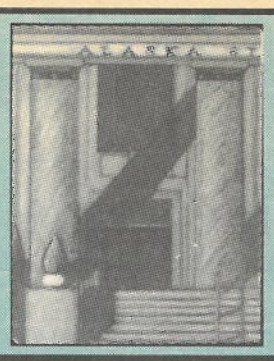
ALASKA BAR ASSOCIATION
ANNUAL CONVENTION
MAY 8 - 10, 1997
CENTENNIAL HALL, JUNEAU



Inside:

- LEGAL SERVICES SURVIVAL
- SERIAL PIGEON MURDERERS
- POETRY RETURNS • TECH NEWS

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The Alaska BAR RAG

VOLUME 21, NO. 2 — *Dignitas, semper dignitas* — MARCH-APRIL, 1997

Alternative vocations - charter sailing the world

BY SCOTT A. BRANDT-ERICHSEN

Taking a sabbatical to sail around the world is almost a cliche for the proper method to "enjoy the good life" or "live life to its fullest." Generations have fantasized about following in the path of Ferdinand Magellan's expedition to circumnavigate the world. That and similar fantasies flow from more recent adventures chronicled in Thor Heyerdahl's *Kon-Tiki* or in Robin Lee Graham's *The Boy Who Sailed Around the World Alone.* Few can afford to embark on such adventures without substantial planning.

Keith Stump of Ketchikan, has not only a plan, but an enterprise in mind when, in April of this year, he will be embarking on a four-year sailing trip around the world. He intends to spend time in numerous ports and provide a varied experience of world wide charters in the company of intermittent companions who will sail with him from one port to another. Stump, in setting up the expedition, has formed The Inside Passage Charter Company as a business entity under which his combination of cruises, races and charters can both finance a part of the expedition and provide a unique adventure experience.

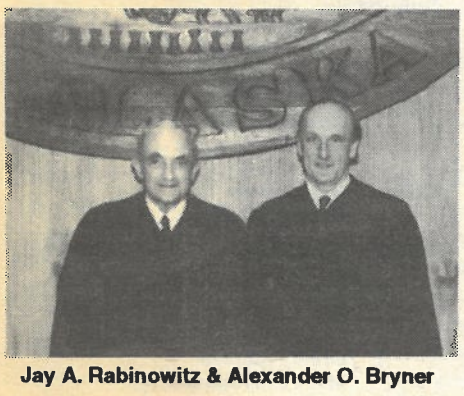
Stump's world tour is not merely a cruise, but a combination of races, cruises and passages. Stump has mapped out a complex route which includes 63 separate legs totaling 48,700 miles. He'll depart in April and return in August of 2001. The races include world-famous events such as the Sydney/Hobart, Fastnet and Key West Race Week races, as well as club races in Puget Sound, San Francisco Bay, Australia, New Zealand, the Mediterranean, England, the Caribbean, and the East Coast of the United States. Stump plans to write about the trip and videotape experiences in preparation for a feature length film and book after completion of the voyage.

Stump is a life-long Alaskan of 47 years and the son of W.C. "Bill" Stump, who practiced law in Ketchikan from 1934 until the early 1980's. (Bill Stump was the last president of the Territorial Bar Association and the first president of the State Bar Association.) Keith was admitted to the bar in 1986, and joined his older brother, Clark, in the firm of Stump and Stump. Keith will be suspending his practice for his four-year voyage. Prior to practicing law, Keith worked as a public relations director, photographer, writer and film maker. Stump first sailed in 1968, but learned the art of sport from Dave Johnson on his Pearson 10-meter Aeolos, and Bruce Hedrick of North

Continued on page 2

Silvergirl* is ready for the world. *Photos courtesy of Keith Stump.

Colleagues applaud newest justice at ceremony



Jay A. Rabinowitz & Alexander O. Bryner

BY PETER MAASSEN

It was over a quarter-century ago that newly annointed Justice Alexander O. Bryner first left his mark on the high court's work-product, as his old friend Susan Burke revealed at the swearing-in ceremony held March 6, 1997, in the Supreme Court courtroom in Anchorage. Back in 1970, while clerking for Chief Justice George Boney, Bryner drafted a decision regarding the scope of Chugach Electric Association's service area. The decision (at 476 P.2d 115) made subtle use of electrical puns throughout (*e.g.* "battery of arguments," "short-circuit this determination," "plugging in the various statutes," "the matter may remain static"), while at the same time presenting a serious and detailed analysis of important legal issues. Another Bryner product of the same era (which the *Bar Rag* investigative staff was unable to locate despite days of legwork) contains a congratulatory message — encrypted, and in French no less — to friends of his who were getting married in California.

See related story page 24

According to Burke and his other friends (whose name is apparently Legion), this is what we can expect from Justice Bryner: bright, articulate analysis of the law, with irrepressible humor—sometimes sophisticated, sometimes (gulp!) not—lurking slyly around the edges.

Chief Justice Compton presided over the swearing-in ceremony. Retiring Justice Jay Rabinowitz administered the oath of office, and the new justice's mother, Zoya Bryner, robed her son. Bryner's 16-year colleague on the Court of Appeals, Judge Robert Coats, led off the accolades, claiming, in words to be echoed throughout the proceedings, that among Bryner's more notable traits is "the ability to make the people around him perform at a higher level."

Judge Brian Shortell followed, representing the superior court bench. He more candidly identified Bryner's cardinal virtue as no-hands watermelon speed-eating, then succinctly tied together Bryner's passion for endurance sports (long-distance running and biking) and his tenure on the Court of Appeals: both require a high pain

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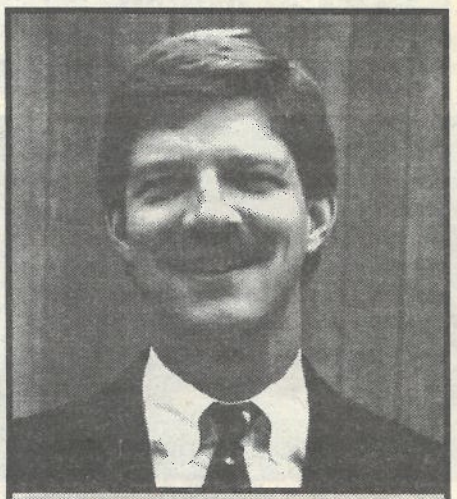
Editor's Column

Editor tries hand at etymology (or is it entymology?)



Peter Maassen

Confused readers of the *Bar Rag* continue to believe that the position of editorship brings with it, *ex officio*, an ability (or at least willingness) to answer silly questions about word usage and the odd turn of phrase. With some faint hope of bringing our lingual landscape into sharper focus, and a much greater hope of discouraging further inquiries, the Editor admits, denies, alleges and avers as follows:

Dear Editor:

The next time I hear someone say "Let's go back to Ground Zero," I think I'm going to blow up! Ground Zero is where the bomb goes off, isn't it? Who would want to go there? Who would want to go back there? Who would be able to go back there? Shouldn't we all be going back to Square One instead?

— Short Fuse

Dear Shorty:

"Let's go back to Ground Zero" is a harmless colloquialism used mostly by die-hard Cold Warriors whose most formative childhood experience involved the sound of sirens, the feeling of sharp little knees pressed against tender little ten-year-old earlobes, and the sight of someone else's initials scratched into the underside of a school desk. These folks were really living then; their nerves were all afire and their skin a-tingle; they relished the moment. They want to go back, especially now that they know they survived.

"Square One," on the other hand, is a reference to the old TV show "Hollywood Squares," particularly that square in the upper left-hand corner where Jonathon Winters pretended to be asleep. Few people who've been there want to go back, including Mr. Winters himself. A preference for "Ground Zero," while perhaps not completely rational, is thus not without historical basis.

Dear Editor:

Speaking of harmless colloquialisms, when did "out of pocket" evolve into a euphemism for "out of the office" or "out of touch?" The first time a client told me he'd be out of pocket for two weeks while vacationing in Hawaii, I thought he was envisioning his hotel bill. Since then, however, other people have advised me that they would be "out of pocket" for a time, hence unreachable. Does this make sense to you? What's the derivation?

— *In Pocket But Apparently Out of Synch*

Dear Pocket:

My dictionary, like yours, defines "out of pocket" as "paid out in cash" or "without funds or assets." But I've heard that other weird use too, and I've always wondered at it. On a hunch, I checked with my Dutch ancestors and discovered that the "Gouda packet" is a notoriously unpredictable passenger boat plying the Netherlands canal system around Gouda (pronounced "clearing-my-throat-noise ow da," not "goo-da," you cheese-heads) Passengers have been known to be stuck on board incommunicado for days longer than the printed schedules predicted. In my view, the term "out of pocket" probably owes its colloquial abuse to the Gouda packet.

And if you believed that one, here's another.

Dear Editor:

What is the difference between *pro per* and *pro se*? I recently stumbled upon the Alaska Supreme Court's opinion in *McShea v. State, Department of Labor,* 685 P.2d 1242 (Alaska 1984), a worker's compensation case involving attorneys' claims for fees. According to the Pacific Reporter (at p. 1243), Roger McShea appeared pro se, whereas A. Lee Peterson appeared pro per. Are the terms interchangeable, or did the two attorneys appear in different capacities? If I appear for myself, which should I be?

—*Pro proper usage*

Dear Pro:

There are two differences between *pro per* and *pro se*. First, *pro per* is an abbreviation for longer Latin words and *pro se* is not. Second, *pro per* used to have something to do with special appearances to contest jurisdiction, though that usage has long been lost in the murk of procedural miasma. There's no discernible difference in current usage of the two terms, and why Messrs. McShea and Peterson split on the issue may have to be the subject of further litigation.

Ultimately, the choice between *pro per* and *pro se* is yours, and the only ones who will ridicule you for your choice are those who know a heck of a lot more than you or I do and are therefore presumptively total social misfits. You may want to know, however, that our semantically sophisticated Supreme Court is considering whether to expand the glossary of self-representation. It has asked that I pass on the following suggestions for a vote of the Bar: *pro crustean*, for attorneys who stretch the facts to fit the law; *pro saic*, for attorneys who lack flair; *pro fit* center, for attorneys who request oral argument in every case; *pro gram*, for attorneys defending themselves against drug charges; *pro jectile*, for attorneys who should be thrown out of the courtroom feet-first; and *pro zac*, for attorneys who can't seem to wipe off that goofy smile.

Alternative vocations

Continued from page 1

Sails. His past sailing experience includes numerous types of vessels and includes both races and ocean voyages.

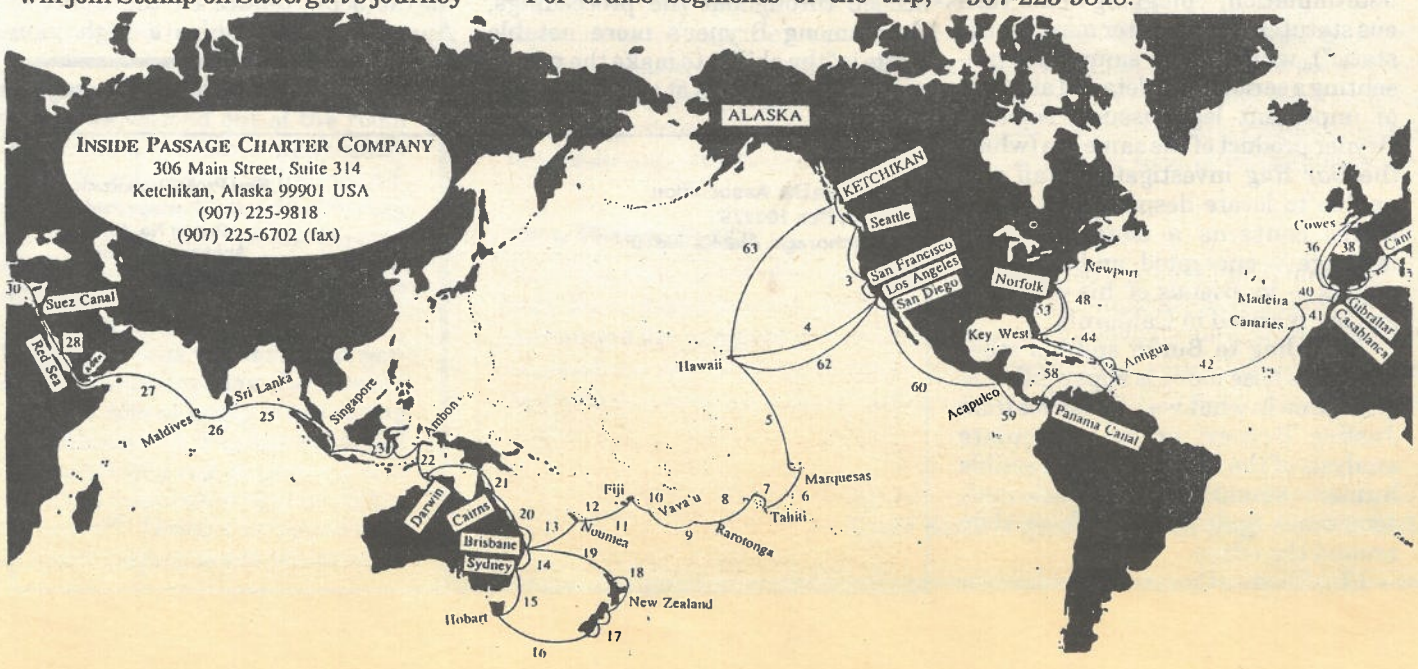
Stump has skippered *Silvergirl,* a Frer 38, for seven years now, and has had the added experience of teaching all his new crew members. He is a licensed U.S. Coast Guard Master and licensed U.S. Sailing Association Keelboat Cruising Instructor. *Silvergirl*, designed in 1988 and built in 1989, is a semi-custom fiberglass sailing sloop built by Carroll Marine in Bristol, Rhode Island. It has a 55' high, triple-spreader rig, with rod rigging and running backstays, and carries over 735 square feet of sail. Two private cabins, aft and fore-peak, each sleep two comfortably, and port and starboard settees in the main salon convert to bunks for two more. It also has a Yanmar 27-horsepower, three-cylinder diesel engine which pushes *Silvergirl* at just over 7 knots in fair seas.

As you can see from his itinerary, Stump has developed a very full schedule. One crew member and many guests will join Stump on *Silvergirl's* journey around the globe. For participating in the races, Stump plans on charging a crew fee, which will vary from race to race. Normally, six to eight crew will participate in races. All crew members must have experience appropriate for the race and "compatibility" will be a prerequisite for the week-long races.

Stump at the helm.

For cruise segments of the trip, Stump will conduct hired charters for anything from a few days to two or more weeks cruising around a local area (for example, the Whitsunday Islands inside Australia's Great Barrier Reef), and for one - to three-week excursions (such as sailing through the Aegean and Ionian seas to the Isle of Capri, or through the French Polynesian islands from Tahiti to Bora Bora). Ocean passages also provide an opportunity for crew and guests. On these trips, Stump will be looking for two people to help crew the boat and cover expenses; and some ocean sailing experience may be required.

With his project plans settled, Stump is ready to seek out crew to help him accomplish his goal of cruising and racing around the world. Stump welcomes ideas, experiences, contacts and advice which people may have which may be useful on the trip. He'll also be publishing a quarterly newsletter called "Race-Cruise News" and welcomes subscriptions ($10 per year). He also welcomes interest from anyone who would like to be a part of the experience. He may be contacted at 306 Main Street, Suite 314, Ketchikan, Alaska 99901, or at 907-225-8551 or 907-225-9818.



The Alaska BAR RAG

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

Bryner known as "intellectually lively"

Continued from page 1

threshhold and an unusual tolerance for mind-numbing repetition, traits which Shortell, who has often served *pro tem*, predicted would prove useful on the high court as well.

Representing the district court bench was Judge Peter Ashman, who reportedly got someone else to do the evening milking so he could come to the Big City and say nice things about the Supreme Court. Ashman's theme —"former district court judge makes good" — was subsumed in a meditation on the incredible distance between the ivory Fifth-Floor tower and the trial judges in the trenches, a distance which makes the latter greet the former's issuance of opinions each Friday with delighted guffaws and the slapping of Carhartt-covered thighs. Will Bryner forget his trial-court roots? Has he forgotten them already? Will the Supreme Court reverse its decision to allow Ashman to transfer to Anchorage, as Chief Justice Compton threatened at the close of Ashman's remarks?

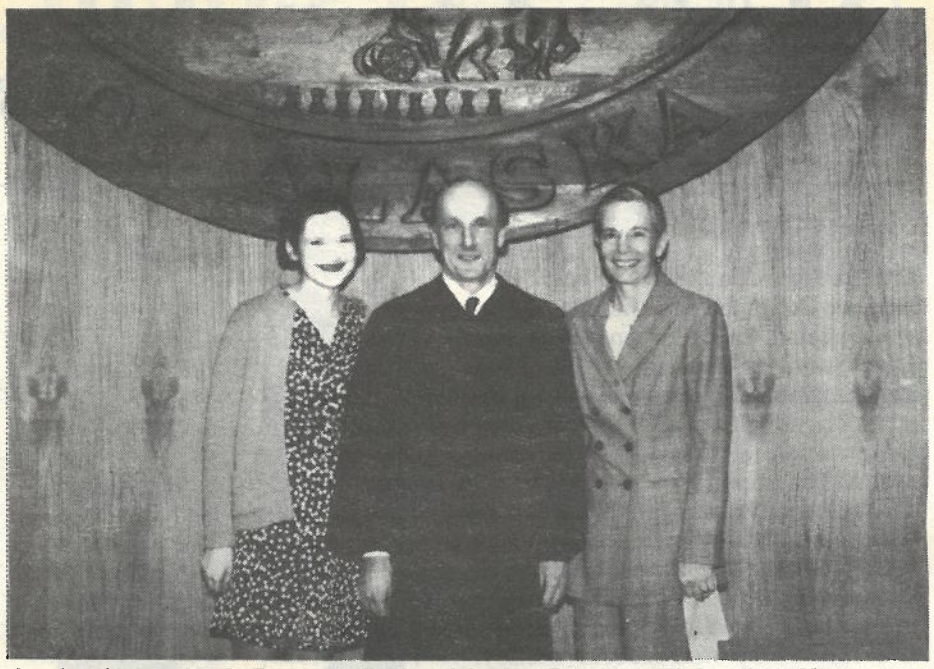
> *'...bright, articulate analysis of the law, with irrepressible humor—sometimes sophisticated, sometimes not—lurking slyly around the edges.'*

Susan Burke relayed the excerpts already mentioned above from "Alex Bryner: The Early Years," as well as Bryner's idea for revolutionizing appellate review: The Black-Robed Ones sit in a room full of video screens, monitoring trials in progress. They press a big button to prompt the flashing of a big red "Error" sign in any courtroom in which reversible error is detected, following it up with (mild) electric shocks to the judge if error persists. Apparently based on other evidence than this, Burke concluded that Bryner was "perfect for the job" of Supreme Court justice.

Art Snowden, retiring court administrator, is another longtime friend of Bryner's who was haled into the courtroom on the assumption that he would have something nice to say and instead metamorphosed into a cleverer version of Don Rickles. Snowden revealed a stream of Bryner pranks from years ago, including a long-running memo war between Bryner and Al Szal, whose proposed revisions to Court System rules were stymied when Bryner counterfeited counter-memos on Szal's own letterhead.

Jim Gilmore appeared on behalf of the State of Kansas, for lack of any more relevant group affiliation. As a long-time family friend of Bryner, his wife Carol Crump Bryner, and their two children, Paul and Mara, Gilmore was able to attest that (1) Bryner has not changed at all since his wild and crazy days in the early seventies, and (2) Bryner is a lifetime member of the Mickey Mouse Club.

But it was Alaska Bar President



Justice Alexander O. Bryner, wife Carol Crump Bryner, and daughter Mara. Page 1 and page 3 photos by John Tuckey

Beth Kerttula whose revelation left the lawyer-heavy audience groaning and gasping for breath. When she was clerking for Judge Bryner on the Court of Appeals 15 years ago, he sent his secretary downstairs to white-out Beth's name from the list of successful bar examinees posted at the courthouse's front door. The ruse failed only because Beth took a different door into the building that day; but she was clearly haunted for a long time by the close shave.

Besides his wacky sense of humor (?), Beth identified four other character traits which Bryner's new colleagues should take into account in figuring out the newcomer: (1) has huge appetite for food ("start working out now," she advised the Court); (2) is eager to get to the point; (3) is seriously competitive; and (4) is intellectually lively.

Bob Ely spoke on behalf of the Anchorage Bar Association and the host of non-criminal lawyers who have never read a Bryner opinion from the Court of Appeals. Ely said that he nonetheless knows Bryner as the regular source of "the wry comment, the self-deprecating remark." He also related having stumbled into an exhibit on the Bryner family, including the future justice himself and his father's famous cousin Yul, in a watch museum outside Zurich, Switzerland.

It was finally Bryner's turn to speak. He began by saying (to general hilarity) how honored he was to serve in the Fairbanks seat, but he soon segued into sincere gratitude to his friends, family, supporters, and Governor Knowles. He expressed a special debt to his former colleagues on the Court of Appeals, Judges Singleton, Coats, and Mannheimer, and he committed to taking each new case as it comes, on its own merit.

Long and sincere applause followed. Chief Justice Compton concluded the ceremony by claiming that the Supreme Court was already well aware of most of Bryner's "idiosyncracies" and looked forward to discovering the others. He welcomed the newest justice to the fold and predicted a memorable tenure.

Rabinowitz: 30 years of history

What would Alaska's legal landscape be like had Justice Jay Rabinowitz not sat on the high court for over 30 years, authoring nearly 900 published majority opinions? Each practice specialty in Anchorage will have its own list of often-cited Rabinowitz decisions, but among the many which affect the way we daily practice law are these:

National Indemnity Co. v. Flesher, 469 P.2d 360 (Alaska 1970) (insurer's duty to defend)

Ravin v. State, 537 P.2d 494 (Alaska 1974) (right of privacy and personal use of marijuana)

Volkswagenwerk, A.G. v. Klippan, GmbH, 611 P.2d 498 (Alaska 1980) (long-arm jurisdiction over foreign corporations)

Williams v. Zobel, 619 P.2d 448 (Alaska 1980) (residency requirements for Permanent Fund dividends)

Peterson v. Wirum, 625 P.2d 866 (Alaska 1981) (rules of contract interpretation)

Harned v. Dura Corp., 665 P.2d 5 (Alaska 1983) (negligence per se)

Tommy's Elbow Room v. Kavorkian, 754 P.2d 243 (Alaska 1988) (damages under the Wrongful Death Act)

Municipality of Anchorage v. Anchorage Daily News, 794 P.2d 584 (access to public records)

State v. Hazelwood, 866 P.2d 827 (Alaska 1993) (immunity for oil spill reporters)

You can say that again

From the transcript of a recent trial in Kotzebue:

Q. When you were growing up in Kotzebue did you know a gentleman named Louie Reich?

A. No.

Q. Do you...

A. Just a — just their son.

Q. What was the son's name?

A. Louie. He's still here in Kotzebue.

Q. Louie Reich?

A. Yeah.

Letters from the Bar

Re: Let's get serious

When I realized that lawyer Wayne Anthony Ross had contributed all of the eight humorous courtroom anecdotes coming out of Alaska of the 150 in my book "The Lighter Side of Practicing Law," I told him I might accuse him of violating the Anti-Trust. Division of the Alaska Bar Rug [sic] if he didn't buy at least one $25 copy of my book. By letter he replied that I was unfair in not giving him a free copy of my book, as being a retired lawyer I was living on a pile of money while he was working as a slave trying to make a living.

What Ross doesn't know is that I am losing money, because many Bar publications won't mention that "The Lighter Side of Practicing Law" can be obtained merely by sending a $25 check, payable to "We, the Lawyers," to William F. White at 205 Berwick Road, Lake Oswego, Oregon, 97034, unless I buy advertising space which I can't afford.

I ask you, what should I do? I realize both the Alaska Bar Rag and Wayne Anthony Ross are both right and I am wrong.

Should I offer to let Ross pay the $25 in five monthly (5) $5 payments?

Or should I hire an attorney and sue Ross for discriminating between State and out-of-State book publishers; particularly if going to a federal court I can keep venue in the warm State of Oregon and not have to go to the cold State of Alaska?

I hope you or an Alaska lawyer can advise me.

— William F. White,
Oregon Bar No. 50124

Classified

ALSC President's Report

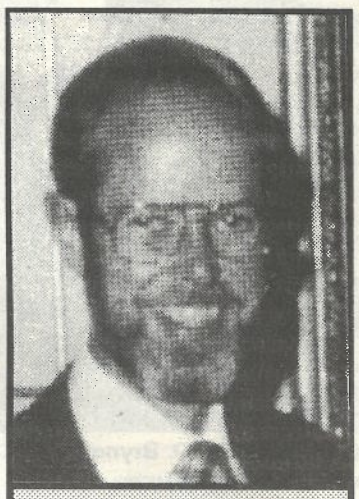
Legal Aid Society of Hawaii v. Legal Services Corporation

On Valentine's Day, Feb. 14, 1997, Chief Judge Alan Kay, of the U. S. District Court for the District of Hawaii, issued an order enjoining the Legal Services Corporation (LSC) from enforcing some, but not all, of the restrictions and prohibitions imposed by Congress on legal services programs around the country.

While many of us oppose the restrictions and prohibitions generally, as unnecessary, Draconian, and plain ol' unfair to poor people, the focus of the lawsuit is their application to activities funded by *non*-federal money. Congress has said that a legal services program that receives federal money through the Legal Services Corporation (LSC) is not allowed to use the money it receives from *other sources* (state and local governments, private foundations, bar associations, individuals) for legal activities that the current majority in Congress doesn't like.

In the Omnibus Appropriations Act for fiscal year 1996, which, as you will recall, wasn't enacted until April 26, 1996, Congress stated a number of restrictions and prohibitions. They were carried forward in the FY 97 Omnibus Appropriations Act.

P.L. 103-134 (110 Stat. 1321), sec. 504, lists the following activities that an LSC funding recipient may not do—even with its non-LSC money: (1) participate as counsel in a class action; (2) initiate legal representation or participate in any other way in "litigation, lobbying, or rule making, involving an effort to reform a Federal or State welfare system" (except to comment on public rulemakings or respond to a written request for information or testimony); (3) engage in legislative or administrative advocacy (with the same exception); (4) claim or collect attorney fees under a statute or court rule allowing them to the prevailing party (such as Alaska's Civil Rule 82); (8) represent aliens (except for certain narrow categories of lawful aliens and except in certain domestic violence cases); (6) participate in litigation on behalf of incarcerated persons; (7) defend a public housing tenant in eviction



Arthur H. Peterson

proceedings involving an allegation of the use of illegal drugs; (8) advocate or appose any redistricting plan, through litigation or otherwise; and others.

In addition, LSC funding recipients may not file a complaint or conduct pre-complaint settlement negotiations without first obtaining a written statement of facts from each plaintiff that must be kept available to federal auditors (and, potentially, to opposing parties). This is a requirement to which an opposing party is not subject.

Containing the outrage of the legal services community, *Legal Aid Society of Hawaii. et al. v. Legal Services Corporation,* Civil No. 97-00032 ACK, was filed January 9, 1997. The plaintiffs are five legal services programs (including the Alaska Legal Services Corporation), two nonprofit funding organizations, one association of indigent clients, and two individual legal services program attorneys. They sued the LSC, the agency responsible for enforcing the Congressional restrictions and prohibitions.

The plaintiffs challenged the restrictions on the use of non-LSC money as (A) a violation of the First Amendment rights of free speech and association of legal services organizations and their lawyers, clients, and donors; (B) a violation of the Fifth Amendment guarantee of equal protection, because they subject the poor to unique and onerous burdens in their efforts to obtain redress for legal grievances; and (C) a violation of the Fifth Amendment guarantee of due process, because they interfere with the ability of legal services organizations and their lawyers to provide their indigent clients with adequate legal representation.

In the court's February 14, 1997 "Order Granting in Part and Denying in Part Plaintiffs' Motion for a Preliminary Injunction," Judge Kay enjoined the LSC from enforcing the restrictions on the following activities, but only to the extent that they relate to the use of non-LSC money: (1) advocate regarding reapportionment; (2) influence an executive order; (3) influence an agency adjudicatory proceeding; (4) influence legislation at the federal, state, or local level; (5) litigate or lobby to reform welfare laws; (6) conduct a training program to advocate a particular public policy; (7) litigate on behalf of a prisoner; (8) participate in litigation on behalf of a person allegedly engaged in illegal drug activity in public housing eviction proceedings; and (9) participate in litigation regarding abortion.

The judge found that there is a substantial likelihood of the plaintiffs prevailing on the merits at trial, i.e., of the listed provisions being held unconstitutional. He also found, however, that the restrictions and prohibitions on the following activities do not implicate the First or Fifth Amendment protections: (1) representing certain aliens except in domestic violence cases; (2) claiming or collecting attorney fees; and (3) initiating or participating in a class action lawsuit. In the same vein, he held that the written-statement-of-facts, requirement does not offend the Constitution.

The judge's refusal to enjoin the attorney-fee prohibition hits the Alaska Legal Services Corporation especially hard, because our Civil Rule 82 has been a significant source of funding for us. During the past three calendar years, ALSC's litigation income has averaged $123,624, with some years seeing substantially more than that. That's a sizable chunk out of our FY 97 $2.3 million budget. And, again, this is a prohibition to which the opposing parties are not subject. Congress slashes the amount of federal money available, saying "get your funding from some other source," and then it prohibits us from relying on one of our major sources.

The litigation will proceed in due course, and now it's appropriation time again. President Clinton has requested $340 million for LSC in FY 98. That is the amount that was sought last year, when Congress approved only $283 million.

There is concern that some members of Congress are miffed about legal services programs seeking a judicial determination of the Constitutionality of the restrictions and prohibitions discussed above. We trust that that attitude will not release a retaliation against the legal services system. Complying with the Congressional mandate, programs have divested themselves of class actions and the prohibited kinds of clients. Now, relying on our system of justice, we seek a court ruling on the validity of that mandate as it pertains to non-federal money. What could be more reasonable?

Your vocal support for legal services funding and for lifting the restrictions and prohibitions on the kinds of legal help poor people can get would be most welcome. Please contact the members of congress—especially the Alaska delegation. And don't forget our state appropriation, currently pending in the Alaska Legislature.

It's A Long Day For Secretaries

(Sung to the tune of "It's A Long Way to Tipperary:)

Words By Lance Nelson

It's a long day for secretaries,
It's a long day we know.
It's a long day for secretaries,
But we pay you lots of dough.
It's an honor to be working for the finest boss you know.
It's a long, long day for secretaries,
Please get the lights before you go.

Never thinking of complaining,
Never seeking any praise,
Never claiming any credit,
Never begging for a raise.
Overtime work is not a problem, but extra pay insults your pride.
You don't need reward or glory
If your boss is satisfied.

You don't mind our procrastination,
You know genius takes awhile.
Running madly to the courthouse
At four-thirty makes you smile.
You just laugh at deadline pressure, simply shrug off heavy stress,
Gladly work right through your lunch hour
And leave the office looking fresh.

And at length, when you retire,
With a pension, well-deserved,
You'll look back with fond emotion
On the years you proudly served.
Carpal tunnel and arthritis will hardly seem a sacrifice;
To have served the finest lawyers
Will have been worth any price.

Legal services and tort reform: The poor in jeopardy

By Joe Sonneman

Cuts to Alaska Legal Services budgets and proposals for tort reform both seem likely to pass the legislature this year — and are equally likely to harm less wealthy Alaskans. This article reviews facts of Alaska's oil wealth and supposed fiscal gap; reviews the gap between reality and ideology or perception; notes political realities; and suggests organized reading and letter-writing as a possible action plan, because lawyers are trained to read and write and because letters alone may be effective now.

Oil income basics

The flow of Alaska's North Slope oil, beginning in June 1977, was projected to last only 13 years. But nearby oil fields and new oil recovery techniques keep oil flowing even now. The State of Alaska gets the industry-standard one-eighth royalty, based on wellhead prices (market price less transportation costs). This works out to about $150 million in state income annually for each $1 in the per-barrel price of oil. These oil royalties account for about 85% of total state government revenue.

Fiscal gap?

In recent years, some people claimed the state had a fiscal gap—a difference between the state's expenses and its projected income—which, over time, would prove financially harmful. Some economists — such as David Reaume and Gregg Erickson — did not believe the gap existed or was significant, given the State of Alaska's various 'savings accounts' such as the $20 billion Permanent Fund.

Oil price projections

The fiscal gap appears more likely when future state royalty income is based on a projected oil price of $16 or $16.50 per barrel. But for reasons which once included Saddam Hussein's burning of Kuwaiti oil, oil prices seem to keep going up, increasing state royalties and revenues, even as the Legislature keeps saying it needs to cut state budgets because of the fiscal gap. On March 7, Texaco's president and CEO said on Louis Rukeyser's "Wall Street Week" TV show that oil prices were now in $20-$23 price range.

Fiscal gap revisited

If Texaco's CEO is right, the average price of oil is about $21.50, or about $5 per barrel more than the $16.50 estimate the state usually uses. That extra $5 per barrel translates into an extra $350 million per year for the state of Alaska—an amount more than enough to bridge the alleged fiscal gap. This means further government cuts are not necessary for fiscal reasons.

Ideology rules

But Legislative leaders, claiming cuts of $70 million in last year's budget, plan to cut an additional $60 million this year. Why? Why plan additional cuts when income is increasing because oil prices are higher? Might ideological concepts underlie actions apparently inconsistent with fiscal realities? Is this part of an organized effort to cut public budgets, supposedly to save more in taxes Alaskans do not now pay?

Victims of excessive cuts

Unnecessary budget cuts do not apply to all Alaskans equally, if only because government programs help most those who cannot help themselves. Cuts in programs thus most affect those least able to withstand those losses. Among the affected are two groups of Alaskan attorneys' clients: Legal Services' clients and contingency fee clients.

Alaska Legal Services

Some in Congress and some in Alaska's Legislature have a long-run plan to end Legal Services —government-paid lawyers who provide civil litigation services for the poor (as public defenders do for indigent defendants in criminal law). In Alaska, the Legislature cut ALSC to $260,000 in fiscal year 1976, then to $100,000 in FY 97. In response, ALSC has closed offices, laid off employees, put people on part time, and increased eligibility requirements, among other strategies. Now, the Governor's budget only *proposed* $100,000 for FY 98, so further cuts risk ending ALSC altogether.

Tort reform?

Alaska's Legislature has tried for several years to enact another round of tort reform. Two years ago, the bill did not pass; last year, it passed, but the Governor vetoed it. This year, after the report of a bi-partisan task force, the law is likely to pass, with or without a veto that itself seems unlikely.

Reality: Reforms not needed

Alaska is one of just nine states which already cap punitive damages. Alaska is the only state to use the so-called "English rule" (Rule 82), under which litigation is discouraged by forcing losers to pay some part of winners' costs and fees. A *National Law Journal* article showed that Alaskans filed about 400 civil cases per 100,000 population in 1985 but about 160 cases per 100,000 in 1993. The bi-partisan Tort Reform Task Force found only 15 state court punitive damages awards in the last 10 years, of which only one exceeded $700,000. Statistics like these suggest Alaskans now need relaxation rather than reform in tort laws.

Subjective drive for reform

The task force said no punitive damage problem now exists, except in the minds of the business community. On a recent "Gavel-to-Gavel" TV show, Rep. Brian Porter (R-Anch; House majority leader and a principal tort reform proponent) did not refute Rep. Croft's (D-Anch) suggestion that Porter wanted the tort system to work like workers' comp: prompt payment (of lesser amounts), with less money to lawyers and system participants. Porter said that the bi-partisan task force (he'd been a member) did not get all the numbers. Porter also admitted that contingency fee arrangements allow those without money to seek legal redress, but he did not answer a person who asked how lawyers were to be cut out of the process (for example, if punitive damage awards went to the state rather than to the plaintiff). Porter still wanted change, claiming it would lower insurance rates.

Independent opposition to tort deform

Steve Conn, executive director of the Alaska Public Interest Research Group (AKPIRG), spoke to the Egan Forum (a Juneau Democratic luncheon group) March 5. His theme was that opposition to tort reform is to the '90s as support of civil rights was to the '60s. He argues that the bill will "shift costs to the victim and the community, forc[ing] the victim to settle for less .., mak[ing] it less likely a victim will find an attorney...." Conn noted that AKPIRG, being independent, did not face accusations of self interest so often leveled at attorneys who oppose tort reform. He also said that *no* reduction in insurance rates was guaranteed or even likely to follow tort reform, because Alaska's population is too small to much affect insurance rates. Conn says that the real or imagined tort law "crisis" was instead a "cover for ugly special interest legislation."

Torts deformed?

According to Conn, the bill would ignore inflation and lower existing 1988 pain and suffering caps from $500,000 (1988 dollars) to $300,000 (1997 dollars.) The bill would also cap punitive damages at three times compensatory damages (or, $600,000), directing half of any punitive damages to go to the state, not the victim. The bill requires periodic payments—which, Conn says, disrupt eligibility of those Alaskans otherwise entitled to public assistance. The bill further exempts hospital emergency room attendants hired as independent contractors, so patients between screams need ask to their doctors' employment status.

O.J. in Alaska?

One way of thinking about tort reform is to ask how the O.J. Simpson case would come out if the trial had been in Alaska under the proposed bill. I called that question in to the "Gavel-to-Gavel" show. Rep. Croft answered. He said that as Nicole did not have a job, her economic damages very likely might be zero. The proposal caps non-economic damages at $300,000 and punitive damages at three times compensatory damages. The result: an O.J. trial in Alaska under this bill would yield no more than a $1.2 million judgment, which O.J. perhaps could pay. Would Alaskans want that result?

Continued on page 7

STATE COURT NEWS

By Sharon Hotrum

As clerk of the Fairbanks Trial Court and assistant area court administrator, I wish to both inform attorneys of many court administrative matters and publicly relate my pride and appreciation to the supervisors of the Fairbanks Trial Court for their efforts directed towards improvements.

First of all, Area Court Administrator Ron Woods and I want to ensure that everyone is aware that Judge Ralph Beistline has been appointed presiding judge of the Fourth Judicial District. Judge Beistline replaces Judge Richard Savell, who provided leadership as presiding judge for six years (1991-1996). The entire administrative staff thanks Judge Savell for his service and support, and welcomes Judge Beistline. One of Judge Beistline's first acts was to appoint Judge Jane Kauvar as presiding district court judge.

All supervisors of the Clerk's Office have willingly consolidated other units into their departments to better serve the Bar and the public. This required each supervisor to immediately become proficient with the Alaska State Statutes and Rules of Court as they apply to new areas of responsibility. Each assumed additional responsibilities in reviewing management work flow and procedures as well as implementing adjustments. Supervisors and staff worked together in adjusting to the new work environment.

Shirley Nash, chief deputy of the trial court, former accounting/traffic supervisor, was the first supervisor to consolidate departments. Shirley illustrated that by combining the accounting and traffic departments, the court eliminated the duplication of accounting records. Cindy Bole, the present supervisor, was appointed deputy magistrate to perform specific paper functions which has enhanced our customer service. This year this department, with assistance from the records department, processed all PFD checks within 36 days.

Other department consolidations included:

Madge Kelleyhouse, court services supervisor, led the consolidation of the calendaring and jury departments. Additionally, Madge has assumed responsibility for transcript requests. Since consolidation of these functions, our customer service to jurors, attorneys and litigants has improved.

Cathie Strickland, appeals supervisor, orchestrated the consolidation of the Second and the Fourth Judicial District appeals. Cathie's expertise on appellate procedures limits the burden of training personnel for the various types of appeals in the smaller Second Judicial District Courts. Cathie also enjoys working with personnel of the second district.

The records department consolidated with the microfilm department. This required organizational skill to combine records of two departments for public use. This task was accomplished skillfully by the records supervisor, Jan Stroffolino.

The civil department merged with the transcript department which gave the flexibility of a second legal tech. Betty DeBoard, our civil supervisor, states this merger benefited the judiciary, outside agencies and the public as file information is entered and processed in the computer more timely.

Aly Closuit, probate master, worked with the probate and vital statistics staff in consolidation. The consolidation provided lunch hour access to the public for probate and vital statistic matters.

We all appreciate any concerns or comments you may have regarding our court management. I also witness the efforts of supervisors and staff members in their dedication to provide the service our customers deserve. I am proud of the employees of the Fairbanks Court System and give special recognition to the supervisors for their efforts to examine means to improve our court.

Through the consolidation efforts, each supervisor assumed additional work-load and staff responsibilities for which they were not previously trained. The responsibilities were eagerly accepted by the supervisors without additional monetary compensation but with a commitment to improve our court system and court service. If you believe the supervisors are deserving of positive recognition for their efforts, please let them know.

Kafka takes the February Bar as the clock ticks

By Mike Wirschem

During lunch on Wednesday, February 26, I looked across Humpy's and noticed a friend who had been studying for the bar exam. She was sitting with her back to the bar, and I thought that I would lower my eyes so as not to put any pressure on her to say hello. I remembered that same lunch break (yes singular, thank God) and didn't figure she needed any small talk.

As for the bar exam, I can only say that my MBE checklists, triggers, and mnemonics (like "SCAT") are far in the past. The slippery, sliding-scale slope of equal protection challenges hasn't been all that useful either. Am I doing something wrong (again)?

Probably not (again). There is another bar exam, however, that patiently waits to be discovered and then administered. Listen:

After sitting in the lobby for what seemed like a brief visit to the DMV, I was motioned in by the proctor. The door closed behind me. The room I found myself in was brightly lit, but there were no windows or even so much as a photon of natural light. Lights on the ceiling provided the faces of those in the room with a purplish glow. Said proctor indicated that the six individuals seated on my right as well as the six individuals seated on my left would judge my performance and render a score. "Score big," I thought as I noticed a video camera mounted over the doorway though which I had entered.

I was served with a list of tasks as the clock commenced running. The first station was a counter with a pot of fresh coffee sitting on it, of which I consumed three mugs. The proctor directed me to a desk chair at the end of the room that she raised to the height of a stool. I sat on it and looked straight ahead. One after another the twelve judges stood directly before me and stared into my eyes. Despite the waves of amphetamine running in my blood, I fought to keep my eyes fixed on the space in front of me. I kept my focus straight-on, despite the fact that several of them peered at me from various side-angles.

> *'After college I didn't find myself being pulled in any particular direction, and at the same time I figured that attending law school would be a pretty dynamic experience.'*

When the last of the judges returned to her seat I walked over to another counter with a telephone on it, picked up the receiver and made my shaking fingers dial the number printed on the task sheet. The air in the room was warm. The ringing ended and a voice began, "How did you become interested in the field of law?"

"After college I didn't find myself being pulled in any particular direction, and at the same time I figured that attending law school would be a pretty dynamic experience," I answered.

"Why do you want to be a member of the Alaska Bar?"

"I don't have any definite plans to practice law, but I think it's a prudent career move at this juncture," I replied.

"Where do you see yourself ten years from now?" she asked.

"I think . . ."

"Mister Wuuh, Wuurrk, Worksham, is it?" the judge nearest to me blurted as I began to speak.

"Ah, yes ma'am?" I said as my eyes darted to meet the stare of the one who had addressed me.

"Is that your answer, sir?" inquired the voice on the phone.

"Mister Workshem," said the judge, "can a private university prevent its newspaper from publishing a story that reports allegations of sexual harassment against one of its professors?"

My hand gripped the phone so hard it quit shaking for a moment. I could feel a single drop of sweat moving slowly floorward underneath the hair that hung down onto my temple. I looked at the questioning judge as I talked into the phone.

"Uh, when I envision myself ten yeas from now I see a panel of five robed judges sitting high above me on a bench. They are listening to me. I am giving the introduction to an oral presentation that I have worked for months preparing," I said.

The judge scowled at me from her seat. To her I said, "Yes, indeed your honor..."

The person on the phone began speaking again. "What do you predict will be your biggest challenge if you pass the Alaska Bar Exam?" she said.

"...the university may legally do so," I said. At the same time the phone went dead.

"May a public university prevent its newspaper from publishing a story that reports allegations of sexual harassment against one of its professors?" the judge asked.

"No, your honor, it would be unconstitutional to censor the article just because it reported wrongdoings by a professor," I replied.

"Why?" retorted the judge.

"Because the public university's attempt to censor the article is an act by the government that would probably be prohibited."

"Well, why are the two cases different?" The first drop of sweat ran down my jawline, and I tried to be casual as I wiped it away with the side of my thumb. I could feel several more getting ready to launch down the side of my face. At the same time I glanced at the clock which the proctor had reset and started running from zero. Time for a new station.

I walked over to a copier machine that stood next to a bookcase full of reporters. The task list had a dozen cites on it, and I scanned the shelves in the bookcase for the reporter that contained the first cite. The reporters were totally unordered on the shelves. I opened the book, pressed the crack onto the glass of the copier and pushed the "copy" button. My fingers picked apart pages and moved the books into position as fast as I could go. Out of the corner of my eye I noticed a judge making notes on her scoresheet. The clock on the wall ticked off my case-gathering proficiency score.

After finishing the copying I stood with a shiny black stapler in my shaking hand trying to get the corner of the pages between the jaws of the Swingline. I collected the required set of cases one after another and then handed the stack to the proctor. She took the cases, stopped the clock, and reset it to zero.

Then she motioned me over to the eye-contact seat which she lowered back into an office chair. The task listed was simply "endurance requirement." As I sat down on the chair, the twelve judges silently got up and went into another room. The proctor looked at me sitting in the chair, set the clock running once again, and then followed the judge out. I looked up at the lens of the video camera and tried to divert my thoughts away from how much time I was accumulating.

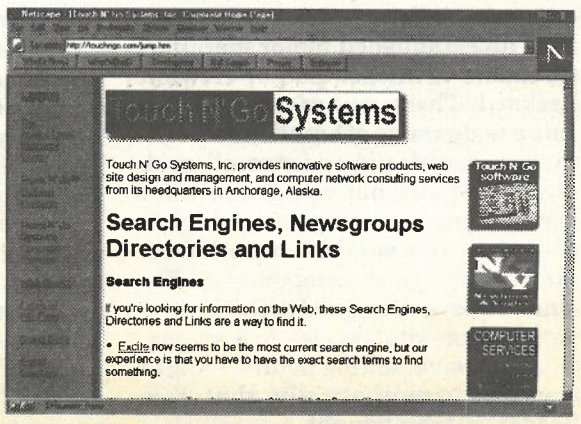
Lawyer offers a free on-line law library

If your law office hasn't yet gotten its computer technology up-to-date and made the leap into cyberspace, you may have just found a good reason to do so.

The Alaska Legal Resource Center *(http://www.touchngo.com/lglcntr/index.htm)* gives you instant access to legal information on the Internet, and it's absolutely free of charge. This innovative web site includes a current and complete set of the Alaska Statutes and Administrative Code. It also provides Alaska Supreme Court Opinions and Court of Appeals Decisions dating back to 1991. New Supreme Court Opinions are available on the Friday they are issued—almost always by 4:00 p.m. All of these resources are word searchable, and the Supreme Court Opinions are organized with a subject index. The Alaska Rules of Civil Procedure, Rules of Evidence, Appellate Rules, and Criminal Rules are also available. More specialized rules, such as the Probate Rules and Child in Need of Aid Rules are available as well. You can also access a United States District Court page, with the local rules and other information from the United States District Court.

The Alaska Legal Resource Center is the brainchild of Anchorage Attorney Jim Gottstein, operated in conjunction with his computer consulting company, Touch N' Go Systems, Inc. "We started pulling the Alaska Supreme Court Opinions off the Court System's dial-in bulletin board system in February of 1995, and it just took off from there."

The Alaska Legal Resource Center now attracts over 5,000 user visits a week. "In addition to Alaskan attorneys, we get a lot of average people, from all over the world, who are looking for legal information and referrals. Many people have suggested that we start charging for this information," says Gottstein, "but we are committed to keeping the service free." It is, however, possible for local attorneys to advertise at the website, starting as low as $10 per month. Ken Hintz, Touch N' Go's marketing director, says, "There is no easier or less expensive way for attorneys and other law related businesses to establish an Internet presence than getting a listing with the Alaska Legal Resource Center." In addition to providing valuable exposure for Alaskan attorneys, the advertising helps to defray some of the cost of maintaining this valuable service.



Burgess Allison, author of *The Lawyer's Guide to the Internet,* called The Alaska Legal Resource Center "my absolute favorite site on the Net." It received *Legal Resources via the Internet's* highest rating of 5 stars. It's also a *Reader's Digest's* Look Smart site, and has received Magellan's 3-star rating. According to Gottstein, the Center is easy to use and offers ready access to more than just Alaskan legal information. It offers links to United States Supreme Court Cases on the Internet, all of the Federal Circuit Courts of Appeals, the Federal Rules of Civil Procedure, United States Code and Code of Federal Regulations. The Alaska site also has links to legal periodicals on the Internet, such as Lawyer's Weekly and other resources, such as expert witnesses.

Does the Alaska Legal Resource Center eliminate the need for more formal legal research methods? No, says Gottstein, but "you will be amazed at how quickly and easily you can jump-start your research. It allows you to access all of this information from anywhere, at any time of day or night." (For a partial listing of materials available at the Alaska Legal Resource Center, see the box.)

In addition to maintaining the Alaska Legal Resource Center, Gottstein's company, Touch N' Go Systems, also offers computer consulting services, and has developed Touch N' Go, the Desktop In-And-Out Board.This innovative new software for computer networks replaces old-fashioned in and out boards, and allows everyone in your office to know where everyone else is at the touch of a button. There are versions of the software available for offices with 2 to 4,000 employees. For more information, you can contact Touch N' Go Systems at 264-6333, or E-mail Jim Gottstein at jimgotts@touchngo.com.

FIND THESE RESOURCES IN THE LEGAL CENTER

Case Law	Constitutions, Statutes & Regulations	Rules, etc.
• Alaska Supreme Court • Alaska Court of Appeals • U.S. Supreme Court • Search all US Circuit Court of Appeals Decisions on the Internet via LII • Decisions of the U.S. Supreme Court • Second Circuit, U.S. Court of Appeals • Third Circuit, U.S. Court of Appeals • Fourth Circuit, U.S. Court of Appeals • Fifth Circuit, U.S. Court of Appeals • Sixth Circuit, U.S. Court of Appeals • Seventh Circuit, U.S. Court of Appeals • Ninth Circuit, US Court of Appeals • Tenth Circuit, U.S. Court of Appeals • Eleventh Circuit, U.S. Court of Appeals • Federal Circuit, U.S. Court of Appeals	• Alaska Constitution • Alaska Statutes • Alaska Administrative Code • U.S. Constitution • The Declaration of Independence • U.S. Code • The Code of Federal Regulations • U.S. Congress Information Bills and Other Legislative Information (Including the Congressional Record) • Federal Register Daily Table of Contents • Links to other states' materials	• Alaska Rules of Civil Procedure • Alaska District Court Rules of Civil Procedure • Alaska Adoption Rules • Alaska Child in Need of Aid (CINA) Rules • Alaska Rules of Probate Procedure • Alaska Delinquency Rules. • Alaska Rules of Administration • Alaska Rules of Criminal Procedure • Alaska District Court Rules of Criminal Procedure • Alaska Rules of Appellate Procedure • Alaska Rules of Evidence • Alaska Rules of Evidence Commentary • Local U.S. District Court Rules • Alaska Rules of Professional Conduct • Alaska Bar Association Ethics Opinions • U.S. Supreme Court Rules • Federal Rules of Civil Procedure • Federal Rules of Evidence • U.S. Tax Court Rules • U.S. Bankruptcy Rules

Legal services and tort reform

Continued from page 5

Exxon Valdez

Another popular question is: "How much would Exxon have to pay under this proposal, had the *Exxon Valdez* gone aground when Alaska tort law was thusly "reformed?" I leave the answer for you to work out, but suggest that Exxon could have been assessed far less than $5 billion. Would Alaskans have wanted that result?

Veto unlikely?

Alaskan lawyers should not think that the Governor will automatically veto tort reform. According to his January 23 letter to Alaskans, the Governor called the Task Force recommendations "a real breakthrough" which would "increase the efficiency of the courts and access to justice, and reduce frivolous lawsuits and defenses." Remember, the Governor appointed the task force, whose members included legislators desirous of reform. His letter asked for support of the bill and for community work to ensure passage; he was apparently encouraged by, *inter alia*, proposals for shorter statutes of limitation.

What to do?

Both possibilities—of Legal Services cuts and of tort deform enactment—are similar: They most affect people with the least income; and a strong Republican majority in both houses of the Alaska Legislature may be able to pass them. And because the Governor proposed only $100,000 for ALSC this time and sent out a letter urging support for tort reform, these measures are similar in another, equally unfortunate way. Faced with this difficult position, what is to be done?

Action plan

At a prior Egan Forum, I asked how new legislators would recommend increasing ALSC budgets. Rep. Hemphel (D-Anch.) said that statewide opposition had to contact legislators. Sen. Lincoln (D-Rampart), in a 1996 Egan Forum appearance, said that handwritten (not pre-printed) *letters* get the most attention: phone calls are too readily forgotten or mis-translated by staffers, and electronic POMs [public opinion messages] too frequently are electronically discarded or disregarded. AKPIRG's Conn said that Alaskans have first to *read* the tort reform bill, before they object to its provisions. The Juneau Bar promised ALSC $2,000 directly, but, knowing that the Congress and Legislature can cut faster than JBA can add, I got the JBA also to create a separate fund to which members can contribute. The fund is for hiring lobbyists and community organizers—effective activities which Congress barred LSC from doing with its own money, whether or not that money comes from government sources.

Write a letter, ask friends to write more

The word from those who seem to know is to write letters and get others to write still more letters. Letters should be in the writer's own words and tone of voice, addressed to the writer's own state senator, legislators, and the Governor. But lawyers may wish to encourage writers to use common themes, especially increasing Legal Services budgets and opposing tort reform.

Naturally, likely defendants and their attorneys, as well as LSC opponents, may well take an opposite approach, but, frankly, they seem already so far in control that they need not bother. They are the likely winners here, and Alaska's poor, injured, and middle economic class the likely losers.

Everyone *else* needs to take pen or computer in hand and write, write, write your legislators and Governor. Write, right now.

Good fortune.

West, Thomson Legal Publishing merge

West Group is the new name of the former West Publishing and Thomson Legal Publishing (TLP) companies, which were merged following The Thomson Corporation's $3.425 billion acquisition of West publishing in June, 1996. Headquartered in Eagan Minn., West Group, with approximately $1.1 billion in annual revenues and some 9,500 employees, is the largest provider of information to the U.S. legal industry.

Brian Hall is promoted to CEO

Brian Hall was appointed CEO and said the new name, West Group, is a major step in combining the two companies. "Introducing the West Group name to the marketplace is another significant step forward in the full integration of our legal products and services," Hall said.

Choosing hardware for small office networks

By Joseph L. Kashi

My five year old Novell Netware file server has been getting a bit long in the tooth. In fact, one of our file server's secondary hard disks recently failed, motivating people to buy a replacement server.

The first question was whether to buy a complete file server from a major manufacturer or build it ourselves. It's obvious that if you're willing to spend enough money you can get essentially anything you want from an established major manufacturer like IBM, Compaq or Hewlett Packard. These manufacturers provide a wide range of excellent off-the-shelf servers designed for small, mid-range and company-wide network applications, typically at a higher price than a server custom built from comparably good components. Extended warranties, good problem solving, and on-site service are strong, but expensive, selling points. I might mention, parenthetically, that Tom Boedeker, who bought a small IBM PC320 file server for the City of Soldotna, has been very happy with IBM's technical support and believes that he got good value for IBM's higher purchase price.

Because I felt comfortable designing and building my own file server, I decided to custom build the best possible equipment at the best possible price. However, you may face different constraints and thus should strongly consider buying an off-the-shelf file server.

> *'Reliability, not speed or price, is the paramount consideration when buying any new network file server.'*

Off-the-shelf advantages

There are several good reasons to purchase a complete file server from a major manufacturer. For example, if only you can repair your home-brewed server and you're often out of the office, then there's no question that you'll need a system that includes on-site, 24 hour per day, seven day per week service by a reputable and stable manufacturer like IBM, HP or Compaq.

If you're typically in the office and able to deal with any problems, particularly in the first troublesome months after a new network server is deployed, then a home-brewed system may be quite economical IF your network is a relatively simple one that doesn't require complex software configuration. Regardless of what type of system you actually choose, you will face many of the same decisions and types of hardware.

The hardware that we'll discuss in this article and a second Bar Rag article should be suitable for networking a small to medium law office using Novell Netware, Windows NT Advanced Server, OS/2 WARP Server Advanced, or peer to peer networking with Windows 95/97 or OS/2 WARP Connect. Later this year, we'll discuss the pros and cons of network operating system software, itself.

What to look for in a file server

Reliability, not speed or price, is the paramount consideration when buying any new network file server. If the server goes down, so does your entire office, often at the worst possible time. (Murphy was a sluggish service technician who snacks on your backup tapes.)

Surprisingly, after reliability, the foremost criterion for deciding among commercially available small file servers is the number of available high speed expansion card slots. Everything seems to go faster these days and it's no surprise that we want our computers to run as fast as possible. With modern high speed Pentium processors and very fast hard disks, there's a need for correspondingly fast peripheral connections. The PCI bus has the broadest support and best speed among currently available expansion buses. It's fast enough to keep up with modern 40 MB per second Ultra/Wide SCSI hard disks. Most new high speed cards use the PCI interface and the cost of PCI cards is now comparable to that of the older, 16-bit, ISA cards. Almost all new high speed system boards include some PCI expansion slots and these are typically easier to configure than older ISA and EISA network cards and hard disk controllers.

> *'Everything seems to go faster these days and it's no surprise that we want our computers to run as fast as possible.'*

Limitations & options

PCI is thus a logical choice but it usually has a few limitations. In the first instance, you'll typically not have more than three or possibly four available PCI slots in most system boards, thus limiting the number of PCI connections. There are some systems that use a double PCI bus, allowing six or more expansion slots, but these are harder to find and more expensive, particularly from recognized manufacturers.

Unfortunately, practical network demands often outpace the limited expansion capabilities of current PCI system boards. For example, you'll often want to have two or three separate hard disk controllers, each running parallel but independent hard disks. This arrangement, called disk duplexing, provides the greatest degree of protection against data loss from a hard disk failure. There goes at least one, possibly two, of your PCI slots, unless you use a dual channel SCSI controller that places two separate PCI SCSI controllers on to a single card using only one PCI slot. You'll want to us comparable single channel PCI SCSI cards to control any tape drives and CD-ROM drives attached to the file server. There goes one or two more PCI slots.

If you're using the newer high speed Ethernet, either 100Base-TX or 100Base-T4, then you'll typically need PCI slots for those file server Ethernet cards because older ISA cards choke up and greatly reduce 100 megabit network performance. If you have but one PCI slot remaining, then you're limited to a single high speed connection between the file server and the faster segments of your network. That may not be enough for best performance and flexibility.

Often, in order to achieve best performance throughout an Ethernet network, you'll want to have several direct Ethernet connections to the file server, each servicing fewer client workstations. This is called segmenting and is one of the best ways to improve the performance of an Ethernet network without using very expensive, and we mean very expensive, network switching hubs or a hard to find Fast Ethernet card that incorporates several separate connections to the file server.

A system board using all four currently available PCI slots is thus limited to two or three SCSI controllers for hard disk access and for CD-ROM and optical jukebox connections, and one or two high speed Ethernet connections. And, that assumes that you can still find a good ISA VGA card to plug into one of the remaining expansion slots. These common limitations are much tighter than our earlier EISA file servers that had eight high speed EISA expansion slots available. You'll thus need to choose components carefully with an eye to both reliability and conservation of high speed PCI slots.

Overcoming the limitations

Currently, the most practicable way to overcome current PCI limitations is either to find a system board with six or more PCI slots (and these are not commodity items) or to install a system board that uses a combination of PCI and EISA peripheral slots. EISA, as you may recall, was the predecessor to PCI and, although not as fast as PCI, still offers a useful performance improvement over ISA. Many high speed PCI cards also have EISA counterparts, thus maintaining future expansion capabilities and software compatibility.

There are some disadvantages to EISA, however. It tends to be more difficult to configure than any other type of system bus, and EISA cards are invariably more expensive than their PCI equivalents. Adding EISA capabilities to a PCI system board costs a few hundred dollars, at a minimum.

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Choosing hardware for small office networks

Continued from page 8

Hard Disks

Ultra/Wide SCSI is the most appropriate hard disk type for any new, heavily used file server. SCSI drives tend to be more reliable for the heavy duty use expected in a file server and reliability, of course, is paramount. We restricted hard disk and hard disk controller choices to Ultra/Wide SCSI even though almost all PCI system boards include built-in controllers that run Enhanced IDE hard disks efficiently without using an additional PCI slot. EIDE drives will work with Netware, Windows NT, and OS/2 WARP Server, by the way, and can be a suitable drive choice where economy takes precedence over performance. Some EIDE drives, such as those made by Western Digital, seem to hold up well when used in small to medium office file servers.

I found that the IBM Ultra/Wide SCSI drives were the best choice for me. They were very fast, easy to install, reasonably priced and have an excellent reputation for reliability. I preferred the IBM Ultra/Wide SCSI drives because they were much less expensive than other high quality brands and because IBM's customer service and exchange policy is very customer friendly, unlike some other high end brands.

Ultra/Wide SCSI is twice as fast as its immediate predecessor, Fast/Wide SCSI and, because of circuitry advances, Ultra/Wide SCSI is, paradoxically, less expensive than its slower Fast/Wide SCSI predecessor. I avoided Seagate and Conner drives because of my own difficult experiences with their customer service, Fujitsu drives because the newer models seem to have installation and performance problems, and HP drives due to HP's high cost and imminent exit from the disk drive market. Quantum and Western Digital, and IBM are my preferred SCSI and EIDE disk drive brands.

I'll convert our still-functioning existing server into an emergency standby server, ready to take over in a pinch should the new server ever fail. To do that, we'll keep it connected to the network and periodically update any files and data on it. The one-gigabyte SCSI drives on our existing file server are currently mirrored to form a single redundant one gigabyte Netware volume. When we convert the old file server to an emergency server, we'll no longer use redundant disk mirroring but instead we'll use Netware to convert those two one-gigabyte drives into a single two-gigabyte Netware volume. As a result, our emergency standby server will then have the same storage capacity as our new file server and can function effectively as an emergency backup but without any redundant hardware.

> *'I'll convert our still-functioning existing server into an emergency standby server, ready to take over in a pinch should the new server ever fail.'*

CPUs and RAM

Using a Pentium Pro CPU is expensive overkill for small and medium office file servers, and there's little profit in using a 486 system that might be adequate for the moment but has little reserve capacity for future demands. Thus, a Pentium class system was the only one that made any economic sense. Cyrix's 6x86 CPU (most of which are physically manufactured by IBM) works just as well as Intel's Pentium, is very compatible, is often faster, and has a markedly lower price. Unfortunately, some 6x86 system boards limit your secondary SRAM cache to 256K, which could somewhat reduce overall file server performance compared to the 512K SRAM cache that some Pentium systems accommodate. I thus chose a true Pentium CPU and a 512K SRAM cache module only to find that the 512K cache modules wouldn't work. In the end, I used a slower 133 Mhz Pentium and was forced to reduce cache size to 256K cache, anyway. If I had known that my cache size was to be limited to 256K as a practical matter, I would have used a faster, less expensive Cyrix 6x86.

Rolling Your Own File Server

If you do not feel comfortable setting up your own network, then by all means you should buy an already configured file server from a first-tier vendor providing around the clock service and network software technical support. However, be prepared to pay top dollar for that hand-holding.

For my new file server hard disks, I chose two 2.16 gigabyte IBM Ultra/Wide SCSI hard disks. I'm using an Adaptec 3940 Ultra/Wide SCSI adapter, which incorporates two separate SCSI controllers on one single slot PCI card, each running one of those independently mirrored drives.

Because you'll have far fewer configuration problems if you use only one brand of SCSI controller and one flavor of ASPI SCSI interface software, I also installed two Adaptec 2940 PCI SCSI adapters to run our networked legal research CD-ROMS and our new 20 gigabyte HP 20LT optical disk library used for document imaging storage. Use a separate SCSI adapter for each type of storage device: one adapter for the hard disks, another for slow devices like tape and CD-ROM drives, and a third adapter for rewritable optical devices.

I used a third party Gigabyte 586HX system board because the Intel system boards then available to me did not support the parity checking and ECC RAM that is mandatory for reliable file server operation. I would use an Intel board with the 430HX chip set and parity RAM capabilities where possible, though, because of Intel's excellent reliability. The Gigabyte board has been quite reliable so far, though.

I do not have the capacity to run multiple Pentium processors although I could have purchased that capability for an extra $400-$500. I'm not sure how important multiprocessing capability is anyway because Netware is so efficient at file and print services that it really doesn't need the fastest possible CPU performance. Multiprocessing is most useful if you intend to use the file server for applications as well, such as database operations. My preference is a separate Windows NT or OS/2 applications server computer hooked up to the network. This approach is more stable, probably faster, and less expensive than running comparable applications on a single multiple processor file server.

In the next issue of the Bar Rag, I'll discuss how to protect your network from some preventable failures and how to network your legal research CD-ROM databases.

RealWorld solutions releases Agility® 3.05 software for the law office

RealWorld Solutions, Inc. has released a new version of the AGILITY® document assembly system. The product now includes the use of the mouse for attorneys who use the DOS operating system, among other improvements.

AGILITY enables law firms and departments to simply, quickly and cost-effectively draft documents from template documents. When attorneys draft a document in AGILITY, they answer questions in a window superimposed on the document. As questions are answered, the effect of each answer is seen immediately. The document is recreated continually. There is no separate merge step. Because attorneys are able to refer to the document while answering questions, change answers anytime from within the document, and see the results of their answers immediately, they are in complete control of the process of quickly creating draft documents.

Attorneys create the templates from their word processor documents in the AGILITY Prepare program. There is no need for programming skills or a complex authoring system. First blanks and decisions are added to a word processor document. Then, AGILITY Prepare sets up the questions to be defined using the information contained in the template. After the questions are completed, the template is installed in the AGILITY system. Templates can be completely changed using most word processors. New question blanks can even be added to documents already in progress.

RealWorld Solutions, Inc., is a privately held Massachusetts corporation, based in Cambridge. It was incorporated in 1988 to develop law-office automation software.

NEWS FROM THE BAR

Board of Governors meeting takes actions

At the January, 1997 Board of Governors meeting, the Board took the following actions

• Accepted a stipulation for a two year suspension, with Respondent agreeing to make payment of fee arbitration awards;

• Accepted a probation plan with the modification that it is important to have malpractice insurance and important to have a law office practice audit;

• Adopted the ethics opinion entitled "Unsolicited contact by Opposing Party;"

• Directed a subcommittee to approach the court system and express desire to explore the courthouse security issue and especially the concept of allowing lawyers and their personnel to bypass the security barriers;

• Asked a subcommittee to attend the Pro Bono Supervisory Committee meeting, and recommend an attorney for the ABA Senior Attorney Pro Bono award;

• Meet with Alaska Pension Services to set up a 401(k) plan for the staff;

• Met with the following local bar presidents via conference call: Judge Mike Jeffery, Ukpiagvik (Barrow); Chris Cooke, Bethel; Dan Wayne, Juneau; James Benedetto, Chukchi (Kotzebue); and Brian Hanson, Sitka and Ken Lagacki, Anchorage Bar, who was present in person. They talked about the size and nature of their local Bar, CLE, concern for the fate of ALSC and other issues. The Board said they would ask Seth Eames if it was possible to get a list of attorneys who'd be willing to answer legal questions from people from Kotzebue;

• Accepted a stipulation for a private reprimand with conditions that the Respondent obtain malpractice insurance in the amount of $100,000 and submit to as many as three random audits of his practice;

• Voted to publish amendments to Rule 28(g) & (h), which would provide for publication of public reprimands;

• Voted to publish amendments to Rule 15(b), which would provide a UPL definition of what disbarred or suspended lawyers may do;

• Accepted a stipulation for a public reprimand;

• Waived the CLE seminar fee for 30 admissions per year for ALSC employees, with ALSC employees paying for any lunch costs;

• Voted to publish proposed Rule 16(e), which would allow for law office audits;

• Authorized the Staff to proceed with the development of a Bar home page;

• Approved the admission of 3 reciprocity applicants (Juliana Rinehart Cobb, David Graham and Dianne Hoffman);

• Accepted the 3 recommendations of the Lawyers' Fund for Client Protection committee (2 claims to be reimbursed and 1 claim denied);

• Set up a subcommittee to investigate the possibility of Board certification of Specialists;

• Set up a subcommittee to investigate a proposed rule which would provide for mandatory disclosure of malpractice insurance;

• Set up subcommittees to propose award winners for the Distinguished Service and Professionalism awards;

• Added an additional day of CLE on Jury Selection to the Convention;

• Rejected a stipulation for a 48 month suspension and indicated that a majority of the Board wanted disbarment;

• Approved a CLE program cosponsorship with the Gender Equality Task Force giving them the profit above direct expenses plus 10% to cover overhead;

• Approved the following status change requests; to Retired: Russ Arnett, David Free; to Active: Diane Smith, Michael Swanson, Vivian Senungetuk; and to Resigned: Marsha Hammack, R.C. Mattson, Allan Olson and Susan Williams.

Proposed amendment and ethics opinion

BAR RULES 15(b) & (c)

PROPOSED AMENDMENT DEFINING THE UNAUTHORIZED PRACTICE OF LAW FOR *DISBARRED AND SUSPENDED* ATTORNEYS AND ADDITION LISTING PERMISSIBLE ACTS

(Additions italicized; deletions bracketed and capitalized)

Bar Rule 15(b)(1) defines the practice of law for the purpose of the Bar Rule 15(a)(7) which prohibits a disbarred or suspended member from practicing law.

The first two provisions are relatively straightforward: 1) disbarred or suspended lawyers may not hold themselves out as attorneys authorized to practice law [Rule 15(b)(1)(i)] and 2) they may not represent another before a court or other governmental body operating in its adjudicative capacity, including the submission of pleadings. Rule 15(b)(1)(ii).

The third provision prohibits these lawyers from providing advice or preparing documents **for another** which affect legal rights or duties. Rule 15(b)(1)(iii). (Emphasis added.) Unfortunately, the "for another" language is not specifically defined. While this undoubtedly includes a "client," does it also include another "lawyer" for whom the disbarred or suspended lawyer is working?

Bar counsel is aware of perhaps four situations in which disbarred/suspended lawyers have either in the past or in the present provided law clerk or paralegal-type services to members of the Alaska Bar. Read strictly, Rule 15(b)(1)(iii) would prevent a disbarred/suspended lawyer from performing these services for another lawyer. In effect, they would be "less than zero" because these services can be performed by non-lawyers.

However, a strict construction of Rule 15(b)(1)(iii) appears to run counter to the premise underlying Bar Rule 29 that a disbarred/suspended lawyer may demonstrate fitness to resume practice through the reinstatement process. A primary requirement for reinstatement is the "...knowledge of law required for admission to the practice of law in this State ...". Barring an attorney from **any** contact with lawyers or legal issues, even under supervision, significantly affects that attorney's ability to demonstrate this knowledge requirement.

Of course, there is always an argument to be made that a disbarred/suspended attorney's conduct was so egregious that the attorney should have no further contact with the legal system or even other lawyers during the period of suspension.

A better approach to this problem might be to revise Bar Rule 15(b) to clearly identify what a disbarred/suspended lawyer can and cannot do, and more importantly, to identify the obligations of a licensed member of the Bar who may employ such a lawyer in a law clerk or paralegal role.

California has recently adopted a comprehensive rule on this subject. It provides clear guidelines for both the disbarred/suspended lawyer and any lawyer who hires them. It also provides for notice to the Bar and to clients of the disbarred/suspended lawyer's work for the hiring lawyer.

At the October 1996 meeting, the Board asked bar counsel to draft a revision to current Bar Rule 15(b) concerning the unauthorized practice of law by disbarred and suspended attorneys along the lines of the recent California rule. At its January 1997 meeting, the Board directed that the proposed rule be published, with commentary, for member comments.

The draft revisions to **15(b)(ii) & (iii)** use the word "client" rather than "another" to more clearly identify the person for whom certain activities cannot be performed. 15(b)(ii) also expands the list of persons or entities who perform adjudicatory functions.

15(b)(iv) prohibits representation of a client at a deposition or other discovery matter.

15(b)(v) prohibits negotiating or transacting any matter for or on behalf of a client with third parties.

15(b)(vi) prohibits receiving, disbursing or otherwise handling a client's funds.

15(c)(1) is a new provision which identifies certain acts by disbarred or suspended attorneys which are permissible provided those attorneys are under the supervision of an attorney authorized to practice law in Alaska and proper notice is given to affected clients.

15(c)(i) would permit legal research, data gathering, and document drafting.

15(c)(ii) would permit direct communication with a client or third parties but only on specified topics such as scheduling, billing, etc.

15(c)(iii) would permit the disbarred or suspended lawyer to attend a deposition or discovery matter with an authorized attorney, but only in a clerical role.

15(c)(2) specifies the notice which must be given each affected client. Essentially, the client must be notified of the disbarred or suspended attorney's bar status, of the list of prohibited activities and that the disbarred or suspended attorney will not engage in any of those activities. Proof of service of the notice on the client and the notice itself must be maintained for two years after the representation ends.

Finally, **15(c)(3)** permits a disbarred or suspended attorney to be employed in a clerical, support, courier or maintenance role without notice to the affected client.

This proposal will come back before the Board at its May 4-6, 1997 meeting in Juneau for final consideration and a vote on whether the proposal should be sent to the Supreme Court for adoption.

Please send your comments to Deborah O'Regan, Executive Director, Alaska Bar Association, PO Box 100279, Anchorage, AK 99510 or e-mail them to "oregand@alaskabar.org"

Rule 15. Grounds For Discipline.

. . .

(b) Unauthorized Practice of Law.

(1) For purposes of the practice of law prohibition for disbarred and suspended attorneys in subparagraph (a)(7) of this rule, except for attorneys suspended solely for nonpayment of bar fees, "practice of law" is defined as:

(i) holding oneself out as an attorney or lawyer authorized to practice law;

(ii) representing [ANOTHER] *a client* before a *judicial officer, arbitrator, mediator,* court, *public agency, referee, magistrate, commissioner, hearing officer* or governmental body [WHICH IS] operating in [ITS] *an* adjudicative capacity, including the submission of pleadings; [OR]

(iii) providing advice or preparing documents for [ANOTHER] *a client* which affect legal rights or duties;

(iv) representing a client at a deposition or other discovery matter;

(v) negotiating or transacting any matter for or on behalf of a client with third parties; or

(vi) receiving, disbursing, or otherwise handling a client's funds.

(2) For purposes of the practice of law prohibition for attorneys suspended solely for the non-payment of fees and for inactive attorneys, "practice of law" is defined as it is in subparagraph (b)(1) of this rule, except that those persons may represent another to the extent that a layperson would be allowed to do so.

(c) Permissible Acts by Disbarred and Suspended Attorneys.

(1) The following acts may be performed by disbarred and suspended attorneys under the supervision of a attorney authorized to practice law in Alaska provided the notice required in subparagraph (2) is given:

(i) legal work of a prepatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;

(ii) direct communication with a client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or

(iii) accompanying an active member in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the authorized attorney who will appear as the representative of the client.

(2) Prior to or at the time of employing a disbarred or suspended attorney to work on a client's specific legal matter, the authorized attorney will serve a written notice upon each client on whose specific matter the disbarred or suspended attorney will work advising the client of the disbarred or suspended attorney's current bar status, of the conduct prohibited by subparagraph (b)(1), and that the disbarred or suspended attorney will not engage in such conduct. The authorized attorney shall obtain proof of service of such notice on the client and retain such proof and a correct copy of the notice for two years following the termination of the authorized attorney's employment by the client.

(3) A disbarred or suspended attorney may be employed by an authorized attorney without notice to a client if the disbarred or suspended attorney's sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.

Continued on page 11

NEWS FROM THE BAR

Proposed amendment and ethics opinion

Continued from page 10

ALASKA BAR ASSOCIATION ETHICS OPINION NO. 97-1
Notification of Opponent of Receipt of Confidential Materials

The Committee has been presented with a hypothetical situation in which a party in a divorce case intentionally mailed a copy of a confidential letter from her lawyer concerning the litigation to her adverse party's lawyer, and this was done without her lawyer's knowledge. Neither the adverse party, nor the adverse party's lawyer solicited the information. However, the receiving lawyer's client asked that his lawyer not disclose the receipt of the material because it might adversely affect his relationship with his estranged wife. The Committee was asked to opine whether the lawyer who received the letter must, over the objection of his client, notify the lawyer representing the party who mailed the letter.

The Committee believes that the receiving lawyer has no obligation to notify her opponent.[1] There is no Alaska Rule of Professional Conduct that directly controls this situation. ARPC 4.2 prohibits a lawyer from communicating about the subject of the representation with the person the lawyer knows to be represented by another lawyer in the matter. However, in the hypothetical before us, it cannot be said that the lawyer receiving the letter from the other party is communicating at all with the other lawyer's client; he merely received a mailing containing a copy of a confidential communication, which he neither invited nor anticipated.

Nor is this a situation in which a lawyer was mistakenly sent a confidential communication, such as by a misdirected facsimile transmission. In that situation, the ABA Standing Committee on Ethics and Professional Responsibility opined that a lawyer receiving inadvertent disclosure of confidential communication should return the communication unopened and unexamined to the opposing lawyer. ABA formal Opinion 92-368, Inadvertent Disclosure of Confidential Materials (November 10, 1991). In so concluding, the ABA Standing Committee relied, in large part, upon the critical importance of maintaining confidentiality in the attorney-client relationship. However, in the hypothetical before this Committee, disclosure was not inadvertent at all, but was intentionally made by the client, who is, after all, the beneficiary of the rules of protecting attorney-client confidentiality. This Committee finds no other overarching ethical principal embodied in the ARPC that would require notification of opposing counsel by the receiving attorney in this situation.

The situation presented to this Committee is more closely analogous to that of a lawyer who receives, on an unauthorized basis, materials of an adverse party that she knows to be privileged or confidential. In such a situation, the ABA Standing Committee on Ethics and Professional Responsibility, has opined that the receiving lawyer must, before reviewing the materials, notify her adversary's lawyer that she has the materials, and should either follow instructions of the adversary's lawyer with respect to the disposition of the materials, or refrain from using the materials until a definitive resolution on the proper disposition of the materials is obtained from a court. ABA Formal Opinion 94-382, Unsolicited Receipt of Privileged or Confidential Materials (July 5, 1994). State Bar Ethics Committees have disagreed with that result. See, Maryland Bar Association, Opinion 89-53 (1989) (receiving lawyer has no obligation to reveal the matter to the Court or opposing party; a lawyers' only obligation is to preserve originals from destruction); Virginia Bar Association Opinion 1076 (1988) (materials may be used although opposing counsel should be notified of their receipt as a matter of "professional courtesy"); Michigan Bar Association CI-1970-1983 (confidential document of the opposing party may be used at trial providing neither the attorney nor his client procured removal of the document from the possession of the opposing party).

ABA Formal Opinion 94-382, and the above-cited state ethics opinions, assumed that the disclosure was made by a third party, who was not authorized to do so. Here, however, the disclosure was made intentionally by the person who had unquestionable authority to do so, and on whose behalf confidentiality rules were promulgated: the client. Accordingly, the Committee does not believe an ethical obligation to disclose receipt of the material should be imposed on the receiving lawyer when the situation was created by the intentional, unsolicited acts of the opposing party, particularly when the disclosure may not be in the best interests of the lawyer's client.[2]

Approved by the Alaska Bar Association Ethics Committee on November 7, 1996.

Adopted by the Board of Governors on January 17, 1997.

[1]This opinion does not address whether there are obligations under the Alaska Rules of Civil Procedure or other rules of court that require disclosure.

[2]Ordinarily, it may be a good practice, as a matter of "professional courtesy," to inform the sending party's counsel of the receipt of the material. This will increase candor and trust between counsel and forestall allegations of wrongdoing. However, absent specific provisions in the ARPC imposing such a duty, the committee declines to create one here.

NOTICE OF PROPOSED RULES U.S. BANKRUPTCY COURT, DISTRICT OF ALASKA

The Advisory Committee on Bankruptcy Rules has proposed amendments to the local Bankruptcy Rules.

Written comments on the proposed rules are due no later than April 30, 1997

Address all communications on rules to;
Clerk, U.S. Bankruptcy Court
Attention: Local Bankruptcy Rules Committee
Historic Courthouse, Room 138
605 West Fourth Avenue
Anchorage, Alaska 99501-2296

The proposed amendments to the rules may be reviewed at: State Court Libraries in Anchorage, Juneau, Fairbanks and Ketchikan: U.S. Courts Library in Anchorage; U.S. District Court Clerk's Office in Anchorage, Fairbanks Juneau. Ketchikan, and Nome; U.S. Bankruptcy Court Clerk's office in Anchorage; or on the web at the U.S District Court Home Page at http://www.touchngo/lglcntr/usdc/usdcak.htm.

NEWS FROM THE BAR

Women's treaty resolution to be presented to Bar

BY JOYCE M. RIVERS

A resolution concerning an important international human rights treaty will be presented to the Alaska Bar Association for its consideration at the annual meeting to be held during the Annual Convention in Juneau on May 8. The treaty is the Convention for the Elimination of All Forms of Discrimination Against Women (generally referred to as "CEDAW" or "The Women's Treaty"). The text of this resolution, supporting ratification by the U.S., appears in this issue of the *Bar Rag* at page 11.

A brief history of CEDAW and of the support from the American Bar Association (ABA) is set out in the resolution. The current focus on efforts to accomplish ratification of CEDAW by the United States resulted from the United Nations Fourth World Conference on Women held in Beijing, China in 1995. At the Beijing Conference, U.S. delegates learned of U.S. nonratification. Also, President Clinton's support for U.S. ratification was announced. U.S. delegates to the conference and attendees at the simultaneous NGO (Non-Governmental Organization) Forum returned home committed to working for ratification of CEDAW through citizen effort throughout their states and communities.

The American Bar Association has a long history of involvement in and support of CEDAW. In February 1996 the ABA House of Delegates approved Resolutions urging (1) ratification of CEDAW and (2) implementation of the Platform For Action—the non-binding action document that identifies strategies and concrete steps to eliminate barriers to the full participation of women in critical areas of concern. For a full report on CEDAW, the Platform for Action and the ABA's role and formal positions, see "Section Recommendations and Reports," *The International Lawyer* (the quarterly publication of the ABA/Section of International Law and Practice), Winter 1996, Volume 30, Number 4, pages 867 through 921.

CEDAW is presently held in the Senate Foreign Relations Committee. Although CEDAW was reported out of the committee in 1994 with a do-pass recommendation, it was not acted on by the Senate at that time so was referred back to the committee. The committee is now chaired by Sen. Jesse Helms who opposes ratification. It is apparent that a nationwide effort will be needed to get CEDAW forwarded to the floor of the Senate for a vote on ratification.

A copy of informational material related to CEDAW has been left at the Alaska Bar Association offices. The material includes the full text of the treaty; a summary of its provisions; a Fact Sheet that includes a listing of countries that have ratified and a summary list of major national organizations that endorse CEDAW; the conditions (RUDs) submitted by the Administration to accompany CEDAW; and a leaflet containing the full text of the views of the Senate Foreign Relations Committee members who oppose ratification, together with counter-arguments.

I urge your support for the resolution.

1997 Alaska Bar

CONVENTION HIGHLIGHTS

May 8 - 10, 1997 • Centennial Hall, Juneau

Come to beautiful Southeast Alaska for the 1997 Convention!
Watch for the convention brochure in the mail!

CLEs

Thursday, May 8

Morning
Politics, Public Policy and the Law
A panel of distinguished members including **Jay Hammond, Jay Rabinowitz, Jay Kerttula, Arliss Sturgulewski, Esther Wunnicke, Charlie Cole and Julie Kitka** discusses how politics and public policy have shaped the way law is made and interpreted in Alaska. **Jeff Feldman** moderates the panel.

Noon
Alaska Bar Association Annual Meeting and Luncheon

Afternoon
State of the Judiciaries Address
Chief Judge James K. Singleton, Jr.,
U.S. District Court
Chief Justice Allen T. Compton
Alaska Supreme Court

Theresa Newman

For the First Time!
Update on Recent Alaska Appellate Decisions
Theresa Newman, Lecturer in Law, Duke University School of Law & General Editor, *Alaska Law Review*

Friday, May 9, 1997

Morning
They're Back!
Update on Recent U.S. Supreme Court Opinions
Professor Peter Arenella, UCLA School of Law and Professor Erwin Chemerinsky, USC Law Center

Peter Arenella
Professor of Law, UCLA School of Law

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

Afternoon
Beyond the Mainstream: Cross-Cultural Communication in Alaska's Legal System
Polly Wheeler, anthropologist and **Chris Cooke,** attorney and former judge of the 4th Judicial District Superior Court, and a panel of judges, lawyers, and non-lawyers, present a practical discussion of how language and cultural differences affect participation in the justice system.

Saturday, May 10, 1997

9:00 a.m. - 4:00 p.m.
Voir Dire: The Phil Donahue Approach to Jury Selection

Robert B. Hirschhorn
Nationlly known trial lawyer and jury consultant based in Texas, co-author of *Bennett's Guide to Jury Selection*

Robert B. Hirschhorn, nationally known trial lawyer; **Judge Walter Carpeneti,** First Judicial District Superior Court; **Presiding Judge Elaine Andrews,** Third Judicial District Superior Court, and **Ray Brown,** Dillon & Findley, use breakout groups and demonstrations to show you how to get answers to difficult questions.

Special Events

Thursday, May 8, 1997
12:00 noon - 1:30 p.m.
Bench and Bar Lunch
Keynote Address: **Attorney General Bruce Botelho**

6:30 - 8:00 p.m.
President's Reception
Gastineau Salmon Hatchery

8:00 - 10:00 p.m.
"Politics, Public Policy and ...Poetry?"
A public performance of attorney-artists' original works. Coordinated by the Juneau Bar Association.
Valentine's Coffee House

Friday, May 9, 1997
6:30 - 10:00 p.m.
Annual Awards Banquet
Keynote Address: **Avrum Gross,** Gross & Burke, former Attorney General

Saturday, May 10, 1997
Invitation to the Bench and Bar from the Juneau Bar Association
Watch for details about a special legal community event to be held Saturday!

Convention Information

Centennial Hall Convention Center is the site of convention meetings and programs. Located at 101 Egan Drive in Juneau, Centennial Hall is directly across from the convention hotel, the Westmark Juneau. The phone number of the Alaska Bar registration desk in Centennial Hall will be 907-586-5341.

Parking at Centennial Hall

Parking is limited. Please check in with the Centennial Hall office to get a parking permit for their assigned spaces next to the building.

Hotel

The Westmark Juneau Hotel is the convention hotel for 1997. Located at 51 West Egan Drive, the phone number is 907-586-6900 and the fax number is 907-463-3567. To make reservations call the reservation number 800-544-0970. Please make your reservations by April 2.
The rates are $108 single/double or $116 single/double plus 11% tax depending on availability. Check-in time is 3:00 p.m.

Travel

Jay Moffet at World Express Travel, phone 907-786-3274/fax 907-786-3279, is our official convention travel agent. Please contact Jay for assistance in making your travel reservations.

Call the Alaska Bar office
907-272-7469 /
fax 907-272-2932
e-mail
alaskabar@alaskabar.org
for more information.

NEWS FROM THE BAR

A RESOLUTION

Supporting Ratification by the United States of America of the Convention on the Elimination of All Forms of Discrimination Against Women

BE IT RESOLVED BY THE ALASKA BAR ASSOCIATION:

WHEREAS a document titled *The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* (herein "The Convention") was adopted by the United Nations General Assembly and opened for signature in December, 1979, the United States signed the Convention on July 17, 1980, and The Convention entered into force on September 3, 1981; and

WHEREAS, as of March 1, 1997, 156 countries, representing over half of the world's countries, have now ratified or acceded to The Convention and yet the United States has not ratified it; and

WHEREAS, in 1984, the House of Delegates of the American Bar Association (ABA) voted to endorse ratification of The Convention subject to the Reservations, Understandings, and Declarations (RUDs) then put forward by the United States and have urged the Senate Foreign Relations Committee to support ratification; and

WHEREAS, on November 17, 1995 the ABA's Section of International Law and Practice and the Standing Committee on World Order under Law submitted to the ABA a Recommentation and Report reaffirming the ABA's stand in support of ratification of The Convention, and such Recommendation was adopted by the ABA's House of Delegates in February 1996; and

WHEREAS the spirit of The Convention affirms faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights, in the dignity and worth of the human person, and in the equal rights of men and women, and The Convention provides a comprehensive framework for challenging the various forces that have created and sustained discrimination based upon sex; and

WHEREAS although women have made major gains in the struggle for equality in social, business, political, legal, educational, and other fields in this century, there is much yet to be accomplished and through its support and leadership, the United States can help create a world where women are no longer discriminated against and have achieved one of the most fundamental of human rights, equality; and

WHEREAS it is particularly appropriate for the Alaska Bar Association to endorse ratification of The Convention, given that *The Constitution of the State of Alaska,* in Article I titled "Declaration of Rights" in its Section 3 titled "Civil Rights" incorporates into State law the principle of non-discrimination on the basis of sex when it states that "No person is to be denied the enjoyment of any civil or political right because of...sex

THEREFORE, BE IT RESOLVED that the Alaska Bar Association supports United States ratification of The Convention on the Elimination of All Forms of Discrimination Against Women; and it is

FURTHER RESOLVED that the Alaska Bar Association strongly urges President Bill Clinton and Secretary of State Madeleine Albright to place The Convention in the highest category of priority in order to accelerate its passage through the Senate Foreign Relations Committee and the U. S. Senate, and urges the Senate Foreign Relations Committee to pass The Convention favorably out of Committee and urges the U. S. Senate to ratify The United Nations' Convention on the Elimination of All Forms of Discrimination Against Women and to support The Convention's continuing work, and it is

FURTHER RESOLVED that copies of this Resolution shall be sent to the Honorable Bill Clinton, President of the United States; to the Honorable Al Gore Jr., Vice-President of the United States and President of the Senate: to the Honorable Madeleine Albright, Secretary of State; to the Honorable Jesse Helms, Chairman of the U.S. Senate Foreign Relations Committee and to each member of the U.S. Senate Foreign Relations committee; to the Honorable Ted Stevens and the Honorable Frank Murkowski, U.S. Senators from Alaska, urging immediate action on The Convention, and urging ratification by the United States of The Convention on Elimination on all Forms of Discrimination Against Women.

Signed by 10 members of the Alaska Bar.

Homer L. Burrell disbarred

In an order issued January 29, 1997, the Supreme Court disbarred Anchorage attorney Homer L. Burrell. The order took effect February 28, 1997. Burrell's disbarment followed findings by an area hearing committee and the Disciplinary Board that Burrell violated the Alaska Bar Rule prohibiting the practice of law by a suspended attorney on five occasions.

Burrell had been previously disciplined by the Supreme Court. In *Burrell v. Disciplinary Board*, 702 P.2d 240 (Alaska 1985) ("Burrell I"), Burrell was suspended from the practice of law for 90 days for creating an impermissible conflict of interest and violating a court order disqualifying him from representing a client. While his suspension was in effect, Burrell continued to practice law. For that conduct and other reasons he was suspended again in *Burrell v. Disciplinary Board*, 777 P.2d 1140, 1141 n. 1 (Alaska 1989) ("Burrell II").

In addition, Burrell was criminally charged with, prosecuted for, and ultimately convicted of criminal contempt of the Supreme Court for continuing to practice while suspended following *Burrell II*. Upon conviction, the Court imposed probation upon him. The current matter involved acts Burrell committed while on probation not to violate any Bar Rule concerning his status as an attorney. By violating the Bar Rules 15 and 29, Burrell also violated his criminal probation. The Supreme Court revoked Burrell's criminal probation in *Disciplinary Matter Involving Burrell*, 882 P.2d 1257 (Alaska 1994). He was ordered to perform community work service which he completed for the Better Business Bureau.

Fairbanks lawyer reprimanded for neglecting appeal

Attorney Barry Donnellan of Fairbanks received a public reprimand from the Disciplinary Board after his neglect resulted in dismissal of a client's appeal. The Board issued the reprimand on January 17, 1997 under a stipulation for discipline with Bar Counsel.

Donnellan's client hired him to pursue a superior court appeal from administrative proceedings. Despite the court's warnings and extensions of time, Donnellan missed several deadlines for filing his appeal brief. The opposing party moved to dismiss the case, but Donnellan did not file an opposition. This course of conduct violated Alaska Rule of Professional Conduct 1.3, which requires a lawyer to be diligent. After the court dismissed the case, Donnellan did not immediately notify his client (who learned of the dismissal second-hand). The Disciplinary Board also reprimanded Donnellan for failing to communicate with his client, a violation of ARPC 1.4.

Injury to the client included loss of administrative remedies but no direct financial loss. The most serious aggravating factor was Donnellan's substantial experience in the practice of law. Mitigating factors included personal problems during the relevant period, lack of any prior discipline, and cooperation with the Bar's investigation. The stipulation for discipline may be reviewed at the Bar Association office in Anchorage.

Royal Bar Association of Juneau

What to do in Juneau

Eric Kueffner announced that the Juneau Arts and Humanities Council will present a jazz piano and vibraphone[1] concert on February 15, 1997, at the J.D.H.S. auditorium. The Silverbow Inn will offer (at some expense, a special dinner menu before the concert and afterwards, the Fiddlehead (not to be outdone) will offer (at some expense) dessert.

Eric also announced that on February 21. 1997, at the ANB Hall, the JAHC will hold its annual fundraiser. A Taste of Paradise, a five-course polynesian dinner prepared by Kai Augustine. Tickets are $20. (James Crawford, apparently overcome by the promising menu or the vision of Eric performing the hula, blurted out something about a "white smoking hot piece of juicy meat.")

Gerry Davis will prepare a bar convention brochure, which will include a column called. "What to do in Juneau when you're dead." (One suggestion: Take your family to Costco, watch 30 minutes of big screen TV, play a couple of computer games, and feed the family for free at the grazing tables.)

—Feb. 7, 1997
Lach Zemp, Secretary

[1]Vibraphone: a musical instrument resembling the marimba. But with electrically operated valves in the resonators that produce a gentle vibrato. See Websters New World Dictionary. Third College Edition.

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Joe Sonnemann announced that the Juneau World Affairs Council will sponsor two presentations on Lawyers in Africa. Both will be held in the lobby on the 2nd floor of the court building. The first presentation, on January 22, Will feature Margot Knuth discussing the plight of the black rhino and Liz Cuadra discussing volunteer organizations in Africa. The second presentation, on January 31, will feature Jon Tillinghast, who will show slides from his travels to Namibia.

Gordon Evans is moving, on! Gordon is moving his office out of the Mendenhall Apts. Bldg. and into Suite 305 of the Assembly Bldg. on Seward. He has furniture and books that he is selling but you better call quickly; supplies are limited. (Gordon also shared that, with the foresight that only Bill Gates could appreciate, he and Allen Angstrom purchased the first IBM memory typewriter in Juneau—1974).

—Jan. 10, 1997
Lach Zemp, Secretary

Estate Planning Corner

Generation assignment under the GST tax

Steven T. O'Hara

The generation-skipping transfer ("GST") tax is a surprise to most of us. Few are surprised that there is an estate tax, many are surprised that a gift tax has been created to back-up the estate tax, but the GST tax catches nearly everyone off guard.

Congress created the GST tax because it would like a transfer tax paid at each generation—when husband and wife die, when their children die, when their grandchildren die, etc. Thus, in general, the GST tax strives to catch those plans that avoid estate tax at a generational level. For example, if husband and wife die and leave their estates in trust for the benefit of their children and grandchildren, GST tax will generally be payable on the death of the couple's children absent an exemption (IRC § 2612 (a)). Here the GST tax is in rough substitution for the estate tax that would generally be payable if the trust assets had been owned by the children.

Once the surprise over the existence of the GST tax has worn off, most of us are then surprised to find that the GST tax is not limited to transfers between family members. Just as gift and estate taxes apply to gratuitous transfers from one individual to another, regardless of any relationship by blood, adoption or marriage, so the GST tax may also apply.

> *'...in general, the GST tax strives to catch those plans that avoid estate tax at a generational level.'*

For example, suppose a client creates an irrevocable trust for her child 12 years of age. The client does not want a so-called Crummey or Code Section 2503 (c) trust (i.e., a trust that qualifies transfers for the $10,000 annual gift tax exclusion). Suppose a good friend, not related to the child by blood, adoption or marriage, wants to make a gift to the child and does so by contributing a modest sum to the child's trust. Suppose the friend happens to be 50 years of age. Here the friend would be considered to have made a generation-skipping transfer because he is more than 37.5 years older than the child, and the transfer would be subject to both gift and GST tax.

In other words, where the parties are not related by blood, adoption or marriage, they are assigned to a generation on the basis of their relative age. An individual born not more than 12.5 years after the transferor's birth is considered a member of the transferor's generation (IRC § 2651(d) (1)). An individual born more than 12.5 years but not more than 37.5 years after the transferor's birth is considered a generation younger than the transferor (IRC § 2651(d) (2)). An individual born more than 37.5 years after the transferor's birth is considered two or more generations younger than the transferor (IRC § 2651(d) (3)).

Suppose a client marries a widow with two children. The client does not adopt the children. The client is 50 years of age, and his stepchildren are ages 11 and 12. Here the stepchildren, no matter how young they are, would be considered one generation younger than the client, since he is married to their mother (IRC § 2651(b) (2)). Of course, if the client later adopts the children, they will continue to be considered one generation younger than the client (IRC § 2651 (b) (3) (A)).

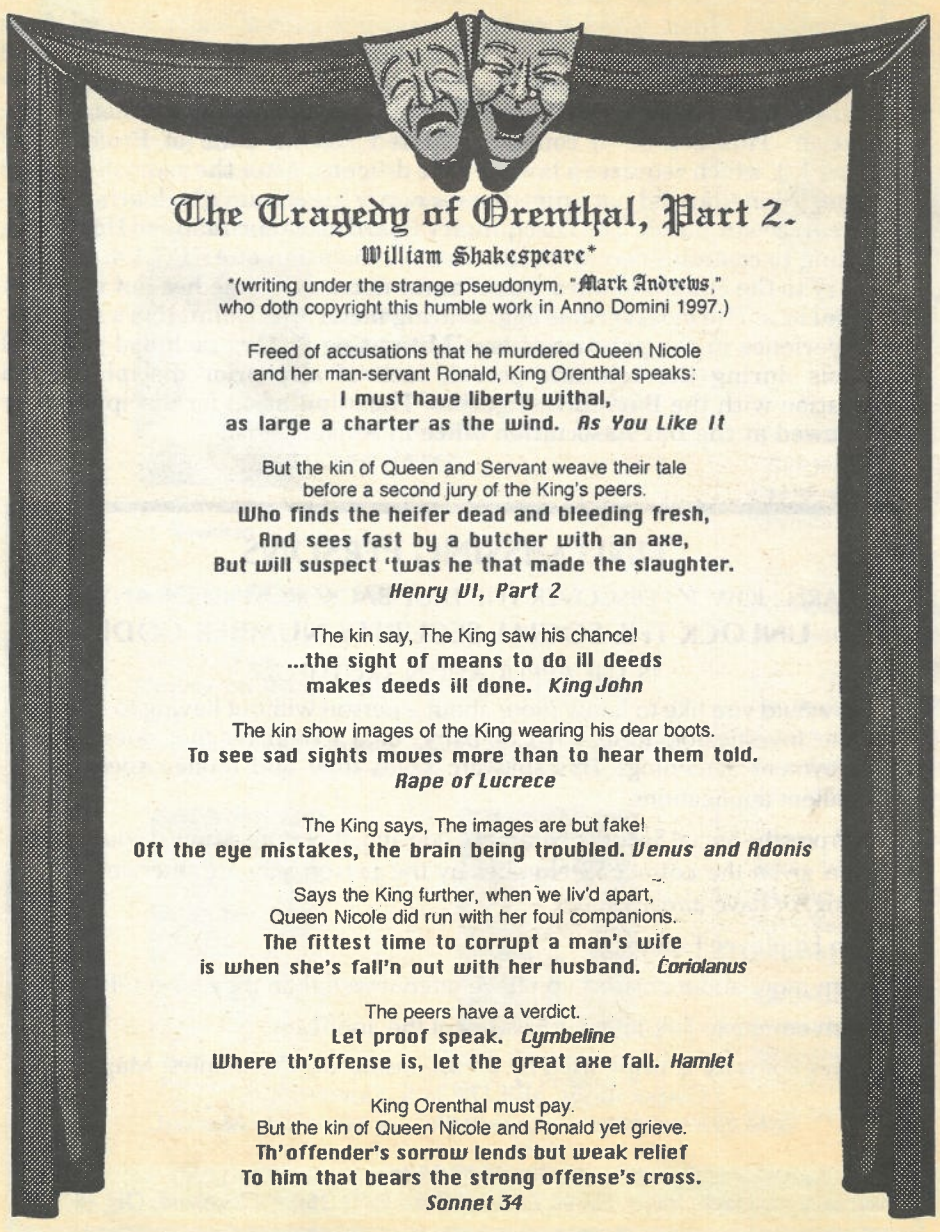
Suppose a client 70 years of age is dating someone 32 years of age. If the client makes gifts to her 32-year-old friend, those gifts would be considered generation-skipping transfers because the donor is more than 37.5 years older than the donee and the parties are not related by blood, adoption or marriage. But if they later get married, the couple would then be considered to be of the same generation (IRC § 2651 (c) (1)).

Suppose the 70-year-old client and her 32-year-old friend get married but then divorce. Suppose the client continues to make gifts to her ex-husband, as well as gifts to her-ex husband's children from a prior marriage. Here the ex-husband would continue to be considered the same generation as the client (id.), and the ex-husband's children would continue to be considered one generation younger than the client (IRC § 2651 (b) (2)).

Suppose a client is 90 years of age. He has a son 70 years of age, and the son marries someone 32 years of age. Here the client's daughter-in-law would be considered one generation younger than the client because the daughter-in-law is married to the client's son (IRC § 2651 (c) (2)).

Suppose a client has a half-sister in the sense that they have the same mother, but different fathers. The half-sister has two children, ages 11 and 12. The client is 50 years of age. Here the children of his half-sister, no matter how young they are, would be considered one generation younger than the client, since he shares a half-blood relationship with their mother (IRC § 2651 (b) (3) (B)).

After the initial surprises over the existence and breadth of the GST tax, those of us in the estate planning field recognize the GST tax as just another back-up to the estate tax. We realize that just as we must consider the gift and estate tax implications of each gratuitous transfer, so we must consider any GST tax implications.



The Tragedy of Orenthal, Part 2.

William Shakespeare*

*(writing under the strange pseudonym, "Mark Andrews," who doth copyright this humble work in Anno Domini 1997.)

Freed of accusations that he murdered Queen Nicole
and her man-servant Ronald, King Orenthal speaks:
I must have liberty withal,
as large a charter as the wind. ***As You Like It***

But the kin of Queen and Servant weave their tale
before a second jury of the King's peers.
Who finds the heifer dead and bleeding fresh,
And sees fast by a butcher with an axe,
But will suspect 'twas he that made the slaughter.
Henry VI, Part 2

The kin say, The King saw his chance!
...the sight of means to do ill deeds
makes deeds ill done. ***King John***

The kin show images of the King wearing his dear boots.
To see sad sights moves more than to hear them told.
Rape of Lucrece

The King says, The images are but fake!
Oft the eye mistakes, the brain being troubled. ***Venus and Adonis***

Says the King further, when we liv'd apart,
Queen Nicole did run with her foul companions.
The fittest time to corrupt a man's wife
is when she's fall'n out with her husband. ***Coriolanus***

The peers have a verdict.
Let proof speak. ***Cymbeline***
Where th'offense is, let the great axe fall. ***Hamlet***

King Orenthal must pay.
But the kin of Queen Nicole and Ronald yet grieve.
Th'offender's sorrow lends but weak relief
To him that bears the strong offense's cross.
Sonnet 34

Certifications benefit Bar

By Jolene Thornton

PLS does not stand for Please and ALS does not stand for Also. What they do stand for is: CERTIFIED Professional Legal Secretary and Accredited Legal Secretary. Just like ESQ, CLA, CPS, Ph.D, etc., these titles/initials take a lot of wisdom, personal motivation and professionalism to obtain.

The PLS certification program was created by the National Association of Legal Secretaries (NALS) in 1960. In the 1995-96 fiscal -ear, only 158 secretaries became PLS Certified, bringing the total number of PLSs in the United States to 4,262. The ALS program was first made available in July 1992. Only 172 secretaries became ALSs in 1995-1996, bringing the total number of ALSs in the United States to 988. When you stop to ponder on how many legal support staff are employed in the city of Anchorage alone, or even statewide, let alone nationwide, 4,262 is NOT very many!

A certified PLS designation is attained by at least 3 years of experience under direct supervision of a lawyer or judge. The certification is received after passing a grueling two-day examination (which, in my opinion, must be similar to the bar exam). Attaining this goal demonstrates dedication to professionalism and acceptance of the challenge to be identified as exceptional. The exam consists of seven areas of knowledge, skills and procedures: written communications, ethics, office procedures, accounting, legal terminology, exercise of judgment and legal secretarial skills.

In April, 1992, the American Council on Education advised it would recommend to colleges that certain college credits be made available to PLSs as of March, 1998. A total of 27 credit hours may be available.

ALS is attained by the legal support staff person with one year of secretarial experience or a similar course. The exam is designed for the individual at the apprentice level. The 6-hour test consists of written communication comprehension and application; office administration, legal terminology and accounting; and ethics, human relations and applied office procedures.

How certifications benefit you, the attorney: Simply put, we save you time and work and ease your mind! You can assign complex tasks and expect to receive a thorough, well-done project in return. Once your assistant is certified, he/she has a working knowledge of drafting correspondence, legal documents, and court documents with minimal supervision and is expected to assume responsibility, exercise initiative and judgment by making decisions within the scope of assigned authority.

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AAERT offers congratulations

The American Association of Electronic Reporters and Transcribers (AAERT) held its first nationwide certification examination for electronic reporters and transcribers on October 26, 1996.

Kim Kalmbach Robinson

Kim Kalmbach Robinson, of Palmer Alaska, d/b/a Kim Robinson, Court Reporter received the designation of certified electronic court reporter and transcriber.

Elizabeth LeBahn, of Wasilla, Alaska, affiliated with Metro Court Reporting of Anchorage, Alaska and **Shati Aguiar**, of Wasilla, Alaska, affiliated with Kim Robinson, Court Reporter, received the designation of certified electronic court transcriber.

Jacqueline Herter, of Kodiak, Alaska, d/b/a Deposition Services Ltd. received the designation of certified electronic court reporter.

Jacqueline Herter

Book Review

What to Do When You're Mad at Your Lawyer.
By Tanya Starnes. Nolo Press, Berkeley, CA, 1996, $21.95

REVIEW BY ROBERT W. MARTIN, JR.*

This book is obviously written for a non-lawyer to read; it was written by a lawyer who specializes in suing other lawyers and it was published by a publisher (Nolo Press) which specializes in law related self-help books (e.g., Elias and Levinkind, *Legal Research: How to Find and Understand the Law* and Matthews, *Win Your Personal Injury Claim).* However, it is a book that all lawyers should read.

The book is organized in much the same way as the all too familiar "Dummy" books (there is, of course, a *Law for Dummies*). There are more than an acceptable number of minor typographical errors (e.g., the book says the author graduated from law school in 1997 when it is reasonably clear from the rest of the book that she graduated in 1977) but all of that should not distract you, the lawyer/reader, because it will not distract your clients. Instead, you should focus on the not-so-pleasant messages in this book and remind yourself that it is available to your clients at most major bookstores.

For those of you who look bemused when legal malpractice carriers warn you about being sued when you refer a matter to another attorney who then acts negligently, the author reminds the public that such actions exist: "If one attorney sent you to another attorney who was not qualified to handle your matter, you would have a claim against the first attorney for negligent referral." This quotation is in the chapter titled "Suing your Former Lawyer."

Similarly, the author implicitly tells clients that they should avoid worrying too much about not paying their legal fees by explicitly stating: "Insurance companies tell me that an attorney suing for his fee is the number one action that triggers a client to sue for malpractice. If you have been refusing to pay your lawyer because you believe he messed up your case, you may have reason to join this club."

Unfortunately, the overall tone of the book is negative. The author asserts that relative to attorney state disciplinary boards "... all state agencies tend to see attorney discipline cases from the point of view of the lawyer, not the consumer." This same theme is expressed at numerous points in her chapter titled: "Filing a Complaint with Your Lawyer Discipline Agency." There are many lawyers who have been the targets of frivolous filings who would presumably take exception to Ms. Starnes' conclusion.

Other troublesome suggestions made by the author include her assertions that clients should approach their lawyer about allowing the client to do "supplementary legal research that your attorney may not have time for" in order to keep the expenses to a minimum. That sounds like a great combination: a client with a little bit of dangerous knowledge and a lazy lawyer! Good luck to both.

You should also be prepared for clients who, after reading this book, follow other suggestions by the author, e.g., go down to the courthouse to check up on the attorney's work by reviewing the filings (which should have been sent to the client anyway) or show up at the attorney's office demanding to see your file to make sure it is well organized.

The chapter titled "Taking Actions Against the Lawyer for the Other Side" should be mandatory reading for at least all of you who do domestic relations work. Privity and similar concepts are perhaps more elusive and less protective than you believe.

If you dismiss these legal self-help books, you make a serious error. People buy them, read them and may be more inclined to listen to an unknown author than a long-trusted lawyer. The book is, in many respects, unfair and extremely one-sided. Hopefully, the lay reader will see through the fact that it is written by a lawyer who presumably wants to encourage more people to sue lawyers because that is her specialty. Nevertheless, to ignore it would be as serious a mistake as failing to do proper discovery. If you are recovering from your last bypass surgery, however, or suffer from anxiety attacks related to stress, read a good mystery instead.

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

Bar People

The Kenai firm of Cowan & Gerry is now Cowan, Gerry & Aaronson.....**Paul Adelman,** formerly with the Law Offices of **Deidre Ganopole**, is now with Mendel & Huntington.....**James Crary**, formerly with ATU, is now with BP Exploration.....**Ken Diemer** is now with Leutwyler, Brion & Associates.....**Barbara Dreyer**, formerly with Hartig, Rhodes, et.al., is now with Wohlforth, Argetsinger, et.al.

John DeNault has relocated to eastern Oregon.....**Lynn Erwin**, formerly with Davis Wright Tremaine, is now with the Office of the Anchorage Municipal Attorney.....**Tim Jannott** is now with the Kenai Public Defender Agency.....**Robin Koutchak**, formerly with Edgar Paul Boyko & Associates, is now with the Municipality of Anchorage Dept. of Law, Criminal Division.....**Barry Kell**, formerly with LeGros Buchanan & Paul, has opened the Law Offices of Barry J. Kell in Anchorage.

Gabrielle LeDoux, formerly with LeDoux & LeDoux, is now with Beard, LeDoux, Stacey & Trueb in Kodiak.

Fate Putman has relocated from Anchorage to Juneau.....**Patrick Rumley** is now with Goerig & Associates.....**Philip Reeves**, formerly with the Borough Attorney's Office in Barrow, has relocated to Girdwood.....**Lester Syren** is now with the Law Office of William Azar.....**Vivian Senungetuk** has relocated from New York to Anchorage.....**Valerie Tehan**, formerly with the Federal Public Defender in Anchorage, has relocated to San Diego.

Antoinette Tadolini, who is with ARCO Alaska, has relocated to Anchorage.....**Gerald Van Hoomissen** has relocated from Oregon to Fairbanks.....**Julie Webb**, formerly with the Law Office of Julie Smith, is now with ALSC in Fairbanks.....**Michael Wenig** has relocated from Anchorage to Calgary. Alberta, Canada.

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Louann Cutler

The law firm of Preston Gates & Ellis LLP is pleased to announce that **Louann Cutler** has become a partner in the firm's Anchorage office.

Cutler has a general civil litigation practice in which she handles complex commercial disputes, oil and gas tax disputes, employment law and other cases. She also advises nonprofit organizations in Alaska. She has been the vice president of the Board of Abused Women's Aid in Crisis (AWAIC) since 1992, and was recently appointed by the Governor to the Violent Crimes Compensation Board.

Prior to attending Northeastern University School of Law and joining the firm in 1990, Cutler worked for Sen. Al Adams and former Rep. Thelma Buchholdt from 1980-87. She conducted policy, fiscal and political analysis of legislation.

Preston Gates & Ellis LLP also has offices in Seattle, Washington, D.C., Los Angeles, Portland, Spokane, Coeur d' Alene, and Hong Kong.

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Gail Anagick Schubert

Gail Anagick Schubert, a partner at Foster Pepper & Shefelman practicing in the Anchorage office, has been elected Chair of the Alaska State Pension Investment Board. Schubert, who has served on the board since its inception in 1993, was first appointed by Gov. Wally Hickel and reappointed by Tony Knowles. She will serve a four-year term.

The eight-member board acts as the fiduciary for pension funds collectively totaling $11 billion, including the Public Employees' Retirement System and the Teachers Retirement System.

At Foster Pepper & Shefelman, Schubert practices in corporate and commercial law, general business, and taxation. Foster Pepper & Shefelman, a Northwest regional law firm with offices in Anchorage, Bellevue, Seattle, and Portland, provides a full range of legal services to businesses, municipalities, and individuals.

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Two of the five attorneys in the Anchorage office of Keesal Young & Logan have been selected for inclusion in the 1997-1998 edition of "The Best Lawyers in America," a referral guide for the legal profession.

John A. Treptow and **Susan Wright Mason** have been selected for their work in health care law. Attorneys are selected based on a survey of attorneys, and Treptow and Mason received similar recognition in the two previous editions.

John A Treptow

Treptow has been practicing law in Alaska since 1976. His practice focuses on litigation, with emphasis in the areas of health care, employment, professional responsibility, insurance, and admiralty law. He also serves as a mediator in similar matters.

Susan Wright Mason

Mason has been practicing law in Alaska since 1979. Her practice is concentrated in the areas of health care regulation, employment law, and administrative and civil appeals.

Keesal, Young & Logan has offices in Anchorage, Seattle, San Francisco, Long Beach, and Hong Kong, as well as a Ketchikan office for its maritime clients during the summer cruise season. The firm's clients in Alaska include Providence Health System, Valley Hospital, Alaska State Hospital & Nursing Home Association, American Express, Crowley Marine Services, UNOCAL, Princess Cruises, and Holland America Line Westours.

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AG appoints 7

Attorney General Bruce Botelho has named **Susan Parkes,** as Anchorage district attorney.

Parkes is a former state prosecutor specializing in sexual assault and domestic violence and is currently supervising attorney in the Department of Law's Civil Human Services Section, which protects abused children and prosecutes juvenile offenders. She also served three years on the state Council on Domestic Violence and Sexual Assault, including two years as chair.

"Susan Parkes is the right person to keep up our fight against two of the most terrible crimes plaguing Alaska families—sexual assault and domestic violence," Botelho said.

Parkes graduated cum laude from the University of Puget Sound School of Law in 1986 and immediately moved to Alaska, working as a clerk to Court of Appeals Judge Robert Coats. She worked as an assistant DA from 1987-91 and was the supervising attorney in the Medicaid Provider Fraud Unit for three years before moving to her current post in the Human Services Section. She also was a member of Gov. Knowles' Conference on Youth and Justice as a member of the committee on youth at Risk.

Parkes replaces **Ken Goldman,** who requested a transfer back to his hometown of Palmer. Goldman will serve as Palmer district attorney, a post he held for several years before being named Anchorage DA in December 1994.

Renee Erb, the current Palmer DA, has taken a newly created position in the Office of Special Prosecutions and Appeals in Anchorage. Erb will handle the proliferation of civil litigation attacking criminal convictions and criminal justice legislation, such as challenges to the sex offender registration law and the new domestic violence laws.

Botelho also announced the hiring of new prosecutors to fill vacancies in four offices:.....**Susan McLean** will be assistant district attorney in Kenai. A 1981 graduate of the University of Idaho Law School, McLean served as prosecutor in Kodiak for six years, the last three years as district attorney.....**Amy Gurton** joins the Ketchikan District Attorney's office as assistant DA. Gurton is a 1996 graduate of Tulane Law School and served as clerk to Ketchikan Superior Court Judge Thomas Jahnke.....**Roman Kalytiak,** a 1987 graduate of Notre Dame Law School, will fill a vacant position in the Palmer DA's office. Kalytiak has nine years experience as a prosecutor in Michigan.....**Doug Kossler** will fill a vacancy in the Office of Special Prosecutions, representing the state in the appellate courts. A 1994 graduate of Temple University Law School, Kossler is a former clerk of Court of Appeals Chief Judge Alex Bryner.

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Moore joins ADR firm

The Hon. Daniel A. Moore Jr. (Ret.) has announced his decision to join J.A.M.S/ENDISPUTE, a private provider of alternative dispute resolution (ADR) services.

Justice Moore was appointed to the Alaska Superior Court in 1981 where he served four years as a trial judge. During that time, he settled hundreds of cases, while averaging a 90 percent settlement rate. In 1985, he was appointed to the Alaska Court of Appeals. Later he served on the Alaska Supreme Court as Chief Justice until his retirement in 1995.

Prior to his appointment to the bench, he was managing partner and trial lawyer with Delaney, Wiles, Moore, Hayes & Reitman, in Anchorage. As a practicing attorney, he was devoted to the litigation and settlement of disputes ranging from simple to complex matters involving employment law, workers' compensation claims, maritime disputes, insurance and oil and gas litigation, product liability and catastrophic personal injury claims.

As a neutral with the company, Justice Moore will cover all formats of ADR services, including mediation and arbitration.

SOLICITATION OF VOLUNTEER ATTORNEYS

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

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

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

Second District:
Tom Mize
604 Barnette St. Rm 210
Fairbanks, AK 99701-4576
(907) 451-9251

Third District:
Al Szal
825 W. 4th Ave.
Anchorage, AK 99501-2083
(907) 264-0415

Fourth District:
Ron Woods
604 Barnette St. Rm 202
Fairbanks, AK 99701-4547
(907) 452-9201

Family Law

With new players, it's back to the basics again

Not long ago, two Anchorage Superior Court judges were assigned to all of the domestic cases. Prior to trial, those who practiced in this area knew quite a bit about how these judges would most likely decide interim motions. At calendar call, it was likely that these, or one of a few other available judges, would hear your client's case.

Things changed. Now approximately 8 judges who have caseloads in other areas of the law are automatically assigned to hear domestic cases. On its face this appears to be a positive step, for it is good to learn early on who will be the trial judge. However, recently many changes have occurred among those judges already assigned to family law cases, and three new decision-makers will be ruling on these issues as others are reassigned.

Additionally, changes have occurred in the area of custody investigation. The court has restricted the appointment of the office of the custody investigator to cases where the parties cannot afford to hire a private investigator. Civil Rule 100 has added court-ordered mediation to its available arsenal of options in family law. Thus there are new private custody investigators and mediators involved.

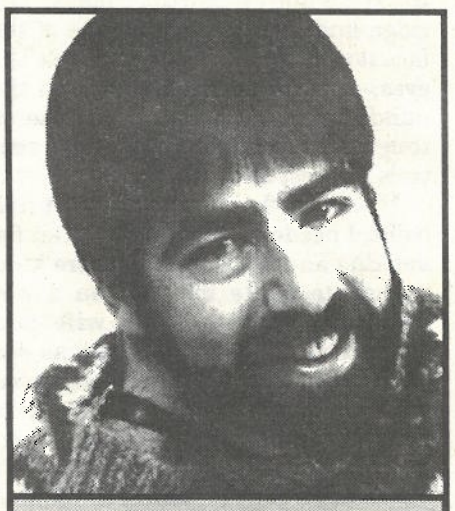
With all of these additional professionals, it becomes necessary to reexamine the basics and to prepare cases without simply relying upon the premise that all involved are completely familiar with all of the applicable law and the most current cutting-edge cases. In short, attorneys can help the court by making the job easier for those who make the decisions.

It is also important to familiarize your clients with general principles of the law so that the client can assist with trial preparation and see early on what kind of evidence the court must review in making its decision. The most fundamental principles which control family law cases include property division and the factors the court uses in determining custody. I have two pamphlets that I often provide to clients in these areas, which include basic information as follows:

PROPERTY DIVISION

The court must divide marital property pursuant to the following factors:

1. The respective ages of the parties and their normal life expectancy
2. Their earning ability in the type of work for which they are qualified by training and experience
3. The duration of the marriage and the conduct of each party during the marriage
4. Their station in life
5. The circumstances and necessities of each
6. Their health and physical condition
7. Their financial circumstances
8. The time and manner of the acquisition of the property in question



Steve Pradell

9. The value of the property and its income producing capability, if any
10. Any other factors bearing on the equities, and
11. The psychological welfare of a party.

The standard the court uses in making custody determinations is the "best interests of the child." In determining the best interests of the child, the court must consider certain factors, which include the following:

1. The physical, emotional, mental, religious, and social needs of the child.
2. The capability and desire of each parent to meet these needs.
3. The preference of a child, if the court determines that the child is of sufficient age and capacity to form a preference.
4. The love and affection existing between the child and each parent.
5. The length of time that the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.
6. The desire and ability of each parent to allow an open and loving frequent relationship between the child and the other parent.
7. Any evidence of domestic violence, child abuse, or child neglect in the home of a parent who desires custody, or a history of violence between the parents.
8. Evidence that substance abuse by either parent or other members of the household directly affect the emotional or physical well-being of the child.

It may be helpful to create your own lists and use them as the basis for client forms. The client can answer questions about the case which are formed by the use of the above factors. You can use the factors in your briefs to the court to assist in organizing your thoughts, and have your clients prepare for custody investigator meetings by reviewing the custody factors prior to their interviews.

Finally, attorneys often fail to inform the court of exactly what they want the judge to do. It is as if they expect an informed judge to take the facts and find the solution. Judges, mediators and custody investigators are assisted if clients and counsel have a plan and make it known early on. Prepare proposed orders as a habit, and remember to tell the court in the initial motion exactly what result you desire. Cite the law and educate the decision-maker about why your client should prevail. With the number of new faces who may play a crucial role in your case, you may be pleased that you took these extra steps.

Eclectic Blues

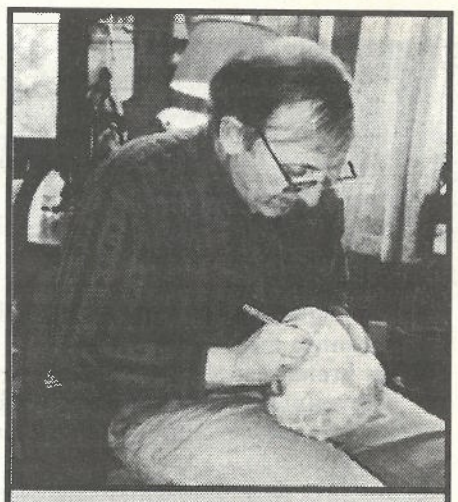
Carving the Wooden Me

An alder mask starts in the forest. First you cut down a green tree after the leaves drop and the sap has settled in the roots for the winter. Last fall, needing fresh wood for a mask, I picked up a Forest Service green alder permit from Smokey and headed out the road to cut one down. A couple of hours later the Honda Civic was loaded down with alder rounds. Somewhere in the back of the car sat the makings of a mask of Martha.

The alder tree I dropped was a sweet piece of wood with evenly spaced growth lines and smooth white flesh. It was sad to toss most of it on a friend's wood pile. I placed the two best half rounds in the freezer. Green alder easily takes a crooked knife. Dried alder does not. Freezer time keeps the wood from drying out.

After squirreling the alder away, I starting mapping out the mask. Photos help for this part. Spending time with the model helps more.

Martha, my model, lives in Juneau but she spent most of her life in Seward. Her people came from the Nome area. Many years ago, before she was born, her dad loaded the family into a boat and brought them to a cannery town on the Alaska Peninsula. He earned money sailing around the Bering Sea on the old *North Star*, delivering supplies to the government village schools. When she lost her mom and grandmother at an early age, Martha moved



Dan Branch

to the Jesse Lee Home in Seward.

I know these things about Martha because she told me while I was measuring her head for the mask. She told me more about her life while sitting as a model.

Martha has a fine face with lots of landmarks. It gave me plenty to think about. Even though she's lost most of her sight, Martha knows more about her face than anyone I know. Using a finger as her measuring stick, she mapped out her face for me before I started carving.

When it was time to start, I took the wood out of the freezer. After working it into a rough shape with the adz, I put the ridge line on Martha's mask. The ridge line runs the center line of the face down the forehead, between the eyes, over the nose and through the middle of the mouth. The nose is roughed in next. That landmark controls the rest of the face.

Pictures weren't much help at this point. I needed to have Martha sit for me. She and her daughter were kind enough to invite me over on a wet Saturday afternoon. My wife and daughter came too. Martha was sitting in front of the TV when we showed up. Since she can't see well, she has to sit close. (Martha and I share a common passion for Star Trek but it wasn't on when we arrived. Instead, she was watching a Shirley Temple movie.)

While Shirley and Mr. Bo Jangles tap-danced across Martha's magnified TV screen, I drank tea and carved. When I needed to see the front of her face, I'd asked Martha to look in my direction and smile. This made us both laugh. When I laughed, I couldn't concentrate on her face. Most of the time I had a side view. The mask looks best from the side.

Sometimes Martha turned her attention from the TV to Dillingham where she worked during the war as a cook. Keeping my eyes on the mask, I carved while she talked. I could imagine her then, walking the road to Naknek past patches of blueberries and Arctic cotton.

Martha and "Wooden Me."

There's a time, in the carving of a portrait mask, when you find the simple essence of the person's face. I usually see it after carving in the basic shapes. I found it in Martha's mask during her second modeling session. She was telling me about Dillingham again. I was carving, head down, when I recognized the young woman Martha was describing in her narration. After that visit, Martha started calling her mask "the Wooden Me."

When most of the moisture left Wooden Me, I used small sharp knives to put the details of aging in the mask. Martha the story-teller emerged in the alder's grain.

Since she moved to Juneau after she raised her kids, Juneauites will see the Martha they know in the mask. It has her laugh and smile lines. I like that face and am happy to record it in wood. I wish that people in Juneau could also have known the face of the young woman who worked her war years in Dillingham.

Congressman finds interest due on Alaska purchase

By Congressman Tom Campbell

For several years, my wife Susanne and I have heard rumors about the 1867 treaty by which Russia sold Alaska to the United States. Susanne is the executive director of the University of California at Berkeley's Business School Project in St. Petersburg, Russia. I am a devotee of spy novels and the fiction of Jeffery Archer, and I serve on the International Relations Committee of the U.S. House of Representatives. A recurrent theme we have both picked up is that there was something amiss with the U.S. side of the agreement. One of Archer's novels suggests that it contained a clause whereby Russia could take Alaska back, if it paid back the $7.2 million within a set period of time. Susanne, who is fluent in Russian, has heard that a Russian word in the treaty could be interpreted as "lease" rather than "sale."

It seemed the only way to answer these fascinating speculations definitively was to visit the Archives of the United States to look at the original document. Last December we did just that. Ms. Cynthia Fox, chief of the Reference branch of the Archives, was awaiting our visit. She had laid out with care not only the actual 1867 Treaty between the Russian Empire and the United States, but also other artifacts connected with it—significantly, the U.S. Treasury draft that had been used to pay the $7.2 million. This, she showed to us first. It bore the date, August 1, 1868. Ms. Fox explained to us that it was a Treasury draft rather than a check because the treaty specified the payment was to be in gold, and at the time the Treasury paid drafts, but not checks, in gold.

Ms. Fox then showed us the actual document. The original U.S. copy of the Treaty is in the archives of Russia; the original Russian copy is what we reviewed. The first page was in Russian, reciting all of the Czar's various titles. Subsequent pages, however, alternated between English and French, the diplomatic language of the Czar's Court in 1867. Quickly, all doubts about the "lease" as opposed to "sale" rumor were dispelled. Article 4 clearly stated the cession was to be deemed complete and absolute upon the exchange of ratifications.

Something later in the treaty then caught my eye. Article 6 specified that, in consideration of the cession of territory, the "United States agree to pay at the Treasury in Washington within *ten months after the exchange of the ratifications* of this convention to the diplomatic representative or other agent of His Majesty the Emperor of all the Russias, duly authorized to receive the same," the seven million two hundred thousand dollars in gold. (emphasis added). The Treaty was ratified May 28, 1867, but according to Ms. Fox's records, the exchange of ratified copies took place on June 20, 1867. Ten months from that date, by my reckoning, would be April 20, 1868. But, the U.S. Treasury draft, shown us by Ms. Fox, was dated August 1, 1868. The payment took place three months, 10 days late!

For those seeking a premise to return Alaska to Russia, I must disappoint: the treaty's own words made the cession absolute. The money is a different question. Surely, Russia was due $7.2 million three months and ten days earlier than it was received. Suppose the interest rate was 5%. That sum of lost interest is $108,493. This sum, compounded at 5% and carried forward to the present day, is worth $58,724,766. $58 million.

Under international law, successor governments that succeed to the burdens of a treaty are entitled to the benefits of a treaty. The USSR, and now the Russian Federation, continue to operate without Alaska. Hence, the present successor government is entitled to the benefit of that burden: Namely, $58 million.

There are Americans with valid claims against the Russian government. Their claims, however, have not been able to be satisfied because, under the Sovereign Immunities Act, only funds of a foreign government used for the commercial purpose under which such claims arose can be attached. Might they now claim against the $58 million in the U.S. Treasury? The issue is a nice one: the sale of property is a commercial undertaking in which individuals as well as sovereigns can engage. If American plaintiffs with unsatisfied judgments related to property sales or seizures wish to try to attach the $58 million, they might prevail.

The other side of the argument would be that the particular transaction was a uniquely sovereign one, and that the money can only be offset by sovereign debts owed to the U.S. from Russia or its successor governments. Although President Roosevelt wiped the slate clean regarding claims relating to the Soviet seizures of American property, issues of sovereign debt might remain between our two governments. Careful analysis of legal liability resulting from the Lend Lease Act, and other means of sending material to the Soviet Union during the Second World War, might demonstrate a debt outstanding. But I must say I do not know that to be the case (Stalin was careful not to accept Marshall Plan money, for instance); and if the funds are not restricted to sovereign U.S. claims, American plaintiffs seeking to settle their judgments against Russia might attach a new source of funds in this $58 million.

So, while one mystery surrounding the 1867 Treaty over the sale of Alaska is solved, another one arises. Maybe some enterprising lawyer will tackle this new legal conundrum. If so, I wish her or him *"bonne chance', 'zelayu udachi'!* **[good luck in Russian]**

Tom Campbell is a U.S. Congressman, representing the San Jose, CA. area, and a Professor of Law at Stanford University. The topics he has taught include International Law and International Legal Transactions.

Bankruptcy Briefs

Preferential transfers

A preferential transfer is a transfer made (1) to or for the benefit of a creditor, (2) during the preference period (90 days or, in the case of insiders, one year) preceding the filing of the petition, (3) on account of an antecedent debt, (4) at a time when the debtor was insolvent, and (5) that permits the creditor to receive more than the creditor would receive from a distribution made in a chapter 7 liquidation in the absence of such transfer [§ 547(b)]. Analysis of preferential transfers requires one to look at all five elements.

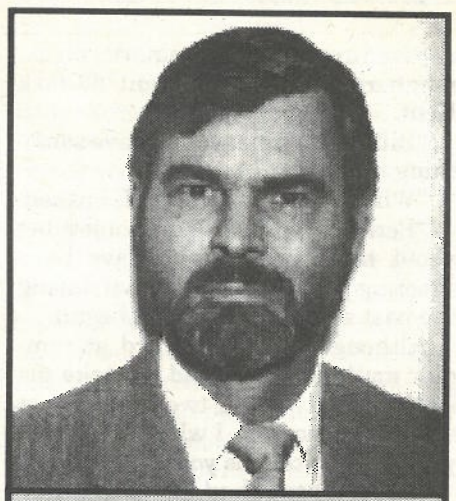
Section 547(e) defines when a transfer occurs. For real property, the transfer occurs when a BFP can not acquire an interest superior to the interest of the transferee [§ 547 (e) (1) (A)], the transfer instrument is recorded. For other property, a transfer occurs when a creditor on a simple contract can not acquire a judicial lien superior to the interest of the transferee [§ 547(e) (1) (B)]. For transfers by check, the transfer is completed when the drawee bank honors the check [*Barnhill v. Johnson,* 503 US 393 (1992)]. Under § 547(e) (2) transfers perfected within 10 days of the time the transfer takes effect between the debtor and the transferee relate back to the effective date, otherwise the transfer is made at the time of perfection. However, no transfer is deemed made until the debtor has acquired rights in the property [§ 547 (e) (3)]

Insiders are defined in § 101(31) and, in the interests of editorially imposed brevity, those definitions are not repeated in this article.

A debt is a liability on claim [§ 101(12)], a claim in turn is a right to payment, whether liquidated, unliquidated, contingent, matured, unmatured, disputed, undisputed, legal, or equitable and any right to an equitable remedy if the breach gives rise to a right of payment [§ 101(5); *Matter of Southmark*, 88 F3d 311 (CA5 1996) cert den. 117 SCt 686 (1997)]. In an interesting twist on the definition of a "debt" involving a "check kiting" scheme, it was held that granting provisional credit by a bank for deposited but uncollected funds is deemed an advance on a debt from the bank to the depositor that will come due when the deposit clears the other bank and is not, therefore, a debt owed the bank by the debtor [*Laws v. Missouri Bank of Kansas City, N.A.*, 98 F3d 1047 (CA8 1996)]. An antecedent debt is any debt then in existence, including an obligation that is not yet matured, e.g., future support obligations or installment loans *[In re Futoran*, 76 F3d 265 (CA9 1996)]. It has been held that a claim arising out of an executory contract does not "arise" until such time as the contract is breached, thus, a payment made contemporaneously with the "breach" is not on account of an antecedent debt [*Matter of Southmark Corp.*, 62 F3d 104 (CA5 1995) cert. den. 116 SCt 815 (1996)].

A debtor is insolvent when the sum of the debtor's debts exceeds the aggregate value (at fair valuation) of the debtor's property, excluding fraudulently conveyed and exempt property [§ 101(32)]: the balance sheet insolvency test. If the debtor is a partnership, the non-exempt property of the general partners, to the extent it exceeds the partners' nonpartnership debts, is considered part of the debtor's property [§ 101(32) (B) (ii)].

A debtor is rebutably presumed to be insolvent during the 90-day period preceding filing [§ 547 (f); *In re*



Thomas Yerbich

Koubourlis, 869 F2d 1319 (CA9 1989)]. Presumption of insolvency during the 90 days immediately preceding the petition does not shift ultimate burden of proof, but merely shifts the initial burden of going forward with evidence. Once the transferee comes forward with substantial evidence of solvency, the presumption vanishes and plaintiff must come forward with sufficient evidence to meet its burden of proving insolvency *[In re Sierra Steel, Inc.*, 96 BR 275 (BAP9 1989)].

Disputed and contingent claims against the debtor are considered in determining insolvency of the debtor at time of transfer. Contingent liability must, however, be reduced to its present or expected amount before insolvency can be determined, and, to determine contingent liability, one must discount it by the probability that the contingency will occur and liability will become real [id].

The fifth element, the "greater amount test," requires the court to construct a hypothetical chapter 7 case and determine what the creditor would have received in a distribution, taking into consideration the facts of the case as they actually exist, including claims actually filed and administrative costs necessarily incurred postpetition [*In re LCO Enterprises*, 12 F3d 938 (CA9 1993)].

Classification of the creditors' claim on the date the petition is filed is an important initial step. In an ordinary case, the amount and priority of an unsecured creditor's claim is fixed on the date of filing. Similarly, a secured creditor's claim is fixed in amount and the value of the security ascertained as of that date - the claim may be either fully or partially secured.

If a creditor is fully secured, a prepetition transfer is not preferential because the secured creditor is entitled to receive 100% of its claim [*Laws v. United Missouri Bank of Kansas City, N.A.,* supra; *In re Powerine Oil Co.*, 59 F3d 969 (CA9 1995); see In re *World Finance Service Center, Inc.*, 78 BR 239 (BAP9 1987) *aff'd* 860 F2d 1089 (CA9 1988)]. However, it is important to note that it is the value of the collateral at the time the petition is filed that controls, not the time of transfer [*In re the Sufolla,* 2 F3d 977 (CA9 1993)]. Thus, if at the time petition is filed the value of the collateral has deteriorated to an amount less than the creditor's claim (adding back in the amount of the transfer), the creditor is undersecured.

With respect to unsecured claims, the rule is quite different. In determining the amount that the transfer "enables [the] creditor to receive," the creditor must be charged with the value of what was transferred plus any additional amount that the creditor would be entitled to receive from a chapter 7 liquidation. The net result is that, as long as the distribution in bankruptcy to the creditor's class (as determined under § 726) is less than 100%, any payment "on account" to an unsecured creditor during the preference period will enable that creditor to receive more than he would have received in liquidation had the payment not been made [*In re Lewis W. Shurtleff, Inc.*, 778 F2d 1416 (CA9 1985)].

What about the undersecured creditor? The answer depends on (1) to what claim the payment is applied (application aspect) and (2) from what source the payment comes (source aspect). In bankruptcy, an undersecured creditor holds two different claims, each of which is entitled to different treatment in bankruptcy: (1) its claim against the collateral and (2) the amount of debt that exceeds the value of that property, which is by definition "unsecured." If payment is applied to the unsecured claim of the creditor, then in the usual situation the creditor will have received more than it would receive in a chapter 7 liquidation, meeting the greater amount test and satisfying the trustee's burden on the fifth element. By the same token, if the source of the payment is the creditor's own collateral, then the creditor will have received no more than it would receive in chapter 7 anyway, so that the greater amount test will not be met, and the trustee will have failed to sustain her burden on the fifth element. Even a payment that has been applied to the unsecured claim of an undersecured creditor will not trigger the test if the source of the payment is the creditor's own collateral. Both aspects of the test must be examined before a court can safely conclude that the greater amount test has or has not been satisfied in the case of an undersecured creditor.

Turning first to the "application" aspect, if a payment received by an undersecured creditor is applied to the unsecured portion of the debt, the effect of the transfer is similar to the effect on the ordinary unsecured creditor who receives such a payment. Like the unsecured creditor, the undersecured creditor who applies a transfer to the unsecured portion of its debt will have recovered a greater amount on this claim if the estate cannot pay 100% of the unsecured claims.

If the creditor applies the payment to the secured portion of the debt, on the other hand, the creditor effectively releases a portion of its collateral from its security interest (*i.e.*, its secured claim is reduced, freeing up an equivalent amount of collateral). Now, the effect of the transfer is quite like that received by a fully secured creditor. The payment will not have enabled the creditor to receive any greater amount than it would have received in bankruptcy anyway, because, when payment was applied, a corresponding amount of collateral was released from the security interest, becoming at least theoretically available for bankruptcy distribution to unsecured creditors. If the creditor does not actually release collateral upon application of the payment, the payment is *ipso facto* a payment on the unsecured portion of the claim.

However, even if the payment in question is applied to the unsecured portion of an undersecured creditor's claim, the creditor will not be deemed to have received a greater amount as a result of the payment if the source of the payment is the creditor's own collateral. A creditor who merely recovers its own collateral receives no more as a result than it would have received anyway had the collateral been retained by the debtor, subject to the creditor's security interest. Upon bankruptcy, the collateral would simply be returned to that creditor by the trustee as part of the chapter 7 administration. When an undersecured creditor is paid from the proceeds of its collateral pre-petition, it has received precisely what it was entitled to receive anyway in the chapter 7 liquidation — the value of its collateral. Thus, the undersecured creditor receives no more from a receipt of the proceeds of the collateral than it would have under a chapter 7 liquidation. [*In re El Paso Refinery, L.P.,* 178 BR 426 (Bank.W.D.Tex. 1995); see *In re Castletons*, Inc., 990 F.2d 551 (CA10 1993)].

Certain transfers are specifically excluded from being classified as preferential. These will be covered in the next article.

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
1997 CONFERENCE
FRIDAY, APRIL 25, 1997

The United States District Court for the District of Alaska is hosting its 1997 Conference on Friday, April 25, 1997, in Anchorage at the Anchorage Museum of History and Art, 121 West Seventh Avenue. The conference will feature:

Edwin J. Nichols, Ph. D, a nationally known clinical/industrial psychologist, working in organizational development. His presentation will examine the subtleties of race and ethnicity, prejudice, and fairness in our legal system, our every day lives and our society generally.

Prejudice, Fairness & You -- A Case Study
Dr. Edwin J. Nichols
(Underwritten by Pacific Telecom, Inc.)

* * * *

The District judges and magistrates hosting a discussion of motion practice in the District Court.

* * * *

Cathy A. Catterson, Clerk of Court of the Ninth Circuit Court of Appeals, discussing appellate practice.

Members of the Alaska Bar Association are cordially invited to attend the 1997 Conference. A registration form will be mailed to members. Questions may be directed to Michael D. Hall, Clerk of Court, 271-5568.

Tales from the Interior

Serial killer

Every attorney has an ultimate goal. For some, it is becoming a judge. For others, achieving fame and glory. And for still others, it is the traditional yellow feather which the U. S. Supreme Court gives out following argument. For Mike Brain, it was simply to pass the Bar exam.

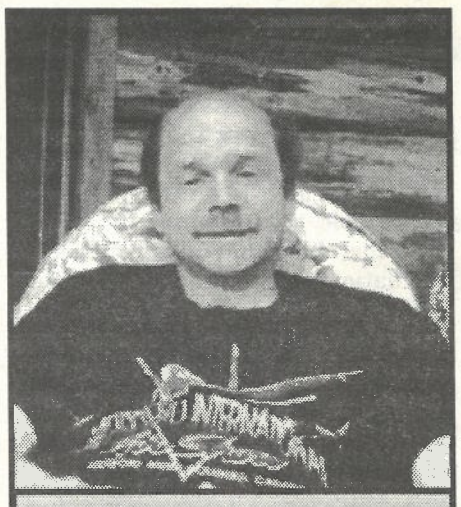
My ultimate goal always has been to represent a truly heinous criminal. The type of miscreant who makes Safeway tabloids shudder, and for whom television networks broadcasts six month long trials.

But where, in Fairbanks, Alaska, will one ever find a truly heinous criminal? True, Fairbanks has its occasional hammer murderer, and more than its fair share of DWI cases. But the really shocking carnages still seek out Hollywood and the *National Enquirer*.

All of this changed in the spring of 1996, when I found myself destined to represent my first serial killer. Not just one serial killer, mind you, but three honest-to-god serial killers were loose in our city. And I was given publication rights, to boot, of which I am currently taking advantage.

Perhaps I should explain . . .

Several years ago, when Fairbanks was a fledgling town nestled in the beautiful Tanana River Valley, some kind, innocent individual brought to the city a bevy of pigeons. No one knows for sure who that individual was, and no one wants to claim the credit. The pigeons, like their sexual cousins, the rabbits, proliferated. Fairbanks soon became known not only as the Golden Heart City, but also as a fine place where pigeons had all come to roost. Lacking natural enemies (except perhaps ravens and an occasional starving cat), the pigeon population in Fairbanks became proportionately productive. In a sense, Fairbanks became the Trafalgar Square of the Arctic, with even its own "Bird Lady" from *MARY POPPINS*, of sorts, a kindly old woman, Irene, who only recently passed away. The pigeon population in Fairbanks grew so rapidly that many of us believed that the extension of the electrical lines throughout the city had nothing to do with the demand for power, but rather was an environmental mandate to provide a perch for these feathered foragers.



William Satterburg

Pigeons can be somewhat enjoyable. My children had the experience of a lifetime in London when they had over 20 pigeons perching atop their heads and outstretched arms, nibbling bird food from their giggling bodies. Needless to say, although this event was somewhat exciting, the cleaning job afterwards left much to be desired.

Fairbanks, as well, suffers from pigeon pollution. Whereas ravens commute to the city from a roost reputedly located 65 miles north of town, pigeons, on the other hand, are not commuters. The city-dwellers make distasteful messes throughout the town. It does not take long to observe the telltale traces of these little infidels, adorning hoods, umbrellas, and attorneys' balding heads.

Recently, three individuals in Fairbanks, whom I will dub the "three musketeers," took it upon themselves to rid Fairbanks of the pigeon problem.

It is now time to digress further to first year criminal law.

Legally, pigeons are classified as a nuisance and pest. In fact, if a Fairbanks veterinarian is given an injured pigeon to nurse back to health, the veterinarian is under a legal obligation not to release to bird, but to euthanize the animal after it is healed or find it a domestic abode. Despite the cries of many to rid Fairbanks of its pigeons, the city council, in its benevolent wisdom, has done nothing of the sort. Frustrated, the three civic-minded musketeers recently took it upon themselves to eradicate the pigeon population.

For the next several weeks, reports flourished around town of unnamed individuals in commando garb screeching to a halt and leaping from their shiny pickup trucks. Silenced weapons would pop and hiss, and pigeons would plummet from their precarious perches to eternal peace and the pavement below.

Eventually, the exploits of these marauders drew the attention of the local populace and the city police. The pigeon-plunkers had been too obvious and a widespread manhunt was started to pigeonhole the offenders once and for all. In a short time, suspects were identified, but it was usually difficult to obtain evidence of the *corpus non-delicti*, since the raven population was having a heyday hauling pigeon carcasses home for dinner. A truly symbiotic relationship had developed between the three hunters and the raven population of Fairbanks.

> *'The pigeon-plunkers had been too obvious and a widespread manhunt was started to pigeonhole the offenders once and for all.'*

For several weeks, I followed the exploits of the exterminators in the *Fairbanks Daily News Miner* with a certain degree of awe and fascination at their brazen bravado. Over time, the hunters became more and more daring, eventually committing their crimes in broad daylight and in virtual defiance of all who watched. Letters to the Editor screamed both support and condemnation of their activities, and notorious folk heroes and folk villains were born. The police dedicated their most capable task force to the growing crime spree. People flocked from miles around to see what the results would be.

Despite the publicity, I did not realize that one of the pigeon bandits was, in fact, a longstanding client of mine. You can well imagine my surprise, therefore, when one quiet evening I received a call from an ordinarily meek-mannered client reminiscent of Clark Kent.

"Bill," he commenced, "I have something to tell you."

"What could it be George?" I asked.

"Perhaps you have heard something about those people who have been shooting pigeons around town during the past several weeks?" he began.

Although never a wizard at complex mathematics, it did not take me long to put two and two together on this one. "George!", I whispered, "Are you trying to tell me you are the one?"

"Let's just say I had something to do with it," he confessed. "I guess you could say I was one of the three who has been killing the pigeons around town."

Stunned, I remained quiet.

"They are really a problem, you know," he confided. "They have been in this town for years, and nobody has done anything about them. They have been littering the sidewalks, vehicles, and passerbys with pigeon DOO without control." In a note of public service, he added, "Somebody has got to do something about them, you know." Clearly, he was on the verge of breaking up.

> *'I soon received a phone call from Paul, the primary prosecutor of pigeon-poppers and an assistant city attorney.'*

Summoning my innermost strength, I steadied myself, realizing that we were in a very delicate moment. "George," I asked, "Does anyone else know about this?"

"No," he responded, "except the police."

My feet flew off the edge of my desk and I almost fell on the floor.

"How do they know?" I asked.

"I don't know," he began. Just about the time I was about to complement him on finally exercising his constitutional rights to remain silent, he added, "Perhaps it's because I told them."

Immediately, I began to draft a diminished capacity defense.

George concluded his confession by announcing that the police had broken into his pickup truck and had taken his air gun. He announced that they were planning to charge him with a crime.

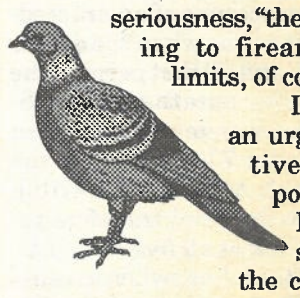
"What crime have you committed?" I asked, now intrigued. Naturally, like most people, I figured there must be a law against pigeon-popping. George quickly corrected my impressions, however, and stressed that the only law that the police had been able to dredge up for this dastardly deed was one that prohibited the discharging of a "firearm" within city limits. Confounded, I asked George if he had been using firearm within city limits, and he responded, "Oh, no. The only thing I have been using was an air gun. Unfortunately, the city ordinance says that air guns are firearms, at least according to the police." Now I was thoroughly confused. The city council had done it once again. I couldn't believe it. Air guns were firearms in Fairbanks, Alaska! Imagine the shock and dismay that every parent must feel as their young child opens the big present under the Christmas tree, fondly cradles their Daisy BB gun, and then immediately goes outside to become a young criminal, with a punctured Coca-Cola can ... the smoking gun, if you will.

Apparently, the city attorney recognized the same problem, since I soon received a phone call from Paul, the primary prosecutor of pigeon-poppers and an assistant city attorney.

"Bill," he commenced. "We know you are representing one of the pigeon-killers. We have a problem here. He is violating the law."

Quietly, I began to check my office for bugs. Innocently I asked, "what law, Paul?"

There was a hint of hesitation in his voice when he announced, in all seriousness, "the law pertaining to firearms in city limits, of course."



I restrained an urge for invective, and I pointed out to Paul, instead, that the city was trying to pigeonhole my client; that my client would not be a stool-pigeon for anyone else; and that the city was faced with a classic chicken-and-egg crisis. In the process I also pointed out that my client obviously could not be guilty of all the fowl deeds of which he had been accused, and that the shell of their case was cracked. Interspersed with the basics, I threw in a few comments about things coming home to roost, an allegation of feather-bedding, and a warning that the city should no longer try to wing its cases. Wisely, Paul quickly recognized that I had the drop on him, and gave up.

"Bill," he implored, "will you simply tell your client not to shoot pigeons anymore and we will be okay?" (A victory!) In passing, he also suggested that my client should approach the city council with a proposal to be contract killers for the city. (To my surprise, Paul had learned that there was a competition among the culprits to see how many of the pesky birds could be bopped before certain time limits.) The perplexing problem, of course, was that the city had declared pigeons to be a pest and nuisance. Clearly, my client was, in fact, doing a public service, yet at the same time allegedly violating a law pertaining to the discharge of firearms within the city, an embarrassing conundrum to all concerned.

As a compromise, I suggested to the city attorney that perhaps my client should plead no contest to the charges, be given a lengthy term of community service with an SIS, and that such service could include eradicating pigeons using an air gun. This did not seem to go over very well with Paul, although I gave it a shot. Once again, I was asked to simply inform my client that it was time to hang up his guns.

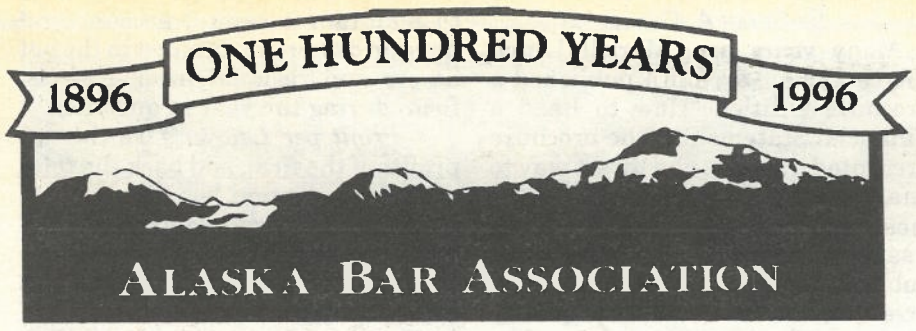
Dutifully, I contacted George, and indicated to him that the gig was up. Things were getting serious, and I was becoming more concerned that he might be subject to a littering charge, in the event that the ravens did not haul away all of the evidence as they had in the past. Reluctantly, George agreed to seek professional help for his addiction, an agreement was reached, and the air gun was quietly returned to him.

For several weeks Fairbanks pigeons ceased dropping from the overhead lines. Yet the other day, when I finally began to relax, I received a most gut-wrenching phone call. It was short, yet bone-chilling. Its meaning was deadly:

"Bill. Help Me. I am afraid I am going to kill again."

The way I see it, the only way I could live with such a terrible secret was to tell everybody about it.

Stan McCutcheon remembered



By Russ Arnett

Stan McCutcheon was second only to Governor **Gruening** in political power in Alaska from the mid '40s to the early '50s. Influenced by his parents who were political notables in Anchorage, Stan was first elected to the Territorial House in 1943, becoming Speaker in 1949. Through the powers of the Territorial Legislature were severely limited by the Organic Act, Stan persuaded the Legislature to use its powers more fully. The 1949 Legislature created the Alaska Statehood Committee. The legislation presumptuously commenced "In recognition of the near attainment of Statehood for Alaska..." Stan served on the Statehood Committee from 1949 until statehood. As Speaker and later as Democratic National Committeeman (1952-1953) he and Governor Gruening reduced the political power of the Seattle-Washington, D.C. axis of fishing, shipping and mining interests which dominated the Territory.

House Speaker

In the 1951 Legislature Stan and House Speaker **Mike Stepovich** engaged in a lively debate over a bill to reorganize the financial structure of the Territory. The bill was a priority of the Democrats, and was rushed out of the House with great expectation. Mike was horrified.

"Mr. Speaker," Mike declared in stentorian tones, "We have just seen a bill railroaded out of here with Mr. McCutcheon blowing the whistle - choo, choo, choo!"

"Yes, Mr. Speaker," replied Stan, "I plead guilty to ringing the bell and blowing the whistle, but the train won't move until we get Mr. Stepovich off the breaks and away from the switch."

Stan dropped another bill in the hopper of the 1951 Legislature to appropriate $5,000 to "investigate the pusillanimous activities of **Almer J. Peterson,**" and aging and no-so-bright lawyer who argued politics by offering to fight. Almer, also a member of the House, raced forward, took a bare-knuckled stance, and challenged the membership. When Almer retired from practice and before he moved to Washington, the Anchorage Bar had a lunch for him. Almer smiled benignly on his colleagues and said, "Well boys, I made it all right here (Long pause) and I'm talking it all with me."

The wages of McCutcheon's political success were his indictment for various offenses under the Territorial banking statutes. He was an officer of the Union Bank and technical violations were charged in a very partisan grand jury proceeding. He was fully exonerated, through it took its personal toll. Afterward Stan seemed a changed man. His career from then on was primarily that of a lawyer - the best trial lawyer in Alaska.

Early Beginnings

Always controversial, he was nearly expelled from grade school when he challenged his teacher's scoff that there was not a tree in Alaska you could not reach around.

Stan read law in a law office while still a teenager. His admission to practice in 1939 had to be delayed until he became 21.

He became president of Alaska Airlines in 1949 during the military construction boom and, though still active in politics and his law practice, developed it into a successful interstate airline. On a dead-head run to Seattle, Stan and the pilots left the stewardess in the closed cockpit with the controls on auto-pilot. With the pranksters in the aft cabin, the plane started a steep climb, then dived sharply before eventually levelling off. After gaining entrance to the cabin which Stan had locked, they learned that she had ferried B-17's across the Atlantic during World War II.

Represented

Though Stan had a highly successful law practice, he represented many Natives when Natives had no money. When oil interest picked up, but before the Native Claims Settlement Act, Stan obtained petroleum rights from the United States for the Tyoneks in the exercise of formidable legal and political skill. The Alaska Supreme Court decision in *Metlakatla v. Egan* was against his position, but by emotional and political pressure on the Bureau of Indian Affairs which, like any other government bureau was unwilling to part with power or control, Stan prevailed. The petroleum lease money was at Stan's insistence prudently invested and spent for good housing and permanent community improvements. It was better legal and financial advice than many Native corporations now generally receive.

Jokers Wild

Roger Cremo and Stan collaborated for the plaintiff in a P.I. case. **George Grigsby** defended for the carrier. In cross-examination Grigsby made much of the fact that the plaintiffs, although allegedly injured, were in Cremo's office at 8:30 a.m. the morning following the late-night accident. After hearing all too much of this Cremo called McCutcheon to the stand and Stan testified that when he clerked for Grigsby, Grigsby not only got Stan a job at the hospital but he eventually arranged to have him drive the ambulance.

Once **Buell Nesbitt,** Stan's partner and later Alaska's first chief justice, replaced the shotgun shells in Stan's pockets with moose nuggets. Another time Stan and Buell lifted the compact car owned by **Felton Griffin,** the Baptist preacher and their friend, and set the car on end on Fourth Avenue, with terror on Felton's face.

A very old placer miner resided in an earlier-day log cabin in Anchorage. Stan was his friend, attorney, and executor, so when the miner's death was reported in the Seattle paper Stan sadly took possession of the cabin and some personalty. Probate proceedings were commenced. The city tried to condemn the cabin and, rather than resist, Stan had it burned to the ground. In the spring the miner returned (a man by the same name had died in Seattle) and Stan had one hell of time explaining to his friend why he had burned his cabin down.

Sucker Lake

Stan had been a professional chef. Once when Stan thought he was frying beef steaks, Buell substituted steaks from a black bear that had been eating fish. Soon the stench in the cabin became intolerable. Stan inferred the cause, and threw the steaks in his cabin mate's bunk.

In the 1950s when Judge **McCarrey's** territorial judicial reappointment stalled in the U.S. Senate Judiciary Committee, **Frank Orth** came to Anchorage from Washington to look over the situation. Orth had the right political faith, was Under Secretary of the Army, and indicated that he was favored for the appointment. Stan, Buell, and **Wendell Kay**, along with several other lawyers, flew Orth out to their cabin at Sucker Lake for some ice fishing, a steak dinner, poker and 7 Crown. Buell helped Orth set his overnight line through the ice and told him they would check it in the morning. Stan and Buell had brought a 30-pound frozen king salmon along, and during the evening revelry Buell slipped down and tied the fish to Orth's line. The next morning everyone was standing around while Orth and Buell checked his line. When Orth felt the weight of a fish, Buell told him to act quickly and helped him raise the frozen king out of the snow and ice to a lively round of cheers and jeers. Orth held it shoulder high and Stan took color movies. Orth was speechless. Later, at the Anchorage Bar Christmas party Judge McCarrey was portrayed by the Old Crow Players in a moment of great judicial frustration shaking his fist and declaring, "East may be east, and West may be west, but Orth ain't North-YET!"

The Hell Ship

Stan sometimes holed up in a hotel room with a jug for a week of preparation before a trial. Final argument was his greatest strength. He started a final argument file at the first conference with his client and as arguments occurred to him he would note them down and file them. This thoughtful and prolonged development of his arguments was one reason for their effectiveness.

One of his many notable cases was called the "Hell Ship" case by the newspapers. A young merchant seaman who aspired to becoming a mate had been provoked to homicide by appalling social conditions on his ship. Stan pled his client guilty to second degree murder and evidence was presented for sentencing. The client, who was not from Alaska; was eventually paroled to Stan who took him into his home to live until he could get on his feet. He entered Gonzaga and became a priest (the client, not Stan).

Stan worked for nothing for a full week to get another young fellow off with probation. His client then repaid Stan by forgoing $1,400 worth of checks on Stan's bank account!

Stan the Man

Stan liked young lawyers and always helped and encouraged them. Before **Ken Atkinson** started law school he was driving a well point for Stan and Buell at their cabin. stan would always buzz Ken with his plane and often dive bomb Ken with rolls of toilet paper. Once during Stan's bombing run Ken observed an erratic approach. When Stan landed he introduced Ken to **"Deefey" Swanson** whose dog's testicles had been caught in the plane's control cables. Stan could not obtain help from "Deefey" because, as his name suggests, he was deaf.

Once I worked with Stan on a case that settled before we agreed to a division of fees. Because of his prominence i could have not objected to any division. A lawyer who had worked for Stan said that if i insisted that he decided he would be generous to a fault. I did and he was.

In 1975, as it must to all, death came to **Stan McCutcheon.** The Pipeline boom had been on for a couple years. Hundreds of new lawyers completely changed the character of the bar. They did not have the privilege of his friendship, nor of seeing him in court. I first met Stan in 1952 in Nome and found him cocky and a little too smooth. The longer Stan practiced the more humanity and dedication to his clients he developed.

How to read your law firm's financial statement

By Peter A. Giuliani

Many years ago, Merrill Lynch Pierce Fenner & Smith published a brochure entitled "How to Read a Financial Statement." The brochure presented a simple and direct way to analyze a company's financial statement by computing and interpreting a series of ratios. The objective of the publication was to teach potential investors how to evaluate the quality of the stock of a company they may be considering purchasing as an investment.

> *"This article presents and interprets a series of financial ratios and other statistics which can be used to interpret law firm financial statements."*

Merrill Lynch's premise is still true today. Moreover, it applies to law firms. This article presents and interprets a series of financial ratios and other statistics which can be used to interpret law firm financial statements. Some of these ratios have been published elsewhere. Others provide newer insights, as law firms have come under financial pressure to restructure and reengineer.

To the experienced financial manager, some of this will be very basic stuff. To others, it may be the first time all of these statistics have been collected together in one article. One hopes that everyone will find something of interest and use in this article. Throughout, the analysis is presented in the context of partnership accounting.

Cash or Accrual?

Most law firms keep books on the cash basis of accounting for tax purposes. For analytical purposes, they also keep a rough approximation of accrual-basis books of account. The ratio analysis contained in this article sometime applies to cash-basis accounts and sometimes to accrual basis accounts. Whenever required, I will specify whether the ratio should apply to cash-basis or accrual-basis financial statements. In the absence of a specification, the presumption should be that I am referring to cash-basis accounts.

Firm Profitability

When measuring profitability, the pertinent ratios should be calculated on both cash and accrual bases. The difference between cash-basis and accrual-basis profitability ratios can be very instructive. For example, most growing firms experience a persistent deficit in cash-basis profits relative to accrual basis profits. The difference reflects an investment in building the "pipeline" of unbilled and uncollected work for newly-acquired lawyers. By comparison, a shrinking firm may experience a short-term excess of cash income over accrual income, because it is collecting the "tail" of accrual assets left to it by departed lawyers.

There are three basic ratios which attempt to measure firm profitability. They are as follows:

• *Profit per Equity Partner* - This ratio is the fundamental measure of the return earned by the owners of the law firm. It measures the relative rewards which accrue to owners for their efforts and assumption of risk. The numerator consists of the net profits of the firm (i. e., excess of all revenues over all expenses and payment to former partners) for a particular year. The denominator is the weighted-average number of equity partners (i. e., those who are required to maintain a capital account and have an ownership interest in the net assets and residual income of the firm) during the year in question.

• *Profit per Lawyer* - To the net profits of the firm, add back the total of all compensation, benefits and payroll taxes paid on behalf of lawyer-employees. Divide this sum by the weighted-average number of lawyers who practice full-time with the firm. Ignore all others who are not expected to be full-time fee-earners for the firm. This ratio measures the return earned by the firm on all of its lawyers. As such, it removes any effects of operating leverage (see below) and provides a useful comparison of relative efficiency in use of lawyers.

• *Profit per Fee Earner* - In recent years, firms have taken to employing paralegals and other professionals whose efforts are billed to clients. A more accurate measure of the efficiency of use of resources is the profit earned per fee earner, which is computed by adding to firm net profits the total of all compensation, benefits and payroll taxes paid on behalf of lawyer-employees *and any other employees whose services are billed to clients,* divided by the weighted-average number of fee-earners (lawyers, paralegals, etc.) employed for the year in question.

These ratios are the fundamental measures of firm profitability. They also provide the basis for computing other ratios that follow.

Resource Utilization

In economists' terms, the fundamental "units of production" in a law firm are the lawyers and other fee earners. The firm invests in hiring lawyers (and fee earners) and in retaining partners in the hopes that their efforts will provide adequate revenue to cover the firm's overhead (i. e., all non-lawyer (non-fee-earner?) support costs, fair compensation to the lawyers and fee earners, and a reasonable profit for the owners of the firm to share.

There are four ratios which attempt to measure how well the firm is doing in earning a return on its investment in lawyers and other fee earners.

• *Revenue per Lawyer* - This ratio is easily calculated. Simply divide the fee revenue earned during a given period by the weighted-average number of lawyers employed by the firm. Part-timers are taken into account by including their full-time-equivalent in the denominator. Thus, a lawyer who works four days a week for the firm is counted as four-fifths of a lawyer. This ratio should be calculated on three different bases, as follows:

- Fees received per lawyer (pure cash-basis),

- Fees billed per lawyer (i. e., fee additions to accounts receivable, divided by number of lawyers), and

- Value added to work-in-progress per lawyer (i. e., the value of all time charges added to WIP, divided by the number of lawyers).

When viewed comparatively across multiple time periods, the three versions of this ratio give a very good picture of how well the firm is doing in getting work into and through the "pipeline", as well as how well it is doing in getting the optimum production out of its lawyers.

Despite its simplicity, this ratio is probably the most important one to watch and track from period-to-period. One cannot have profits per partner without solid revenue per lawyer. The total revenue of the firm may be growing, but if the number of lawyers is growing faster than the revenue base, revenue per lawyer will slip and so will profits per partner, other things being equal.

• *Revenue per Fee Earner* - This ratio is essentially the same as Revenue per Lawyer, except that the denominator includes paralegals and others who are expected to create revenue for the firm. It has the same significance as Revenue per Lawyer and is probably a more valid measure in firms which have a high number of paralegals, consulting engineers, economists, etc.

• *"Am-Law Profitability Index"* - Originally developed for and published in The American Lawyer Magazine by David Maister, this ratio is computed by dividing Profits per Partner by Revenue per Lawyer. Ideally, it measures the return earned by the partners on every dollar of revenue collected, taking firm size out of the equation. Without going through the full derivation of the formula in this article, it is sufficient to understand that API is a measure of efficiency, not absolute profitability. For example, a firm may have a high API but relatively low Profits per Partner compared to other firms, if its Revenue per Lawyer is also low.

According to Maister's analysis and conclusions, an "ideal" API is greater than 1:1. That is, most firms should strive to achieve one dollar of Profit per Partner for every dollar of Revenue per Lawyer. This is not always easy to accomplish, especially for smaller firms engaged in "general practice" in communities with limited markets for legal services. Nevertheless, it is a useful measure to compute and track over time.

• *Realization Rate* - A firm should keep track of time worked on client matters and target an hourly rate of recovery sufficient to meet expenses for lawyer compensation, overhead and support costs, and a reasonable profit for the firm. For example, if a "normal" work-load is 1,800 hours per year, and a particular lawyer earns $100,000 per year in salary and benefits, and the firm spends $75,000 annually per lawyer on infrastructure and support, and the firm hopes to earn a 30% profit margin on fees collected, then the target-rate computation would be as follows:

	Compensation and Benefits	$ 100,000
plus:	Overhead and Support Cost	75,000
equals:	Total Cost	$ 175,000
divided by:	one minus Target Margin	70%
equals:	Target Revenue	$ 250,000
divided by:	"Normal Hours"	1,850
equals:	Target Rate per Hour	$135

If all works well, the firm should collect fees for the lawyer's services which average $135 or more per hour for the time spent on client matters. Collections at less than the Target Rate and the firm forfeits profits.

At this point it is important to note that we are not advocating hourly billing. We are, however, advocating cost accounting for services rendered which is based on the concepts of standard costs, standard levels of activity and standard rates which reflect a target profit for the firm.

The Realization Rate, then, provides an indicator as to whether of not the fees collected by the firm cover its costs and provide for profit. The Realization Rate represents the ratio of fees collected divided by the standard value of lawyer time expended to produce the fees collected. For example, if a firm collects $1,000,000 in fees in a particular year and the standard value of time expended to produce the fees collected is $1,100,000, the Realization Rate is 91%. Overall, a firm should be able to sustain a Realization rate of 100% or more.

The tricky part of computing Realization is making sure that the denominator reflects the appropriate cost/profit value associated with the fee collected. One cannot simply divide fees collected in a particular year by the value of time added to WIP. In such case, the numerator and denominator are out of phase. The denominator reflects value created which will be billed and collected in the future, while the numerator represents fees collected for efforts expended in the past. It is important that the firm's cost accounting system is capable of keeping the two elements of the ratio in phase with each other.

Each of these statistics provides a slightly different measure of the firm's performance with respect to recovering a fair return for the efforts its lawyers expend on serving clients. These ratios attempt to measure the degree to which the firm's cost structure and resource allocation are appropriate.

Working Capital Management

Typically, clients pay for legal service on a monthly or quarterly basis, or when a particular matter has been completed. On average, five or six months can elapse between the time service is delivered and cash is collected. During the interim, the firm has to pay salaries, rent and other costs of operation. Consequently, it is important that law firms appropriately manage cash. To accomplish this, they need to keep the "work-to-collection" cycle within a reasonable time frame, manage cash outgo to keep it in line with cash inflow, and build up a cushion to even out peaks and valleys.

Three statistics measure how well a law firm handles this process. Two statistics attempt to measure the work-to-collection cycle and one assesses the extent to which inflows cover outgo.

• *Months' Work Unbilled* - This ratio approximates the average length of time between rendering the service and billing the client. Before computing the ratio, the firm should analyze the value of its unbilled work-in-process (WIP) and eliminate any items which are probably not going to be collected. In addition, it is probably also prudent to reduce the aggregate value of WIP by some percentage to reflect the probability that not all of the unbilled value will be realized at target rates.

The ratio itself is computed by dividing the resulting adjusted WIP

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Solid Foundations

ABA Commission on IOLTA continues to aid the Bar in efforts to assist Alaska Legal Services Corp.

The Trustees of the Alaska Bar Foundation have been assisted for years by the members and staff of the American Bar Association Commission on IOLTA. As the challenges facing the legal services community, and the IOLTA community specifically, continue, the assistance of the Commission is ever more valuable.

The provisioning of legal services by the Legal Services Corporation (LSC) is more difficult in 1997. Congress appropriated $283 million to the LSC for FY 1997 but restricted greatly how programs can use these funds. Thus IOLTA funding of LSC programs is more critical than ever before. Given the nationwide IOLTA funding requirements, the Commission, in 1996, established several objectives to realize its mission to assist IOLTA programs in ensuring the delivery of civil legal services:

Mary Hughes

• Assist IOLTA programs, state bars and other entities in connection with court challenges and assist the ABA in providing the national perspective on IOLTA in the courts;

• Develop and recommend policies to the ABA regarding IOLTA;

• Assist IOLTA programs to maximize and utilize resources for the delivery of civil legal services;

• Assist IOLTA programs, state bars and other entities, when requested, with continuing state planning efforts;

• Provide technical assistance, training and information- services;

• Promote the delivery of a full-range of civil legal services to people with low income, consistent with the highest professional standards;

• Act as liaison between IOLTA programs, the ABA and other entities, and inform the ABA leadership and membership about IOLTA.

As in the past, the Commission co-sponsored the recent IOLTA workshop in furtherance of its goal of ensuring equal justice to all, regardless of financial status.

The ABA Commission on IOLTA is the national clearinghouse for IOLTA information, ideas, guidelines, and strategies. Without the Commission, the state IOLTA programs would have faltered long ago. The Alaska Bar Foundation, the proponent of one of the smallest IOLTA programs, has utilized the resources of the Commission to initiate the Alaska IOLTA program in 1986, to alter the program in 1989, and to stay abreast of IOLTA developments.

The Trustees of the Alaska Bar Foundation are presently discussing strategies with the Commission staff and counterparts in other IOLTA programs in order to preserve the work of the Alaska Legal Services Corporation. The discussions have been fruitful; however, the future of the provsioning of legal services in Alaska will depend on the efforts of the entire membership of the Alaska Bar Association. Hopefully, the topic will be one of the most important discussed at the annual convention. With the support of the Alaska Bar Association membership, a solution is sure to emerge.

How to read your law firm's financial statement

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balance by the monthly average value of time added to WIP, computed at target rates. The denominator should consist of a six- or twelve-month moving average of value added, in order to even out seasonal or cyclical fluctuations. The result should be an approximation of the number of months of "good" work which is tied up waiting to be billed. Longer cycles may prevail in certain practice specialties.

This statistic should be computed each month and charted over time. Most firms experience a rise in this statistic during the middle of the calendar year, and a sharp drop at the end of the year, coincident with the year-end billing "push".

• *Months' Billings Uncollected* - This a companion statistic to Months' Work Unbilled and it is intended to approximate the average length of time between billing a client and receipt of cash. As with the previous statistic, old or uncollectible accounts should be excluded from consideration before computing the ratio.

The computation of this statistic parallels the previous one. In this case, adjusted accounts receivable are in the numerator and average monthly billings (i. e., actual fee bills rendered to clients) are in the denominator. The resulting ratio indicates the number of months required to collect a fee bill, on average.

Normally, this ratio should be about two months. Certain practice areas may have billing and payment conventions uncharacteristic of this norm, however.

• *Cash Flow Coverage* - Every law firm has a certain minimum monthly requirement for cash flow to sustain operations. The monthly "nut" typically consists of the total of planned cash expenditures on salaries and operating expenses, debt service (principal and interest), payments to retired partners, scheduled contributions to pension/profit-sharing/401(k) plans, estimated amounts for costs advanced on behalf of clients, and some reasonable draw for partners to live on. The cash flow needed to cover the monthly "nut" comes from cash balances on hand at the start of the month, plus normal collections from bills rendered in previous months, and recoveries of costs previously advanced on behalf of clients.

Cash Flow Coverage is computed by adding the firm's available cash balance to the average monthly cash inflow and dividing the sum by the average monthly minimum cash outflow. As with previous ratios, the averages should be calculated on a six- or-twelve-month moving average. If the partners are going to expect to have any additional year-end profit distribution, the average monthly coverage ratio should be substantially greater than 1:1.

> *'Financial statement ratios and statistics are useful analytic tools. Their purpose is to raise questions, not supply answers.'*

Cash flow and capital management are tricky problems for law firms. The best way to ensure success is to keep the work-to-collection cycle as short as is reasonable and as steady as possible. The more regular the cash flow, the smaller capital cushion the firm is likely to need to level out monthly fluctuations.

Debt and Capitalization

Many firms are more concerned than ever with the basic "balance-sheet" issues — debt, permanent capital, undistributed earnings, and depreciation. Four key ratios - besides the standard measures of debt/equity and permanent capital per partner - help us understand law firm balance-sheet relationships.

• *Debt / Asset Ratio* - If the firm chooses to finance asset acquisitions with debt, the amount of outstanding long-term-debt at any given time should be roughly equal to the net value of fixed assets (after deducting accumulated depreciation). A useful ratio, therefore, is computed by dividing the firm's outstanding debt balance by net fixed assets. Ideally, the ratio should not be greater than 1:1. The repayment schedule and depreciation expense should be synchronized so that the extra cash from depreciation can be used to retire the debt.

• *Debt Coverage Ratio* - This ratio measures the extent to which the firm's net income on a per partner basis covers the firm's debt per partner. It is calculated by dividing Profit per Partner (see above) by Debt per Partner. Normally, one would like to sustain a ratio of at least 2:1 (i. e., the partners would have to forego paychecks for no more than six months to retire the debt). Bankers are often stricter with this ratio, especially of the firm has en erratic cash-flow pattern.

• *Excess Depreciation and Amortization* - This statistic measures the extent to which non-cash expenses are able to cover debt service. It is calculated by dividing annual depreciation plus other non-cash expenses by the annual scheduled debt retirement, excluding interest. Anything over 1:1 is considered good.

• *Number Of Months' Earnings Undistributed* - This ratio measures the firm's ability to stay current with making distributions to the partners. Months' Earnings Undistributed is computed by aggregating the undistributed earnings accounts of the partners, subtracting any available cash balance, and dividing the result by the average monthly profit, before partner draws or other distributions. It is generally desirable that, on December 31, there be no more than three months' income undistributed. Higher levels of undistributed profit suggest undercapitalization and a need to build up the permanent capital in the firm.

Most firms strive to distribute all of a particular year's income by March 31 of the following year so that partners will have sufficient cash on hand to pay income taxes. Typically, the first quarter of the calendar year is too "light" in terms of cash flow to sustain partner draws to cover this personal expense.

Final Thoughts

Financial statement ratios and statistics are useful analytic tools. Their purpose is to raise questions, not supply answers. They are simply tools for the skilled financial manager to use in identifying and diagnosing potential problem areas. The appropriate response to unfavorable statistics is to delve further into the facts behind the numbers to discern the root causes behind the result. One hopes that this article has added some useful tools to the financial diagnostician's medicine kit.

The author is with Altman Weil Pensa, Inc. of Westport, Connecticut.

Former Rabinowitz clerk reflects on his mentor

By Bill Choslovsky

Melodrama intended, come the end of February, Alaska lost an institution. On February 25, Justice Jay Rabinowitz turned 70, and per Alaska's state constitution, he had to retire. His contribution defies description, though I'll nonetheless try. At least in this writer's mind, Rabinowitz is synonymous with Alaska jurisprudence. (I am admittedly biased, having clerked for the justice during the 1994-1995 term.)

For starters, there are the numbers: 37 years on the bench, four stints as chief justice, and hundreds — if not thousands — of published opinions. In his time, he has sat with all but two of Alaska's 16 supreme court justices and overlapped the tenures of all of Alaska's seven governors, spanning the bridge from Egan to Knowles. I'll leave the final accounting of Rabinowitz's quantitative contribution to the historians and statisticians, which should keep them quite busy.

More telling than the numbers is Rabinowitz's qualitative contribution. With all due respect to Webster's, its definition of judicious — "having, exercising, or characterized by sound judgment" — is inadequate in this instance. Since adjectives come up short, I'll instead share a story.

Fresh from Harvard Law School, I was starting the first day of my clerkship, September 20, 1993. One thing was missing, however, — my boss. After having been told he had six months to live, he — as I came to learn was customary — was stubbornly fighting that diagnosis with chemotherapy (the customary part being his stubbornness). When he later arrived, he bore little resemblance to the man who had interviewed me the previous fall. He spent that day, and many to follow, immobilized on his back, in his office, overcome by pain he tried to hide.

Later that first day he summoned me and the other clerks. Entrapped in a back brace, he made his way to a conference table to hear our recommendations on three cases he was to discuss with the other justices. When my turn came, he asked a question I relished. Since it was my first opportunity to prove myself, my thoughts were, "Great, I can show how much I know." However, halfway through my answer a light bulb went off and I said out loud, "Oh yeahhhhh." By asking what was a seemingly easy, simple question, Rabinowitz had clarified the entire case. Now on the right track, I backed up my answer with supporting facts. After listening, Rabinowitz, eyes closed and in noticeable pain, said, "That makes sense, but didn't the plaintiff say something in a footnote on page 17 of her brief that negates that argument?"

I dutifully opened the brief and sure enough, there was a footnote on page 17 and yes, it obtained some obscure (and meaningful) factual point. This was but the first of many instances where I shook my head thinking, "How did he...?"

After my co-clerks were similarly humbled, we walked out of the room and I mumbled to them — apparently too loud, "If this is him at half-speed, what's he like at full speed?" Proving that pain hadn't affected his hearing or wit, Rabinowitz barked back, "Half speed, huh ... it's more like an eighth." And this was just the first day.

Then there was my last, and perhaps most amusing day, September 15, 1995. A school group was touring the courthouse in Fairbanks and I heard the teacher ask an unwary student, "What's the rule with picking the chief justice?" Though he apparently hadn't been paying much attention in class, the boy had apparently been around Alaska long enough to answer, "It's Rabinowitz, then someone else, Rabinowitz, someone else, Rabinowitz,...." Though admonished by the teacher and technically incorrect, he'd have gotten full credit from me. After all, it was practically standard practice if not a constitutional requirement.

And those were just my first and last days. You can imagine all that came in between, like December 5, 1994, Tony Knowles' inauguration day. Though forbidden by his doctors, let alone his wife, Rabinowitz checked himself out of the hospital that morning and dutifully administered the oath of office to Governor Knowles. Just another day.

Though my story tends to portray Rabinowitz in a mythical light, what impressed me most was how human he is. I couldn't believe how after 35 years he still dotted every i and crossed every t. Though he could have operated on cruise control, he didn't. To say he is thorough is an understatement. Time and time again when discussing an issue, he'd query, "Well, what does the record say," or "What do the treatises say?" He was not only thorough, but from what I observed, apolitical as well. That is, his focus was consistently singular: namely, "let's get it right." Though he took his work quite seriously, he didn't take himself that way. Perhaps most important, he laughed. Finally, and in his mind most important, there's his work product. Time will prove his genius on that front.

Let me conclude by noting that Alaska is losing not only a legend of sorts, but his fellow super-heroes as well. Like any good trio, Rabinowitz, his long-time secretary Mona Edfelt, and Court Director Art Snowden are exiting in unison. Their collective contribution spans 79 years — over twice the age of the state itself — yet can't be measured in numbers. Though an expatriot, I think I speak for others when I say, "Alaska thanks you."

The author is a member of the Alaska Bar, a former Juneau and Fairbanks resident, and is currently living in Chicago.