Highlights Inside

Alaska Bar Association Annual Convention

May 16-17, 1996

Hotel Captain Cook, Anchorage

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$2.00

The Alaska BAR RAG

VOLUME 20, NO. 2 — *Dignitas, semper dignitas* — MARCH-APRIL, 1996

Admission of out-of-state attorneys:

Alaska has the right idea

BY ROBERT W. MARTIN, JR.

Chances are that some time during the course of the last year, you read an article about "telecommuting".

Telefax machines, modems and 800 numbers all ensure that you cannot be sure of the location of the person at the other end of the telephone or the computer cable. Indeed, telecommuting makes a great deal of sense from a number of different public policy standpoints, ranging from the reduction of automobile exhaust fumes in larger cities to the possible eventual elimination of the need for large public expenditures to support infrastructures which in turn support large office complexes and similar business centers.

No one is quite sure where it will all lead, but if you have "surfed" the net, it is not difficult to envision the day when the need for supermarkets and large retail stores to showcase products will be unnecessary and may only survive as a quaint glimpses of the past like Williamsburg, Virginia or Old Sturbridge Village in Massachusetts.

What does this all have to do with the practice of law? Once again, if you have taken that tentative step onto the technological superhighway, you will note that many law firms, from the sole practitioner all the way up to and including the 500-person multi-office firms, have placed "web pages" on the Internet. If you have access to the Internet in Alaska, you have access to "web pages" of, and in some cases direct access to, attorneys in law firms located in California, Alabama, New York and any other state of your choice.

As long as those out-of-state lawyers make it clear in their advertisements that they can only practice in certain states, there seems little chance of their being accused of unauthorized practice of law. *See e.g., Committee on Professional Ethics of the Illinois State Bar Association, Opinion 94 -5* (7/94); *Committee on Legal Ethics and Professional Responsibility of the Pennsylvania Bar Association. Opinion 92-51* (4/6/92); *Committee on Professional Ethics of the Connecticut Bar Association.* Opinion 91-24 (12/27/91).

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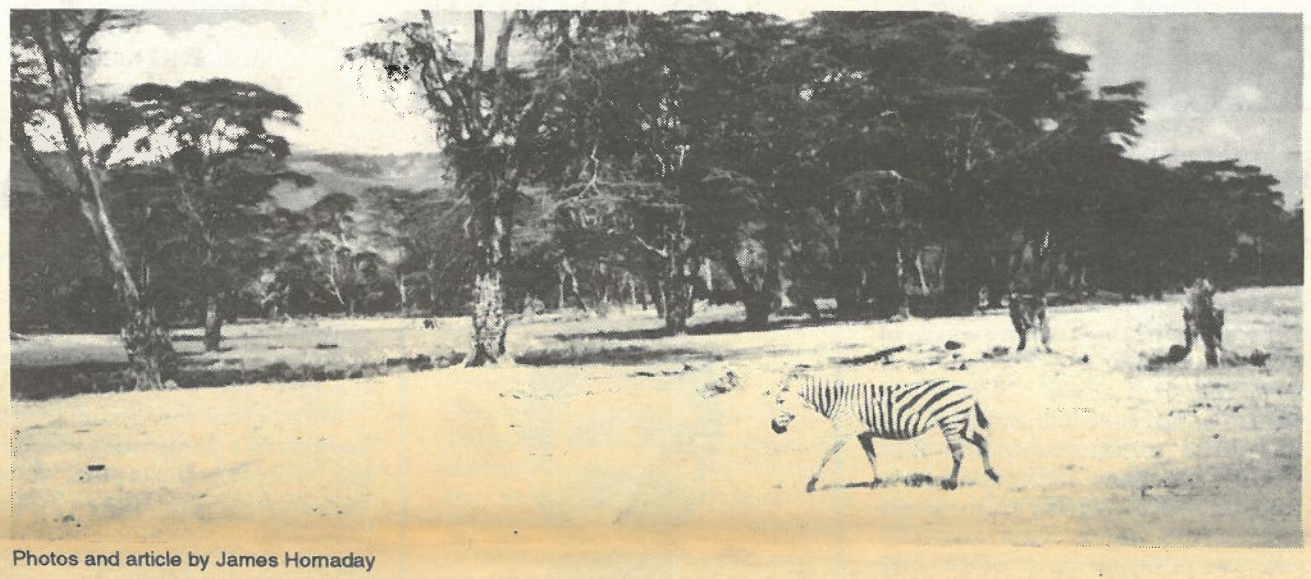
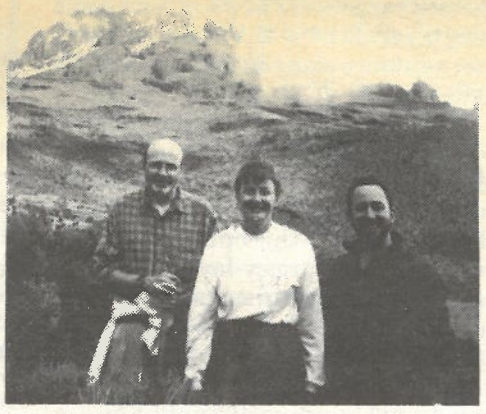
In and out of Africa, 1995



Photos and article by James Hornaday

The animals, birds and safari country were magnificent. We drove by Land Rover through the areas we watch on National Geographic programs: The Serengheti Plain, Ngorongoro Crater, and Mayanara and Tarangire Parks. We also visited Olduvai Gorge where the Leakeys found Neanderthal Man.

See story page 8



What's happening at the 1996 convention

Help us celebrate our 100th Anniversary! The Alaska Bar Association marks its 100th Anniversary this year, and our convention program reviews the history of the Alaska Bar and Judiciary. Come join us Thursday and Friday, May 16 - 17, 1996 at the Hotel Captain Cook and the Alaska Center for the Performing Arts. Watch for the convention brochure in March!

Meet nationally known law office management expert Jay Foonberg as he shares with Bar members "What Clients Really Want and How to Give It to Them," and later discusses "Quality of Life and Practicing Law: Balancing Family, Profession & Self."

They're back! Professors Arenella and Chermerinsky return once more to give us the latest on recent U.S. Supreme Court Opinions.

Take a look back in time during our Historian's Committee program. Learn about the 1964 Court Bar Fight, the Origins of the Alaska Civil Code and hear about Alaska's colorful Federal Territorial Judges.

Join U.S. Court of Appeals Senior Circuit Judge Robert Boochever as he reflects on Alaska Territorial events and their impact on Alaska law today.

Experience MOVIE MAGIC: The award-winning American Bar Association program, *Movie Magic: How the Masters Try Cases,* will be presented following our President's Reception on Thursday, May 16. Join us in the Discovery Theater of the Alaska Center for the Performing Arts for this unqiue presentation. Featured are clips from films such as "To Kill A Mockingbird," "My Cousin Vinnie," "Judgement at Nuremburg," and "Miracle on 34th Street" demonstrating litigation tactics. A panel of local judges and attorneys will critique the clips and discuss courtroom strategy.

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President's Column

Don't take the client's story at face value

Diane F. Vallentine

I recently attended a national meeting of bar leaders, where George Bushnell, the former president of the American Bar Association, launched his speech by bellowing CLIENTS LIE! I sat back smugly and only half listened to the lecture because I was already familiar with that phenomena, and I, in fact, lecture new lawyers about it.

Shortly after returning to Anchorage, I had a conversation with a lawyer I've known for 20 years, who described just having finished the worst case of his life involving the "client from hell." The lawyer then recounted trying a case where his client had altered documents and the opposing side was able to produce the originals at trial. In describing this nightmare experience, my friend acknowledged that there had been some red flags, but explained that his client had convincing explanations for each inconsistency. My colleague was beating himself up for believing his client's story, and not following up on some clues that had come to his attention. Again, although I was sympathetic, to myself I acknowledged that this was a lesson I had already learned so that situation just couldn't happen to me.

For the last several years, I have been representing one of two partners in a small business. Since the partners left their former employment to start their own firm, the business has done relatively well. Nonetheless, as is typical in partnerships, the two partners have different needs and directions in dealing with money. One of the partners is a mature individual with over 20 years in the workforce, retirement plans, savings, and resources. My client is a young single mother. The partner's priority for the business is in investing its earnings in making the business grow. My client's primary concern is taking enough money out of the business each month to pay her rent and put food on the table for her children. Since the beginning, this difference in style has been a constant source of friction. I have had several discussions with both partners about the fact that their needs are different and that in making financial decisions there is no right or wrong answer, but that the priorities and needs of each of the partners have to be taken into account.

Recently, my client showed up on my doorstep and demanded that I get her out of the partnership. I questioned her in detail about the events

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Editor's Column

"Once noble profession" still noble for most of us

Peter Maassen

"A once noble profession," mourned the headline in the Forum section of the Sunday paper (*Anchorage Daily News,* March 3, 1996). "Too many lawyers today are too greedy, too sleazy," the subhead tut-tutted. Was this the usual know-nothing diatribe by a letter-writer whose only contact with lawyers was a court order for back child-support, a quick flip through the Reader's Digest condensed version of *The Firm,* and some rough recall of a T.V. anchorman's two-sentence slant on the McDonald's coffee case?

Not quite. Close, though, judging by the content. Neatly wedged right above a far more appropriate headline ("Friendly Fire," on fallout from the Gulf War), the opinion column was the work of pricey-lawyer-turned-cabinet-secretary-turned-pricey-lawyer-turned-philanthropist Joseph A. Califano, Jr., a man who ought to have known better. At a time when any respected lawyer with a public forum should be using it to dispel the prevalent, noxious, and false stereotypes, Califano instead accepts the lawyer jokes as the reality and builds toward some truly oddball advice for the profession.

Among the basic "facts" that Califano accepts unreservedly is that "[t]he United States does have too many lawyers." He contrasts, as proof, our three lawyers per thousand with the lower ratios in other developed countries. But is three in a thousand "too many lawyers?" Maybe, but maybe not; it's a question that deserves intelligent discussion. Maybe three in a thousand means that we in the United States prize personal justice more than citizens of other countries do. Maybe it means that average U.S. citizens are more likely to have access to their local courtrooms when they want it than do their confreres in Great Britain, Germany, and Japan. Assuming that universal access to justice is a laudable goal, which most lawyers do, it's certainly a much more reachable goal than it would be if this country had one-tenth as many lawyers.

More troubling to Califano than raw numbers, though, is what he calls the "brass-knuckled lawyering" that feeds our "loss of trust in one another and in our institutions." He lays at lawyers' doors wide-spread tax evasion, a "loss of trust between doctor and patient" the impenetrability of federal regulations, the pain of divorce, a loss of moral obligation in contracts, and the tobacco industry's efforts to ensnare children. Why he fails to mention AIDS and Hurricane Camille is probably due solely to the newspaper's limitations of space.

It's true, obviously, that when people have the right and the ability to hire lawyers to represent their points of view, all the bad and corrupt points of view will have lawyers' faces attached to them. But so will the good and decent points of view, assuming rough equality of resources. For every lawyer who's persuading a Southern jury to acquit a lyncher, to take one of Califano's examples, there's a lawyer on the other side who's arguing for justice. For every lawyer arguing for a tobacco company's right to advertise, there's a lawyer representing the government's right to protect the health and welfare of its citizenry. Why not point out the good to a society already too prone to revel in the rarer examples of the bad?

Most lawyers realize eventually in their careers that lawsuits are rarely between good and evil. Especially in divorce cases and contract disputes, to take a few more of Califano's examples, litigation is usually between two people who both think they're right and the other side is wrong. It's *the clients* who hold these views; the lawyers don't manufacture the dispute for them. The lawyers merely represent the client's views in court. It's their job.

What about the "greed" factor? Are lawyers as a group more greedy than, say, dentists, fishermen, or bicycle messengers? As a (former and repentant) high-priced lawyer with paying clients like Chrysler and Chase Manhattan Corp., Califano can afford to take the obligatory sneer at the "one-third (plus expenses)" commanded by plaintiffs' lawyers. But the contingency-fee issue is a complex one with its own set of difficult questions, which Califano could have, but doesn't, address: How many injustices would go unrectified if every litigant had to pay Califano's hourly rate? If "one-third (plus expenses)" is a greedy and gouging percentage, how come all those unemployed young lawyers, whom Califano mentions smugly earlier in his column, haven't ratcheted that rate downward by taking cases for one-fourth, or one-tenth, or one-hundredth of the recovery? Could it be that "one-third (plus expenses)" is actually a fairly accurate reflection of a lawyer's costs and risks?

The truly weird aspect of Califano's column, as opposed to the merely simple-minded, comes toward the end. After having thoroughly decried the way that lawyers have sneakily insinuated themselves into every nook and cranny of American life, Califano attacks them for not taking leadership roles in genetic research, assisted suicide, artificial life, and neonatality, for failing to "help parents, children and physicians face the choices these marvelous but terrifying [scientific] discoveries open up."

The computer business, too, is calling us, he says: Society is crying out for "juridical concepts, laws and procedures to accommodate the technological revolution and cushion the human displacement."

More dense regulations, in other words. More fine print. More detailed contracts that only lawyers can decipher.

But hey, Joe, didn't you start out by saying that there were too many lawyers leaving their messy handprints on too much of society? Now you want us to lead the charge in science, medicine, and the computer revolution? Say it ain't double-talk, Joe.

The bottom line, which we all recognize by now, is that the antics and egos of F. Lee Bailey and Alan Dershowitz do us all no favors when it comes to rehabbing our tarnished image. But the lawyers in the headlines are not the ones who do the yeomen's work of representing the diverse and sometimes antagonistic interests of America's citizens. Not just some but almost all of us make a decent but hardly obscene living by doing it day in and day out capably, professionally, and with genuine concern for our clients and for justice. Califano should take his nose out of "A Thousand and One Sleazy Lawyer Jokes," take a reality check, and address the subject again.

The Alaska BAR RAG

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President's column

Continued from page 1

that had precipitated this decision. She denied that there was a precipitating event, and explained that having to worry about all the time was simply too stressful. She had come to the conclusion that she would be better off as an employee in a business where she had a regular salary. I asked her about job possibilities and she told me she had an offer from a reputable business. I discussed in detail with her the potential upside to having her own business, but she adamantly insisted that she would prefer to have the security of a salary over the possibility of long-term potential. Although I discussed with her the fact that her business had more value than her initial investment, she insisted that she would be satisfied if her partner would simply pay her back her initial investment so she could get on with her life.

I then wrote the partner a letter offering my client's interest in the business for sale. Imagine my shock when my client's reaction to the "good news" that her partner had accepted her offer to sell and would have the cash available within ten days was "oh my gosh, how could you do this to me? I didn't want to sell my interest. I just wanted to provoke a confrontation!" I reminded my client about our lengthy discussion regarding the benefits and disadvantages of staying in her business. She then confessed that her partner had hired a new employee without conferring with her and, because of the employee's salary and taxes, there had not been enough money in the business at the beginning of the month for the partners to take their normal draws. As a result, my client had panicked. When I asked her why she simply hadn't told me what was going on, she reminded me that it is my job to ask the right questions.

In her own way, my client was reminding me that a lawyer's job is not to take the client's story at face value, but rather to evaluate the story in light of our own knowledge and experience and to give advice based upon what is best for the client, even when that may not be what the client wants.

Letter from the Bar

Facts concerning the Inn movement

The American Inns of Court are an interesting, effective and fast-growing means by which members of the legal community are improving the ethics, professionalism, skills and civility of American legal practitioners. Among the more interesting facts about the Inn movement:

- The American Inns of Court are the fastest-growing legal organization in the country, with some 270 Inns and 17,000 members active in all 50 states.
- During 1994 alone, 39 new American Inns were chartered by the national American Inns of Court Foundation. In the nine months since the American Inns of Court Annual Meeting in May, 1995, 25 new Inns have been chartered.
- 40% of federal judges belong to an American Inn of Court, including five Supreme Court justices.
- 1,500 state judges belong to an American Inn of Court, including 71 state supreme court justices.
- Both the American Bar Association and the Conference of Chief justices have issued resolutions encouraging judges and lawyers to become members of American Inns of Court, form new American Inns of Court and promote the mission of the American Inns of Court.

The success and growth of the American Inns of Court can be attributed to the effectiveness of their organization and the significance of their mission. Organized on the local level in small communities and large cities throughout the United States, American Inns are designed to allow third-year law students and young lawyers to benefit from the experience, knowledge and skills of experienced lawyers and judges in their community. Each Inn has members ranging from law students to lawyers and judges with decades of legal experience, and is divided into several teams consisting of the same range of members. Teams are responsible for preparing one "program" per year, which illustrate ethical and professional situations which members may face during their legal careers. Following each program, Inn members discuss the situation presented in order to consider the implications of their actions and decisions. By providing such a forum, American Inns enable their members to consider ethics and professional conduct in real-life terms, rather than simply in terms of the classroom or a chapter in a textbook.

I hope you will find this information to be a good introduction to the American Inns of Court. If you would like to learn more about the American Inns of Court in Alaska, you may contact the Hon. Harry Branson of the Anchorage American Inn of Court at 907-271-3013. Also, for more on the American Inn movement around the country, feel free to contact me at 202-544-1441 or Ms. Ellen Cardwell of the American Inns of Court Foundation at 703-684-3590.

Sincerely,
Brian W. Engelhart
On behalf of the American Inns of Court Foundation

Oops!

In the last issue of the Bar Rag, we inadvertently omitted the byline for the historical article about the "floating court" of the 1950s. Russ Arnett contributed the yarns in the Jan.-Feb. issue.

Lawyers Helping Lawyers Substance Abuse Committee

The Substance Abuse Committee is composed of Alaska Bar members dedicated to assisting impaired colleagues. Following is a list of members of the committee. Please feel free to contact them at any time with questions or concerns about substance abuse. ALL contact with the committee is confidential.

John Abbott, Chair, Anchorage
907-346-1039
Cliff Groh, Sr., Anchorage
907-272-6474
Mike Lindemann, Anchorage
907-563-3657
Brant McGee, Anchorage
907-274-1684
John Reese, Anchorage
907-264-0401
Nancy Shaw, Anchorage
907-243-7771
Valerie Therrien, Fairbanks
907-452-6194

Resources available from the Alaska Bar:

"Lawyers Helping Lawyers Who Belong to One'Bar'Too Many" is a videotape program by the Substance Abuse Committee. Originally presented live on February 23, 1996, this seminar is for anyone interested in learning about substance abuse and is designed for lawyers and nonlawyers alike. The program is also required training to participate as a member of the Substance Abuse Committee. The video will acquaint you with recognizing the problem of substance abuse and what alternatives are available to assist in addressing the problem. There is no charge for rental of the video and the accompanying course materials are free.

Topics covered in the video:

- What Is the Substance Abuse Committee?
- How Do You Recognize Substance Abuse?: The Secret Everybody Knows
- What Help Is Available?
- Funding for Treatment
- Demonstration of an Intervention
- What Is Alcohol Abuse? What Is Drug Addiction?

Included in the materials are schedules of AA meetings in Anchorage and Fairbanks and a list of treatment programs available in the state.
To order the tape and/or materials please call the Alaska Bar office at 907-272-7469/fax9O7-272-2932.

Juris Prudence

Recommendations to aid jurors

Trial practice and the role of the jury were in the spotlight last year as a result of the highly publicized criminal trial of O.J. Simpson. In that case, jurors sat the better part of a year through a trial that produced some 50,000 pages of testimony, including a numbing amount of scientific evidence. And some observers predicted a hung jury.

Previously, this column reported on various reforms of the Alaska Rules of Civil Procedure designed to rein in the costs of litigation by introducing mandatory disclosure and discovery limitations. The state of Arizona preceded Alaska in the forefront of those litigation practice reforms.

Now, the Arizona Supreme Court has adopted a comprehensive approach to reform of jury practices. Effective December 1, 1995, the unprecedented changes are intended to assist jurors in sorting through evidence during the course of a civil trial.

Daniel Patrick O'Tierney

An appointed panel of former jurors, judges, academics and lawyers made some 55 recommendations to the Arizona Supreme Court designed to aid jurors in understanding, handling and assessing evidence in a more efficient manner.

As a result, the Arizona court unanimously adopted numerous changes to its rules governing jury practices. For example, one change will allow jurors to pose questions to witnesses through the judge. As is the present practice in Alaska, Arizona jurors will also be allowed to take notes throughout civil trials. Moreover, jurors in Arizona will now be provided with special notebooks to compile and collate documentary evidence, witness photographs and jury instructions as the trial progresses. Judge Meg Green in Fairbanks reportedly utilizes a form of notebook for jurors in complex civil cases.

Also, Arizona trial court judges will now have the discretion to allow jurors to discuss evidence in the jury room during a civil trial. Fairbanks presiding judge Richard Savell has indicated an interest in implementing a similar practice. Arizona judges will also have the option of limiting the length of a trial and avoiding a hung jury by polling deadlocked jurors to determine whether unanswered questions remain. If so, jurors can be permitted to hear additional evidence regarding those questions or hear additional closing argument on them from the parties' lawyers.

Some of the Arizona panel recommendations were not adopted, however, such as one proposal to require judges to give final jury instructions before, as opposed to after, each party summarizes its case in final argument and another to permit alternate jurors to vote once the trial is completed. The Arizona Supreme Court deferred a recommendation to allow jurors to discuss evidence during criminal cases, pending the outcome of a constitutional challenge.

Some of the panel's recommendations will require legislative enactment. For example, one recommendation involves increasing the stipend for jury duty from $12 to $40 per day.

The Arizona Chief Justice has indicated that the adopted jury reforms are intended to loosen the straightjacket that jurors have historically operated in and to apply methods of social science and communications skills to the jury process.

State courts in Delaware and California are presently exploring similar reforms to jury practices in light of the groundwork laid by the Arizona experiment. Currently, there is no statewide review of jury practices being undertaken in Alaska (although an inquiry into Alaska Native representation in jury pools has been initiated). But it may be an idea whose time has come, particularly given Arizona's groundbreaking reforms.

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

What's new in CLE

• Improved Quality Videotape Library: We are now having all live CLEs professionally videographed and edited. What does this mean for you? The videotapes have improved audio and better video quality. They are more viewable and no longer have dead air time while a question is posed from the audience.

• The Alaska Attorney's Desk Manual has a new chapter! In 1994 and 1995 we published the Real Estate and the Employment Law Desk Manuals. Family Law is the latest one to be published. Please call the Bar office to order your copy today! Each Manual is in a 3-ring binder format. The cost is $45 plus $5 s&h.

• The 1996 CLE Calendar was published and sent to all Bar members the week of January 8th. We distributed this to help you plan in advance which CLEs of interest to you will fit into your schedule. Updates to the calendar will be sent out periodically. Flyers for each program are mailed 4 - 6 weeks in advance of the program date.

• Are you on the Information Super highway? If you are, look for Alaska Bar Association information on the Alaska Court System's Home Page. The net address is http://www.alaska.net/~akctlib/homepage.htm

• Look for our updated CLE Library Catalog in March. Use the catalog to choose courses for self-study or to earn credits for another jurisdiction.

Call the Bar at 272-7469 or fax us at 272-2932 for more information about all the resources in the CLE Library.

Family Law

Protecting your office from disaster

A wave of burglaries recently hit a number of law offices in downtown Anchorage. The thieves were brave enough to hit many locations in one evening, leave cigarette butts on the floor, and return to at least one office again approximately a week later to steal more goods.

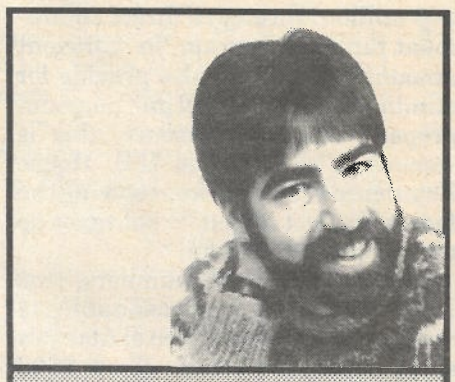
Disasters of this type can harm small and large law firms alike. For the solo practitioner, the consequences can be devastating. This article suggests precautions which can be taken to minimize the likelihood of burglary and to help an office recover as quickly as possible if a burglary occurs.

An alarm system may help prevent a burglary. Sensors may be installed which detect movement, glass breakage, the opening of doors, changes in air pressure, and other events which indicate the presence of a thief. Dead bolts on doors offer additional protection. Firm owners must decide if a security company should monitor their offices, and determine whether a silent alarm alone should notify third parties or whether a loud alarm bell should ring to discourage a burglar from entering or remaining on the premises. While the police would prefer a silent alarm, which may result in apprehension of a would-be looter, an office may instead prefer that potential thieves are scared off the premises before the robbery occurs. A box containing a keyboard can be installed which requires that a code be entered each time the office is opened or closed.

Burglaries often occur because people are careless. Window shades are left open and lights left on, nightly exposing the expensive computer equipment to the outside world. Doors are accidentally left unlocked and dead bolts unsecured. The risk of harm may be avoided if a detailed list of procedures is prepared, to be followed and initiated by the last person leaving the office. Don't forget to include turning off coffee pots and other appliances which might cause fires. Check all potential entrances and exits, windows and doors, and ensure that they are adequately secured. A fireproof safe can store valuables such as retainer agreements and computer discs. Keep all open and closed files off the floor to prevent damage caused by flooding,

Make certain that you have adequate insurance which will protect your investments as the firm grows and the value of your assets increases.

The computer has become an irreplaceable element of a law office. In it is stored information which is essential to the existence of a firm. Computers are also primary targets of thieves. The information contained in the computer and the time spent replacing both the computer and the data may be far more valuable than



Steve Pradell

the price of the equipment. For this reason, it is important to store information off-site on disks or other back-up storage systems. Zip disks and drives are a recent low-cost addition to the arsenal of an attorney. Zip disks are small and can store a great deal of information easily in a very short amount of time. Attorneys should regularly back up *all* information on each computer, including time slips or other billing programs, client files, legal forms, client trust fund records, and accounting and tax information. If this is done, even if a fire were to completely wipe out a firm, necessary information could quickly be entered into a new computer to rebuild the lost documents. Attorneys' computerized billing slips should be backed up at least once a week to ensure that this important information is not lost due to inadvertence or disaster.

Keep valuables out of the office to the greatest extent possible. Money, loose checks, and other liquid assets should be kept in outside storage, or deposited in the bank or other safe location on a daily basis.

Record serial numbers of all computers and other valuables and mark them clearly with the name of your firm. Keep the receipts in a safe place. Photograph or video your possessions on a regular basis, and keep the photos and videos, Zip discs and other essential back-up information at home or in other safe places. Keep your personnel and others who work nearby informed of your whereabouts so that you can be immediately informed if disaster strikes.

If you are subject to a catastrophe, it does not necessarily mean the end of your career. Take a few deep breaths, notify your insurance company immediately, and begin the business of rebuilding your life, recreating your office, assessing the damage, taking steps to prevent future harm, and moving on.

Sometimes a disaster can lead to an essential reassessment of existing problems and goals, which results in a new long-term direction, change and growth for the firm.

FISH/HUNT/SNOWMACHINE IN ALASKAN COMFORT

16x18 ft. 2-story cabin on 4.8 wooded creekfront acres. View of Talkeetna Mountains. 40 airmiles NW of Anchorage, 10 miles up Alexander Creek from the mouth. Cabin has cedar siding, finished interior (Coryon countertop, t-in-p pine, linoleum on lower floor), and propane- and battery-powered lights. Sauna, snowmachine, propane range, CB radio and antenna, and a storage/generator shed with 2 kw generator are included. $78,000, owner financing. Judy Akelstad, Marston/Vista of Wasilla, 376-2414 (File No. 95-6377).

The Public Laws

Another use for the permanent fund

Scott Brandt-Erichsen

I recently filled out my family's applications for the 1996 permanent fund dividend. This process usually triggers a daydreaming session considering all of the various ways that I could spend my dividend check when, and if, it arrives in the fall.

This year was a little different, however. Perhaps it is a result of the legislative debate over the fiscal gap, but this year I found my mind wondering what various uses the permanent fund could be put to, if the idea of a state savings account and permanent fund dividends were abandoned.

From letters to the editor and random quotes in various news articles, I believe I am not alone in this sort of daydream. I have heard ideas ranging from liquidating the fund, distributing the entire corpus to all residents, and creating endowments for certain types of expenditures (such as education), to leaving well enough alone.

If I understand correctly, the actual corpus of the permanent fund in somewhere around $18.5 billion, give or take a billion. Dividing that among 600,000 citizens would be about $30,000 apiece, or about $22,000 after taxes. The federal tax bite eliminates this as a desirable method for distribution.

The idea of an endowment for education is attractive in that it reduces the state budget burden, but doesn't have a appeal to the individual pocketbook. It would be reducing or eliminating a public benefit (receipt of a permanent fund dividend check) without any direct, personal gain to the general public. The $600 million or so that the state spends on public education now is not derived from individual tax funds, thus there is no individual tax savings from shifting this funding source.

This train of thought, however, led me to an interesting concept. What if the permanent fund were used as an endowment for both education *and* municipal expenses.

The theory would be that earnings from the fund would be used not only to defray the state's contributions to education, but its local contributions, as well. Further, earnings from the fund could replace state municipal assistance and revenue sharing payments (currently these total about $60 million) through a direct endowment funding program. In sufficient amounts, this could also provide for elimination of local real and personal property taxes. In essence, this is somewhat akin to the U.S. House Republicans' method for resolving the federal budget deficit — cut taxes as part of closing the gap.

Looking at actual numbers, this isn't completely unreasonable to imagine. The state portion of Alaska's education funding was about $600 million. Revenues from real and personal property taxes imposed by local governments totaled $367 million in 1995 (excluding the state-imposed property tax on oil and gas production property). The local contribution to education funding (about $215 million) is included, for the most part, in this local tax revenue figure.

This means it would take just under $1 billion per year to both eliminate local property tax and fund education through an endowment. This would cut about $677 million from the state budget ($600 million in education funds, $60 million in revenue sharing and municipal assistance, plus another $17 million unfunded tax exemption program funds). Additional cost savings on the municipal level could be realized from elimination of municipal property taxing functions. Granted, this would complicate municipal debt service and service area functions by requiring sales tax, fees or other revenues, but it would make all real and personal property exempt from local taxes.

People who study statistics can show you that in effect, a family of four which receives four permanent fund dividend checks and pays average property or sales taxes has income from the state. The system above would make that fact clear to everyone. Taking the example of a homeowner who pays $2,000 in property taxes to a municipality, full funding through a municipal endowment would reduce or eliminate that individual's dividend check, but would also eliminate the $2,000 tax bill.

It is true that there is a degree of inherent unfairness in such a program because eliminating or limiting property taxes only benefits property owners while elimination of the permanent fund dividend check impacts everyone. Thus, a family of four with no property would lose four dividend checks, while the owner of a multi-million dollar building would gain a significantly greater benefit than his or her foregone permanent fund dividend check.

To respond to the landless critics, the state could address some of the disparate impacts by juggling the formula. For example, if people are less concerned about encouraging businesses by lowering taxes, and the educational endowment seems too much like a blank check, eliminating all local property tax in 1995 would have required $367 of the $565 million used for dividends. This would still leave $200 million for dividends while encouraging businesses to locate or expand property in Alaska. In another alternative, the property tax exemption could be limited to owner-occupied residential properties and the dividend program could be continued at about one-half the current size. (Would you trade one-half of your dividend for no residential property tax?)

Beyond the potential negative impact on those who pay no property tax now, several positive results could occur, not the least of which is encouragement of economic development. In determining where businesses should locate, one of the considerations is the local tax environment. While Alaska does not have a personal income tax, a business must consider the effects of property taxes and business income taxes, both of which Alaska utilizes. Elimination of property taxes would arguably encourage development of physical plants and facility intensive industries. This, in turn, can promote economic diversification and increased employment.

Another factor to consider is the effect on federal taxes. Distribution of $500 million through permanent dividend checks results in taxable income for all Alaskans who receive checks. If a of 20 % tax rate is used, one-fifth — or $100 million — of the permanent fund dividend money goes directly to the federal government. If the funds were used, instead, to eliminate other taxes or fees for municipal services and education, the federal take is zero.

Various combinations of funding and exemptions could be designed to encourage or discourage types of development, home ownership, or business investment for example. The bottom line is there are a lot of possible uses for the permanent fund, and they don't all have to mean loss of dividends with no offsetting individual benefits. Don't rule out local property tax relief.

John Hellenthal's pre-law in Juneau

1896 ONE HUNDRED YEARS 1996

ALASKA BAR ASSOCIATION

John Hellenthal, right, with Jim Delaney at the Anchorage Bar picnic in 1974.

BY RUSS ARNETT

The following is a portion of a speech by John Hellenthal on September 26, 1979, which I had the pleasure of attending. John grew up in Juneau, the son of Simon Hellenthal who served as Territorial District Judge in Valdez and later, after the court was moved, at Anchorage. John was the nephew of Jack Hellenthal who was a well-respected Juneau attorney. At the time of his death in 1989, John had been admitted to the bar of Alaska for just under 50 years.

• • • •

The courts were curious in Ketchikan and Juneau. They were well established. They didn't go out into the boondocks. The people came to them because transportation was available. They would come on curious little boats for the trials. It was not difficult although for years they excluded Indians from juries and it was pretty much a white man's court.

In fact, I went to a segregated school in Juneau. We had separate schools until 1926 and we should not have had. We all played together, the Native kids and the other kids. My mother had a lot to do with segregated schools in Juneau. She got mad about it and went up and saw the Common Council and raised hell with them. There is no reason to have separate schools, our kids played together and she did not like the schools to allow otherwise. I do not think she had any deep philosophical reasons for it but it did not seem right. She spearheaded a group of ladies and they single-handedly did desegregate the Juneau schools and that is the way, of course, it should have been.

But in Juneau they all came in for trial. They had funny stories.

I suppose I ought to tell it. To me it is a hackneyed story, but people seem to like it and I know the lawyers here have heard it many times. They bring the witnesses in from outlying areas. One time they brought a girl in, a girl from Hoonah, and she came on the motorship *Estabeth*. They asked her in the courtroom, "When were you subpoenaed by Marshal Brown?" She did not want to answer. They asked again: "When were you subpoenaed by Marshal Brown?" When it was established that she had to answer, she said "Once in Hoonah and twice on the *Estabeth*".

Another one of our judges, a carpet-bagger, was Judge Folta (who later stayed here, though, to his credit). He was strictly a Federal appointee. He was one of those was always writing letters back to Washington about this or that or the judges. If the judges did not do right, the District Attorney wrote the Attorney General and there was always an investigation going on. Folta was at once an eager man and strange man. He was trying a case once as District Attorney in Juneau where a boy was charged with raping a girl. On the stand Folta asked, "Annie, what happened that night?"

She said, "We were sitting on the dock and he put his hand on my leg."

Folta very dramatically said "What happened next?" "He put his hand near my tummy."

Then the third question: "What was he doing with the other hand?" And the answer was, "He was eating a piece of pie."

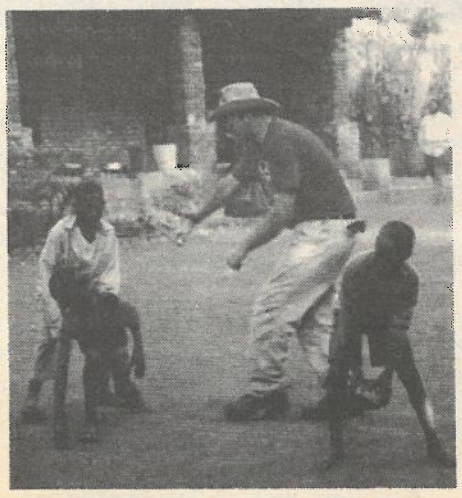
The first thing I ever recall about law was after school once, when I decided to see the Legislature. My teacher told me, "You should go." They held it in what was called the A B Hall. It later became a fish hatchery. You had to go up three big flights of stairs to get to the Legislature. I am 12 or 13 years old heading up those stairs. All of a sudden I heard the damnedest noise I ever heard in my life. Yelling and screaming profanity and rolling down those flights of stairs, one tier, then another and another, were William Paul and Fate Polly. They were legislators. William Paul was a Native lawyer, a great leader among the Native people, and terrific fellow, but they took their politics very seriously. Those two men went out and fought in the street after that. It was a bloody fight. Then they went back to resume the business of the Legislature. I thought it was great and said I wanted to go the Legislature every day.

But Paul was an interesting man. He was a scrapper. He is still alive. He really fought for the Indians and the establishment did not like him. They had him disbarred once for some phoney deal. It was phoney but he surmounted that and practiced law and his sons practice law now. They are very capable men, and they have reason to be kind of iconoclastic.

In and out of Africa, 1995

By James C. Hornaday

Tanzania, East Africa was a real change from Homer, Alaska — the other side of the world just below the equator. We were with Global Volunteers, a world-wide service organization that works with the Peace Corps, churches and other groups in international projects. A primary attraction was the emphasis on the servant-learner. The locals selected the work project and did most of the work. We supplied the materials and assisted. "A" personality types were discouraged, as the people are very poor and are primarily involved in survival. Dr. Bell and Bonnie Betley at Public Health filled me with shots and pills to ward off disease.



Football team.

Our first meeting was in Dar Es Salaam on the Indian Ocean. Our group of 12 hailed from Massachusetts to Alaska — only two males, five in our 50's, the rest either teenagers or in their 20's.

A few brief Tanzania facts: Population: 27 million, 70 percent rural. Languages English and Swahili. Religion: 1/3 Moslem, 1/3 Christian, 1/3 traditionalist. About twice the size of California. Constitution similar to ours with a British flavor. Life-expectancy about 50 years, mortality of children as high as 25%. Rate of population increase more than 3%. Formerly Tanganika and Zanzibar.

History in brief: Slave center, Arabs came in 8th century, Portuguese in 1500s, Stanley found "Dr. Livingston, I presume." Was German-East Africa as the German Empire expanded in 19th century, then back to the British, and Independence in 1961. Tried socialism — didn't work. Poverty wide-spread.

We centered in the little village of Pommern in central Tanzania, traveling by bus from Dar to Iringa, then by a very rough dusty road for 1 ½ hours to Pommern. On the way, we went through Mikumi Park and saw elephants and other animals, all protected in the parks. The elephants are coming back, but there is still a poaching problem.

We picked up our supplies in Iringa where malaria is a serious problem. I was assigned the task of purchasing the windows, putty and paint for the Lutheran high school in Pommern — the project selected by the local village. Even in the city, you barter for everything — in Swahili — which after took all day. We also helped teach classes.

About 3,000 live in the village area. Each village has a primary school with large classes, up to 90 in a room, but very few secondary schools. Young men and women come from all over Tanzania to attend the high school which serves all religions. A student body of 300 is taught by a faculty of 30. Teachers earn on average of about $30 per month and given a shamba (garden) to grow their food.

The civic class I talked with was astonished that I had "only" four children and wanted to know why such a small family. Children are the jewels of the poor, who have no social security and suffer high mortality. Amoos, the carpenter I helped, had lost two of his four children. The cemetery is

Global volunteers. Pommern, Tanzania, 1995.

hard to ignore with all the new little graves.

The Global Volunteers program emphasized interaction with the local people, rather than the actual work accomplishment. The houses have no electricity and no running water. There is often insufficient food. They are kept busy just surviving and the rains had not come while we were there. Imagine if we had to haul water, cut wood, charcoal it for cooking, wash by hand, and also work a large garden.

Safari

We participated in numerous activities. The Lutheran church was active — the church bell rang at 5 a.m. with the roosters. The music was fantastic - immediate four-part harmony with no song books. The Lutheran pastor talked about the history of religion in Tanzania, we visited a fish farm and agricultural project, learned about African cooking, dating and courting — a man can have more than one wife, but he has to pay a bride price for each to the bride's father.

The most poignant experience was walking four miles to a well-baby clinic in an even-poorer neighboring village, carrying the needles and medicines through the burned and cut forests. All up and down the road as far as one could see, mothers were coming with their babies. The nurse saw about 200 babies in one day, most underweight and malnourished. It was not uncommon to see a woman, obviously pregnant, with another child at her breast, holding the hand of another, with yet another on her back.

I wish the writer of the book of Genesis could have seen the clinic — would the command still be to populate and dominate the earth? I wondered what the future holds for all of those babies.

I had never experienced poverty on such a massive scale. The people in the region literally have practically nothing. There were always a lot of kids around the mission house. Some had sores, few had shoes, but they were still kids and our football team had a lot of speed. A strong family and community ethic binds them.

After working in the village three weeks, we said our goodbyes to all. Another volunteer and I took a 13-hour bus ride to the northern Tanzania city of Arusha to arrange for animal safaris. On the way we were constantly stopped by armed soldiers and delayed because Tanzania was re-running certain parts of their first multi-party election and officials were concerned about possible violence.

The animals, birds and safari country were magnificent. We drove by Land Rover through the areas we watch on National Geographic programs: The Serengheti Plain, Ngorongoro Crater, and Mayanara and Tarangire Parks. We also visited Olduvai Gorge where the Leakeys found Neanderthal Man.

Fortunately, the rains had started the massive animal migrations. This area is the last place in the world to witness millions of animals on the move — over a million wildebeests (gnus), 700,000 zebras, impalas and gazelles. We saw the big five dangerous animals — rhinoceros, elephant, buffalo, lion and leopard. We also saw giraffes, hippos, baboons, monkeys, hyenas, jackals, cheetahs, crocodiles and many birds, ostriches, eagles, storks, cranes, and geese.

Although we thought we would be staying in low-budget facilities, we ended up in luxurious lodges with beautiful views. While swimming in a pool, sipping a cold drink, we watched elephants drinking from the river and listened to the animal sounds at night.

On a wild hair I decided to try and climb Mt. Kilimanjaro, the highest point in Africa at 19,300 feet. I was not prepared and was even negotiating for long-johns as we started up with our guide, Arnold, and five porters. The locals run up and run down — I was lucky to haul myself and a water bottle. We started out in a tropical rain forest with monkeys and encountered miserable heavy rain the second day (I had no rain gear). When we learned it was snowing on top, many turned back. Over 30,000 people attempt to climb the mountain each year; less than 1,000 succeed. We lived in huts and slept in our clothes for four days up and two days down. The final 4,000 feet were the most difficult as it is hard to breathe at that altitude. All three in our party made it: Rob Brown, a young doctor from Pittsburgh; Ann Norberg, a 3M employee from Minnesota with a biology Ph.D. and a law degree; and me. We lucked out with fine weather on top at Uruhu (Freedom Peak), the highest free-standing mountaintop in the world. Kilimanjaro means "mountain of greatness" and is aptly named. On the lower slopes the soil is fertile, producing coffee and bananas.

After our descent we gave clothing donations and a tip to the guide and porters and, after a shower, headed to the Kilimanjaro airport for home and Homer.

Public Sector Labor Relations Conference '96

The Alaska Labor Relations Agency and the Federal Mediation and Conciliation Service are sponsoring a Public Sector Labor Relations Conference 196, in Anchorage on Thursday, March 28, 1996, 9:00 a.m., at The Hotel Captain Cook.

The conference is designed to acquaint management, labor, elected officials and interested members of the public with public employee collective bargaining in Alaska.

The conference will provide opportunities to

- learn about current issues in labor relations
- ask questions of experts
- share ideas with management, labor, and neutrals
- learn about administrative proceedings, including hearings before the Alaska Labor Relations Board and arbitration proceedings
- explore alternatives to formal proceedings

The keynote luncheon speaker is Patrick Hardin, Professor of Law, The University of Tennessee, and editor in chief of the third edition of *The Developing Labor Law*, a two-volume treatise of law under the National Labor Relations Act, published by BNA books.

The morning program also includes a presentation on labor mediation by Doug Hammond, Director of Mediation, FMCS, Mano Frey, Executive President, AFL-CIO, and Dianne Corso, Labor Relations Manager, State of Alaska, and an opportunity to meet with members of the Alaska Labor Relations Board about proceedings under the Public Employment Relations Act and Alaska's railroad labor relations laws. The afternoon program consists of six workshops: Administrative Pointers I, the unit dispute; Negotiating Agreement and the Role of the Mediator; Administrative Practice Pointers II, the Unfair Labor Practice; Grievance Mediation: An alternative to arbitration; Administrative Practice Pointers III, Arbitration Proceedings; and Impasse Issues: Strike, lock-out, and unilateral implementation. Presenters include local experts and such out of state labor specialists as Nancy Brown, State Conciliator for the State of Oregon, and Marvin Schurke, Executive Director, Washington Public Employment Relations Board.

The program has been approved for 5.25 CLE credits by the Alaska Bar Association.

Fee: $25.00 includes lunch and Alaska Public Sector Labor Relations Handbook.

For further information or for a copy of the registration form and program, contact Margie Yadlosky, conference coordinator, Alaska Labor Relations Agency, Department of Labor, P.O. Box 107026, 3301 Eagle St., Anchorage, Alaska, 99510-7026, or call 269-4895.

Bankruptcy Briefs

Representing the debtor in possession

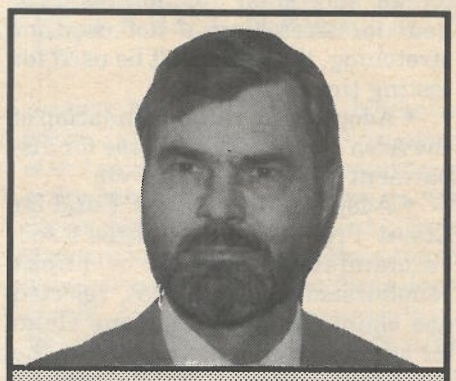
The debtor in possession ("DIP") in a chapter 11 case performs essentially the same functions as a trustee. [11 USC § 1107(a)] As the functional equivalent of a trustee, the DIP is the fiduciary of the bankruptcy estate and its beneficiaries, the creditors. [*CFTC v. Weintraub,* 471 U.S. 343 (1985)] Where the DIP is a corporation, corporate officers are considered officers of the court having fiduciary obligations to the estate as a whole and the creditors. [*In re Intermagnetics America, Inc.,* 926 F2d 912 (CA9 1991); *In re Anchorage Nautical Tours,* 145 BR 637 (BAP9 1992)] This frequently presents conceptual difficulties as debtor's management finds itself performing a new and strange role. It is particularly difficult when the debtor is an individual and, to some extent, a partnership or closely held corporation. In these cases, the DIP has the added burden of not only acting as the representative of the estate, acting in the best interests of the creditors, but, also, in his or her own behalf in the preservation of personal rights. This creates an inherent conflict arising from potential issues regarding dischargeability, exemptions, preferences and avoidable transfers. [*See In re Canion,* 129 BR 465 (Bank.S.D.Tex. 1989)]

The focus of this article is on the role of an attorney as counsel for the debtor in possession. Certain aspects of the role of counsel to the DIP are, or should be, self-evident - counsel (1) represents the estate, not the individual debtor, (2) has a fiduciary responsibility to the client, and (3) is an officer of the court. [*In re Wilde Horse Enterprises, Inc.,* 136 BR 830 (Bank.C.D.Cal. 1991)] Having said that, the obvious question is - why the need for any further discussion? Simply because it is not quite that simple in actual practice.

The duty of counsel for a DIP goes beyond simply responding to requests for advice: it requires an active concern for the interests of the estate and it beneficiaries, the creditors. Counsel must remind the DIP of its duties under the Code and assist the DIP in fulfilling those duties. Counsel may not simply close his or her eyes to matters having legal and practical consequences to the estate, particularly where the consequences may be adverse. [*Id.*] The fiduciary duties and obligations of a DIP carry over to counsel, who owes his or her allegiance to the entity and not a stockholder, officer, or director of the entity. *[In re Bellevue Place Associates,* 171 BR 615 (Bank.N.D.Ill. 1994)] In this regard, counsel for the DIP must balance the role of counselor to the estate with the role of officer of the court and fiduciary to the estate. [*In re Rivers,* 167 BR 288 (Bank.N.D.Ga. 1994)]

It has been stated that "a debtor in possession and counsel who represent it are fiduciaries of the creditors in the 'highest sense of the term fiduciary.'" [*In re T & D Tool, Inc.,* 125 BR 116 (E.D.Pa 1991)] However, on the other hand, in *In re Sidco, Inc.,* 173 BR 194 (E.D.Cal. 1994) it was stated:

> "These cases do not overthrow [the] basic tenet that attorneys for debtors-in-possession have a fiduciary duty to their client, the debt-in-possession, not to the creditors and shareholders whose interests may be adverse to the debtor. In fact, 11 U.S.C. § 327 guards against concurrent representation of both the creditor and a debtor-in-possession."



Thomas Yerbich

With all due respect, Chief Judge Coyle in Sidco has misperceived the role of the DIP, its counsel and the purpose of § 327. While one may agree, as Chief Judge Coyle observed, that, strictly speaking, it is the DIP, not the attorney (the attorney being an advisor), who acts as the trustee for the estate; it is an oversimplification.

First, the DIP, as representative of the estate, is a fiduciary to the creditors as a group, not with respect to any individual creditor. Second, counsel represents the DIP as representative of the estate, not the debtor individually or the DIP in any individual capacity. Third, because of the mandates of the Code, *e.g.,* preferential and fraudulent transfers, equal treatment of similarly situated creditors, and the preferences created by the Code itself, the interests of the estate (or a creditor) may be adverse to those of a particular creditor. However, this is a result of the fiduciary obligation to the estate as a whole or the creditors as a group, which does exist, as opposed to a fiduciary obligation to each individual creditor, which does not exist. While, as this author believes, there may not be a general fiduciary obligation to a particular creditor, the Code itself may, in a sense, create a "fiduciary" obligation to an individual creditor. *E.g.,* creditors entitled to priority over general creditors and special rights conferred on certain creditors. A failure to follow the mandates of the Code is, *ipso facto,* a breach of the fiduciary obligation of a DIP. Fourth, 327(c) is not an absolute bar, it is operative when an actual conflict in interest exists, *e.g.,* because the interests of a particular creditor may be antithetical to a specific mandate of the Code. [*See, e.g. In re Adam Furniture industries, Inc.,* 158 BR 291 (Bank.S.D.Ga. 1993)]

Moreover, counsel for a DIP "is not merely a mouthpiece for his client. 'Counsel for the estate cannot close their eyes when the debtor's principals are not acting in the best interests of the estate and its creditors, and certainly cannot aid the adverse activity.'" [*In re Harp,* 166 BR 740 (Bank.N.D.Ala. 1993)] As the Ninth Circuit admonished (2 weeks before the *Sidco* decision):

> Counsel for the estate must keep firmly in mind that his client is the estate and not the debtor individually. Counsel has an independent responsibility to determine whether a proposed course of action is likely to benefit the estate or will merely cause delay or produce some procedural advantage to the debtor. While he must always take his directions from his client, where counsel for the estate develops material doubts about a whether a proposed course of action in fact serves the estate's interests, he must seek to persuade his client to take a different course or, failing that, resign. Under no circumstances, however, may the lawyer for a bankruptcy estate pursue a course of action, unless he has determined in good faith and as an exercise of his professional judgment that the course complies with the Bankruptcy Code and serves the best interests of the estate. [*In re Perez,* 30 F3d 1209 (CA9 1994); *see also* Rules 1.16 and 2.1, Alaska Rules of Professional Conduct]

Should the DIP refuse to follow counsel's good advice and instruct counsel to take some action antithetical to the interests of the estate or contrary to the Code — counsel may simply refuse to so do and resign. However, what does counsel do when, as is frequently the case when actions of those nature occur, the act is done before the DIP consults counsel? Counsel, of course, has a duty to advise the DIP to take remedial action and, if it refuses to do so, resign. In the event remedial action is for any reason either a legal or practical impossibility and the transgression is serious enough, counsel could possibly resign in that situation as well.

However, is resignation always the best, or only, course for counsel to take in these situations? In many cases it may be either inappropriate or insufficient. Does counsel have an obligation to take any further action; specifically, should, or more importantly, must, counsel "blow the whistle" by reporting the transgression to the U.S. trustee and the court? In this author's opinion, the answer is an unequivocal YES. [*Cf. In re Tames Contracting Group, Inc.,* 120 BR 868 (Bank.N.D.Ohio 1990)]

The first element to be examined is identification of the client. Although we may say counsel is representing the DIP, it is only in the sense that the DIP, whether it be management of a corporation, the general partners, or an individual debtor, is the representative of the estate, which can only act through its agent (the DIP). Moreover, counsel is paid from funds of the estate. In every sense of the term, the estate is the client.

The second element is identifying who will suffer a loss as a result of transgressions by the DIP. The answer here is clearly the estate or its beneficiaries, the creditors. Since counsel owes a duty of allegiance and has a fiduciary responsibility to the estate, it seems, *a fortiori,* that counsel has an absolute obligation to take such action as counsel may, in counsels independent professional judgment, deem necessary or appropriate to preserve the estate. If it means conversion, dismissal, the removal of the DIP by appointment of a trustee or other action removing the individuals from control - so be it - counsel has no legal, ethical or moral obligation to the DIP *per se.*

The DIP might attempt to raise the attorney-client privilege. But that is, in cases where such disclosure would be appropriate, an argument easily debunked. The attorney-client privilege does not apply if to so do would perpetrate a crime or fraud. [Rule 503 (d) (1), Federal Rules of Evidence; *see also,* Rules 1.6 (b) (1) and 3.3 (a), Alaska Rules of Professional Conduct] Most, if not all, cases where counsel may deem it necessary to "blow the whistle" will involve situations where the DIP is required by the Code or FRBP to make a disclosure and either (1) fails to disclose or (2) makes a misleading or incomplete disclosure such as in the schedules or monthly operating reports. Those cases clearly fall within the exception to application of the attorney-client rule. [*In re French,* 162 BR 541 (Bank.D.S.D. 1994); *In re Fidelity Guarantee Mortgage Corp.,* 150 BR 864 (Bank.D.Mass 1993); *In re Trout,* 108 BR 235 (Bank.D.N.D. 1985); *cf. Trehan v. Tarkanyi,* 63 BR 1001 (S.D.N.Y. 1986)]

In conclusion counsel for a debtor in possession: (1) represents the estate and its intended beneficiaries; (2) has a fiduciary obligation to use his or her independent professional judgment in advising the DIP; (3) may not comply with the instructions of the DIP if to do so would be contrary to the Code or detrimental to the estate; (4) must resign if the DIP insists on carrying out a course contrary to the Code or detrimental to the estate; and (5) "blow the whistle" where the actions of the DIP would result in the perpetration of a crime, fraud or material harm to the estate.

INCORRECT FAX NUMBER

In the Fall 1995 Alaska Directory of Attorneys and the June 1995 Alaska Court System Telephone Directory the incorrect fax number was printed for the Juneau Civil Division of the Attorney General's Office. Please note the general fax number is 465-6735. However, there are additional fax machines available and you can call (907) 465-3600 to obtain the number of the fax closest to each assistant attorney general.

STATE OF ALASKA
DEPARTMENT OF ADMINISTRATION
OFFICE OF PUBLIC ADVOCACY
REQUEST FOR PROPOSALS ASPS 97-0002

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 44.21.410. OPA contracts with attorneys to provide services to clients for which OPA irresponsible 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 FY97 and FY98 (July 1, 1996 through June 30, 1998) you may obtain a copy of the Request for Proposal from:

BARBARA CROMBIE
Office of Public Advocacy
900 West 5th Avenue, Suite 525
Anchorage, Alaska 99501
Phone 274-1684

The deadline for submitting proposals is 5:00 p.m. on April 19, 1996.

NEWS FROM THE BAR

At the January 12 &, 13, 1996 Board of Governors meeting, the Board of Governors took the following action:

• Continued consideration of a stipulation for discipline until after a related court case is finished.

• Rejected a stipulation for discipline and asked for more factual background.

• Authorized $1800 for consultation with Software North to assist in evaluation of computer database conversion proposals.

• Declined to approve a staff proposal to hook up to the internet and e-mail.

• Approved Reciprocity applicant John Sharp.

• Dismissed a stipulation for discipline.

• Approved a stipulation for discipline.

• Voted to publish Rule 37(c) & (e) as amended (concerning the amounts for Fee Arbitration hearings.)

• Tabled consideration of amendments to Rule 26(h) (concerning the Substance Abuse Committee) until March and asked for more background information and requested that committee Chair John Abbott appear.

• Voted to publish Rule 26 defining 'conviction" in January Bar Rag.

• Tabled the trust accounts issue until March.

• Adopted the ethics opinions entitled 'Ethical Considerations when Billing Clients for Contract Attorney Legal Services" and "Ethical Obligation of an Attorney Representing a Seller to Third Persons Purchasing Property Encumbered by a Deed of Trust which Contains a "Due on Sale" Clause."

• Adopted a stipulation for discipline as amended.

• Granted an admission appeal on one point regarding access to scores of other applicants, and denied the other appeal points.

• Granted a request for special accommodations for the bar exam, for an additional 15 minutes each hour for stretching, if not used for stretching, the time can't be used for testing time.

• Adopted the recommendation of the Area Hearing Committee for disbarment of Homer L. Burrell.

• Adopted the Lawyers' Fund for Client Protection Committee's recommendation for client reimbursement in 7 cases, rejected one claim and remanded one claim for additional findings as to why the attorney's conduct was fraud and not negligence.

• Held a public hearing on Ethics Opinion 95-5, "Undisclosed Tape Recording of Conversation with Potential Witnesses in Criminal Cases" and voted down a motion to revoke this opinion.

• Adopted a stipulation for a discipline suspension.

• Adopted amendments to the Bylaws and Board of Governors Standing Policies and voted to send a proposed amendment to Bar Rule 61 to the Supreme Court, as a result of votes taken when the 1996 budget was approved.

• Clarified the standing policy to state that the requirement that admitted law clerks must be active members of the Bar, only applies to in-state law clerks.

• Tabled the Pro Bono Service Committee recommendation which would allow for a reduction in bar dues for Bar members with 400 hours or more of pro bono service in a year.

• Considered a request by the Juneau Bar Association that the 1997 convention be held in Ketchikan rather than Juneau, and due to concerns regarding the economics and accommodations, confirmed Juneau as the site for the 1997 convention.

• Approved the status change for Judge Ralph Moody to retired status and accepted the resignation of Peter Turner.

• Approved the October minutes as corrected.

Suspensions and public reprimand imposed

Cavanaugh receives three year suspension for neglect and failure to answer grievances

The Alaska Supreme Court recently approved a three year disciplinary suspension for Anchorage lawyer Randall S. Cavanaugh. Cavanaugh's stipulated suspension arose out of four separate grievances.

In the first grievance, Oregon residents retained Cavanaugh in 1990 to sue for damages arising from purchase of a defective marine engine. His office contacted the clients two years later and told them he had not filed it yet but would soon. Thereafter he filed the complaint but did not serve it. When the clients' Oregon lawyer wrote him repeatedly asking for case status and expressing concern that trial might be approaching, Cavanaugh did not respond. When he still had not arranged service a year after filing, the court transferred the case to inactive status and threatened dismissal in 60 days. On the 62nd day, he asked for more time, served one defendant only, and when that defendant answered and served interrogatories, he faxed them to the Oregon lawyer without any explanation but still did not communicate with the clients themselves. The interrogatories went unanswered. Six months later the court again threatened case dismissal but by then he had closed his practice and moved to Bethel without withdrawing or notifying the clients. When it appeared that he had abandoned the case, his malpractice carrier assigned a lawyer to prosecute it, who fought dismissal, but the court ultimately dismissed the case in early 1995 without prejudice.

In the second grievance, Cavanaugh was appointed to represent a criminal defendant. He defended at trial and in the appeal that followed, and advised the defendant that the agency would not fund a second appeal if they lost the first. When they did, the defendant wrote asking him to appeal to the Alaska Supreme Court and asking him to respond and indicate whether he still represented him. Cavanaugh never replied.

In the third grievance, Cavanaugh accepted a pro bono appointment to represent an incarcerated prisoner in a civil rights action. He entered an appearance and engaged in extensive litigation but did not notify the client that the court granted summary judgment against her. The client ultimately wrote the court asking for information; the pro bono administrator wrote Cavanaugh asking for the case's status, noting that the file had simply come back without "ex-

Continued on page 11

COME HELP US CELEBRATE 100 YEARS

1996 Alaska Bar Convention Highlights

May 16-18, 1996

Hotel Captain Cook — Anchorage

1896 ONE HUNDRED YEARS 1996

ALASKA BAR ASSOCIATION

CLEs

Thursday, May 16

Join us for a day with Jay Foonberg, nationally known law office management expert!

Jay Foonberg
Law Office Management Expert

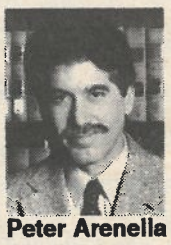
Morning
"What Clients Really Want and How to Give It to Them"

Afternoon
"Quality of Life and Practicing Law: Balancing Family, Profession & Self

Friday, May 18

Morning

They're back! Professors Arenella and Chermerinsky return once more to give us the latest on "Recent U.S. Supreme Court Opinions"



Peter Arenella
UCLA School of Law

Erwin Chermerinsky
USC Law Center

Afternoon

History of the Bench and Bar

Take a look back in time -- learn about "Bad Company: Tales of the Territorial Alaska Bar" with Bill Hunt, UAF Professor Emeritus of History; "Congressional Intrigue and the Formation of Alaska's Civil Code in 1900" with David C. Frederick, U.S. Department of Justice, Washington, D.C.; "Federal Territorial Judges" with Claus-M. Naske, UAF Professor of History; and "The 1964 Court Bar Fight" with Pamela Cravez, Alaska lawyer and historian.

SPECIAL EVENTS

Thursday, May 16

6:00 p.m., Performing Arts Center
President's Reception

7:00 - 10:00 p.m.
Movie Magic: How the Masters Try Cases. It's an evening of fun and education -- Hollywood-style! Bring family and friends to the Discovery Theater for a look at courtroom scenes from such movies as "To Kill a Mockingbird," "My Cousin Vinnie," and more . . . **Judge Karen Hunt, Ray Brown, Carmen Gutierrez, and moderator Steve Rosen** critique the film clips and discuss litigation strategy. You don't even have to be a lawyer to enjoy the movies and commentary!

Friday, May 17

Awards Banquet and Reception
6:00 p.m. - 10:00 p.m.
Ballroom, Hotel Captain Cook

Our keynote speaker, **Senior Circuit Judge Robert Boochever** of the Ninth Circuit U.S. Court of appeals reflects on Alaska Territorial events and their impact on Alaska law today.

Call the Alaska Bar office 907-272-7469 or fax 907-272-2932 for more information. Watch for the brochure in the mail soon!

NEWS FROM THE BAR

Suspensions and public reprimand imposed

Continued from page 10

planation, cover letter, or closing documentation;" but Cavanaugh did not respond to either inquiry. The client ultimately learned of the summary judgment and thereafter filed a *pro se* notice of appeal, but because she filed it more than seven days after her actual notice, the court dismissed her appeal with prejudice.

In the fourth grievance, a client retained Cavanaugh to defend him in a suit for debt. Cavanaugh filed a cross-complaint against a third party defendant but did not have it served. The court clerk would not set the matter on for trial until it was served; and when Cavanaugh still had not served the third party six months later, the plaintiff asked the court to dismiss the third party complaint or to order him to submit evidence that he had attempted service. The court gave Cavanaugh 30 days to serve the complaint or to file within 30 days evidence indicating "actual and good faith attempts to serve" the third-party defendant promptly or an explanation "why service could not have been perfected." He did not comply. Six months later he moved to withdraw without explanation. The court denied the motion, struck the third party complaint, and set the matter for trial. But at trial call neither Cavanaugh nor the client appeared, so the plaintiff filed for default, and the court ultimately entered a $6,000 default judgment against Cavanaugh's client.

Cavanaugh responded initially to the first grievance, but did not respond to follow-up requests. He never responded to the other three. He moved to Bethel during the first's investigation without telling the Bar or his clients. He sent the Bar a letter saying he would respond shortly with more information, then four months later sent a letter discussing a grievance which did not exist.

Cavanaugh's disciplinary violations included violations of former Disciplinary Rules ("DRs") 6-101(A)(2) and (A)(3) (handling a legal matter without preparation adequate in the circumstances and neglecting entrusted legal matters). For conduct on or after July 15, 1993, his disciplinary violations included Alaska Rule of Professional Conduct ("ARPC") ARPC 1.1 (requiring acting competently); ARPC 1.3 (requiring reasonable diligence and promptness); ARPC 1.4 (requiring keeping a client reasonably informed of a matter's status); ARPC 1.16 (requiring upon withdrawal taking reasonably practicable steps to protect the client's interest); and Bar Rule 15(a)(4) (requiring answering grievances).

Applicable aggravating factors included a prior disciplinary offense (a written private admonition for neglect), a pattern of misconduct; and multiple offenses. Applicable mitigating factors included absence of dishonest or selfish motive and personal or emotional problems.

Ravin suspended for ignoring grievances and practicing without paying bar dues

The Alaska Supreme Court approved a stipulation for a six month suspension for lawyer Irwin Ravin of Homer.

The stipulation and discipline arose out of two separate grievances. Ravin was disciplined for failing to respond to both grievances despite repeated Bar requests to do so and for continuing to practice law while suspended for non-payment of dues.

Ravin failed to respond to the first grievance (the substantive charges were later dropped) then did not answer a Petition for Formal Hearing charging him with failure to respond. In the second grievance, Ravin continued to represent clients in two separate court matters despite being suspended for non-payment of bar dues. In a medical malpractice case, Ravin filed with the court a pretrial memorandum, discussed settlement with opposing counsel on several occasions, exchanged settlement documents, and signed a stipulation for dismissal for court filing. Ravin failed to answer the grievance arising out of the case. In a divorce case, Ravin appeared in court on behalf of a client and questioned a witness.

Zorea reprimanded for neglect

Anchorage lawyer Moshe C. Zorea received a public reprimand from the Disciplinary Board for violating DR 6-101. The rule (which has been replaced by Rules of Professional Conduct 1.1 and 1.3) prohibits neglect and incompetence. Zorea's misconduct occurred after he accepted a complex bankruptcy reorganization case for a client with multiple real estate holdings, taking only $3,500 in fees. Zorea hand-wrote the bankruptcy petition documents and monthly reports, and delayed filing other reports. He failed to submit a reorganization plan for his client, though there was evidence that a plan could have been crammed down on creditors. After the court threatened to dismiss the bankruptcy for want of prosecution, Zorea converted the case to a Chapter 7 liquidation; according to the client, he did not explain the consequences of this development. Zorea contended that he did not represent the client in liquidation and adversary proceedings that followed, and had no duty to attend related hearings. Bar Counsel's position was that Zorea had a duty to clarify his relationship with the client and to protect the client's interests. Notwithstanding some dispute with Bar Counsel about the scope of his duty to the client, Zorea admitted misconduct and entered a stipulation for discipline. The Board accepted the stipulation and imposed the reprimand at its meeting of January 13, 1996. The stipulation is available for review at the Bar Association office.

Proposed amendment to bar rule 37(c) relating to panel size based on amount in dispute

The Board of Governors invites comments by May 1, 1996 on the following proposed amendment to Bar Rule 37(c) relating to the size of fee arbitration panels based on the fee in dispute.

The Board believes that a petitioner (the client) should be afforded a choice of one arbitrator or three arbitrators when the fee in dispute is in excess of $2000 up to $5000. The petitioner could elect to have a hearing scheduled sooner because only one arbitrator is involved or to have the participation of a public member on a full three arbitrator panel. This proposal will on the Board's May 13-15, 1996 meeting agenda. Please submit your comments to Executive Director Deborah O'Regan at the Bar office.

(Additions italicized; deletions bracketed and capitalized)

Rule 37. Area Fee Dispute Resolution Divisions; Arbitration Panels; Single Arbitrators.

. . .

(c) Assignment of Arbitration Panel Members for Disputes in Excess of $2000.

(1) Disputes in Excess of $2000. to $5000.

The petitioner may have a dispute in this range heard by three arbitrators as described in this paragraph or by a single arbitrator as described in paragraph (e). If three arbitrators are requested, Bar Counsel will select and assign members of an area division to an arbitration panel (hereinafter "panel") of not less than two attorney members and one public member [WHEN THE AMOUNT IN DISPUTE EXCEEDS TWO THOUSAND DOLLARS]. In addition, Bar Counsel will appoint an attorney member as chair of the panel.

(2) Disputes in Excess of $5000.

Bar Counsel will select and assign members of an area division to an arbitration panel of not less than two attorney members and one public member. In addition, Bar Counsel will appoint an attorney member as chair of the panel.

. . .

(e) Assignment of Single Arbitrator for Disputes of $2000.00 or less.

Bar Counsel will select and assign an attorney member of an area division to sit as a single arbitrator when the amount in dispute is two thousand dollars or less.

1996 Convention Resolutions

WHEREAS, the Alaska Legal Services Corporation and its Pro Bono Program provide an invaluable and irreplaceable service to the people of the State of Alaska, and more particularly to those who are in need of legal representation but cannot afford the cost of legal services;

WHEREAS, national and state funding for Alaska Legal Services has drastically declined in the past three years;

WHEREAS, further significant decreases in funding on the national level are anticipated;

WHEREAS, alternative, reliable sources of funding are needed to ensure that Alaska Legal Services and the Pro Bono Program can continue their mission to provide legal services for the needy; and

WHEREAS, the IOLTA (interest on lawyer trust accounts) plan is one such source.

BE IT RESOLVED that the Juneau Bar Association supports a policy that requires all attorneys who maintain retainer or similar accounts to participate in the IOLTA program, and that provides for disbursing the interest primarily to the Alaska Legal Services Corporation on a regular basis; and

BE IT FURTHER RESOLVED that the Juneau Bar Association urges the Alaska Bar Association to request the Alaska Supreme Court to adopt a court rule establishing a comprehensive IOLTA plan that includes all Alaska attorneys, and provides for complete, regular disbursement primarily to Alaska Legal Services; and

BE IT FURTHER RESOLVED that the Juneau Bar Association requests that a comprehensive IOLTA policy be considered and presented for a vote at the 1996 Alaska Bar Association's annual meeting.

DATED this 9th day of February, 1996.

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WHEREAS Alaska is geographically a large state, and

WHEREAS it is costly to travel within Alaska, and

WHEREAS all Alaskan attorneys must belong to the Alaska Bar Association and should therefore have a voice in its important decisions, and

WHEREAS Alaskan attorneys are already familiar with postal ballots on other matters, and

WHEREAS the Alaska Bar Association should provide postal ballots so that distant members who often cannot afford high travel and housing costs of Bar Conventions, can have a voice on important Bar Association matters, especially if postal ballots are included with regular Bar Association mailings;

NOW, THEREFORE, BE IT RESOLVED that the person presiding at any Convention business meeting shall, in good faith refer every controversial matter to all Alaska Bar Association members by means of an advisory postal ballot, and

BE IT FURTHER RESOLVED, that if this Resolution shall require change in Charter, constitution, or by-laws of the Alaska Bar Association, that the Association hereby advises the Board of Governors and all other appropriate persons of the Association's request that they make the necessary change.

Passed, this 26 day of January, 1996, by the Juneau Bar Association.

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WHEREAS organizations that provide legal services to people who are indigent help secure the right of all people, and

WHEREAS, therefore, Government should provide legal services to people who are indigent, and

NOW, THEREFORE, BE IT RESOLVED that the Alaska Bar Association should advocate to branches of State and Federal governments for increased funding for organizations that provide legal services people who are indigent.

Passed, this 23rd day of February, 1996, by the Juneau Bar Association.

Sarah J. Felex

Juneau Bar Association

Resolutions submitted to Bar as of March 10. Deadline is April 1 to be considered at Convention

NEWS FROM THE BAR

Ethics opinion no. 96-1 Ethical considerations when billing clients for contract attorney legal services

The opinion of the committee is that a law firm may charge clients for contract legal services at a rate higher than the law firm's actual cost for the services so long as the total charge to the client is reasonable.

The practice is becoming common for law firms, including sole practitioners, to contract for the services of an attorney on a temporary basis for research, specific projects, or general legal services. Contract legal services can provide certain advantages to both the firm and the contract attorney. The law firm can obtain legal services on a short term without increasing overhead, and the contract attorney maintains independence and control over workload. The committee has been asked to consider whether the firm may bill the expenses incurred for contract legal services at a higher rate than the rate paid the contract attorney. In other words, can the firm include in the fee billed the client a premium or surcharge for office overhead.

In this opinion the term "contract attorney" refers to an attorney providing services for hire as an independent contractor and includes an attorney referred by a temporary placement agency. The term "law firm" refers to the attorney or attorneys hiring the service and includes law firms, sole practitioners, and corporate legal departments.

The contract attorney is hired for a period of time. During that time the law firm may incur overhead costs in connection with the contract attorney's services, for example, by providing an office, office supplies, telephone, computer, or secretarial support or by incurring errors and omissions liability. We believe that it is appropriate for the law firm to include such general overhead expenses and profit in the rate charged for the contract attorney.

We recently outlined standards for charges to clients for disbursements and other expenses in Ethics Opinion No. 95-4. We concluded that clients may be charged for actual out-of-pocket expenses and a reasonable amount for in-house services provided the charges and the basis for their computation were disclosed. We distinguish services performed by contract attorneys from the disbursements addressed in that opinion. The reason is that the law firm has supervised and is responsible for the work of the contract attorney. The situation is more analogous to the law firm's use of an associate than to making a disbursement on the client's behalf.

ARPC 1.5(a) requires that the charges be reasonable.

It is fair and reasonable to add to the rate charged a client an amount for profit and overhead when the law firm incurs basic overhead expenses when using a contract or temporary attorney. The differences between the contract attorney and the law firm's associates are not great. Using contract attorneys allows a law firm to handle work load variations without increasing its overhead. The requirement that fees be reasonable does not require the law firm to incur a loss, which would result if the law firm were reimbursed for the amounts paid the contract attorney as a cost or disbursement when it provided secretarial and other support. The charge, however, must not be unreasonably high in light of the service and the amount customarily charged in the community for the service. See ARPC 1.5(a), which provides:

> A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent.

ARPC 1.5(b) may require disclosure to the client.

The client generally is entitled to know who is representing its interests. When the contract attorney's relationship to the law firm resembles that of a temporary associate under the close supervision of the law firm, however, the American Bar Association does not require the law firm to disclose the contract attorney to the client under Model Rule 1.5(b). The reason is that, when the client retains the law firm, the client can be reasonably assumed to consent to services performed by various persons under the direct supervision of the firm.

On the other hand, the ABA would require a law firm to disclose to the client and obtain the client's consent in advance for work by a contract attorney who is not directly supervised. The reason is that, when the contract attorney acts independently of the law firm, the client's consent cannot be inferred from the client's relationship to the law firm. The American Bar Association's Standing Committee on Ethics has stated:

> The Committee is of the opinion that where the temporary lawyer is performing independent work for a client without the close supervision of a lawyer associated with the law firm, the client must be advised of the fact that the temporary lawyer will work on the client's matter and the consent of the client must be obtained. This is so because the client by retaining the firm, cannot reasonably be deemed to have consented to the involvement of an independent lawyer. On the other hand, where the temporary lawyer is working under the direct supervision of a lawyer associated with the firm, the fact that a temporary lawyer will work on the client's matter will not ordinarily have to be disclosed to the client. A client who retains a firm expects that the legal services will rendered by lawyers and other personnel supervised by the firm. Client consent to the involvement of firm personnel and the disclosure to those personnel of confidential information necessary to the representation is inherent in the act of retaining the firm.

ABA Formal Op. No. 88-356, at 10 (Dec. 16, 1988). In such cases the arrangement must be disclosed and consent obtained in advance.

ARPC 1.5(e) restricts "fee splitting."

A law firm retaining the services of a contract attorney must be aware of the restrictions on "fee splitting." ARPC 1.5(e) provides:

> A division of a fee between lawyers who are not in the same firm may be made only if:
> (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
> (2) the client is advised of and does not object to the participation of all the lawyers involved; and
> (3) the total fee is reasonable.

The ABA has determined that the fees a law firm pays a contract attorney (the ABA uses the term "temporary lawyer") do not implicate this rule if the attorney is compensated for services performed and the services are not billed to the client as a disbursement. In other words, the contract attorney who is supervised works much like an associate and may be billed similarly. A direct division of the fee or a contingent fee arrangement, however, would require disclosure and consent under this rule. ABA Formal Op. No. 88-356, at 10.

Approved by the Alaska Bar Association Ethics Committee on January 4, 1996.
Adopted by the Board of Governors on January 13, 1996.

[1]The contract attorney arrangement raises a number of ethical questions in addition to how such services may be billed. Beyond the scope of this opinion are such questions as the level of supervision required, whether the contract attorney is liable directly to the client, the risk of conflicts of interest with contract attorneys who contract with a number of law firms, and how to protect client confidences. A discussion of these issues appears in Calif. St. Bar Stdg. Comm. On Prof'l Resp. and Conduct, Formal Op. No. 1992-126, 1992 WL 166234 (1992), and ABA Formal Op. no. 88-356 (Dec. 16, 1988). Also beyond the scope of this opinion is whether the contract attorney is an employee under state and federal law with all of the attendant obligations.

Ethics opinion 96-2 Obligation of an attorney representing a seller to third persons purchasing property encumbered by a Deed of Trust which contains a "Due on Sale" clause

The Committee has been asked whether an attorney representing the seller of property which is encumbered by a deed of trust containing a "due on sale" clause has an ethical obligation to advise the purchaser of that property of the existence and effect of the "due on sale" provision. It is the opinion of the Committee that an attorney representing a seller does not have an ethical obligation to advise the buyer of the property of the existence or effect of a due on sale clause in a deed of trust encumbering the property unless the attorney has expressly or impliedly represented to the buyer that the property is not subject to such a provision, or the attorney is aware of such representation by the seller.

In Ethics Opinion 88-2, the Committee determined that an attorney representing a seller who proposed conveying property subject to a due on sale clause without obtaining the beneficiary's consent, must advise the client of the consequences of a breach of the provisions in the deed of trust, but was not ethically prohibited from preparing the sale documents. As between the owner and the beneficiary under the deed of trust, the committee determined that circumventing the contract term was not fraud or fraudulent conduct. Opinion 88-2 did not address the knowledge of, or disclosure to, the buyer of the due on sale clause, but dealt only

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NEWS FROM THE BAR

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with the issue of whether representation of the seller in the transaction would be fraudulent conduct as to the beneficiary under the deed of trust.

A "due on sale" clause in a deed of trust generally provides that if an interest in the property is conveyed or transferred without the written consent of the deed of trust beneficiary the remaining balance due on the underlying debt is, at the option of the beneficiary, immediately due and payable. The beneficiary's decision regarding enforcement of that clause can involve consideration of prevailing interest rates and a number of other factors.

It is reasonable to expect the buyer to become informed regarding the terms of the deed of trust to be assumed before the transaction is concluded. The deed of trust will generally be a recorded document giving the buyer constructive notice of its terms. Moreover, the typical document for assumption, or sale subject to that deed of trust, provides sufficient information to locate the deed of trust if the document is not otherwise provided during the negotiations for sale. We are not, therefore, dealing in this opinion with a situation in which the terms of the deed of trust are known to the seller and the seller's attorney, but are not available to the buyer.

Because the beneficiary who becomes aware of the sale in breach of the due on sale clause in the deed of trust can insist on full payment of the balance due, and initiate foreclosure if the payment is not made, a question has been raised whether Alaska Rule of Professional Conduct 4.1(b) imposes a duty on the seller's attorney to disclosure to the buyer the existence and effect of the due on sale clause. Rule 4.1, relating to "Truthfulness in Statements to Others," provides:

In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting in a criminal or fraudulent act by a client unless disclosure is prohibited by Rule 1.6.
The COMMENT to that section states in relevant part:

Misrepresentation

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentation can occur by failure to act.

. . . .

Fraud by Client

Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. . . [1]

It has been suggested to the Committee that the interpretations of fraud contained in *Carter v. Hoblit,* 755 P.2d 1084 (Alaska 1988) and *Mogg v. National Bank of Alaska,* 846 P.2d 806, 813-815 (Alaska 1993), impose a duty of disclosure on the seller's attorney which will constitute fraud or assistance of fraudulent conduct if the duty is breached. Carter held in relevant part that fraud results when one not in a fiduciary relationship makes truthful representations to another which the maker knows or believes to be materially misleading because of a failure to state additional or qualifying matter. Mere preparation of documents for a seller relating to sale of property in which the buyer assumes or buys subject to a deed of trust with a due on sale clause does not result in the making of any representations which would be fraudulent under *Carter.* The request to the committee does not contain, and we will not assume various fact scenarios in which such representations by the attorney or client could or would occur.

Mogg involved a transaction that was negotiated based on a clearly expressed understanding that Mogg, as a lender, would be secured by a second position in collateral. The bank's attorney, who was present in the negotiations, knew that Mogg would be in a third position because of the "dragnet" clause in the first deed of trust. In other words, the fact upon which everyone else was relying as the basis for their agreement was incorrect and the bank's attorney, who was aware of the mistaken assumption, did not disclose that the basic assumption was erroneous. On those apparent facts, the court found there was adequate evidence to establish a prima facie case of fraud sufficient to abrogate the attorney-client privilege and permit full discovery relating to the transaction.[2]

This ethics opinion assumes the attorney preparing documents for a sale involving property subject to a deed of trust with a due on sale clause is not aware of any mistaken assumption on the part of the buyer. The attorney is not, therefore, participating by act or omission in conduct involving a misrepresentation of the substance or effect of the transaction.

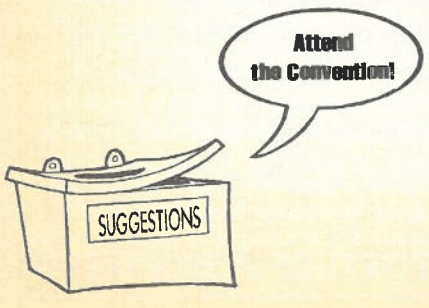
While attorneys have an ethical obligation to avoid assisting in criminal or fraudulent misconduct, this Committee is extremely reluctant to create any duty requiring attorneys to advise parties with whom their clients deal. Establishment of such additional duties will also create difficult conflict of interest issues and expose attorneys to claims by parties with whom their clients deal for failure to adequately advise those third parties regarding the transaction. In effect the attorney may then become the guarantor of the fairness and satisfactory result of each transaction for which the attorney provides services. That clearly is not the intent of the Rules of Professional Conduct.

Approved by the Alaska Bar Association Ethics Committee on December 14, 1995.

Adopted by the Board of Governors on January 13, 1996.

[1]ARPC 9.1(e) provides that "fraud" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

[2]The court made it clear that it was not expressing the view that fraud had been established by the facts presented.



HI-TECH IN THE LAW OFFICE

Admission of attorneys: Alaska has the idea

Continued from page 1

The question addressed in this article is not whether an attorney sitting in New York who gives information over the Internet to a client in Alaska is thereby engaged in the unauthorized practice of law in Alaska, but rather whether the time has come to recognize that the practice of law is, for many reasons, no longer an intrastate activity.

As technology allows lawyers to sit in their offices/homes hundreds or even thousands of miles away from their clients, yet communicate with them as if they were sitting across the desk from each other, the pressure to allow interstate (or even national) practice will only increase. Moreover, like it or not, due to technology, the ability of an out-of-state lawyer to practice law in a state where he/she is not admitted is going to be much easier and almost impossible to detect. Instead of discouraging such out-of-state lawyers from seeking admission in those states where they have long distance clients by interposing another Bar Examination, states should do all they can to encourage such admission so as to regulate the very legitimate "character and fitness" issues and continuing education requirements of lawyers practicing within their borders. By persisting in their efforts to regulate the quantity of attorneys practicing within their jurisdictions, some states may lose the ability to regulate quality.

A House divided

At the present time, roughly half of the states allow relatively free admission to out-of-state attorneys who meet the character and fitness requirements and who have practiced for a minimum amount of time in another jurisdiction. Alaska is one of the states which allows such relatively hassle-free admission.

The states which require that all attorneys, no matter how long they have been practicing, take the regular Bar Examination include Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Hawaii, Kansas, Louisiana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, South Carolina, South Dakota, and Washington State. *See ABA/BNA Lawyers' Manual on Professional Conduct, 21:2002.*

Some states, like California, Idaho, Maine, Maryland, Massachusetts, Mississippi, Montana, and Utah, have a shortened version of the regular Bar Examination for the applicant who has practiced for a period of time elsewhere and meets certain other requirements which vary from state to state. *Id.*

This article is not meant to be a research source for individuals seeking to apply for out-of-state admission to another state's Bar. The requirements vary from state to state and are ever-changing. For example, Wyoming recently instituted a rule which requires that any out-of-state applicant for admission in Wyoming must show that the state where they previously practiced accords similar reciprocity to Wyoming attorneys. If there are any requirements for Wyoming attorneys to be admitted in that other state, generally speaking, those same requirements will be imposed upon the out-of-state attorney seeking admission in Wyoming. *See Wyoming, Lawyer* (August 1995).

Alaska is also very liberal about where the site of the previous practice occurred. See In *Re Brewer,* 506 P. 2d 676 (Alaska 1973). For more than eight years now it has been established that states cannot require that someone be a permanent resident of the state before being admitted to the bar. *See Virginia Supreme Court v. Friedman,* 487 US 59 (1988). Given the fact that all states require a showing of proper character and fitness before anyone is admitted to the bar, whether they are a recent law school graduate or a practicing attorney from another jurisdiction, and given the fact that technology allows attorneys to literally advise clients by modem, fax or telephone halfway across the country, it is seemingly well beyond the point that some state Bars should be holding on to their insular views.

Even putting aside technology, lawyers are as mobile as the rest of society. They have spouses who get transferred just like everybody else and, assuming they meet the character and fitness requirements as well as being properly seasoned, they should be able to practice in that new jurisdiction with relative ease. The obvious mobility of attorneys in the modern age has even led to the publication of treatises on the subject. *See* Hillman, *Hillman on Lawyer Mobility,* (Little, Brown and Co. 1994).

The notion of requiring all attorneys, no matter how long they have been practicing, to sit and take the Bar Examination before being admitted to practice in that jurisdiction can be justified as nothing more than a protectionist ploy. It certainly cannot be justified on the basis that a person needs to be tested on each state's laws because, if that were so, states like Alaska, Vermont and North Dakota could be accused of dereliction of their responsibilities for not so testing. No such allegation has been made or is warranted. If other states persist in the more protectionist view, it is not beyond the realm of reason that pressure will persist for equal protection or equal pain. Wyoming is a good example. As noted above, that state has basically said we will treat you the same way you treat us.

In a technologically driven age where clients "visit" their attorneys by telephone or modem, there seems little justification for the barriers erected by some states to the admission of out-of-state attorneys. Hopefully, the trend will start to reflect the approach taken by Alaska which recognizes not only the technological but also the personal needs of lawyers to be mobile.

Most importantly, states like Alaska have been able to recognize and accommodate those needs of lawyers without putting Alaskans at risk of being prey to bad lawyering. If those other states thought about it, they would presumably opt for continued regulation of attorneys within their borders instead of running the risk that at some point, the pressure may become overwhelming for a national bar admission with little or no regulation by the individual states.

Indeed, if you think about it, we are not very far from such a scenario with the multiple-state Bar Examination and the National Conference of Bar Examiners reviewing applicants for more and more state Bar admitting committees.

Conclusion

States like Alaska clearly take the right approach to preserving their interest in regulating individuals who practice law within their borders by requiring that such applicants become members of the Alaska Bar and meet certain character and fitness requirements associated with such membership. At the same time, they do not discourage such admission by requiring attorneys who have practiced for a number of years in another jurisdiction to actually sit and take yet another Bar Examination as a means of presumably discouraging out-of-state admissions.

In the technological age where interstate attorney/client consultations will increasingly become the norm, it is important that legitimate state interests be protected and that out-of-state attorneys be encouraged to become members of (and under the purview of) the state Bars in those states where they practice and not be discouraged from such membership through the unnecessary and painful exercise of having to take another Bar Exam. Indeed, those states that persist in mandating such a requirement may be indirectly encouraging the unauthorized practice of law or, alternatively, a national Bar admission process whereby legitimate state's rights will be subsumed by an overriding federal interest.

The author is assistant risk manager for Attorneys Liability Protection Society.

Michie open site on the World Wide Web

Michie, publisher of legal materials since 1818, recently established an address on the World Wide Web featuring its entire catalog of products and services. Users can visit Michie at http://michie.com

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For more information, call Michie toll-free at 800/562-1197.

Announcement

The **Alaska Shorthand Reporters Association** will be adopting, on May 18, 1996, the following guidelines for the retention of shorthand notes:

> Shorthand notes to be preserved in accordance with statute or court order, or for a period of no less than seven (7) years through storage of the original paper notes or an electronic copy of either the shorthand notes or the English transcript of the notes on computer disks, backup tape systems, or optical or laser disk systems. This includes exhibits, video tapes, electronic media, and adjunct information.

Should you have questions or comments, please mail them to Lisa Shaffer, President, ASRA, 1106 West 15th Avenue, Anchorage, Alaska 99501· fax 276-6727 no later than May 10, 1996.

ALASKA SHORTHAND REPORTERS ASSOCIATION

Hi-Tech in the Law Office

Some thoughts on PC productivity

By Joseph L. Kashi, M.S., J.D.

Our legal environment is becoming increasingly competitive at a time when the Alaskan economy has turned flat. For most of us, we must become increasingly efficient at delivering quality legal work at a price that our middle class clients can afford while holding our costs down. Legal automation technology is key to improving our performance in both of these areas.

Here are some technologies, both old and new, that might help improve the efficiency of our law offices over the next five or so years.

Network your office

Many law offices still resist networking. It is an effective way to make any office work more smoothly, even if you are just sharing office space with a few other practitioners. You will at least be able to take messages for each other and share work product more readily. Networking will also help you work more smoothly if two or more attorneys are working on the same case. In fact, even if you have only a single secretary, a simple network will make reviewing documents, entering time and billing, and taking messages and phone calls work more smoothly. A two-person office can network for a few hundred dollars in hardware costs if you use the simple built-in networking included with Windows 95 or OS/2 connect.

Network your legal research

West's *Premise* legal research software includes built-in networking support. This means that you can attach a few CD-ROMs with your legal research materials to the network and then give everyone immediate access to all of the legal research CD-ROMs that you might have. I can't imagine why anyone would not use CD-ROM research tools anymore. Full text and keynumber searching are an excellent complement to just reviewing the digests. In fact, you can even Shepardize directly using the West Premise CD-ROM by searching for the entire original citation as a string search. Networking CD-ROM research so that everyone has access to it is clearly the way to go. It's more efficient and you will not misplace the CD-ROMs. It is also easier to update the batch files that tell Premise which CD-ROMs to look for.

Purchase a broader range of CD-ROM research materials

You would be surprised at the reasonable costs of purchasing the 9th Circuit District Court and appellate opinions from West, for example. I believe that the purchase price is on the order of $500 per set with a $50 monthly update charge for each of the two sets. This gives you broad access to pertinent Federal decisions. It is much cheaper than buying the books. If you are interested in any U.S. Supreme Court opinions, then you might consider buying the semi-annual US Supreme Court service from Infosynthesis in Minneapolis. Every six months, they'll provide you with an updated CD-ROM containing all US Supreme Court decisions back to the early 1970s at a cost of $195 semi-annually.

Use some form of litigation support

There are many legal-specific litigation support programs on the market. Mostly, these are databases where you can store information about particular documents and deposition/testimonial excerpts or full transcripts. There are several litigation support programs on the market, some of which include optical document imaging. These include Discovery Pro, Summation Blaze for networks, and many others. You can even take a database like Microsoft Access and devise your own simple litigation support database to track documents.

Quick deposition searching

Most court reporters will give you your depositions on a floppy disk in either a specified word processing format like WordPerfect 5.1 or the Universal ASCII basic text format. You can then search the full text of the actual testimony. You can also do some simple deposition indexing and summarization by inserting (in brackets) some key words to help you retrieve pertinent information later. Put all of the deposition files into a single directory and then index them with a full text search program like DT Search, Isys or ZyIndex. You will be able to more rapidly pin down and cross-reference pertinent areas of depositions. You must be careful with the vocabulary used for search terms. You will need a pre-approved list of search terms pertinent to a particular case. Otherwise, there is a risk of imprecise usage which would not be found by a full text search program. Some programs, like PowerSearch and the now discontinued Lotus Magellan, include so-called "fuzzy logic" searching, that lets you find words or concepts that are related, but not precise matches for the search terms.

Consider voice dictation

Voice dictation is an emerging technology that holds real promise for reducing law office costs. As yet, there are no true continuous speech programs that can take dictation spoken at a normal rate and tone of voice with the same degree of accuracy as a transcriptionist. You will need to speak slowly, in carefully separated, precisely enunciated words.

Once you get the hang of it, voice dictation can, with a fair degree of accuracy, take your spoken word and turn it directly into a typed, transcribed document.

Voice dictation systems are far beyond some of the basic speech control programs included with many computer systems. The next version of IBM's OS/2 operating system, in fact, includes voice dictation and voice control technology as part of the basic operating system. It will work with a standard Sound Blaster sound card. Versions of IBM's VoiceType for OS/2 and for Windows are already available, but require a more expensive, specialized interface card. Kurzweil, Dragon and others make comparable dictation systems for Windows systems, although the Windows 3.1 operating environment probably doesn't have the efficient computing power that is desirable for voice dictation. IBM's VoiceType for OS/2 gets the best reviews for dictation products.

Connect to the Internet for e-mail

I know that is has been said so many times as to be almost banal, but connecting to the Internet provides an excellent means of widely usable E-Mail. The proportion of lawyers logging onto the Internet is increasing exponentially. There are numerous legal research sources available for free, including the Alaska Administrative Code, many municipal codes, and essentially all state law materials free for the asking.

The U.S. House of Representatives, Cornell Law School, and many others maintain in-depth, publicly available World Wide Web law libraries with journals and other less common materials easily searchable and available.

Internet E-Mail is by far the most convenient of any wide E-Mail I have seen. If you need to find some sort of material on the Internet, then make sure that you use a good search service such as DEC's Altavista, Yahoo, or Lycos. You can also construct your own customized search routines using QuarterDeck's WebCompass. Remember, though, that the confidentiality of Internet E-Mail cannot be guaranteed, so it is quite important to avoid including any confidential material, attorney-client communications or the like in it. OS/2 WARP includes very usable Internet tools as part of the basic operating system package while an Internet option for Windows 95 is available as part of the inexpensive Microsoft Plus add-on package.

Invest in OCR

Optical Character Recognition (OCR) and simple scanners are becoming very inexpensive and cost effective. The Visioneer system, for example, costs less than $400 and includes a basic document imaging system and some useful optical character recognition software. HP's ScanJet also is widely supported and has some enhancement technology to assist optical character recognition. OmniPage, WordScan, and Xerox's TextBridge are other useful optical character recognition programs.

Consider implementing optical imaging technology

Optical imaging technology is probably the cost effective filing system of the future. It certainly makes more sense for archival purposes. Planning a proper imaging system is neither simple nor inexpensive. It works best across the network with documents to be ultimately archived on CD-ROM media. I believe that imaging will become quite prevalent as a basic law office enabling technology in the near future, and it is wise to begin planning now. Windows 95 may have the edge here, because Microsoft has announced its intention to bundle a basic Wang imaging system with later versions of this operating system.

In the Kingdom of Juneau

Minutes: Royal Bar Association of Juneau

January 19, 1996 Minutes

The crowded little Chinese restaurant looked like every other hole-in-the-wall place on the waterfront of this dirty little town. But the food here was better. I know the cook. My name is Mac. I'm a private investigator.

The dame with the long, brown hair came to my office a couple of days ago. She claimed that she was the president of the local Bar Association and that they meet for lunch at the Chinese place on Front Street. The owner of the restaurant had been putting the heat on because some unscrupulous lawyer had been snatching extras of those little Hershey bars with almonds that they serve after the meal. She begged me to attend the lunch and report on anything I found out.

The dame with the hair ran the meeting and started with the announcement that John Shively, commissioner of Natural Resources, would be speaking at the February 9 meeting at the Westmark. Then this other guy stood up and his stout build immediately led me to suspect that he was our man. He announced that the Juneau World Affairs Counsel would be hosting a talk by Murkowski. The political connection made sense. The evidence was piling up. Then the new Treasurer announced that dues were due and a letter to that effect is forthcoming. This guy was obviously no slacker, but that clean facade could be hiding an addiction to chocolate and almonds. I decided to bide my time.

The meeting heated up with the old business of that resolution on the Ninth Circuit Court split. A quiet but dangerous-looking fellow in the corner passed around copies of an article on the current senate bill that never heard of reasonable geography. I thought the resolution ought to be against the current legislation. The quiet guy said the Alaska Bar ought to poll the membership on the issue. The sharks were out and the resolution failed. The proponent was this tall guy with close-set eyes and he moved for reconsideration, but couldn't even get a second. Here was a man who made enemies.

When the president called for new business, a motion was made to resolve that any resolution to be considered at the business meeting of the state convention be referred to the bar on an advisory ballot.

Chaos ensued.

Amid the rumbling of the mob, I saw a pretty and petite attorney graciously passing around the plate with the candy. Here was the moment I was waiting for. I fingered my piece to make sure the safety was off in case there was trouble. Out of the corner of my eye, I saw her pass the plate to the tall guy with the beady eyes. He deftly palmed at least four pieces of candy right under her nose. I made ready to grab him, when he looked up and met my eyes. I could see the pain of having lost his resolution and couldn't help but feel sorry for the mug. I grabbed a handful of chocolate and hit the road.

— Mie A. Chinzi

Eclectic Blues

Irish stains

Ireland paints a different stain on every traveler's memory. Some remember the place being as dark as Guinness, others recall the warm tones of Jamison's Whiskey and tea. I went there expecting heaven on earth and found purgatory.

Homesick nuns from Ireland's County Cork taught me about their Ireland. The Daughters of Mary and Joseph had sent them to the Southern California suburbs to teach children of Catholic immigrants. Armed with faith, clickers, and rulers, they kept us classmates under control at St. James The Less School.

I spent eight years at St. James, having education poured into me by the exiled nuns. I hated their discipline but loved their stories about Ireland. None of them told a better Irish tale than Sister Mary Aquinas.

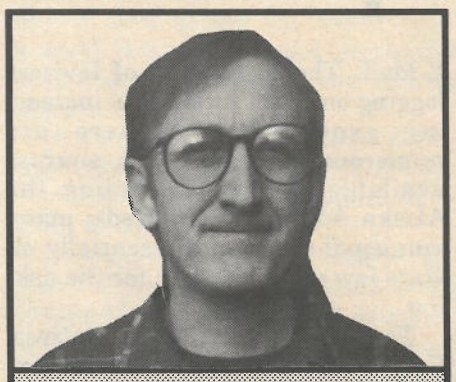
She brought to the Daughters of Mary and Joseph her distaste for tinned meats and a dream of dying for her faith in Communist China. Sister did suffer for her faith. Not, as she had hoped, in the rice paddies of Red China. Her martyrdom came at the hands of me and the other savages who invaded her 5th grade classroom at St. James the Less.

I was well marked by the time we first said morning prayers in Sister Mary Aquinas's class. The night before she had been warned by my 4th grade teacher.

"Watch out for Danny Branch," Sister Anna Marie advised Mary Aquinas, "The devil may get his soul before Advent." He didn't, but it was not, as the good sisters would say, for want of trying.

Sister Mary Aquinas believed that the consumption of tinned meats by children made them misbehave. On our first day in class, she surveyed each lunch bag of her 65 students. Children sent to class with cheese sandwiches were allowed seats in the back of the room. Liverwurst sandwiches earned places in the middle. Anyone eating tinned meat was placed in the front row.

Sister, aware of my reputation,



Dan Branch

was not surprised to find me happily munching away on Wonder bread and spam wedges. Looking into my very Scandinavian face, she clucked in disapproval and told me it was too bad that my sister got all the Irish blood from our sainted mother.

Sister was a tall woman with some girth. She would stroll up and down the isles of the class, mostly in control. Punishment came quickly, often without merit. When force failed her she would drift to the back of her room where the cheese-eaters sat. There, while the class bad boys decorated the back of her veil with spit wads, Sister would stare at the dead-dry chaparral hills that formed the first obstacle between her and Ireland.

"Oh children," she would croon, "It's raining now in Ireland, a land so green it hurts your eyes to look upon it. Someday I'll return. By God's grace it won't be in a coffin." Putting down my spit wad shooter, I would close my eyes and see Sister's soft, rich land. By Easter, I shared her love of Eire.

I managed to graduate from St. James without a criminal record. Sister Mary Aquinas and the other Daughters of Mary and Joseph sent me off to high school with academic discipline, a box of guilt, and strong love for County Cork.

When my grandmother, Grace Whalen, left me $700 in travel money in my 19th year, I flew to Europe. Saving Ireland for last, I wandered around Italy, Germany and England before taking a Welsh ferry to Southeast Ireland. A girl named Colleen made the crossing with me. We had met the night before in a chip shop near the Swansea Youth Hostel. Irish nuns in Seattle had primed her for our pilgrimage.

"It is green," Colleen said when we pulled near the Quay. We wandered toward the Cork Road past a soccer field full of uniformed school kids. The boys wore ties and shorts. They welcomed us to Eire with a shower of rocks. This was the first of many Irish experiences that didn't fit Sister Mary Aquinas' Gaelic tales.

Colleen and I were short of bus fare so we hitchhiked over to Cork. A fish truck picked us up. Colleen, with her Irish good looks, rode in the front seat next to the driver while I sat on some crates of aging whitefish in the back.

After kissing the Blarney Stone and thumbing around the Ring of Kerry, we found ourselves in Limerick, trying to find our way to the edge of town. We wanted to see the wild lands of Connemara but no one would tell us the way. While my partner waited outside, I entered a chip shop and faced a freckled girl with eyes the color of Ireland's flag.

"You're man and wife?" she asked before we could speak.

Colleen replied, "No."

"Brother and sister then?"

When we denied blood ties, she closed the door on us, muttering something about "there'd be none of that in this blessed house."

We didn't even get to ask her for separate rooms.

We slept in some ruins that night and spent the next day trying to find a way out of Connemara, a land of small white houses and stone field fences. No one rose to build a peat fire before 10 in the morning. Without Gaelic we couldn't read the road signs, so we positioned ourselves on a roadside stone fence and waited for a ride. No cars came the first morning.

In the afternoon a local priest offered to take us back to civilization the next day when his youth group went on a bus tour of Galway. Fortunately, an English family in a beat-up Hillman wagon gave us a lift before sunset.

"We want to practice our American," the mother said.

I knew little about Northern Ireland before that summer. This was 1970 and The Troubles hadn't made the TV news. Crossing the military checkpoint at Derry, we walked through the Bogside. Scruffy kids in that poor Catholic part of town stalked us behind graffiti-stained walls.

We were happy to leave the Bogside until the machine gun nests and

I snuffed out the candle between finger and thumb. Was it the left hand
Hacked off at the wrist and thrown to the shores of Ulster?
Did Ulster Exist? Or the Right Hand of God, saying Stop to this and No to that?

— From "Bloody Hand" by Ciaran Carson

"Excuse me miss," I asked, "Do you know the way to Connemara?"

"But which way have you come?" she replied. It's the way they pass the time in Limerick, asking tourists to mispronounce local names. Tongue-tied, I left to try another shop. Another freckled beauty with electric green eyes asked me where we'd been. By chance a tweedy-looking guy was picking up some take-away in the shop. Eyeing Colleen, he offered to drive us there himself.

In seconds we were in his Mercedes heading towards Galway Bay. As usual I rode in the back while our benefactor impressed Colleen with lies about the summers he had spent with the Kennedys in Massachusetts. On the way to Connemara, he stopped at a Galway Pub to recite poetry and feed us raw oysters. Colleen washed hers down with a bitter and lime. I had a Guinness. I was impressed with his poetic presentation, and the fact that he paid for our drinks.

The road into Connemara crosses miles of bog hills which had a disagreeable effect on Colleen's stomach. Soon the Galway oysters forced their way out. Some of them ended up in our friend's car. He dropped us off at the next crossroads town. Drawn by singing and conversation floating out of the only pub, we walked in and silenced the place. Looking into the now quiet faces of our ancestors, we asked for a bed and breakfast. They directed us to "the old crone's place across the way."

"It's a pound for bed and the breakfast," she said opening the door. Seeing two young people weighed down with backpacks, she blocked our entry with her rib-thin body.

rolled barbed wire on the Protestant bridge came into view. British soldiers driving armored Land Rovers hurried us through to the Protestant side of Derry. An ice cream truck vendor gave us a ride to the edge of town. While he was setting up for business, an English patrol stopped to buy.

"Sorry, sold out," the ice cream guy said.

The soldiers showed pain but moved on. They still believed that they could win the locals' hearts. In six months they would lose such innocence.

A long-haul lorry driver offered us a ride to the Antrim Coast.

"Are you Protestant or Catholic? " he asked as we settled in for the ride. When we answered, he gave the road a hard stare and told us that he once believed in God.

Colleen still wanted to see Belfast, but I had felt enough hate. We parted near the terminal for the Scottish Ferry. Colleen started crying while I unloaded my rucksack from the back of the truck. I didn't understand her tears, for we were just friends. Twenty-five years of watching Northern Ireland tear itself down the middle has given me a clue.

Ireland paints a different stain on every memory. Sister Mary Aquinas carried her Ireland to California in a green velvet pouch. A polished thing, she could take it out to break the back of home sickness. While I was her student, my Ireland was a perfect lushness. After the visit, it faded. Now it rides with me in an unseen bag—jumbled memories and Colleen's tears.

Pray for peace.

ATTENTION!

MEMBERS OF THE LEGAL PROFESSION VISITING ATLANTA FOR THE 1996 OLYMPIC GAMES

The Atlanta Bar Association will be hosting social and educational activities for judges and lawyers who will be visiting Atlanta for the Games. If you would like information about these functions or the Games, please contact your Bar Association to obtain a questionnaire to submit to the Atlanta Bar Coordinating Committee for the Olympics. The questionnaires are due by March 1, 1996. After you complete and return this questionnaire, you will be provided with information responsive to your interests about Atlanta, the Games, and activities the Atlanta Bar can offer during your visit. If you prefer, you can contact the Atlanta Bar Association by telephone at (404) 521-0781 or facsimile at (404) 522-0269 for more information.

Torts

New thresholds in intra-family tort liability

About a year ago (March 10, 1995), the Supreme Court issued its opinion in *Myers v. Robertson,* 891 P.2d 199 (Alaska 1995). Mr. and Mrs. Robertson had two sons, Sidney, age 13, and Stephen, age 9. They left the children at home while they went to the museum. While they were gone, one of the family's vehicles rolled out of the garage and down their steep driveway. Sidney, probably attempting to stop the vehicle from rolling downhill, was injured in the process and died a short time thereafter.

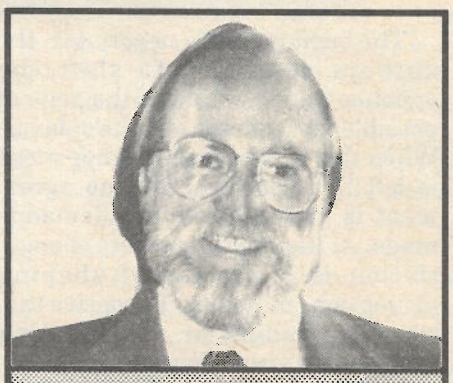
The Robertsons sought capable counsel. Olaf Hellen, recognizing potential conflicts, directed the Robertsons to their own counsel and advised them that Sidney's estate would be asserting claims against them, as would their son Stephen, through family friend, Linda Myers, who was ultimately appointed guardian for Stephen and personal representative of Sidney's estate. Mr. and Mrs. Robertson always believed that they were negligent in failing to properly secure their vehicle in their garage. They were insured by Allstate. Allstate believed Mr. and Mrs. Robertson were not at fault. These opposing positions generated conflicts that ultimately led to the appointment of Ted Pease to defend the Robertsons. Mr. Pease was instructed by the court to do so at Allstate's expense. However, he was not to report to Allstate.

The jury will no longer be left scratching its head about what in the world is going on when mom sues dad or child sues parents.

The case proceeded to trial without disclosure of Allstate's interest in the case, even though Allstate had, by then, intervened as a party.

Variously through the proceedings, Allstate preserved two major defenses. It first asserted that the court lacked subject matter jurisdiction because there was no true adversity, thus no standing, between the estate on the one hand and Mr. and Mrs. Robertson on the other. Secondly, Allstate contended that Mr. and Mrs. Robertson, at least as to the estate's claims, would be the beneficiaries of any recovery. Allstate contended that Alaska public policy barred the Robertsons, as negligent parties, from benefitting from their wrongful conduct.

The tension between the Robertsons' role as defendants and their belief that their own acts and omissions had contributed to their son's death persisted through the trial and forced Mr. Pease, their defense counsel, to impeach his own clients during those proceedings. The Robertsons argued on appeal that they were denied independent counsel paid for by Allstate because their attorney impeached their own testimony and argued for jury instructions that were contrary to their view of the truth.



Michael Schneider

The jury ultimately determined that the Robertsons were negligent, but that their negligence was not the legal cause of Sidney's death or Stephen's emotional injury.

The court held that adversity is a basic requirement of standing and that there is no subject matter jurisdiction in the absence of standing. *Id. at 203.* While confirming that no direct action could be brought against Allstate as the Robertsons' liability insurer (*id.* at 204, n.4), the court held that, where defense counsel was paid by Allstate, but had no duty to report to Allstate, and "conscientiously and effectively presented the Robertsons' defense" (*e.g.,* argued that they were not liable . . .), an adequate adversarial relationship existed between the parties, and the trial was "not a sham and was properly allowed to proceed" even though the Robertsons wished to lose, and thought they should lose, at trial. *Id.* at 204.

Taking a slightly different approach, Allstate argued that the Robertsons, beneficiaries of Sidney's estate, were the "true plaintiffs", thus killing adversity and subject matter jurisdiction. *Id.* at 205.

The court held:

> Where any recovery by the estate would not be paid directly to specified individuals, the beneficiaries to the estate should not be considered the plaintiffs. Therefore there is no jurisdictional bar to administrator's negligence action against parties who might otherwise stand to benefit from their wrongdoing. (*Id.*)

This, however, is a highly technical response to the substantive question posed by Allstate, "Does Alaska public policy allow wrongdoers to benefit from their own negligence?" Treating this issue separately and reversing the trial court, the Supreme Court held that Alaska public policy precludes a negligent party from obtaining any part of a damage award. That does not, however, mean that the *recovery* should be reduced. It only dictates, the Court held, that the recovery should pass through to other heirs, as if the negligent party had (in this case) predeceased the victim, or otherwise renounced his intestate succession rights. *Id.* at 207.

One of the court's most dramatic and far reaching holdings was that the carrier could not hide behind the skirts of a named defendant in an intra-family tort setting. Relying on Justice Dimond's concurring opinion in *Drickerson v. Drickerson,* 604 P.2d 1082, 1089 (Alaska 1979), the Court stated:

> we agree with the argument that, in intra-family negligence actions such as the present case, the jury should be informed of an insurer's status as the real party in interest in order to avoid confusion and prejudice against either the plaintiffs or defendants. (*Id.* at 207.)
>
> * * *
>
> Without explaining the basic alignment of the parties, and the Robertsons' role as purely nominal defendants, there was a risk of confusing the jurors and unfairly prejudicing them against the plaintiff. In reaching this result, we do not overrule *Severson* or alter the basic proposition that the existence of insurance is irrelevant to the issue of negligence or wrongful conduct. See Alaska Rule of Evidence 411. We simply conclude that, in cases such as this, the jury should be provided with some context in order to fully and fairly evaluate the case and the testimony before it. Here, the fact of insurance could have been admitted consistent with Evidence Rule 411 because that information would tend to show the potential bias or prejudice of the Robertsons as witnesses. (*Id.* at 208.)

Despite this holding, the Court concluded that the trial court's failure to disclose Allstate's participation was harmless error. *Id.* at 208.[1]

The most dramatic impact of this decision will be the disclosure of insurance interests in intra-family tort cases. The jury will no longer be left scratching its head about what in the world is going on when mom sues dad or child sues parents.

The case will have an equally profound effect on the day-to-day tactics and politics of handling these claims. Any time a child is injured, the defense asserts the parents were at fault. These assertions of fault run all the way from the standard "if you hadn't brought the kid into the world, he/she wouldn't have been hurt . . . " to legitimate arguments that the parents failed to supervise their child or otherwise contributed to the unfortunate outcome at hand. This case makes it clear that these claims can proceed to judgment and that the damages are not to be reduced because of the participation of a family member in causing the harm in question.

Benner v. Wichman, 874 P.2d 949 (Alaska 1994), holds that fault won't be apportioned to those not in the lawsuit and recognizes "equitable apportionment" as the cause of action by which defendants can bring in parties they believe are at fault. Alaska R. Civ. P. 14(c) makes it clear that a plaintiff can obtain a judgment against a party brought in by a defendant even though plaintiff has failed to assert an affirmative claim against that party. In the future, plaintiff's family members, third-partied in by an original defendant, will be defended by their homeowner's carrier (or other relevant carrier) because of their very real monetary exposure under A.R.C.P. 14(c). Plaintiff's attorney will not be forced to defend the conduct of the non-client family member; this will be done by their insurance carrier's chosen defense counsel. The third-party family member's carrier will likely be disclosed to the jury under the authority of Myers. Seeing that intra-family claims are not reflective of some bizarre family dysfunction, juries will probably be more objective in allocating fault. An allocation of fault to plaintiff's family member(s) in this setting will generate a recovery for plaintiff out of family insurance assets.

[1] Justice Compton, in a partial dissent joined in by Justice Bryner, pro tem, strenuously and ably argued, citing to *CHI of Alaska, Inc. v. Employer's Reinsurance Corp.,* 844 P.2d 1113 (Alaska 1993), that the error was not harmless and that the Robertsons should have had an attorney at Allstate's expense to argue their view of the facts. The dissent is well worth reading.

Getting Together

Win-win negotiations and deception— are they compatible?

Is it ever permissible to mislead the other side during a negotiation? Even if some traditional negotiators do use deception in negotiations, surely those of us looking for win-win solutions should never use such methods.

Or should we? Are there ever circumstances where deceptive tactics are permissible?

A recent national academic conference of negotiation scholars concluded that students should be taught win-win negotiation tactics only, and not taught traditional win-lose methods of bargaining. This course was supported by the majority of the academics present at the conference, as being the correct method for teaching ethical behavior on the part of students of the negotiation process.

Equating ethics with win-win or mutual gain bargaining has a familiar ring to it. Both proponents and critics of the win-win bargaining method have confused win-win bargaining with being good, ethical, and nice. In fact, however, such a view of the win-win negotiation method is not only wrong, it is actually counterproductive to the gains in effectiveness that can be achieved through use of the win-win negotiation method. Ethical negotiations and win-win negotiations are two separate and distinct concepts, each of

Drew Peterson

which is of critical importance to effectiveness as a negotiator,

Raymond A Friedman and Debra L. Shapiro have written a recent fascinating article on the subject: *Deception and Mutual Gains Bargaining: Are They Mutually Exclusive?* (Negotiation Journal, Vol. 11, No. 3, July, 1995.) By focusing on one particular bargaining strategy —deception— they attempt to clarify the distinction between ethics and win-win bargaining.

Friedman and Shapiro first acknowledge the debate on whether the use of deception in negotiation can ever be ethical. Is it ethical to use deception in negotiating with terrorists for the release of hostages? Most would agree that it is, if lives can be saved thereby.

The basic goal of a negotiator, the authors assert, is to shift the opponent's perception of the zone of possible agreement in one's favor. When this is done well, the opponent is left to decide whether no agreement is preferable to the demands made. At its core the process of negotiation is a process of shaping perceptions of reality. Deceptive tactics, like hiding or exaggerating information, can shape the perception of the negotiator's power.

Traditional win-lose negotiations focus on getting more for oneself by forcing the opponent to take less. Win-win negotiations, in contrast, try to help both sides obtain the maximum possible gain through four basic principles:

1.) separating the people from the problem;
2). focusing on interests, not positions,
3.) inventing options for mutual gain; and
4.) evaluating those options using mutually agreed-upon criteria.

Nothing in either negotiation method directly addresses issues of ethics or deceptive tactics.

According to Friedman and Shapiro, it is the second of the win-win principles that causes the confusion between win-win and ethical bargaining. That principle suggests that win-win negotiators explain to their opponent what their underlying interests are. The opponent can then propose actions to meet such basic needs at the least possible cost. Disclosing one's interests does not say to disclose all bargaining cards, however. Principles of win-win negotiating do not necessarily suggest disclosure of one's alternatives to a negotiated agreement, nor one's true reservation price, nor the amount of money in the bargaining budget, for example. Yet all such information is of extreme relevance to the final position which will be acceptable, even if all underlying interests are revealed.

Moreover, the reason that the win-win method has for disclosing core underlying interests is not that being honest about such issues is inherently ethical. The reason for being honest about one's interests is that it can help you to get a better deal. If others know what really matters to you, they can try to satisfy your needs in the way that is least costly to them.

The authors also assert that confusion comes from the fact that win-win and win-lose bargaining methods are improperly framed as mutually exclusive alternatives. Most negotiations are a combination of the two methods: They include both opportunities for joint gain and opportunities for grabbing more from the other side. Strategies that are wise for creating win-win opportunities may be opposite those that are helpful for claiming final advantage in negotiations. Deception about interests may be disruptive for creating, while deception about positions and power may be helpful for claiming. One of the main challenges to negotiators is learning how to balance these two elements.

The win-win bargaining method does teach negotiators not to deceive the opponent about their interests. But it makes the prescription based upon effectiveness, not ethics. When ethics and the win-win method become confused, several problems can occur:

- negotiators may miss distinctions between ethical and unethical behavior that exists in traditional negotiations;
- they may miss the true benefit that the win-win method provides, and
- they may think of the win-win method as naive and avoid using it.

Friedman and Shapiro point to the fact that there are many ethical constraints on deception under the traditional win-lose negotiation method. Some forms of deception are expected, while other forms go beyond acceptable limits. While traditional negotiators may not be completely honest with their opponents, they do place limits on deception and will withdraw cooperation from those who cross the line.

The authors point to three primary benefits of teaching win-win negotiation methods that do not depend upon the "do-not-ever-be-deceptive" message.

First, such training can simply help students recognize that there can be a win-win aspect to virtually all negotiations. This is a revelation to those who have been previously exposed only to the win-lose bargaining style.

Second, win-win training can help negotiators anticipate times when their emotions make them forget about seeking mutual gains. Understanding the win-win method goes a long way towards helping negotiators "separate the people from the problem".

Third, win-win training can help negotiators use win-win methods somewhat more than they traditionally do. This shift in the balance between win-win and win-lose methods can lead to substantial improvements in negotiation effectiveness.

With the growth of attention to the win-win bargaining method, it is important to make clear the distinction between ethical negotiations and win-win negotiations. Practicing the win-win negotiation method does not require negotiators to make themselves vulnerable through comprehensive self disclosures. It only says that is makes no sense to deceive the opponent about your interests. Win-win negotiations need to comply with the ethical constraints of negotiations, just as do the traditional win-lose bargaining methods.

Bar People

Tom Amodio, formerly with Birch Horton, is now with Rubini &, Reeves.....**Patrick Anderson** has relocated from Anchorage to Juneau.....**Linn Asper** has relocated from Haines to Saipan.....**Leonard Anderson,** formerly with the Alaska Court System, is now with Davis & Goerig.....**Thatcher Beebe** has relocated from France to Switzerland.

Margaret Berck has relocated from Juneau to Massachusetts.....**Joe Barcott & John Christopherson** have formed the law firm of Barcott & Christopherson in Mt. Vernon, WA.....**Marty Beckwith** is a Hearing Officer with the Medicaid Rate Advisory Commission.....**Ann Broker,** formerly with Cook, Schuhmann &, Groseclose, is now with the Fairbanks North Star Borough legal dept.....**Teresa Chenhall,** formerly with Chenhall & Treiber, is now with the Alaska Court System.

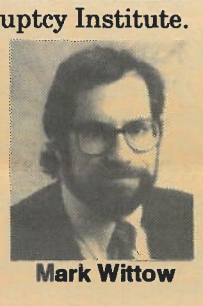
James Crawford, formerly with Faulkner, Banfield, is now with Legislative Affairs Agency, Division of Legal & Research Services.....**Holly Eager-Vance** is now with the A.G.'s office in Anchorage.....**Terry Fleischer** has retired after 27 years at Guess & Rudd and will study at the Centre for Medicine, Ethics &, Law at McGill University in Montreal, Quebec.....**George Freeman,** formerly with Jermain, Dunnagan & Owens, has opened his own law office in Anchorage.....**Elizabeth Friedman** is now with the Law Offices of Ken Jacobus.....**Lee Goodman** is now with Pradell & Associates.....**Harry Goldbar** has relocated from Palmer to Missouri.

Brent Johnson and **John Kim** have formed the law firm of Johnson & Kim in Anchorage.....**Bernadette Janet** is now with the Washington State Bar Association.....**Jeffrey Jessee** has left Advocacy Services of Alaska and is now the Executive Director for the Alaska Mental Health Trust Authority....**Vernon Keller,** formerly with the P.D. Agency in Ketchikan, is now with the law office of Mary Trieber.....**Mike Lindeman,** formerly with Patterson, Van Abel & Lindeman, has joined with John Abbott to form the firm of Abbott & Lindeman.....**Edw. McNally** is now with the firm of Altheimer & Gray in Chicago.....**Tim Middleton** is now with the Municipality of Anchorage Dept. of Law.

Steve Morrissett, formerly with Partnow, Sharrock & Tindall, is now with the Utah A.G.'s office.....**Daniel Patrick O'Tierney** has opened his own law office in Anchorage.....**Paul Stockler** has relocated from Anchorage to Maryland.....**Carol Spils** is now working for Sen. Murkowski's office in D.C.....**Keith Sanders** has left BP Exploration and is now with Cook Inlet Region, Inc.

Nicholas Theotocatos has relocated from Anchorage to New York.....**Bart Tiernan** has opened his own law office in Anchorage.....**Paul Wharton,** formerly with Hughes, Thorsness, et.al., is now with Hartig, Rhodes, et.al.....**Ron Webb** has relocated from Anchorage to Everett, WA.

Mark Wilkerson and **Audrey Faulkner** have left Guess & Rudd and are now with the firm of Wilkerson and Associates.....**John Suddock** has opened a sole practitioner's office at 500 L Street in Anchorage. He is continuing to practice in the areas of personal injury, product liability and legal malpractice.....**Dave Bundy** (Bundy & Christianson) and **Tom Yerbich** (sole practitioner) have received certification in Business Bankruptcy law by the American Bankruptcy Board of Certification of the American Bankruptcy Institute.


Mark Wittow

Mark Wittow has become a partner in Preston Gates & Ellis' Anchorage office. Wittow has a general civil litigation and natural resources practice. He is on the adjunct faculty of the University of Alaska, Anchorage, teaching natural resources law and serves as the Alaska reporter for the oil and gas exploration and development committee of the American Bar Association's Natural Resources, Energy and Environmental Law Section.

Prior to joining Preston Gates & Ellis in Anchorage in 1989, Wittow worked as the associate director of state/federal relations for the Governor's Office.

Faulkner, Banfield, Doogan & Holmes has Eastern Europe access

Commercial Law Affiliates (CLA), the world's largest organization of independent business and commercial litigation law firms, has gained access to the Federal Republic of Yugoslavia with a new affiliates, Lalin Radovan Law Office, in Novi Sad.

According to Randall Weddle, shareholder from CLA's local affiliate, Faulkner, Banfield, Doogan & Holmes, P.C., the addition of a Yugoslavian law firm will provide clients with invaluable entries into the Eastern European marketplace. "With a strong legal presence in Yugoslavia, we will be able to more effectively help clients take advantage of the economic incentives provided to foreign investors."

Foreign investors in Yugoslavia are allowed to; establish their fully-owned corporations, establish corporations together with other foreign or domestic entities, invest in existing domestic corporations, establish a branch office or affiliate, and take advantage of concessions.

The country is liberalizing foreign investment, restructuring the banking system and privatizing major industries to stimulate economic growth.

Investors are looking to Serbia's most promising economic sectors — agriculture, food-processing, copper mining, textiles, machinery, ship building, wood processing, and transportation.

Ben Esch to Nome Superior Court

Praising his legal experience and familiarity with issues facing rural Alaska, Governor Tony Knowles Feb. 16 named Anchorage attorney Ben James Esch to serve as Superior Court Judge in Nome.

Born in Washington, Illinois, Esch, 51, attended MacMurray College in Jacksonville, Illinois and earned his law degree at Arizona State University. Esch moved to Alaska shortly after graduation in 1973 and started work with the Public Defender Agency, including a year as public defender for Bethel.

"Ben Esch brings a wide array of experiences that are important to the Nome Court," Knowles said. "He brings to the bench a sensitivity to cross-cultural concerns and an understanding of such important issues as subsistence. He is familiar with the determined efforts of rural communities to confront the effects of substance abuse. He is experienced in civil and criminal law, and legal issues facing families and juveniles. Ben Esch has the legal experience and his work in rural Alaska makes him especially qualified for the court in Nome."

"I am looking forward to moving to Nome and becoming part of the community," Esch said. "I was born and raised in a town about the size of Nome and my work in Alaska has taken me across the state. Rural Alaska faces unique challenges and I believe the courts can help communities through speedy resolution of criminal and civil matters and firm, fair, and consistent sanctions for those who break the law."

The Nome Superior Court judge presides over a trial court serving Nome and 15 surrounding communities in northwest Alaska. In fiscal year 1993, the court handled 302 cases including 105 felony cases, 70 cases involving children's matters, and 127 civil matters including domestic relations cases.

—Office of the Governor

The Board of Directors and staff of Alaska Legal Services Corporation would like to thank the following contributors for their generous contributions to ALSC's Fourth Annual Fundraising Drive. The gifts received from these individuals and law firms, combined with several Memorial bequests, totaled $38,000!

INDIVIDUALS

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Williams, Teresa E.
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BAR ASSOCIATIONS

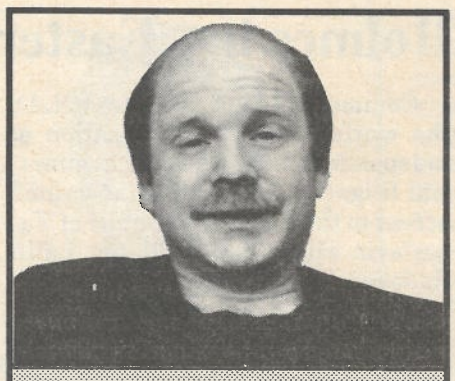
Anchorage Bar Association Juneau Bar Association

MEMORIAL BEQUESTS

Lucille DamrauCarol

Tales from the Interior

Window dressing



William Satterburg

Probably one of the most asked questions with which I am faced from clients, both male and female is, "What do I wear?" Usually, I tell them to wear clothing.

In some cases, the answer is clear. You either wear the blue or the orange uniform furnished to you by the jail. It is comfortable. The laundry is free, and the outfit generally doesn't stand out in the crowd.

Some clients aren't that lucky, and need greater coaching. Several years ago, I read an article that said the clothes that one wears can have a profound effect upon both the judge and the jury. I began to conduct a study of my own on the subject, and quickly learned that there might be some truth to the matter.

A rather colorful Nenana attorney, Marc Grober, was known for showing up in the Fairbanks courthouse, much to the consternation of then Judge Van Hoomissen, wearing all sorts of outlandish garb. Grober's multicolored checkered sports jacket, clashing tie, and threadbare pants were legendary. Certainly, more than one discourse in the courtroom centered around Grober's attire.

Although I often wondered why judges would complain, seeing that they had the freedom to wear those drab robes all day long and could literally wear anything they wanted underneath, one nevertheless had to recognize authority figures. Although Grober continued to fight his battle (bolstered by such contemporaries as the public defender's office in their tennis shoes, corduroy pants, corduroy jackets with the leather patches, and flamboyant ties), I generally chose the more conservative route. Eventually, I elected to trade in my J.C. Penney's polyester suits for something more sedate, made out of a living animal. Relatively conservative dress became the mode. I left the wild ties to the Stepovich clan.

Clients, however, are a different matter. During my first days of private practice, no longer employed by the government, I was faced with having to defend a young lady who had been criminally charged. The incident was alcohol-related. It was my job to prepare her to convince the jury that she had not been consuming alcohol on the particular evening in question.

As trial day approached, I explained to my client, quite carefully, that she would need to wear something pretty, professional, and sedate in nature. It appeared to me that she understood my request and I was confident that she would appear at my office the next morning appropriately dressed.

She did. Appear, that is. In point of fact, when she arrived, this buxom young lass was wearing a very tight-fitting t-shirt which had boldly emblazoned across her chest the slogan, "Loves to party," in glitter.

I panicked. Trial was scarcely 20 minutes away, and my reputation clearly was at stake. There appeared little left for me to do other than endure the embarrassment and agony. Then I had a rare stroke of genius.

On the way to the courtroom, I remembered that my old stand-by, J.C. Penney's, opened early. At the last minute, we were able to swing in and buy her a bulky knit sweater, at the expense of the Teamsters Legal Defense Fund. Although my client lost at the trial, at least she had a consolation prize.

As any attorney can appreciate, criminal defense trials are often difficult with respect to dressing clients, since the clients often do not have all of the appropriate garb available. When such crises occur, I now rush to the local Fred Meyer store, even if my clients insist on Nordstrom.

In a recent trial, one client, a basketball player in school, stated to me that he had never owned a sports jacket, and did not even know how to tie a tie. Although I could sympathize with his second problem, I did at least have a sports jacket from the Grober era. He tried it on. The sleeves came down to his elbows. He looked like he should be swinging from a tree.

I determined it was time to take him to Fred Meyer. The jackets were on sale and, to be candid, were quite attractive. We bought two: one for him and one for me. Not a bad deal at $19.95 each. After the purchase, it became apparent to me that I would not be able to wear mine during his trial, despite my instant love for it. We would have looked like Tweedledumb and Tweedledee. (His case, incidentally, had to go through a retrial and I had to forego wearing the jacket for another two weeks.)

Following the purchase, we went to my house on the evening before trial, where I showed him how to tie a tie. Much like my father used to do, I stood on a chair and leaned over him from the rear and proceeded to engage in my famous double-windsor knot. It is famous because it always twists around backwards. Moreover, not only is it famous, but it is the only knot that I know. My client recognized my abilities in this regard. The tie remained tied in the same condition for the entire trial, with my client simply slipping it over his head and off, depending upon the progress of the case.

Every so often, I end up with a client who is a sheet-rocker. Sheet-rockers are probably the most enjoyable group, because they view their spackle as part of their normal attire. The white mud adorns everything from facial hair to skin, glasses, and clothing. Ironically, Fairbanksans do not seem to mind, and view it as a common occurrence. I have never had any problem with sheet-rockers in the courtroom.

The same cannot be true, however, with respect to furnace people. My office carpet still bears the scars where one of our clients, who came in for a quick hearing, literally stood like the proverbial Pigpen of *Peanuts* fame, dropping greasy black soot all over the floor. Despite our best efforts, that grime still remains in place, a grim testimonial to the cleanliness of certain people we represent, although some people view it as a reflection upon counsel, instead.

One particular client I represented was an interesting one to say the least. A Deltoid (a person from Delta), my client has been accused of various and sundry crimes including DWI, resisting arrest, assault, and a few others. His story is an article in itself, but suffice it to state that when it came time for him to go to court, he had shed his Oshkosh coveralls for a delightful three-piece pinstriped suit . He had taken my advice to heart, although the suit had been used on many similar occasions in the past, based upon his record. I do believe that the suit made an impression on the judge, although it was somewhat embarrassing to be sitting next to yet another dandy who had clearly upstaged me in the process.

Which brings me to another case. Several years ago, I was representing a young man on a DWI charge. The complaintant who had identified my client had given a rather inaccurate description. For example, the accused reportedly had a beard, and was slightly bald. He was also somewhat stocky. He was obviously a handsome guy. Remarkably, the description matched myself. In reality, my client was obviously ugly. He had a full head of hair, was clean shaven, well muscled, and stood six feet one.

Seeing an opportunity for sure fun, I had my client dress as an attorney would, complete with suit , tie, and white shirt. Conversely, I proceeded to dress a little more shoddily. In short, I dressed as usual.

During the trial, when the accuser was being called to testify, I passed my case to my client. I told him to write a letter home to his mother on the legal pad which I also gave him. Not fully understanding what I was up to, but willing to follow advice under any circumstances, my client happily proceeded to author a letter.

As for myself, I crouched forward in my chair, picking imaginary calluses off of my hands occasionally looking up at the testifying witness with a look of disdain, hoping that no objections would be necessary.

When the moment came to identify the individual who had been driving the car, the state's star witness, as I had predicted, dramatically pointed to me and loudly announced

Continued on page 21

Window dressing

Continued from page 20

nounced that it was the short, balding one sitting in the chair. Shocked, I quickly stood up and pointed to myself in amazement. "Yes, you. You're the one," came the uninvited reply. The jury went into hysterics, whereupon Judge Crutchfield began to comfort the confused man, reassuring him that everyone makes mistakes. The result? A hung jury. (Otherwise known as a defense victory to us desperate ones).

The final incident regarding dress code occurred several years ago, when I casually commented to a client that studies had shown that juries respond particularly well to the color maroon. My client took that as a hint, apparently.

What I should have said, more appropriately, was that a sedate grey suit coupled with a clean white shirt and a maroon tie seems to have a certain degree of credibility with the jurors. My client misunderstood me, however, which I did not learn until the final day of trial. Eager to please both myself and to impress the jury in the dash to a compelling closing, he showed up in a full maroon suit. He looked like Santa Claus. Unfortunately, the jury on that particular day was not in a giving mood.

Regardless, I am still a strong believer that clothes have a distinct effect in the courtroom. Certainly, the lack of clothing has an effect. Whether or not there is any definitive correlation between the attire of the attorney or the clients can never be said for certain.

My occasional Anchorage co-counsel, Tim Dooley, thinks the whole idea is hare-brained. Yet he also scoffs at the Steve Cline method of using shoes for jury selection.

1996 CLE Calendar

DATE/CLEs	TITLE	CITY/LOCATION
#88 March 26 3.0 cles	Mandatory Ethics for Applicants (NV)	Juneau Centennial Hall
#21 March 28 5.25 cles	Labor Relations Committee	Anchorage Hotel Captain Cook
#06 March 28	Family Law Advocacy	Anchorage Hotel Captain Cook
#23 March 29 cles tba	Direct & Cross Exam with Lynn Gold Bikin	Hotel Captain Cook Anchorage
#88 March 29 3.0 cles	Mandatory Ethics for Applicants (NV)	Fairbanks Westmark Hotel
#28 April 5 3.25 cles	Chapter 13 Bankruptcy	Fairbanks Regency Hotel
#28 April 8 3.25 cles	Chapter 13 Bankruptcy	Juneau Baranof Hotel
#29 April 10 18.75 cles	Utility Finance & Accounting	Various Locations
#14 April 12 2.75 cles	International Law Issues	Anchorage Sheraton Hotel
#08 April 16 3.25 cles	Real Estate Issues in Divorce	Anchorage Hotel Captain Cook
#26 April 19-20 13.0 cles	AK Action Trust Trial Skills: Voir Dire, Opening Statement and Closing Argument in Non-Economic Cases	Anchorage Location TBA
#27 April 25 2.0 cles	Off The Record	Juneau Centennial Hall
#16 April 25 6.0 cles	Children & Divorce (NV)	Fairbanks Westmark Hotel
#17 May 3 2.0 cles	Federal Bench/Bar Off The Record	Anchorage Hotel Captain Cook

The Bar Rag
welcomes
articles from its readers

Estate Planning Corner

Life insurance on children

An article appeared recently in *The Wall Street Journal* questioning the value of insurance on the lives of children (O'Connell, *"Kiddie" Life Insurance Stirs Skepticism,* Wall St. J., Jan. 29, 1996, at C1, col. 2). The article asked: "If life insurance is meant to be used to protect one's dependents, why should a parent need or want to own coverage on a child?" The article quoted financial planners who said: "It doesn't make sense" and "Life insurance should be used only to cover true economic risk."

The article did not give enough attention, in this writer's view, to the best reason a parent might consider insurance on the life of a child, namely: to insure, to some extent, the child's insurability.

We all have clients who are uninsurable for one health reason or another. Many of us also have clients with young children who have suffered life-threatening diseases or injuries. These children will grow up to lead productive lives, but affordable, individually-owned life and disability insurance may be unavailable to them.

Many of this writer's clients insure their children's lives. For example, a client with three young children recently insured each of them. She did not buy the insurance as an investment per se. Her primary motivation was to guarantee her children affordable insurance from a reputable company should they ever need it. Along with the base policy, she purchased options to buy additional

Steven T. O'Hara

insurance on the child-insured's life. These options are exercisable without regard to the child's insurability.

With each policy, the client was interested not so much in the current death benefit, because she is not financially dependent upon the child-insured, but rather in the amount of additional insurance that may be purchased if and when the child needs it. Here she was able to obtain, with an initial purchase of $50,000 of death benefit, a maximum of $100,000 of insurance on each future purchase date, for a total maximum of $700,000 of additional insurance.

The right to buy additional insurance is triggered when the child-insured marries and also each time the child has or adopts a child of his own. If not already used, the options may be exercised on the child's 22nd, 25th, 28th, 31st, 34th, 37th and 40th birthdays.

The cost of any additional insurance purchased will be in accordance with the company's premium rate then in effect for the coverage purchased, based on the child-insured's age but not his insurability.

The client also viewed the life insurance policy as an indirect source of disability insurance for the child. So with the life insurance, she purchased the benefit of waiver of premium in the event of the child-insured's disability. She determined that the restrictions placed on this benefit were reasonable, and she liked that any additional insurance purchased down the road would also have this waiver of premium benefit to protect the child in the event of his disability.

A concern was that with inflation, $750,000 of insurance may not be adequate protection someday for the child-insured and his dependents. Consider the client's three-year-old. Suppose on the child's 22nd birthday, his mother gives or sells him the insurance policy (*cf.* IRC §§ 101(a)(2) & 2503(b)). Suppose the child then exercises the options to buy $100,000 of additional insurance on each available purchase date. Suppose an annual inflation rate of four percent over the 37-year period beginning in 1995. Finally, suppose all policy dividends, which are basically refunds of premiums, are not used to buy additional insurance (paid-up additions) but rather to reduce premiums.

Under this scenario, the child's life insurance protection at age 40 could be $166,000 in terms of 1995 dollars. The client determined that this possible result and its underlying assumptions were acceptable. The client figured that she and her child could increase the amount of insurance by having dividends buy paid-up additions. She also determined that the cost of the insurance was reasonable. For her, life insurance on children made sense.

Attorneys need to take public appointments

The Alaska Court System is presently establishing a list of Anchorage attorneys willing to accept appointment as counsel for absent parents in termination of parental rights proceedings in Child in Need of Aid cases. These appointments are mandated by Child in Need of Aid Rule 12(d) whenever the parent has failed to appear or when the parent's whereabouts are unknown.

Because no determination of indigency can be made, payment for these services is made by the Alaska Court System under Administrative Rule 12(e)(5) at the rate of $40 per hour. Refer to the rule for further details as to maximum payment and provisions for extraordinary expenses.

Attorneys who would like more information or are interested in being placed on the list are requested to send a letter of interest to William D. Hitchcock, Master, Children's Court, 303 K Street, Anchorage, AK 99501, 264-0420.

INVITATION FOR BID

Alaska Housing Finance Corporation (AHFC) is soliciting sealed bids for surplus legal books. For bid packets contact the Procurement Office at 562-2813. Bids are due March 24, 1996 at 2:00 p.m.

About the process

13 evaluated for judicial retention elections

BY WILLIAM T. COTTON

The arrival in your mailboxes in February of the 1996 judicial retention survey signaled the beginning of the Alaska Judicial Council's evaluation of judges eligible to appear on the ballot in November of 1996. The Council is looking for comments from attorneys and other members of the public about how well Alaska's judges are doing their jobs.

An independent agency created by the Alaska Constitution, the Alaska Judicial Council is charged by law with evaluating the performance of every judge and justice standing for retention in the state, and recommending whether each judge should be retained in office by the voters for another term. Seven citizens serve on the Judicial Council: three lay members appointed by the Governor, three attorney members chosen by the Alaska Bar Association Board of Governors, and the chief justice of the Alaska Supreme Court as chair.

This year, the Council is evaluating 13 judges who are eligible to be on the ballot in November:

First Judicial District
Judge Walter L. Carpeneti
Judge Michael A. Thompson

Third Judicial District
Judge Larry D. Card
Judge Brian C. Shortell
Judge Peter G. Ashman
Judge Natalie K. Finn
Judge William H. Fuld
Judge Stephanie Joannides
Judge James Wanamaker

Fourth Judicial District
Judge Ralph R. Beistline
Judge Richard D. Savell
Judge Charles Pengilly
Judge Mark I. Wood

Alaska's judicial performance evaluation program, created by the legislature in 1976, has operated longer than any other program in the nation. The Council continually improves the evaluations by testing new methods and refining procedures. The goal is to give Alaska's voters information about judges' performance to help them decide how to vote on retention.

In addition to the results of the Bar survey, the Council reviews many different kinds of information about the judges' skills and performance. The information includes:

- Written and verbal testimony from members of the public. The Judicial Council is one of a very few organizations in the nation using public hearings to gather comments on judicial performance. The Council solicits public input through newspaper ads and radio public service announcements,
- Written questionnaires for counsel who have appeared before the judge during the judge's most recent term on the bench;
- A written survey of all peace and probation officers in the state (the surveys are similar to the Bar survey, including detailed numerical ratings and extensive comments). Alaska is the only state to survey all peace and probation officers about judicial performance;
- A written survey of jurors who have served with the judges in the past two years. Again, Alaska is one of very few states that asks jurors about judges' performance;
- Written financial disclosure statements submitted yearly by the judges to the Alaska Public Offices Commission;
- Written Conflict of Interest statements submitted yearly by the judges to the Alaska Court System;
- Questionnaires completed by the judges describing their work during their term on the bench;
- Solicited and unsolicited letters from attorneys and other members of the public;
- Statistics about how often the appellate courts reverse or affirm the trial court judges' rulings, and how often attorneys file peremptory challenges against them, analyzed in the context of the judges' caseloads;
- A confidential written survey of court system employees (new in 1996); and
- Extensive additional investigation, including interviewing the judges when necessary.

In June, the Council members will meet to review the accumulated testimony and evidence, and to make findings and recommendations to the voters. Council members will vote on each judge individually.

The Council publicizes its findings and recommendations in the Lieutenant Governor's Official Election Pamphlet and through press releases statewide. As a service to the voters, the Council also buys advertisements in the newspapers just prior to the elections. The Election Pamphlet summarizes information (including survey results) gathered during the evaluation. More detailed information is available to the public directly from the Council.

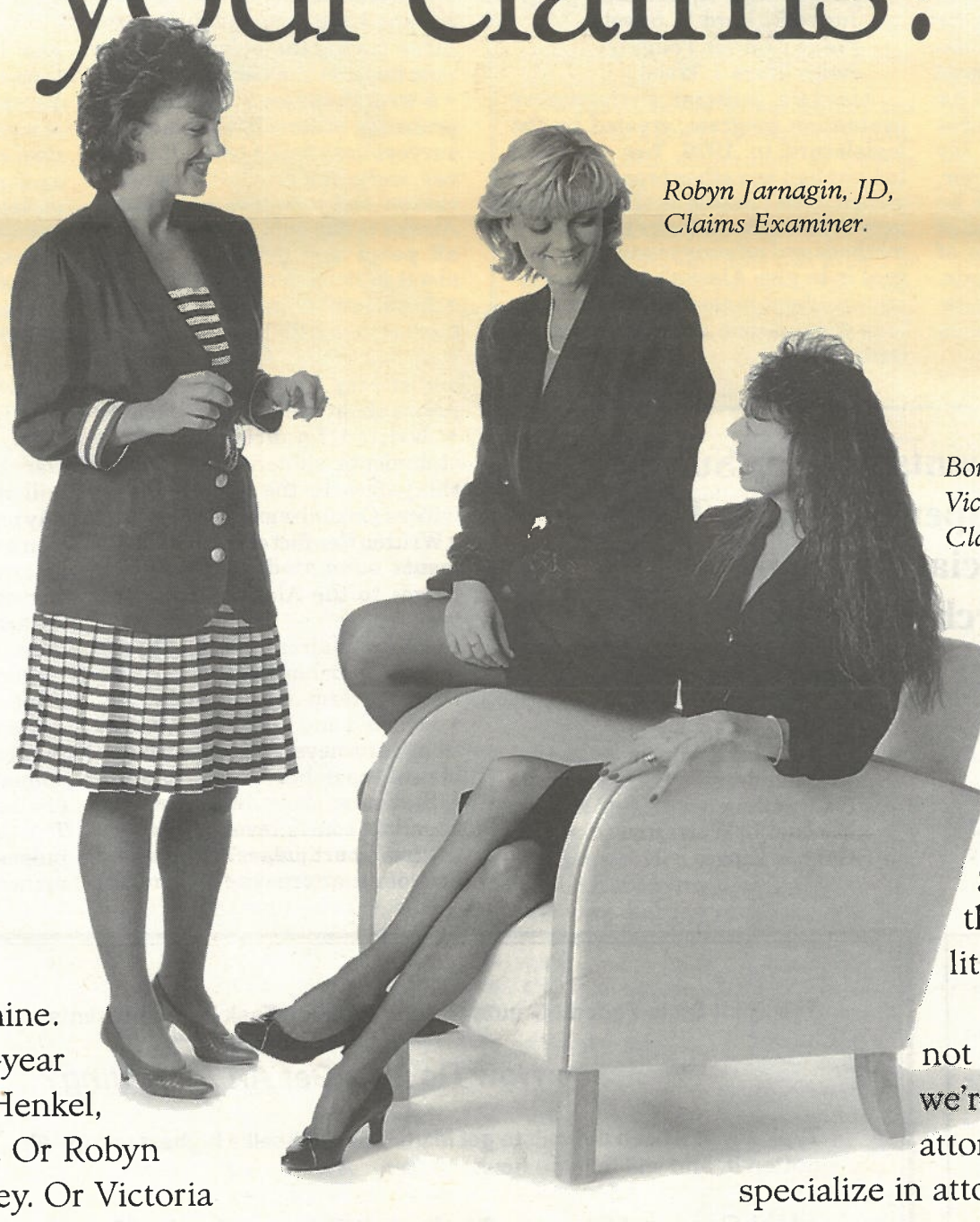
Note that the 1996 Bar surveys included pages for all judges who will be eligible to stand for retention in 1998. The questions for 1998 judges were brief but important; the results will apprise them and the Council of any problems before the actual retention evaluation. To ease the work for attorneys filling out the retention survey, the Council will send out a separate questionnaire later for the pro tem judges.

Because the Code of Judicial Conduct prevents judges from campaigning unless they are opposed, the Judicial Council's evaluation gives voters valuable information that otherwise would be difficult to obtain. The Council's findings also help the judges evaluate their own performance, where needed.

List of Applicants for Bar Survey Anchorage Superior Court, Third Judicial District March 11, 1996

Peter G. Ashman
Marshall K. Coryell
John E. (Jack) Duggan
Kari L. Bazzy Garber
Sharon L. Gleason
Mary Anne Henry
Dan A. Hensley
Elizabeth "Pat" Kennedy
Brant McGee
Sigurd E. Murphy
William B. Oberly
Nelson G. Page
Eric Sanders
Nancy Shaw
Michael L. Wolverton
Gary A. Zipkin

Wouldn't it be nice if your liability insurer's claims people actually understood the issues behind your claims?



Victoria Orze, JD, Claims Examiner.

Robyn Jarnagin, JD, Claims Examiner.

Bonnie Henkel, Vice President, Claims Manager.

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