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Okebos, a wee ramble, *beans*, **endomorphs, and** A NEW CONTEST

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The Alaska BAR RAG

VOLUME 18, NO. 2 — *Dignitas, semper dignitas* — MARCH-APRIL, 1994

Legislature targets supreme court decisions

By Peter Maassen

The 1994 session of the Alaska Legislature could send a number of well-established Supreme Court precedents tumbling.

Among the targets of proposed legislation is the "public-interest litigant" exception to Civil Rule 82, applied most recently in *Hickel v. Southeast Conference,* Op. No. 4055 (Alaska, Feb. 18, 1994). Under the exception, attorney's fees are not awarded against parties who, for reasons other than their own financial self-interest, litigate issues of public importance but lose. Senate Concurrent Resolution No. 4, sponsored by Senator Robin Taylor, targets "special litigation organizations opposed to natural resources development in the state," but his advice to the Supreme Court is more sweeping: that the Court "modify its interpretation of Alaska Civil Rule 82 to permit all prevailing parties to recover attorney fees and costs."

Another common-law rule subject to legislative change is the "discovery rule," which tolls a statute of limitations until the plaintiff discovers or reasonably should have discovered all the elements of a cause of action. *See, e.g., Pedersen v. Zielski,* 822 P.2d 903 (Alaska 1991). House Bill 292, an omnibus tort reform act, would virtually eliminate the discovery rule in products liability, construction, and medical malpractice cases, among others. (For more on the Tort Reform Act, see Mike Schneider's column in this issue.)

Related story, page 14

Also up for legislative tinkering is the Wrongful Death Act, AS 09.55.580. Key to the Act's application has always been its limitation of damages to "pecuniary loss," a term which (according to the Supreme Court, anyway) has been consistently interpreted "[s]ince adoption of the wrongful death statute

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LEGISLATIVE DISPOSITION

Alternative sentencing: New policies, new choices

By Teri Carns

"You are hereby sentenced to two years on probation, with 100 hours of community work service, a $300 fine, pay restitution to the victim, and report to ASAP for alcohol screening." More frequently than in the past, an observer of sentencings in Alaska courtrooms hears a judge impose a combination of penalties, rather than a simple sentence to "Three months, two suspended, on probation for two years." The reasons for choosing alternative punishments vary, ranging from efforts to rehabilitate the offender, to a decision to hold the offender accountable, recompense the victim, or respond to emergency overcrowding situations in the local jail. Although many of the alternative punishments available have existed for years, and have been used by judges in a wide variety of situations, a new urgency pervades the criminal justice system. In its final report to the legislature and the governor, the Sentencing Commission recommended more extensive use of alternative punishments, defined target groups and types of alternatives appropriate for each group, and urged agencies to train their personnel in the use of alternatives. Pressing from the practical side has been the increasing number of incarcerated offenders. Several times in the past few months, crisis calls have gone out from the Department of Corrections to prosecutors, courts and law enforcement around the state. Not only have the jail populations exceeded the *Cleary*— caps, they have expanded beyond the emergency capacities of the facilities. DOC personnel have turned away police officers with arrested persons sitting in the police vehicles, refusing to book in any more inmates. The Department convened a series of lengthy meetings in December and January, inviting representatives of all criminal justice agencies to assist in pinpointing sources of prison population growth and proposing solutions.

Responding to the Sentencing Commission recommendations for more training, the Judicial Council

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Reduced Convention Rates!

(see page 10)

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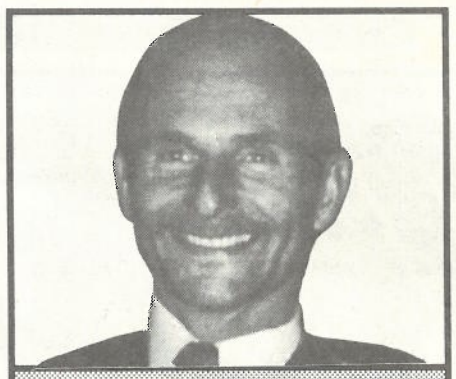
President's Column

Let's not sunset the Bar

The Division of Legislative Audit's "sunset" report on the Bar recommended that the practice of law in Alaska continue to be regulated by the Board of Governors, finding that the Board met public need in an effective and economical manner. But one would never know that from news articles recently covering the audit report. Stories in the *Juneau Empire* and *Daily News* gave the impression that the audit found Alaska's system of attorney self-regulation to be wanting. Nothing could be further from the truth.

The audit did not disclose even one problem in the Bar Association's discipline or admissions system. Legislative auditors poured over four years' worth of admissions and discipline records in the Bar office, yet could find no unfairness in testing or grading, nor any problems with the investigation, prosecution or disposition of discipline cases. Instead, the audit found that the public's need to be secure in its expectation that those admitted to the Alaska Bar are worthy of trust and confidence was ensured by the Bar's admissions, complaint investigation and discipline process. The Audit also favorably reported changes in the Bar rules adopted by the Board and designed to improve practice, promote conciliation and fee arbitration, and improve public access to discipline. The only failures of the Board noted by the audit were that two conference call meetings were not properly advertised and the fact that one Board member term was out of sync with the set statutory rotation. Otherwise, the Board was found to be in full compliance with its statutory mandate.



Philip Volland

So why didn't the news reports tell this story? In part, I think, because of an image of distrust that still shadows the profession. Despite the clean bill of health given to the Bar, and the absence of any findings of inadequate admissions or discipline, the State's auditor offered the gratuitous comment that "from a citizen's perspective, there are no advantages to allowing the legal profession to self-regulate." This sentiment, it seems, sells more papers than reporting the Audit finding that "the Board meets the public need (for trust and confidence in their attorneys) in an effective and economical manner."

It's still a battle of image rather than fact.

What can be done? Well, the first step, for sure, is to disabuse Legislators of the misimpression of the audit given by press reporting. We can all do that by urging passage of SB 318 and HB 518 which extend the Board's functions through June 1998. But a great deal more still needs to be done to combat the distrust of the profession. The auditor's recommendation, for example, that all attorneys be required to disclose grievances against them (whether meritorious or not) is a reflection of a deeply rooted cynicism about lawyers and their conduct.

For sure, the Bar Association can take a leadership role in the effort to change misimpressions of the profession. But the underlying tone of the audit that the profession must still be "reformed" tells us that much more needs to be done. The auditor picked up his distrust somewhere — as a juror, client, litigant, or hearing a story from a friend. The image of the profession may well arise as much from these day-to-day encounters with the public as it does from how the media portrays us.

I can't say I know what to do. Representing clients effectively often means taking positions at odds with values shared by others. But perhaps we ought not worry so much about the fact of what we do, as how we do our work. The public likely judges us, like other professions, by our ethics, professionalism, and credibility. And these are issues of "image" over which we all have control.

Editor's Column

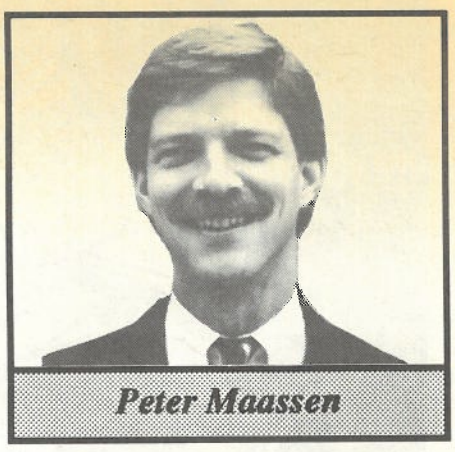
Remember: This is your newspaper

I didn't immediately realize all the ramifications of becoming *Bar Rag* editor. I had asked outgoing editor Mike Schneider only about the two most obvious things: the amount of the deductible under our libel policy and whether the editor's office had a view of the Inlet. He said, "Ten million. What office?", so at least I thought I knew what I was getting into.

That night, however, as I walked home from work, I noticed that a man was following me. He made no effort to conceal himself, so I waited at my front door until he caught up to me. He tipped his bowler — yes, a bowler — and said in an impeccable BBC accent, "Jackson, sir. The *Bar Rag* valet. Mr. Schneider has instructed me that the time has come to transfer my allegiance to a new flag, as it were, sir."

I let him into the house. As he unlaced my bunny boots he asked whether I had been to the *Bar Rag* editor's chalet yet or whether he should pack my suitcase for the coming weekend. "I'd love to see it," I said.

"Will you be using the editor's Gold Card, sir," he asked, "or shall I pick up some Swiss francs?" I opted for the Gold Card and slipped of to tell my wife and daughter that we had stumbled into something big. I was editor of the *Bar Rag* now, and our lives would never be the same. Farewell to the humdrum, the drab and mundane. Hello to three-martini lunches in New York City with other members of the editorial set: George Plimpton, Helen Gurley Brown, Howard Weaver.



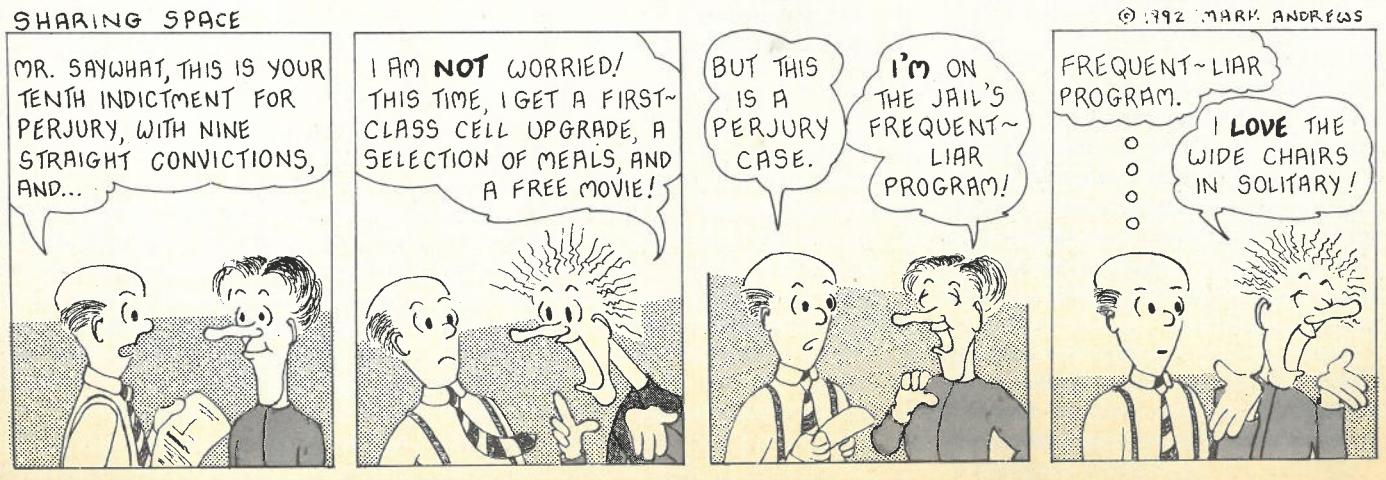
Peter Maassen

It's been suggested that I use this premier editor's column to remind you that this is *your* newspaper, that it exists to serve you as members of the bar. Frankly, I've been tempted to make it *my* newspaper instead. I have a lot of stifled relatives who'd love to see their poems and platitudes in print. My nephew Dmitri has written a sixty-verse Norse saga in haiku form, using only seven letters of the alphabet. I'm the only person who's ever expressed any interest in it.

But I guess I'd better not jeopardize the generous underwriting of this periodical. So here goes: This is your newspaper. It exists to serve you as members of the bar. I intend to continue its long tradition of entertaining the half of you who turn to its pages for entertainment and informing the other half of you who need to remove your funny bones before fitting into your professional dress.

The *Bar Rag* has always attracted writers of talent and lawyers with something informational or provocative to say. With the help of all of you who take the time to put pen to paper, that will continue to be the case.

So please write. News releases and scholarly essays are good, but letters to the editor are fine too. I've instructed Jackson to see that all submissions get to me expeditiously. I've installed a fax machine in the *Bar Rag* editor's jet for that very purpose, and frankly, I don't see how Mike Schneider got along without it. The flight to Geneva seems interminable sometimes.



The Alaska BAR RAG

The *Alaska Bar Rag* is published bimonthly by the Alaska Bar Association, 510 L Street, Suite 602, Anchorage, Alaska 99501 (272-7469).

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

Letters from the Bar

More from Obermeyer

On October 22, 1993 Alaska Bar Association passed 64 of 102 applicants or 65% of July, 1993 Alaska Bar Exam. *In the Matter of the Application of Thomas S. Obermeyer,* 717 *Pacific Reporter 2d* 382,57 *American Law Reports 4th* 1195 (Alaska 1986) has brought national attention to the inherent unfairness of this test. Of 102 applicants, possibly up to half of the test takers were repeaters which would reduce the passage rate to 30-40 percent. In past exams, the mailing labels of the successful applicants show that over 25 percent have out of state addresses. This "3-M Post It Scam" is a single-digit score on the upper right side of applicants' papers run through a computer after the desired passage rate is decided. Due process is the opportunity to "pay to play" for another Alaska Bar Exam. On December 14, 1992 *Anchorage Daily News* published: "2,513 Alaska attorneys control resources and taxes on oil worth billions more that oil produced by Texas, which has 55,319 licensed attorneys." While our population has doubled, the number of attorneys has only risen by one-third. Some states, such as Virginia, Washington, Wisconsin, either do not require a written bar exam at all for licensure or offer optional clerkships.

Please review *Application of Theodore F. Stevens,* 355 *Pacific Reporter 2d* 164 (Alaska 1960). Senator Stevens was admitted in Alaska by reciprocity one year after statehood after several denied petitions and a residency battle because he was living in D.C. The case does not state he was licensed in another state or that he ever sat for a written bar exam. Senator Stevens' application papers are inexplicably blank at Alaska Supreme Court. *Alaska Directory of Attorneys* has incorrectly listed Senator Stevens' admission date as 1953 for many years. I went to Anchorage Chamber of Commerce Meeting on December 20, 1993 at which time Senator Stevens told a room full of people that he had been licensed in 1953.

When I was criticized for using Anchorage School Board stationery inappropriately, it only brought up the lack of ethics of the current Chief Justice, Alaska Supreme Court, who actually was promoted to Chief Justice after he used his Alaska Supreme Court stationery to be bought out of City Mortgage for $500,000 in 1980s. His Alaska Supreme Court salary has provided his family over $1,000,000 during the last ten years while Tom Obermeyer has faithfully and conscientiously taken Alaska Bar Exam seventeen times which should test minimal competence since February, 1984. Unlike Senator Stevens, Tom has gone through the system that has been established and was licensed in 1990 in State of Missouri by written exam only to find that a Alaska Bar Rule was then proposed targeted specifically to exclude him from reciprocity until five years after his last failed Alaska Bar Exam.

It is time for the majority of well intentioned Alaska attorneys who care about your profession to rise up against the few attorneys and judges who control the entire process in the only state in our nation without a law school. Board of Governors, Alaska Bar Association, do your job and supervise Alaska Bar Exam. If you pay $450 to allow this sham, you are part of the problem. Lastly, do not give access to Alaska Court System to a Russian, over Tom Obermeyer, an American who has served his country as a former officer in US Air Force Reserves and a lawyer duly licensed in another state.

—Theresa Nangle Obermeyer

Dennis Walle speaks to historian's committee

"We want it all."

That's how University of Alaska archivist and manuscript curator Dennis Walle approaches the collection and preservation of lawyers' papers.

Walle, speaking at an Historians Committee lunch in January, explained he actively seeks records which document a person or a firm.

He and his staff of trained archivists have been collecting general historical materials for the past 15 years and have more than 800 manuscripts.

Walle added he understands some materials are sensitive. He works with people donating records to determine what is closed and what is open to the public.

The UAA archives is willing to take closed records as long as they are part of something that is open, Walle said.

Walle works with people who would like to donate their papers to the archives. He and his staff process papers and make an inventory or catalogue. The university personnel take responsibility for sorting out material.

Once this inventory is completed a person may decide to withdraw some materials, Walle said. But Walle would really like it all.

There are three ways to provide papers to the archives: a deed of gift where a transfer of physical ownership of records occurs; a statement from the individual that there is permission to copy and use material; finally a deposit agreement where the archives holds materials for the depositor.

—Pam Cravez

Come to the convention!

If you are a lawyer licensed to practice law in Alaska and have been practicing for less than three year (total) please come to the Alaska Bar Association Annual Business Meeting in Anchorage at the Hotel Captain Cook, on May 6, 1994. A resolution has been submitted which will scale bar dues for those members who have practiced for less than or up to three years. This resolution can pass but it needs your support and your presence at the business meeting. Spread the word.

Shannon O'Fallon

Meeting note

The Anchorage Legal Secretaries Association will hold their next monthly meeting on Thursday, April 7, 1994, at the Ramada Inn, 598 W. Northern Lights Blvd. (Between Arctic and C). Dinner will be at 6:00 p.m. followed by the meeting at 7:00 p.m. For further information contact Michelle Davis at 276-1726.

Is court user-friendly?

Providing effective access to justice often rests on simple concepts of customer service that courts can easily implement. For many court users, perceptions of how the process treated them is more important than the case's outcome. Sharing strategies to improve the delivery of justice can help enhance the public's trust and confidence in the courts.

The American Judicature Society is collecting suggestions for simple ways courts can be easier to use and more inviting to the public. With funding from West Publishing Company, the Society will compile these tips into a booklet to be distributed to trial judges nationwide. Among the suggestions the Society has received so far are volunteer-staffed information booths, payment of court fines by credit card, and clear informational signage throughout the courthouse.

The Society welcomes ideas from judges, attorneys, court staff, and court users. Please send your suggestions to American Judicature Society, User-Friendly Courts Project, 25 E. Washington St., Suite 1600, Chicago, IL 60602, fax (312) 558-9775, or call Ira Pilchen at (312) 558-6900.

Check out the library

Interested in educational tapes for your lawyers and staff? The Alaska Association of Legal Administrators has a library of more that 100 audio and videotapes covering a wide range of topics, from management of your office, library, finances, lawyers and staff to training the troops, ethics, confidentiality, and more topics. All available at a nominal rental fee. For more information, call Jan or Kitty at 563-8844.

—Jan Joseph

Fulbright Fellowship In European Community Law 1995-96 Program with the U.K.

The United Kingdom Fulbright Commission, in association with Allen & Overy, a leading U.K. and international law firm, has announced the availability of a professional fellowship in European Community Law for 1995-96. The grand period is for four months. The grantee will be provided the opportunity to pursue three months of study and work experience in London and one month of work experience in Brussels.

The following are some of the requirements for the fellowship:

- Applicants must hold U.S. citizenship.
- Applicants must hold law degrees and be qualified and practicing U.S. lawyers.
- The award is designed for U.S. lawyers who have been qualified lawyers for between three and six years and who can demonstrate some experience of, or interest in, aspects of EC law.
- The candidate's employer is expected to provide appropriate leave during the four months of the fellowship, and the candidate is expected to continue employment in the U.S. with the existing employer at the end of the fellowship.
- The U.K. Fulbright Commission grant is for $1,000 per month for the four months in addition to roundtrip travel.
- The fellowship period is from the beginning of October 1995 until the end of January 1996.

A completed application form, five page statement, resume, and four letters of reference are required by the **August 1, 1994** deadline.

Call **202/686-7878** to leave a message requesting application materials.

U.K. Fulbright Fellowship in European Community Law, Council For International Exchange of Scholars, 3007 Tilden Street, N.W., Suite 5M, Box L-F, Washington, D.C. 20008-3009

Judicial Academy Awards

In the interest of highlighting some of the most memorable published opinions of 1993 there will be contest, with apologies to the Oscars, for the best and worst judicial performances of 1993. (Hint: this also provides an opportunity for anonymous feedback on the wisdom of published opinions issued last year).

Nominees are solicited in the following categories:

1. Best performance by a leading majority;
2. Best concurrence by a supporting justice;
3. Worst performance by a judicial body;
4. Best dissent; and
5. Most confusing holding by a majority;

Nominations may be offered for additional categories if one of those listed just doesn't capture the spirit of the opinion nominated, but contest judges reserve the right to re-classify nominations if space/time require. Nominations should be sent to the Alaska Bar Association, Alaska Bar Rag, P.O. Box 100279, Anchorage, AK 99510.

In order to qualify, the opinion must have been issued in 1993 by a court having jurisdiction in Alaska and must be a published opinion (unless you want to mail a copy to all Bar Rag subscribers). The top nominations in each category will be listed in an upcoming Bar Rag. The winners will be selected by vote of the readers responding.

Eastaugh joins 'old professional friends'

By John C. Wendlandt

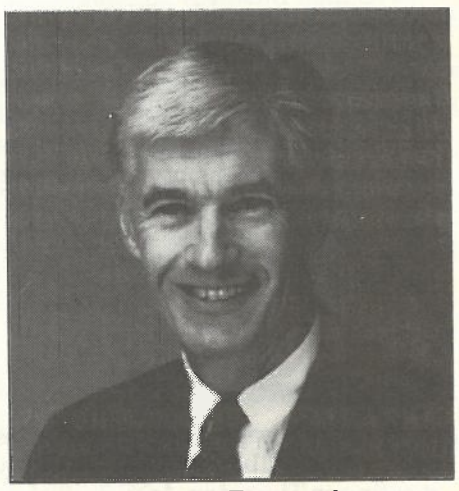
Anchorage attorney Robert Ladd Eastaugh will next month be sworn in as the newest member of the Alaska Supreme Court. He was recently appointed to that post by Gov. Walter J. Hickel after the resignation of Justice Edmond Burke, who had served on the court for nearly nineteen years.

Eastaugh comes to the court directly from private practice. During the past 22 years, he has been associated with the Anchorage firm of Delaney, Wiles, Hayes, Reitman & Brubaker. Prior to that time, Eastaugh spent approximately four years with the Alaska Department of Law, first as an Assistant AG in Juneau and, later, as an Assistant DA in Anchorage.

The focus of Eastaugh's practice has, throughout, been appellate work. He has been involved in more than 100 civil and criminal appeals taken before the Alaska Supreme Court, of which 94 have resulted in published opinions. Additionally, Eastaugh has appeared in a dozen matters heard by the Ninth Circuit Court of Appeals. He is widely recognized as one of the top appellate attorneys in Alaska.

Eastaugh explains his interest in appellate practice as growing out of his appreciation of its analytical requirements. "I take great pleasure in the process of legal analysis and the reading and writing associated with it," he noted. "Sitting on the court, and participating in its decisions, will involve the 'purest form' of legal analysis," he said.

It was his experience in and familiarity with the arena of appellate work that, according to Eastaugh, made his decision to seek a position



Robert Eastaugh

on the Alaska Supreme Court a "natural one." He explained that membership on the court "gives me a chance to continue what I have been doing for a long time." And, he said, "it gives me an opportunity to become more actively involved in 'defining' the law in Alaska."

Raised and schooled in Juneau, Eastaugh did not plan to pursue a career in the law when he graduated from high school in 1961. Although both his father, Fred Eastaugh, and grandfather, Ralph Robertson, were long-time practicing attorneys there, Bob left for college assuming that he would become an engineer.

His plans changed somewhere along the way. Graduating from Yale University in 1965 with a B.A. and a major in English literature, Eastaugh moved on to the University of Michigan Law School. Upon receiving his J.D. in 1968, he left Ann Arbor and returned to Alaska, where he has practiced law for the past 25 years.

When asked about his approach to the practice of law, Eastaugh explained that, "You need to perform a 'balancing act' between the demands of a professional career and family and personal needs." He is an active runner and alpine skier, and describes his family as "heavily involved" in various ski organizations. Eastaugh also enjoys reading and indicates that he "usually has two to three things going at once." He said that he is near the completion of Churchill's multi-volume "A History of the English Speaking Peoples."

Eastaugh's departure from private practice and advancement to the court does not come without some personal regrets. "I am leaving behind several close friends at my firm with whom I have worked closely for many years," he explained. And Eastaugh said that he also regrets having to withdraw from involvement in organized skiing. Finally, he expressed concerns that his new position on the court may cause some changes in his relationships with other attorneys. "I've been told that I may notice some withdrawal — that your close friends will stay your close friends, but your less-close friends may 'back off' somewhat."

And what will Eastaugh miss least when he leaves private practice? "Filling out timesheets," he explained. He said that he is thinking about having an old timesheet framed and hung in his chambers to remind him of what he left behind.

Eastaugh's appointment represents the first change in more than a decade to the make-up of the Alaska Supreme Court. While others could be concerned about joining the court under these circumstances, Eastaugh does not anticipate an adjustment problem. He explains that, considering the many years that he has practiced before the court, he views the current membership as "old professional friends" and thinks his presence will compliment the court. "I anticipate a collegial and friendly place which will operate at a high intellectual level."

Alternative Punishments

continued from page 1

assisted prosecutors, Public Defender and Office of Public Advocacy staff, judges and Department of Corrections personnel from southcentral Alaska in organizing a half-day seminar about alternative punishments. About 120 professionals met on February 4 at the Captain Cook Hotel to review existing programs and look at new policies. Representative Fran Ulmer, who chaired the Sentencing Commission's Alternative Punishments Task Force, moderated the seminar.

Chief among the new initiatives was the announcement by Ed McNally, Deputy Attorney General and Anchorage District Attorney, of Attorney General Bruce Botelho's policy on the use of alternative punishments by prosecutors. In a memo dated February 3, 1994, the attorney general encouraged prosecutors to consider *voluntary agreements offered by defendants* in *nonviolent cases* to accept alternative punishments *instead of some or all prison time.* Listed alternatives to incarceration included:

- agreements to increased forfeitures
- agreements to increased restitution (to individuals or organizations),
- agreements to increases in length of probation;
- agreements to conditions such as area restrictions, curfews, waivers permitting searches and/or warrantless arrests if violations are found
- agreements to increased hours of community service;
- agreements to increased fines;
- agreements to increased treatment programs, including those paid for by the defendant.

None of the proposed alternatives include relatively new types of programs such as electronic monitoring, house arrest, or programs available only through assignment by the Department of Corrections such as Intensive Supervised Probation Program or Day Reporting Centers. The new policy focusses more on encouraging prosecutors to respond positively to proposals that they might have rejected in the past as failing to meet the sentencing goals of protecting the public or reaffirming community norms. The policy also notes that "probation revocation is one area in which alternatives to prison are most appropriate, especially when the revocation is for 'technical' violations."

Panelists emphasized the need to use alternatives for both felons and misdemeanants. Frank Prewitt, Commissioner of the Department of Corrections, compared the 1980 prisoner population of 771 to the 1994 population of 3,200, adding that the Department's budget had increased from $21.5 million to $121.5 million in the same period. Much of the most recent growth has come from increasing numbers of incarcerated misdemeanants. Bonnie Lembo, head of the District Attorney's misdemeanor prosecutions, attributed some of the increase to recent legislative changes such as a 72-hour mandatory minimum sentence for joyriding. Steve Branchflower, head of felony intake in the Anchorage District Attorney's office, noted the felony intake process uses of a variety of alternative dispositions. He said that the office had declined 14.6% of the charges referred to it (down from about 25% screening rate in 1987), and had resolved most cases short of trial (77 felony trials, out of 1,346 cases accepted for prosecution, or a trial rate of 5.7%, as compared to 8% in 1987).

None of the proposed alternatives include relatively new types of programs.

Panelists also identified barriers to using alternatives. Primary among the difficulties cited was the lack of sufficient state-paid treatment beds for offenders suffering substance abuse problems. The Department of Corrections has had funding for only 37 beds in treatment programs statewide. Since the majority of crimes in urban areas (and almost all of the crimes in rural areas) are associated with substance abuse problems, the lack of treatment leaves few useful choices for sentencing.

Other barriers include the need to use state-approved facilities, in some instances; difficulties in completing the forms necessary to assign Permanent Fund Dividends from offenders to the state; obtaining credit for time served in some programs; and possible disparities in the availability of programs based on income or location in the state. Barriers cited as important in felony cases were court rules requiring presentation of the case to the grand jury within 10 or 20 days, and "Catch-22" situations in the requirements for entering treatment programs.

Participants varied in their assessments of the changes likely as a result of the new prosecutorial policies, and the information provided by the seminar. Some believed that without more treatment programs, the new emphasis on alternative punishment instead of jail lacks meaning. However, less than two weeks after the seminar the Department of Corrections announced it will be moving ahead with a plan to convert 34 halfway house beds at Cordova Center to treatment beds, nearly doubling the treatment slots available in the state. The Department also said that it has asked the legislature to fund other substance abuse programs in the coming year.

Other participants believed that relying on alternative punishments could lead to "net-widening," meaning that offenders who would otherwise have been sentenced to probation will now be required to participate in treatment, electronic monitoring, or other sanctions that would not have been required under old policies. Mr. McNally noted that the Attorney General's February 3 memo addresses those concerns by directing that the alternatives be used "[t]o help conserve limited prosecution resources, and to ensure that prison bedspace is available for violent and sexual offenders," and by encouraging alternatives "in return for a decreased period of incarceration . . . (or, in appropriate cases, in lieu of incarceration altogether)." Deputy Commissioner of the Department of Corrections, Larry McKinstry, noted that at present felony offenders are being furloughed to halfway houses, resulting in hard bed space that is then filled by misdemeanants. He suggested that using alternative punishments at sentencing for some felons and misdemeanants could provide less costly housing for misdemeanants, as well as giving judges and attorneys more control over the actual disposition for the offender.

Initial reaction to the policy from one victims' organization was positive. Janice Lienhart, head of Victims for Justice, said that the new emphasis on victim involvement in plea negotiation, and the attention to victims' needs in alternative punishments could be very effective in improving victims' perceptions of the justice system.

Eclectic Blues

Don't sno-go with this Okebo

Dwayne came by for coffee last Friday night. His new girlfriend Carol wasn't with him, which surprised me. I hadn't seen much of the big guy since he found romance. Seeing Dwayne sucking up cups of French roast at our place on date night suggested trouble in Brigadoon.

Dwayne danced around it for awhile. We talked about guy stuff like herring, king salmon and Chevy trucks. One by one, these male-correct topics stalled out like our Plymouth wagon. Dwayne started getting jumpy with anticipation and caffeine. While switching to decaf, I brought up the old standby, baseball.

"How do the Twins look this year?" I asked.

The former Minnesotan smiled for he first time and proclaimed that the Minneapolis team would again ride Kirby Puckett's bat to the World Series.

"I'm from Minnesota, you know," he told me for the 251st time, "from a little prairie town named Jumping Jack,"

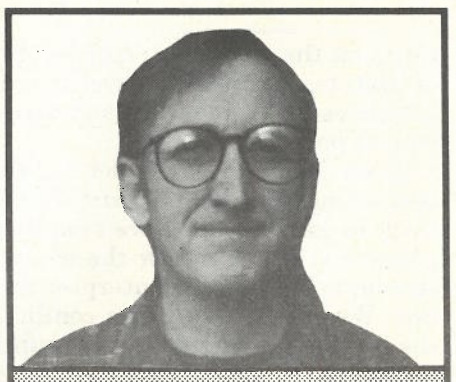
Dwayne went on to explain how he grew up in this little Swedish-American community, proud to trace his blood lines back to Avesta in the old country. I knew from past conversations that a second generation German-American surveyor named the town "Jumping Jack" because of the tendency old counrty Swedes have to pronounce "j's" as if they were really "y's." It tickled him to hear the Swedish newcomers ask the way to "Yumping Yack Meneeesota." Well, modern-day citizens of Jumping Jack, Minnesota have mastered their J's but no one has bothered to change the name. They're just too busy farming.

My friend's family clung to their Swedish culture as television waves and the Interstate threatened to suck them into the American mixing pot. Dwayne's people still cut their wood, mend clothes with Husqavarna products, eat lutefisk and boiled potatoes at Christmas, and use Okebo snowmachines. Once I asked Dwayne what car his dad drives.

"He drives a Ford," he answered, "but only because Volvo doesn't make a farm vehicle."

When Dwayne was 12 his father got a great deal on a boggie-wheeled Okebo snowgo. He picked it up for $100 from a guy on the Iron Range. Since it started on the first pull and still had a cowling, he didn't even bother to test drive it.

Over coffee last Friday night, Dwayne reminded me of his excitement when dad pulled up with the shiny black snowmachine filling the bed of the family pickup. That was



Dan Branch

before he learned about the poltergeist.

The truth is, the darn machine was haunted. One day it would be hard to start, the next day it wouldn't shut off. More than once Dwayne rode it into the family barn with a stuck throttle. The light would come on during the day and short out during night rides. If the Lutheran Church had an exorcism program his family would have sought metaphysical backup. When the Okebo bucked Dwayne's sister and crashed into the chicken coop, Dwayne's dad took it out to the pasture and slashed its sparkplug wires with his hunting knife.

I was trying to figure a way to work Carol into the conversation, so I asked Dwayne if he ever told her about the possessed Okebo.

"Oh yes, I told her, on the way to Prince Rupert last week," he answered. Dwayne and Carol had taken the *MV Aurora* down to Rupert, British Columbia and then driven over to the winter play area at Smithers. They told friends it was a ski trip, but I think they saw it as an international experience.

After checking into the Bavarian Inn and eating lunch at a little Chinese restaurant, they read over the Smithers' Winter Vacation guide. There, sharing a page with an ad for Swiss Yodeling lessons, was an invitation to rent safe and modern snow machines. Carol worked on Dwayne until he agreed to drive over to Oliver's Snow Traveler Rentals.

Oliver walked them down his row of shiny new Ski-Doo snowgos, recommending that they take advantage of his two-for-one Ski-Doo special. Dwayne was about to say yes when Carol spotted a big boggie-wheeled Okebo peeking out from a blue tarp.

"Look honey," she exclaimed, "Isn't that one of those Swedish snow machines you loved as a kid?"

Dwayne looked with horror at the Okebo. Chilling childhood memories swept over him like gas from bad lutefisk.

"Sweetie," he recommended, "I think you would be more comfortable with one of these Canadian machines." Carol persisted and Dwayne gave in when she pointed out that the big Okebo could carry them both. With Carol's arms wrapped around his chest, Dwayne drove the Okebo off Oliver's Snow Traveler's lot.

Things went well until Dwayne suggested that Carol give the machine a try. By now the winter sun had dropped behind the local Alps, so Dwayne suggested that Carol switch on the light. To his relief, it actually stayed on as they bumped down the trail.

"Honey, this is fun!" Carol shouted, just as the Okebo throttle jammed open. Racing at high speed away from town, the Okebo hit a stump, throwing Carol from the machine. After dusting off her rented snowgo suit, carol looked around for Dwayne. Neither he nor the snowmachine could be found. Being an Alaskan, she resolved to head for help.

It was a long walk back to Smithers. On the way she thought of Dwayne lying out there somewhere in the winter dark. She also thought about haunted Okebo snowmachines. She should have known there was a reason why Oliver kept the Okebo under a blue tarp.

Carol was near the Yellowhead Highway when she heard the sound of a snowmachine coming towards her. Looking up for help, she saw instead the clunky silhouette of the Okebo. The haunted machine had gotten her man and now it was after her. She thought about making a run for some trees lining the road but decided to stand down the machine or die trying.

Closing her eyes she stood tall, prepared to live or die as a Valkyrie. Her bravery was not needed. The Okebo stopped two feet short of our heroine. When the engine died she could hear a familiar voice laughing at her.

Dwayne had managed to hang onto the tow bar of the Okebo and work his way into the driver's seat. The snowgo responded when Dwayne hit the kill switch, which gave him time to free the stuck throttle.

Dwayne then rushed back to the scene of the crash and found the trail of Carol's footsteps heading back to town. He had nothing but concern in his heart when he spotted Carol in the headlight of the Okebo. That changed to humor when he saw her turn to make a stand against the evil snowmachine.

Carol didn't appreciate Dwayne's laughter, something she reminded him of for the rest of the trip. They haven't spoken to each other since.

Hope they get back together soon. It'd be a shame to see a fine relationship ruined by a mean spirited snow go.

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Velvis Rejoins Public Defender Office

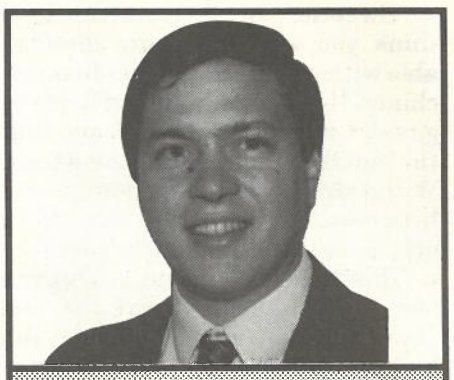
In the January issue of the Alaska *Bar Rag,* Dan Branch described the kidnapping of David Seid's Elvis Presley painting from the Ketchikan Public Defender's Office. Readers will be happy to hear that the velvet King is back, this time with a golden halo. Dan Branch, like others who work in the Ketchikan state office complex, is glad to know that Elvis is now in the building.

The Public Laws

Do we need an elected attorney general?

The issue of an elected attorney general has been discussed at length in the past. However, the matter has never been put to a public vote and settled, and each time there is a high-profile attorney general's opinion which the courts reverse, people wonder why the opinion was off base. Although the recent conflict over the constitutional budget reserve prompted my speculation, I refer in this article to the public perception, not to any real-life situations or actual opinions.

Attorneys, like expert witnesses, often offer very different opinions and conclusions based upon the same facts. There is a perception that an attorney can be hired to say pretty much whatever you want, and that perception may not be entirely inaccurate. This perception, and the practical effect of the pressure on elected officials for a given result, may cause the public to be skeptical of opinions offered by the attorney general or other public attorneys.



Scott Brandt-Erichsen

This is a matter of concern because the official opinions of the attorney general are, in the absence of an opinion by the court, perceived as the most reliable interpretation of state law. Similarly, local municipal attorney's opinions are usually treated as the most reliable interpretation of local laws until a court holds differently. As a result, it is important for the good of the legal community that the official interpretations of statutes offered by government attorneys be as impartial and accurate as possible.

In one view, these opinions are a best estimate of what a court would hold. In another, they are simply a policy statement of how the executive branch chooses to interpret the law. Where the two views conflict, the abilities of the attorney are bound to be questioned either by the public or by his or her employer, the elected official. There does not appear to be any effective way of preventing such conflicts short of either insulating the attorney from removal by the executive or making the position elective. The former is impractical because it would remove any accountability to the executive, and the latter could be worse if it served only to further politicize the activities of the attorney general.

Another argument against an elected attorney general stems from the fact that Alaska's form of government features a strong governor. Unlike many other states, we have only five statewide elected positions, only two of which are state officials. This contributes to the amount of power wielded by the governor. The degree to which an independent attorney general would diminish the governor's power is unclear. It is also unclear whether any diminishment would be a bad thing.

It is not necessarily desirable that the governor have such a high degree of influence over interpretations of state laws offered by the attorney general. If it is a matter of verifying the legality of his own actions, the governor would likely have his own private counsel. The legislature seems quite capable of utilizing separate counsel if they disagree with the attorney general

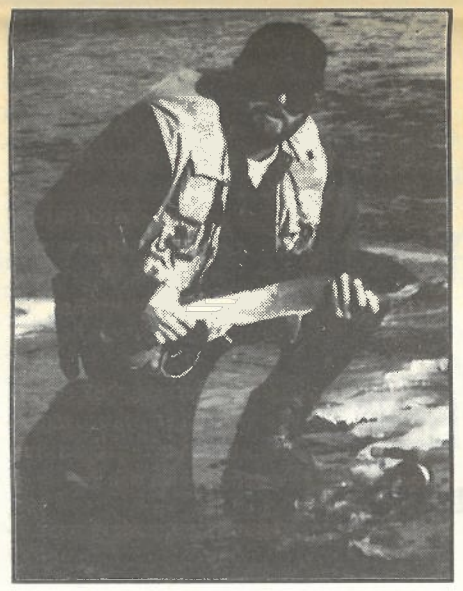
A possible compromise would be election of the attorney general to a single six-year term. Any time there is the potential for retaining or advancing in the position based upon performance, there is potential motivation for a directed result. An elected position, with the possibility of re-election, would not be sufficient to remove the politics of the position. However, single terms might do the trick.

It may be time for the bar association to take a position as to whether an elected attorney general would be an improvement in our system of governance.

In re Robert Bundy, United States Attorney of Alaska

By Matt Claman

Bob Bundy's best qualification for his new job as United States Attorney for Alaska is a broad range of experi-



ence in both civil and criminal law in the 23 years he has lived and worked in Alaska.

With a *Bar Rag* deadline looming and snow falling outside, I met with Bob one morning in his spacious new office to learn about his experiences before being confirmed as U.S Attorney. He told me that he first learned about Alaska from a visiting uncle, who had a job with Union Oil Company drilling in Cook Inlet in the 1950s. His uncle's stories of Alaska, along with a love of fishing encouraged by his father, a part-time hunting and fishing guide, combined to make Alaska the destination of choice for young Bob Bundy. In 1970, he and his friend Bill Rice both accepted summer jobs with the Alaska Legal Services Corporation and left Boalt Hall for the far north.

While he couldn't say whether it was because of the tremendous fishing opportunities, the sense of the Great Land or the challenging legal opportunities, Bob Bundy accepted a permanent position with ALSC in 1971. After three months in Anchorage, he was sent to Nome. During this time Bob met Bonnie Lembo, who was working as a VISTA lawyer in Anchorage and Fairbanks.

With Ethan Windall's appointment to the district court bench, Bob became supervising attorney for ALSC in Nome. He held that position until 1974, when he and Bonnie, now married and expecting twins, moved to Kiana, where Bob embarked on a solo practice. Sustained by a contract with Legal Services and occasional court-appointed criminal cases, Bob and Bonnie quickly settled into the village life-style.

After the twins arrived in December, however, their cabin grew smaller. ALSC offered a job in Anchorage, so the family of four found themselves returning to the city. Six months later, the opportunity to prosecute criminal cases in Nome enticed Bob to accept a job as Nome District Attorney. He remembers this work as a "trial by fire." The experienced trial lawyers in the firm of Larson, Timbers & Van Winkle had the Public Defender contract for Nome and "took advantage" of the new prosecutor "whenever possible." Bob learned many lessons in trying cases from Point Lay to St. Michael, but he was ready for work in the big city again when the Anchorage District Attorney's office called in 1978.

Bob Bundy's outstanding work as an Assistant District Attorney led to a transfer in 1980 to the Attorney General's office, where he worked in the antitrust section. Two years later, Larry Weeks named him Deputy District Attorney, and Bob returned to criminal prosecution. After another two-year hitch in the District Attorney's office, he accepted an offer to work for a private firm, Bogle & Gates. After two years "of counsel," he became a partner in the firm. He stayed with Bogle & Gates though 1993, apparently tired of the biannual transitions that had marked his professional life since his return to Anchorage in 1978.

In 1992, while working at Bogle & Gates, Bob served as counsel to the Clinton campaign in Alaska. After Bill Clinton's election and Janet Reno's appointment as Attorney General, he applied for the job of U.S. Attorney. He survived the lengthy selection process, including an FBI background check encompassing his entire adult life, and Bob's appointment as U.S. Attorney was confirmed by the Senate in early February.

To celebrate his new job, Bob Bundy and Bill Rice boarded a plane for Mexico, where they spent a week fly-fishing for marlin. Bob reports that the marlin never hit the flies, and he and Bill convinced their guides to release the marlin they caught with bait.

I asked Bob about his reputation as a catch-and-release fisherman and whether his fishing practices would influence his decisions as U.S. Attorney, particularly in the area of Fish and Wildlife enforcement. First he explained that he "sometimes" keeps salmon because "they're going to die anyway." He went on to explain that clean waters and a healthy environment are critical to good fishing, and this was the only way that catch-and-release would impact his decisions in his new job.

Since starting his new job, Bob Bundy has been consistently impressed with the quality of the lawyers working in the U.S. Attorney's Office. He assured me that all lawyers in Alaska can expect to be treated with respect by his office.

Before leaving, I asked Bob about his one clear goal for the future. His answer: "Fish as much as possible."

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ALASKA

In re Delay in Implementation of Certain Federal Rule Changes Regarding Discovery, Debtor (s)	General Order 94-001 ORDER DELAYING IMPLEMENTATION OF FEDERAL DISCLOSURE AND DISCOVERY RULE CHANGES IN CONTESTED MATTERS

Numerous bankruptcy courts have delayed or limited the implementation of the recent amendments to the Federal Rules of Civil Procedure requiring mandatory disclosure. The amendments became effective December 1, 1993 and incorporate FRCivP 26(a) (1), (2), (3), (4), (d), and (f), and all related "disclosure" provisions into FRBP 7026. The timing or logistics of these rules do not work well with some contested matters under FRBP 9014. Therefore,

IT IS ORDERED that this court delays the implementation of the automatic disclosure rules in FRCivP 26 in contested matters under FRBP 9014 until further order of the court. The court may implement the rule on a case-by-case basis. There is no delay in implementing the rule in adversary proceedings.

DATED: February 2, 1994

/s/HERBERT A. ROSS
U.S. Bankruptcy Judge

/s/DONALD MacDONALD IV
U.S. Bankruptcy Judge

Juris Prudence

The power of (an) attorney??!

On several occasions, this column has addressed ways in which small businesses might bring or resolve claims more cost-efficiently. For example, using small claims court or mediation (where applicable) does not necessitate the services of an attorney.

The Alaska Supreme Court recently determined, however, that a statutory power of attorney does not entitle a non-attorney agent to litigate a civil claim on behalf of his principal. A power of attorney is a written instrument which evidences the authority of the principal's agent to third parties with whom the agent deals on behalf of his principal.

Of course, one can always proceed with a legal action *pro se* that is, in one's own behalf without counsel. But in *Christiansen v. Melinda* the

Daniel Patrick O'Tierney

Supreme Court ruled that a principal can only engage an agent under a power of attorney to file or prosecute a legal action in his place if the agent is a licensed attorney.

The facts of the case are quite simple. Christiansen was appointed attorney-in-fact authorized to act on behalf of an apartment owner in all matters relating to an apartment complex. Pursuant to that authority, Christiansen (agent) attempted to file a small claims action on behalf of the owner (principal) but court personnel refused to accept the filing on the ground that a power of attorney does not authorize an agent to bring suit *pro se* - on behalf of the principal.

Christiansen then filed suit *pro se* (on his *own* behalf) against the Alaska Court system for the failure to honor a properly executed statutory form power of attorney under state law. The trial court dismissed his complaint and Christiansen appealed.

The Alaska Supreme Court analyzed the appeal in two parts: first, whether Christiansen's in-court representation of his principal violated the statutory prohibition of the unlicensed 'practice of law'; and second, if so, whether the statutory power of attorney overcame that prohibition.

The unlicensed practice of law is a criminal misdemeanor; however, the term 'practice of law' is not previously defined in case law for civil purposes. The Supreme Court readily found that (Christiansen's) in-court representation of another (his principal) falls within the definition.

Therefore, the Supreme Court's analysis turned to whether a statutory form power of attorney removes the agent from the prohibition against unlicensed law practice. Christiansen argued that because the durable power of attorney authorized him to act in the shoes of his principal and the principal could represent himself *pro se* Christiansen could litigate *pro se* for his principal. The Court concluded otherwise.

The Supreme Court acknowledged that several of the powers explicitly granted in the statutory form (AS 13.26.344(i)) could be construed to confer on the agent the authority to litigate in his principal's stead. But the Court also noted that other language in the statute authorizes only those actions by the agent that "the principal can do through an agent."

Consequently, the Court concluded that an agent's authority is thus limited by other existing law which prohibits the unlicensed practice of law. As such, a principal can engage an agent to practice law on his behalf only if that agent is a licensed attorney. The Court observed that, if it were otherwise, a mere power of attorney would enable any person to practice law in Alaska - contrary to the prohibition against unlicensed law practice.

As a result of the *Christiansen* decision, the scope of the statutory form power of attorney is necessarily restricted. An agent is generally authorized to act only as the client in an attorney-client relationship but lacks the authority to litigate *pro se* on behalf of his principal - unless, of course, the agent happens to be a licensed attorney.

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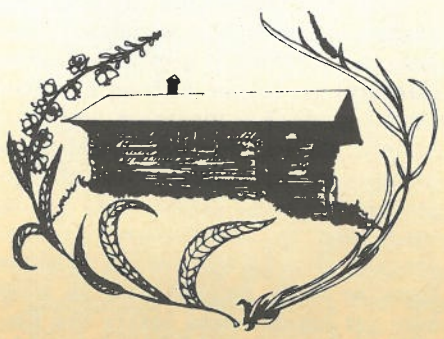
Origins of the Alaska Bar Association



By Russ Arnett

The Alaska Bar Act was passed by the 1955 Legislature to a large extent because of two Anchorage disciplinary cases and some bar exam problems.

Herald Stringer was a lawyer and the Third Division's most powerful Republican at the time of the death of District Judge Anthony J. Dimond in 1953. Herald backed the appointment of J.L McCarrey Jr. as his successor and told some of the Anchorage Bar they were going to get him whether they liked it or not. He was right. Not long afterward he found himself before Judge McCarrey on a disciplinary matter. Judge McCarrey disqualified himself and sent the case to Fairbanks. The Fairbanks judge sent the case back to Anchorage. Assistant United States Attorney Jim Fitzgerald prosecuted the case, and Judge McCarrey suspended Herald. In the Ninth Circuit "Stringer, represented by many attorneys (Grigsby, Kay, Davis, Butcher), vehemently complained for a procedure in which he acquiesced. In our judgment, once having disqualified himself for the cause, on his own motion, it was incurable error for the district judge to resume full control and try the case."

Bailey Bell was handcuffed in his office in the Central Building by a Deputy Marshal because of a disciplinary charge against him and marched across the street to the Federal Building. A Fairbanks judge who was new to Alaska and had spent most of his time in Fairbanks tried the case. He held that the prevailing ethical standards in Anchorage were so abysmal that it would be unfair to punish only Bailey. We now realized something had to be done, if only to quit referring Anchorage grievances to Fairbanks judges.

Three of the five unsuccessful candidates for the 1952 bar exam filed *In re Fink, Hermann and Arnett,* alleging that questions were given to some candidates before the exam and that secrecy system of grading was violated by at least one examiner. Judge Folta held that "If a member violates his oath, it is doubtful whether any system could be devised that would assure secrecy in the particular here under discussion. The remedy indicated is the administrative one of removal, rather than invalidation of the examination by judicial process." He also held that there was no showing of "a scheme or conspiracy, participated in by the remaining board members, or some of them to flunk the patitioners." The smart flunkee instead of litigating went to work for the Attorney General, who ran the exam, and his score improved from the mid 60's in the 1952 exam to the mid 90's in the 1953 exam.

Others complained that the bar examiners did not expeditiously grade the annual exams because they took five months one year and 11 months another year to grade about 20 papers.

The 1955 Legislature had a good number of able lawyers. Lead by Representative Kalamarides, they answered the question of whether the lawyers themselves could do a better job on admissions and discipline with "Why not?" They passed the Bar Act.

The first convention of the Alaska Bar Association soon followed in Ketchikan, Earl Cooper asked the Convention how Arnett's wife could possibly be in Anchorage when he had seen a woman in his room only the night before. Ah, to return to those golden days of the bar!

—Reprinted from the Bar Rag archives

An American abroad

In Scotland, the unique Citizen's Advice Bureau teaches lessons of civility

By Jeri L. Bidinger

While flipping through the *Bar Rag* a few months ago, I noticed the bit of news that I had moved to Aberdeen, Scotland. Actually, I had only moved about 130 miles from my previous home in Stirling, Scotland, having left Anchorage in 1991. So by now I've had plenty of time to absorb a bit about life in Britain and the mindset of a welfare state. An educational experience, to be sure. So here's a "wee ramble" through some practical—and philosophical—turf.

A friend who is seven months pregnant slipped on black ice and fell—HARD—on the pavement in front of her child's nursery school last week. The horrified staff reached her husband who carted her off to the hospital (after she refused a ride in an ambulance). Turns out she sustained a mild concussion, but the baby—and her back—are fine.

And though I'm three years here and haven't practiced law since 1991, my mind immediately turned to the liability of the nursery and/or the district council for failing to adequately grit the pavements (oops! . . sand the sidewalks. . .).

The British don't have our American love-affair with turning fault into money.

But you see, the British don't have our American love-affair with turning fault into money for every injury, and my legal sensitivities are not theirs. The nuances of this are myriad, but I want to share one—the volunteer Citizen's Advice Bureau—with you because it has much to offer to make justice and informed decision-making accessible to everyone. Yet for all its value, I don't see how it could exist in our American culture where anyone seeking to help others faces a potential damage claim and where only licensed lawyers can provide legal advice and representation.

The Citizens Advice Bureau (CAB). I hadn't been in Scotland a week before I passed a busy-looking town-center office by that name. I wondered what it was. And as a newcomer who was completely muddled and befuddled at all the bits and pieces I had to figure out to get myself and my family into "the system" (while doing my best to keep my car on the left side of the road and to remember that the gear-shift was on the left and that thing I kept trying to shift was the door-handle), I would have been AMAZED to know that it was a place I could have gone and received FREE help to sort things out, locate all the offices I needed to know about, pick up a few forms, and generally get myself organized and comforted. All without even needing an appointment!

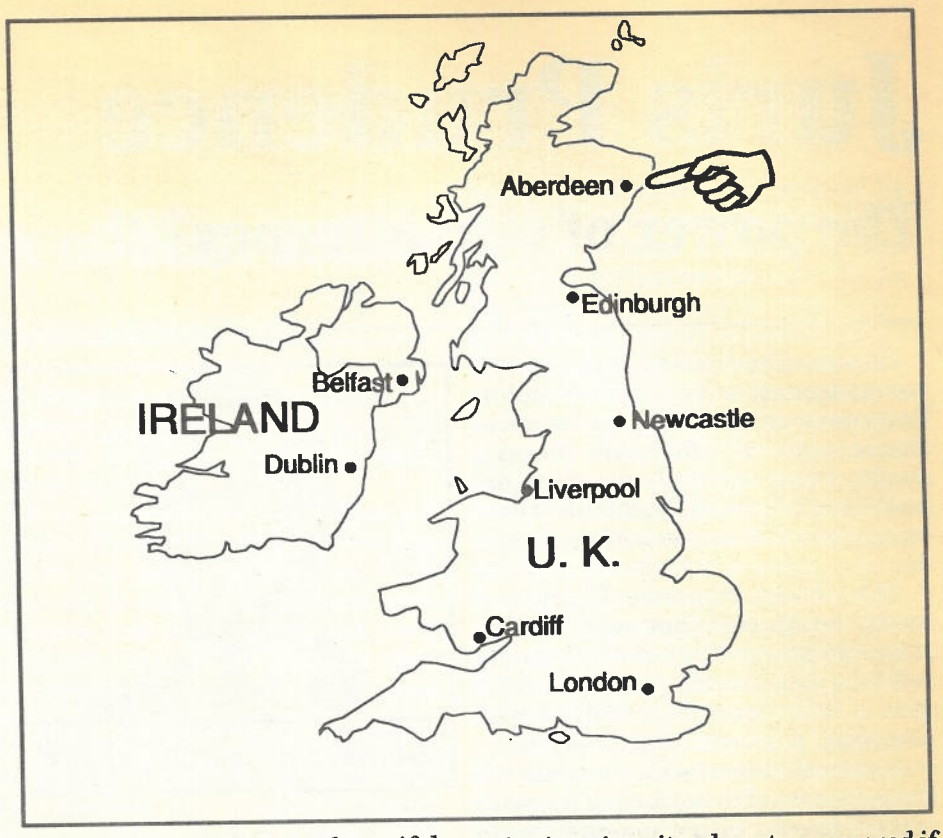
The Citizens Advice Bureau. An amazing concept. They've been around for a long time. The idea of an independent, nationwide information and advice service was born in the 1930s. As World War II loomed it was setup in earnest to help deal with the evacuation of children to safety from Hitler's bombs, and to face soldiers lost in battle or taken as prisoners of war. Following the War, Bureau volunteers found themselves helping returning servicemen and women to reunite with their families, locate housing, find employment, obtain training or education, and apply for newly-introduced welfare benefits.

The Citizens Advice Bureau was intended as a short-term measure to help British citizens through tough times. But tough times don't end, they just shift focus; so CAB didn't disband, it evolved. Today there are CAB offices in most cities and larger towns, each with a skeleton paid staff and a crew of trained volunteers. In Aberdeen, a city roughly the size of Anchorage, our downtown office has two full-time staff positions and about 60 volunteers who put in about six hours each week. These Bureaux offer an amazing range of information and other helping services. Everything from a phone number and "how do you find the bus station" to advice and help with social security, welfare benefits, employment problems, taxation, consumer disputes, debt counselling and reorganization, family matters, immigration, health and housing, and death and inheritance. In addition to information and advice, letter writing and phone calls, larger CABs provide representation at industrial and medical tribunals, and in small claims court.

For the individual, the CAB is a free, confidential, impartial and independent source of advice, information and practical help. Because it is a generalist service, CAB can take a broad look at the whole person and the client's complex bundle of problems and pull together (for example) mediation services, emergency and permanent housing, and renegotiation of debts into one package. For the larger society, CABs provide significant social policy data resources and reporting.

And now I work there. Besides the lure of helping people who need it and staying sharp myself, I just HAD to find out how this works. So I took the training course for volunteers (they even take American Lawyers, and they do provide indemnity insurance for workers), and I'm part of the madness. It's Wednesday morning, 9:30 and time to open up. Besides the Manager and Duty Manager, there are about five of us ready to work, each armed with steno-pad and pen. Already there are three or four folks in the waiting room, and the phones are ringing. A deep breath and into the room—"Who's first, please?" (The British are great at queues—the room can be mobbed and muddled and they always know who's first.)

A man and a woman stand and follow me into one of the five small conference rooms. No imposing desk—just them and me in facing seats. "How can I help?" No names unless it becomes necessary in order to proceed. The man pulls out some papers—a sheriffs warrant threatening execution in 14 days if he doesn't pay alleged child support arrears. A review of the original court order suggests he has defenses. But these Orders are from an English court. He is also unemployed. I excuse myself to go research the situation while he waits.



CAB has developed an amazing system of law digests which summarize and practically apply the law in (largely) lay terms. Fifteen minutes later I know that his unemployment benefit can't be attached, that he is entitled to have the amount of support lowered on application to the court due to his changed circumstances, that he will need a solicitor familiar with English law to help him get his defenses before the English court, and that he can probably qualify for legal aid to pay the solicitor. And I have the name and phone number of a local law firm specializing in English law. He leaves to go contact the solicitor. I write up the matter in six or eight lines on the day-sheet.

Then another deep breath, and out to the reception area —"Who's first, please?"

This woman received a letter from her employer yesterday that she's being made redundant ("laid off in American). She's been off work for ten weeks following surgery and was due to go back Monday. She's senior in her department with an accounting firm. She has an appointment with her boss in half an hour and wants to know her rights, as well as what unemployment and welfare benefits she'll be entitled to when her job ends. No time to do it all now.

People without access to "the system" gain access.

I excuse myself for 15 minutes and quickly ascertain that she can expect five weeks notice pay, five weeks redundancy pay (based on her age and years of service), and pay for accrued holidays. She may have a claim for unfair dismissal if her employer's action has anything to do with her time off sick. Being senior in her department and more highly compensated gives no preference. She should try to ascertain whether her employer is truly reducing the number of available clerical jobs such as hers. Oops—she needs to go! I encourage her to stay calm and ask some questions that may help determine a claim for unfair dismissal—and to come back later to complete this discussion.

After writing up that interview, I discover all the conference rooms are full (so is the waiting room today). So I answer the phone (which is always ringing since it only gets answered if advice workers are otherwise unoccupied). This lady just had two "thugs" come and take her recently-purchased used car because she is behind on payments. (Watch it, Jeri—you know THIS area of the law is VERY different from what you've seen elsewhere.) After discussing the purchase, the credit arrangements, and other problems with the car, I explain that I will put her on "hold" for a few minutes and go research the problem. Turns out, after pouring through the digests, that there are several potential criminal violations by the car dealer. I summarize these for her and refer her to the Consumer Protection Department of the Trading Standards Office.

And so it goes. By 3:00 pm I've no idea how many calls I've answered or clients I've seen. I've talked with a teenager who can't make ends meet on her pitiful wages, helped her to recalculate her housing benefit based on her lower wages, and advised her on negotiating a lower rent with her landlord. I've worked with a debt client and gotten the file ready for letters to his creditors to be sent out. I've prepared a demand letter on behalf of a woman whose former employer refuses to give her final paycheck. CAB will take the matter to an industrial tribunal for her if the letter doesn't obtain results. I've directed a caller to a hotline for gays. And, just as I have to leave, the woman who lost her job returns. She's been crying, and she thanks me especially for advising her to stay calm during the interview with her employer, because she's gained helpful information.

DIFFERENT! To the point of being beyond imagination for this American lawyer used to quiet offices, a big desk, elaborate file systems, organized appointments and receptionists who take messages (translate: order and control). But a vital job is getting done and generally is done well. People without access to "the system" gain access. And they are listened to, helped, and often comforted in the process.

Now, don't get all excited about coming to visit and see all this first hand, because this Alaskan lawyer is set to move home this summer and the guestroom closes July 1. (Anybody want to offer me a job?) But what a thought to cut through the red tape and paperwork and delays—and CYA memos—to empower regular people with understanding and access to the system!

Legislature targets supreme court decisions

continued from page 1

in 1900." *Kulawik v. ERA Jet Alaska,* 820 P.2d 627, 631 (Alaska 1991). One effect of HB 292 is to change the word "pecuniary" to "economic" so that the tort bar can begin the interpretive process all over again.

Another effect of HB 292 would be to overturn one of the many hoary damages principles that originated in *Beaulieu v. Elliott,* 434 P.2d 665 (Alaska 1967). Under the bill, in any action for personal injury or wrongful death, "the amount of economic damages awarded for past or future gross earnings shall be reduced by the amount of federal and state income tax that would be paid on the earnings under tax rates in effect on the date of the injury or death."

Several bills intend either explicitly or implicitly to overrule the Supreme Court's decision in *Jackson v. Power,* 743 P.2d 1376 (Alaska 1987). Senate Bill 204, HB 274, and HB 292 all seek to ensure that hospitals will not be liable in the future for the negligence of their independent contractors (in *Jackson*, an emergency-room physician).

In a bill notable for its thirteen paragraphs of indubitable preamble ("skiing is an active sport conducted in the outdoor alpine environment. . . weather varies from sunny and warm to bitterly cold and windy. . . . skiing is an exhilarating sport. . . . falling is an ordinary, obvious, and necessary component of the sport"), Senator Tim Kelly aims to revise state skiing law "as interpeted by the Alaska Supreme Court in *Hübschman v. City of Valdez,* 821 P.2d 1354 (Alaska 1991)," largely by codifying in numbing detail the reciprocal duties of ski resorts and skiers. For example, under the bill a skier would have not just a common-law duty but a statutory duty as well "to ski within the limits of the skier's ability."

Senate Bill 206, also sponsored by Senator Kelly, is specifically intended to overturn *Bevins v. Ballard,* 655 P.2d 757 (Alaska 1982), by protecting a real estate agent from liability based on innocent misrepresentation "if the agent does not have personal knowledge of the error, inaccuracy, or omission that is the basis for the misrepresentation."

Not all of these measures, of course, will make it through this year's session, but some of them no doubt will. And this list is far from exhaustive. There are many bills in the legislative hopper which, for better or worse, would allow civil practitioners to throw away a lot of back volumes of the Pacific Reporter.

Plea bargaining policy rescinded by Cole

By Teri Carns

In 1975, Alaska's Attorney General Avrum Gross made national headlines by issuing a brief memo prohibiting the use of plea bargaining in most cases. Nearly twenty years later, at a luncheon speech to the Alaska Bar Association at its annual conference, Attorney General Charles Cole announced that he had rescinded the policy prohibiting plea bargaining. On February 3, 1994, Attorney General Bruce Botelho published a revised policy on plea bargaining designed to bring the Department's written policies into line with the actual practices of the last ten years. Although the policy memo was disseminated by Botelho, he credited Cole's leadership role in the effort and noted that the memo was "substantially completed" by Cole by November, 1993. He portrayed the policy as one that "brings Alaska back into the mainstream of criminal procedure -- virtually all other state, federal and municipal jurisdictions -- including federal and municipal prosecutors in Alaska -- engage in the practice of plea bargaining." He noted that other Attorneys General, particularly Hal Brown in 1986, had modified the policy in significant ways that served as the basis for the most recent revisions.

The Alaska Judicial Council studied the "ban on plea bargaining" in two separate federally funded studies. The National Institute of Justice funded the first evaluation (*Alaska Bans Plea Bargaining,* 1978); the State Justice Institute sponsored the second (*Alaska's Plea Bargaining Ban Re-evaluated*, 1991). The first study found that the prohibition had substantially reduced the incidence of plea bargaining, especially the sentence bargaining that had characterized Alaska's criminal case dispositions prior to the ban. Practices had changed greatly by the time of the Council's second review of the policy. In its 1991 report, the Council noted that prosecutorial practices in the late 1980s were "substantially at odds" with the Attorney General's written policies, and recommended that the written policy and actual practice should be consistent. Attorney General Botelho cited this recommendation as one impetus for the new policy. He added that Alaska's criminal prosecution division was sufficiently well-trained and professional to use plea bargaining "to protect the public, achieve fair and just results, and provide for efficient administration . . ."

The policy maintains the screening procedures established in 1980, requiring that prosecutors use a "beyond a reasonable doubt" standard for filing charges. That screening policy was one of the most important aspects of the ban, originally meeting with stiff resistance from police who were accustomed to determining the filing charge. Later experiences led police to view the screening policy more favorably, finding that it led to more professional police work. In turn, more professional police work has led to prosecutors declining fewer cases, according to some observers, because the overall quality of cases is strong enough to support prosecution in more instances.

District Attorneys may enter into plea agreements, defined as "discussion . . .that may lead to entry of a plea . . ., the dismissal of charges, a decision to decline to prosecute

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TANANA VALLEY BAR

Wolves & cats invade luncheon

TVBA MINUTES February 4, 1994

The TVBA luncheon was forced into the bar in the basement of the Regency as Fish & Game was having a wolf barbecue in our usual room.

The din of the diners made the task of the hearing more difficult for those of us who were aurally impaired.

Guests included Sylvia Gordon who is admitted to the Bar in Indiana and is looking for work. She can be reached at 356-2858.

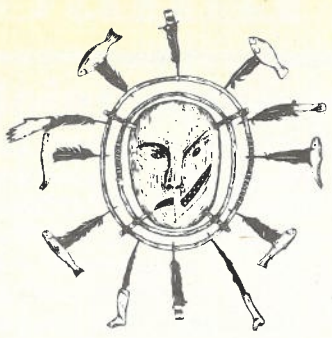
Ron Smith made a gender neutral remark prior to the commencement of the hearing. Such a statement is unheard of in the history of the TVBA. Bob Noreen stated he used to be roommates at West Point with the army officer who is now the chief of the JAG offices for all of the army. Bob noted that there is really no difference between he and his former roommate except that his former roommate has a lot more prestigious rank and makes a lot more money and is in charge of a whole lot more people than he is.

An astute observer also noted that Noreen's former roommate only had to come to Fairbanks for one day whereas Noreen was stuck here for the rest of his life.

John Connor is presently attempting to auction himself off as a sex object for pay to the TVBA and other individuals purportedly for a good cause. However, since he declined to relate to us the public record and facts of his recent cat urination case the TVBA declined to endorse any good works that may have been hidden within his lurid proposition.

Kenneth L. Covell

The Bar Rag welcomes articles from its readers



Rediscovering the

The legal profession today faces many challenges, one of which is reconnecting with the spirit of justice, advocacy and public good that exemplifies the legal system. Our convention is aimed at revitalizing that spirit in our members. We take inspiration from a symbol of Native spirit and a culture and law that pre-date ours.

Seminar Highlights

"Legal Implications of Breast Cancer Detection and Treatment: A Forum for Lawyers and the Public"
In a unique partnership with the American Cancer Society, national experts and local attorneys have been brought together to discuss legal issues surrounding breast cancer treatment, among them the emerging field of litigation over insurance coverage for "experimental" coverage. This program is sponsored in part by the Attorneys Liability Protection Society (ALPS), A Mutual Risk Retention Group.

"Battered Women Accused of Crime — Traditional Defenses"
"The Dynamics of Violent Families"
NYU Professor Holly Maguigan addresses the issue of gender in criminal law in a three-part series that focuses on women living with violence who come into contact with the criminal justice system. In a related joint Bench/Bar program, Sarah Buel of the Harvard Law School Battered Women's Advocacy Project discusses violence in families.

"Cultural Bias In Criminal Law"
A panel of lawyers, anthropologists, and scholars examines cultural bias in the criminal justice system, particularly against Alaska Natives.

"Update: State and Federal Rules Changes"
"Review of Recent U.S. Supreme Court Decisions"
Two programs present a review of significant developments in State and Federal practice. A panel of local attorneys and judges outlines the most significant changes to State and Federal Rules of Civil Practice, particularly the new Federal Rules of Discovery. UCLA Professor Peter Arenella and USC Professor Erwin Chermerinsky return to present another joint Bench/Bar review of the year's most important Supreme Court decisions.

"Changing Law Firm Economics"
Nationally known management consultant Blane Prescott outlines cost control strategies for firms in the 90's. This program is presented in cooperation with the Alaska Association of Legal Administrators.

"The Life and Times of a Young Lawyer in the 90's"
Ethics, partnership issues, litigation problems, and quality of life issues facing lawyers in the first five years of practice are discussed by a panel of local attorneys and judges.

"An Update on the ADA: What Every Lawyer Needs to Know"
The requirements of the Americans with Disabilities Act remain a mystery to most lawyers, despite the Act's impact on firms, clients, and client relations. In this program local public and private attorneys present an overview of the significant provisions of the Act.

"The New Appeals Process: Getting It Right"
"The Door to Winning: When a Mock Trial is the Key"
"The Insider's Guide to Working With In Court Clerks"
Three programs for lawyers, legal secretaries, and legal assistants are designed to enhance team practice. Trial practitioners and their teams learn how to assess cases by presentations to a mock jury. Two other programs concentrate on working effectively with in court clerks and understanding the new appellate rules and appeals process. These programs are presented in cooperation with the Alaska Association of Legal Assistants and the Anchorage Legal Secretaries Association.

NEW PRICE SCHEDULE FOR CONVENTION!

1994 Bar Convention Registration Fees

May 5, 6, & 7, 1994
Hotel Captain Cook, Anchorage

All 4 days: $175
(includes Domestic Violence CLEs May 4 at Judicial Conference)
ANY Full Day: $90
ANY Half-Day: $50

Watch for your brochure in the mail.
Please call the Bar Office at 907-272-7469 for information.

"The Unforgiven II: Contaminated Sites"
This program, a sequel to the 1993 Environmental Law Section CLE, examines through scenarios the practical problems that often arise in the sale of real estate, including the discovery of environmental contamination after sale.

"Anchorage Inn of Court Demonstration"
This program illustrates the "pupillage" concept of the Inn of Court. A panel of local judges and attorneys presents forensic techniques with an emphasis on legal skills, ethical behavior, and Civility.

"TRO's & What's Next: The Court System and Domestic Violence"
This session will cover the basics of getting issues of domestic violence in front of the court in domestic violence proceedings and divorce and custody cases. Practice pointers will be specifically geared to the Anchorage court.

"Immigration Issues: An Overview"
This session will provide an overview of some of the more common immigration law issues practitioners are likely to encounter.

Guest Speakers Will Include:

Peter Arenella, Professor of Law, University of California at Los Angeles School of Law

Sarah Buel, Esq., Harvard Law School Battered Women's Advocacy Project

Erwin Chermerinsky, Legion Lex Professor of Law, University of Southern California Law Center

Holly Maguigan, Professor of Criminal Law, New York University School of Law

Phyllis Morrow, Associate Professor of Anthropology and Cross Cultural Communication, University of Alaska, Fairbanks

Blane Prescott, Hildebrandt Inc. Management Consultants - San Francisco

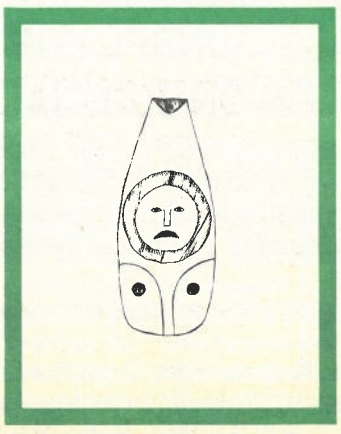
Karen Stevenson, Esq., Howard, Rice, Nemerovski, Canady, Robertson & Falk - San Francisco

Lish Whitson, Esq., Helsell, Fetterman, Martin, Todd & Hokanson - Seattle

The Hotel Captain Cook is the site of the 1994 Annual Convention. Located at 5th and K Street in Anchorage, the phone number is 907-276-6000 and fax is 907-278-5366.

TRAVEL
JAY MOFFETT at World Express Travel, 907-786-3274, is our official convention travel agent. Please contact Jay for assistance in making your travel reservations.

CAR RENTAL
AVIS RENT A CAR is the official convention car rental agent. Special car rental rates are available for all bar members. Call AVIS in-state at 800-478-AVIS and out-of-state at 800-331-1212 or Jay Moffett at 907-786-3274 to reserve a car. Be sure to indicate you are with the Alaska Bar Association Group and give the Alaska Bar reference number A677400.



HOTEL GUEST ROOMS
The Bar Association has reserved a block of rooms at the Hotel Captain Cook in Anchorage.
The rate is $85 single and $95 double. To make a reservation call the Hotel Captain Cook at 907-276-6000 or tollfree inside Alaska at 800-478-3100 or tollfree outside Alaska at 800-843-1950.

HOSPITALITY SUITE
The Hospitality Suite hosted by the Anchorage Bar Association will be open from 12:00 noon daily in Crow's Nest 1, Tower 3.

Spirit of the Law

"The Welfare of the People is the Chief Law." —*Cicero*

Events

In the spirit of community involvement, the Alaska Bar Association will be working with local organizations to perform public service projects. Sign up on the convention registration form for more information.

Reception in Honor of Sarah Buel, Holly Maguigan, and Women Lawyers and Judges sponsored by the Anchorage Association of Women Lawyers, Hotel Captain Cook, Wednesday, May 4

State of Judiciary Address, Lunch, Thursday, May 5

President's Reception, 4th Avenue Theatre, Thursday, May 5

Alaska Bar Association Business Meeting, Lunch, Friday, May 6

Awards Banquet, Hotel Captain Cook, Friday, May 6

Section Meetings will be held on Saturday, May 7 at the Hotel Captain Cook. Times and room assignments will be sent to Section members.

SPONSORS

Alaska Association of Legal Administrators
Alaska Association of Legal Assistants
Alaska Court System
Alaska Legal Services Corporation
American Cancer Society, Alaska Chapter
Anchorage Association of Women Lawyers
Anchorage Bar Association
Anchorage Inn of Court
Anchorage Legal Secretaries Association
Attorneys Liability Protection Society (ALPS) (A Mutual Risk Retention Group)
AVIS Rent a Car
Dean Moburg & Associates - Court Reporters, Seattle
Hagen Insurance
Information Services - Jerry Dortch
The Michie Company
Midnight Sun Court Reporters
Professional Business Video
R & R Court Reporters
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EXHIBITORS

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Bureau of National Affairs
Butterworth Legal Publishers
Charter North Hospital
Hagen Insurance
Lawyers Cooperative Publishing
Mead Data Central
The Michie Company
Northwestern School of Law of Lewis & Clark College
Pacific Data Storage
Seattle Deposition Reporters
Vocational Economics
WEST Publishing

Resolutions

PETITION TO AMEND ALASKA RULE OF PROFESSIONAL CONDUCT 4.2
Alaska Bar Association
1994 Annual Convention
Anchorage, Alaska

Anthony N. Turrini, a member in good standing of the Alaska Bar, submits this petition to the annual convention of the Alaska Bar Association pursuant to Alaska Bar Rule 62 for consideration of the amendment of Alaska Rule of Professional Conduct 4.2. The rule as amended would read:

RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

(a) In representing a client, a lawyer shall not communicate about the subject of the representation with a party or person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(b) This rule does not prohibit communications by a lawyer with government officials who have the authority to redress the grievances of the lawyer's client, whether or not those grievances or the lawyer's communications relate to matters that are the subject of the representation, provided that in the event of such communications a lawyer must disclose to such official both the lawyer's identity and the fact that the lawyer represents a party with a claim against the government.

Comment

This rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between two organizations does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communication with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

In the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent of that counsel to a communication will be sufficient for purposes of this Rule. *Compare* Rule 3.4(f).

Paragraph (b) recognizes that special considerations often come into play when a lawyer is seeking to redress grievance involving the government and that, as a result, litigation with the government generally does not fall within the traditional model of litigation to which Rule 4.2 is addressed. It permits communications with those in government having the authority to redress such grievances without the prior consent of the lawyer representing the government in such cases.

Paragraph (b) is not intended to permit a lawyer to bypass counsel representing the government on every issue that may arise in the course of disputes with the government. It is intended to provide lawyers access to decision makers in government with respect to genuine grievances, such as to present the view that the government's basic policy position with respect to a dispute is faulty, or that government personnel are conducting themselves improperly with respect to aspects of the dispute. It is not intended to provide direct access on routine disputes such as ordinary discovery disputes, extensions of time or other similar scheduling matters, or similar routine aspects of the resolution of disputes.

This rule also covers any person, whether or not a party to formal proceeding, who is represented by counsel concerning the matter in question.

Statement of Reasons for Proposed Change

The Alaska Bar Board of Governors interprets current Alaska Rule of Professional Conduct 4.2 to prohibit a lawyer representing a client in litigation with the government from communicating with government officials who have the ability to commit the agency or otherwise exercise control over decisions regarding the litigation. Alaska Bar Association Ethics Opinion 94-1 (1994). Section (b) of the amended rule would allow such contact in instances in which a lawyer wished to address the underlying policy concerns of governmental litigation position or the perception that government personnel were acting improperly with respect to aspects of the dispute. Section (b) and the accompanying comments are modeled on District of Columbia Rule of Professional Conduct 4.2(d) and its accompanying comments.

1. *Strict application of Rule 4.2 is unnecessary in the context of litigation with the government.*

Ethics Opinion 94-1 states that Rule 4.2 "is designed to permit an attorney to function adequately in his or her proper role and to prevent the opposing counsel from impeding performance as the legal representative of the client." A party retains counsel "based on a determination that skilled assistance is necessary to evaluate the facts and applicable law, to develop the strengths of the client's position, and to permit the client to avoid direct demands and communications from the opponent." Direct communications, it is feared, will result in a party being misled as to the strengths and fairness of the other party's position, perhaps creating "beliefs, fears or impressions that cannot later be corrected by that party's counsel." Alaska Bar Association Ethics Opinion 94-1 (1994).

These justifications do not apply in the context of government litigation because the government does not fit within the model of the vulnerable, unsophisticated client this rule is designed to protect. Government officials who can change policy are not legally unsophisticated and susceptible to pressure as portrayed by Rule 4.2. Often they are lawyers themselves. Whatever their former profession, such officials' roles are to evaluate interests and choose between alternatives. They are capable of evaluating

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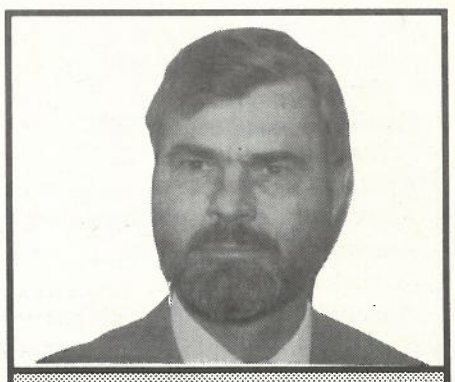
Bankruptcy Briefs

Joint administration and consolidation



Thomas Yerbich

Although frequently used interchangeably, joint administration and substantive consolidation are distinctly different. In joint administration, bankruptcy proceedings of separate entities are consolidated for administrative purposes to promote procedural convenience and cost efficiencies; however, the assets and liabilities of the debtors remain separate and distinct, with the substantive rights of claimants unaffected (*e.g.*, a single notice and hearing but separate plan): "procedural consolidation." The equitable doctrine of substantive consolidation permits the court in bankruptcy cases involving related entities, under appropriate circumstances, to disregard the separate identity of entities, to consolidate and pool their assets and liabilities and treat them as though held and incurred by one entity - creating a single estate for the benefit of all creditors of all consolidated entities, and combine such creditors into a single, integrated creditor body.

Rule 1015, FRBP governs consolidation when two or more petitions are pending in the same court against the same debtor [Rule 1015(a)] and joint administration involving (1) a husband and wife, (2) partnership and one or more of its general partners, (3) two or more general partners, or (4) a debtor and an affiliate [Rule 1015(b)]. However, since consolidation depends upon substantive considerations and affects the substantive rights of the creditors of different estates, Rule 1015 does not deal with consolidation of cases involving two or more separate debtors. [Advisory Committee Note, Rule 1015, FRBP] The power to consolidate substantively arises out of equity and is derived from the court's general equitable power granted by 11 USC 105. [5 King, *Collier on Bankruptcy*, 1100.06 (15th ed. 1993); *In re Continental Vending Machine Corp.*, 517 F2d 997 (CA2 1975)]

Procedurally, cases may be consolidated at any point during the pendency of the proceedings upon noticed motion [to all parties in interest in all affected cases] and hearing. In cases involving chapter 11 or 13 debtors, consolidation may be an integral part of the Plan. Moreover, there is no requirement that cases to be consolidated be filed under the same chapter of the Code, *e.g.*, a chapter 7 case may be consolidated with a chapter 11 case. However, consolidation of cases under different chapters presents substantive difficulties discussed further below.

The key to substantive consolidation is the relationship between the entities sought to be consolidated - the character of the entities being secondary. Thus, consolidation of the estates of an individual and an affiliated corporation *[In re Manzey Land & Cattle Co.,* 17 BR 332 (Bkrtcy SD 1982)] or a parent corporation and its subsidiaries *[Soviero v. Franklin Nat'l Bank of Long Island,* 328 F2d 446 (CA 1964)] have been held appropriate.

The most common form of substantive consolidation is a husband and wife. When a joint petition is filed, 11 USC 302(b) requires the court to determine the extent, if any, to which the debtors' estates will be consolidated. As a practical matter, although technically not sanctioned by either the Code or the FRBP, consolidation of the estates is automatic unless the court orders otherwise. That is, unless the debtors or another party in interest objects to consolidation, consolidation occurs as a matter of course [the required "unity of interest" presumptively exists]. [Note: a husband and wife need not file jointly: such filing being permissive - not mandatory. It is possible for married persons to not only file separately, but under separate chapters as well.]

Two critical concerns govern substantive consolidation decisions: First, "whether creditor dealt with the entities as a single economic unit and 'did not rely on their separate identity in extending credit,'" and, second "whether the affairs of the debtors are so entangled that consolidation will benefit all creditors." *[In re Augie / Restivo Baking Co., Ltd.*, 860 F2d 515, 518 (CA2 1988)] It has also been stated:

> "It is agreed that the basic criterion by which to evaluate a proposed substantive consolidation is whether "the economic prejudice of continued debtor separateness" outweighs "the economic prejudice of consolidation. In other words, a court must 'conduct a searching inquiry to ensure that consolidation yields benefits offsetting the harm it inflicts on objecting parties.'"

[Eastgroup Properties v. Southern Motel Ass'n, Ltd., 935 F2d 245, 249 (CA11 1991); *see also In re Giller,* 962 F2d 796 (CA8 1992)]

Although no single element is treated as being conclusive nor need all be present, courts evaluate several elements in ascertaining whether the interrelationship between debtor-entities warrants substantive consolidation in bankruptcy: (1) presence or absence of consolidated financial statements; (2) unity of interests and ownership between the entities; (3) degree of difficulty in segregating individual assets and liabilities; (4) sharing of overhead, management, accounting, and other related expenses among different entities; (5) existence of cross-guarantees on loans and inter-entity loans; (6) transfer of assets or shifting of funds from one entity to another without observing proper formalities; (7) adequacy of capital; (8) commingling of assets or business operations; (9) common directors or officers, 0 degree of independence; and (10) common business location. *[In re Drexel Burnham Lambert Group, Inc.,* 138 BR 723, 764 (Bkrtcy SDNY 1992)]

Because of procedural problems inherent in substantive consolidation and the potential inequities caused to one creditor group. when forced to share *pari passu* with creditors of a less solvent debtor, substantive consolidation is an unusual occurrence. Generally, the burden of proof is on the party seeking substantive consolidation. However, the modern trend towards liberalizing substantive consolidation is illustrated by the "shifting burden" rule stated in *Eastgroup Properties, supra.*

> [T]he proponent of substantive consolidation must show that (1) there is substantial identity between the entities to be consolidated; and (2) consolidation is necessary to avoid harm or to realize some benefit. When this showing is made, a presumption arises "that creditors have not relied solely on the credit of one of the entities involved." Once the proponent has made this prima facie case for consolidation, the burden shifts to an objecting creditor to show that (1) it has relied on the separate credit of one of the entities to be consolidated; and (2) it will be prejudiced by substantive consolidation. Finally, if an objecting creditor has made this showing, "the court may order consolidation only if it determines that the demonstrated benefit of consolidation 'heavily' outweigh the harm."

It is suggested that creditors who believe they may be the "goree" if cases are consolidated, *e.g.*, a creditor of the more solvent debtor being asked to "share the pie" with creditors of a less solvent affiliate, before objecting look at the overall situation. Remember even a "weak-sister" (one that is marginally profitable) can make a contribution to the - "family" and the lack of that contribution may jeopardize the remaining members. For example, although it may be necessary to provide cash infusions to the "weak-sister" to satisfy its creditor *pari passu;* because of cross-guarantees, a complete failure may shift the entire burden to the remaining affiliates - creating a *defacto* burden-sharing in any event with smaller slices or, worse, causing the entire "family" to fail. Enhancement of the potential survivability of the "family unit" may be the benefit of consolidation that outweighs the harm to a particular creditor or creditor group. On the other hand, debtors need to bear in mind the fact that the court will carefully weigh the demonstrated benefits against the harm, and consolidation must be carefully crafted to minimize the detriment to any creditor or creditor group.

Substantive consolidation of cases under different chapters of the Code may present particularly troublesome substantive barriers. As an example take the small "Mom & Pop" corporation. Almost inevitably the major creditors of "Corp" are personally guaranteed by "Mom & Pop." Also, the principal, if not sole, source of income for "Mom & Pop" is "Corp." Consequently, when "Corp" finds itself in a "financially deprived" condition, "Mom & Pop" suffer the same ailment. To prevent foreclosure on the family homestead (securing the individual guarantees), when the "Corp" files chapter 11, "Mom & Pop" also file chapter 13 (assuming "Mom & Pop" qualify). [At first blush a reasonable approach because a chapter 13 is generally less cumbersome and less expensive than chapter 11.]

Because of the inter-dependency between "Mom & Pop" and "Corp" and substantial identity of interests, it is decided to consolidate the cases (a single proceeding with a single plan). [Any way one structures it, the bottom line is the same: the income of "Corp" is the source to pay the obligations of "Mom & Pop"!] Theoretically this is possible, but is it as a practical matter? Three major inherent differences between the proceedings illustrate the problems: (1) a chapter 13 plan may not extend longer than 5 years, while there is no such limitation in chapter 11; (2) a debt secured solely by a principal residence may not be modified in a chapter 13, but may in a chapter 11; and (3) chapter 11 has an "absolutely priority" rule effectively precluding confirmation over objection of less than a full payment plan, while chapter 13 employs a "disposable income" test. If the cases are consolidated, which rules govern? The author suggests that the "most restrictive" rule would apply and any joint plan would have to meet the requirements of both 1129 and 1325 to be confirmed. Thus, to be confirmed, the plan must: (1) be 5 years or less; (2) not modify the obligation secured solely by the principal residence of "Mom & Pop"/ and (3), if creditor object, be a 100% payback plan.

Using joint administration having separate plans standing alone may not be the answer either. (1) The chapter 13 plan will remain dependent for implementation and consummation on the successful reorganization of "Corp." (2) Treatment accorded "common" creditors will have to be consistent between the two plans and meet the "most restrictive" rule. (3) The chapter 13 process will be slowed to march in step with the more cumbersome, slower chapter 11.

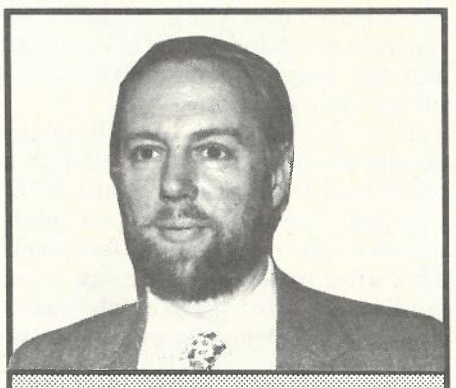
If "substantive consolidation" is contemplated, consider using chapter 11 for both (or, if a chapter 13 has been filed, converting the chapter 13 to chapter 11). Consolidation of the chapter 11 cases will create a single estate and the expense incurred will be the same as for single estate of "Corp," thereby eliminating the major factor in favor of chapter 13. In addition, the problems inherent in consolidating a chapter 13 case with a chapter 11 case will disappear.

Getting Together

Anchorage Youth Court

Our jury system is based upon being judged by a panel of our peers. Yet the majority of crime is committed by adolescent offenders. Is it fair that they are tried and judged by a bunch of adults, many of them middle-aged and older? Why not let them be judged by their own teenage peers? In fact, such a concept is the driving force behind the Anchorage Youth Court. It is a unique program, and it has been a smashing success.

The basic concept of the Anchorage Youth Court program is simple. Students in grades seven through twelve run their own criminal justice system. The students themselves perform all of the necessary roles. They begin by studying the law in Youth Court classes, instructed by volunteer adult attorneys from the Anchorage legal community. They then take the Youth Court Bar Examination. If they pass (they can take it more than once just like real attorneys) they are sworn in to the Youth Court Bar Association. They then begin to function in various roles in the court, beginning with the jobs of clerk, bailiff, and paralegal and graduating to become full fledged Youth Court attorneys. After gaining experience as attorneys they can run for election as judge. Youth Court juries are also filled by students, although jury members are not normally members of the Youth Court Bar Association.



Drew Peterson

The Youth Court adjudicates real cases. At the time of initial processing of cases, the Anchorage Juvenile Intake Office offers certain offenders the choice of being tried in the regular Juvenile Court or in Youth Court. Most cases referred to Youth Court have involved first time offenders and misdemeanor offenses. With the success of the program over time, however, referrals have involved more serious offenses, including felonies. Offenders are advised that if they do not cooperate with the Youth Court program, they will be returned to the adult-run Juvenile Court. Moreover, if found guilty by the Anchorage Youth Court, offenders will not receive criminal records as long as they complete their sentences successfully.

Anchorage Youth Court cannot impose jail terms, which is another incentive to the offenders to choose Youth Court. Common sentences include fines, community service, writing an essay about the experience (Youth Court judges report that convicted offenders particularly hate to be sentenced to write essays) and restitution. Youth Court has dealt with restitution orders of up to $3,000.00, and offenders have had to sell their cars, or obtain jobs, to satisfy their sentences. Convicted Youth Court offenders are required to pay for restitution and certain educational classes with money that they have personally earned.

Anchorage Youth Court began organizing in 1988, with the support and leadership of Attorney Blythe Marston, Judge Rene Gonzales, Master Bill Hitchcock, and Juvenile Intake Officer Mike Geisler, to name just a few. The Youth Court accepted its first cases in March of 1989. It currently receives approximately 15-20 cases per year. Jon Ealy, President of the Anchorage Bar Association, is also the current President of the Anchorage Youth Court, Inc. Administrative Board. The Administrative Board of Directors has an equal number of adult and student members.

The Anchorage Youth Court operates on a shoestring budget, with one, less than full time, employee. Executive Director Sharon Leon is a certified teacher whose job is to facilitate activities for the students who themselves run all aspects of the Youth Court program.

Perhaps most impressive are the recidivism statistics of Anchorage Youth Court. 95 percent of the offenders adjudicated by Anchorage Youth Court have not reoffended. This is in comparison with over 50 percent of regular juvenile court offenders who do reoffend.

In the past two years Anchorage Youth Court has also started a mediation program in an attempt to resolve disputes before they get to court. Anchorage Youth Court currently has eleven trained peer mediators to mediate disputes between students on as little as twenty-four hours' notice. Youth Court mediators have also been trained as co-mediators, to remediate along with an adult remediator in disputes between students and adults.

The fame of Anchorage Youth Court is spreading. In 1993, upon nomination by the Anchorage School District, the program won two major awards from the American Bar Association Information America Program: the Grand Prize for Outstanding Partnership in Communities, and the First Place Public Education Award. For the former award, which is the highest award given by the ABA program, Anchorage Youth Court was a unanimous choice from over 100 applicants representing programs serving a total population of seventeen million people.

The Alaska Legislature in 1992 passed Legislative Resolve Number 61, recommending "expansion of the Youth Courts into other communities of the state" based upon the example of Anchorage Youth Court. Currently under consideration in the Legislature is HB 195, which will provide pilot matching grants of up to $5,000.00 per community for organization of a youth court. This bill will also grant subpoena power to youth courts. Passed by the Alaska House, HB 195, was in the Senate HESS Committee the time of writing of this article.

Ironically, as the Alaska Legislature seeks to expand the Youth Court concept to other Alaska communities, Anchorage Youth Court is itself experiencing a funding crisis and its continued existence is in real danger. Until recently it has received a large proportion of its funding from the Alaska Bar Foundation's IOLTA program, but IOLTA funds have been greatly curtailed by the recent decline of interest rates. The Anchorage Bar Association, a major supporter of Anchorage Youth Court since the program's inception, has provided some emergency funds to fill the gap, but cannot afford to do so indefinitely. Anchorage Youth Court is currently seeking other sources of stable funding.

Anchorage Youth Court is a wonderful example of how to be proactive instead of reactive towards crime in our society, the majority of which is committed by juvenile offenders. It is also a great way of educating youth about our legal system at an early age. The Anchorage Youth Court teaches juveniles responsibility and respect for others by respecting students and giving them real authority at a young age. And the students involved with Anchorage Youth Court have shown that they can handle that responsibility in a mature and thoughtful way.

The author is a member of the Administrative Board of Anchorage Youth Court.

Tuffy Boots: Beware the endomorph in a DWI case

By William Satterberg

I tend to do a fair amount of trials. Although I enjoy civil work, I have found, over the years, that one of the best ways of keeping your edge, if any, is to do criminal defense work, especially in the field of DWI. The clients are generally respectable and love to party, the trials are of a reasonable length, and, besides, it usually pays.

During the past few years, there has been a substantial swing in jury sentiment against DWI related offenses. I have come to the conclusion that it is easier to obtain an acquittal in an unclassified felony than in a DWI case. Perhaps it is because of that mothers' group which has lobbied extensively with respect to the offense. Perhaps it is because of that marvelous little whiz-bang machine similar to the one that the pigeon pecks at only to get a morsel at the end, otherwise known as an Intoximeter 3000. (I am still trying to figure out where the first 2,999 units went.) Perhaps it is because half the time my clients stagger into the courtroom still blitzed.

In any event, following several years of DWI work (I used to represent the Teamsters), I hit on a formula which has helped more than others to bring about acquittals. Shoes.

Recognizing the stacked deck which often exists in DWI prosecutions, defense counsel have had to become either extremely innovative, working diligently but in vain, or lethargic, sleeping blissfully through the State's case. Arguments of logic are lost when faced with Charlie's confounded contraption. Fortunately, the last bastian of protection, as it currently appears, is in the jury selection process.

Now how does one select a jury? Especially in Fairbanks, Alaska? Or Tok? Books have been written on the subject *ad infinitum,* and legal education seminars regularly spew out theories of jury selection and how determined attempts should be made to "educate" the jury, to establish personal relationships, and the like.

But the best piece of advice I ever received actually came from a district court jurist in Fairbanks, who has since departed for Utah to become a farmer. At a past CLE seminar, Judge Stephen Cline awakened the class when he announced that the best method for selecting juries was to check out their shoes.

Fairbanks has long enjoyed the reputation of being somewhat the renegade town. Judge Cline's suggestion, however, even in Fairbanks before members of the Tanana Valley Bar, still drew muffled chuckles.

Choosing to join with the crowd, I ignored the good judge's suggestion for several years and slept on, instead concentrating intently upon the more scientific methods of jury selection, including questioning of such things as the books and articles most recently read (one juror announced that he had read military inspection manual 648), inquiring into the ability to understand and follow the law ("What do you think of FIJA? Do you know a guy named Turney?"), and concentrating on other mundane subjects such as organizational membership, bias, and the like. Finally, when all else failed, I decided to try the elusive Cline formula.

Keep in mind that, for 12 jurors, there are usually 24 shoes, given the normal juror.

continued on page 19

TRUST CONTRIBUTIONS SOUGHT

Many of you will remember Clay Mizar. Clay passed away on March 9, only a few weeks after his wife Barbara, who had MS. If you are interested, please send donations for their son's education: Hunter Riggs Mizar Trust, 1920 East 66th Avenue, Anchorage, AK 99507. If questions, call Kathy Anderson 345-3801.

Torts

Civil justice system perches on brink of destruction

House Bill 292, the omnibus "tort deform" bill, *was* introduced by the House Labor and Commerce Committee late in the last legislative session and is making its way through the state house at an unusually rapid pace. Among this bill's ill-conceived features are:

1. A six-year statute of repose for product liability and negligence claims. The clock starts ticking from the date a manufactured product was first used for its intended purpose, the date of substantial completion of construction, or the last act alleged to have caused the injury, death, or property damage. See Section 3.

2. Minors injured before the age of six by medical negligence must bring their claims by their eighth birthday, whether or not damages are identified or identifiable by that time. *See* section 4.

3. General damages are capped at $500,000 *total for all claims* rising out of a single injury or death. Some classes of catastrophically injured people can get up to $750,000. *See* Section 7.

4. Punitive damages require clear and convincing evidence and, in addition, must be based upon actual malice or conscious acts showing a deliberate disregard. Recovery is limited to three times compensatories, or $200,000, whichever is greater. *See* Sections 8 and 9.

5. Future economic loss must be reduced by the projected amount of federal and state income tax (no, the reduction doesn't go to any governmental entity, it is simply pocketed by the wrongdoer . . .) *See* Section 11.

6. Future damages after the first $50,000 *must* be paid in the form of periodic payments. *See* Section 12.

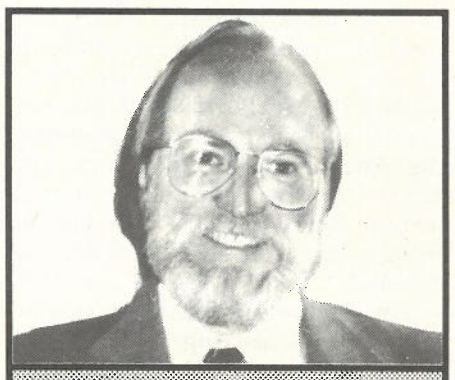
7. The benefit of any collateral source paid for by or on behalf of the victim is transferred to the wrongdoer unless the collateral source is a federally funded program that must legally seek subrogation. *See* Section 15.

8. No prejudgment interest. *See* Section 21.

9. Dead folks without dependants (whether adults or minors) are declared to be worth no more than $10,000. *See* Section 25.

10. Rule 82 becomes a matter of historical consequence only. *See* Section 26.

11. Hospitals will be able to avoid



Michael Schneider

any vicarious liability for acts of "independent contractors" and are not limited in the nature or extent of services they may provide through these independent contractors. *See* Section 27.

12. You "frivolous" suit filers out there can be sanctioned between $500.00 and $10,000. *See* Section 28.

13. The act will take effect July 1, 1994, and apply to all causes of action accruing on or after that date. *See* Sections 38 and 39.

While the most strident support for this bill comes from the ranks of the uninformed, some capable attorneys are beating the drum for passage of this legislation.

However appealing this bill may be to those who labor at the behest of the insurance industry, our supreme court apparently sees the matter differently. The court took the rather unprecedented step of sending an attorney to testify before the House Labor and Commerce Committee last November, expressing its concern over the fiscal impact of this legal nightmare on the court system.

The court system is expected to submit a fiscal note in near future, though the note will likely underestimate the true impact of this legislation on the cost of running the court system. Sorting out the vagaries of Proposition 2 (effective 3/5/89) is currently making life miserable for most trial judges and their law clerks.

The problems created by Proposition 2 are going to look like a joke compared to some of those raised by HB 292. Think of the fun we will all have arguing over security for periodic payment of future damages, the constitutionality of economic and noneconomic damage caps, to say nothing of the many claims that will get litigated once the settlement incentives provided by Civil Rule 82 and the prejudgment-interest statute go up in smoke.

It is easy to think of endless examples of why most of the stuff in this bill is bad for Alaskans. Your 5-1/2 year old is subject to medical malpractice that doesn't manifest itself until after his eighth birthday; your family is killed in a plane crash caused by a defect in design or manufacture that's over six years old; a school roof collapses on a building over six years old, leaving the victims without claims; a single person is wrongfully killed, leaving the estate with a recovery of no more than $10,000, etc.

What's really interesting is the failure of the legislative debate to focus on why Alaskan businesses, both large and small, should be worried about this legislation. If you are a Native regional or village corporation (or any other corporation for that matter) and handle or transport fuel or hazardous substances, your liability in the event of mishap may, under federal law, be both strict and joint and several in nature. The statute of repose provisions in this bill could quite easily keep you from passing on any portion of your liability to other parties more responsible than you in causing the mishap in the first place.

If your tanker went aground because of a defect in the navigation or steering system that is over six years old, you'll be left holding the liability bag.

If the roof falls in on your office building, you and your workers' compensation carrier will be saddled with the workers' compensation claims flowing from the incident. If the building is over six years old, you will be shut off from any hope of collecting indemnity or subrogation as a result of HB 292.

Section 15 of the bill, while eliminating a plaintiff's ability to collect collateral-source benefits from a third-party defendant, also makes it impossible for *the insurance carrier providing those benefits* to perfect subrogation claim. The insurance industry isn't going to like this in non-ERISA settings. In ERISA settings, there's a good chance that claimants will be kept from obtaining a recovery for the collateral benefit in question at trial. Because of the peremptory effect of federal rules governing such benefits, plaintiffs may still be subject to a subrogation claim after verdict, thus having their recovery "double clipped."

No less amazing than the substance of HB 292 is the process by which this bill is moving through the legislature. Most hearings to date have been by "invitation only." While the Alaska Academy of Trial Lawyers has been asked to participate in these hearings and has done so, a number of Alaskans unassociated with the legal profession have sought to testify and, so far, have been denied that opportunity. Many separate parts of this bill could and should require weeks of careful study and analysis, but the bill is being pushed through committee by its main proponent, Representative Brian Porter, who sits on the House Labor and Commerce Committee and chairs the House Judiciary Committee.

The only thing standing between HB 292 and a floor vote in the House (where it is most likely to pass) is the House Finance Committee. Most of the people on this committee have been around for awhile and let's hope that their depth of experience and understanding will lead them to demand that HB 292 get the scrutiny that it deserves.

Representatives Eileen MacLean (465-4833) and Ron Larson (465-3878) co-chair this committee. Representative Mark Hanley (465-4939) is vice-chair. Other members of the committee are Gene Therriault (465-4797), Terry Martin (465-373), Sean Parnell (465- 2995), Richard Foster (465-3789), Ben Grussendorf (465-3824), Mike Navarre (465-3779), Kay Brown (465-4998), and Lyman Hoffman (465- 4453). Each one of us should do all we can to encourage every member of this committee to oppose this legislation. HB 292 will most assuredly be before this committee by the time you read this article,

AND THERE'S MORE . . . .

AS 21.89.020 requires that Alaskan insurance consumers be provided uninsured/underinsured motorist coverage in the absence of a written waiver and that they also be offered U-coverage limits in excess of liability limits. If HB 403, introduced by House Labor and Commerce Committee, becomes law, this advantageous treatment of Alaskan insurance consumers will be at an end. Senator Dave Donley is largely responsible for AS 21.89.020 in its current form, and has testified against HB 403. He needs all the help he can get.

SB 206 is sponsored by Senator Kelly. This bill would have the effect of reversing *Bevins v. Ballard,* 655 P.2d 757 (Alaska 1982) and would immunize real estate agents from innocent misrepresentations made in the course of real property transactions.

SB 44/HB 41, seeking to immunize ski area owners and operators, and put smiles on the faces of the foreign owners of Seibu Alaska, Inc., has recently escaped the Senate and is moving rapidly through the House.

This list is only a partial compilation of the ill winds blowing in southeast Alaska. If you don't want to see these misguided concepts become the public policy of this state, you'd best get involved in the debate *soon!*

Estate Planning Corner

Calculating the gift tax

For a variety of tax and nontax reasons, wealthy clients often consider making substantial lifetime gifts. Such clients are typically aware that, in general, gifts of up to an aggregate amount of $600,000 are currently exempt from gift tax, regardless of the donee (I.R.C. Sec. 2505).

Clients who are considering making aggregate gifts in excess of $600,000 like to be able to calculate, on their own, their likely gift-tax exposure. The gift tax does not lend itself, however, to the typical rate schedule with which clients may be familiar. Instead, calculating the gift tax is generally a four-step process.

The first step is to determine a "tentative tax," using the rates reproduced at the end of this column, on the aggregate sum of taxable gifts for the current year and for each preceding taxable year or quarter (I.R.C. Sec. 2502 (a) (1)).

For example, suppose in 1994 a client makes a $200,000 taxable gift. Suppose further that in 1991 the client made taxable gifts aggregating $500,000, but has not made any other taxable gift. From the rates provided, the "tentative tax" on $700,000 (the aggregate sum of all taxable gifts) is $229,800.

The second step is to determine another "tentative tax," using the rates provided, on the aggregate sum of taxable gifts for each taxable year or quarter preceding the current year (I.R.C. Sec. 2502 (a) (2)). Under our example, the aggregate sum of taxable gifts made before 1994 is $500,000. From the rates provided, the "tentative tax" on $500,000 is $155,800.

Steven T. O'Hara

The third step is to subtract the second "tentative tax" from the first "tentative tax" (I.R.C. Sec. 2502 (a)). Under our example, the result of this third step is a tax of $74,000 (i.e., $229,800 less $155,800).

The effect of these first three steps is to assure the application of the marginal tax rates, which begin at 18 percent and generally go up to 55 percent. Under our example, the client is currently in the 37 percent gift-tax bracket.

The fourth and final step is to apply any remaining so-called unified credit against the tax determined under the third step. This credit, which shelters from tax transfers of up to $600,000, is called the "unified credit" because it applies not only to estate tax, but also gift tax (I.R.C. Sec. 2010 and 2505). In other words, the gift tax and the estate tax were once separate systems, but are now unified and the credit that applies to them is thus called the unified credit.

For gift-tax purposes, the unified credit for any calendar year is $192,800 less any unified credit (and, in general, exemption under pre-1977 law) previously used by the taxpayer (I.R.C. Sec. 2505). Thus, under our example, the unified credit available to the client is $37,000 (i.e., $192,800 less $155,800 of unified credit used to shelter the $500,000 of taxable gifts made in 1991). Under our example, then, the client owes $37,000 in gift tax (i.e., $74,000 of tax less $37,000 of remaining unified credit).

As a practical matter, the fourth step is skipped if the taxpayer has previously made aggregate taxable gifts in excess of $600,000 — in other words, if the taxpayer has previously used all of his unified credit. Under our example, the client has now exhausted all of his unified credit. So for future years, calculating the gift tax for him will be a three-step process.

Rate Schedule

Amount with respect to which "Tentative Tax" is to be computed	"Tentative Tax"
Not over $10,000	18% of such amount
Over $10,000 but not over $20,000	$1,800, plus 20% of the excess of such amount over $10,000
Over $20,000 but not over $40,000	$3,800, plus 22% of the excess of such amount over $20,000
Over $40,000 but not over $60,000	$8,200, plus 24% of the excess of such amount over $40,000
Over $60,000 but not over $80,000	$13,000, plus 26% of the excess of such amount over $60,000
Over $80,000 but not over $100,000	$18,200, plus 28% of the excess of such amount over $80,000
Over $100,000 but not over $150,000	$23,800, plus 30% of the excess of such amount over $100,000
Over $150,000 but not over $250,000	$38,800, plus 32% of the excess of such amount over $150,000
Over $250,000 but not over $500,000	$70,800, plus 34% of the excess of such amount over $250,000
Over $500,000 but not over $750,000	$155,800, plus 37% of the excess of such amount over $500,000
Over $750,000 but not over $1,000,000	$248,300, plus 39% of the excess of such amount over $750,000
Over $1,000,000 but not over $1,250,000	$345,800, plus 41% of the excess of such amount over $1,000,000
Over $1,250,000 but not over $1,500,000	$448,300, plus 43% of the excess of such amount over $1,250,000
Over $1,500,000 but not over $2,000,000	$555,800, plus 45% of the excess of such amount over $1,500,000
Over $2,000,000 but not over $2,500,000	$780,800, plus 49% of the excess of such amount over $2,000,000
Over $2,500,000 but not over $3,000,000	$1,025,800, plus 53% of the excess over $2,500,000
Over $3,000,000*	$1,290,800, plus 55% of the excess over $3,000,000*

**Subject to the following phaseout of the benefit of the graduated rates and unified credit where amount exceeds $10,000,000: The "tentative tax" is increased by an amount equal to five percent of so much of the amount (with respect to which the "tentative tax" is to be computed) as exceeds $10,000,000 but does not exceed $21,040,000 (I.R.C. Sec. 2502 (a) and 2001(c) (2)).*

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

Solid Foundations

Gender equality task force receives assistance

On November 11, 1993, the Trustees of the Alaska Bar Foundation considered the request of the Gender Equality Task Force to provide interim assistance for its fund raising efforts. The trustees determined that the Foundation, in fulfilling its purposes to foster and maintain the honor and integrity of the profession of the law and to study, improve and to facilitate the administration of justice, would serve as an interim conduit of funds for the Task Force.

The Task Force is a joint state-federal court advisory body. Its duties include the evaluation of questions of gender fairness in the administration of justice in Alaska and the recommendation of solutions to problems which are identifies. Chief Justice Daniel A. Moore and Chief Judge H. Russel Holland established the task force on October 27, 1993. Task Force members include: Jacquelyn Luke, Deborah O'Regan, Stephanie Cole, Susan Lindquist, Phil Volland, Susan Cox, Dan Callahan, Mary Guss, Susie Erlich, Nancy Groszek, Teri Carns and Judges Jim Singleton, Dana Fabe, Karen Hunt, Larry Weeks and Niesje Steinkruger.

Mary Hughes

Within the next eighteen months, the Task Force plans to examine the problem of gender bias in the courts and practicing bar of Alaska. The Task Force will focus on the courtroom environment (credibility of women litigants, conduct towards women, race and economic status effects), and experiences of women attorneys (professional acceptance, professional opportunity, judicial appointments), women court employees, and women litigants. Recommendations will be made to correct identified concerns. The Task Force will also seek implementation of its recommendations.

Donations will be accepted by the Alaska Bar Foundation for the benefit of the Task Force. They may be mailed to the Foundation at P.O. Box 100279, Anchorage, AK 99510.

Resolutions

continued from page 11

lawyers' representations and resisting improper or unpersuasive suggestions, especially in the realm of policy. At the least, any official who is in a high enough position to make binding decisions can be relied upon to exercise independent judgment as to whether to allow individual contact at all, to seek an attorney's advice, or to have a government attorney attend a meeting. Of course, under the amended rule an opposing attorney will still go through government counsel on routine litigation matters, and will generally contact government officials directly only for discussions of policy.

2. *Rule 4.2 frustrates public policy goals.*

The government as an entity is in a different position with regards to litigation than is a private litigant because it has duties to the public, including parties to litigation, that a private litigant does not. As a result, the application of current Rule 4.2 to litigation with the government impedes the accomplishment of several important public policy goals.

First, government officials who set policy must balance or reconcile myriad different public interests. This reconciliation process does not end when litigation begins. In fact, it often intensifies when litigation calls attention to concerns that officials may not have seriously considered earlier. The public interest is best served in such cases if government officials—those best versed in the competing policy considerations and most experienced in analyzing, choosing among and reconciling those factors—are exposed to the arguments of all those concerned with the policy decision. This is best done by facilitating, rather than limiting, direct communication with government officials. This same interest is advanced by allowing parties whose interests are affected by government policy decisions to have their most able advocates, those with the best grasp of the *policy* concerns and implications of a position, meet with policy-making officials. These advocates are often parties' attorneys. This may be especially true in the cases of disadvantaged public interest clientele who are unable—because of physical, mental, educational, or psychological limitations—to personally convey their concerns and needs to public officials.

Second, the role of a public disputant is not to seek vindication of a partisan position, it is to seek resolution of its disputes with citizens in the manner that best serves public interest. This principle may be forgotten by government attorneys caught up in the fervor of litigation. The problem is exacerbated by a government lawyer's considerable power, beyond that of an attorney representing a private client, to shape public policy.[1] Litigation positions often harden into policy positions. Allowing litigating attorneys access to policy makers to discuss policy concerns helps ensure that the government, in the person of non-litigating officials, continues to consider the policy implications of its position rather than becoming entrenched in an attorney's win/lose mindset.

Finally, the Federal Freedom of Information Act and Alaska's public records laws evidence a broad public policy of access to government officials, documents and processes.[2] Underlying these federal and state statutes is the notion that government is accountable to the public it serves. Accountability is dependent on the free flow of information, and that flow of information should not be diminished because of a dispute between a segment of the public and the government.

3. *Rule 4.2 frustrates First Amendment concerns.*

It seems indisputable that contacts with government officials are included within the First Amendment right to petition for the redress of grievances, and the effective exercise of this right is clearly facilitated by representation of counsel. As a public interest organization, the Alaska Bar has an obligation to be a leader in encouraging free speech and accessible government. The Bar should apply a presumption in favor of free speech, and draw rules narrowly in an effort to avoid unnecessary restrictions on speech. Rejecting First Amendment concerns simply because the First Amendment may not guarantee the right to communicate directly with the government ignores the Bar's obligation to carefully scrutinize any promulgation of restrictions on free speech.

Conclusion

For the above reasons, this petition to amend Alaska Rule of Professional Conduct 4.2 should be approved.

[1] The Preamble to the Alaska Rules of Professional Conduct recognizes that "the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon a settlement or whether to appeal from an adverse judgment. . . . [Government lawyers] may be authorized to represent several government agencies in intra governmental legal controversies in circumstances where a private lawyer could not represent multiple clients. They also may have authority to represent the 'public interest' in circumstances where a private lawyer would not be authorized to do so." *Alaska Rules of Professional Conduct*, Preamble.

[2] *Alaska Stat.* SS 9.25.110, 115, 120 (Supp. 1993).

SUBMITTED BY KENAI PENINSULA BAR ASSOCIATION
RESOLUTION 2

BE IT HEREBY RESOLVED that while Alaska Bar Association dues are a necessary part of practicing law in Alaska, we find the bar dues currently assessed against persons wishing to practice law in the State of Alaska to be burdensome to those who have not practiced law for more than three years in any state.

As is often the case, new lawyers just out of law school do not have the financial stability of experienced practitioners. It would be fair and beneficial to have a fee scale for paying bar dues.

THEREFORE, we find that persons eligible to practice law in the State of Alaska who have not practiced in any state for more than three years, shall pay a percentage of the total dues assessed. This percentage will increase in percentage increments every year until such persons have practiced law for a total of three years in any state. The percentages to be paid are as follows:

1st year of practice: 40%
2nd year of practice: 60%
3rd year of practice 80%

JUNEAU BAR ASSOCIATION

Be It Resolved by the Alaska Bar Association:

1. That the Alaska Bar Association shall conduct an advisory vote, by mail ballot, of all members on whether the dues for an active member shall be set at $300.00 per year.

2. That the Alaska Bar Association shall conduct an advisory vote by mail ballot, of all members whenever an increase in dues is proposed

JUNEAU BAR ASSOCIATION

Be It Resolved by the Alaska Bar Association:

1. That the Executive Director of the Alaska Bar Association be directed to refund to any active bar member not less than 70% of that member's annual membership dues for any year in which that member can document having devoted not less than 500 hours of pro bono professional time, or not less than 70% of that member's annual professional effort.

JUNEAU BAR ASSOCIATION

WHEREAS:

1. Alaska Attorneys are polled from time to time using a retention survey on the performance of the Alaska State Judges.
2. The United States Federal District Court Judges have included their names on the retention survey submitted to Alaska Bar Association members.
3. This action by the federal judges is completely discretionary with the federal judges.
4. By submitting their names to the Alaska Bar, Alaska practitioners get the benefit of providing comments on the actions of federal judges, who may benefit from these comments.

Be It Resolved that the Alaska Bar Association:

1. Commends the United States federal judges for submitting their names to the Alaska Bar Association members for comment on the retention election survey, and:
2. Encourages the United States federal judges to continue to submit their names to the Alaska Bar Association for review in the future.

Bar People

Samuel Adams is now with the A.G.'s office in Anchorage.....**Gary Amendola** has relocated from Juneau to Boise, Idaho.....**Ken Albertson,** formerly with Bliss Riordan, is now with Birch, Horton, et.al.....**Joe Josephson** and **Daniel Bair** have formed the firm of Josephson & Bair.

Adrienne Bachman has relocated from Ketchikan to Eagle River.....**Robert Bacon** is with the Office of the State Public Defender in San Francisco.....**Blake Call** is again with the Anchorage office of Guess & Rudd.....**Joe Cox,** formerly with Faulkner, Banfield, is now with Batchelor, Brinkman & Pearson in Juneau.....**Patrica Clark,** formerly with the JAG office at Fort Richardson, is now with APUC.

Thomas Gingras, formerly with Ross, Gingras, et.al., has opened his own law office in Anchorage, as of Feb. 7.....**Richard Helm,** formerly with Burr, Pease & Kurtz, is now with Biss & Holmes.....**Heather Kendall,** formerly with ALSC in Fairbanks, is now with the Native American Rights Fund in Anchorage.....**Bruce Roberts,** formerly with the Municipal Prosecutor's Office in Anchorage, is now with the D.A.'s office.

Paul Tony, formerly with Copper River Native Assn., is now with Fortier & Mikko.....**Rene Wright,** formerly with the P.D.'s Agency, has opened her own law office in Soldotna.....**Alan Schon** has relocated from Fairbanks to Virginia.

Jay Durych, formerly with Gordon F. Schadt joins Peter Giannini, Rhonda Lee Fehlen, and Kathi Brown-Roberts at the Law Office of Giannini & Associates P.C. as of January 10, 1994.....**James R. Blair** has become of counsel to Winfree &Hompesch in Fairbanks.

Alaska Bar Association Ethics Opinions

ALASKA BAR ASSOCIATION
ETHICS OPINION 93-2
Ethical Restraints on the Compensation of Witnesses

The Committee has been asked to consider the circumstances under which it would be unethical to compensate a witness for his or her testimony.

Rule 3.4(b) of the Alaska Rules of Professional Conduct ("ARPC") prohibits a lawyer from "offer[ing] an inducement to a witness that is prohibited by law." The Comment to this rule observes that "it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee."[1]

The Committee's task is complicated by several factors. First, the distinction between a lay witness and an expert is not always clear. Lay witnesses may be permitted to offer opinions if "rationally based on the perception of the witness" and if it would assist in the "determination of a fact in issue." *See* Alaska Evidence Rule 701. Depending on the size of the case and the demands on the witness's time, it may be appropriate for the witness to receive a reasonable fee in addition to reimbursement of his or her expenses. *See* n.2 *infra*.

Secondly, Alaska is generally a liberal jurisdiction with respect to the admissibility of expert testimony. *Norris v. Gatts*, 738 P.2d 344 (Alaska 1987); *Hilburn v. State*, 756 P.2d 1382 (Alaska App. 1988). There is no requirement that a witness possess a particular license or academic degree in order to qualify as an expert; the criterion in determining whether a person qualifies as an expert is whether the fact finder can receive appreciable help from that person. *Leavitt v. Gillaspie*, 443 P.2d 61 (Alaska 1968). The issue of admissibility is committed to the broad discretion of the trial judge. *New v. State*, 714 P.2d 378 (Alaska App. 1986).

Finally, the issue of compensation does not necessarily hinge on whether the witness is properly characterized as an expert. Most experts command high fees because of their professional training, education, skill or experience. However, a witness may be qualified as an expert on a relatively discrete issue, or for a limited purpose, but the fee for his or her "professional services" could be grossly disproportionate to what the witness would make in his or her normal trade or endeavor. Under those circumstances, a fee for an expert could be so excessive as to no longer be "reasonable."

Notwithstanding, the Committee believes that it is appropriate to evaluate certain factors in determining the ethical constraints on the compensation or fees which a witness might receive.

1. How does the fee or compensation paid to the witness compare to the wage or salary in his or her normal trade or occupation. Again, this issue is not clear cut. For instance, a highly skilled auto mechanic may command $30.00 per hour in the shop. Even though he or she may qualify as an expert mechanic, a fee of $250.00 per hour for testimony in a case may not be "reasonable." By the same token, a highly skilled and educated engineer may be content in his or her twilight years to earn a relatively nominal wage working in a greenhouse. Yet, that person could probably command a fee worth many times his or her hourly wage.

2. Does the "expert" have other clients and/or a consulting business? If not, and he or she is commanding a fee for services above and beyond what would normally be the case for a person in their trade or occupation, that arrangement might run afoul of the ethical prohibition.

3. Is the "expert" testifying based upon firsthand observations or experience, or based upon after-the-fact independent analysis and evaluation? For instance, former employees of a product manufacturer could testify about their observations during the time they were employed with the product manufacturer, and that, in their opinion, the manufacturer falsified test results, had a deficient quality control procedure, etc. While these may be opinions, in the Committee's view that person does not qualify as an expert, as defined by Alaska Evidence Rule 702. In effect, the witness is being paid for his or her recollections and observations. It is probably true that many other employees, both present and former, worked for the manufacturer during the same period of time; why is this witness's observations or comments any more insightful or probative than the other employees, former or otherwise? In fact, the witness's opinions could be probative because of the position held with the former employer, but that does not qualify the witness as an "expert" in the Committee's view.

4. Related to the above, what services does the witness provide in return for his or her compensation? If it is analysis and evaluation followed by testimony in deposition or in court, the witness is more fairly characterized as an "expert." If a witness, on the other-hand, is paid primarily to provide observations and recollections related to his or her firsthand experience or observations, or to review documentation provided by the attorney for purposes of refreshing their recollection of events and circumstances, the witness is more properly characterized as a lay witness. In the Committee's view, paying a fee or providing compensation to the latter category of witness should be done with caution, and mindful of the ethical constraints.[2]

Given the wide variety of litigation and the complexity of issues which are involved, categorizing a person as an expert or a lay witness defies an easy solution. The Committee believes the above factors can assist in making that determination. We emphasize that this issue should not be taken lightly by the practicing bar. The payment of a sum of money to a witness "to tell the truth" is just as subversive of the proper administration of justice as to pay the witness to testify to what is not true. *In re Porcelli*, 397 N.E.2d 830 (Ill. App. 1979); *People v. Belfor*, 591 P.2d 585 (Colo. App. 1979). Not only is the practice unethical but it also exposes a witness to cross-examination and attacks on his or her integrity and character which could be very damaging to the attorney's case and the cause of his or her client.

Approved by the Alaska Bar Association Ethics Committee on September 2, 1993.

Adopted by the Board of Governors on September 11, 1993.

[1]This is generally consistent with the former Disciplinary Rule 7-109(C). See also former Ethical Consideration 7-28.

[2]The Committee espouses the view set forth in former EC 7-28 to the effect that a lawyer may, *if necessary*, reimburse a non- expert witness "for expenses and financial loss incident to his being a witness." If the lay witness is an engineer or other professional, or a treating physician who often presents a mixed bag of both fact and opinion testimony, their "financial loss" could be a substantial and reimbursement of that loss by the attorney would be ethical. However, the Committee emphasizes that the compensation must always meet some objective standard of reasonableness, which, again, depends for the most part on the witness's occupation and/or trade.

ALASKA BAR ASSOCIATION
ETHICS OPINION NO. 93-3
Disclosing Information on IRS Form 8300

The Committee has been asked to render an opinion on whether, under the Alaska Rules of Professional Conduct, an attorney can properly disclose the identity of a client on an IRS Form 8300. Under section 6050I of the Internal Revenue Code, lawyers are required to complete this form whenever they receive cash in excess of $10,000 from a client. The form calls for information concerning the purpose of the payment and specifically requests disclosure of the client's identity. As the request for an opinion notes, the reporting requirement presents a potential conflict between an attorney's obligations to abide by the law and to protect client confidentiality.

The Committee has concluded

(1) that disclosure of information on a Form 8300 in accordance with the requirements of IRC 6050I is not contrary to the provisions of the Alaska Rules of Professional Conduct; and

(2) that, under the Alaska Rules of Professional Conduct, when a lawyer is offered a cash payment of more than $10,000 for any purpose connected with his or her practice the lawyer is obligated to explain the reporting requirement imposed by section 6050I to the client in order to provide the client with an opportunity to make the payment without utilizing cash.

It appears that there are two sets of circumstances under which a lawyer might receive more than $10,000 in cash from a client. First, the client may wish to pay his or her fee in cash. Second, the client may wish the lawyer to hold cash to be utilized in connection with a transaction, such as a real estate acquisition, in which the lawyer is providing representation.

Both situations are governed by ARPC 1.6(a), which provides, in relevant part, as follows:

A lawyer shall not reveal information relating to representation of a

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NEWS FROM THE BAR

At the Board of Governors meeting on March 4, the Board took the following action:

• Authorized up to $6,000 in expenditures for a lobbyist on the Bar's sunset bill.

• Authorized up to an additional $10,000 for the communications program (with the public).

• Approved a discipline stipulation for a 6 month suspension of Kenneth Cusack, with all but 60 days suspended on conditions.

• Reviewed a discipline matter which is in abeyance and directed bar counsel to tell the parties that this will be on the agenda in May and the Board is considering taking it out of abeyance, and the parties are welcome to respond.

• Discussed an award for $1,000 attorney's fees against the Bar by the supreme court in the Disciplinary Matter of Stephen Frost, who received a public censure.

• Approved a modified stipulation for discipline re David Grashin for a 9 month suspension with conditions.

• Voted to publish a proposed bar rule amendment which would require all active members to submit an affidavit that they have reviewed the new Rules of Professional Conduct.

• Discussed a possible bar rule amendment requiring attorneys to disclose if their malpractice insurance falls below a certain level and voted to table this until May.

• Approved the bylaw amendment establishing a Pro Bono Service Committee.

• Approved the concept of a "Law Fair"/Law Day and directed that this be assigned to the Pro Bono Service Committee.

• Approved a modification to the Standing Policies "Special Testing Accommodations" regarding deadlines.

• Certified a reciprocity applicant for admission.

• Approved the request of Douglas Riggs to transfer to active status; accepted the resignations of Pankhurst, Spangler, Ganesan, Holcombe, Wercinski and Albertson; approved the transfer of Joseph McLean and Gil Johnson to retired status.

• Approved a waiver of inactive bar dues due to hardship pending receipt of the appropriate documentation.

• Reaffirmed that all requests for waivers of penalties for late payment of bar dues are to go to the Board.

• Considered whether Bar Rule 61 should be amended to provide for suspension for nonpayment of NSF charges due to paying bar dues with an NSF check.

• Denied request for waiver of reapplicant exam fee and set date for payment.

• Approved request to form Elder Law Section.

• Selected recipients of Distinguished Service and Professionalism Awards.

• Declined to accept a proposal by Electra Enterprises to offer a discount/marketing packet to members.

• Approved October and January minutes as amended.

• Reviewed the Bar Association's Professional Liability Insurance renewal or search for new carrier.

• Approved the payment of a $2,000 claim from the Lawyers' Fund for Client Protection.

• Reviewed a "Pre-suit Mediation Program" and suggested that if the ADR Section wished to come to the Board with a specific proposal regarding the Bar's involvement, they would review it.

Disciplinary action

Attorney X used letterhead indicating that the attorney was "specializing" in a particular area of law. Former Disciplinary Rule 2-105, with limited exceptions not applicable to this case, prohibited lawyers from publicly holding themselves out as specialists. Although the attorney has been previously warned that the use of that word in the letterhead was not proper, the attorney used the letterhead in a later communication to the Bar. Attorney X entered into a stipulation calling for a private reprimand which was approved by the Disciplinary Board.

The general prohibition on the use of "specialist, specializing, specialties" and other "s" words continues in new Alaska Rule of Professional Conduct (ARPC) 7.4 although a lawyer who has been certified as a specialist by a named organization may indicate that certification provided that the communication clearly states that the Alaska Bar Association does not accredit or endorse certifying organizations.

Health plan rates plunge

Premiums for the Bar's Group Health plan have dropped 23.8%. "Good experience, stable claims, and an increasing plan surplus are responsible," said Bob Hagen, the plan's agent. Despite no increase in rates since 1991, the plan's surplus has increased to over $1,100,000. The surplus belongs to the group plan, not Blue Cross, and can be used to cushion rates.

Over 80 law firms ranging in size from one to over 60 employees will enjoy the new savings. The new rates are effective April 1, 1994. For information about enrolling, contact Hagen Insurance at 561-8040.

New members asked to be familiar with conduct rules

The Board of Governors is proposing an amendment to the Bar Rules which would require all active members to submit an affidavit that they have read and have familiarized themselves with the new Rules of Professional Conduct. The Board welcomes comments or suggestions from the membership. This proposal will be reviewed by the Board again at their May 2-4 meeting. Please address any comments to Deborah O'Regan, Executive Director, Alaska Bar Association, P.O. Box 100279, Anchorage, AK 99510.

PROPOSED BAR RULE 64 RELATING TO MANDATORY AFFIDAVIT OF REVIEW OF ALASKA RULES OF PROFESSIONAL CONDUCT

Rule 64. Mandatory Affidavit of Review of Alaska Rules of Professional Conduct: Suspension for Noncompliance.

*(a) Every active member of the Alaska Bar Association as of **(effective date of rule)** shall execute, on a form printed by the Bar Association, an affidavit of review stating that the member has read and is familiar with the Alaska Rules of Professional Conduct. The affidavit of review shall be filed with the Bar Association on or before **(12 months from effective date of rule).***

*(b) Persons who become active members of the Alaska Bar Association after **(effective date of rule)** shall execute, on a form printed by the Bar Association, an affidavit of review stating that the member has read and is familiar with the Alaska Rules of Professional Conduct. The affidavit of review shall be filed with the Bar Association on or before the date on which they become active members.*

(c) Any member who without good cause fails to comply with the requirements of this rule shall be notified in writing by certified or registered mail that the Executive Director shall, after 30 days, petition the Supreme Court of Alaska for an order suspending such member for noncompliance. Upon suspension of the member for noncompliance, the member shall not be reinstated until the member has complied with this rule and the Executive Director has certified to the Supreme Court that the member is in compliance.

Tuffy Boots

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In some cases, there may be less than 24 shoes, depending upon one's background. But, in all, you can usually expect to see 24 shoes shuffling into the jury box. In no case should you see 27 shoes for a 12 person jury. Trying to match those shoes with respect to the owner is sometimes difficult. I once thought of having every juror simply put their feet up on the banister and relax. The idea quickly proved impractical and a possible breach of court decorum, except for Tok. Leaning over the jury box, usually, is also impermissible, unless you are relieving yourself.

Accordingly, one of the hardest jobs at jury selection is to quickly identify and catalogue everyone's shoes and, if possible, sock type, before they enter the box. Although belt buckles are often useful in determining one's vocation, and you may even be able to learn someone's name if you look at the back of their belt closely enough (if they are from North Pole), it still is really the shoes that are the key to successful jury selection. Now the secret.

Some of the parameters which figure into the equation are as follows:

1. *Cowboy boots.* Texture, of course, is always a first lead. The actual angle on the point of the cowboy boots is not anywhere near as important as the wear on the heels. If cowboy boots have a metal toe, you can presume that the person is a sissy. (The same goes for metal taps on the heels.)

On the other hand, if cowboy boots are of the general, rugged variety, your next step is to determine whether the person lives in North Pole. If they are a North Poler, they always will vote for a conviction. Still, based upon secondary questioning of the pointy-toed individuals, you can often select a suitable, folded arms juror. The only other problem, with respect to the older time cowboy boots, is that they should be seated with you at counsel table, as opposed to in the jury box, and may very well have been doing such on more than one occasion.

2. *Spit-Shined Shoes.* This is an obvious giveaway for a military person. No human being has ever been able to shine shoes like that, and the way I look at it, if a person will take the time to shine shoes to such a high sheen polish, they are very clearly inclined to follow orders. The last thing that you want in a DWI jury defense is a juror who is capable of following orders. Viva FIJA!

3. *Tennis Shoes.* I am still having a problem with tennis shoes nowadays, unless it is in the winter. Tennis shoes are the rage, and virtually everyone in Hollywood now wears them. Recently, I even discovered a juror who wore different colored laces in his tennis shoes. One lace was fluorescent orange and the other fluorescent green. I preempted the individual on general principles, since he did not fit into my format of evaluation. Generally, however, an individual wearing tennis shoes is a casual sort of person, especially if the sides are blown out. You can rely upon that juror to sleep through most deliberations.

4. *High Heels and Low Heels.* Generally speaking, the height of the heel has little to do with the juror's acceptability for trial. Low heels tend to reveal, however, a more casual minded juror, as opposed to very high heels, which are your business type person. Accordingly, stick with low heels in defense cases, but you are still better off with tennis shoes. And if it is a man who is wearing high heels, don't sit him next to juror categories one or two above.

5. *Hiking Boots / Vibram Soles / Ski Boots.* Hiking boots and vibram soles, as well as cross-country ski boots, present specific problems. When such footwear appears, your next step is to immediately cross reference the person into being an ectomorph, endomorph, or a mesomorph. Of course, if a jury candidate is a mesoectomorph, or an endomesoectomorph, or a mesoectoectoendomorph you have greater problems. Probably the greatest threat to a DWI in this case is the endomorph with mesomorphic tendencies, and only a slight degree of ectomorphism. When all else fails, see if they have a Patagonia jacket and then reference my Patagonia criteria - yet to be developed.

6. *No Shoes At All.* This is probably one of my exclients, who has recently paid the attorney's fees bill. Usually, these are sympathetic jurors, although I also find that they are invariably disqualified for cause immediately upon expressing an opinion upon the quality of legal services rendered.

All in all, the heel-toe method of selection which I have been employing in the DWI cases has, in many cases, worked quite admirably. At least, it gives defense counsel a foot in the door, not to mention the opportunity to do some real sole-searching at trial.

Ethics opinions

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client unless the client consents after consultation.....

Two recent U.S. Court of Appeals decisions have addressed the question of attorney disclosures on a Form 8300. *See, U.S v. Leventhal*, 961 F.2d 936 (11th Cir. 1992); *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501 (2d Cir. 1991).

In *Leventhal, supra*, the government appealed a District Court decision which approved an attorney's refusal to provide identifying information on the Form 8300 absent an express judicial order. 961 F.2d at 939. The lawyer argued that simple disclosure of the information in the summons would violate a Florida Bar rule substantially identical to Alaska's Rule 1.6(a). 961 F.2d at 940, note 7. The Eleventh Circuit ruled against the lawyer and followed the Second Circuit, holding as follows:

> In *Goldberger [supra]*, the court first explained that "in actions such as the instant one, which involve violations of federal law, it is the *federal* common law of privilege that applies".....The court further pointed out that, even if the state law of privilege should apply, "a communication to an attorney would not be considered confidential unless it was made in the process of obtaining legal advice; and fee arrangements between attorney and client do not satisfy this requirement in the usual case.".....Finally, the *Goldberger* court noted that, even if a conversation concerning fees technically might fall within the scope of the attorney-client privilege, the privilege would yield in the face of "a federal statute that implicitly precludes its application"....The court identified section 6050I as just such a federal statute, remarking that Congress, in enacting section 6050I, had rejected lobbying efforts to exclude the legal profession from that section's reporting requirements.
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> **********
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> We find the Second Circuit's reasoning in *Goldberger* persuasive. We have held on numerous occasions that "[t]he identity of a client or matters involving the receipt of fees from a client are not normally within the [attorney-client] privilege."

961 F.2d at 940 (emphasis in original, citations omitted). The Eleventh Circuit appears to have correctly described *Goldberger*, which also involved the payment of a cash fee.

As noted above, situations may arise in which a cash payment is made for reasons unrelated to fee payments. To the extent that *Leventhal* and *Goldberger* hold that communications concerning fees are not privileged, those portions of the holdings would not be applicable in such a context. The Committee does not necessarily accept the proposition that communications regarding fees lie outside the scope of Rule 1.6(a), however. It does find the other grounds for these holdings (*i.e.*, the superseding effect of federal law and Congress' rejection of an exception for the legal profession) to be persuasive. In reaching this conclusion, we note that, inasmuch as section 6050I only requires disclosure where payments are made in cash, clients can easily avoid the disclosure through alternative means of payment. *See, Goldberger*, 935 F.2d at 504 ("To avoid disclosure under 6050-I, they need only pay counsel in some other manner than with cash. The choice is theirs. None of the appellants have advanced a legitimate reason why payment other than in cash cannot be made.").

The Committee is also aware of the fact that, prior to *Goldberger*, Bar Opinions in several other states had held that identifying information sought in a Form 8300 should only be released under the compulsion of an IRS summons or Court order. *See*, 76 ABA J. 114 (October 1990). As far as we can tell, none of these rulings took account of the factors discussed by the Eleventh and Second Circuits, and, in any case, the Committee views the decisions in *Leventhal* and *Goldberger* as constituting persuasive countervailing authority.

In view of the foregoing, it is necessary to discuss the appropriate response of a lawyer when a client or prospective client tenders a cash payment in excess of $10,000. In the *Annotated Model Rules of Professional Conduct* ("*Annotated Rules*"), the ABA discusses the problem at issue here and states that "[t]his 'Form 8300' requirement creates a duty on the part of the lawyer to fully inform clients of these reporting requirements and their effect on confidentiality considerations." *Annotated Rules* at 104 (2d ed. 1992).[1] In the Committee's view this requirement is drawn from the provisions of Rule 1.4(b), which states that a lawyer must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Additional support for the requirement is found in Rule 1.2(e), which provides that a lawyer must explain relevant limitations on his or her conduct when the lawyer "knows that a client expects assistance not permitted by the rules of professional conduct *or other law*." (Emphasis added).

Approved by the Alaska Bar Association Ethics Committee on September 2, 1993.

Adopted by the Board of Governors on October 23, 1993.

[1]The Commentary in the *Annotated Rules* describes the holding in *Goldberger* without taking any position on the decision's impact on obligations under the Model Rules.

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, 1994 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 FY95 and FY96 (July 1, 1994 through June 30, 1996) 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 22, 1994.

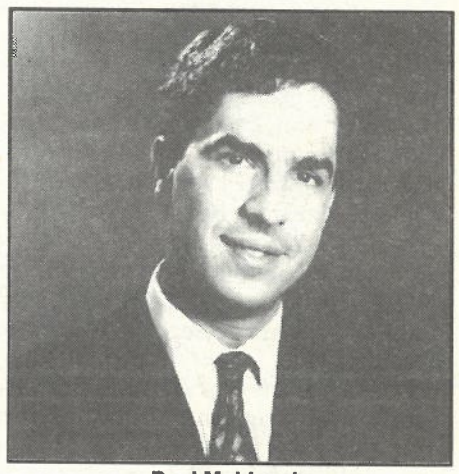
Effective depositions help 'write' the stories told at trial

"Cover that deposition for me, will ya?" or "Just find out what she knows, that's all." These all too common statements are the instructions given to many lawyers as they go off to take a deposition. Yet, if the process were so easy, why do so many seasoned trial lawyers find themselves frustrated at the time of trial when the depositions taken in the case don't support the case theme or story desired to be told to the jury? The answer rests in the all too forgotten connection between depositions and the trial story.

The trial story does not begin at the moment trial preparation begins. Law school teaches us well enough that we should draft our closing argument first before any other trial planning. But the closing argument is necessarily comprised if the pretrial discovery cannot support it. In short, we are best advised to draft the closing arguments shortly after the completion of the initial attorney-client interview and to begin crafting its support through the course of discovery and especially through depositions.

Depositions are more than information-gathering devices that help us explore and probe what the deponent says. They must reach much further, into case strategy and design. Depositions offer the opportunity to evaluate the witness' appearance for determining how that person will testify at trial. In addition, depositions provide an opportunity for lawyers to evaluate the style and approach of the other lawyers as well. All this information can be integrated into case strategy and the determination of the techniques that may work in court and those that won't.

Most important, however, is the use of the deposition to test and evaluate the story to be told at trial. Consider where your case needs to end up when you first take it into the office, and you are likely to find your stories have new strength and appeal by the time trial actually takes place. Ultimately, a jury is going to



Paul M. Lisnek

evaluate how complete, coherent and consistent each side's story is, through testimony, evidence and argument.

Sliding a story through in the face of deposition testimony that contradicts the trial story places two burdens on the lawyer: first, finding a way to explain away the contradictory deposition testimony, and second, convincing the jury that the testimony presented at trial is more credible than the information gathered at the prior deposition.

Does it not make more sense to be building a case story from the very first gathering of discovery? Shouldn't we have a sense of what our story is from the first telling of the account by our client during an interview? True enough, we'll need to modify the account, perhaps constantly, as new pieces of information come to us. Knowing that every account of an event is related through the tainted and biased memories of our clients, consider the insight we gain into the nature of hour our clients tend to bias their reporting of information by drafting their story up front and then seeing how additional information comes in.

For example, suppose your client comes to see you about a breach of contract case. Assume that she tends to focus her comments on the "bad attitudes of the other parties and their unwillingness to work out the conflict." You draft a closing argument that reflects that point, but come to learn through discovery that the opposite is true. It appears to be your own client and not the other parties who were seemingly unreasonable in attempting to achieve a resolution. This way, you learn that your client tends to bias her reporting of other people's demeanor and communication style. This may be a concern regarding other relationships that are relevant to the case.

If you don't use this approach, then future depositions taken by lawyers who "just seek to find out what you know," may miss the demeanor and attitude components of the interaction. By drafting a closing argument in story form at the onset of the case, every lawyer who takes part in working up the file can gain the same insights and knowledge about the case as it builds through each deposition. The benefits gained by drafting a story at the outset of a case are tremendous and can produce a significantly higher level of competence in trial preparation.

To summarize the story approach, you should proceed in the following manner:

- First, interview the client if you are a plaintiff's lawyer or review the case file for the defense.
- Second, draft the case story that could be given as a closing argument at that time. This task includes a consideration of what other evidence and testimony will be needed to support and strengthen the case story as it exists at that time.
- Third, with each set of interrogatory responses, each production request and each deposition, consider its effects on the case story. Modify the story as necessary to keep it complete, consistent and coherent for a jury. If clearly contradictory information to the story emerges, then work to clear it up through future discovery or change that part of the case story so that it re-establishes the necessary consistent account.

By the time trial comes along, your case story will have undergone significant modification and analysis. You also will be quite ready to begin your trial presentation already knowing that your trial account is supported by the evidence.

Paul M. Lisnek, J.D., Ph.D., lectures and writes on lawyering skills. He is a senior trial consultant with Tsongas Associates and is vice president of the National Institute for Legal Education and senior partner with Salamone and Lisnek, P.A. He also hosts Continental Cablevision's television talk show "Inside the Government."

Paul Lisnek, J.D., will present a CLE, "Jury Psychology: Communication in the Courtroom," on June 3, 1994 in Anchorage. Watch for the brochure in the mail.

Plea bargaining

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charges, or the granting of concessions relating to a sentence or other disposition." The policy does not make it clear whether these are to be Rule 11 plea agreements, binding on the parties unless rejected by the judge. In the past Rule 11 agreements typically were used primarily for sentence negotiations, and far less frequently if only charge changes were negotiated.

Prosecutors are encouraged to "enforce the criminal code as the legislature intended it." To encourage this, prosecutors must treat unclassified and Class A felonies, the most serious offenses, differently than lesser felonies and misdemeanors. The attorney offering "a concession in charge level or . . . sentence recommendation" for one of these offenses must explain the decision in a confidential memo to the case file. Monthly, the memos are to be forwarded to the Criminal Division's central office in Juneau. The purpose of the memo system is to monitor and ensure consistency in plea practices throughout the state's fourteen District Attorneys' offices. The standard established in 1980, a plea to the "essence" of the charge is maintained in the new policy for all agreements.

Throughout, the policy emphasizes public safety and the needs of victims and the public. The Attorney General cites "potential trauma, discomfort or embarrassment to a victim or witness" as one reason supporting the a potential plea agreement. He requires that, wherever possible, the prosecutor contact the victims and investigating officer before making the final resolution of a felony. He notes that public safety "should be the overriding concern of prosecutors," with the "two most important considerations . . . [being] the degree of danger imposed by the offender and the strength of the state's case." These appear to be more important considerations in felony cases; in misdemeanors, "saving resources . . . may be emphasized more . . . than in felony cases." A further consideration in resource-based decisions is whether limited public finances create a situation "that forces an election between dismissal or plea bargain of a case that would otherwise proceed to trial." He urges the plea bargain in such a case.

Some actions still are either prohibited or strongly discouraged. Primary among these are deferred prosecution and pretrial diversion, which the Attorney General says should be used only in extremely rare circumstances and "never in a case involving a sexual offense." Prosecutors are to make a "full presentation of the facts and the law" at the sentencing hearing, including counts dismissed as part of a plea agreement. Prosecutors also are discouraged from entering into sentence agreements for felonies, except under the "Rule 11 SIS" program. To enforce this, the prosecutor is required to report the agreement to the Criminal Division Central Office with an explanation of the reasons for the negotiated sentence. These negotiations are envisioned for cases in which, apparently, the main consideration is that the negotiated sentence "protects the public interest more fully than charge bargaining."

Deputy Attorney General Ed McNally presented the new policy at a February 4 seminar on alternative punishments for southcentral prosecutors, defense attorneys, judges and probation officers. He noted that his office viewed the policy more as a codification of existing practices than as leading to any changes in procedures. Fairbanks District Attorney Harry Davis agreed that little change was likely in his office either, as a result of the new policy. He commented that the procedures established for monitoring plea and sentence agreements by the Criminal Division Central Office would help maintain consistency in dispositions throughout the state, and avoid disparities in the types of agreements reached.

Recent data from the Department of Law for the Anchorage District Attorney's office support the belief that present Anchorage practices result in dispositions somewhat parallel to those in the early 1970s (recent data were not available for other offices). For example, 10% of Anchorage cases in the year preceding the ban (August, 1974 - August, 1975) were screened out (the prosecutor declined to file any charges). Of the cases filed in that year, 4% were tried. About one year ago, in the twelve months between August, 1992 - August, 1993, 14.6% of the cases were screened out, and 5.7% of the filed cases were tried. In contrast, in 1984 when the policy prohibiting most plea bargains was still fairly strong in Anchorage, 28% of the cases were screened out and 8% of filed cases were tried. Other dispositions in 1992-1993 included 350 "Rule 11 Suspended Impositions of Sentence,"[1] and 919 cases that were resolved through a plea to a misdemeanor, another plea, or a dismissal. Most of those 919 dispositions did not involve formal plea agreements under Alaska's Criminal Rule 11.

Presence of the new policy, combined with a new emphasis by the Attorney General on use of alternative punishments in lieu of some or all incarceration for non-violent offenders, could result in more prison bedspace available for violent offenders. In a separate memo, the Attorney General encouraged prosecutors to respond to *"voluntary agreements offered by defendants."* All of the agreements described have to do with conditions of sentence, rather than changes in charge level, or dismissals. The memo appears to anticipate that defense attorneys will take the initiative in plea negotiations, with prosecutors agreeing to proposals. However, Mr. McNally emphasized the need for prosecutors to not only be open to creative approaches to sentencing, but to suggest possible dispositions to defense attorneys.

[1] Alaska Rule of Criminal Procedure 11 governs the entry of pleas and plea negotiations. The "Rule 11 SIS" program created by the Department of Law in 1987 offers selected defendants a plea agreement to a suspended imposition of sentence with various conditions of probation, instead of the deferred prosecutions offered in the Department's earlier pretrial diversion program. Although the Department's attorneys occasionally enter into other Rule 11 agreements, the great majority of formal plea agreements occur under this program.