable trust, the estate-tax disadvantage would generally be removed and predictability of ownership would be obtained. Father would lose the right to benefit from and control the insurance, but mother could have some benefits and control. She could be the trust's primary beneficiary. In addition, it is possible for mother to be the trustee of the irrevocable trust without adverse transfer-tax consequences (Adams & Abendroth, *The Unexpected Consequences of Powers of Withdrawal*, 129 *Trusts & Estates* 41 (August 1990) (discussing distribution powers held by a trustee who is also a beneficiary or related to one)).

Planning Ahead. An important consideration to keep in mind is that if father ever owns the insurance on his life, he must live three years and a day after transferring the insurance by gift in order for the death benefit to be excluded from his gross estate for estate tax purposes (I.R.C. Sec. 2035(d)(2) & 2042). Therefore, the ownership of any new life insurance should be planned before the application for the insurance is made. From a tax standpoint, the intended long-term owner of any new life insurance should be the applicant and initial owner.

PUBLIC SERVICE ANNOUNCEMENT FROM THE OFFICE OF THE CLERK OF THE UNITED STATES BANKRUPTCY COURT DISTRICT OF ALASKA

The Bankruptcy Court will no longer mail courtesy copies of the Fairbanks Trial Calendar. In addition, the Bankruptcy Blurb Quarterly Newsletter will no longer be mailed to subscribers.

In lieu of mailing the Court will make both the Fairbanks Trial Calendar and the Newsletter available on the Court's Electronic Bulletin Board.

The Fairbanks Trial Calendar will be posted to the Electronic Bulletin Board on the dates for which the calendar would normally have been mailed. The Newsletter will be available on a quarterly basis and prior editions of the Newsletter will be maintained electronically for your use.

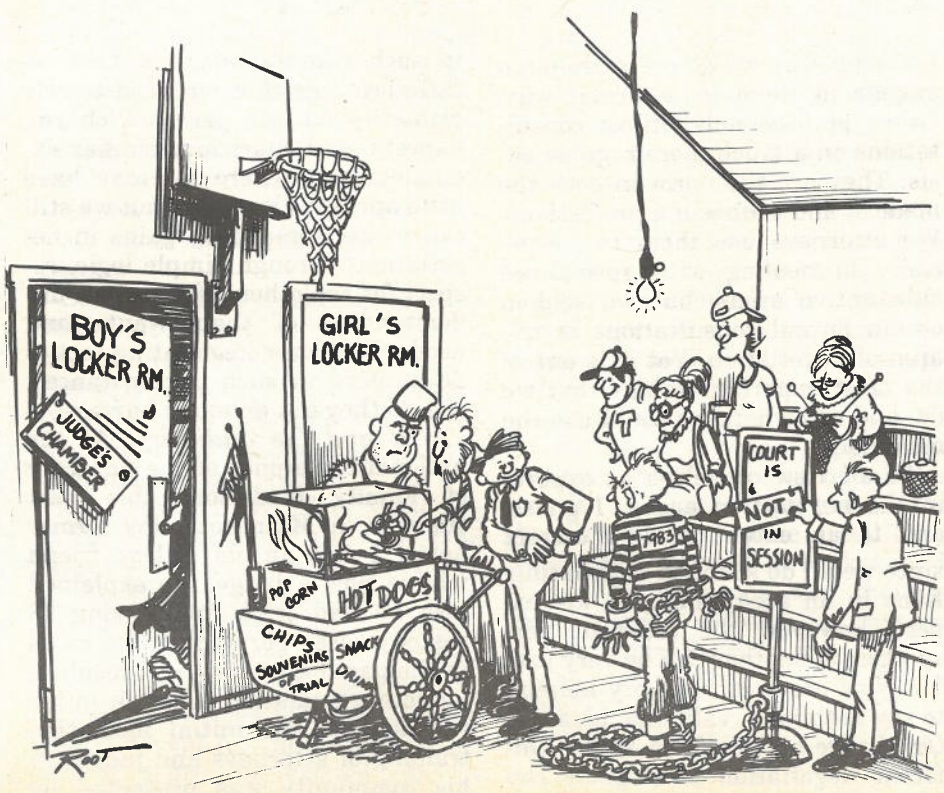
Printed copies of both the calendar and Newsletter are available at .50 per page and may be obtained in person only from the Office of the Bankruptcy Clerk in Anchorage, Fairbanks and Ketchikan.

Interested persons may call 271-2654 to reach the Bankruptcy Court's Electronic Bulletin Board. A PC with modem (9600 Baud) is required, however there is no fee to the user. Access to the Bulletin Board is free. This departure from normal mailing is necessary due to the severe budget shortfall and reduced funding for the United States Courts.

/s/ Wayne W. Wolfe, Clerk
February 26, 1993

Trials in Tok: Timely, tasty treats

FRONTIER JUSTICE & SNACKS



BY WILLIAM R. SATTERBERG, JR.

Recently, I had the delightful opportunity to conduct a criminal defense trial in the Gateway City of Tok, Alaska. Having not visited Tok for almost 17 years, memories came back to me of a time, years gone by, when I had my first legal experience in that City. . .

It was the spring of 1978. I was a young attorney, fresh out of law school, aggressively pursuing my legal career representing the State of Alaska. I was an Assistant Attorney General in Fairbanks, Alaska, and had a framed document on my wall to prove it. My client was the monolithic Department of Transportation and Public Facilities.

My first victim was an individual, "Joe,"[1] who had been so rebellious as to park cars within the right of way of the Alaska Highway. The right of way consisted of 150 feet on either side of the highway centerline. Although the cars were only a limited amount of distance into that 150 foot right of way, justice still needed to be served, and the rights of the mighty State of Alaska vindicated at a contempt of court proceeding.

I had been selected by my office supervisor, Gary Vancil, to do battle with the recalcitrant. Judge Van Hoomissen, or "Judge Jerry," known by many for his inevitable style in the court, had preceded me as had a young assistant district attorney, "Fred,"[2] to conduct an earlier trial of a criminal nature involving theft of the most heinous sorts.

(Actually, the facts were somewhat different, as I learned upon my arrival).

Having landed in a chartered aircraft, at copious State expense, I proceeded to the courthouse to scope out the lay of the land, as any well-prepared attorney would do. I also figured that I would be able to watch the famous Judge Van Hoomissen in action to determine the nature of the case which was being tried, and the general demeanor of this sometimes irascible jurist. When I arrived at the courthouse, nobody was there. Instead, a sign was on the door stating that the trial was in the Tok school gymnasium.

I went next to the school and, upon entering the parking lot, saw that it was heavily congested with dilapidated Pickup trucks, all with Easy Rider rifle racks and various bumper stickers proclaiming political philosophies known only to bush Alaska.

A wee bit of background is in order at this point. The trial, which was already underway, was a case involving the alleged theft of a number of washing machines and dryers from Alyeska Pipeline Service Company by two locals. Realizing that a family ordinarily only needs one washing machine and dryer per household, I was amazed to learn that these men had been accused of absconding with well over a dozen each of these machines. Even more remarkably, the machines had apparently been sold for a mere pittance to various Tok residents for the nefarious purposes of doing their laundry. Rather than a "mark up" on the value of the appliances, there was, instead, a "mark down." Virtually everyone in Tok owned a set.

As I muscled by numerous spectators and entered the courthouse (gymnasium), my nostrils were immediately assaulted by the smell of freshly cooked popcorn. Realizing that this distinctive courtroom aroma exists only in the judicial chambers of the District Court in Fairbanks, with its ever-present popcorn machine from the Crutchfield epoch, I quickly began to look around to see from where the aroma emanated. Try as I might, I could not locate the source and ultimately concluded that everyone in Tok must simply eat popcorn for their diet, to the point that the smell exuded from their pores.

The room was packed, with all of the residents sitting on metal chairs, arms folded, and baseball caps in their laps. The jury was also perched on these ubiquitous metal folding chairs, on an elevated stage in front of the audience. The venerable judge was seated behind a card table, with the assistant district attorney and the public defender seated at their respective card tables before the judge. The two accused sat smugly, arms folded, baseball caps also in their laps. At the time of my entry, Judge Van Hoomissen was declaring a recess, to listen to some sort of objection.

Judge Van Hoomissen, the assistant district attorney, and public defender rose and left the courtroom. Scarcely seconds after the door to the chambers closed (which I could only assume was the boy's locker room), a plywood door covering a hidden concession stand flew open, and I was shocked to see that the concession stand was not only occupied, but began actively selling various items such as popcorn, soda, coffee, and candy bars. Throughout the entire recess, those present in the courtroom, including the various jurors, and the two defendants purchased their refreshments.

It was obvious that the in-court clerk had already become quite accustomed to this, since she came out of the back room a little bit ahead of counsel and the court to inform everyone that it was time to resume the trial.[3] Everyone reluctantly returned to their seats, and the concession stand closed just prior to the judge's and counsel's entry into the courtroom, apparently oblivious to the events occurring in their absence.

Examination of witnesses continued for a short period of time, until the young assistant district attorney happened to look back in desperation and saw me crouching in the rear of the courtroom. He immediately requested the court to take another brief recess, which was granted, whereupon the concession stand once again opened and sales resumed. Clearly, this young man was seeking my sage counsel, readily acknowledging that I had been practicing almost six months longer than he.

"What should I do?" he asked, drawing me aside.

After he outlined the status of his case to me, my advice came immediately, "Punt."

Not familiar with advanced legal theory, he inquired, "Do you mean dismiss the case?"

I responded, "Or die."

The district attorney's options were limited. The modern day Robin Hoods of Tok clearly had the upper hand.

Court reconvened. Quite magnanimously, the young assistant district attorney stood up and, turning to face the assembled multitudes, announced, "Your Honor, in the interests of justice, the State of Alaska dismisses . . ." The remainder or his statement was lost amid the cheers and loud applause. (In retrospect, I could not help but wonder how impartial the jury in Tok actually was, when I noticed that they were all standing and clapping as well).

The courtroom was adjourned, leaving only the janitor behind to clean up the mess.

That evening, regularly scheduled post trial proceedings took place at the lounge of the Tok Parker Lodge.

The assistant district attorney, undoubtedly in a profound fear of his life, had wisely decided to return to Fairbanks. Judge Van Hoomissen, as always, remained, since he had the trial with me the following day on the contempt of court charge for the right of way encroachment case. And, as always, Judge Van Hoomissen was in his inimitable form.

As I entered the Lodge, I saw Judge Jerry seated in a chair, with a local member of the community sitting heavily on his lap, explaining incoherently to the judge just how much she really loved him and his dynamic ability to rule, dealing out swift justice left and right. In response, the renowned jurist was expounding that she should stick around and see the fireworks he expected to ignite the following morning, at the contempt trial.

Recognizing that no one in Tok had yet recognized me as the enemy, I also proceeded to imbibe substantially, reasoning that "When in Rome. . ." ultimately, I crawled to my bed, only to awaken the next morning with a most thundering headache, dry mouth, and an incomprehensible fear of the immediate future.

After a greasy breakfast, I went to the courthouse, cursing myself all the way and praying to my God for just one more chance to live, and that the demons would leave my head, taking their incessant sledgehammers with them.

When I arrived, the clerk was apparently already anticipating our delicate predicament, for each of the desks in the courtroom, including the judge's, contained not only one, but two full pitchers of water. Aspirin was liberally available, and there seemed to be general agreement among all those present, including spectators, not to talk too loudly or object too strenuously. All individuals, that is, except for the attorney from Juneau who was representing my intended victim.

The hearing commenced, and I began to present the State's case, explaining why one defendant should be held in contempt for having not obeyed a lawful order to remove his cars. The defense made numerous tactical objections, all of which were argued halfheartedly by myself. Eventually, we got to the rebuttal of the case.

Then it happened.

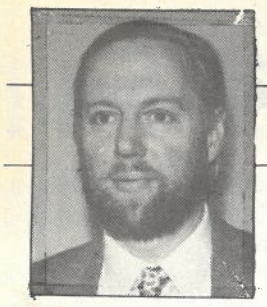
The defense made the proverbial objection which broke the camel's back, again on the recurring grounds of relevancy. Having had enough, I decided to address the grounds of relevancy extensively. Figuring that I would overpower defense counsel with my convincing arguments, and that he would withdraw all future objections, I launched into my diatribe. I was about halfway through argument when Judge Van Hoomissen, squeezing his temples, bellowed from the bench that, "I'm ready to rule!"

Naturally, I figured that the judge would next enter his ruling on the evidentiary objection. I was mistaken. Rather, Judge Van Hoomissen was simply ready to rule. Enough said.

Immediately demanding silence from all present, the judge announced that he was holding the defendant in contempt of court, and that the cars had better be removed from the right of way immediately, or else! (The "or else" was never specified.) So much for the defense presenting its case.

The good judge then slammed his gavel down, (a regrettable mistake,

Continued on page 6



GETTING TOGETHER

By Drew Peterson

Some miscellaneous thoughts about mediation and alternative dispute resolution (ADR):

On Lawyers as Peacemakers. A recent *Bar Rag* column I wrote was on the subject of lawyers as peacemakers. I confess to some trepidation. Would my legal friends and peers think that I had gone over the edge? I even told my twelve year old son about it. A proud member of the Anchorage Youth Court Bar Association, his response was "Yah, Right, Dad."

I remain convinced that our role as peacemakers is one of the biggest attractions to the practice of law. We get more satisfaction from cases promptly and fairly settled than from those litigated to a bitter end. Why then do we have such a hard time acknowledging our peacemaker role? We have acquired a mindset that it is somehow weak and soft to agree but tough and strong to be disagreeable. The attitude gets us into great trouble. I agree with Mary Parker Follett that the opposite is actually true. That it is harder but much more rewarding to help reconcile parties than to participate in their wars and vendettas. As Mahatma Gahndi said: "the true role of lawyers is to help parties riven asunder."

On Negotiation Consultations. I have recently been involved in some negotiation consultations, and I wonder why we do not more often engage in them in a formal way. Other professionals utilize consultations on a much more regular basis. They are the norm in both the medical and counseling professions. We attorneys use them too, especially in dealing with specialized substantive areas, but we seldom obtain formal consultations in the area of negotiation. Yet it is one of the most important things that we do, and one where we could use the most help.

We all view ourselves as experts in the negotiation arena, I guess, and to an extent that is correct since we all do so much negotiating. Even in an area where we are expert, however, the different perspective of another can be very useful. New ideas can be very helpful, to say nothing of valuable. Ideas after all are our stock in trade. Different negotiation stratagems can be translated directly into money in many instances. Better ideas in such areas is just as valuable if not more so than substantive knowledge. We may be less insecure in negotiations because of our familiarity with them, but the great advantage of getting a fresh perspective remains.

On Negotiating with the IRS. A recent negotiation with the IRS made me recognize that we intuitively use collaborative techniques in such negotiations. We have so little leverage that we need to rely primarily on our personal charm, honesty, and charisma. Similar examples exist where we may have little apparent leverage, but we still can make tremendous gains in negotiations through simple logic, respect for the other side, and an understanding of their wants and needs. Bulldozer negotiating tactics do no good in such circumstances; indeed they can do much harm.

ADR and the Judiciary. At the national conference of the Academy of Family Mediators this past summer in Minnesota, my former home, I met an old college friend who is now a judge. He explained how he had gone from trying 18 custody cases per year to no cases in the past four years as a result of an active mediation program in his jurisdiction. The initial mediation training of attorneys and judges in his community was presented by Chief Justice Sandy Keith of the Minnesota Supreme Court. Justice Keith was also present at the conference, telling about heartbreaking stories he had observed in family practice and his consequent commitment to family mediation.

My friend's experience brought home to me the importance of the judiciary in establishing an effective ADR program. In all states where ADR has become firmly established, the primary driving force has been the judiciary. Sometimes this has been the simple result of overburdening caseload pressure on the courts. More often, however, it has been the result of one or more enthusiastic advocates, like Justice Keith, motivated by personal experience and a driving desire to improve the system.

On Ecological Law. Have you noticed that even McDonalds is becoming more ecologically conscious? Protecting the environment is the current business fad. It may even be here to stay. I have been enamored for some time now by the writings of family therapy theorist Edgar H. Auerswald. Auerswald believes that a fundamental shift is occurring in our thinking to a more ecological way of looking at the world. Ecological thinking is relative, not absolute. Relationships become crucial, as we try to find the right balance to establish a stable ecosystem. We think in terms of both/and instead of either/or. Paradox is welcome, as a signal to expand our fields of thought.

The effects of ecological thinking are having an increasing impact on the law. We are focusing more on long term relationships rather than short term victory. Dispute resolution methods are gradually shifting from the coercive to the consensual. Arbitration is being replaced by mediation, in various forms. Public issues are being resolved by negotiated rule makings rather than by political power plays. Politics is more and more being conducted out in the open, instead of behind closed doors.

It is a gradual but exciting shift in our consciousness. It is also a critical one for our survival. With the increasing technological complexity of our modern lives, we need to be conscious of environment impacts before they get out of hand. Ecological thinking is the key to survival in our increasingly complicated modern age.

POLAR EXTREMES: DEBATING ALASKA'S FUTURE

BURR, PEASE & KURTZ

Wishes to Thank the Individuals Listed Below for Their Assistance as Judges of Our Second Annual "**Polar Extremes**" High School Debate. Their Generosity and Enthusiasm is Greatly Appreciated.

The Honorable Elaine M. Andrews
Douglas Baily
Nora Barlow
Stephen D. Brady
Harold M. Brown
Russellyn S. Carruth
Suzanne Cherot
C. Ann Courtney
Ralph E. Duerre
Penny J. Dufek
Robert C. Ely
Dan A. Hensley
The Honorable Karen L. Hunt
Ann C. Liburd
Thomas E. Meacham
William F. Mede
Scott J. Nordstrand
Bradley Owens
Nelson G. Page
The Honorable John Reese
A. William Saupe
The Honorable John W. Sedwick
Michael W. Sewright
The Honorable James K. Singleton
Michael Stephenson
R. N. Sutliff

• Tok justice

Continued from page 5

especially for himself, who was the closest) and rushed from the courtroom, muttering something about having to fly his plane back to Fairbanks, and making colorful comments about the quality of attorneys generally (as opposed to attorneys general, I hoped).

As we left the courtroom, Judge Van Hoomissen roared overhead in his Cessna 180, having taken off on the highway in Tok en route to Fairbanks. Because the weather was closing in, I could fully appreciate his concern for the quick and flamboyant exit. Still he could have been a little bit kinder to us on the ground, for if you have ever heard an aircraft fly overhead with a variable pitched prop flattened out, you will quickly learn that the effect upon an already pounding hangover can reach the outer limits of human endurance.

Perhaps the only thing that was more excruciating was having to endure the venting of wrath of an incredulous opposing counsel, who still could not comprehend why he had lost the case before he ever got the chance to fully put on his defense. But then again, that was Tok, Alaska — a place far away in a time long ago.!

1 Last name forgotten - to protect my malpractice policy.
2 Ibid.
3 Under the circumstances, I later questioned why she didn't just dim the lights twice.

JurisPrudence

By Daniel Patrick O'Tierney

The cost of doing business often includes expenditures for legal advice and, occasionally, the services of a trial attorney. The Alaska Supreme Court recently initiated a review of the current civil rule on attorney's fees and its effect on the behavior of parties to a lawsuit. That inquiry may result in some changes to Alaska's unique provision for partial recovery of attorney's fees by a successful litigant.

In England, the successful party in a lawsuit is generally entitled to recovery of the costs and fees incurred to advance the claim. Alaska, unlike most American states, takes a similar approach. Alaska Civil Rule 82 currently provides for partial recovery of attorney's fees by the prevailing party in a dispute that ends up in court.

Rule 82 includes a fixed schedule which awards a percentage of the money judgment obtained by the prevailing party in a lawsuit as a proxy for partial recovery of expended attorney's fees. The schedule does so on a graduated scale. For example, in a contested case that goes to trial where the total amount of the prevailing party's judgment is $100,000, 20 percent of the first $25,000 is recovered for attorney's fees but only 10 percent of the remaining $75,000 is recovered for attorney's fees. In a contested case involving the same judgment amount that does not go to trial, the applicable percentages for attorney's fee reimbursement are 18 percent and 8 percent, respectively. In a non-contested case (e.g. a default judgment), the applicable percentages are 10 percent and 3 percent, respectively.

However, in cases where no monetary recovery is awarded or where the money judgment is not necessarily an accurate criterion for determining the percentage of attorney's fees to be reimbursed, Rule 82 allows the judge the discretion to award a reasonable amount that is appropriate under the circumstances of the case.

Several concerns have been raised about the operation and impact of the current rule. One concern is that when the prevailing party does not recover a money judgment (and, therefore, the fixed schedule described above cannot apply), there is a lack of uniformity in fee awards determined by the court. Second, the current rule does not require the trial court judge to specify and explain the reasons in support of its determination of a given award amount.

In a recent case, the Alaska Supreme Court itself has raised an even more fundamental concern. In *Bozarth v. ARCO*, the Supreme Court questioned whether the costs of litigation have increased to such an extent that the prospect of having to pay Rule 82 attorney's fees deters people from voluntary use of the courts to contest their claims.

Bozarth, a pilot, sued his former employer on the basis that he was fired in retaliation for whistleblowing about alleged unsafe practices in his employer's aviation department. The trial court determined, however, that there was no evidence introduced that Bozarth's termination was based on any other reason than his refusal to take a lawful, random drug test, and decided the case in favor of his employer. Since the case did not result in a money judgment, the trial court awarded the former employer 50 percent of its actual attorney's fees in defending the claim, or $76,000.

In upholding the award against Bozarth on appeal, the Alaska Supreme Court noted that an attorney's fee award of that magnitude against a dismissed employee was disturbing and tended to cast doubt on the continued desirability of Civil Rule 82 in the face of the high cost of litigation. Nevertheless, the Supreme Court stated that the rule is grounded in basic fairness in that one who has been forced to litigate in order to vindicate one's rights should be reimbursed in part for the costs of that litigation,

At this writing, the Alaska Supreme Court is reviewing various recommended changes to Rule 82 which have been proposed by its Civil Rules Standing Committee. In cases where the prevailing party recovers no money judgment, the proposed changes would require the court to award a fixed one-third of the prevailing party's actual, reasonable attorney's fees, as opposed to leaving the amount of the award in the judge's discretion.

Further, the Committee's proposal specifies nine guideline factors on the basis of which a judge could vary an attorney's fee award. The factors include, for example, the length of the trial, the written settlement offers made, and the reasonableness of the attorney's rates. Accordingly, the judge would be required to identify and explain which of the nine factors support a variation.

The Committee's proposal does not, however, address the concern over access to the court system that was raised in Bozarth. One option which has been discussed would be to simply cap the amount recoverable in attorney's fees under Rule 82. Another option would entail an adjustment of an award based on the non-prevailing party's ability to pay, or the relative ability of the parties to pay.

Whatever changes, if any, that are eventually adopted by the Supreme Court will not go into effect until July 15, 1993.

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.

VISTA to hold reunion

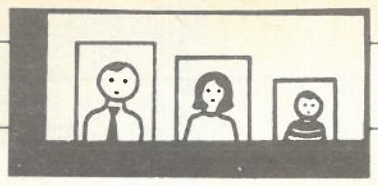
People who served as VISTAs (Volunteers in Service to America) in the '60s, '70s, '80s and '90s in Alaska are planning a reunion in Anchorage in June of 1993.

An offshoot of the Peace Corps in the 1960s, VISTA was the "domestic" Peace Corps program in the United States. The brainchild of President Kennedy, VISTA was headed by Sargent Shriver and assisted by Glenn Olds, currently Alaska's Commissioner of Natural Resources.

VISTAs in Alaska served in such programs as Legal Services, Community Councils, senior programs, RurAL CAP, Headstart, environmental programs and human rights programs.

Former (and current) VISTAs interested in attending the reunion are asked to mail their names, addresses and contact phone numbers c/o Alaska Conference & Event Services, P.O. Box 202622, Anchorage, AK 99520-2622. Or the information can be faxed to: 907-278-2449. The names will be put on a mailing list to receive more information on the reunion.

Heading up the reunion effort is Flo Mason LaLande, a VISTA who served in Anchorage from 1974-1979.



People

Jeff Bush, formerly with Birch, Horton, has opened his own law office in Juneau.....**Joseph Bottini**, formerly with the U.S. Attorney's office, is now a sole practitioner in Anchorage .....**Robert Briggs**, formerly with the Sierra Club Legal Defense Fund, has opened his own law office in Juneau.....**Bill Bonner**, formerly with the A.G.'s office, has now opened his own law office in Anchorage.

Sidney Billingslea, formerly with the Federal Public Defender, is now with the P.D. Agency in Palmer.....**Brian Clark**, former law clerk for the AK Court of Appeals, is now with Lane Powell Spears Lubersky.

Janet Crepps is now with the Center for Reproductive Law & Policy in Denver.....**Joel DiGangi** has relocated from San Diego to Arlington, VA.....**Penny Dufek**, formerly with Heller, Ehrman, is now with Jermain, Dunnagan & Owens.....**Richard Fossey** is now in Baton Rouge, LA.

Eric Johnson, formerly with the A.G.'s office, is now in private practice.....**Barbara Kissner**, formerly with Wohlforth, Argetsinger, et.al., is now with the P.D.'s office in Ketchikan.....**Kevin McCoy**, formerly with the P.D.'s office, is now with the Federal Public Defender.....**Steve Morrissett** is now with the Utah A.G.'s office.

John McConnaughy III is now with the P.D.'s office in Bethel.....**William Oberly** has opened his own law office in Anchorage....**William Olmstead** & **Patrick Conheady** have formed the firm of Olmstead & Conheady. **Elizabeth Ziegler** is also with the firm.....**Steve Pradell**, formerly with Birch, Horton, has opened his own law office in Anchorage.

Geoffrey Parker is with the law firm of Jameson & Associates.....**Mary Pate**, formerly with Guess & Rudd, is now with Eide & Miller.....**Fate Putman** has opened his own law office in Anchorage.....**Philip Pallenberg**, formerly with the P.D.'s office in Kodiak, is now with Batchelor, Brinkman & Pearson in Juneau.....**David Rogers**, formerly with Robertson, Monagle & Eastaugh, has now opened his own law office in Juneau.....**Mark Regan**, formerly with the A.G.'s office in Juneau, is now with the National Health Law Program in L.A.

Connie Sipe has relocated from Juneau to Anchorage.....**Terri Spigelmyer** has relocated from Bethel and is now with Haas & Spigelmyer in Homer.....**Joseph Slusser**, formerly with Hughes Thorsness in Fairbanks, is now with the D.A.'s office in Barrow.....**Gregory Silvey**, formerly with Robertson, Monagle & Eastaugh, is now with Guess & Rudd.....**Vance Sanders** & **Bill Council** have formed the firm of Council & Sanders in Juneau.

John Tindall, formerly with Heller, Ehrman, is now with Condon, Partnow & Sharrock.....**Laurel Tatsuda**, formerly with Jermain, Dunnagan & Owens, is now with Condon, Partnow & Sharrock.....**Susan Williams** is now with Advocacy Services of Alaska. She announces that on August 1, 1992, she and Randall Weiner got married at the Alaska Zoo.....**Michael N. White**, formerly with Preston, Thorgrimson, is now with Friedman, Rubin & White.....**James Wagner**, formerly with Lane Powell, et.al. is now with Stafford, Frey, Cooper & Stewart in Seattle.

Constance E. Livsey has become a shareholder in the Anchorage office of the law firm Faulkner, Banfield, Doogan & Holmes. Ms. Livsey graduated from the University of Oregon School of Law and was admitted to the Alaska Bar in 1984. Since joining Faulkner, Banfield in 1988, her practice has emphasized employment law, workers' compensation defense and defense of personal injury claims.

Lawyers on the move

Former U.S. Representative **Les AuCoin** (D., Oregon) has accepted the position of Chairman of the Government Relations Group with the Bogle & Gates law firm, effective immediately.

Bogle & Gates has offices in Portland, Tacoma, Seattle, Bellevue, Yakima, Vancouver, B.C., Anchorage, and Washington, D.C. AuCoin will join the firm's Washington, D.C. office, where he will work with the firm's Pacific Northwest clients to expand their knowledge of public policy issues in the 1990s. He will also have offices in Portland and Seattle.

AuCoin, who gave up his seat in Congress in 1992 to run against incumbent U.S. Senator Bob Packwood (R., Oregon), was narrowly defeated in one of the closest and most hotly contested races in the nation.

Steve DeLisio has been elected vice chair of the board of directors of the Alaska Voluntary Health Agencies (AVHA).

AVHA is a coalition of 16 health-related agencies that provides direct services, research, educational and wellness programs that can prevent suffering and improve the chances of survival for people whose lives are affected by grief, disease or disability. Each of the members is a non-profit agency with its own area of expertise. He is a partner in the law firm of Staley, DeLisio & Cook, a 17-attorney firm.

Ronald F. Black

Ronald F. Black has joined the law firm of Paul L. Davis and Associates of Anchorage. Black holds a masters degree in geotechnical engineering and has worked as an engineer in Alaska since 1979. He received a Doctorate of Jurisprudence from Willamette University's School of Law in May 2992.

Black has worked as project manager and engineer for three local engineering firms, including EBA Engineering, Inc., Woodward Clyde Consultants, and R&M Consultants, as well as for his own firm, R.F. Black Consulting Engineers.

The Bar Rag welcomes articles from its readers

Hickel appoints three

Governor Walter J. Hickel on Jan. 21 appointed Michael Thompson to the Ketchikan Superior Court and Mark Wood to the Fairbanks District Court. Thompson replaces Thomas Schulz who retired December 31, 1992, and Wood replaces Ed Crutchfield who retired August 1, 1992.

Thompson has an 18-year history in Ketchikan in private and public law as a prosecutor and defense attorney. Thompson has had a sole practice since 1982, involving criminal defense, appellate, personal injury cases, and insurance defense. He worked for the Ketchikan District Attorney's office from 1975-82 on criminal prosecution and civil representation of state matters. Thompson earned his bachelor of science and law degree from the University of Arkansas.

Wood has practiced law as a criminal prosecutor and defense attorney for the past 17 years in Fairbanks. Wood worked as an assistant district attorney in the Fairbanks D.A.'s office since 1979. During his tenure with the D.A.'s office, Wood worked on criminal prosecutions, juvenile cases and taught at the Sitka Police Academy. From 1975-79, Wood worked as an associate with Rice, Hoppner and Hedland. He received his bachelor of arts from Stanford University and his law degree from Cornell Law School.

"I was impressed by the quality of all the candidates submitted by the Judicial Council," Hickel said. "I am pleased to be able to appoint strong candidates with many years of experience, in private practice and public, both in prosecution and defense."

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Governor Walter J. Hickel has reappointed John Salemi, of Anchorage, to a four-year position as director of the public defender agency in the Department of Administration. He was originally appointed in 1989.

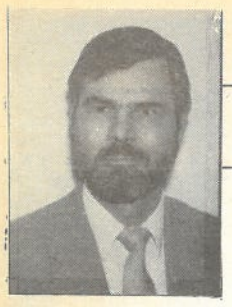
New officers elected

At its February 12 meeting, The Alaska Commission on Judicial Conduct elected new officers. Susan A. Burke of Juneau was elected Chairperson and Sharon Nahorney of Anchorage was elected Vice-Chairperson. Each will serve a two year term.

Ms. Burke is a lawyer member of the Commission and is a partner in Gross and Burke. She is a graduate of Boalt Hall Law School at the University of California, Berkeley and has been a member of the Alaska Bar Association since 1971. She has served on the Law Examiners Committee of the Alaska Bar Association, The Alaska Code Revision Commission, and the Commission on the Future of the Permanent Fund.

Ms. Nahorney is a public member of the Commission and is involved full time as a volunteer with Victims for Justice, a non-profit organization dedicated to assisting homicide survivors and victims of violent crime. She is also active in the Anchorage Woman's Commission Executive Committee, the Anchorage Chamber of Commerce Crime Commission, the National Organization of Victims Assistance, and the Anchorage Sexual Assault Task Force.

The Commission on Judicial Conduct is a constitutionally created agency responsible for investigating complaints of ethical misconduct against judges. The nine member commission is composed of three judges, three lawyers, and three public members.



BANKRUPTCY BRIEFS

By Thomas Yerbich

As creditors, particularly secured creditors, become less tolerant in accepting the treatment proposed in chapter 11 plans, the use of the "cram-down" provisions of 11 USC § 1129(b) has become more prevalent; a trend that can be expected to continue. The greatest divergence of view between debtors and creditors with respect to the requirements of § 1129(b) is the "present value" concept explicit in both § 1129(b)(2)(A)(i)(II) [secured creditors] and § 1129(b)(2)(B)(i) [unsecured creditors]. This article discusses determination of "present value."

"The concept of 'present value' does not define, and thus the court must determine, based upon the facts of a given case, the appropriate 'market rate' which will serve as the measuring standard by which the court can determine whether deferred payments under the terms of the plan have a value as of the effective date of the plan equal to the allowed claim." [5 King, *Collier on Bankruptcy* § 1129.03[3][f][i] (15th ed. 1989)] Thus, the court must determine the "market rate" of interest to be paid to the objecting or rejecting creditor class in order to provide the present value equivalent of the allowed claim. Once the court determines the appropriate interest rate to be paid, it should be presumed that the discounted present value of the deferred payments equals the allowed claim. [*See* H.R.Rep. No. 95-595, 95th Cong., 1st Sees. 414-415 (1977)] The problem lies in defining "market rate."

Colliers. supra, goes on to state: "The appropriate discount rate must be determined on the basis of the rate of interest which is reasonable in light of the risks involved. Thus, in determining the discount rate, the court must consider the prevailing market rate for a loan of a term equal to the payout period, with due consideration of the quality of the security and the risk of subsequent default." The Ninth Circuit has quoted , with approval and adopted the *Collier* test, and approved the use of the formula approach in determining the appropriate "market rate" [*In re Camino Real Landscape Maintenance Contractors, Inc.*, 818 F2d 1503 (9th Cir. 1987)].

Under the formula approach, the court starts with a base rate, (*e.g.*, T-Bill or "prime rate) and adjusts it based upon risk of default and the nature of the security (the "risk factor") [*In re Fowler*, 903 F2d 694 (9th Cir. 1990)]. For example, the court starts with a base rate and, taking into consideration the risk factor, adds to that rate a certain number of percentage points for the risk of default and subtract a certain number of percentage points dependent upon the nature and quality of the security, if any. [*E.g.*, The Ninth Circuit in *Camino Real*, interpreting § 1129(a)(9)(c) but indicating its analysis would be useful in applying similar statutes, approved an interest rate determination that increased the T-Bill rate by 2 percent for the risk and reduced it by 1 percent for the security.) The Ninth Circuit has further recognized that where a plan has been reviewed and confirmed by the court as feasible, "risk" of default is reduced [*e.g. In re Fowler, supra*]. In fact as the BAP has suggested, where the risk of default is excessive, the plan is probably not feasible and should not be confirmed [*In re Patterson*, 86 B.R. 226 (9th Cir. BAP 1988) (approving an interest rate of prime plus 4 points on a 30-year payout in a chapter 12 "cram-down" after noting the "volatility" of the agricultural industry)]. In addition, as the *Fowler* court indicated, evidence of market interest rates in the community for similar loans, while not necessarily controlling, is relevant to the determination of "market rate."

Although not strictly applicable to determining "market rate," this author suggests some of the factors set forth in *Great Western Bank v. Sierra Woods Group*, 953 F2d 1174 (9th Cir. 1992), a "negative amortization" case, are relevant and helpful in determining the "risk factor" involved. Modified, these are: (1) length of deferral; (2) ratio of debt to value during the payoff period; (3) quality of debtor's financial projections (are they reasonable and sufficiently proven, *i.e.*, feasibility); (4) nature of the collateral (*i.e.*, appreciating, depreciating, or stable); (5) does the plan preclude a secured creditor from foreclosing; (6) the original loan terms; and (7) adequacy of safeguards to protect the creditor against plan failure.

The court should evaluate the risk of default as high, low or medium, dependent upon the court's overall evaluation of the ability of the debtor to perform under the terms of the plan. In other words, the greater the feasibility the less risk of default. This evaluation entails an assessment of the relative strength of the projections upon which the plan is based as well as the forecast of the future economic climate in the general sense, as it pertains to the particular industry, and factors that might uniquely affect the debtor. The greater the level of confidence of success, the lesser the risk of default; conversely, the lower the comfort level, the greater the risk of, default. For example, the court may add three points for a high risk but only one point if perceived to be a low risk. In short, the "stronger" the plan in terms of realistic probability based upon objective, empirical evidence and built-in conservatism, the lower the "risk" of default and the smaller the upward adjustment from the base rate.

It is then necessary to evaluate the nature or character and quality of the collateral securing the obligation. Is the collateral real property and, if so, is it improved or unimproved; or is it consumable (*e.g.*, inventory, receivables). Is the collateral appreciating or depreciating in value? Is the collateral subject to economic depreciation or obsolescence, or physical deterioration (*e.g.* equipment)? What are the current and projected market conditions in the event the creditor must resort to the collateral to collect? Obviously, the more desirable the nature or character of the collateral and the higher its quality, the greater comfort level and lower the risk of collectibility. Finally, and perhaps most importantly, what is the debt to value ratio? [Note: Value may take into consideration the factors discussed in the preceding paragraph and, for this purpose, should probably be based upon liquidation or foreclosure sale value, not "fair market value."] Where the creditor is undersecured (debt to value ratio less than 1:1), it is questionable whether that creditor has, in reality, security; thus, it might be appropriate to use a minimal, if any, reduction to the interest rate. On the other hand, where the debt to value ratio approaches or exceeds 1:2, it becomes questionable whether the creditor is at risk at all and use of a maximum (even to the point of eliminating the "risk factor" adjustment)

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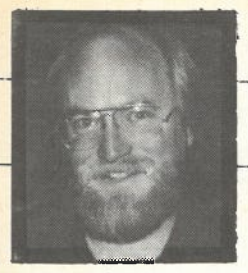


Torts

By Michael Schneider

The legislature is in session, As someone once observed, "When the legislature is in session, your lives and your property are in peril!"

There are a number of bills before the legislature this year that will limit victims' rights. Some of them are being moved through committee hearings and toward the floor at a rate that is puzzling, given their questionable merit. Some examples follow.

HB#87 and **SB#52** are identical bills that would exempt guides and outfitters from the insurance requirements set forth in AS 08.54.395. That statute currently requires a guide or outfitter to have a general liability insurance policy providing a minimum combined yearly aggregate of $500,000 and at least $300,000 per occurrence. The proposed amendment is aimed at relieving "small" operators from this fairly minimal insurance requirement. After all, they may only kill or injure a few people per year.

Another example of questionable public policy can be found in **SB#73**. This bill provides a 10-year statute of repose for claims "based on a defect in the design, planning, supervision, construction, or inspection or observation of construction of an improvement to real property." As many of you will recall, our supreme court struck down the six-year statute of repose for suits against architects, planners, and engineers in *Turner Construction Co., Inc. v. Scales*, 752 P.2d 467 (Alaska 1988). The court found that the original statute failed to bear a "fair and substantial relationship" to the legitimate purpose of the original statute of repose.

The legislative findings (*see* § 1, ¶ 2, of SB#73) acknowledge that 96.8 percent of all claims sought to be covered by the act are brought within 10 years. There is no information in the record before the legislature suggesting that insurance to cover the remaining 3.2 percent of claims is either expensive or unavailable. The legislature is also aware that many schools, bridges, and other public facilities have a design life, and thus carry the risk of failure, well beyond the proposed 10-year statute of repose. Potential claimants may not even be born yet and cannot identify, evaluate, or avoid the risk until it is too late.

Nevertheless, design professionals are pressuring members of both houses, asserting anecdotal injustices of questionable accuracy and railing that "there ought to be a law. . . !" They may get their way. The foreseeable will someday occur. A bridge will collapse or a roof will fall in on a school full of kids 10 years and a day after the date of substantial completion. It will be interesting to see what promoters of this legislation will have to say to the families who are left without recourse if this bill becomes law.

HB#41 and **SB#44** are intended to provide immunity to operators of ski areas. The ski industry, with Seibu, Inc. (Alyeska) leading the charge, makes two arguments for the immunity it seeks. The first argument is that it only wishes immunity from the "inherent hazards of skiing." This, of course, is ridiculous, as the common law, AS 09.65.135, and *Hiibschman v. City of Valdez*, 821 P.2d 1354 (Alaska 1991) already gives the industry the protection that it claims it requires through this new legislation. A review of the original bills and most of the committee substitutes makes it quite obvious that the industry is seeking immunity for acts that go far beyond anything that can be fairly characterized as an inherent risk of the sport.

The second major theme put forward by the industry is the "we're so special" argument. Downhill skiing being the upper middle class activity that it is, and Seibu holding the economic carrots that we've all read about in the paper, the legislature is being asked to recognize that ski area operators are simply above and beyond the tedious business of having to account for their negligent conduct.

The drafts of the bill that I have seen seek immunity even from duties specifically imposed by the U.S. Department of Agriculture, Forest Service, as a condition to operation of the ski areas on public land in the first place. This bill is moving in both the house and the senate and may well become law if the folks in Juneau don't hear from those who think ski area safety is the appropriate business and responsibility of this for-profit industry.

Last, and certainly not least, is **SB#64**. This is a senate labor and commerce committee bill that, despite considerable opposing testimony, has easily found its way out of the senate labor and commerce committee and the senate judiciary committee. It is currently in the rules committee. It will then probably find its way to the senate floor for a vote. As originally drafted, this bill provided a broad immunity to any entity (insurance carriers being the most probable entity) for the negligent provision of a safety inspection or activities related thereto. This bill is clearly a response to our supreme court's decision in *Van Biene v. ERA Helicopters, Inc.*, 779 P.2d 315 (Alaska 1989). In this 1989 case, our supreme court followed the *Restatement (Second) of Torts,* § 323 (negligent performance of undertaking to render services), and such radical jurisdictions as Illinois [(*Nelson v. Union Wire Rope Corp.*, 199 N.E. 2d 769 (Ill. 1964)], Alabama [*Beasley v. MacDonald Engineering Co.*, 249 S.2d 844 (Ala. 197a)], and Georgia [*Sims v. American Casualty Co.*, 206 S.E.2d 121 (Ga. 1974)] in recognizing a rule of law that's been around for the better part of a century [the oldest case I'm aware of is *Hartford Steam Boiler Inspection & Ins. Co. v. Pabst Brewing Co.*, 201 F. 617 (7th Cir. 1912)].

The insurance industry has placed a lot of disinformation in the record regarding this bill and the rule of law that it seeks to abolish. My personal favorite is a letter of February 1, 1993, from Alaska National Insurance Co. over the signature of its president, James E. Pfeifer, describing SB#64 as "extremely important." Alaska National goes on to suggest that "If, in fact, an insurance carrier makes a mistake (intentional or otherwise) in the safety inspection, the employee is taken care of under the workers' compensation system. No need exists, nor should there be any incentive, for an employee to *reap windfall benefits*." (Emphasis added). Mr. Pfeifer goes on to express great faith in the Department of Insurance by suggesting that it is the best and most appropriate entity to address a pattern of poor inspection practices. He then repeats his attack against the intentional misconduct exception to the bill, saying, "I strongly urge your committee to delete the language relative to "intentional misconduct "Mr. Pfeifer repeats that, when these claims are brought by injured workers (individuals covered by the workers' compensation system), "The important consideration is that the employee is already taken care of."

There is very little fire to accompany this smoke. The industry hasn't been kind enough to advise the legislature of the number of inspections done before or after the *Van Biene* decision or to account for the number of claims made based on the *Van Biene* ruling.

I suspect that there are only a trivial number of such claims, past or pending. This bill has implications for governmental subdivisions, adjacent property owners, and businesses. It would immunize the insurance industry for activities not only voluntarily entered into, but entered into as part of affirmative marketing programs and as part of a profit-based (and clearly laudable) effort to minimize losses through the minimization of risk. It would seem that public policy would dictate rules encouraging the best possible safety inspections instead of immunizing those who conduct such important professional activities in an unreasonable manner. This point of view was apparently lost on the members of the senate labor and commerce committee.

These piecemeal attempts to give away the rights of Alaskans in exchange for benefits to a chosen few are, of course, only the tip of the iceberg. Omnibus tort deform legislation is being drafted and may be introduced this session.You are seriously confused if you think that these bills can't pass. Unless those of us interested in preserving an even playing field work to address this attack on the jury system, the judiciary, and individual rights, the forces of darkness and confusion are likely to prevail.I encourage your participation in this important debate.

NOTE: Since this article was written, SB#64 has passed the Senate and has found its way to the House Labor and Commerce Committee. The Senate Judiciary Committee significantly altered the original form of the bill. The latest form of the bill eliminates the claims of workers covered under the Alaska Workers Compensation Act. See CSSB 64 (JUD) (efd fld).

SOLICITATION OF VOLUNTEER ATTORNEYS

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

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

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

Second District:
Mike Hall
303 K Street
Anchorage, AK 99501-2099
(907) 264-8250

Third District:
Al Szal .
303 K Street
Anchorage, AK 99501-2083
(907) 264-0415

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

STATE OF ALASKA
DEPARTMENT OF ADMINISTRATION
OFFICE OF PUBLIC ADVOCACY
REQUEST FOR PROPOSALS

The Office of Public Advocacy will issue a Request for Proposals on April 1, 1993 to provide attorney services for OPA cases as mandated in AS 44.21.400. OPA contracts with attorneys to provide services to clients for which OPA is responsible by statute but cannot represent because of a conflict of interest or because distance makes staff coverage too costly.

If you are interested in contracting with OPA to provide attorney services during FY94 (July 1, 1993 through June 30, 1994) you may obtain a copy of the Request for Proposal from:

BARBARA CROMBIE
Office of Public Advocacy
900 West 5th Ave., Suite 525
Anchorage, AK 99501
274-1684

The deadline for submitting proposals is 5:00 p.m. on April 21, 1993.

Arctic war games

Maybe they should pad the latrines

BY DAN BRANCH

My friend Mike stopped by the other day. He was walking kind of slow. I was about to ask him why he was wearing loose-fitting sweatpants when he said, "Don't ask, it's all in the letter." With that said he gingerly moved out of the room to leave me alone with a letter addressed to Mandy.

"Dear Mandy," the epistle began, "I feel that you deserve an explanation about why I was unable to meet you in Seattle last weekend." The letter went on to describe the implausible series of events that I have set out below. It also contained enough cooing and other romantic stuff to render it unsuitable for the *Bar Rag*. That's OK. I'll just set out the tale in my own words.

Mike, as some of you may know from other *Bar Rag* columns, began his adult life as a naval aviator. Flying carrier jets off of Spain and Viet Nam, he went down in the history books as one of the only pilots ever to be shot down in a rare reconnaissance jet. The plane could also be used as an offense weapon by inserting a specially designed bomb into the rear of its fuselage. Once over a target, the plane moved the bomb out of its bowels much like a dragonfly laying eggs.

After taking enemy fire, Mike ejected from his wounded bird and went on to serve his country well. He eventually mustered out of the Navy and began an interesting civilian career which included employment in a Texas mental hospital, commercial diving, boat towing, and an early attempt to market Alaskan salmon below the Mason-Dixon line. The salmon business failed when several tons of sockeye were misrouted to El Paso where they stayed until Texas health officials condemned the air freight hanger.

Scampering back to Alaska, Mike settled down in Ketchikan. Missing the military life, he joined the Ketchikanites serving Alaska in the National Guard. In deference to his age and prior military experience, they made him a sergeant.

Since joining up, Sgt. Mike has faithfully attended the weekend training sessions held each month at the armory. His unit went up to Ft. Grealy last year for two weeks of winter war games but Mike stayed in Ketchikan, confined by illness to the National Guard Armory. Except for the occasional delivered pizza, he existed for the whole two weeks entirely on government issue MRE (Meals Repugnant to Everyone).

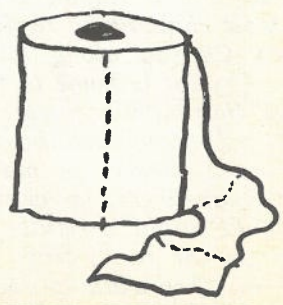
This year Mike was healthy enough to attend the games. In prewar training sessions held before the unit's departure, he listened carefully as his officers went over the use of the winter gear that would keep him alive during his stay in the land of 40 below. Unfortunately, he was called away during the lecture on proper toilet hygiene.

When Ketchikan's finest flew to Fairbanks, Sgt. Mike was there pouring over the Guard's winter toilet manual. After landing, the unit was transported to a tundra knoll east of North Pole and told to hold it at all costs. Sgt. Mike supervised the establishment of a defensible perimeter and was just thinking about relieving himself when word came that they were about to be attacked.

The old man, as Mike was known to his charges, gave out gentle words of encouragement before heading to the latrine area. There he found a five gallon bucket made of plastic. Someone had thoughtfully placed a roll of toilet paper on a nearby tree limb.

The temperature was hovering around 45 below when Mike prepared himself for the ordeal of arctic elimination. "Let's see," he puzzled to himself, "Do I sit or squat?" Before he could remember correct procedure, his unit came under attack. Desiring to finish up in a hurry, Mike sat down on the bucket which immediately froze to his tender rear end.

Once in place, the bucket could not be removed without doing major damage to the sergeant. With his men scrambling heedless towards the perimeter, Mike left the latrine area with bucket attached, and began issuing orders. To keep his new appendage from bouncing along the tussocks, he had to duck walk with trunk bent forward toward the front lines. His boys rallied and repulsed the attack. Then they thanked their sergeant for providing comic relief.



From the AG's January blotter

A two-week trial on charges of police brutality in Fairbanks concluded with a verdict for the state. The state's case was strengthened by the stature of the trooper, who stands 6 feet 6 inches tall and weighs 280 pounds. "We argued it was inconceivable that the plaintiff was acting rationally when he took on the trooper, plus two city officers. Also helpful to the defense (the state) was the plaintiff's expert in police procedures, who came all the way from Seattle to testify that, so long as the trooper did not use deadly force, he was justified in taking the plaintiff to the floor."

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Other than several burglaries and a number of sexual assault charges, it has been a slow month in Kotzebue. "We think several weeks of extremely cold weather put a damper on the usual criminal activities; temperatures have been in the minus 50s and 60s and wind chills at times below minus 100."

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From Palmer, "Farming continues in the Valley even in the dead of winter. Six people were indicted for growing marijuana." There were also 25 arrests for driving while intoxicated, one-third of the statewide total.

—Media Support Center, State of Alaska

For Sale

Stacor Tri-File Mobile File System. Condensed filing system well suited to Legal or Medical files.

Three rows of stacking files where the first two rows slide back and forth to expose the back rows:

Row 1 (Back) 36" x 16" deep, 7 high (4 ea.)
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Entire system sits on carriage decking system: 144" wide by 52" deep.

Contact: Marge Wheeler -- 265-2630

• Law's of credit

Continued from page 9

might be appropriate. For example, the court might deduct 1 point where the debt to value ratio is 1:1 and three point where the ratio is 1:2.

The next question is the appropriate "base rate" to be used. Unfortunately, the Ninth Circuit has given little guidance in this area: approving use of either the T-Bill rate (*Camino Real*) or the prime rate (*Fowler*). The author suggests that use of the T-Bill rate is probably inappropriate for two reasons: (1) it is usually much shorter (1 to 5 years) than the term proposed under the plan; and (2) in terms of "risk," is generally considered the least risky or highest quality investment. As a result, use of the T-Bill rate necessarily heightens the "risk of default" analysis. [It might also be noted that *Camino Real* involved the rate of interest to be paid to the Internal Revenue Service under § 1129(a)(9)(C) and use of the T-Bill rate as the base rate is more appropriate in that context than under § 1129(b).] On the other hand, the "prime" rate is more in line with the realities of the commercial loan market that is usually present in the § 1129(b) situation.

One additional factor, although not explicitly considered by the Ninth Circuit in the context of determining "market rate," , comes into play: the length of loan. In fixing the interest rate to be charged for a particular loan, the term (length) of the payback period is a significant factor considered by commercial lenders. In general, the longer the loan term, the higher the interest rate. How does one "compute" this factor? One method using information more or less readily available is to refer to the Applicable Federal Rates published monthly by the Internal Revenue Service in the IRB. The AFR is published in three lengths: short-term (less than 3 years); mid-term (more than 3, but less than 9, years); and long-term (9 years or longer). One can easily extrapolate the term difference and apply it to the base rate. [For example, at the time this article is written, the prime rate is 6.0 percent, the short-term AFR (monthly payments) is 4.15 percent, the mid-term AFR (monthly payments) is 6.05 percent, and the long-term AFR (monthly payments) is 6.94 percent; the difference is added to the prime rate to arrive at the "base rate" for a mid-or long-term loan. Thus, the appropriate "base" rate would be 6.0 percent for short-term, 7.9 percent for mid-term, and 8.8 percent for long-term loans.]

To illustrate the foregoing principles: For February 1993, application of the "risk factors" should result, for the "average" chapter 11 plan, in "market rates" for secured loans in the range of 6.5 percent to 7.5 percent for short-term, 8.5 percent to 9.5 percent for midterm, and 9.5 percent to 10.5 percent for long-term payouts; and for unsecured creditors a range approximately 1 point higher.

As a practice hint, this author suggests four important , points: (1) do not overlook, where applicable, the relevance or importance of "comparable loan" rates set by the local lending community; (2) do not forget that the lender would probably not take the loan if it were being originated [the "rewritten loan" is being forced on the lender, otherwise the lender would not be objecting], which makes a "comparable loan" analysis somewhat artificial; (3) for mid- pr long-term rewrites, seriously consider using a variable or floating interest rate, adjusted annually, with "floor" and "ceiling" rates [remember, initial interest rates are generally lower in the "real" market with adjustable or floating rate notes]; and (4) negotiate.

Shooting the rapids

The Grand Canyon works magic

BY MATTHEW CLAMAN

We wake and eat breakfast to the crashing sound of Granite Rapid. The flat, slow-moving water where we park the boats is a precursor to the fast current, exploding waves, rocks, and white water that is Granite Rapid.

Watching from the bank, each boat seems to go perilously close to a solid granite wall on the other side of the river. Once in the boat, the rapid is a blur of whitewater until we're through the rapid and bailing out buckets of water from the bottom of the boat. The river then carries us downstream to Hermit Rapid, and it's a roller-coaster ride — especially when one huge wave breaks over the front of the boat and seems to stand the boat on end. We look over the bow and see blue sky.

The river now takes us through Boucher Rapid and on to scout the run at Crystal Rapid. One of the two most challenging rapids in the Grand Canyon along with Lava Falls, Crystal is home to two large "holes" that must be missed. Lateral waves will try to push the boats into the wrong places, so making the right maneuvers is critical. We scout the rapid carefully, looking down on the rapid from a gravel bluff and then walking down to the bank to look closely at the rocks and waves. Finally, having talked about every detail of the run, it's time to get in the boats.

A float trip through the Grand Canyon on the Colorado River is a magnificent way to escape to the southwest desert. I believe it is one of the finest vacations anywhere in the world. But then, I'm biased: With 7 trips down the river, first as a passenger and now as a guide for Grand Canyon Dories, I know the magic that the Grand Canyon works on me and I've seen the magic it works on just about everyone who takes the trip.

It all starts at a place called Lee's Ferry, just a few miles below Glen Canyon Dam, where the top of the first sedimentary rock formation appears beside the river and begins rising up. As we float downriver in the boats, the canyon rim rises. By the 20th river mile, we have already seen 5 geologic formations and the rim of the canyon is over 1,000 feet above the river. Part of the magic of the Grand Canyon is how people lose track of time. Did we run the "Roaring Twenties" on the second day or the third day? Where is President Harding? When did we hike up North Canyon? When did we enter the Granite Gorge? Was the hike up Tapeats Creek two days ago or just yesterday? How many days before we run Lava Falls?

The best way to see the Grand Canyon is to travel the entire 280 miles of the river corridor: Lee's Ferry to Pierce Ferry on Lake Mead gives you the total experience. While commercial trips are not cheap, the memories last a lifetime. If time or money doesn't allow a complete trip, there are shorter trips: people can join or leave a trip by hiking in or out at Bright Angel Creek, about one-third of the way through the journey, or they can helicopter in or out at Whitmore Wash, just downriver from Lava Falls and about two-thirds of the way down the river.

For the experienced river runner, private permits are available, but it may take 6 years to get your permit. For Alaskans, the best time to take a Colorado River trip is the late spring or the early fall: April, May, September, and October. It's a great way to miss spring break-up or the fall rains.

Each tributary to the Colorado River has carved its own side canyon through the layers of rock. Rocks and other debris eroded from the side canyons have been flushed into the main channel of the Colorado, narrowing the channel and forming the many exciting rapids that we navigate every day throughout the journey. The side canyons also provide access to some of the most wonderful areas of the Grand Canyon. You can hike to small waterfalls to swim under, shady trees to sleep under, and spectacular vistas to gaze at. A short morning hike from the river may take you to a place that is inaccessible from the rim. Another destination from the rim might take days to reach on a backpacking trip, while the river runner has already moved down the river and spent the afternoon somewhere else.

A longer excursion has you crossing creeks, hopping over rocks, and hiking up a steep hill to a misty lunch spot where the Thunder River pours out of a solid rock face. Another long hike will bring you to Moonie Falls, where the adventurous swim behind the waterfall before eating lunch — one of my personal favorites. On other explorations, we hike up one side canyon and return to the river down the next side canyon — "up and over" hikes that help convey the scale and majesty of the Grand Canyon.

When the river day is over, we stop on one of the canyon's many beaches for the night. The beaches are wonderful resting places even though daily fluctuating water releases from Glen Canyon Dam are making the beaches smaller every year. This is because the beaches do not receive new sand since the spring floods and their sediment are captured behind the dam. The desert climate means rain is unlikely and tents are seldom necessary. In the many nights I have spent in the Grand Canyon, I can still count on one hand the number of nights I have slept in a tent. Relaxing after dinner, we sometimes watch the growing band of moonlight on the opposite canyon wall until the moon rises over the rim and bathes our camp in light. Another part of the magic of the Grand Canyon is falling asleep under a blanket of stars framed by immense canyon walls.

Then, of course, there are the rapids. It's big water in the Grand Canyon, and the dories — rigid boats made from wood or aluminum — are especially amazing in the big water because they ride high on the waves, sometimes cutting right through and other times getting a special boost. The names of the rapids and the runs through those rapids become part of the fabric of the river journey: Hance with its tricky maneuvers: Sockdolager with its own special punch; Hermit with its fabulous waves; Upset with all kinds of emotions; Lava Falls — near the end of the trip in the midst of hot, black rocks; and Crystal.

Back in the boats, the adrenalin is pumping as we approach the top of Crystal Rapid. As the boat nears the big water, the current picks up and the pulse quickens. Then we're crashing through waves and looking at the hole we just missed. On this day, we all have successful runs, so it's time for an ABC lunch — Alive Below Crystal. We'll run the "jewel" rapids next: Agate, Sapphire, Turquoise, Ruby, and Serpentine. All with big waves and exciting white water. By the time we make camp, we will have run at least 14 rapids in 15 miles: the largest concentration of white water in the Grand Canyon. That evening, we'll enjoy dinner and recall the events of the day we've just completed. Going to sleep on a sandy beach under a blanket of bright stars, we'll look forward to tomorrow's adventures: side canyons to explore, shady spots to relax in, archeological ruins, millions of years of geologic history, the good company of our fellow travellers, and more white water.

As the days pass, one after another, and we near the end of the journey, it seems to have lasted longer than anyone could have imagined and, at the same time, not nearly long enough. Finally, inevitably, the river brings us to the upper waters of Lake Mead, where it's time to pack up the river gear and begin to treasure the memories.

Words and pictures alone, however, can never capture the magnificence of a trip through the Grand Canyon. You'll just have to take your own journey and experience the magic.

The sun sets behind the rim, while in the evening the boats are secured.

Photos by Matthew Claman

Attorney reprimanded for communicating with opposing party; other attorneys sanctioned

Attorney X received a reprimand by the Disciplinary Board, privately imposed, for violating Disciplinary Rule 7-104(A)(1) by communicating directly with an opposing party whom she knew to be represented in litigation without the prior consent of the party's counsel. Attorney X represented Wife in a divorce and child custody matter. On Christmas day 1991, Wife called Attorney X in a distraught state, asking that she do something about Husband's alleged violation of an oral agreement to allow Wife visitation with the couple's child on Christmas day. Attorney X initially refused, noting that Husband was represented by counsel. Wife represented that she had already contacted both Husband and his counsel at home and both had refused to do anything. Wife persisted in her requests for assistance, and Attorney X ultimately agreed to call Husband. She called Husband and asked that he do one of the following: (1) return the child, (2) call his attorney, or (3) contact Wife directly to resolve the problem. Husband refused, and the call ended.

In aggravation, Attorney X's misconduct, although impulsive and poorly thought out, was "knowingly" committed. Further, Attorney X had substantial experience in the practice of law and had received prior private discipline from the Bar Association. In mitigation, the prior discipline was unrelated and relatively remote in time; there was no harm as a result of the contact and no overreaching by Attorney X during the conversation; the call was made impulsively, out of personal sympathy for a distraught client, and was not the product of substantial reflection; Attorney X cooperated with the Bar Association throughout the investigation; she admitted misconduct and expressed remorse; she voluntarily attended an ethics CLE, and agreed to take and pass the Multistate Professional Responsibility Examination as a condition of discipline. The matter was resolved by stipulation approved by the Disciplinary Board pursuant to Alaska Bar Rule 22(h).

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Attorney X received a written private admonition for violating DR 5-105(B) by undertaking to negotiate and draft a release of liability between two existing clients, when she knew or should have known that the two clients had conflicting interests therein, without first obtaining the informed consent of each client after full disclosure of the conflict. In aggravation, Attorney X had substantial experience in the practice of law and had a prior record of private discipline. In mitigation, the prior discipline was remote in time and unrelated to the instant matter. Attorney X's actions were negligent rather than knowing or intentional, and were not motivated by selfishness or dishonesty. Attorney X was cooperative with the Bar throughout the investigation, admitted misconduct, and took steps to prevent future recurrence of the problem.

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Attorney X received a written private admonition for violating Disciplinary Rule 6-101(A)(3) by neglecting a legal matter entrusted to him. After obtaining a default judgment on Client's behalf, Attorney X agreed to pursue collection efforts to obtain satisfaction of the judgment. The matter was unduly delayed in Attorney X's office and, as a result, later judgment creditors were able to satisfy their judgments before Client's judgment was acted on, thus leaving insufficient assets to enable Client to achieve satisfaction through execution.

In mitigation, Attorney X had no prior record of discipline, he did not act out of selfish or dishonest motives, he was experiencing personal emotional problems during the relevant period, he was cooperative with the Bar Association, he admitted misconduct, and he agreed to make full restitution to the client for losses incurred. There were no significant factors in aggravation.

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Attorney X received written private admonitions in two separate matters, both involving his negligent failure to avoid conflicts of interest. In the first matter, Attorney X negligently undertook to advise Client A concerning whether she should continue paying condominium association dues at a time when he was simultaneously representing the same association in other dues collection matters. In the second matter, Attorney X failed to establish conflicts-check procedures adequate to prevent his associate from rendering legal advice to Client B about whether to sue a condominium association in a personal injury matter, while simultaneously representing the same association in other matters. In each case, Attorney X violated Disciplinary Rule 5.105(A) by undertaking to represent a client when his independent judgment on behalf of such client was likely to be adversely affected by his representation of another client, without first obtaining the consent of both clients after full disclosure.

In aggravation, Attorney X had substantial experience in the practice of law and there was more than one incident of conflict. In mitigation, Attorney X's actions were negligent rather than intentional, and no actual harm resulted to clients. Attorney X did not act out of selfish or dishonest motives, he cooperated with bar counsel, and he had no prior record of discipline. Additionally, Attorney X acknowledged deficiencies in his conflicts-check procedures and took active steps to remedy them. Attorney X accepted the admonitions.

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Attorney X received a written private admonition for violating DR 9-102(B)(3), which requires a lawyer to maintain complete, accurate records of client money and to "render appropriate accounts," which means to promptly render an account on request by a client or, if necessary, by Bar Counsel. The lawyer was the trustee of a trust maintained for the benefit of a family member living Outside. The lawyer's failure to maintain proper records and submit them on request to her clients created confusion and distrust; it also hindered Bar Counsel's resolution of the disciplinary grievance that followed. Private discipline was appropriate because the failure to account caused no financial loss, and it was an isolated instance of misconduct not likely to be repeated.

From Discovery to Disclosure: CLE on Upcoming Proposed Rules

A CLE on the upcoming proposed civil rules changes affecting discovery and disclosure is scheduled for Friday, June 11 in Juneau as part of the Alaska Judicial Conference. These proposed changes may be modeled on changes to the Arizona rules adopted in July 1992. Justice Thomas Zlaket of the Arizona Supreme Court will be the guest speaker at the CLE titled "From Discovery to Disclosure: The Elimination of Unnecessary Cost and Delay."

Presiding Judge Karl S. Johnstone of the Third Judicial District has been appointed chairman of a Special Alaska Bar Association Committee charged with proposing civil rules changes to reduce cost, delay, discovery abuse, and to enhance professionalism in the practice of law. The committee has been charged with studying and investigating the Arizona rules, which have significantly changed conventional methods of discovery in that state's legal system. The Arizona rules have become commonly known as the "Zlaket Rules," named after the committee chairman, Thomas Zlaket, who has since become a member of the Arizona Supreme Court.

Bar participation in this CLE with Justice Zlaket and the Alaska judiciary is considered critical, and Bar members are encouraged to attend this program and engage in the discussion of these upcoming rules changes.

Solid Foundations

By Mary Hughes

In April, applications for IOLTA (Interest on Lawyers Trust Accounts) grants are to be submitted to the Alaska Bar Foundation for review and determination by the Trustees for 1993-1994 IOLTA funding. Approximately $225,000 will be distributed for either of the following purposes:

The provisioning of legal services to the economically disadvantaged: The Foundation is committed to improving access to legal services. IOLTA support is given to projects and organizations which provide legal services to persons or groups who find it difficult to obtain such services;

The improvement of the administration of justice: The Foundation supports projects and organizations which seek to improve the legal system and the administration of justice. Emphasis is placed on projects that contribute to the substantive understanding of the legal system or advocate for the improvement thereof.

The Trustees urge non-profit organizations which provide any type of legal services to the economically disadvantaged or participate in the administration of justice to review the IOLTA Grant Application to determine whether the services might be funded with IOLTA monies. For example, in addition to providing the funding for the Alaska Pro Bono Program, a statewide program of clinics, representation and legal presentations for the public, the economically disadvantaged and the elderly, the Trustees have participated in the support of an immigration law program as well as AIDS legal assistance. The developmentally disabled have also been assisted by IOLTA monies. Initial start-up funding is available for eligible programs.

Although the administration of justice is a very broad category, Anchorage Youth Court is a primary recipient of grant monies therein. Its programming is exemplary for the type of youth legal education which can be accomplished.

The youth court recently received an American Bar Association award demonstrating the unique quality of its program.

The Trustees have also funded a pilot project involving two Alaskan communities in which community resources people assisted in youth legal education. The purpose of the project was to assist secondary students in developing an increased awareness and understanding of the legal system and the skills necessary to be a responsible citizen. IOLTA monies were also utilized in the presentation of a women's conference focusing on issues relevant to women in the 1990's.

The trustees are purposeful in their goal of continuing to extend IOLTA funding to programs serving the greatest numbers of Alaskans. Through the utilization of IOLTA funds, more organizations are able to assist not only their constituencies but the people of Alaska.

Kids vote in April; law firm sets scholarships

Kids from kindergarten through twelfth grade will vote in the Anchorage Municipal Election April 20, 1993. It sounds like that could put a different spin on things, but while their votes will be tallied and reported to the media, they will not directly influence the election's outcome. Yet kids voting will surely have an impact as more parents make the necessary commitment to go to the polls and cast their ballots along with their children.

When Kids Voting USA was introduced as a pilot program in Arizona's 1990 election, it was met with enthusiastic response and was credited with a hefty increase in adult voter registration.

KIDS VOTING ALASKA is a nonpartisan, non-profit organization licensed through the national association. It was kicked off in Fairbanks for the 1992 Presidential election. Approximately 78 percent of the school age children in the program cast their ballots and adult voter turnout was significantly increased. But Anchorage will be the first community to implement Kids Voting in a local election — elections where voter turnout is traditionally low.

Since World War II, 70 percent of eligible citizens do not participate in local elections, 50 percent do not participate in presidential elections. Of even greater concern is that less than 16 percent of eligible young adults between the ages of 18 and 24 voted in 1990. KIDS VOTING ALASKA offers a unique program designed to make life-long voters of today's school children, while also increasing voter turnout among adults.

The Anchorage School District supports the program and, during the months of February and March, almost all District teachers will offer an age-appropriate curriculum tailored for students from kindergarten through high school which teaches the democratic process and voting rights and responsibilities. All students must be registered to vote and registration will be done only at their schools.

For adults who are not registered, but who are making the commitment to vote with their children, there will be a number of voter registration opportunities at locations that have been coordinated through KIDS VOTING ALASKA.

The right to vote for public officials is an American freedom that citizens of many countries envy. Kids Voting USA and KIDS VOTING ALASKA could help restore its importance again in our country.

Principal sponsors for KIDS VOTING ALASKA are the Anchorage Daily News, Alyeska Pipeline Service Company and Alascom. Volunteers are essential to a program's success wherever it has been implemented. During the Arizona election, 10,000 people volunteered for a variety of tasks. If you want to volunteer to help KIDS VOTING ALASKA, call 257-4263, or Jon Ealy at 277-1900.

The law firm of Hughes Thorsness Gantz Powell & Brundin is holding its fourth annual essay competition for six scholarships totaling $6,500. The competition is open to all graduating seniors in the state of Alaska planning to attend a nationally accredited college or university next fall.

One grand prize scholarship of $1,500 will go to the student who writes the best essay. Scholarships of $1,000 each will be awarded to five additional winners.

The essay topic this years is: "Alaska's Future: The Role of the Permanent Fund in Our Changing Economy."

Winners will be notified by April 13, 1993 and publicly announced with photos in May. Winners will be asked to provide five small photos. Scholarships will be paid to the student's college or university upon proof of enrollment. Interested students, parents, and teachers with questions are encouraged to contact Hughes Thorsness.

The Lawyer's Almanack

by Peter Zinman

Observations and comments on our profession as set forth in American almanacs of the eighteenth and nineteenth centuries

LEGAL ADVICE.

"Sir," said a barber to an attorney who was passing his door, "will you tell me if this is a good seven shilling piece?" The lawyer pronounced the piece good, deposited it in his pocket, adding, with great gravity, "if you'll send your lad to my office, I'll return the four pence."

—The Rhode Island Almanack, for the Year of our Lord Christ, 1824.
By Isaac Bickerstaff, Esq. Philom., Providence.

• Committee considers discovery reform

Continued from page 1

interrogatories, requests for production, and requests for admissions. The theory is that mandatory disclosure would serve most of the purpose of discovery, while promising to eliminate much of the cost and delay it engenders.

The cost savings would be significant. Discovery has become the major cost of litigation, while at the same time a major source of profit for litigating firms, with estimates running up to 50 percent of gross income. Some lawyers are making careers of discovery without ever trying a case. The discovery system encourages an adversarial process driven by the wrong incentives. The rules that were once set up to bring about the inexpensive determination of an action now encourage lawyers to conduct discovery so as to leave no stone unturned. Lawyers allay their fears of surprise or malpractice claims with protracted and expensive discovery. It is no surprise that discovery offers opportunities for associates and paralegals to run up chargeable hours to meet firm minimums. And in the end, it is the public that pays the bills.

This is not a condemnation of all lawyers. They are utilizing a system that was originally put in place for a noble purpose. They are following the rules for which the courts are ultimately responsible. The vast majority of lawyers follow the rules without abusing them. Viewing the problem objectively, however, there is no doubt that at times discovery is *being* used as a weapon to harass, discourage and exhaust the opponent rather than to gather needed information.

More significant than the occasional abuse is excess. Excessive discovery is often the product of inexperience, lack of preparation, or ineptitude. It results in depositions that take too long, documents and interrogatories that are too voluminous, take much time to prepare and answer, and, in many cases, will never be used in litigation. The result is unnecessary delay and excessive cost incurred in the resolution of disputes.

Good faith mandatory disclosures would eliminate the need for most discovery. And while there may always be a fear that one side will not be getting as much information as it gives, the threat of sanctions should normally discourage improper disclosure. A thorough court ordered scheduling conference would provide a method for special handling of cases that need special treatment.

Alaska is not the only state examining the need for reform. A similar committee of Arizona lawyers and judges was appointed to propose changes to the Arizona rules. As a result, in 1992, after an eighteen month pilot program, Arizona adopted statewide discovery reform. Mandatory disclosure now replaces a substantial amount of conventional discovery and quantitative limitations are placed on what remains. And, while it is a little early to tell whether all the goals are being achieved, a recent study conducted in Arizona shows some positive change.

Some lawyers argue that no rules will be adequate unless the courts enforce them. This is a valid observation that Arizona addressed by requiring mandatory sanctions for noncompliance. The study in Arizona reflected that the bar and the bench expect significant sanctions for noncompliance and, in the event of fraudulent noncompliance, many feel that the lawyer's right to practice law should be taken away.

Noteworthy in the Arizona study were feelings by many lawyers that they were experiencing more cooperation from their colleagues. the Arizona rules promote cooperation and penalize unreasonable conduct. For example, depositions may only be taken of experts or parties. A party must obtain a stipulation or receive leave of court to take other depositions. However, a party or counsel will be sanctioned if they unreasonably withhold a stipulation. The same holds true for depositions taking more than four hours. They may be only taken by stipulation or leave of court. But, a lawyer who unreasonably withholds a stipulation, or engages in obstructionist conduct during a deposition, will be sanctioned.

In Arizona, associate hiring in major litigation firms is down while case loads remain the same or are increasing. This may be because, where it was almost automatic to take the deposition of every person named who might have information, or send standard interrogatories or production requests to each party, much of that information is now being disclosed.

Eliminating unnecessary discovery in Alaska may have an initial adverse financial impact on some lawyers. However, if the result is to make the courts more accessible to the public by decreasing the cost of litigation, lawyers will be able to take on more clients, which may reduce the impact. In any event, it is the client that will save.

Judges will probably appreciate the disclosure/discovery limitation approach. The disclosure process will involve the judge in the management of the case, but the involvement will be different than what it is now. Judges will no longer have to deal with the painful stacks of discovery disputes, and more cases will be disposed of early without judicial intervention as a result of good faith disclosures. Only cases requiring judicial intervention will come before the judge, and then only for action having a significant impact on the management of the case by defining the issues and clarifying the disclosure obligations, and in some cases expanding discovery.

There will no doubt be resistance to any change. There will be complaints of interference with the advocacy system, penalizing good lawyers, interference with the attorney-client privilege, inadequate discovery of the facts through disclosure, and attempting to fix something that already works. There will probably be some honest claims of painful economic impact. In some cases, each of these arguments may have some merit. But for the overwhelming majority of the cases filed in court, these complaints will not be a valid excuse to resist reform, because, for the public who foots the bill in those cases, the system is no longer just, speedy, or inexpensive. And, it simply is no longer working.

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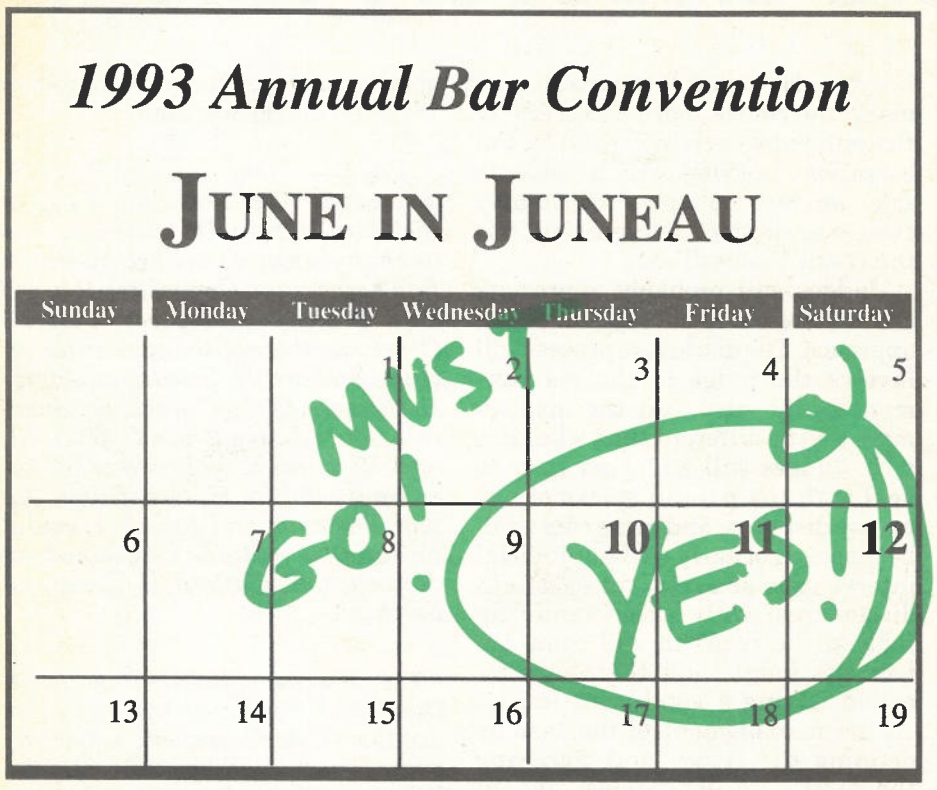
Superior Court Judge Karl S. Johnstone is the Presiding Judge of the Third Judicial District and serves as chairperson of the Special Alaska Bar Association Committee charged with proposing discovery reform. Other members of the committee include Richard H. Friedman, James D. Gilmore, Cheri C. Jacobus, Superior Court Judge Brian C. Shortell, and Richard E. Vollertsen, of Anchorage; Robert B. Groseclose, Joseph Paskvan, and John F. Rosie, of Fairbanks; William T. Council, of Juneau; and Clifford H. Smith, of Ketchikan.

The Special Alaska Bar/Bench Committee appointed by Chief Justice Daniel A. Moore, Jr., is investigating and studying the Alaska Rules of Civil Procedure for the purpose of reporting to the Alaska Supreme Court on ways to make the civil justice system more efficient, less costly, and more accessible to the public.

The committee's report is expected to be submitted to the Supreme Court sometime during the summer of 1993. As a result, the Alaska Supreme Court, which is the rule-making authority, has not had an opportunity to consider or formally adopt the views expressed in the foregoing article. The views expresses therein were those of the committee chairman, Superior Court Judge Karl S. Johnstone.

NEW CHEESE WEASEL ISSUE

To receive your copy of the Weasel's latest (issues 5 & 6), it's $2.95 for each book at Side Show Comics, PO Box 464, Herscher, IL 60941.



CONVENTION CLE HIGHLIGHTS

THURSDAY, JUNE 10

"Demonstrative Evidence Revisited": Judge Karen Hunt, Judge Larry Weeks, Valerie Van Brocklin, and Gary Foster

"Review of Recent U.S. Supreme Court Opinions": Professor Peter Arenella and Associate Dean Julian Eule, UCLA School of Law

"Reading the Silent Messages of Jurors" and "Taking the Edge Off Stress: Not Just Another Stress Session": Lynne Curry Swann, Ph.D., The Growth Co.

"Gender Equality: A Challenge to the Justice System": Judge Karen Hunt, Collin Middleton, and other distinguished panelists.

FRIDAY, JUNE 11

"Ethics and Professionalism in Pretrial Practice" (Sponsored by ALPS): Robert Reis, Risk Manager, ALPS; Stephen Van Goor, Bar Counsel, Alaska Bar Association

"Client Interviewing Skills" and "Direct & Cross Examination": John Strait, Associate Professor of Law, University of Puget Sound School of Law

"Total Access Courtroom": Lynda Batchelor, Lenny DiPaolo, Marianne Lindley, Alaska Shorthand Reporters Association

"From Discovery to Disclosure: The Elimination of Unnecessary Cost & Delay": Justice Thomas Zlaket

Social Events Social Events Social Events

THURSDAY, JUNE 10
President's Reception
DIPAC
Sponsored in part by Butterworth Legal Publishers

FRIDAY, JUNE 11
Awards Reception
Centennial Hall
Sponsored by The Michie Co.

AWARDS BANQUET
Centennial Hall
Entertainment by the 20th Century Bluescast and John Buck and the Casual "T's"

HOSPITALITY SUITE OPEN THURSDAY, JUNE 10
Tongass Suite, Westmark Juneau Hotel
Sponsored by the Anchorage Bar Association
Soft drinks donated by the Juneau Bar Association

SATURDAY, JUNE 12
Fun Run sponsored by Attorneys Liability Protection Society, a Mutual Risk Retention Group (ALPS)

PICNIC AT SANDY BEACH
Sponsored by the Juneau Bar Association

Watch for the convention brochure with information on these other Juneau Bar Association activities: "Dinner in the Home" on Thursday, June 10 following the President's Reception and "Stay with Local Families" coordinated by the Juneau Bar.

Distinguished Speakers

THURSDAY, JUNE 10
Lunch
"State of the Judiciary" Address
Chief Judge H. Russel Holland, U.S. District Court
Chief Justice Daniel A. Moore, Jr., Alaska Supreme Court

FRIDAY, JUNE 11
Attorney General Charles E. Cole, State of Alaska

The Anchorage Bar has St. Pat's party