# The Alaska BAR RAG

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## Inside:



*Millenium bug:*

# A major threat to computer systems

*By Christopher Canterbury*

As Alaskans look forward to the long days of summer and relief from the cold and flu season, a "bug" of a different order raises concern among even the sturdiest of sourdoughs.

It isn't an ice-worm, but the dreaded "Year-2000 Bug"— the latest in doomsayers' "end-of-the-world" predictions as the new millenium appears solidly on our horizon. The problem involves computer hardware and software programmed with dates using a two-digit year field rather than a four-digit year field. When the digits "00" are entered for the year 2000, as is already happening in some areas (have you received a renewal on your credit card lately?), systems with the "bug" will not recognize the year "00" as the correct year and the programs will fail or fail to operate properly.

The potential for disaster is frightening, considering society's growing reliance on computers and the fact that the bug can be found in all kinds of software applications and operating systems, affecting mainframe and PC computers alike. The Gartner Group, a prominent information technology consulting and research organization, estimates the worldwide cost of Year 2000 (Y2K) remediation at $400 billion to $1.5 trillion—and rising. At the U.S. federal government level, alone, the Office of Management & Budget has increased its estimate to $4.7 billion for government-wide correction, up 100% from a year ago. Even an automobile engine that relies on a microchip with embedded date-field code could be affected. The failure of bug-infested systems could mean big trouble for such tasks as personnel, medical and academic record-keeping; banking and finance; the delivery and maintenance of inventory; accounts payable and receivable; licensing and permitting—the list goes on.

**SHOULD YOU BE CONCERNED?**

Any business owner should be concerned about possible exposure to liability from a failure to correct

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**December's pupillage group preparing for its Inn of Court presentation. L-R: Brian Bjorkquist, The Honorable Larry Card, Taylor Winston, Brooks Chandler (seated), Steve Van Goor, and Mark Millen.**

*The Anchorage Inn of Court*

# Solving problems of the legal profession

*By Mike Moberly*

*Santa Claus, the tooth fairy, an honest lawyer and an old drunk are walking down the street together when they simultaneously spot a hundred dollar bill. Who gets it? The old drunk, of course; the other three are fictitious creatures.*

Jokes such as this are more abundant today than ever. Lawyers and the legal profession have always been the subject of public attention. Some of today's most popular television shows, films, and books are about lawyers and the law. Yet a paradox exists. The same public that reads the books and views the films and television shows has a perception of lawyers that remains unflattering. Many lawyers are becoming increasingly concerned about this public perception of them and their profession. The emergence of "lawyer bashing" is attributable, however, to the attitudes not only outside of the profession, but also within. The strident advocacy and incivility of lawyers employing "Rambo-type tactics," including discourteous, combative, harassing, and rude behavior, have brought disrepute upon attorneys and the legal profession.

See CLE Pages 14-16

In addition to criticizing this "win at all costs," "take no prisoners," "scorched earth" attitude, many lawyers are also concerned about the competency of those who practice in the profession. In the last year the Alaska Bar Association has proposed several changes to Bar rules and Rules of Professional Conduct, including requiring disclaimers in attorney advertising, mandatory written fee agreements, and notifying clients when an attorney is not covered by malpractice insurance. All seem to stem from growing concerns over the public's tarnished image of the legal profession, as well as attorney misconduct.

In an effort to recapture the noble roots of the profession, the American Inns of Court have set out to solve the problems that beset the legal profession, not just identify and debate them. An Inn of Court is not a social club, a course in continuing legal education, a lecture series, or an apprenticeship system, although it contains some elements of each of these. The goal of the American Inns of Court is to foster professionalism, ethics, civility, and improved legal skills for judges and lawyers in order to perfect the quality, availability and efficiency of justice in America. Members of an Inn come from all areas of the legal profession, including judges (both state and federal), the plaintiff's bar, defense counsel, solo practitioners, prosecutors, corporate counsel, large law firm practitioners, and public defenders. The essence of an Inn is its relatively small size and the personal contact among members, especially the sharing of the experiences of the accomplished judges and lawyers with the less experienced lawyers.

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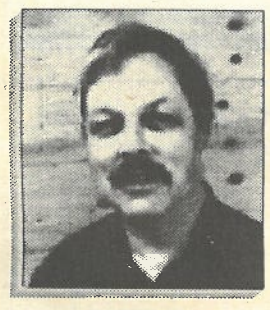
## President's Column

# Dialogue with the legislature

☐ David H. Bundy



This particular column is a collaborative effort, made necessary by the quadrennial "sunset" process that the Bar must endure. For some time now, the Legislature has required state agencies to justify their existence every few years. In 1994, the Board was renewed for four years, and unless we are again renewed this year, the Board will "sunset" and go out of business in 1999. (The Supreme Court could integrate the Bar by rule, if that proves to be necessary.)

Last fall the Legislative Auditors reviewed the Association's operations. Generally, they found that the Association was fulfilling its functions in an efficient and effective manner. The auditors recommended some changes they thought would provide benefits to consumers, such as mandatory CLE and implementing a method to make sure that lawyer referral participants are qualified in the areas in which they seek business.

The renewal bill was introduced in the Senate and was referred to Judiciary, which moved the bill without discussion. In Senate Finance, however, we got delayed by Sen. Dave Donley (a Bar member) who first wanted additional budget material, and, when that was provided to him, furnished a list of questions which he said had been provided to him by "members of the public." Deborah, Barbara, Steve and I spent most of two days answering the questions, and provided the results to the Committee. Having done all this work, we thought some Bar members might find the dialogue interesting, and even find answers to questions that might be on your minds as well. So here are the questions, in unedited form, and the answers we provided to the Senate Finance Committee Feb. 27.

### INTRODUCTION

At the Committee hearing the Committee asked the Bar Association to respond to the questions submitted by Senator Donley and appointed a subcommittee to review the responses and make a report. While some of the questions are apparently leading, the answers are nevertheless provided in a good faith effort to be responsive.

Most of the questions can be answered by reference to the Alaska Bar Act, the Alaska Bar Rules and Bylaws, and annual reports or the financial records of the Bar Association, all of which are and always have been available to all members of the association and the public. In addition, the Board of Governors meetings are public and we routinely provide the opportunity for public comment. In my years on the Board, very few Bar members have attended meetings or made comment unless they had specific business with the Board. This suggests to me that the membership is not generally unhappy with the management of the Association.

**1** ***Would the Bar consider surveying all Bar members regarding their thoughts on Bar budget and expenditures?***

When I became Bar President last year I included this subject in my first President's column in the *Alaska Bar Rag*. I observed that some members (about three a year) have complained to the Board of Governors over the expense of membership. I urged all members who are concerned about the issue to review the Bar's budget and tell the Board which programs or line items they think should be reduced or eliminated. I received zero responses to this request.

In addition, the Board appointed a committee to review the 1998 budget before it was approved. The committee included several Board members who were quite skeptical of the need to maintain expenses at their current level. After extensive review, the committee did not recommend any significant reductions. However, this should not be taken to mean that the Board is not concerned about ongoing expenses. Every item in the budget is scrutinized by members and has to be justified by staff. We have made a major effort to ensure that salary levels do not exceed those paid for comparable State employment and we also monitor salaries paid by comparable mandatory bars in other states.

A Bar-wide survey was conducted in 1991. The functions of the Bar were supported by a substantial majority of members who responded. Nevertheless, I will ask the Board if there is a desire to survey the membership again. That would best be done in conjunction with the preparation of the 1999 budget in the third quarter of 1998. Based on past experience I do not believe that such a survey will develop a consensus in favor of major reductions in the Association's annual budget.

**2** ***Do you view the Bar's role as one of necessity or as a sort of service-oriented "extra" for lawyers?***

The Alaska Bar Association is an

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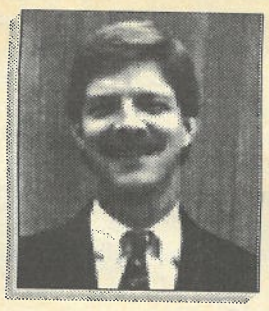
## Editor's Column

# Ken Starr not to investigate *Bar Rag*

☐ Peter Maassen



The rumor that Kenneth Starr is extending his investigation to Alaska is based on readership confusion of a number of storylines that are truly unrelated. Putting wolf-snaring on the Alaska ballot has nothing at all to do with the waning credibility of the Special Prosecution, leg-holds and Tripp-wires notwithstanding. Moreover, the truly pernicious part of the rumor — the part that I, in all honor, can only treat as a personal affront — is utter fable. Starr is not coming to Alaska to investigate the internship program of the Bar Rag.

Few members of the Alaska Bar, I suspect, even realized that the Bar Rag had an internship program until the intern herself went public. It must be emphasized that those e-mail excerpts were only that — excerpts — and heavily edited ones at that. The true story is much more complicated, as the stories of human relationships always are. Sure, I bought her a certain article of clothing, but who could have thought that earmuffs could be so badly misconstrued? A beret does so little to protect the delicate cartilaginous contours of little shell-like Aphrodite ears.

But her job was no sinecure; in fact, her energy and creativity were often astonishing. I remember the time I asked her, with a particularly Shakespearian flourish toward the nearest Kaladi Brothers, to fetch me coffee anon, and she returned a few days later with the Secretary General of the United Nations. Imagine my embarrassment. But he and I talked about the Bar Rag's editorial treatment of the Iraqi question, and whether a permanent partition of Cyprus would be good or bad for the Alaskan practitioner, and after a few hours Mr. Annan, claiming a fresh perspective, caught the next Delta flight to Kosovo. I could only praise her initiative and thank heavens I hadn't asked for Pol Pot's head on a platter.

True, she had her weaknesses, like every *Bar Rag* intern. Her legal reportage suffered the flaw of most of her generation: "And he's like, 'Oh, I object,' and the judge's like, 'On what grounds?' and he's like, 'On grounds of, like, incomprehensibility or something?'" *That* is why I told her to drop the word "like" from her vocabulary, not — as has been reported — because I was hoping for a more intimate verb to describe what existed between us.

Indeed, the rumor that there was something sexual about our relationship is based on a fundamental miunderstanding of the nature of editorial work. The terms "sex" and "gender" are not synonyms. People have sexes, words have genders; so in the newspaper business it's gender, not sex, that concerns us, despite the contrary impression conveyed by loose phrases like "media obsession." It is true that our relationship had its gender-related aspects, particularly a heated and, yes, sometimes personal debate over whether ships should, in this enlightened age, continue to take the feminine pronoun. She maintained that the practice was "like, sex-based," whereas I insisted that it was totally unlike sex-based but rather like totally gender-specific. The seriousness with which she addressed this issue is evident in the fact that she hounded me about it right into the editor's inner sanctum, 37 times if it was once. I have the visitor logs to prove it.

Finally, I really had no idea that her boyfriend played hockey for Detroit until the rumors reached me of the vast Red Wing conspiracy. Now, what with the subpoenas, the hockey players, and the rumors all hovering around me like buzzards, I'm planning to lie low for awhile. Please direct all *Bar Rag* correspondence to my lawyers, unless you're applying for an internship, in which case forget it.

Been there, done that.

**The Alaska Bar Rag**

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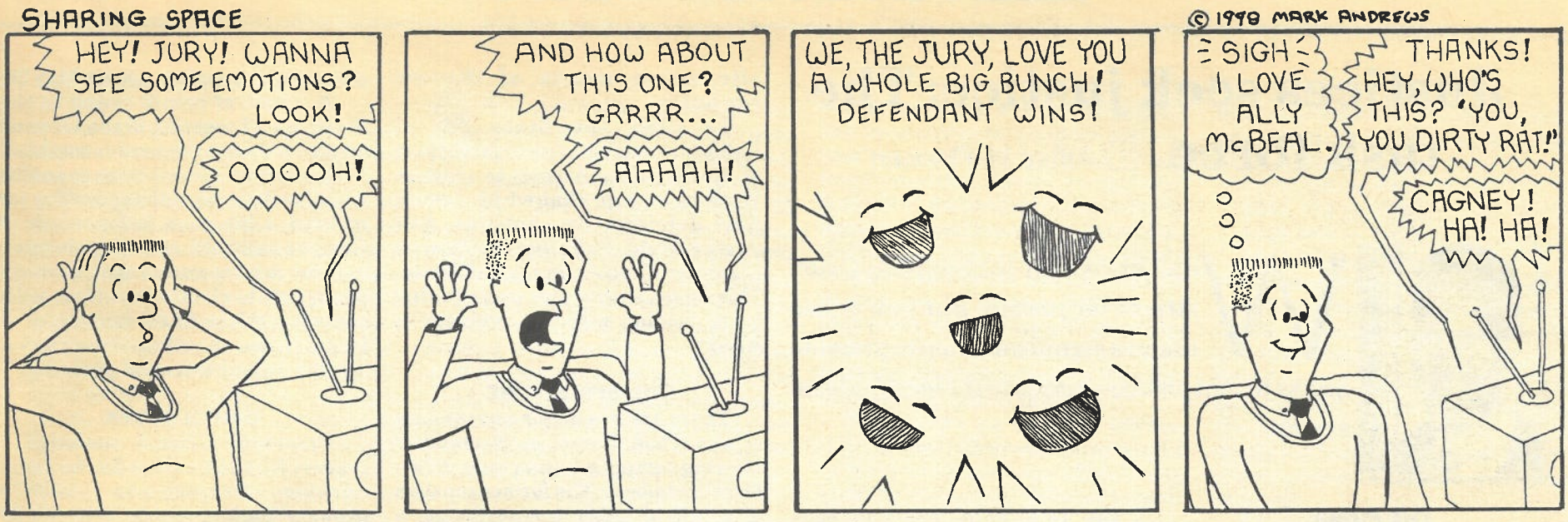
Steven Pradell

**Contributing Cartoonist**
Mark Andrews

**Design & Production:**
Sue Bybee & Joy Powell

**Advertising Agent:**
Linda Brown
507 E. St., Suite 213
Anchorage, Alaska 99501
(907) 272-7500 • Fax 279-1037




# Civil rights campaign litigates disabilities act

The Disability Law Center of Alaska launched a statewide civil rights campaign in January, aimed at getting individuals with disabilities in the doors of inaccessible businesses.

The center filed complaints against 17 businesses in Anchorage, Juneau, Homer, and Fairbanks.

The lawsuits were filed under the Americans with Disabilities Act (ADA), in Federal District Court for the District of Alaska as part of a statewide campaign to pursue compliance with the ADA through readily achievable barrier removal. The lawsuits, strive to get individuals who use wheelchairs for mobility in the doors of businesses. Typically, construction of a ramp for this purpose is readily achievable, in other words, not too expensive or burdensome.

One of the plaintiffs in the lawsuits, Jesse Owens, of Anchorage, who has paraplegia from an accident 20 years ago, conquered 16,000 feet of 19,350-foot Mount Kilimanjaro and climbed the Harding Ice Field, but cannot get through the front doors of many businesses in Alaska. Another client, Howard Hedges, of Homer, was a professional trombonist who toured with big bands and Broadway productions until he suffered a stroke in 1993.

Plaintiffs in the lawsuits are seeking that access promised to all individuals with disabilities when the ADA was passed on July 26, 1990. Says Owens, "The ADA is not just a building code law; it's a civil rights law. It is meant to enhance the quality of life for people. Businesses may not be aware of it, but whenever they have big steps or curbs that someone can't get up, it's like having a big sign that says, 'I'm socially irresponsible.' For every person who has a disability, there's a circle of friends and family who are acutely aware of accessibility."

Duane French, Director of the State Division of Vocational Rehabilitation said "the dream of the Americans with Disabilities Act will never be fully realized without efforts such as those of the Disability Law Center of Alaska."

Janel Wright, an attorney with the Disability Law Center of Alaska, said, "There is no reason why businesses and public facilities throughout Alaska should not be in compliance with the mandate of federal law. The ADA gave businesses until January 26, 1992, to come into compliance. They have had sufficient notice of the ADA and the effective date for compliance, the lawsuits argue. The first priority of the ADA, for removal of architectural barriers, is to provide individuals with disabilities access into the facility from public sidewalks, parking, or public transportation, including installing entrance ramps, and providing accessible parking places. Further, compliance is a continuing obligation. Therefore, what may not have been readily achievable in 1992 for some businesses, is certainly readily achievable six years later. Businesses acting in good faith should have done a self evaluation and made plans to come into compliance."

Lawsuits were filed against Kimball's Store and Kobuk Coffee Company; Professional Beauty and Barber Supply; Signs Now; Sis's Deli and Espresso Bar; Pyramid Audio; Alaska Hair Design; and Mr. Prime Beef in Anchorage; Dawson Construction, TransAlaska Title Insurance Co. in Juneau; Forget-Me-Not Flowers in Homer; and Pizza Hut in Fairbanks. ADA compliance measures sought in the lawsuits range from construction of ramps to designated parking.

Rick Tessandore, Executive Director for the Disability Law Center of Alaska, said that approximately 60 per cent of the businesses to which demand letters have been sent pursue voluntary compliance. "Although many businesses claim it is too expensive to comply with the ADA, 80 percent of busineses can come into compliance for less than $500 and 60 percent can for less that $250," said Tessandore. The IRS also allows a deduction of up to $15,000 per year for qualified architectural barrier removal expenses for people with disabilities and the elderly.

The Disability Law Center of Alaska is the Alaska Protection and Advocacy System (P&A). P&As are federally mandated in each state and territory to provide protection of the rights of persons with disabilities through legally based advocacy.

*—Disability Law Center*

# Singleton addresses costs of non-resident courtrooms

*(From a letter to Ken Legacki, President of the Anchorage Bar Association)*

For some time now, there has been considerable controversy at the national level over the cost of judicial facilities. Congress has been looking closely at the subject and, as a consequence, the Judicial Conference of the United States has been looking into the matter. Among other things, one of the areas of inquiry has been non-resident facilities, that is, those court facilities at which there is no resident district judge. (The availability of a part-time magistrate judge does not count in regard to this inquiry.) The Ninth Circuit Space & Security Committee (of which Judge Holland is a member) has recently completed a survey and approved a report which will go to the Ninth Circuit Judicial Council, and from there to the Judicial Conference of the United States, recommending that the non-resident facilities at Fairbanks, Juneau, and Ketchikan remain open.

I am writing to you at this time to the end that the bar be informed as to the current state of this matter. I do not believe there is anything that anyone needs to do at the present time; but there is a concern that at some future time, those at the national level who ultimately review the matter of facilities and the cost of them might start fixing a "bright line" or, by some other vehicle, push courts to close very costly facilities.

In the grand scheme of things, our court facilities at Fairbanks, Juneau, and Ketchikan are not all that expensive. But when evaluated on a cost per-day-of-use basis, Juneau and Ketchikan are particularly expensive. During 1996, the cost per-day-of-use at Juneau was $2,675. The next most costly in the circuit was a facility at Richland, Washington, which cost $1,943 per-day-of-use. Ketchikan, on the other hand, was the most expensive facility in the circuit on a per-day-of-use basis of $7,676. The Fairbanks cost is $1,821 per-day-of-use.

As already suggested, we do not think there is anything which the bar can or should do right now as regards the administrative process. However, the bar should most certainly be alert to the fact that our ability to continue to justify the cost of the non-resident facilities will in the long run depend upon the amount of use which these facilities receive. The court sometimes hears from members of the bar that more cases would be filed at the non-resident facilities if the court were more readily available. The problem here is a circular one. The court cannot justify the expense of travel for judicial officers and clerks if there is no business to be done at a given location. At a very practical level, it is the bar (not the court) which can break the circle here. For our part, the court would welcome the opportunity to conduct more of its business at Fairbanks, Juneau, or Ketchikan.

*James K. Singleton, Jr.*
*U.S. District Court Judge*

## Annual Business Meeting Resolution

**COMES NOW** the Kenai Peninsula Bar Association and hereby proposes the following Resolution for consideration by the Alaska Bar Association

That there be created a Fifth Judicial District headquartered out of the court system at Kenai, Alaska. Said new judicial district to include Kodiak and the Aleutians and other geographically compatible areas to be determined by the Alaska Court System.
Submitted by KENAI PENINSULA BAR ASSOCIATION

## ALSC President's Report

# Justices seek justice: The task force

☐ Arthur H. Peterson

We all know that our Supreme Court strives for justice. But now it has taken a significant step to promote access to that justice—*access* to the legal/judicial system.

### THE FORCE

By a unanimous vote, the Alaska Supreme Court justices adopted the following resolution, dated November 25, 1997, creating the Access to Civil Justice Task Force:

> WHEREAS, recent precipitous funding declines for legal services to the poor have triggered a crisis in the access to justice; and
> WHEREAS, the demand for civil legal services by those who cannot afford them is growing dramatically; and
> WHEREAS, there exists a substantial gap between these legal needs and the resources available to meet them; and
> WHEREAS, this lack of legal representation impedes access to justice, a subject in which the judiciary has a special responsibility;
> NOW, THEREFORE, IT IS RESOLVED by the Alaska Supreme Court, that there should be established a statewide Access to Justice Task Force comprised of judges, bar leaders, legal services providers, and community leaders to investigate, plan, and recommend methods to increase the delivery of civil legal assistance and improve access to justice for the people of Alaska.

This resolution implements the October 8, 1997 resolution of the five presiding judges (for the four districts and the Court of Appeals) and the suggestions of many attorneys. It follows an approach taken in several other states.

The Task Force has now been created and its membership appointed. Justice Dana Fabe is the chair.

### THE PURPOSE

The purpose of the Task Force is well-reflected in the Supreme Court resolution. Poor people have a variety of civil legal problems. Many need help; many need protection. When they don't have access to lawyers and the judicial system, legal needs go unmet, rights go unprotected, and disputes are sometimes resolved in civilly unacceptable confrontations. Often, when their disputes do get into court without a lawyer, they clog the system.

For reasons of their own—some a mystery, some mentioned in my earlier *Bar Rag* reports—the current Congress and the current Alaska State Legislature have precipitously slashed funding for legal services programs. As a result, the Alaska Legal Services Corporation has had to close offices, fire attorneys and support staff, put some staff on a part-time basis, and take other drastic cost-cutting measures. This means that fewer legal needs of poor people are being met.

So the Task Force has been created to explore a variety of approaches to meeting those needs: to find new sources of money, analyze and improve the structure and procedures for providing legal services, make greater use of modern technology, simplify court procedures and expand staff services, and explore alternative means of dispute resolution.

In 1996, the State Bar of California published a weighty report of California's Access to Justice Working Group, chaired by Justice Earl Johnson, Jr., entitled *And Justice for All: Fulfilling the Promise of Access to Civil Justice in California*. This report should give us a running go at dealing with the problem in Alaska.

### THE STRUCTURE

There are two major components of the Task Force—a 16-member steering committee and group of "at-large" members. The former consists of a federal judge, a state judge, a state senator and representative, an attorney appointed by the governor, an attorney representing each of the four judicial districts, an attorney representing Native corporation attorneys, an ALSC- eligible client, the ALSC/Alaska Bar *pro bono* coordinator, two ALSC staff people (urban and rural), the president of the Alaska Bar Association, and the president of the Alaska Legal Services Corporation.

The at-large group consists of a number of Alaskan attorneys representing organizations such as the IOLTA Commission, the Alaska Bar Association, the American Bar Association, the Municipality of Anchorage's ombudsman's office, ALSC, the *pro bono* services committee, and the UAA Justice Center. It includes another state representative, another state judge, presiding judges not previously specified, members of the Alaska Bar's board of governors not previously specified, and members of the *pro bono* services committee not previously specified. At the February 11, 1998 teleconference meeting of the steering committee, six subcommittees were established. The six subcommittee subjects, and their chairs, are: (1) *pro se* litigants, chaired by Michele Christiansen; (2) non-ALSC-eligible individuals, co-chaired by Robin Bronen and Brant McGee; (3) *pro bono*, co-chaired by Seth Eames and Mark Rindner; (4) alternative dispute resolution, co-chaired by Lach Zemp and Suzanne DiPietro; (5) community legal support and education, co-chaired by Carol Heyman (representing the business community) and Mark Kroloff; (6) Alaska Legal Services Corporation, co-chaired by Marcia Rom and me. Membership on these subcommittees is made up of other task force members along with people in the state's communities—non-attorneys as well as attorneys - who have an interest in and can provide a variety of perspectives on the provision of legal services to poor people. You will note that there is no fundraising subcommittee. That's because ALSC's "development director," Jim Minnery, is organizing his own multi-faceted structure for fundraising. We are trying to coordinate with, not duplicate, other efforts.

### MEETINGS

The steering committee has held three meetings, with most people participating in person in Anchorage and several others around the state by telephone. So far, the meetings have been introductory and organizational, reviewing existing written material and planning the Task Force's activities. The subcommittees created at the February steering committee meeting have held at least one meeting. They are to continue working, and three of them are to report at the next steering committing meeting, set for May 20.

A couple of points raised at the February 11 meeting of the steering committee were the need to establish a legal services foundation, to enable ALSC to become self-supporting (or at least a bit more independent of Congress and the state legislature), and the need to encourage attorneys to suggest to clients that their wills contain a gift to ALSC (instead of or in addition to other charities)—"philanthropic financial planning."

### OTHER STUFF

President Clinton included a request for $340 million for the Legal Services Corporation (ALSC's primary funding source) in the FY 99 budget he submitted to Congress in January. That is the same amount he requested last year and, I believe, the year before. Congress appropriated $283 million for LSC for FY 98 and FY 97. Last year, the U. S. Senate passed a bill providing $300 million and the House passed one with only 5250 million. The conference committee's compromise contained the maintenance 283. Let our Congressional delegation, and any other members of Congress whom you might be able to persuade, know that neither the number of poor people nor the number of their legal problems has decreased, and support of the President's request is crucial.

Back here, the Alaska Bar Association's board of governors approved ALSC's request for a line on the annual bar dues notice for making a donation to ALSC. The details of its presentation are being developed. The idea is to make it as easy as possible for all Alaskan attorneys and judges to donate money to the cause of equal access to justice.

For the ALSC fundraising year that ended January 31, 1997, of the 2,607 attorneys with active membership, only 120 donated! In the just-concluded fundraising year, we did a bit better, with 175 attorneys donating $35,345.25. As I recall, the number of attorneys signed up for the *pro bono* program is 900 and some. Simple subtraction suggests that approximately 1,700 active practitioners neither donate money nor offer to donate time. Prior reports have reminded us that improving access to justice is the responsibility of all of us - not just the ALSC staff.

In his February 25 "State of the Judiciary" address to the legislature, Chief Justice Mathews mentioned that "The lack of funding for legal services for the poor has (among other things) the effect of increasing judicial work loads." That was nice.

There's another issue that requires some thought. We've all heard court personnel say that they "can't give legal advice." But, notwithstanding decades of trying to define such concepts as "practice of law," the concept of "legal advice" is pretty mushy. Nevertheless, it should be possible for our Supreme Court, perhaps with the assistance of the executive director of the Judicial Conduct Commission (a nationally recognized expert on judicial ethics, incidentally), to develop guidelines that would enable court staff to facilitate the public's use of court forms and understanding of court procedures. This approach would work to minimize the court delays and complications caused by *pro se* litigants and would take a bit of the burden off of ALSC and the *pro bono* program.

So the Task Force has begun its task, and there are related efforts afoot striving to make "equal access to justice" more equal. Please help them succeed.

SOLID FOUNDATIONS

# Washington State IOLTA program victorious ☐ Mary Hughes

The Washington State IOLTA Program and the Washington Supreme Court were successful in the Federal District Court of the Western District of Washington against an attack by the Washington Legal Foundation.

On January 30, 1998, Federal District Court Judge Coughenour granted summary judgment in favor of the IOLTA program and adopted the analysis of the Eleventh Circuit Court of Appeals. In his decision, Judge Coughenour rejected the analysis of the Fifth Circuit Court of Appeals in *Phillips v. Washington Legal Foundation* that was argued in January before the U. S. Supreme Court.

The issue, whether interest derived from money placed by attorneys in accounts under IOLTA programs belongs to the clients who tendered the money or can legally be allocated to a court-created foundation program, has national significance.

The Eleventh Circuit, in 1987, provided the first Court of Appeals' guidance. It stated that there was no dispute that the finds that were placed into the IOLTA accounts were the property of the client-depositors. However, since the funds deposited in an IOLTA account could not, absent the IOLTA program, earn a net return for the client-depositors, no "taking" of anything that the client-depositor owned had occurred.

The Fifth Circuit, in 1996, concluded that even though the money deposited would have earned no interest for the client-depositor, the client-depositor had a property interest in the aggregate amount of the interest earned.

Judge Coughenour determined that when Fifth Circuit's reasoned that: ownership in the interest attached as soon as the interest accrued, it was examining the gross gains of the account. This approach, however, is nearsighted because the bank charges and accounting fees necessarily impose a net loss. Consequently, the client-depositor would, in the end, own a property interest in nothing.

Judge Coughenour's decision is refreshing and reassuring as IOLTA programs throughout the country await the opinion of the U. S. Superior Court in Phillips. The Trustees of the Alaska Bar Foundation are hopeful that Judge Coughenour's lead is followed.

The funds earned by IOLTA programs are funds that are irreplaceable for the provisioning of legal services for the disadvantaged. In Alaska, for example, since 1986, over $1 million has been available from the Alaska IOLTA Program to support the Alaska Pro Bono Program. Approximately, $180,000 annually is used to provide legal services to Alaskans who otherwise would be without.

## Do You Go?

The boys are on the trail tonight,
The night is clear and cold.
Iditarod! The precious sight.
They're mushing for the gold.

They're running the Iditarod,
They're mushing on to Nome.
Every dog a private god,
A thousand miles from home.

The old one's out of Safety,
Heading up the coast.
Blizzard. White out. Tell me,
Who wants Nome the most?

Do you stay or do you go,
Out into the night?
Stop and think or just go on,
Down the trail of life?

*Phillip Paul, Ana Cristina, &*
*Phillip Thor Weidner*
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ESTATE PLANNING CORNER

# The four legs of estate planning

☐ Steven T. O'Hara

There are at least four important legs on which an estate planning law practice rests. The estate planner must give attention to each of them in order to serve his clients.

First, an estate planner must strive to have, what some in the medical field call, a "good bedside manner." Much of estate planning involves sitting down and talking with the client, whether at the estate planner's office, the client's home or office, the hospital, the airport, or wherever. Clients already have enough excuses to procrastinate on their planning. The estate planner's personality and approach must not give the client another excuse to defer planning.

Moreover, a good manner will allow the estate planner to get the relevant facts from the client. Then a good manner will enable the estate planner to communicate the issues, identified from the facts, in such a way that allows the client to understand the issues and make an informed decision on what planning is appropriate. Effective communication between the estate planner and the client is crucial because the estate planner is at most the builder of the estate plan; the client, fully informed, is the architect.

In other words, a good manner facilitates effective communication, which enables the estate planner to identify issues and the client to undertake his responsibility as the architect of the estate plan.

The second leg of estate planning is document preparation. Some consider this leg the most important part of estate planning. Document preparation is important, but it is not the beginning and the end of the estate planning process. For example, the estate planner may be the best drafter in the world, but his documents may mean little to the client unless the estate planner develops a good manner of explaining them. Effective communication is needed so the client can verify the documents comply with the client's instructions.

The third leg of estate planning is follow-up work after the will or trust signing. If this work is not done, a client's planning may be totally ineffective even though he may have perfectly-drafted documents.

For example, consider a married couple with assets in excess of $625,000. They signed perfectly-drafted wills or living trusts that use the so-called A/B plan, which under current law is intended to eliminate all estate taxes on aggregate assets of up to $1,250,000. After signing the wills or living trusts, the couple fails to separate their assets and continues to own them in a form of co-ownership with right of survivorship. In general, upon the death of the first spouse to die, the tax benefits of the A/B plan would be lost because no assets would be disposed of under the decedent's will or living trust. Rather, the surviving spouse would now own all assets by right of survivorship, and her estate would face needless estate taxes on her death.

Clients may not want the estate planner involved after the will or trust is signed, since clients can do the follow-up work on their own or with the help of other professionals. Here again effective communication is crucial. The estate planner and the client need to be clear about whether the estate planner or the client is responsible for follow-up work. This work could include the structure of asset ownership, beneficiary designations, trust funding, gifting in order to minimize taxes, life insurance ownership, durable powers of attorney, and coordinating estate planning with other family members.

The client needs to recognize that estate planning is an ongoing process. Each time the client acquires or disposes of an asset, the client should review asset ownership, beneficiary designations, trust funding, etc. The client must initiate any participation by the estate planner in the consideration of new facts. At least as often as annually, the client should review his estate planning documents and inquire with the estate planner as to whether there is any new law that may affect the client's estate plan. An estate planner's typical day includes several calls from clients inquiring about any relevant changes in law.

The fourth leg of estate planning is postmortem planning. Here the estate planner is retained by the personal representative of the decedent's estate, by the trustee of the decedent's trust, or by a beneficiary. When representing the fiduciary of the decedent's estate or trust, the estate planner will often not only do the probate or administration work, but will also prepare or participate in the preparation of the decedent's estate tax return. This leg of estate planning can be as important as any of the others. The client may have died with perfectly-drafted documents, but unless the proper tax elections and allocations are made on the decedent's estate tax return, tax-savings opportunities could be lost.

If the estate planner is retained by a beneficiary, then the estate planner will explore with the beneficiary whether any tax savings could be obtained by the beneficiary's disclaiming any part or all of the assets she would otherwise receive (IRC Sec. 2518 and AS 13.12.801). Disclaimer planning is a basic part of the beneficiary's own estate planning.

Not all estate planners do all four legs of estate planning equally well. Whereas one may be best known for drafting wills and trusts, another may be best known for handling estate tax returns. But every estate planner needs to give attention to each leg.



# Perkins Coie announces new partner and associates

Perkins Coie LLP has elected a new partner and added two new associates in its Anchorage office.

"This growth reflects Perkins Coie's commitment to serve our clients in Alaska," said James N. Leik, managing partner of Perkins Coie's Anchorage office.

Katherine Tank

Katherine C. Tank has been named as partner in the firm. Katherine has practiced law in Alaska since 1992. Her principal area of practice is labor and employment law. Katherine received her J.D. in 1988 from the University of Oregon, where she was editor-in-chief of the *Oregon Law Review*. She received a B.S. in political science in 1984, also from the University of Oregon. Katherine practiced law in Portland from 1988-1992. She is a member of the Alaska and Oregon Bar Associations.

Helena Hall

Helena H. Hall has joined the firm as an associate. Her practice is in litigation and employment law. She received her J.D. from the University of Michigan Law School in 1994 and her B.A. in philosophy from the University of Pennsylvania in 1991. Helena was a law clerk to Justice Allen T. Compton of the Alaska Supreme Court in 1994-95, and practiced law in Chicago in 1995-96. She is a member of the Alaska and Illinois Bar Associations.

Valerie Brown

Valerie L. Brown has also joined the firm as an associate. She received her J.D. from the University of Oregon in 1995 and her B.A. in environmental studies from the New College of the University of South Florida in 1987. Valerie was a law clerk to Judge Alfred T. Goodwin of the Ninth Circuit Court of Appeals in 1995-96. She also was a law clerk to Justice Allen T. Compton of the Alaska Supreme Court in 1996-97. She is a member of the Alaska Bar Association.

Perkins Coie established its Anchorage office in 1977. The Anchorage office serves local, national and international clients in a wide range of legal matters including litigation, employment law, municipal law, environmental and natural resources law, health care law, and corporate and business matters. Worldwide, Perkins Coie has more than 350 attorneys serving clients from 12 offices in North America, Asia, and Europe, including Seattle, Los Angeles, Portland, Denver, Washington, D.C., Taipei, Hong Kong and London.



# Goerig & Associates announce new location, promotions and new employees

The Anchorage law firm of Goerig & Associates has moved to a new location. The new offices are in the Resolution Plaza, 1029 West 3rd Ave.

The firm also announces that Mary Cocklin has assumed the position of legal administrator and is now responsible for day-to-day operations.

Cocklin, who had been working on contract as a legal assistant since November, 1996, holds a law degree from New England School of Law in Boston.

Charity Lajoie has been promoted to the position of legal secretary. She began working part time in October, 1996 as a receptionist. Also joining Goerig & Associates recently are certified legal assistant Julia Myers-Rachford, receptionist Bree Goldberg, legal secretary Roni Agre.

Goerig & Associates, practicing in the areas of estate and gift taxation, estate planning, income tax, probate and business valuation law was formed when the 18-year-old partnership of Davis & Goerig was dissolved in the fall of 1996.

The firm has grown from attorney George Goerig, owner, associate Patrick Rumley and legal assistant Brooks Holborn to 9 full time employees. (certified legal assistant Elizabeth Hanson, legal assistant Carolynn Tomory and legal secretary/legal assistant Heather Orzalli also joined the staff since January, 1997.)

The new phone number for Goerig & Associates is (907) 278-9926.

# Bar People

**Norman Banfield** (admitted in 1935) is now in Nashville, TN.....Randal Buckendorf, formerly with the Dept. of Environmental Convservation, is now with ARCO Alaska, Inc.....**Eric Strong Bills**, formerly with the P.D.'s office in Bethel, has relocated to Fairbanks.....**James Benedetto**, formerly with the DA's office in Kotzebue, is now with the Kenai DA's office.....**Ruth Berkowitz** has relocated from Anchorage to the Public Interest Lawyers Group in San Francisco.

**Brian Clark**, formerly with the DA's office in Barrow, is now with the DA's office in Anchorage.....**Robin Brena, Jesse Bell & Kevin Clarkson** have formed the firm of Brena, Bell & Clarkson.....**Roger Connor** has relocated from Reno to Richmond, Vallentine.....The Law Office of C.R. Baldwin became **Baldwin & Butler, LLC,** including **Charles R. Baldwin** and **James N. Butler**.

**Christine Drager** has relocated from Anchorage to Washington DC with the National Labor Relations Board, Contempt Litigation & Compliance Branch.....**Steve Cowper** has relocated from Anchorage to Washington DC and has formed Steve Cowper & Associates.....**Marvin Clark** has relocated from Wasilla to Anchorage.....**Richard Haggart**, formerly with Maloney & Haggart, has opened the Law Offices of Richard Haggart.

**Todd J. Timmermans** has joined the law firm of Groh Eggers, LLC as a partner/member, effective January 1, 1998. Mr. Timmermans has practiced with Groh Eggers as an associate attorney since 1992, primarily in the areas of employment law and commercial litigation.

**Olof Hellen** has relocated from Anchorage to Santa Cruz, Call.....**Ken Lord**, formerly of the Law Office of Kenneth Lord, is now with Heller, Ehrman, et.al. in Anchorage.....**Stephen Koteff**, formerly with Trustees for Alaska, is now with the Alaska State Commission for Human Rights.....**Guy Martine Kerner**, has relocated from Fairbanks and is now with the PD's office in Kenai.

**Nancy Lashnits** is now with Stoel Rives, LLP in Portland Oregon.....**Marcelle McDannel**, formerly with the DA's office in Bethel, is now with OSPA in Anchorage....**Melinda Miles**, formerly of Miles & Goff, has opened the Law Firm of Melinda D. Miles.....**Eric Ostrovsky** has relocated from Washington DC to Portland, OR.....**Richard Poulin** has relocated from Anchorage to Seattle.

The firm of Russell, Tesche & Wagg, is now the firm of **Russell, Tesche, Wagg, Cooper & Gabbert,** with **Joe Cooper** and **Robin Gabbert** added as shareholders.....**Wilson Rice** is currently located in Salt Lake City (more or less.).....**Margaret Stock**, formerly with Atkinson, Conway & Gagnon, has opened her own law office in Anchorage.....**Sandra Saville** has joined the firm of Rubini & Reeves.

**Stephen Wallace**, formerly with the DA's office in Kodiak, is now with the AG's office in Anchorage.....**Theresa Lynn Williams**, formerly with the PD's office, is now with CIRI.....The Sierra Legal Defense Fund is now called **"Earthjustice."** The lawyers with Earthjustice include Tom Waldo, Janis Searles, Eric Jorgensen & Doug Ruley.

**Robin Jager Gabbert** has rejoined the law firm of Russell, Tesche & Wagg as a shareholder, and the firm name has changed to Russell, Tesche, Wagg, Cooper & Gabbert. Gabbert, one of the founding members of the firm, returned to Anchorage after spending six years in The Netherlands to become of counsel to the firm in 1996.

Last month we erroneously reported in this column that **Loni Levy** will be opening the Levy Law Offices effective April 1, 1998. We apologize for any confusion this may have created.

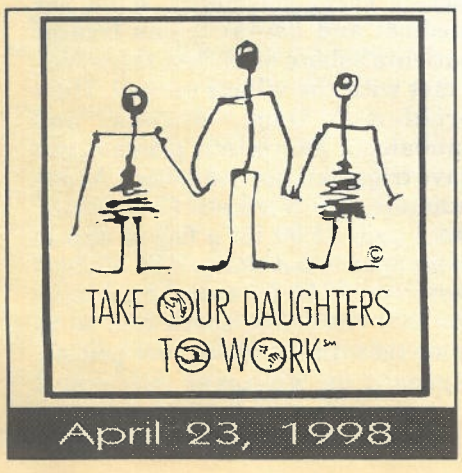
Loni informs us that upon leaving the AG's office, she will be devoting more time to issues relating to legal services for the poor and to the activities of the Anchorage Museum and Sitka Festival Foundation on whose boards she also serves. In addition, Loni will be available for consultation on oil and gas matters and complex administrative litigation and appeals.

## Norsworthy joins Boyko firm

The law firm of Edgar Paul Boyko and Associates is pleased to announce that Kenneth A. Norsworthy, Esq., has joined the firm.

Norsworthy holds a J.D. Degree from Baylor University. After four years service with the Air Force JAG Corps, he practiced law in Anchorage beginning in 1978, concentrating on both civil and criminal litigation, with emphasis on personal injury, wrongful death, employment, real estate, construction, insurance, and military law. He is admitted to practice in Alaska and Texas, as well as in several federal courts, including the U.S. Tax Court and the U.S. Court of Military Appeals.

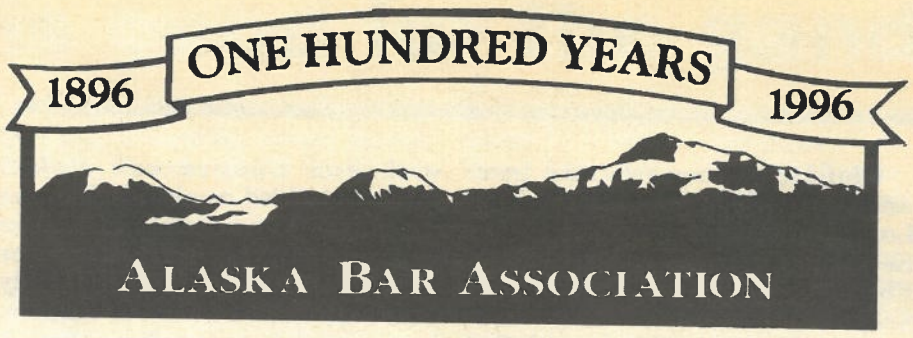
The clientele and cases from Mr. Norsworthy's former sole practice have been merged with those of the firm.



# The last voyage of the floating court: Stebbins to Nome

*The following article is from Down Darkness Wide, a book being written by James Chenoweth about his career as a lawman in territorial Alaska. We reprint this chapter with his permission. In Part I (Alaska Bar Rag, Jan.-Feb., 1998), the young Mr. Chenoweth boards the Coast Guard Cutter Wachussett on its journey from Seward to Barrow during the summer of 1957. It was the last time a federal "floating court" put to sea in Alaska. In the last installment, we left the Wachusett in Mekoryuk on Nunivak Island.*

*Part II of III*




By James H. Chenoweth

On July 18 we moved up to **Stebbins** in Norton Sound. A skeet shoot was held mid- morning on the fantail, but the weather on our arrival was too rough to risk going ashore until the following morning. It took about an hour for the first boat to go through the passage and reach Stebbins itself. It was a small village, older than Mekoryuk, though it seemed to me that it smelled better and that the villagers themselves were cleaner and happier. Some villagers worked during the summers at Nome, St. Michael, or in the Yukon area. Others helped manage a reindeer herd they didn't own which milled around somewhere south of Stebbins. Residents had hoped the construction of an airstrip would improve things but after the strip had been surveyed and staked out, nothing else happened. Local crimes were handled by the five-man village council, elected annually. There seemed to be no liquor problem. I was told that loose dogs were their biggest headache, so I counseled the council about licensing dogs.

The next day, Saturday, July 20 (and still at Stebbins while additional medical and dental work was being done aboard the *Wachusett*), we acquired another civilian passenger. Nurse Beltz, from the Public Health Service, was making her rounds and would be with us as far as Unalakleet. A pleasant companion. The Captain was holding an inspection; she and I stayed carefully out of the way as the crew prepared for it.

**St. Michael** is just a short distance east of Stebbins. We moved there on the 20th and managed to land one boatload of patients brought from Stebbins but the rest of us were unable to go ashore until the next morning. Dr. Thompson, Chief Steyskal, Nurse Beltz and myself caught the first boat. During our trip to the beach, the sea was very choppy and everyone got soaked. I helped them to set up clinic facilities and then began talking to local officials. The weather grew increasingly violent. The wind had picked up and breakers were high out on the water. Around noon we were recalled to the *Wachusett*. Waves were breaking over our boat as soon as we left the beach. Coming alongside the *Wachusett*, we had trouble hooking onto the falls which would hoist us up. When we finally hooked on and started up waves were still breaking over us. Part of the way up, one fall jammed and the boat hung down at an angle. Waves bounced us against the side of the ship. We were lowered back into the water while the drum for the forward fall was fixed. The sea was violent and there was no lee for our boat to hide in. Hooked on again, we were finally hoisted aloft. Overheard, once aboard, were some angry words between the Chief Boatswain Mate and the Captain, who had jumped into the middle of the situation, and (as I was later told) "spewed directions like a whale spouting at the moon."

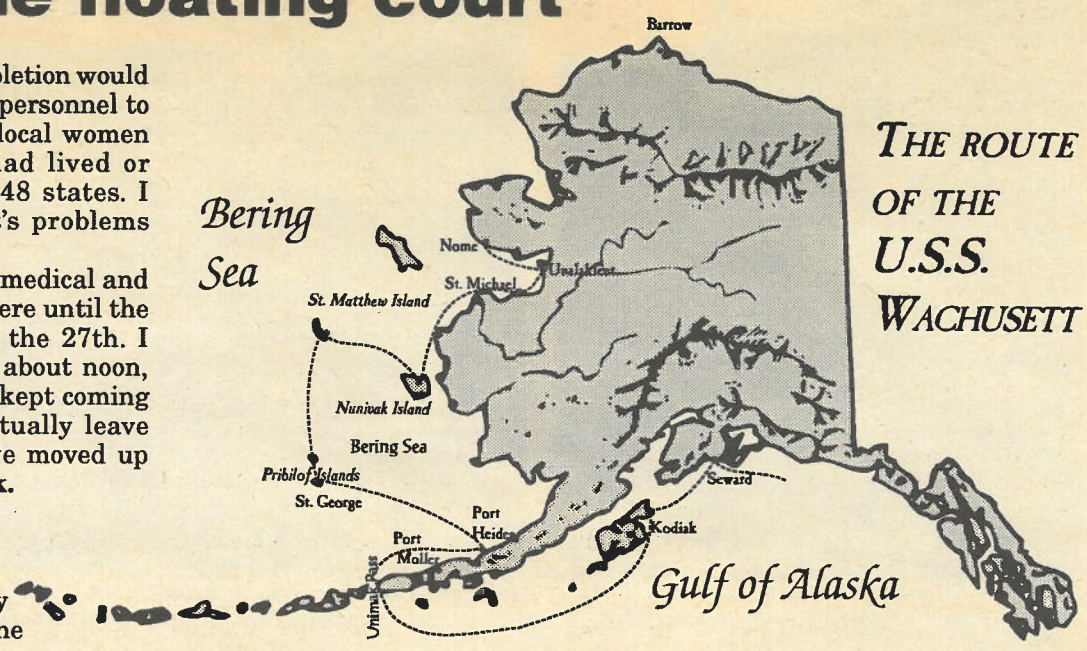
Personally, I was more interested in the medicinal libation administered to those of us who had gotten drenched—2 ounces of brandy. With only eight feet of water under our keel, Captain Applegate moved us six miles offshore to wait out the storm. The sea had eased a bit the next morning but it was still too rough to put a motor launch over the side. The launches are about 28 feet long and weigh nearly two tons. They were nearly impossible to sink but because of their high prow, they were rough to handle in a strong wind. There wasn't much activity aboard that day except for the court-martial of a sailor who had gone AWOL while the ship was in Seward.

On the morning of the 23rd, we were back in St. Michael. The town was a sad relic of its past. Only 70 miles upcoast from the Yukon River's mouth, it had been a major trading post when the Russians owned Alaska. Gold made its impact on St. Michael in the late 1800s. A revenue ship patrolled the Yukon River to protect the flow of gold coming from the up-river mines and heading for St. Michael. The army posted soldiers at St. Michael for further protection. Sometimes they acted to prevent serious violence, but there was a limit to what the army could do in civilian affairs. Gold, ships, and a large population had filled St. Michael with hustle and bustle.

I would never have guessed at its history when I came ashore. It was a weather-beaten town with a disintegrating boardwalk that led to nowhere. One building had been built by the Russians in 1833. No landing strip and no commercial fishing. Money came from occasional longshoring chores; the town was still a transfer station for goods moving up the Yukon's 1,800 miles of navigable water. A six-man council was elected every November. While the medical and dental teams treated patients ashore or aboard the cutter, I met with the village council. Their problems? Dogs, drunks, and vandalism! Exorbitant prices might have triggered the vandalism. As one example, the Northern Commercial store paid $4.00 for a bag of coal to be shipped in but charged St. Michael residents $7.50 for each bag. Among the 200 residents, there had to be some resentment about over-pricing. I passed on whatever guidance I

*Continued on page 9*

# The last voyage of the floating court




*Continued from page 8*

thought appropriate, doubtful that it would be anything more than a temporary Band-Aid for their real difficulties.

Community spirit was spiritless. In my opinion, Alex Wiksik seemed to be the only person resisting the growing dry rot. He was a patient but deliberate man who had been crippled early in life from bone disease. As president of the council, he forced through a regulation that every male villager had to contribute one hour of labor daily to keep the boardwalk in repair. For every failure to do so, the town imposed a $1 fine.

One section of St. Michael's constitution and by-laws really impressed me:

> ***"Drinks and Cards:*** Stakes shall always remain small. They are only a way to increase interest in a game and can never constitute a means to acquire what can only be obtained through hard work. They shall never be in excess of what one is free and willing to give to another as a free gift. However all must keep in mind that drinking and gambling become very easily a tyrannical addiction. When one can control himself no longer and becomes a victim of what is and must remain a recreation, he must stop completely."

I found myself wishing that whoever wrote that statute had also written some of the laws I had to enforce!

If you were traveling down the Yukon in the gold rush days and were in a hurry to reach Norton Sound, you could have left the Yukon at Nulato and gone down the Unalakleet River to - where else? **Unalakleet**. It was a large coastal village with a population of 600, including 150 school children. Already two days behind schedule, that's where we went next, going ashore early on Thursday, July 25. Unalakleet was actually a Native reservation, as many villages were not. One of the councilmen was the local police officer. The U. S. Commissioner told me the village was a quiet one but it was pretty obvious that liquor was a problem. Sale within the village was prohibited, but liquor could be flown in, - and was! DEW line (Distant Early Warning) and White Alice installations for communications were already under construction. Their completion would add nearly 200 civilian personnel to the area. Many of the local women were attractive and had lived or traveled in the lower 48 states. I noted that Unalakleet's problems would bear watching.

The workload of the medical and dental teams kept us there until the afternoon of Saturday, the 27th. I heard we were leaving about noon, but additional patients kept coming aboard so we didn't actually leave until 4:00 p.m. when we moved up the coast to **Shaktoolik.**

The next morning, a strong running surf and shallow water made landing there very difficult. I went in with the first boat. There was no way for the anchor to grip and hold. The boat broached broadside and the crew did a terrific job of keeping it from being swamped by waves. We finally got on shore amid haze, mist, and rain. I did my bit by interviewing local officials and then pitched in to help the shore party. Patients going out to the *Wachusett* had to be ferried by raft and small boat, hauled out to the surf boat on a line between it and the shore party, where we worked in waist-deep water. They went out then through rough water to the cutter itself. As a passenger in the only boat to get ashore, I stayed ashore where manpower was limited, trying to assist the beach party and keeping out from underfoot when not needed. Wet, tough stuff! Back aboard the *Wachusett* in time for a hot shower, dry clothes, supper—and my bunk.

In such bad weather, staying at Shaktoolik was impossible. The next day (leaving a radio behind in the village), we moved across Norton Bay to **Elim** on the north side. The sea was rough, but the surf was not as bad along the shore. Catching the first boat in, I finally made a landing where I didn't get wet!

I thought that Elim was really unique. Timber grew around Elim (very unusual that far north) and there was no permafrost. In January of the year we were there, it had rained, and from what I was told, well water didn't freeze in Elim.

I talked with some residents, the school teacher, surveyors from the Civil Aeronautics Authority, the local nurse, and an Alaska Native Service carpenter (who came from Denver, NJ). The town was founded in 1914 and was originally intended to house an orphanage. So it wasn't surprising to learn that a large part of the village income came from Aid to Dependent Children funds. Many unwed mothers in Elim refused to marry the fathers of their children because doing so would make them ineligible for that income. Which didn't prevent the fathers from living with them. The financial assistance from territorial funds encouraged illegal cohabitation in many parts of Alaska. Privately, I thought that children gained a lot by having a father in the house, and the possible misuse of ADC funds was not really within my jurisdiction.

Although a doctor and a dentist had come ashore with me, patients had to be taken to the ship, which meant carrying them out to the motor launch. So I got wet again.

During the night, we sailed a short distance westward to **Golovin**. There we had to anchor so far off shore that it took an hour by surf boat to reach the beach. On the beach, I wondered why we bothered. It was a deserted village, peopled by only a few locals where it had once housed thousands. There was a time when Golovin could boast of having several stores, a school, a Mission Home, a herring cannery, and a herd of 30,000 reindeer. The herd had dwindled to 2,000. The school, the stores and other buildings were empty and decaying with broken or boarded up windows and doors hanging ajar. The beach was littered with wreckage, with rotting hulks of barges and small boats half buried in the sand. (From one, I salvaged a small ship's wheel as a souvenir.) Civilization had moved 14 miles up-river to White Mountain, leaving behind the carcass of a town which still had a postmaster and a lay minister but no laws, no government, no council, no schoolteacher, and no established church. Golovin would probably continue to die a peaceful death.

Periodically throughout our journey, I reported to Captain Applegate my assessments about villages we had visited. I updated him while we were at Golovin.

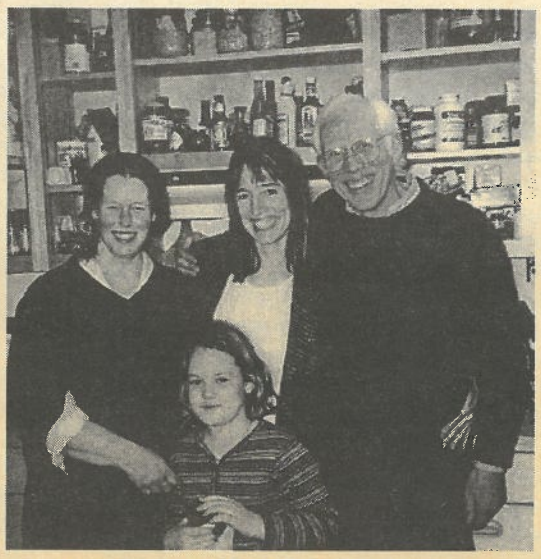
We still had unfinished business back in Shaktoolik and a radio to recover, but weather conditions there made it impossible to return so we went on to **Nome**, arriving there during the early morning of Wednesday, July 31. Moving up Alaska's coast had taken me into jurisdictions outside of my own. I had passed through areas policed by the U.S. Marshal in Fairbanks, Al Dorsh, and was now in the territory of Bob Oliver, the U. S. Marshal in Nome. My travels had been coordinated with both and when I came ashore in Nome, Oliver's Chief Deputy, George Bayer, was there to meet me. Bob, George and I spent some time together and I passed on whatever I had learned during my trip. Criminal cases I had picked up in Stebbins and Elim were already known to them. The Elim situation was under consideration by the U.S. Attorney in Nome.

*(NEXT ISSUE: FROM NOME TO BARROW)*

Stephanie Cole is the first woman to serve as Administrative Director of the Alaska Court System. 1998


Hon. Dana Fabe, Hon. Martha Beckwith, Hon. Elaine Andrews, and Hon. Natalie Finn enjoy an evening in Anchorage. Circa 1988

Many women attorneys who began their careers as his law clerks help Justice Jay Rabinowitz celebrate his retirement. 1997

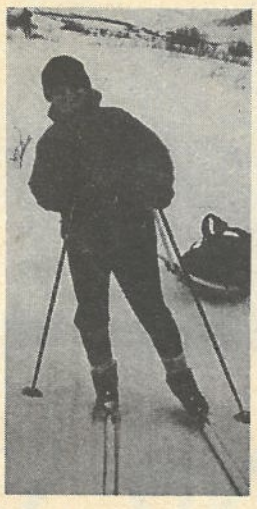


Cindy Strout, her daughter Nora, and Mary Geddes share a laugh with Hugh Fleischer at a Chili Feed. 1996

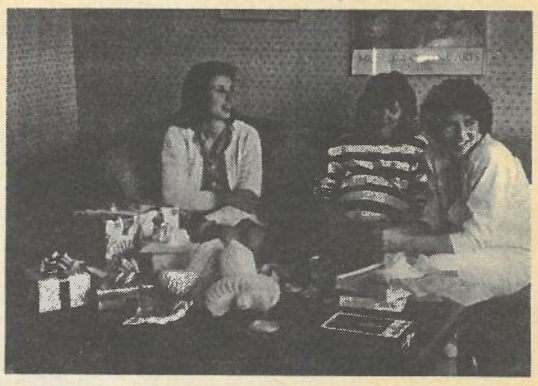
Averil Lerman, center, meets with Sister Helen Prejean, author of *Dead Man Walking*, R, and Kathy Harris-Kainer, L. 1998.

Debra Fitzgerald and her husband Tom Amodio visit India. 1989


Attorneys are well-represented on the "Glacial Tourers" ski team at the 1st Annual Ski for Women in Anchorage. They include Mary Pinkel, Barb Hood, Mary Anne Kenworthy, Connie Aschenbrenner and Kathleen Harrington. 1997.



Susan Reeves pulls a sled over Resurrection Pass. 1997



Tonya Woelber, Nan Thompson, and Debra Fitzgerald relax at a wedding shower. 1988

Judy Rabinowitz meets members of the U.S. Soccer Team at the White House. 1996

# *Deadline nears for "Women in Alaska Law" archive*

It's not too late for attorneys to submit their stories to the "Women In Alaska Law" archive currently being collected by the Alaska Joint State-Federal Courts Gender Equality Task Force. The deadline for submissions has been extended to April 10, 1998. Contributors are asked to provide photographs from both early in their careers and the present day, as well as information about their experiences and any insights they would like to share. Submissions may be made on either the single-page form that was recently distributed in the ballot packet from the Alaska Bar Association, or on separate 8 1/2" x 11" pages clipped to the coupon on page 11. Donations to support the archive and the efforts of the Task Force are welcome. Further information may be obtained by calling (907) 248-7374. Thank you for helping us commemorate the many contributions women have made to the legal profession and the justice system in Alaska.

# Should Alaska limit the ability of its residents to obtain a divorce? ☐ Steve Pradell

As it stands today, any married Alaskan can file a complaint for a divorce by telling the court that there is an incompatibility of temperament making it impossible for the married couple to continue to live together as husband and wife.

This "no fault" divorce concept makes it relatively easy to obtain a divorce: Even if the other spouse objects, the court will grant a divorce on the grounds of incompatibility of temperament.

Despite the fact that studies have shown that the divorce rates have recently fallen in the interior of Alaska, new legislation has been introduced which would make it more difficult for some couples to obtain a divorce. This is an attempt to revive the "fault" requirements for divorce which were the status quo in America until the last few decades. Rising divorce rates in America indicate that a marriage will last approximately 50/50.

To combat this statistic, many states are attempting to recreate the concept of "fault" requirement for a marriage.

As part of this trend, Alaska Rep. Pete Kelly has introduced HB 390, which would, if passed, create a "charter marriage" concept in this state. Under this proposed law, a couple that desired to have a charter marriage must first receive religious or psychological counseling or marital and family therapy and sign at least two statements which indicate their intent to form a charter marriage and their knowledge of what this entails. The charter marriage concept is premised on the belief that marriage is a lifelong serious commitment which should not easily be broken.

While the philosophy of a charter marriage is positive and the intent to reduce the divorce rate is noble, the dangers which lurk in this new bill are numerous. For example, a spouse to a charter marriage may only become divorced if it is proven to a judge that the other spouse has committed adultery, has been convicted of a felony and sentenced to death or at least three years of prison, has abandoned the marital home for at least one year and refuses to return, or after the court grants a legal separation and the couple has not lived together for at least one year, or 18 months if the couple has children.

A legal separation under the new rules is not automatically granted. In addition to proving that the spouse has obtained personal counseling, a spouse must prove separation for at least a one-year separation period, or that the other spouse committed adultery; had a felony conviction; abandoned the home for at least one year; is guily of physical abuse of the spouse; physical or sexual abuse of a child; has been a habitual drug user or drunk; has endangered the life of the other spouse, among certain other factors. A spouse to a charter marriage may not petition the court for a dissolution, nor may a spouse who is legally separated attempt to remarry.

What this means is that the focus of a divorce in a charter marriage may shift first to the issue of adultery, and away from property division and child custody. Divorce trials may begin to have the feeling of the Clinton/Lewinski soap opera, with spouses hiring private investigators in an attempt to prove unfaithfulness so that a divorce may quickly be granted.

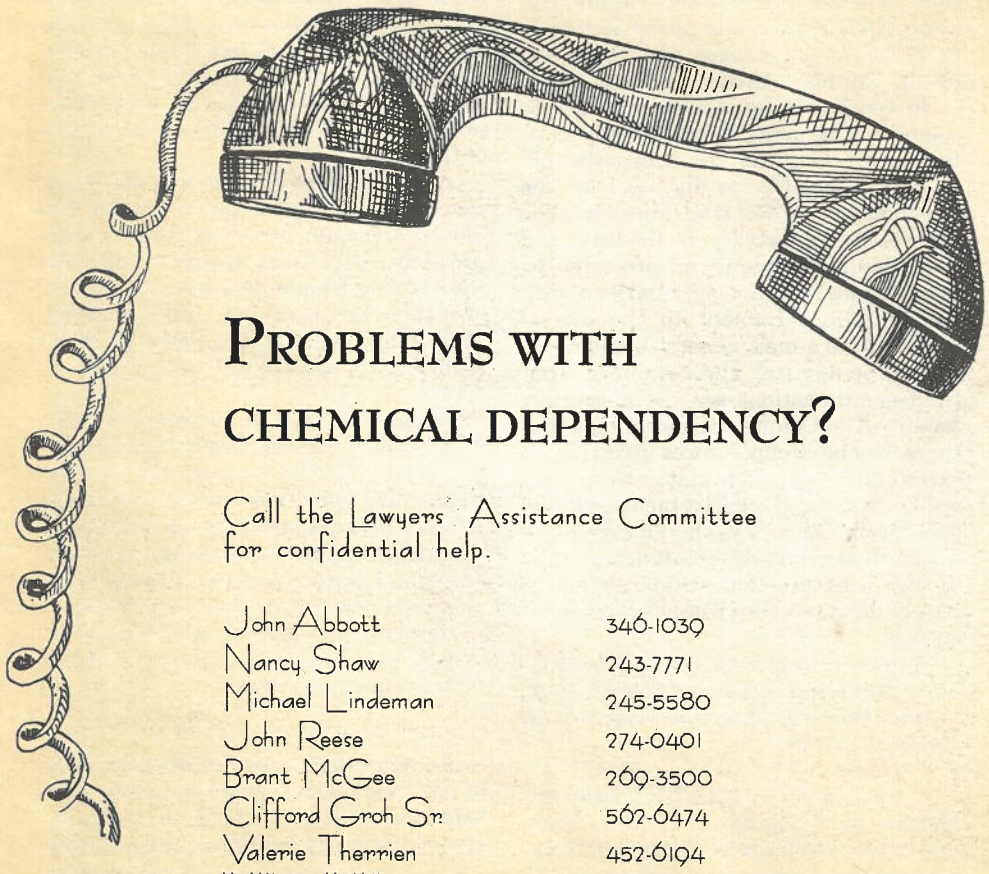
Moreover, those spouses who discover that they have married liars, abusers, gamblers, tax avoiders and the like may not be able to easily undo the damage and move on with their lives. Instead, they may be forced to attempt to reconcile and wait for years under the new waiting periods imposed by the law, while their partner continues the negative behaviors.

The most dangerous aspect of the new legislation concerns victims of violence, which takes many forms in families. It is often extremely difficult for those who have been subject to years of physical, emotional and/or sexual abuse to break away from a perpetrator and seek shelter and freedom from harm. The new proposed laws prevent abused spouses from immediately petitioning for divorce. Instead they must first obtain counseling, and then ask the Court to grant a separation and prove the abuse prior to obtaining a separation judgment. Once the separation is obtained, the spouse subject to abuse must wait at least a year (or 18 months if there are children), and then and only then can a divorce judgment be granted. The divorce process involved in a charter marriage can last for years. The dissolution procedure presently in effect has its own 30-day waiting period designed to allow the parties a "cool down" so that they can be certain the dissolution is what they really desire and to give them time to change their minds about the terms they have agreed to.

Through the use of a charter marriage, one spouse can effectively force the other to remain married, despite the fact that life has become a living hell for that spouse or the children. A spouse with a debt problem can cause the other spouse to become responsible for enormous debts during a marriage, which may be impossible to avoid short of filing bankruptcy if a divorce cannot be quickly obtained. Older successful spouses who marry for the second or third time into a charter marriage can find themselves stuck in a marriage premised upon money and not love, with little recourse. Those with children from a prior relationship may find a new spouse abusive to these children and need a quick release from an unforeseeable situation.

Proponents of the charter marriage concept will argue that the agreement is voluntary, and that there is no requirement that newlyweds enter into a charter marriage. However, it is impossible to really know a potential mate or to predict how your future spouse will act once the marriage occurs.

Those who learn that the love of their lives is really a devil in disguise often need to be able to dissolve bonds easily so that harm can quickly be curtailed.



## PROBLEMS WITH CHEMICAL DEPENDENCY?

Call the Lawyers' Assistance Committee for confidential help.

| | |
|---|---|
| John Abbott | 346-1039 |
| Nancy Shaw | 243-7771 |
| Michael Lindeman | 245-5580 |
| John Reese | 274-0401 |
| Brant McGee | 269-3500 |
| Clifford Groh Sr. | 562-6474 |
| Valerie Therrien | 452-6194 |
| William Walker | 277-5297 |

## *Women in Alaska Law*

**An Archive Celebrating the Contributions of Women to Justice in the Great Land**

**NAME:**_____

**ADDRESS:**_____

_____

**PHONE:**_____ **FAX:**_____

I authorize the Alaska Joint State-Federal Courts Gender Equality Task Force to include the attached materials in the archive on "Women in Alaska Law" to be maintained by the Alaska Bar Association, and to utilize them to develop educational materials such as brochures, booklets, news articles, displays and timelines for use in courthouses, schools, and other public venues.

**SIGNATURE:**_____

**DATE:**_____

_____**ENCLOSED IS MY CONTRIBUTION OF $**_____ **TO SUPPORT THE CREATION OF THE "WOMEN IN ALASKA LAW" ARCHIVE AND THE EDUCATIONAL EFFORTS OF THE GENDER EQUALITY TASK FORCE.** (Please make checks payable to "Gender Equality Task Force")

Please detach this coupon, clip it to the materials you are contributing to the archive, and return them by April 10, 1998, to:

1998 Women In Alaska Law Archive
Alaska Joint State-Federal Courts Gender Equality Task Force
c/o 2413 Lord Baranof Drive Anchorage, AK 99517
248-7374/FAX 248-8387

# Alaska Bar Association Ethics Opinions

**ALASKA BAR ASSOCIATION**
**ETHICS OPINION No. 98-1**
***Contact With Defendant's Insurer***

The Committee has been asked to revisit Ethics Opinion No. 78-4 concerning the propriety of direct contact with an insured's insurer by an attorney representing the plaintiff when the plaintiff's attorney knows that the insured is represented by counsel. In Ethics Opinion No. 78-4, the Committee concluded that the plaintiff's attorney in personal injury litigation is not entitled to either contact or continue discussion with a claims representative of the defendant's liability insurer without the consent of the insured's attorney. In the Committee's view, the bar of Opinion No. 78-4 is no longer valid. Unless the plaintiff's attorney has actual knowledge that the insurer is represented by counsel in the matter at issue, an attorney representing the plaintiff in personal injury litigation does not violate Rule 4.2 by contacting or communicating with a claims representative or other agent of the defendant's insurer concerning the matter.

**DISCUSSION**

Rule 4.2 of the Alaska Rules of Professional Conduct ("ARPC") provides the focus for the Committee's analysis:

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

ARPC 4.2 (emphasis added). In light of Rule 4.2, the specific issue is whether the plaintiff's attorney, having knowledge of the insured's representation, is barred from communicating with the insurer on the premise that "knowledge" that an insured is represented by counsel constitutes the "knowledge" that the *insurer*[1] is also represented by that same lawyer.

The word "'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from the circumstances." ARPC 9.1(f). Thus to violate Rule 4.2, the plaintiff's lawyer must have actual knowledge that the insurer is represented by insured's counsel.

While multiple representation by the insured's attorney is often allowable, there is clearly no rule of law in Alaska which *requires*[2] the insured's lawyer to *represent* the insurer. *See* AS 21.89.100 (separate counsel for insured, paid for by the insurer, is authorized in certain circumstances); *Chi of Alaska v. Employers Reinsurance Corp.*, 844 P.2d 1113, 1118 n.10 (Alaska 1993); Ethics Opinion 90-2 (attorneys hired by an insurance company to represent the insured must honor insured's objection to the insurer's direction to send an offer of judgment, even if the insured's objection might breach insurance contract). Consequently, absent a requirement in all cases that an insured's lawyer must also represent the insurer, knowledge of the insured being represented by a lawyer does not constitute knowledge that the same (or a different) lawyer represents the insurer.[3]

Additionally, the plaintiff's attorney is authorized by law to communicate with the insurer and the *insurer* is under an affirmative duty to communicate with the plaintiff or, if represented, the plaintiff's attorney, including specifically identifying the agent of the insurer who is handling the claim. AS 21.36.125(2); 3 AAC 26.040(b)(1). The plaintiff's attorney is therefore authorized by law to contact the insurer until notice is received identifying the insurer's lawyer as such.

On the other hand, if the plaintiff's attorney has actual knowledge that the insurer is represented by counsel, whether it be the insured's attorney or a separate attorney, then the communication is clearly prohibited (without consent).[4] In such a case, communication with the insurer is accomplished through its counsel.

In summary, ARPC 4.2 prohibits a lawyer from communicating with an insurer who the lawyer *knows* to be represented by counsel. While knowledge may be inferred from certain circumstances, knowledge of attorney representation of the insured is not by itself sufficient to establish that the same lawyer represents the insurer.

Approved by the Alaska Bar Association Ethics Committee on November 6, 1997.

Adopted by the Board of Governors on January 16, 1998.

[1] The insurer is not the same "person or party" as the insured. To establish this, we need only point out that Alaska is not a direct action jurisdiction. A claim, suit, or judgment against an insured is separate from a claim, suit, or judgment against the insurer. *Meyers v. Robertson*, 891 P.2d 199 (Alaska 1995). Therefore, the insured and insurer cannot be considered to be the same "person or party" within Rule 4.2. Absent such a requirement, it would be inaccurate to presume knowledge of such a relationship by plaintiff's counsel.

[2] A determination that the insured's counsel may represent an insurer is far different than determining that the insured's counsel *must* represent the insurer.

[3] The Committee acknowledges that Opinion No. 78-4 states in part:

> In typical personal injury litigation, the defendant is insured. A portion of the contract of insurance entitles the defendant's insurer to control the litigation, and designate the counsel for defense of that litigation.

Alaska Bar Association Ethics Op. 78-4. Thus, where a defendant in litigation is insured, in many instances, the insurer will have a direct interest in the subject matters of the litigation consistent with that of the insured and, in some cases, a contractual right to control the litigation. This does not necessarily mean that the insured's attorney represents the insurer.

[4] The Alaska Rule extends to any person or organization and is not limited to matters in litigation. Thus, if plaintiff's attorney knows the insurer is represented by counsel with respect to the pending matter, the plaintiff's attorney may not contact the insurer without the consent of counsel. ARPC 4.2.

**ALASKA BAR ASSOCIATION**
**ETHICS OPINION 98-2**
***Communication By Electronic Mail***

Electronic mail (e-mail) is fast becoming the accepted and preferred method for attorneys to communicate with their clients, and vise versa. It has the obvious advantages of speed, efficiency and cost to commend its application, and it will likely follow the path of the fax machine and soon become an everyday mainstream business tool. Its rapid rise in currency raises a number of thorny ethical issues,[1] but the Committee has chosen to address probably the most fundamental concern: Is it ethical for an attorney to use e-mail as a means of communicating with a client when such communications may involve the disclosure of client confidences, privileged communications or work-product?

In the Committee's view, a lawyer may ethically communicate with a client on all topics using electronic mail. However, an attorney should use good judgment and discretion with respect to the sensitivity and confidentiality of electronic messages to the client and, in turn, the client should be advised, and cautioned, that the confidentiality of unencrypted e-mail is not assured. Given the increasing availability of reasonably priced encryption software,[2] attorneys are encouraged to use such safeguards when communicating particularly sensitive or confidential matters by e-mail, *i.e.*, a communication that the attorney would hesitate to communicate by phone or by fax.

**DISCUSSION**

The lawyer's duty to preserve confidences is codified in Alaska Rules of Professional Conduct 1.6. The duty extends not only to confidential communications, but to "information relating to representation of a client."

While e-mail has many advantages, increased security from interception is not one of them. However, by the same token, e-mail in its various forms[3] is no less secure than the telephone or a fax transmission. Virtually any of these communications can be intercepted, if that is the intent. The Electronic Communications Privacy Act (as amended) makes it a crime to intercept communications made over phone lines, wireless communications, or the Internet, including e-mail, while in transit, when stored, or after receipt. *See* 18 U.S.C. § 2510 *et. seq*. The Act also provides that "[n]o otherwise privileged wire, oral or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character." 18 U.S.C. § 2517(4). Accordingly, interception will not, in most cases, result in a waiver of the attorney-client privilege. This is in accord with the prevailing view, though the answer in each specific case may depend, at least in part, on the circumstances of whether the disclosure is viewed as "intentional" or "inadvertent." *See Shubert v. Metrophone, Inc.*, 898 F.2d 401 (3rd Cir. 1990). *See also* ABA Formal Ethics Ops. 92-368 and 94-382.

The Committee's view generally comports with the majority of jurisdictions that have considered this issue. *See* Arizona Advisory Op. 97-04 (lawyers may want to have e-mail encrypted with a password known only to the lawyer and the client but lawyers may still communicate with existing clients via e-mail about confidential matters); South Carolina Advisory Bar Op. 97-08 (finding a reasonable expectation of privacy when sending confidential information through electronic mail; the use of electronic mail will not affect the confidentiality of client communications under South Carolina Rule of Professional Conduct 1.6); Vermont Op. 97-5 (a lawyer may communicate with a client by e-mail, including the Internet, without encryption); Illinois State Bar Assoc. Op. 93-12 (lawyer does not violate Rule 1.6 by communicating with a client using electronic mail services, including the Internet, without encryption).

The only dissonant view has been expressed by the Iowa Bar, which suggests that, without encryption, confidential communications should not be sent by e-mail absent an express waiver by the client. *See* Iowa Advisory Op. 95-30.

In conclusion, an attorney is free to communicate using e-mail on any matters with a client that the attorney would otherwise feel free to discuss over the telephone or via fax transmission. The expectation of privacy is no less, and these communications are protected by law. While it is not necessary to seek specific client consent to the use of unencrypted e-mail, clients should nonetheless be advised, and cautioned, that the communications are not absolutely secure. The Committee recognizes that there may be circumstances involving an extraordinary sensitive matter that might require enhanced security measures, like encryption. Attorneys should take those precautions when the communication is of such a nature that normal means of communication would be deemed inadequate.

Approved by the Alaska Bar Association Ethics Committee on January 8, 1998.

Adopted by the Board of Governors on January 16, 1998.

[1] *See generally*, ABA/BNA Lawyers' Manual on Professional Conduct Practice Guide Dealing with Electronic Communication, under the heading "Confidentiality", No. 170; ABA/BNA Lawyers' Manual on Professional Conduct, Current Reports, March 6, 1996, an article by Joan C. Rogers, Staff Editor, entitled "Ethics Malpractice Concerns Closed E-Mail, On-Line Advice"; the ethics article entitled "The Perils of Office Tech" by Joanne Pitulla, Assistant Ethics Counsel, in the October 1991 issue of the "ABA Journal"; "Confidentiality and Privilege in High-Tech Communications" by David Hricick appearing in the February 1997 issue of the "Professional Lawyer"; the 1996 Symposium issue of the "Professional Lawyer" comprised of papers presented at the 22nd National Conference on Professional Responsibility, which took place in Chicago. Several articles dealing with the subject matter are printed in the Symposium issue including "High Tech Ethics and Malpractice Issues", "Spinning an Ethical Web: Rules of Lawyer Marketing in the Computer Age", and "Can the Decrepit Encrypt: Do we Need the Cone of Silence, or is "Pretty Good" Good Enough?".

[2] Encrypted e-mail has been electronically locked to prevent anyone but the intended recipient from reading it, using a "lock and key" technology. Simply stated, such messages are "locked" by the sender, making them unreadable except by the intended recipient, who has a "key" in the form of an electronic password to decode the message.

[3] Speaking generally, electronic mail is a message sent from one user's computer to another user's computer via a host computer on a network, or via a private or local area network (i.e., a network wholly owned by one company or person which is available only to those persons employed by the owner or to whom the owner has granted legal access). In addition, there are commercial electronic mail services (America On-Line, CompuServe), or messages may be sent via the Internet, or by any combination of these methods.

**ALASKA BAR ASSOCIATION**
**ETHICS OPINION 98-3**
***Obligation Of Lawyer To Honor Writ Of Execution Against Client Funds In The Lawyer's Trust Account***

The Ethics Committee was asked whether a lawyer may, consistent with the lawyer's ethical obligation, honor a writ of execution against client funds held in the lawyer's trust account. Assuming funds held in the lawyer's trust account are truly those of the client, that is, the client may direct disposition of the funds at the client's discretion, and that a valid writ and notice of attachment pursuant to A.S. 9.35.010 have been served on the lawyer, it is the opinion of the committee that nothing in the Alaska Rules of Professional Conduct (ARPC), or other ethical considerations, prevents a lawyer from honoring the requirements of the writ.

A lawyer is required to keep a client's funds or other property entrusted to the lawyer separate from the lawyer's own property, ARPC 1.15(a), and deliver it to the client and render an accounting whenever the client so directs. ARPC 1.15.(b). That obligation is limited, however, when a third party asserts a claim to the property:

> When in the course of representation, a lawyer is in possession of property in which both the lawyer and another person claim interest, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

ARPC 1.15(c)

Pursuant to A.S. 09.40.040, the holder of the funds of a judgment debtor (or a defendant whose property has been attached pre-judgment) must pay over such

*Continued on page 13*

# Board of Governors meeting invites comments

*The Board of Governors invites member comments concerning the following proposed amendments to the Alaska Rules of Professional Conduct and Bar Rule 35.*

The recommended change to **ARPC 1.4** would require a lawyer to inform an existing client in writing if the lawyer does **not** have malpractice insurance of at least $100,000 per claimant and $300,000 total and to inform the client in writing at any time the lawyer's malpractice insurance drops below these amounts or the malpractice insurance is terminated. A record of those disclosures must be maintained for six years from the termination of the client's representation.

The proposed changes to **ARPC 1.5 and Bar Rule 35** would require written fee agreements in all matters where the fee to be charged exceeds $500. In addition, the fee agreement must include the disclosure required by ARPC 1.4. The Alaska Comment to ARPC 1.5 would be amended to provide that "client" as used in the rule would include any person or entity legally responsible to pay the fees for professional services rendered by a lawyer. Finally, Bar Rule 35 would be amended to parallel ARPC 1.5 concerning notification to a client of any costs, fees or expenses for which the client may be liable if the client is not the prevailing party.

Please submit your comments to Deborah O'Regan, Executive Director, Alaska Bar Association, PO Box 100279, Anchorage, AK 99510 or e-mail to "alaskabar@alaskabar.org" by April 27, 1998.

PROPOSED AMENDMENT TO
ARPC 1.4
REQUIRING MANDATORY
DISCLOSURE
OF MALPRACTICE
INSURANCE COVERAGE
(Additions italicized; deletions bracketed and capitalized)

Rule 1.4 Communication.

(a) A lawyer shall keep a client reasonably informed about the status of a matter undertaken on the client's behalf and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

*(c) A lawyer shall inform an existing client in writing if the lawyer does not have malpractice insurance of at least $100,000 per claimant and $300,000 total and shall inform the client in writing at any time the lawyer's malpractice insurance drops below these amounts or the lawyer's malpractice insurance is terminated. A lawyer shall maintain a record of these disclosures for six years from the termination of the client's representation.*

*ALASKA COMMENT*

*Subsection (c) does not apply to lawyers in government practice or lawyers employed as in-house counsel.*

PROPOSED AMENDMENT TO
ARPC 1.5
REQUIRING MANDATORY
DISCLOSURE
OF MALPRACTICE
INSURANCE COVERAGE
IN WRITTEN FEE
AGREEMENT
(Additions italicized; deletions bracketed and capitalized)

Rule 1.5 Fees.

...

(b) [WHEN THE LAWYER HAS NOT REGULARLY REPRESENTED THE CLIENT,]The basis or rate of [THE] a fee *exceeding $500* shall be communicated to the client[, PREFERABLY] in [WRITING,] *a written fee agreement* before or within a reasonable time after commencing the representation. *This written fee agreement shall include the disclosure required under Rule 1.4(c).* In a case involving litigation, the lawyer shall notify the client *in the written fee agreement* of any costs, fees or expenses for which the client may be liable if the client is not the prevailing party.

ALASKA COMMENT

...

*In addition to the definition in Rule 9.1(b), the term "client" in this rule means any person or entity legally responsible to pay the fees for professional services rendered by a lawyer.*

PROPOSED AMENDMENT TO
BAR RULE 35
REQUIRING WRITTEN FEE
AGREEMENT FOR
ALL LEGAL SERVICES
AND
DISCLOSURE TO CLIENT IF
ATTORNEY
DOES NOT MAINTAIN
MALPRACTICE COVERAGE
(Additions italicized; deletions bracketed and capitalized)

**Rule 35. Fees for Legal Services; Agreements.**

...

(b) **Written Fee Agreement.** [WHEN THE ATTORNEY HAS NOT PREVIOUSLY OR REGULARLY REPRESENTED A CLIENT,] The basis or rate of the fee to be charged, including any fee of retainer or initial deposit, [SHOULD] *exceeding $500 shall* be communicated to that client in [WRITING] *a written fee agreement,* before commencing the representation or within a reasonable time thereafter. *This written fee agreement shall include the disclosure required under Alaska Rule of Professional Conduct 1.4(c). In a case involving litigation, the attorney shall notify the client in the written fee agreement of any costs, fees or expenses for which the client may be liable if the client is not the prevailing party.* [IN THE ABSENCE OF A WRITTEN FEE AGREEMENT, THE ATTORNEY MUST PRESENT CLEAR AND CONVINCING EVIDENCE THAT THE BASIS OR RATE OF FEE EXCEEDED THE AMOUNT ALLEGED BY THE CLIENT.]

(c) **Contingent Fees.** A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by Section (d) of this rule, or by other law or court rules or decisions. A contingent fee agreement will be in writing and will *include the disclosure required under Alaska Rule of Professional Conduct 1.4(c) and* state the method by which the fee is to be determined, including:

...

## BOARD OF GOVERNORS MEETING
## JANUARY 16, 17

At the Board of Governors meeting Board took the following action:

- Heard a report on a pending stipulation in a discipline matter which will be on the March agenda.
- Denied an applicant's appeal from the July 1997 bar exam.
- Approved two reciprocity applicants pending receipt of the fingerprint card reports.
- Voted to send amendments to ARPC 7.4 (which would certify organizations which certify lawyers as specialists) to the Supreme Court.
- Voted to send amendments to ARPC 1.6 (which changes the definition of confidential "information" to "secrets or confidences") to the Supreme Court.
- Voted to send amendments to Bar Rule 43.1 (which would allow military attorneys to take cases under the Alaska Pro Bono Program and to represent military dependents in state court) to the Supreme Court.
- Adopted 3 ethics opinions: "Obligation of Lawyer to Honor Writ of Execution Against Client Funds and the Lawyer's Trust Account"; "May Attorneys Communicate by Electronic Mail with Their Clients without Violating Their Duty to Not Disclose Information Relating to Their Representation of a Client"; and "Contact With Defendant's Insurer."
- Tabled the Native Law Section's request for funding a timeline until they have a more substantive proposal with the budget, display plan, etc.
- Apointed 5 Board members to a convention awards subcommittee to make recommendations for the Distinguished Service Award and the Professionalism Award.
- The Board requested an ethics opinion on whether it's unethical to obtain confidential records by subpoena without notice to the other side; they will request the Court Civil Rules committee to consider an amendment regarding this.
- Adopted Rob Stone's plan for the New Lawyer Liaison selection procedures, and voted to pay the expenses for the Out-of-Anchorage New Lawyer Liaisons to attend Board meetings.
- Voted to have ALSC contribution check-off on the dues notices, starting with the 1999 notices.
- Asked the Executive Director to survey the 32 Mandatory State Bars to find out how many take credit cards, especially for bar dues.
- Approved the October minutes.
- Voted to send sympathy cards to the families of deceased lawyers.
- Appointed Jeff Currall to the Judicial Council.
- Requested the staff to check into cost of voice mail for the Lawyer Referral Service so that a disclaimer message could be included at the beginning of the call.
- Discussed the response to the legislative audit.
- Asked the staff to check into the cost of display ads in the yellow pages advising the public about the existence of the discipline system.
- Recommended disbarment for Robert Breeze.
- Voted to publish proposed amendments to ARPC 1.4 (which would require a lawyer to inform an existing client in writing if the lawyer does not have malpractice insurance), and 1.5 and Rule 35 (which would require written fee agreements in all matters where the fee to be charged exceeds $500.)
- Asked the staff to put together a proposed Mandatory CLE rule which would require 24 hours of CLE (including 2 hours of ethics) every two years, and to schedule a meeting at the end of February to consider this rule for publication.

# ETHICS OPINIONS

*Continued from page 12*

funds pursuant to requirements of the writ of execution or be personally liable to the judgment creditor for any amount wrongfully withheld. *Von Gemmingen v. First National Bank*, 789 P.2d 353, 356 (Alaska 1990); *Willner's Fuel Distributors v. Noreen*, 992 P.2d 399, 403 (Alaska 1993). No exception appears in the statutory scheme for funds held in attorney trust accounts. *See, Willner's Fuel Distributors v. Noreen, supra,* (reversing summary judgment granted a lawyer on a claim brought by a client's judgment creditor pursuant to A.S. 09.40.040 alleging wrongful failure to pay over a client's funds in the lawyer's trust account pursuant to a writ of attachment). Funds collected by a process server pursuant to the writ of attachment must be delivered to the court issuing the writ. rule 69(f)(22), Alaska Rules of Civil Procedure.

While ARPC 1.15(c) requires that disputed property, including funds held in a trust account be "kept separate by the lawyer," pending a resolution of the dispute, A.S. 09.40.040 requires such funds to be paid to the process server. The committee believes, however, that any conflict created by these provisions is more apparent than real because the purpose of the requirement that the lawyer keep the property separate—so the property will be preserved pending an orderly resolution of the dispute—will be served equally well by paying the trust account funds to the process server who must deposit them with the court.[1] Accordingly, any suggestions that a literal reading of ARPC 1.15(c) prevents the lawyer from turning over trust account funds attached by a judgment creditor must fall to the specific requirements of A.S. 09.40.040 and ARCivP 69.

Approved by the Alaska Bar Association Ethics Committee on January 8, 1998.

Adopted by the Board of Governors on January 16, 1998.

[1] Of course, ARPC 1.4, which requires a lawyer to keep the client reasonably informed about the status of the matter undertaken on the client's behalf, obligates the lawyer to inform the client of the service of the writ so that the client can take steps to protect the client's interests.

# MAND

## CONTINUING L

## Who Has It and Who Doesn't?

- Currently 39 states have Mandatory Continuing Legal Education requirements.
- The most common CLE requirement is 12-15 credits per year.
- Reporting by affidavit is used by 22 of these jurisdictions.
- The following states do not currently have an MCLE requirement, although some states have a mandatory CLE requirement for new admittees.

**Alaska** — A Mandatory ethics class for new admittees (3-hour course) has been required since 1992.

**Connecticut** — An MCLE proposal has been submitted to the Supreme Court Rules Committee.

**Hawaii** — No proposal for MCLE has been presented.

**Illinois** — The Chicago Bar Association has presented an MCLE proposal to their Supreme Court. The Cook County Court Commission has also recommended a mandatory ethics requirement. Both proposals are pending.

**Maryland** —The State Bar recommended to the Court of Appeals in 1995 that MCLE be adopted. The Court turned this over to the Rules Committee which said more study is needed. The Committee is commissioning a survey.

**Massachusetts** — No proposal for MCLE has been presented.

**Michigan** — The MCLE rule was rescinded by their Supreme Court in April, 1994.

**Nebraska** — In May 1997 their Supreme Court denied a petition filed by the Bar Association requesting the adoption of an MCLE rule.

**New Jersey** - A mandatory skills training course for new admittees is required. Certification also available in New Jersey.

**New York** — A Mandatory CLE for new admittees, "Bridge-the-Gap," is required: 32 hours within the first 24 months of admission

**South Dakota** —The state has "free" CLE funded through state bar association dues. There is a high voluntary level of attendance, and therefore little need or support for MCLE.

**Washington, DC** —Since 1994 a mandatory CLE course in ethics and professionalism has been required for new admittees. In 1995 the DC Bar Board of Governors rejected the MCLE Task Force's recommendation for MCLE, but approved a mandatory legal ethics and professional responsibility requirement. A fall, 1995 member referendum rejected both proposals. The original proposal and referendum results have been forwarded to the DC Court of Appeals. No further action has been taken.

## FOR

*By Joseph Faulhaber*

Faulhaber

For more than 100 years the members of the ABA have done just fine, thank you, without the burden of mandatory continu-ing legal education. Yet many believe that the time has come to make MCLE one more requirement to practice law in the largest state.

Accountants and real estate brokers in Alaska, as well as lawyers in other states, have been subjected to mandatory continuing education for years. A visit with any of these other professionals will probably serve to diminish one's apprehension towards this most ominous threat to freedom and individuality. In fact, MCLE may even provide benefits to lawyers that far outweigh any expense or inconvenience it may cause. To consider a few, I believe that MCLE will serve to...

ADVANCE the science of juris prudence. An informed professional is a creative and productive professional. All of us are smarter than any one of us. New lawyers with contemporary educations sharing ideas with street-smart veterans will benefit both. MCLE will provide the best forum imaginable for this kind of interaction.

PROTECT THE PUBLIC. Better educated lawyers are less likely to harm their clients or adversaries through frivolous litigation based on erroneous or dated legal theory. Occupational licensing provides an opportunity for diminished competition within a profession, but it carries with it the burden of protecting those whom that profession serves.

ENHANCE THE IMAGE OF THE PROFESSION. Members of the public are often surprised to discover that MCLE is not in effect. Poor public perception of lawyers does not come from lawyer jokes. Efforts towards continuing education demonstrate to the public that attorneys take their profession seriously.

DIMINISH THE ZEALOUS PURSUIT TOWARDS TORT REFORM. Obviously more respected professionals are less likely to be attacked through often ill-conceived, hastily contrived legislation.

**"...I DO BELIEVE THAT, IF ADOPTED, MCLE WILL MAKE EVERY LAWER A BETTER LAWYER TO SOME DEGREE."**

MAKE THE PRACTICE OF LAW MORE meaningful and rewarding by reducing mundane jousting with less competent contemporaries.

LOWER THE COST OF PROFESSIONAL LIABILITY INSURANCE. Better-educated lawyers make fewer mistakes. Fewer mistakes make fewer claims. Fewer claims mean lower costs and a better environment to vendors of insurance. This means more competition among these providers. Hence, lower prices.

CREATE AN OPPORTUNITY TO MEET NEW PEOPLE. Provide a platform to enhance revenue and increase service to clients through a better-developed referral network.

PURGE ANY LATENT FEELINGS OF GUILT concerning the embarrassingly large disparity between the average income enjoyed by the legal profession and others less fortunate.

OK, a few of these perceived benefits may be a reach, or perhaps worse, but the point is that MCLE can provide real, tangible benefits to those who embrace it as an opportunity towards improvement.

In any enterprise involving education there always seems to be an inverse correlation between those who need it the most and those who actively seek it.

The proposed rule and regulations may or may not be perfect. Acceptance will not be unanimous. But I do believe that, if adopted, MCLE will make every lawyer a better lawyer to some degree.

## AGAINST

*By John M. Murtagh*

Murtagh

I am glad to be able to voluntarily offer my comments on the proposed mandatory continuing legal education requirement. According to the 1962 edition of the American College Dictionary, the definition of "education" is:

*1. act or process of educating; the imparting or acquisition of knowledge, skill, etc.; systematic instruction or training. 2. the result produced by instruction, training, or study.*

If that would be the result of the proposed rule, I would support it wholeheartedly. However, experience in Alaska and elsewhere shows that a more honest title to the rule would be:

Mandatory being in a place where certain activities occur

or,

Mandatory signing in at a place where certain activities are to occur

Several examples demonstrate the realities of such an honest description.

When I was an active member of the State Bar of Wisconsin, I was under a mandatory CLE obligation. My last Wisconsin CLE was at the end of a calendar year and was well attended. I was practicing only criminal defense, and my fellow attendees presumably included career prosecutors, career domestic relations attorneys, and career personal injury and insurance defense attorneys.

Without too much hyperbole, I can state that to be in compliance with the rules we could have been presented with a fascinating discussion of the Uniform Commercial Code and Farm Implement Financing. Those who attended out of professional necessity, with relatively glazed over eyes, were in such a system "the good ones" because we "had our hours in." But to what purpose?

I have attended one ALPS C
Participation in this program g
ated a reduced rate on ALPS premi
What I observed were a number of
competent, well-respected attor
who showed up, signed in, got a c
coffee, and left. By conspicuously
ing in, they would be among "the
ones." But to what purpose?

I have also had the opportuni
be a lecturer several times in the
presently mandatory CLE progra
Alaska: the ethics class for new
admittees. While the vast majority
mid-range attentive, a fair nu
looked upon me as if I were a p
guard talking them through the
part of their sentence. They were
and no matter how little attention
paid, what else they read during
lecture, or how loudly and consist
they visited with their tablemates,
would be among "the good ones." B
what purpose?

This discussion of mandatory
is in its second decade at least, ha
been extensively discussed durin
term from 1989 to 1992 on the B
of Governors. When we went to
datory ethics CLE it was in large
to negate the sometimes-heard ex
in disciplinary proceedings: "B
didn't know that was the rule, a
didn't know we had ethics opinio

The purpose of mandatory CL
least for my vote, was to eliminate t
types of specious defenses by assu
everyone had an opportunity, a
mandatory, to have these issue
viewed with them before they
menced practice.

Experience teaches us you can
a horse to water but you can't make
drink. We all recognize in ourselve
ability to be more stubborn than
the proverbial mule, so it can be f
stated that "you can lead a lawy
class, but you can't make him thi
am aware that upon reflection, so
those mandatorily present will r
nize a thirst for knowledge, and i
will participate in the acquisiti
knowledge or skill.
the proponents of
rule must, if they are
est, acknowledge
some of "the good
will sign in and le
(unless we utilize
resources for hall
monitors) and ma
"the good ones" will
in, sit down, tune ou
turn off (unless we
tests to establish whether educa
took place).

So, to what purpose is the rule?

In the past, it has been describe
a public relations technique (usin
more artful language.) After all
then can demonstrate to the public
the Bar Association is properly pro
ing the public by requiring its mem
to participate in continuing *educa*
My objection is that we know that
is, to a significant degree, not tru
will not be education. Those who
ently attend programs to acq
knowledge and skills do so for the
reason, to better serve their clien
few of those who do not, may in
need this impetus to do what they
they had been doing all alo
somewhat like flossing your teeth
times a day the week before seeing
dentist when you have not flossed

# A T O R Y

## G A L  E D U C A T I O N

you last saw her months ago.

However, for whatever portion of the Bar who will simply sign in and leave, or sign in and tune out, it is a fraud to insist to ourselves or to the public that this is "education" or that it meets a legitimate public purpose.

That is the basis of my objection, that the Bar will be holding out a concept to the public — a process of acquiring knowledge and skill as mandatory — when it is undeniable that this process will not be taking place for a significant portion of the conscripted members.

I support "education" for Bar members and recognize the broad scope of permitted activities under the proposed rule. Nonetheless, because it is not mandatory "education" that is involved in the rule as shown by the examples above, it is misleading and wrong to promote it as such.

The rule should be rejected because it will not meet its stated goal of mandatory "education."

## FOR

*By David A. Ingram*

Ingram

Are you tired of lawyer jokes that portray us as sleazy, lying, parasites on society? I am.

Do you cringe a little when you see a notice that one of us has been disbarred? I do.

Will you concede that the public is right to place more trust in those professions that require their members to pursue continuing education? I will.

I think mandatory CLE will engender more trust from the public, will make us all more aware of ethical requirements, and will be one step on the road to rehabilitation of our unfortunate reputation.

Some criticize efforts to bolster public confidence in our profession as being mere "window dressing." Mandatory CLE is much more than that. In addition to bolstering public confidence, it will undoubtedly make us better lawyers. A well-informed lawyer is obviously better than one who is fumbling in the dark.

Many of our members are already active in CLE, some taking 1-3 courses per year, some taking even more. Others, however, have taken no CLE courses for years. In order to gain the confidence to the public and insure that we are reaching every member of the Bar, we need to adopt mandatory CLE requirements.

While we practice in diverse areas of the law and have little in common with one another in many respects, we all need occasional training in ethics. For that reason, I believe we should adopt, at a bare minimum, a requirement that each member of the Alaska Bar complete at least two hours of CLE in ethics at least every other year.

I support a more extensive requirement, however, perhaps 10-15 hours of general CLE per year. I have been advocating for some time the notion that annual CLE requirements should not exceed that which is available at the annual Bar convention. Such an approach would make it easy for us to satisfy all CLE requirements in one short burst of energy.

It may also help to preserve the annual convention, a tradition that appears to be in serious danger of withering away.

We have special needs in Alaska, and CLE requirements should be structured to accommodate those needs. Attendance at live programs would be too difficult and expensive for many of our members. The viewing of videos should be permitted to satisfy the requirements.

## AGAINST

*By Tina Kobayashi*

Based on an unscientific poll of a number of assistant attorneys general in my office, these are the major concerns public attorneys have about the proposed MCLE:

*The CLEs offered are not relevant to most public attorneys' practices.* Many public attorneys complained about the CLE topics offered. If MCLE is adopted, many public attorneys see themselves suffering through irrelevant CLEs just to get credits. That defeats the purpose of MCLE. Probate, divorce, technology solutions for small law offices, managing partner workshops etc., aren't a part of most public attorneys' practices. Even the ethics CLEs center around issues that public attorneys don't encounter. (I attended an ethics CLE years ago and was disappointed by how little relevance it had to my government/public sector work.) In order for MCLE to work and for attorneys to get something out of their classes, more general classes (i.e. legal writing, depositions, oral advocacy) or more classes relevant specifically to public attorneys need to be offered. Given the large number of public attorneys in Alaska, that should not be impossible.

*The cost of attending CLEs is considerable concern to public attorneys.* Most public attorneys pay for CLEs out of their own pockets and some feel that the CLE costs are too high. The prices are likely to go up to cover the costs of monitoring compliance and enforcement of the MCLE requirements. Whether the cost is reflected in the CLEs or in our Bar dues, public attorneys who pay for these items, themselves, will be impacted. (In 1990, the Bar estimated the additional cost to range from $29 to $52 per person per year.) Finally, the cost of flying to Anchorage to attend CLEs is prohibitive in most cases. Attorneys residing outside Anchorage would prefer more live, general CLEs offered in their home towns, but are concerned that would also drive up the cost of the CLEs.

*Public opinion is not likely to change.* Some attorneys noted that although MCLE is intended to enhance the public's view of attorneys, it will not have that effect. Members of the public who like to bash lawyers are unlikely to revise their opinion substantially because the Bar requires MCLE. If that's why we're doing it, we should think again. If they just hate lawyers, nothing will change that. And if they have had a bad experience with an incompetent or unprofessional attorney, MCLE may not fix that either. *See* below.

*Overall competence of the profession is unlikely to improve.* Some attorneys feel that they keep up on the law adequately, although they appreciate attending CLEs when they are relevant and affordable. For those lawyers who do not keep up on the law, MCLE is not likely to turn them into good lawyers. This observation is not a criticism of the CLEs, but rather an observation on human behavior. (For example, a lawyer may know what ought to be done to provide good representation, but still fail to do it.) Again, neither the overall competence of the Bar or the public's image of the Bar is likely to change because all lawyers are required to attend a certain number of CLEs every year or two.

*Number of proposed required credits is too high.* Some attorneys, including those who favor MCLE, were of the opinion that 24 units of credit during two years is too burdensome.

*MCLE is a step in the right direction.* Some attorneys expressed some or all of the concerns noted above, but still believe MCLE is appropriate and will be good for the profession.

## What's Happening in Other Professions?

**Architects**
State of Alaska —not mandatory — but the number of states requiring continuing professional education (CPE) is increasing.
National Association — American Institute of Architects (AIA) recently adopted a mandatory continuing education requirement.
Requirement: 36 CEUs (continuing education units) per year through a 12-hour training and test designated as "Class 3" credits OR through 36 hours designated as "Class 1" credits — i.e., self-study.
This requirement mirrors 12 states that require continuing education for architects.

**Certified Public Accountants (CPA's)**
State of Alaska — as of January 1990 the requirement is 80 hours every 2 years. Previous requirement was 60 hours every 2 years.

**Dentists**
State of Alaska —28 hours of "clinical" experience every 2 years.

**Electricians**
State of Alaska —12 hours of continuing education per year in codes, plus a minimum of 8 hours of continuing education per year in general electrical subjects. Western States recognize this requirement for reciprocal licensing.

**Engineers**
State of Alaska — not mandatory.
National Association — American Society of Civil Engineers (ASCE) recommends voluntary compliance with 20 hours of professional development per year. Self-study to fulfill the requirement is limited.
14 states now have mandatory continuing education requirement for engineers. Two or three years ago only four or five states had a continuing education requirement.
It is anticipated that in 10 years all 50 states will have mandatory continuing education requirements for engineers.

**Medical Doctors**
State of Alaska —34 hours every 2 years. If continuing education is through a specialty board, the continuing education units (CEUs) are rated higher.

**Paramedics**
State of Alaska —60 hours per year.

**Real Estate Agents**
State of Alaska — requires 20 hours every 2 years for renewal of license.

**Teachers**
State of Alaska —6 semester hours every 5 years. This averages out to 12 hours per year or 60 hours over 5 years.

## FOR

*By Bryan P. Timbers*

I strongly endorse the proposition that the Alaskas Bar Association (Bar) mandate its members to meet minimum continuing legal education (CLE) standards.

From court rules to U.S. Supreme Court decisions, state regulations, and federal statutes, the body of law we must apply in counseling and representing our clients changes from one day to the next. Sometimes the changes are incremental; other times they are dramatic. Often they escape the notice even of scrupulous practitioners. Constraints of time and money make it unlikely that even a substantial portion of Bar members will formally and systematically keep up with legal developments unless this is made a requirement for licensure. Thus, mandatory CLE is a necessary com-ponent of professional responsibility.

CLE is particularly important for practitioners in rural Alaska. I have been in private practice in Nome since 1974. My clients present a wide range of legal problems and expect full service. CLE courses are an invaluable tool for keeping current in various areas of

**"...SO IT CAN BE FAIRLY STATED THAT "YOU CAN LEAD A LAWYER TO CLASS, BUT YOU CAN'T MAKE HIM THINK."**

*Continued on page 16*

# Mandatory Continuing Legal Education

*Continued from page 15*


Timbers

a general practice. They also serve to educate as to our lack of expertise in situations where the client will be better served by a specialist.

Not only are CLE courses necessary, they actually can be pleasurable. By bringing together practitioners with similar interests, they promote the formation of important professional bonds. This synergistic effect is particularly important to solo practitioners and small-town lawyers. Rather than struggling in isolation with a difficult or novel issue, they can learn where to turn for advice on particular matters. Even videotaped courses offer viewers an opportunity to learn who the experts are in a given field.

Having participated in several CLE programs since I joined the Bar 28 years ago, I can honestly say that I have found something stimulating in each and every one of them, particularly those presented by the Bar. I have viewed several tapes and have found the quality of the presentations and the written materials to be exemplary. If the mandatory CLE rule is adopted, the quality and variety of programs would probably be enhanced.

It is imperative that the Bar adhere to the proposed policy which allows members to comply with CLE requirements in a wide variety of ways. (Rule 67) Obviously, monitoring or attendance at live programs would be unduly burdensome for most rural practitioners.

**"THE GREAT IRONY OF THE DEBATE OVER MANDATORY CLE IS THAT WE ALREADY HAVE MANDATORY CLE IN ALASKA."**

I strongly endorse adoption of the mandatory CLE policy.

## AGAINST

*By Gail M. Ballou*

For most bar members in Alaska, mandatory CLE of the kind contemplated by the proposed MCLE rule means compulsory participation (whether in person, by video, by teleconference, or on-line) in packaged programs offered by the Alaska Bar Association or by competing commercial CLE providers.

Although the proposed rule nominally offers alternatives such as in-house training, teaching, and published writing, for most practitioners the only realistic choice for satisfying the proposed mandatory CLE requirement will be to participate in formal CLE programs.

Of course, formal CLE programs are an invaluable resource, but such programs cannot fulfill the continuing education needs of our bar's small, diverse, dispersed population. A bar of our size cannot realistically expect to provide the amount and diversity of formal CLE programming required to meet all, or even most, of its members' professional development needs, nor can we expect that private CLE providers will rush in to offer suitable CLE to members whose needs are not met by the organized bar.

In addition, packaged CLE programming is not the only source, or sometimes even the best source, of information needed to remain current in one's areas of practice. By compelling attendance at formal CLE programs, the proposed MCLE rule will simply create "make-work" projects for practitioners whose professional development needs are better served in other ways.

The great irony of the debate over mandatory CLE is that we already have mandatory CLE in Alaska. The rules of conduct which govern our profession require each of us to have the knowledge and skill necessary to represent each of our clients competently.

Surely the concept of competent representation includes, among other things, being adequately informed about the law which affects each matter which we handle and doing what is necessary to remain advised of developments which affect those matters.

If some among us are failing to represent our clients competently, the solution to that problem is to not compel every attorney in Alaska to go back to school.

*CLE Committee member since 1990.*

# The Anchorage Inn of Court

*Continued from page 1*

For many people, the Inns of Court are a real opportunity to affect the practice of law in America. The American Inns of Court have been referred to by the *Federal Bar News* as a movement that is a "collegial renewal of a search for the attainment of the highest goals of the legal profession that began with each member's first day in law school."

The central purpose of the American Inns of Court concept is to raise the standard of the legal profession by promoting excellence in professionalism, civility, ethics and legal skills for lawyers practicing in, and judges presiding over, the courts and administrative proceedings at all levels. The American Inns of Court do this by encouraging the ingress of varied experiences, talents, and insights for interaction and enrichment; the egress of products worthy of high personal, professional, and institutional purposes; and, above all, a deep feeling, a passion, that the process is of extreme importance. U.S. District Judge A. Sherman Christensen, *The Passion of the American Inns of Court.*

Modeled after the English Inns of Court, established in 1292 by King Edward I, the first American Inn of Court was created in 1980, founded by Chief Justice Warren E. Burger, former Solicitor General Rex Lee, and U.S. District Judge A. Sherman Christensen. In 1985, the American Inns of Court Foundation was formally organized to promote, establish, and charter Inns of Court throughout the United States. Since then, the American Inns of Court movement has grown faster than any other organization of legal professionals. There are now nearly 300 Inns of Court actively involving nearly 20,000 state, federal and administrative law judges, attorneys, legal scholars and law students.

The Anchorage Inn of Court was organized in the fall of 1993 at the instigation of Chief Justice Moore, who wished to see a more collegial interaction between members of the Bar. Three young lawyers, Sharon Sturges, Susan (Swan) Price, and Suzanne Ishii-Regan introduced the Inn of Court concept to attorneys in the Anchorage area. Response was overwhelming. Within only a few months, with the support of the American Inns of Court Foundation, the Anchorage Inn of Court held its first meeting in early 1994. In June 1994, the Inn's charter was formally presented to Susan (Swan) Price by Janet Reno in Washington, D.C.


**Inn members socialize and engage in further discussion over dinner. L-R: Grant Callow, Midori Shaw, and Mark Melchert.**


**Inn members socialize and engage in further discussion over dinner. L-R: Mark Millen, George Skladal, Michaela Kelley, yale Metzger, Kevin Saxby, Lee Houston, Midori Shaw, person facing opposite unknown**

The Anchorage Inn of Court is limited by its charter to no more than 80 members - judges, experienced lawyers, less experienced lawyers, and young lawyers, in an organized and continuing structure designed to enhance the professional and ethical quality of legal advocacy in Anchorage. The main theme of each Inn meeting is practical legal advocacy with an emphasis on excellence in lawyering and legal ethics. The goals of each Inn program are to present, teach, and explain the principles, skills, techniques, and relationships involved in the legal process. The members are organized into "pupillage groups," consisting of from five to 8 members. Each pupillage group contains a mix of members with varying experience, and is responsible for conducting one program for the Inn each year.

Most programs present issues of professionalism, ethics or current legal topics. Recent programs have included topics such as how to handle a lying client, issues surrounding billing abuse, and practical concerns in advising clients on particular legal matters. Each program includes an open discussion in which all members participate. The discussion follows, or is interspersed during, the program and focuses upon the issues of skills, ethics and civility raised by the demonstration. Following the educational program, the Inn's meeting concludes with a meal so that discussion can continue in a collegial atmosphere.

### INNS OF COURT

More information about the American Inns of Court can be found at the Foundation's website: *www.innsofcourt.org.* For more information about the Anchorage Inn of Court, contact either Marla Greenstein or Mike Jungreis:

**Marla Greenstein**
Alaska Commission of Judicial Conduct
310 "K" Street, Suite 301
Anchorage, Alaska 99501
(907) 272-1033

**Mike Jungreis**
Heller, Ehrman, White & McAuliffe
550 W. 7th Ave., Suite 1900
Anchorage, Alaska 99501
(907) 277-1900

# Dispute resolution report proposes change

*By Joe Sonneman*

A December, 1997 report from the Alaska Judicial Council [AJC] to the legislature about alternative dispute resolution (ADR) recommends low-cost educational efforts as well as new pilot projects in probate mediation and in the early neutral evaluation of commercial cases.

The Alaska Supreme Court will change Civil Rules 16, 26, and 100 to force lawyers' and parties' consideration of ADR. Judges will learn more about ADR if the legislature funds a conference.

The AJC Report also recommends creating a task force to determine qualifications and ethics for mediators and evaluators, but not for arbitrators (unless Alaska moves to court-ordered arbitration).

The Alaska emphasis on ADR follows both Alaska's own experience with ADR and the Civil Justice Reform Act of 1990 (28 U.S.C. 471 et seq.).

### QUALIFICATIONS & ECONOMICS

The report recommends that mediator qualifications be based on performance, perhaps with 20-40 hours of training, but suggests that mediators might qualify without education or training. The Division of Occupational Licensing might administer ADR provider licensing and certification programs, the report suggests.

Qualifications are often urged to protect the public, the report notes. In fact, in many fields, qualifications are also often urged as a barrier to entry, to prevent competition and to insure higher incomes for those qualified.

Economics remains an under-explored area of the report, especially the economics of how ADR services by little-trained or uneducated non-attorneys doing ADR will affect lawyers' incomes.

Funding for "neutrals" (the report's term for ADR providers such as mediators, arbitrators, early evaluators) might come either from parties using ADR processes or from government funds, or be nonexistent.

The report notes that most neutrals in federal court ADR programs formerly were volunteers, but such programs now often require either market-rate, court rates, pro bono, or court rates after a pro bono period. Congressional appropriations pay federal court cost of such programs, but court rates for ADR services often remain below market rates.

Alaska's budget-cutting legislature may pay modest court system costs—as for a proposed 1-2 day judges' conference on ADR. The legislature is unlikely to authorize market rates for ADR services, though. User fees are now popular there, so parties will most likely need to pay their own ADR service providers.

Alaska case law holds that labor is property and thus cannot be taken for public purposes without just compensation at market rates. *De Lisio v. Superior Court,* 740 P.2d 437, 440 (Alaska 1987). So payment of neutrals at less than market rates—or compelled pro bono ADR services—seem unlikely as well as unfair. (After all, the 13th Amendment outlawed slavery). But anticipate that nonprofit organizations (with highly paid executive directors) may want to take over ADR, using non-attorney neutrals at low or no wages.

### RULE CHANGES

The Alaska Supreme Court is already changing Civil Rules 16, 26, and 100 to make ADR more likely, the Report says.

Parties tend not to use purely voluntary ADR processes. But forced ADR may create contradictions. For example, parties forced to arbitrate usually can afterwards ask for trial de novo. Again, parties forced into mediation may then lack the willingness to agree that makes mediation succeed.

So the report wisely emphasizes mandatory and voluntary ADR *education* of parties, attorneys, and judges.

- Civil Rule 100—which now lets any party or the court in any civil case require one round of mediation—will be expanded to include options for required early neutral evaluation and required arbitration.
- Civil Rule 16 will require judges to educate parties about ADR at the Rule 16 conference.
- Civil Rule 26 will require lawyers to put ADR in discovery and case management plans, or to explain why ADR is inappropriate. The Rule 26 change will require counsel to choose both an ADR form and an ADR date. The new Rule 26 also may require counsel to select a mediator, evaluator, or arbitrator.

The report adds that the Alaska Supreme Court will also amend other court rules to require counsel to meet early to develop an ADR plan, and to meet with the court to discuss ADR options.

### THE PILOT PROJECTS

The Bar Association's Probate Section has agreed to develop a statewide probate and guardianship mediation pilot program, the report notes. The concept includes training mediators and will hopefully cut the number of master's hearings, will contests, and (intra-family) creditor claims.

If the legislature provides funding, the court system would start an early neutral evaluation of commercial civil cases, training one judge each in Districts I-III. Parties could also choose—and pay for—private evaluators. Experience in Missouri shows that early evaluation can cut case disposition time and party costs.

Alaska already has an Appellate Case Settlement Program in development by the Mediation Committee. The Appellate Rules Committee will review that proposal and make recommendations to the Alaska Supreme Court.

The Child in Need of Aid Committee (CINA) in November 1997 recommended that the Supreme Court set up a pilot mediation project in Anchorage, using federal funds. The goal is to speed treatment and case plans, cutting the delay found to be a problem with such child abuse and neglect cases in Alaska.

Another federal grant will provide court-ordered mediation of Anchorage cases involving child support, custody, access, and visitation. The goals are: fewer contested hearings, faster resolution of custody and visitation, and educating litigants in alternative dispute resolution.

### THE REAL GOAL

The report concludes by stating that these proposals may significantly increase ADR use with only a minimal monetary investment. That last bit is the real key, because Alaska's tort-reforming legislature seems not to want to spend money, even on ADR. Congress seems more willing.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

SANDRA TATE CHAMBERLAIN, )
Plaintiff, )
vs. )
LEE E. CHAMBERLAIN, )
Defendant. )
)

Case No. 3AN-97-4524 Civil

DEFENDANT'S RESPONSE TO PLAINTIFF'S OPPOSITION TO MOTION FOR EXTENSION OF TIME AND PLAINTIFF'S MOTION TO STRIRE DEFENDANT'S NON-CONFORMING MOTION FOR EXTENSION OF TIME AND PLAINTIFF'S MOTION TO STRIRE ELECTION OF SECOND OPTION

Plaintiff's filed her recent pleading,
And I've never heard such bleating,
Never saw in all my reading
In the whole course of law-proceeding,
Such nasty, foolish, outrageous action,
Paltry, vexatious, vindictive transaction,
From a loarned brother of the lagal profession,
Obviously operating from mad obsession,
Dan... Dan... A confession,
Stem such actions from demonic possession?
A short and simple delay I sought,
Which you, my friend, have unkindly fought.
You'd think from all that you have written,
It was your posterior that I've bitten.
Needless to say, the defendant opposes,
All of the things Mr. —— proposes,
Defendant's counsel suggests hereafter,
That plaintiff's pleadings be the butt of laughter.
Lighten up, D—an! Someday you'll find,
Yourself, as counsel, in a scheduling bind,
And then you'll regret your actions here
And not treating your brother with professional cheer.

Respectfully submitted this 18th day of Feburary, 1998.
/s/Wayne Anthony Ross
Attorney for the Defendant

# The pitfalls of retainers and fee agreements

☐ William Satterburg

For attorneys practicing law in the private sector, retainers are a major lamentation. Several years ago, I was visiting with a sage attorney, who complained that another attorney was stealing his clients. I was surprised. Both shared office space. My impression was always that their relationship was excellent.

I asked my friend how he knew that the other was "stealing" his clients. He explained that she recently complained about a client who didn't pay. He was certain that particular client was one of his. After all, he reasoned, all of his clients were non-paying clients.

When I began my own practice of law, I was told that a successful law practice depended upon a knowledgeable secretary. Naively, I thought that such knowledge consisted of such valuable traits as computer languages, bookkeeping, office management, and similar skills. I quickly learned, instead, that the true value of a good secretary is the innate ability to identify "deadbeats."

**GET YOUR MONEY UP FRONT AND LISTEN TO YOUR SECRETARY.**

There is actually a profile to such offenders. They always arrive at a new attorney's office, declaring loudly that the new attorney is the "best attorney in the world" and that they have the one case which will make that attorney a "household word" and "forever rich." If that doesn't work, the attorney is next promised that payment will come from the huge profits expected to roll in any day from some investment scheme in the travel industry, not to mention the PFD check which should arrive if child support doesn't "unconstitutionally" take it again, or the tax return which will generate a refund if it ever gets filed, once the Supreme Court rules on the legality of the IRS and paper currency as a medium of exchange.

And, if all else fails, the finale is usually either a lecture on one's ethical duties of pro bono representation, or the teachings of the Bible. Thanks to the sixth sense antennas of some outstanding secretaries and years of experience, I concluded that the advice I received in the beginning is absolutely correct: Get your money up front and listen to your secretary.

Still, deadbeat clients are a rite of passage through which every fledgling private counsel must pass. Recognizing that I run a proverbial "hole in the wall" office, (although I prefer to think of it as a "boutique practice of law" in this age of politically correct dialogue) I have become rather flexible with respect to payment for my services. I have also learned that there is truth to the Code of Ethics prohibition against taking a contingent fee in a criminal defense case, although I have had more than one client offer to let me serve their time for them in full, should I desire.

Obviously, the preferred method of payment is good, hard cash. But that type of medium of exchange is often difficult to find in the "boutique" practice of law. To survive, the boutique attorney must be resourceful.

In the area of resources, for several years, I represented gold miners. Contrary to many customers, gold miners invariably would burst into my office, reeking of diesel, dropping the proverbial "poke full of gold" on my desk, announcing that they immediately needed quality representation and wanted the whole Constitution declared unconstitutional.

So eager was I to represent anyone, that I would conveniently neglect to check out such minor items as the assay of the gold, the amount, or the true ownership. I soon learned that the term "Fool's Gold" has a meaning other than the valueless yellow specks in a creek. It also applies to the interaction between lawyers with gold fever and their gold miner clients. One thing which I did learn in the process of obtaining noncash items for payment was that IRS obligations still, unfortunately, do exist. I point this out by way of education to the reader, and not by way of any confession or admission against interest (which is also taxable).

## NONCASH ITEMS

Whenever accepting payment in kind, it is critical to obtain an appraisal of non-cash items, to avoid any future concerns with respect to paying the taxes. There are many reputable pawn shops, which provide this service, I'm told. Some items, however, are still very difficult to value, as will be seen shortly.

Several years ago, I represented a rather infamous Fairbanks client who is now serving a very long sentence. Recognizing early in the course of the representation that the likelihood of payment was remote, I viewed the representation on the basis of probabilities, figuring that "probably" he might pay me if he ever got released.

**TO SURVIVE, THE BOUTIQUE ATTORNEY MUST BE RESOURCEFUL.**

I suppose, in a sense, it was a prohibited contingent fee. Addressing the subject of fees, I asked the client how he intended to compensate me for my valuable services. He first offered me publication rights, which I refused. He next confided that he was an artist of sorts, and could send me various jailhouse cartoons for which he was also famous. His works of art adorn the stalls of numerous restrooms in Fairbanks, not to mention the arms of more than one inmate — hence the fame. I politely explained to him that these cartoons would have little economic resale value, despite his protestations that he would someday be famous. As for the tattoos, I told him that needles scared me. He countered by saying that he didn't use needles, but preferred traditional ballpoint pens, instead. Although it was attractive, it still wasn't enough.

As our discussion progressed, the topic turned to blueberries. How a subject concerning law and a person's future can gravitate to Alaskan blueberries still escapes me, but the conversation nevertheless bore fruit. As I listened, the individual kept bragging about the quality of his blueberry patch and how, if he ever got out, he would go back and pick blueberries to his heart's content. When it became apparent that his future did not include kneeling through the tundra or crawl spaces any more, he reluctantly agreed to reveal the location of the blueberry patch only to me, promising that it would exceed my spouse's wildest dreams. I consented, commenting that it was probably the only compensation I would ever receive for my services. This acceptance hurt him. Later, I realized he must have felt that I had a low value of his cartoons, not to mention the tattoos. That wasn't the case at all. It was just that blueberries were the rarest of the three commodities offered.

I told him I would check the patch out. He drew a map that would lead me to the secret spot. (I later learned that the client liked to draw all sorts of maps.) Returning home, I gave the map to Brenda, who immediately set out in search of the exclusive blueberries. Dinner could wait. I didn't try to stop her, since I had learned years ago never to mess with a blueberry addict who has not entered a program.

Several hours later, just when I thought that perhaps she had been eaten by a bear, Brenda returned with a big purple smile, stains all over clothes, and announced that this was truly "the mother of all blueberry patches." A veritable Blueberry Nirvana. It has remained a well kept secret for years.

## MECHANICAL THINGS

I have generally found that things mechanical are best left with the client. For some reason, attorneys are better suited to more common mediums of exchange, as opposed to wrestling with mechanical devils. But that does not mean that I have not accepted mechanical items from time to time. For example, on one occasion, I accepted a snowmachine from a client. After I had it appraised and insured, he decided to "borrow" it back, stating that he would prefer to pay me in cash at some future date, yet to occur. On another occasion, I accepted a riverboat, which promptly sank. I wasn't too upset, however, since the engine had seized the day before. I love aircraft. Although I regularly try to justify the future acceptance of an aircraft to my family, they still vigorously object. In that regard, I have even considered using the Winston Burbank method of aircraft acquisition, which is to let

*Continued on page 19*

# TALES FROM THE INTERIOR

*Continued from page 18*

your spouse find out about it accidentally two years later, with you claiming that you were distracted and simply "overlooked" the issue and then weather the storm. At a bar picnic one day, Winston explained the process to me. "It'll work, Bill, but you have to be prepared for a rough ride," he said, laughing his inimitable laugh, while looking cautiously over his shoulder. The fact that Winston and his wife are still married attests to the strength of their relationship.

### SERVICES

Services can also provide unique sources of compensation. One Fairbanks attorney recently bragged to me about a massage parlor he represents. I have intentionally not inquired into his fee arrangements, in order to avoid rubbing him the wrong way. Personally, I have long represented a nightclub which features topless dancing. Enough said.

An attorney should always be wary of accepting payment from a client which involves any trip with the client. At first glance, one might think that is a nice method of compensation. You simply have to declare the normal value for tax purposes and enjoy the excursion. But don't kid yourself. The whole purpose of traveling with the client from the client's perspective is to avoid paying fees. In fact, clients designed trips so that they can have you entirely to themselves at no charge. "At the client's mercy" is an even better description. In that regard, I have learned to flatly refuse any flying or float trips into Bush Alaska. Simply stated, if the client does not like either the advice or your cooking, a round trip journey can quickly turn into a one way walk. To further complicate matters, society rarely sends out a search party for surplus lawyers, especially in remote Alaska.

### DRUGGIE CLIENTS

"Druggie" clients are perhaps the most interesting ones. Although druggies continually protest their innocence, they usually have the funds readily available to pay, assuming a less than thorough search by law enforcement was conducted. Several years ago, one well-known Anchorage druggie attorney told me about an incident where his "innocent" client actually had to knock suspicious white dust off of the money before the attorney would accept the cash. My faith was restored when I found that he still accepted the money, rather than simply turning up his nose at it.

In a somewhat similar vein, one of my druggie clients recently gave me a five pound sack of grass seed, which later turned out to be Kentucky Bluegrass and Red Fescue, much to my surprise.

A noted author, Jay Foonberg, has discussed what he calls "The client gratification curve." Foonberg states that there is indeed truth to the postulate that the client is most inclined to pay when still in jail on a high bond. Under the Foonberg theorem, the incentive to pay drops off dramatically once the verdict has been returned, regardless of outcome.

In addition, subsequent attempts to contact the client are met with either "no such address" forms on undelivered letters, computerized telephone company messages advising that the number has been disconnected, or client complaints that they have been unexpectedly transferred to an institution in Arizona. In my opinion, Jay Foonberg is highly recommended reading to all private counsel. History will show that he is to law what Einstein was to physics.

Continually frustrated by finances, I arrived at a workable fee solution three years ago when one of my secretaries explained to me that it really wasn't "that tacky" to take Mastercard or VISA as a method of payment, provided the cards weren't stolen. After all, virtually all of my creditors do. Moreover, although one is not obligated to place the customary charge card emblems on the door, it still never hurts to point out to clients that certain charge card programs even have lucrative mileage programs and other gift incentives, including free Ginsu knives. To date, the process has worked well.

As a final caution, remember that deadbeat clients are self-propagating. I occasionally have prospective clients who offer to pay me in referrals. This creates a rather interesting situation insofar as they usually cannot afford to pay me at all. The representation invariably is that they will bring in substantially greater business (not necessarily income) by virtue of the flood of referrals which I will receive, once I win their case and have the Constitution invalidated.

Although, initially, this concept appears most attractive, I have learned that the promised referrals are almost always of the same piece of cloth. Similar to a Ponzi scheme, each referral only generates even more referrals for referrals. In fact, I would be absolutely delighted to send these referrals to any other interested attorneys.

Just call me on my 900 number and have your Visa or Mastercard ready.

## ALASKA BAR ASSOCIATION 1998 CLE CALENDAR

(NV) denotes No Video

| Program #, Date & CLE Credits | Program Title | Program Location | In Cooperation With | Section |
|---|---|---|---|---|
| #12 March 26<br>2.25 CLE Credits<br>Morning | 2nd Annual Discipline Over Easy | Anchorage<br>Hotel Captain Cook | | |
| #14 March 27<br>1 CLE Credit | Recovery of Costs under Civil Rule 79 (NV) | Juneau<br>Centennial Hall | | |
| #04 April 2<br>3.5 CLE Credits<br>Half Day (a.m.) | Fifth Annual Workers' Comp Update | Anchorage<br>Hotel Captain Cook | | Employment Law |
| #13 April 8<br>2.75 CLE Credits<br>Half Day | ADR Civil Rules Changes: How They Will Change The Way You Litigate | Anchorage<br>Hotel Captain Cook | | ADR |
| #17 April 17<br>AM: 3.75 CLE Credits<br>PM: 2.75 CLE Credits<br>Full day: 6.5 CLEs | At Last! An Intellectual Property and Internet Law Seminar | Anchorage<br>Egan Center | | Intellectual Property Law |
| #701 May 7<br>2.25 CLE Credits<br>Morning | Alaska Appellate Update<br>(Alaska Bar Association Annual Convention) | Girdwood<br>Westin Alyeska Prince Hotel | | CONVENTION |
| #702 May 7<br>2.5 CLE Credits<br>Afternoon | A Global Perspective on the Law, the Courts, and Cross-Cultural Issues<br>(Alaska Bar Association Annual Convention) | Girdwood<br>Westin Alyeska Prince Hotel | | CONVENTION |
| #703 May 7<br>2.5 CLE Credits<br>Afternoon | Advanced Legal Writing<br>(Alaska Bar Association Annual Convention) | Girdwood<br>Westin Alyeska Prince Hotel | | CONVENTION |
| #704 May 8<br>.5 CLE Credits<br>Morning | State of the Judiciaries<br>(Alaska Bar Association Annual Convention) | Girdwood<br>Westin Alyeska Prince Hotel | | CONVENTION |
| #705 May 8<br>2.75 CLE Credits<br>Morning | US Supreme Court Opinions Update<br>(Alaska Bar Association Annual Convention) | Girdwood<br>Alyeska Prince Hotel | | CONVENTION |
| #706 May 8<br>2.5 CLE Credits<br>Afternoon | Current Native Law Issues<br>(Alaska Bar Association Annual Convention) | Girdwood<br>Westin Alyeska Prince Hotel | | CONVENTION |
| #707 May 9<br>3.5 CLE Credits<br>All Day | 44 Winning Tactics To Use Before Trial<br>(Alaska Bar Association Annual Convention) | Girdwood<br>Westin Alyeska Prince Hotel | | CONVENTION |
| #14 May 15<br>1 CLE Credit | Recovery of Costs Under Civil Rule 79 (NV) | Fairbanks<br>Westmark Hotel | | |
| #15 June 4<br>CLEs tba<br>Half Day | Trust Accounts with ALPS | Anchorage<br>Hotel Captain Cook | ALPS | |
| #16 June 4<br>CLEs tba<br>Half Day | Risk Management with ALPS | Anchorage<br>Hotel Captain Cook | ALPS | |
| #07B September 11<br>CLEs tba<br>Half Day (p.m.) | Ethics:<br>Video Vignettes with ALPS (NV) | Juneau<br>Centennial Hall | ALPS | |
| #88 September 11<br>3.0 CLEs<br>Half Day (a.m.) | Mandatory Ethics: Professionalism in Alaska (NV) | Juneau<br>Centennial Hall | | |
| #88 September 14<br>3.0 CLEs<br>Half Day (a.m.) | Mandatory Ethics: Professionalism in Alaska | Anchorage<br>Hotel Captain Cook | | |
| #07A September 14<br>CLEs tba<br>Half- Day (p.m.) | Ethics: Video Vignettes with ALPS | Anchorage<br>Hotel Captain Cook | ALPS | |
| #88 September 18<br>3.0 CLEs<br>Half Day (a.m.) | Mandatory Ethics: Professionalism in Alaska (NV) | Fairbanks<br>Regency Hotel | | |

# Millenium bug: a major threat to computer systems

*Continued from page 1*

a latent Year 2000 bug. You should begin by assessing your business' reliance on date-sensitive technology to fill orders, maintain records, meet payroll, and otherwise conduct business. You may find yourself in trouble with business trading partners, your employees, and your shareholders if you do nothing to correct the problem.

For example, directors and officers of corporations may be abdicating corporate responsibilities by ignoring the problem, and may find there is no protection under the "business judgment rule." In light of the fact that the Year 2000 bug has received a good deal of attention in the media, the problem is not something "beyond reasonable control" of which you are unaware. Directors and officers of publicly traded companies have disclosure obligations relating to the costs and uncertainties associated with the Year 2000 bug. You should check out the SEC's Web site devoted to Year 2000 issues (http://www.sec.gov/news/home2000.htm). Directors and officers of both private and public companies should review your directors and officers liability insurance carefully. Also, your business's insurance may not provide coverage for "business interruption" that is not due to a fortuitous event.

### COMMUNICATING WITH YOUR SOFTWARE/HARDWARE PROVIDERS

Contact your computer software and hardware providers to find out if your systems are Year 2000 compliant. Be sure you disclose any subsequent modifications, which may have affected its functionality. In turn, software and computer vendors should contact customers to warn of any noncompliance so that customers are on notice to take reasonable steps to mitigate damages, if any.

Defining "Year 2000 compliant" is difficult. To be compliant, it is suggested that a vendor be able to warrant as follows:

> "that the product will not abruptly terminate or provide invalid or incorrect results before, on or after January 1, 2000, and the product will support all of the following functions: (i) execution of calculations using dates with a four-digit year, (ii) entry, inquiry, maintenance and updates to dates with a four-digit year, (iii) interfaces and reports that support four-digit year processing, (iv) successful transition without human intervention into the year 2000 using the correct system date (e.g., 01/01/2000), (v) continued processing with four-digit years after the transition to the year 2000, (vi) correct calculation of leap years, and (vii) provision of correct results in forward and backward data calculation spanning century boundaries, including the conversion of previous years currently stored as two digits."

If you have a bug, find out what you can do to correct it. The computer software/hardware provider may have developed a fix, or may suggest upgrades for a price. This will help in planning remedial measures and financial disclosures. Check for existing express or implied warranties or repair and maintenance agreements that may obligate the supplier to provide upgrades without additional cost. Also, check your licensing agreements, as an attempted modification of source code may eliminate existing warranties and may create a derivative product that infringes upon a copyright.

The future for litigation involving crashes from Year 2000 bugs is uncertain, as test cases will decide what types of claims proceed under applicable statutes of limitations. As the sale of software and hardware is considered the sale of "goods", the Uniform Commercial Code's four-year statute of limitations will apply for breach of warranty claims. Note that the period begins to run in most cases from the date of delivery of the product, unless there is a warranty for future performance. "Extended warranties" may be interpreted only as warranties for repair, as courts often narrowly construe what qualifies as a warranty of future performance.

It is possible, however, that in situations where vendors supplied "customizing" or consultant services, other statutes of limitations will apply governing breach of contract claims involving the sale of "services" rather than "goods." While many states have six-year statutes of limitations for such claims, measured from the time of breach, Alaska recently reduced its statute of limitations governing general contract claims to three years.

### COMMUNICATING WITH PROVIDERS OF REMEDIAL SERVICES

Once you have determined the scope of your Year 2000 problem, you should structure remedial measures carefully. Most programmers who can offer remedial services will limit the scope of warranties regarding the end result. Depending on the size of your business and the negotiated price for such services, it may be impossible to secure a full warranty. Focus your efforts instead upon structuring the way remedial services are provided. Consider the following measures:

- you should own the work product of the programmer in case the need arises to change programmers during the correction process—you don't want to lose any ground;
- obtain a license to the tools and techniques used to fix the system;
- create a back-up file as the work progresses in case a change or modification results in unexpected failure or termination of software;
- set hard deadlines;
- make sure the programmer's personnel are dedicated to your particular project; limit the allowable turnover, if possible, and require approval of new hires (check for noncompete agreements, which should help to control defections);
- require progress reports, personnel attendance logs, the ability to interview employees about their work, and an independent project manager;
- consider direct employment of necessary programmers, if only short-term, as there may be possible licensing restrictions on

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# Will you be caught by the Year 2000 Bug?

*By Joseph L. Kashi*

When we think about Year 2000 (Y2K) problems, the typical reaction is that Social Security or nuclear power plants may melt down. Just like accidents, Y2K problems happen to other people. Sadly, our own law offices may suffer equal damage.

Many older computer systems, particularly most 486 and earlier systems have Y2K hardware problems: their BIOS and clock chips won't keep proper time after the turn of the century. In such cases, the only solution is system replacement. Even fairly recent equipment from leading hardware manufacturers is not necessarily Year 2000 compliant. Ideally, the best way to determine if your hardware is Y2K compliant is to test each computer individually. I found an excellent testing program that is distributed by National Software Testing Laboratory, a major industry player. You can download their program from http://www.nstl.com/html/ymark_2000.html.

In addition, the respected computer trade weekly *Infoworld* recently published a comprehensive on-line guide to hardware vendor Year 2000 compliance and other information at (http://www.infoworld.com/cgi-bin/displayY2K.p1?y2k.overview.htm).

A surprising amount of your own commercial software may have serious problems with post-2000 dates:

Here is a mere sample of some commercial programs commonly found in the law office that have known minor or major Year 2000 problems. This information was gleaned from the U.S. Army's Year 2000 software site: http://www.monmouth.army.mil/y2k/y2khome.htm, an excellent compilation of Y2K problems with common commercial software.

AmiPro
Autosketch, Generic CADD and older versions of Autocad
Delrina JetForm Filler for DOS
Ecco Pro before version 4.0
WordPerfect version 6.1 and earlier
Timeslips III for DOS
Quickbooks 2 for DOS
Lotus Agenda
Harvard Graphics for DOS
Some Hewlett Packard scanning and printer software
Older network utilities like Lan Assist, Lan Audit and LanAlyzer
Lexis/Nexis Session version 2.51
Lotus Organizer, versions earlier than version 2
Novell ManageWise
Novell GroupWise, all versions
Norton Desktop and Norton PC Anywhere
Oracle database: numerous versions
OS/2 Warp, versions prior to current version 4.0
Packrat, version 5.011 and earlier
Polaris Advantage
PowerChute Plus (network file server power protection software),numerous versions
ProComm Plus
Quicken for DOS
SoftWindows ( numerous versions)
Netware 3.12 and 4.11 (but a free patch is available on the web at *http://www.novell.com/misc/patlst.htm*
Microsoft Products: Some earlier versions like Word 5.0 and 6.0, MS Access prior to Access 95 and Microsoft Office versions 4.2 and 4.3: You can check their new Y2K website at *http://www.microsoft.com/year2000.*

## Other Year 2000 Internet resources

- **Year 2000 Home Page (an excellent place to start): *http://www.year2000.com***
- **Year 2000 Law Center: *http://www.year2000.com/y2klawcenter.html***
- **Year 2000 Resource: *http://www.ttuhsc.edu/pages/year2000/y2k_bib.htm***

# Satchel Paige: One of baseball's greatest pitchers

1896 ONE HUNDRED YEARS 1996
ALASKA BAR ASSOCIATION

*By Richard Pomeroy*

Leroy "Satchel" Paige is the only person who was once a member (albeit honorary) of the Anchorage Bar Association and is also enshrined in the Baseball Hall of Fame. Paige was the starting pitcher for the "Legal Eagles," the unofficial Anchorage Bar Association baseball team, when they faced an all-star team comprised of players from the Anchorage city league teams under the lights at Mulcahy Stadium on August 28, 1965. But it was not pitching for the Legal Eagles that earned Paige the honor of being the first player from the Negro Leagues to be enshrined at Cooperstown.

Satchel Paige was one of baseball's


greatest pitchers. Nobody argues that point. He was also one of its greatest showmen. That point is also undisputed. Paige was born in Mobile, Alabama on July 6, 1906, or so his biographer, Mark Ribowsky, feels comfortable stating; one element of the mystique that Paige created for himself was keeping his age a mystery. He acquired the nickname "Satchel" by carrying passengers' luggage at the Mobile railway station as a boy. He became a teenage sensation pitching in sandlot and semi-pro games in Mobile, then in 1926 started his professional baseball career with the Chattanooga Black Lookouts. He moved up quickly into the elite of Negro baseball in the 1930's, the Pittsburgh Crawfords, a team that included four future hall of fame players. During Paige's career, he would pitch for most of the great Negro League teams: Birmingham Black Barons, Newark Eagles, Memphis Red Sox and the Kansas City Monarchs.

Since major league baseball was racially segregated until 1947, Paige's best years were spent pitching in the Negro Leagues. He was their biggest star, and as such he could, and did, demand top dollar. Since contractual commitments were honored more in their breach than their observance, Paige wound up pitching for a wide variety of teams over the years: one year pitching for Bismarck, North Dakota, another year pitching for the all star team collected by Dominican dictator Rafael Trujillo. One of the most profitable exhibitions was the yearly barnstorming tour of white major league players squaring off against some of the best from the Negro leagues. This was decades before the million-dollar salaries and free agency now associated with the game. Major leaguers like Dizzy Dean and Bob Feller often made more money during these barnstorming tours after the World Series than they did during their regular season, in large part because stadiums filled to see how the white major leaguers would fare against Satchel Paige. And Paige was seemingly always available to pitch for whatever team, wherever...as long as they paid. Paige would often pitch the first three innings of a game at one ballpark, leave and pitch another three innings at another game, and then catch up with his team in a third city to pitch three or four innings the next day.

Paige had been a star for almost twenty years, and was too colorful a character to fit the image of the player that Branch Rickey (University of Michigan law graduate, class of '10) was looking for when he selected Jackie Robinson to become the first African-American to play in the major leagues in 1947. But a colorful personality did not bother Bill Veeck, owner of the Cleveland Indians, who needed another pitcher to contend for the American League championship in 1948. Veeck signed Paige on his forty-second birthday, and Paige responded to his chance to finally pitch in the major leagues by winning six games while losing one while the Indians won both the American League championship and the World Series.

Paige pitched for the Indians in 1949, and was released before the start of the 1950 season after Veeck sold the team. Veeck bought the hapless St Louis Browns in 1951, and signed Paige to pitch. The Browns were an awful team, but amazingly the forty-seven-year-old Paige still had enough to be selected to the American League All Star teams in 1952 and 1953.

After his stint in the majors, Paige continued pitching in the minor leagues, notably with the Miami Marlins in 1956 and 1957. He then took to barnstorming with the Kansas City Monarchs until 1965, when the Monarchs folded. Paige, then fifty-nine, was left to pitch exhibitions on his own. Which is what brought him to Anchorage in 1965.

Paige came to Anchorage at the invitation of some local businessmen who, buoyed by the success of Red Boucher's Alaska Goldpanners, were trying to organize a semi-pro team, the Anchorage Earthquakers. The plan was for Paige to manage and pitch for the team. Amidst the front page celebrations of the reopening of the J.C. Penny store that weekend, news of Paige's exhibition games earned front page status in the Anchorage Daily Times. After pitching his signature three innings Thursday and Friday night for combined teams from the military bases and local business teams, he suited up in his old Cleveland Indians uniform to pitch for the Legal Eagles Saturday night.

Kathleen Harrington and Judith Bazeley wrote an article for the Bar Rag in September 1980 in which they interviewed many of the members of the Legal Eagles. According to their article, retired Judge Occhipinti managed the team and pulled off the coup in getting Paige to pitch for the lawyers. Paige was made an honorary law clerk to be eligible for the team. Apparently eighteen years ago, nobody could remember exactly who was in the starting lineup for the Legal Eagles. It is certain that U S. District Court Judge James Fitzgerald caught and batted third. Paige was a bit tired, and not used to the chill of an Anchorage summer, so instead of pitching the first three, he alternated pitching innings with Roger Cremo through the first five. Between innings he donned a Woolrich shirt and a windbreaker to keep warm. Chief Justice Warren Matthews played second base and turned a double play to get Paige out of the only inning that anyone recalled a scoring threat. After the inning, Matthews recalled that he "felt a large hand patting my head, and Satchel told me 'nice play kid.' I was thrilled."

Other players on the team included were Tom Curran, Jim Merbs, Charles Tulin, Robert Libbey, Judge Ralph Moody, Joe Josephson, Wendall Kay, and Dick Kerns.

According to Judge Fitzgerald's recollections in 1980, Paige was throwing a submarine fastball. His control was still very sharp, which makes a catcher's job much easier. The best recollections of the game are that the Legal Eagles were leading after Paige pitched his last inning, but they went on to lose the game.

Paige's visit to Anchorage ended with a final exhibition game on August 29 and a return flight to his home in Kansas City. He made news in the baseball world on September 1, 1965 when he signed a contract with Charlie Finley's Kansas City Athletics. Paige joined the team as a publicity stunt, but got a chance to pitch three innings in relief against the Boston Red Sox on September 25, 1965. Only Carl Yastrzemski got a hit.

That was Paige's final major league appearance, but he kept on pitching. Judge Occhipinti and others do not recall anything ever coming of the efforts to organize the Anchorage Earthquakers, but Paige's biographer, Mark Ribowsky, records that after pitching one game in the Carolina league, he barnstormed through Canada in 1966 with the Anchorage Earthquakers and a troupe of Eskimo dancers.

Paige did not pitch in the major leagues long enough to qualify for a pension. The Atlanta Braves signed him as a pitching coach for the 1969 season, even though he never left Kansas City, after which he qualified for the pension. Baseball Commissioner Bowie Kuhn was instrumental in creating a portion of the Baseball Hall of Fame to honor the great players of the Negro Leagues. In 1971, the first inductee was Leroy "Satchel" Paige.

# Millenium bug: a major threat to computer systems

*Continued from page 20*

disclosure of proprietary source code to non-licensees, and this measure would assure there are adequate programmers dedicated to your project as opposed to other clients' projects;

- require a post-correction transition period when personnel are required to remain on-site, available for consultation;
- provide for a speedy remedy in case of breach of any warranty, such as requiring a mandatory and binding arbitration process;
- if the service provider is a subsidiary of a larger company, consider requiring the parent company to guaranty the service in case of breach.

### COMMUNICATING WITH YOUR BUSINESS TRADING PARTNERS

Even if you determine that your own business does not have a Year 2000 bug in its system that requires correction, you may face a Year 2000 "problem" if your trading partners have not tackled the issue and you rely on them for deliveries of inventory, etc. Communicate now with your trading partners and put them on notice of your expectation that they are Year 2000 compliant. You should explain that any "force majeure" clause in your contracts will not be implicated by a Year 2000 failure, since such failures are not outside the partner's control.

If you have reasonable grounds to be insecure about your trading partners' abilities to satisfy obligations under your contracts, you should request adequate assurances from them of their abilities to perform. Failure to provide such assurances may be treated as an anticipatory repudiation of the contract.

Of course, if you should receive a request for assurance from a trading partner, be careful in responding. Check with legal counsel to see if any response is legally mandatory. While you want to give some assurance sufficient to avoid repudiation of the contract, you want to be careful about creating any express warranty.

The Year 2000 will be here shortly, so make timely efforts to dedicate resources for assessing, correcting, and testing for possible "bugs" in your system before it is too late. Establishing communications with your computer software/hardware providers and with your business trading partners now is very important to avoid costly Year 2000 failures later. If you have systems that still rely at some level on two-digit year fields, negotiate for remedial services promptly, but carefully.

# Grievance procedures: What's good for the goose is good for the gander

*By Terry A. Venneberg*

In two recent decisions, our Supreme Court has again addressed the significance of adhering to grievance procedures for both employees and employers.

In *State of Alaska, et.al. v. Beard*,__P.2d__(Opin. No. 4913 - November 28, 1997) (*Beard III*), the court held that an employee's claims against his employer and co-workers were barred because of the employee's failure to exhaust the contractual remedies available to him in his union contract. This opinion illustrated the typical effect of a failure to adhere to a grievance process; the employee, having commenced an action in court concerning discipline or termination, had his action dismissed.

In *Ross v. City of Sand Point*,__P.2d__ (Opin. No. 4932 - January 16,1998), however, the court found that it had been the employer who had failed to comply with the grievance procedure, and that the employee was therefore entitled to recovery for wrongful discharge as a matter of law. In that case, the employee was able to use the grievance procedure to his benefit, rather than be required to overcome the process on the way to the courthouse door.

The significance of the opinions in *Beard III* and *Ross* lies in the fact that, in both cases, the party who failed to adhere to the grievance procedure suffered dire consequences as a result of that failure.

In *Beard III*, the result of the employee's failure to exhaust his remedies was, in the term used by Justice Compton, "harsh." Burle Beard had been to the Supreme Court twice before concerning his claim against the State of Alaska, and had been litigating the issue of whether he had exhausted his union remedies prior to filing for the better part of 10 years. He had even been to trial, and had obtained a judgment against the State and others in excess of $800,000 for his termination and conditions of employment. In the third appeal of his case to the Supreme Court, his entire case was dismissed based on his failure to exhaust his union remedies. The Court held that Beard should have brought a grievance concerning the "pattern" of conditions which led to his constructive discharge. "Where an ongoing pattern of harassment in the workplace culminates in an employee's resignation, the employee must attempt to grieve this involuntary termination even if the union has previously been unresponsive to the employee's complaints of harassment."

Although the Supreme Court had previously and frequently held that an employee's obligation to pursue administrative and contractual remedies was a strict one, *Beard III* appears to extend the obligation to absolute, "come hell or high water" status. Under *Casey v. City of Fairbanks*, 670 P.2d l 133 (Alaska 1983), the employee had an obligation to make a "good faith" effort to pursue a grievance prior to filing a counteraction. An employee might believe that, if he had previously attempted to grieve his conditions of employment and his union had been "unresponsive" to those complaints, the obligation to pursue contractual remedies in "good faith" was met.

With the "good faith" requirement having been turned into an absolute requirement to pursue union remedies, employees had best be informed by their unions that, no matter how many times we say "no" to bringing a grievance, you are required to ask us again and again in order to satisfy your exhaustion requirement. In his dissent to *Beard III*, Justice Compton was correct in observing that the decision "requires employees to possess both specific legal knowledge and unreasonable tenacity" in deciding when and how to grieve the conditions of their employment. "Beard made a good faith effort to resolve his overall working conditions through the available grievance procedures. His union failed to come to his aid. We should require no more than this before permitting employees to turn to the courts for the assistance that their unions refuse to provide."

Under the majority opinion in *Beard III*, much more than the "good faith effort" is required of employees to get past the often-futile hurdle of a grievance process. *Beard III* requires employees to be part lawyer and part soothsayer in determining when or if to submit a grievance. Because of this, employees subject to a union contract should be warned that, when in doubt concerning the conditions of your employment, grieve, and grieve often.

While the decision in *Ross* does not represent the slavish adherence to the grievance process that *Beard III* does, it nevertheless tells employers that they too must comply with their own procedures. In *Ross*, a city employee was terminated by the mayor, and proceeded to file a grievance concerning his discharge. The grievance committee, after considering the circumstances of the firing, decided that "Ross should be returned to work." The mayor refused, however, to reinstate Ross to his former position as public works director. Ross was instead offered a position as a "leadman" with the city. Ross refused the position, and did not report to work. The city then terminated Ross, concluding that he had "resigned" by his failure to report.

Ross sued the city, claiming that his contract was breached when the mayor refused to reinstate him to his original position as public works director. The superior court dismissed the case, finding that Ross had voluntarily resigned from his position by failing to report to work as a "leadman." The Alaska Supreme Court reversed, and found that the city had breached Ross' contract as a matter of law when it failed to reinstate him to his former position. The court held that the statutory powers of the mayor did not override the city's contractual obligation to comply with its own grievance procedure. "By refusing to reinstate Ross as director of public works despite the decision of the grievance committee, Mayor Osterback violated the

*Continued on page 23*

# Lunch with the Juneau Bar

**JANUARY 16,1998**

Judge Weeks said that Susan Miller had provided a new prejudgment computation sheet...Lach Zemp discussed the Civil Justice Access Task Force that he is a member of and is currently gathering data. They may be asking family law attorneys about the average cost of a case. He expects a report to be issued by Dec. 1999.

*—Sheri L. Hazeltine*

**JANUARY 23,1998**

Bruce Weyhrauch discussed the recent Board of Governor's meeting...There was a discussion amoung the JBA members about mandatory CLE requirements for attorneys in Alaska. Bruce said that the proposed new rule required 12 hours of CLEs a year. While he supports this proposed requirement, he said that he would be interested in the JBA's thoughts on it. Someone said that even hairdressers had minimum yearly continuing education requirements in Alaska. Mary Zemp was opposed to the new rule, stating that most of the CLEs she was interested in were offered out-of state, and traveling can become quite expensive. Joe Sonneman was also opposed, stating that active sttorneys who learn through experience were not necessarily going to learn much through the CLE classroom. Bruce said that the 12 hour CLE requirement could be fulfilled by attending the yearly Bar convention

*— Sheri L. Hazeltine*

**JANUARY 30,1998**

Isador Arthur Christenson, made his formal entry of appearance on January 25,1998, before proud parents Mie Chinzi and Mike Christenson....Kristen Tinglum from the court system has sent out an update on the continuing effort to assemble. as a retirement gift to former Justice Rabinowitz, a set of leatherbound volumes of all the opinions that he wrote on behalf of the Alaska Supreme Court. If private law firms or private attorneys would like to donate to this effort, all contributions would be sincerely appreciated...The Anchorage Bar Association forwarded us a letter from U.S. District Court Judge James Singleton Jr., putting members of the Alaska Bar on notice that future (albeit not immediate) budget constraints might cause the federal courts to reconsider maintaining costly court facilities at sites such as Juneau or Ketchikan, where there is no resident federal judge. The letter also emphasized that there is no present need for an immediate response from the bar. The standard for figuring out costs is apparently a "cost-per-day-of-use" basis...Members of the Bar should be aware of House Joint Resolution 47 (HJR 47), which proposes, among other things, an amendment of the Alaska Constitution to require the legislature's confirmation of candidates for the bench.

*—Steven Gr. Weaver, Treasurer for Sheri Hazeltine*

# Grievance procedures

*Continued from page 22*

terms of Ross's employment contract, which provided that he would not be fired if he prevailed in the grievance process. The mayor's actions constituted wrongful discharge as a matter of law."

The decision in Ross should serve as the same lesson to employers as *Beard III* serves to employees. Once a grievance procedure has been promised to an employee, the employer must live with the decision reached in that process, regardless of whether or not the employee is successful.

The primary difference between the obligations imposed by *Beard III* and Ross, however, is that employees are required under *Beard III* to go beyond simply complying with the language of a contract in satisfying their obligation; they are required to employ "specific legal knowledge and unreasonable tenacity," in thc words of Justice Compton, to meet their burden.

Employers can meet their obligation merely by reading their own contract, and doing what it says. While the burdens are unequal, however, the messages from the Supreme Court in these opinions are the same: Comply with your internal grievance processes before coming to see us, or we will rain legal misery down upon you.

# President's Column

*Continued from page 2*

"instrumentality of the State" created by statute (AS 08.08.010.230). As in most states, it is a "mandatory" bar and all licensed attorneys are required to belong. The Association, under the authority of the Supreme Court, handles admission and discipline of attorneys as well as continuing legal education. Clearly admissions and discipline, being required by Alaska Statutes and Bar Rules, are necessities and I do not know anyone who seriously believes otherwise. I do not regard continuing legal education as "extra" as it is the obligation of every professional to stay current with developments in his/her field and a professional association should assist in this endeavor to the extent possible. The Legislative Auditors have recommended that the Bar Association increase its efforts in this area. As the Bar is mandatory, the Board is careful not to incur expenses for purely social activities. There are a number of voluntary local bar associations which fill this need.

The Association's functions in the areas of discipline and fee arbitration provide important public benefits as well, in protecting consumers from dishonest and unethical attorneys and in providing an efficient and inexpensive method for resolving disputes between attorneys and clients. I believe the Bar's services in these areas are far superior to any analogous remedies available against members of other licensed professions in this state.

**3** ***Where are CLE's conducted? (answer: Captain Cook Hotel, Centennial Hall, etc.)? Why not consider exploring no-charge alternatives, like firm conference rooms, courthouse jury selection rooms, etc.?***

Alaska Bar CLEs are normally scheduled in hotel or convention meeting spaces. The majority of live CLEs are presented in Anchorage and are videotaped for replay in areas outside Anchorage and for purchase or rental by Bar members.

Live programs are also scheduled in Fairbanks and Juneau at hotel or convention facilities or court rooms.

CLE registration fees cover all the direct costs of CLE programs including meeting space, refreshments, materials, audio-visual equipment, etc.

Approximately one-half of all active Alaska Bar members attend one or more CLEs in a given year. This is a high CLE attendance rate for a non-mandatory jurisdiction.

Scheduling programs in spaces designed for meetings allows us:

a) to provide more comfortable seating and writing surfaces,

b) to increase or decrease room size or setup fairly quickly. Often members do not register in advance and we must respond quickly to an increase in attendees.

c) to contract for audio-visual equipment, flip charts, and other instructional aids.

In 1994 the Alaska Bar Association conducted a CLE Survey. Surveys were sent to all 2,229 active members in Alaska, and the response rate to the survey was 619 (27% — which is considered extremely high for a survey).

When asked about preferred sites for CLE, 71% of the respondents indicated a downtown hotel as their first choice. Reasons listed were ease of access, convenience and availability of parking.

The Alaska Bar has from time to time looked at what lower cost space might be available. However, these facilities do not offer us the flexibility of hotel and convention center space.

As presentations become more sophisticated, we have found that we often need to provide a setting for computer presentations, such as Powerpoint, and that rooms with lights that dim, and have strong electrical power sources are required.

Average attendance at a CLE is 30-40 registrants, but, for example, we had a program on February 27 with 138 registrants. When we did our first mailing for this program, we anticipated 75 attendees.

No law firm that I am aware of currently has a conference room that would comfortably accommodate 30-40 persons. It would be very difficult to schedule space with a law firm for such varying numbers of registrants as we have. We do often schedule other Bar meetings in law firm conference space, but many times there are scheduling conflicts.

From time to time, we have scheduled programs in courthouse space, but again, we have found that the limitations of availability of a/v equipment, and scheduling conflicts are problems. Those programs that we have scheduled in court rooms are usually related to actual trial or court room practice. With court room space, however, there is also the issue of lack of flexibility of seating and no writing surfaces.

The Bar has also explored the possibility of using space at UAA; however, parking is a major stumbling block.

**4** ***Did the Bar hold CLE's on things like: "meet Judge Hunt"; "tour the courthouse"; "meet the new Clerk of court" etc? Why? Is that a good use of Bar members' money?***

It would appear that the above references are to our ongoing CLE programs entitled, "Off the Record." These yearly programs are informal bench/bar exchanges done in cooperation with local bar associations and provide an opportunity for lawyers and judges to discuss issues of mutual concern in trial and legal practice. These programs are extremely well received and well attended by Bar members, many of whom do not frequently have opportunities to speak with the judiciary face-to-face.

It is unclear what the "meet Judge Hunt" topic refers to. Judge Hunt has been a faculty member for numerous "Off the Records" over the years, for our "Mandatory Ethics for New Admittees: Professionalism in Alaska" programs, and for a number of other CLE topics. The Alaska Bar did schedule an "Off the Record" in Anchorage entitled, "Off the Record: Meet and Greet the New Judges," on December 11, 1997.

Presiding Judge Andrews suggested that our annual "Off the Record" in 1997 might be a good opportunity for exchange between the new judges and the bar. The topics specifically to be addressed were administrative concerns, case processing concerns, bottlenecks (in the system), new personnel and the Judicial Council reporting form.

The event was not a social mixer. The faculty were seated at a head table and Ken Legacki, President of the Anchorage Bar Association, acted as moderator, directing questions (some prepared, some from the floor) to the various judges regarding court processing and procedures. This type of exchange is administrative, but invaluable in assuring that cases are processed appropriately and in a timely fashion in order to meet clients' needs.

"Tour the courthouse" may be a reference to our program "Off the Record with the Alaska Court System Administration," held in February 1996. This program included Chief Justice Compton, Presiding Judge Johnstone, Presiding Judge Murphy, Arthur Snowden, Stephanie Cole, Cynthia Petumenos, Kit Duke, Al Szal, Charlene Dolphin and Cindy Marshall.

During the December 1, 1995 "Off the Record" a number of questions had been posed by Bar members concerning changes in court procedures and administration and the new courthouse. In response to this, the February 1996 program was planned to address issues of court administration, court security, the new courthouse, court facilities, and records. Jeff Feldman served as moderator for this program. Attendees were not taken on a tour of the new courthouse, but did receive a map of the courthouse as part of the course materials.

"Meet the new clerk of court" appears to be a reference to an upcoming CLE in Juneau on March 10. This program was requested by Presiding Judge Larry Weeks as part of our annual "Off the Record" series in Juneau. The timing of the CLE happened to coincide with the hiring of the new clerk of court for Juneau. Presiding Judge Weeks thought it would be appropriate to let bar members know that the new clerk of court would be at the program. The faculty includes U.S. Magistrate Judge David Walker, Presiding Judge Larry Weeks, Judge Walter Carpeneti, Judge Peter Froehlich, Magistrate John Sivertsen, and Adam Fleischman, Clerk of Court for the First Judicial District. This CLE will focus on issues of concern to the local bench and bar.

"Off the Records" outside of Anchorage are presented at no charge to Alaska Bar members. This is part of the Board of Governors' recognition of the difficulty of presenting live CLE in every location in Alaska, and it is their desire that Bar members have at least this one opportunity to receive CLE credit and meet with the local judiciary. "Off the Records" in Anchorage have a $25 registration fee.

Similar "Off the Records" have been held in Kenai and Kodiak at no charge.

Past topics for "Off the Records" have included Advocacy in Mediation, Gender Equality, and New Civil Discovery Rules. An "Off the Record with the Supreme Court" held on June 27, 1997 included discussion on appellate practice: motions, petition for review, brief writing, oral argument, excerpts of record, court caseload and processing, case assignment, *per curiam* opinions, MOJ's, *stare decisis,* and changes in the Supreme Court.

**5** ***Why does the Bar not implement a user-pay system for CLEs, fee arbitrations and disciplinary actions? If the answer is that they've begun, shouldn't that result in a lower budget and lower dues payments? Note than in years past the data shows that a few lawyers account for most of the fee arbitrations — why make everyone else pay for them? Also, 30% of lawyers account for 100% of CLE attendance — why make everyone else pay for that? Also, if and when CLEs become mandatory, if only 30% of attorneys are using them now, won't they have to be expanded significantly when 100% start attending? How much will Bar dues be then?***

As indicated above, CLE programs are generally on a user-pay basis. The charge is intended to cover the direct costs of the meeting room, course materials, etc. Most of the CLE faculty are volunteer Bar members. Some CLEs lose money, if there is low attendance, while others are profitable. However, direct CLE program revenue does not cover all of CLE indirect costs. Experience has shown that increasing fees significantly will result in lower attendance, and not produce a gain in revenue. Eliminating CLEs outside of Anchorage might reduce some costs, but would not be in the interests of the membership as a whole. The suggestion that only 30% of attorneys participate in CLE is misleading. Approximately 50% of all active Bar members attend one or more CLEs in a given year. There are already a number of commercial CLE providers who are quite active in Anchorage and to a lesser extent in Fairbanks, and all attorneys are free to participate in Bar-sponsored CLE if they believe they are not getting their money's worth from their dues as it is.

An analogy can be made to public education. Taxpayers without children in school, and taxpayers who choose private schools, must still pay to support the public school system because society has determined that the school system provides an important public benefit. Lawyers all benefit from the availability of CLE and providing a subsidy from the Bar as a whole helps keep the cost of attendance reasonable for newer members whose income may be lower.

Projecting the effect of mandatory CLE is not straightforward. Experience in other states shows that commercial CLE providers will meet much of the added demand, but the Association will have to provide the service to the rural areas of the State where the commercial providers will not go. With the options of video and internet CLE the added costs should not be great as they can be offset by added CLE revenue. This is not a guarantee that there will be no net expenditure, but we do not believe that any dues increase will be needed for several years.

Fee arbitrations are not expensive as all the arbitrators (including the lay arbitrators) are uncompensated volunteers except in rare complex matters and meetings take place at the bar office or at the office of one of the arbitrators. This is a service to the public (only clients can file an arbitration but the attorney is required to submit to the process) but we do not think that the public should be charged for initiating an arbitration. Should the lawyer be charged for the process, considering that in at least half of the cases the lawyer's position is sustained and in many others the parties reach a settlement? The Board does not believe a fair system for charging can be developed which would provide meaningful revenue to the Association and still leave the arbitration system intact. Note that except for a modest filing fee, the Court System does not assess its operating costs to civil litigants, even when the losing party is found to be

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# President's Column

*Continued from page 24*

in bad faith. Many other state bars require fee arbitration if the client requests.

Discipline is a major expense of the Association and it is not revenue producing. The Bar Rules do permit costs and attorneys fees to be assessed as part of a sanction, but this option has not been available for very long and the effect has been minimal. Whether costs are assessed is a judgment to be imposed by the Supreme Court, which has final authority in this area. Realistically, the budget for discipline cannot be covered through charges to the lawyers on whom discipline is imposed. Full recovery would require about $50,000 from each case concluded with public discipline. It is worth noting that in many cases discipline of a lawyer is caused by problems in the lawyer's life (divorce, substance abuse, illness, other financial problems) which have already devastated the lawyer's ability to pay any meaningful amount in sanctions and if the discipline results in disbarment or suspension from practice the lawyer's ability to make a living and pay sanctions will be further impaired.

The criminal justice system does not recover its costs from the convicted, most of whom are without means to pay their own lawyers never mind the costs of prosecution and correction. Suspended and disbarred lawyers are not much better able to pay, in many cases. Attorney discipline, like fire and police protection, is a cost which has to be borne by the entire protected population; I pay for law enforcement even if I never have a need to summon the police.

**6** ***When an attorney pays his dues in one payment, it costs $450. When he splits them into two payments, it costs $475. Where precisely, meaning accounting for each of the extra 25 dollars, does the excess charge go?***

The $25 service fee goes into the general fund of the Bar Association and is not segregated for specific expenses. The Bar must send twice the number of dues notices, certified letters (as required by Alaska Bar 61 for delinquent payments) and process payments twice for every lawyer who splits the payment. This fee also compensates for lost interest income when half of the dues are paid mid-year.

**7** ***Is there any oversight besides the Board over where the millions in Bar dues are spent?***

By statute (AS 08.08.080 (c)) the Board is authorized to set dues and establish the budget. Dues revenue is about $1.3 million annually. Authority over the budget is held by the nine attorney members, elected by the membership, and the three lay members appointed by the Governor. In this sense the Association budget is controlled in the same way the State's budget is set, by the elected representatives of the voters. The Board is answerable directly to the membership, as Legislators are answerable to their constituents. If a voter thinks the Legislature is not controlling spending, he or she can offer suggestions or run for office and try to do better. If an attorney wants to control the Bar's budget, he or she can offer suggestions or run for the Board and try to do better. Ultimate authority in each instance resides with the people whose money is being spent.

**8** ***Why don't Bar dues ever decrease when year after year more attorneys are admitted, thus adding more and more to the Bar "pot"? (e.g., in 1997, 75 people passed the bar exam, which equals roughly $23,000 more than last year in Bar dues.)***

During 1997, 53 members transferred from active to inactive membership, which resulted in a decrease in dues payments of $300 each, or nearly $16,000. In addition, members may resign or be suspended from the Bar for nonpayment of dues. The Bar's total membership has only increased from 3,285 at the end of 1996, to 3,333 today, a total of 48 members. At the end of 1996, there were 628 inactive members; today there are 681.

Active membership actually decreased from 2,611 at the end of 1996, to 2,608 today. Yet operational expenses such as paper, postage, etc. continue to increase.

**9** ***Are there any social events sponsored by the Bar? Which ones? Why? (Young lawyers, Anchorage Bar, new admittees, etc. all have some Bar-sponsored events.)***

The only "social" events co-sponsored by the Alaska Bar Association are receptions for the retirement or investiture of statewide Supreme Court justices or Court of Appeals judges. On the average, these occur once every couple of years. Any receptions for trial court judges are sponsored by the local bar associations. The Anchorage Bar Association, which is a voluntary bar, pays for events for new admittees, Young Lawyers, etc., and receives no funds at all from the Alaska Bar.

**10** ***How much of budget goes to travel for Board members?***

$26,572 (or 1½%) was spent in 1997. Travel for 9 attorney Board members and the New Lawyer Liaison to attend 5 Board meetings (including the meeting in Juneau prior to the convention) was $12,987; travel for the 3 public members to attend those meetings was $3850. Travel for the president and president-elect to attend the 2 meetings of the National Conference of Bar Presidents and the Western States Bar Conference and the Bar Leadership Institute (president-elect only) was $9,735 (this also included travel for the President of the Western States Bar Conference, who is a Fairbanks attorney, an office which rotates to Alaska once every 15 years.)

**11** ***How many fee arbitrations last year? How much was arbitrator paid? Why can't volunteer Bar members perform the same function? What is itemized per hour cost for arbitrations? How many lawyers account for all of the fee arbitrations? (i.e. In 1994, 7 lawyers accounted for 28 fee arbitrations)***

The Bar Association Fee Arbitration program processed 87 fee arbitrations to conclusion in 1997. Of that number, 46 resulted in a panel decision, 29 were settled by the parties, 3 petitions were withdrawn, 1 petition was dismissed because of bankruptcy proceedings and 8 petitions were not accepted for arbitration under the arbitration rules.

The public and attorney members sitting on fee arbitration panels are all non-compensated volunteers except in rare cases where a fee dispute has been declared "complex arbitration" by the Fee Arbitration Executive Committee. A matter is declared "complex" generally where complex legal or factual issues are presented, the hearing is reasonably expected to or does last 8 hours and the amount in controversy exceeds $50,000. At that point, the parties will generally be ordered to split the costs of arbitration and administration. The Bar does not pay the arbitrators.

There were no complex arbitrations in 1997. However, there were 2 complex arbitrations in 1996. In one matter involving an attorney's interest in subsurface rights, the three arbitrators spent a combined total of 557 hours and have been *paid by the parties* a combined total of $28,104.85 including expenses with a unpaid balance of $437.14. In the other matter involving $90,000 in dispute, two arbitrators spent 109 hours (one attorney arbitrator did not request payment) and have been *paid by the parties* a combined total of $5,479.91 including expenses.

In 1994, 77 lawyers accounted for 87 fee arbitrations.

In 1995, 92 lawyers accounted for 99 fee arbitrations.

In 1996, 82 lawyers accounted for 87 fee arbitrations.

In 1997, 77 lawyers accounted for 87 fee arbitrations.

**12** **How many disciplinary actions? Costs associated? Any fees assessed against those sanction? Why not?**

As reflected in the 1994. 1995, 1996 (1997 to be finalized) Alaska Bar Association annual reports to the Legislature, the following disciplinary cases were concluded:

| Disposition* | 1994 | 1995 | 1996 | 1997 |
|---|---|---|---|---|
| Disbarment by Supreme Court | 10 | 3 | 1 | 16 |
| Suspension by Supreme Court | 2 | 7 | 10 | 7 |
| Probation Ended | 1 | 0 | 0 | 0 |
| Public Censure by Supreme Court | 4 | 2 | 4 | 0 |
| Public Reprimand by Disciplinary Board | 1 | 1 | 5 | 4 |
| Private Reprimand by Disciplinary Board | 2 | 1 | 1 | 3 |
| Written Private Admonition by Bar Counsel | 2 | 2 | 2 | 2 |
| Dismissed by Bar Counsel after Investigation | 54 | 46 | 31 | 32 |
| **TOTALS** | 76 | 62 | 54 | 64 |

*All numbers reflect individual complaints filed and not the number of attorneys involved.

The complaint or grievance volume for these years is reflected by adding these numbers to the grievances not accepted for investigation:

| Grievance Volume* | 1994 | 1995 | 1996 | 1997 |
|---|---|---|---|---|
| Cases Concluded | 76 | 62 | 54 | 64 |
| Cases Not Accepted for Investigation | 165 | 180 | 189 | 194 |
| TOTALS | 241 | 242 | 243 | 258 |

*All numbers reflect individual complaints filed and not the number of attorneys involved.

The Bar Association currently has 84 open cases.

Again, as reflected in the 1994. 1995, 1996 (1997 to be finalized) annual reports to the Legislature, the total expenditures for the disciplinary section of the Alaska Bar Association were:

$472,790 in 1994.
$521,714 in 1995.
$525,366 in 1996.
$543,503 in 1997.

The imposition of costs and attorneys fees against a respondent attorney in a disciplinary case is within the discretion of the Disciplinary Board and the Alaska Supreme Court and decided in their deliberations depending on the factual circumstances of individual cases. The following cost/attorneys fee orders were entered:

$4,381.34 in 1994.
$0 in 1995.
$0 in 1996.
$0 in 1997.

**13** ***Who pays for publication of the Alaska Bar Rag? Alaska Bar Review? Why should all Bar members be forced to contribute?***

All Bar members pay for these publications. The Bylaws of the Bar Association require that the Bar issue a publication at least quarterly. A 1991 survey of the active membership indicated that, of those who responded, 71% were in favor of keeping the *Bar Rag* and 61% were in favor of keeping the *Alaska Law Review*. 64% of the *Bar Rag* expense is offset by ad revenue.

**14** ***Why do Bar members pay for discipline when Judicial branch retains ultimate jurisdiction over attorney discipline? (Why not put it in Judiciary budget?)***

The Bar Association investigates and prosecutes attorney misconduct by delegation of the Alaska Supreme Court pursuant to the Court's authority under Article IV, Section 15 of the Alaska Constitution. The Court has indicated that "the license to practice law in Alaska is a continuing proclamation by the supreme court ... that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor, and to act as an officer of the courts." Bar Rule 9(a).

This is an important delegation because it confers on the Bar Association both the responsibility and the privilege of self-regulation. The Bar's Board of Governors is responsible to the public, the courts and the legal profession for the identification and professional discipline of those members who fail to meet the ethical standards of the profession. The Board oversees the operation of the Discipline Section, reviews reports from volunteer attorneys appointed to discipline panels by the Chief Justice, and makes recommendations for final discipline to the Court. In so doing, it involves many members of the profession in the difficult, but necessary process of peer review and thus educates the entire profession in the ethical requirements of practice in Alaska.

The direct involvement of the Bar in this process is crucial to the continuing goal of improving the provision of legal services. The Legislature itself has recognized this principle in the Integrated Bar Act (AS 08.08.080) when it gave the Board the ability to approve and recommend to the Supreme Court rules concerning admission, discipline, licensing, continuing legal education and defining the practice of law.

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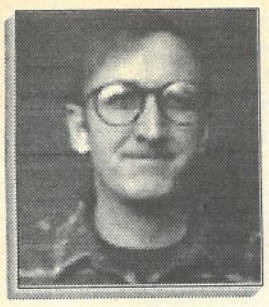
## ECLECTIC BLUES

# Don't kill for me ☐ Dan Branch



It's been a long time since the government hanged someone in Alaska. The building for public executions in Juneau was long ago torn down. It's against the law in our state to use death as punishment for even the worst crime. That could change.

I didn't give the subject of tax-assisted executions much thought until January, when a Roman Catholic nun from Louisiana named Sister Helen Prejean came to Juneau. She was in the Capital City to lobby against the death penalty referendum bill. After spending the day speaking with our political leaders, Sister Helen took the stage at Centennial Hall.

There wasn't much remarkable about her appearance—neutral hair going to gray, an honest face, Southern voice. She wore the modest wool suit over a white blouse combination that has become standard habit for today's Catholic nun.

The sister didn't preach that night. She told stories. She talked about the men she had known on death row and the families of their victims. They were good stories delivered simply.

As Sister Helen talked about the dead men walking, I started to think about the men I have known who killed and committed other serious crimes. Most of them lived in the Yukon Kuskokwim Delta and had done some terrible things in alcoholic blackouts.

Some of them were friends or acquaintances. Sometimes they were people I met for the first time at the Bethel Jail or at the courthouse, before afternoon arraignments. It took a great deal of imagination to see how they could have possibly committed the crimes set out in the state's charging papers. With some exceptions, they were quiet and gentle.

Many of the defendants wanted out on bail so they could keep their families in food, water, and fuel. By watching the way guards treated them, I could tell that most didn't cause trouble at the jail. When the city ran the place, the guards would leave the back door of the jail unlocked on warm summer days to cool off the cells.

Things changed in these men when they drank alcohol. If reading the police reports wouldn't convince you of that, running into one of your clients while he or she was blacked out from alcohol would.

If Alaska passes a death penalty bill, it will be used to end the lives of more Native people (like my former clients in Bethel), then the other residents of our state. Almost one out of three prisoners in the state are Alaska Native. Many come from cash-poor areas of Alaska, like the YK Delta, where the Public Defender's Office provides most of the legal representations for those charged with felonies. That office is already overwhelmed with caseload. Publlic defenders won't have the time nor money to give a client charged with a capital offense the same representation given the Unabomber or Terry Nichols. People in areas like the Delta are going to lose the most if a death penalty bill passes. It's a bad deal.

I say these things even though I have felt anger and anguish when people I knew and cared about were brutally murdered. I have watched families twist in pain after one of theirs is killed.

I say these things even through I still carry anger over the senseless death of a beautiful young woman who was trying to raise her younger siblings. She died after being sexually assaulted with a fireplace poker. There was a time when I would have voted for the death penalty in the hope that revenge would make the anger go away. Even now, I'd like to turn away from the question and let others bring back state executions.

Sister Helen said something that changed my mind. On that Juneau January night she told us that death penalty legislation freeze-frames someone carrying out their worst act, then kills them. That observation hangs heavy in a state where many of the worst crimes are committed under the influence. Then she asked us to tell our legislators, "Don't Kill For Me."

Sister, that's what I'm trying to say here.

•

*In the Eclectic Blues column appearing in the January-February, 1998 edition of the Alaska Bar Rag, the risk managers for the City and Borough of Juneau (CBJ) were mistakenly identified as being responsible for a new policy to prevent nonprofit groups from placing announcement banners on the Egan Drive Pedestrian Walkway.*

*That policy, in fact, was generated by another set of risk managers. A representative of the CBJ attorney's office wanted us to put the record straight. Dan Branch and the* Bar Rag *apologize for any embarrassment CBJ officials might have experienced by being linked to the sign ban policy. Dan Branch thanks the staff at the attorney's office for admitting that they actually read his column.*

## PRESIDENT'S COLUMN

*Continued from page 25*

Finally, the Court System is already asking the Legislature for additional funding to do what it is already requested to do. Does the Legislature want to add another $500,000 to the Court System budget in order to save money for the attorneys of this State?

**15** ***Why is it necessary to have $1.1 Million in certificates of deposit? Why not keep a reasonable amount and return a pro rata share to Bar members.***

The current level of bar dues was set in 1993 (the most recent prior increase was in 1981) with the expectation that it would generate a surplus for several years and avoid the necessity of a further increase in the near future. Due to increased efficiencies, the temporary surplus has increased somewhat more than anticipated and is now expected to last through approximately 2004. Nevertheless the reserve is not huge. There is a minimum working capital reserve of $200,000 and a further $100,000 for protected computer acquisitions. The additional funds on hand amount to about seven months' expenses at the current level. This is not an excessive amount, and is consistent with the policy the State has pursued on a much larger scale, in recognition that future revenue increases cannot be guaranteed. Although the idea might be popular with voters, the Legislature has not decided to distribute the budget reserve *per capita* and count on being able to tax it back in the future.

Given that it would be imprudent to wipe out all the cash reserves at one stroke, the most that could conceivably be returned would be $500,000, or about $200 per active member. I do not believe the Board would consider this a prudent policy, for at least the following reasons:

This would require a dues increase much sooner in the future than otherwise planned. The current plan for gradual and widely-spaced increases was adopted after deliberate study and should not be lightly abandoned.

The current reserve was accumulated over several years and the membership is constantly changing due to admissions, resignations, deaths, etc. There is no way to say to whom the current surplus "belongs" and awarding a refund to current members is totally arbitrary. Keeping the money in reserve in effect benefits members who have a long-term commitment to the Bar.

Inactive members also pay dues at a reduced level. How would any refund be apportioned to them?

Any refund would be taxable income so the net benefit to most members would be less than the face amount.

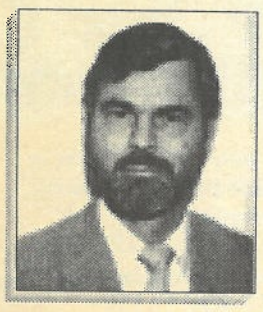
### CONCLUSION

The recent legislative audit of the Bar Association found little to criticize, and concluded that the Bar's function was being fulfilled in an effective and efficient manner. The auditors recommended that the Legislature extend the Bar for an additional six years rather than the customary four. The auditors emphasized a key point: the Bar does not use any State money and is supported entirely by member dues. The tone of the questions propounded by Senator Donley is to the effect that the Bar wastes members' money and dues should be reduced. But the recommendations of the audit are that the Bar should undertake additional regulation of lawyers and additional services to the public, measures which are likely to increase the Bar's budget rather than save money. We believe the recommendations of the audit are propounded thoughtfully and should be seriously considered, as we assume the legislature expects us to do, but we are reluctant to add programs which will raise dues unless we are convinced there will be a real public benefit.

In any mandatory association there will be a minority, sometimes a vocal minority, which is unhappy with leadership decisions. If the burdens of Bar membership are too great, there is the option of transfer to inactive membership or outright resignation. It is impossible to appease all the dissenters, especially where the leadership is confronted with inconsistent requests. As with any other public institution, policy choices must be made within the available resources. The Bar is fortunate to have an experienced and well qualified staff which is conscious of the need to operate with a limited budget and I believe the Board has exercised responsible control over the Bar's budget without crippling our ability to fulfill the functions the law, the Supreme Court, and the bulk of the membership expects.

# "Bad Faith" filings

☐ Thomas Yerbich



Not infrequently debtors file chapter 11 or 13 petitions to achieve objectives outside the legitimate scope of the bankruptcy laws, *i.e.*, the filing is not consonant with the purposes of the Bankruptcy Code. A bankruptcy case filed under chapter 11 or 13 may be dismissed or converted for cause [BC §§ 1112(b), 1307(c)]. Although the Code does not explicitly require that cases be filed in "good faith," lack of good faith in filing a petition establishes "cause" for dismissal. [*In re Marsch*, 36 F3d 825 (CA9 1994)] In lieu of dismissal, the court may convert a chapter 11 case to a case under chapter 7 of the Code. [*In re Eatman*, 182 BR 386 (Bank.SDNY 1995)] Moreover, lack of good faith in filing may be sufficient cause for lifting the automatic stay. [*In re Arnold*, 806 F2d 937 (CA9 1986)]

The debtor's subjective intent is not determinative of whether good faith is lacking; rather, the test is whether a debtor is attempting to unreasonably deter and harass creditors as opposed to attempting to effect a rehabilitation or reorganization of the debtor's financial affairs on a feasible basis. The existence of good faith depends on a amalgam of factors, not a specific fact. [*In re Marsch, supra*] Further, the burden is on the debtor to establish the existence of good faith. [*In re Leavitt*, 209 BR 935 (BAP9 1997)]

## CHAPTER 11

In chapter 11 cases, factors used to determine whether a debtor has filed a bankruptcy petition in good faith include: (1) a single asset; (2) a secured creditor's lien encumbers all the assets; (3) there are generally no employees except for the principles; (4) little or no cash flow, and no available sources of income to sustain a plan or reorganization or to make adequate protection payments; (5) there are few, if any, unsecured creditors whose claims are relatively small; (6) allegations of wrongdoing by the debtor or its principles; (7) the debtor is afflicted with the "new debtor syndrome" in which a one-asset entity has been created or revitalized on the eve of foreclosure to isolate the insolvent property and its creditors; and (8) bankruptcy offers the only possibility of forestalling loss of property. [*In re Stolrow's Inc.*, 84 BR 167 (BAP9 1988)] In general it can be stated that bad faith exists whenever there is no realistic possibility of reorganization and the debtor merely seeks to delay or frustrate efforts of creditors. [*In re Albany Partners, Ltd.*, 749 F2d 670 (CA11 1984)]

One area ripe for a bad faith dismissal is when the debtor is using a bankruptcy filing as a litigation tactic to either forestall litigation or seek a forum perceived to be more friendly. In *Marsch*, the court upheld a "bad faith" dismissal where the chapter 11 petition was filed solely to delay collection of a judgment and avoid posting an appeal bond where the debtor had the financial means to pay the judgment. Because the debtor was not involved in a business venture, there was no danger of disrupting business interests. The court left open the question of whether lack of good faith would exist if the debtor were unable to post an appeal bond and business operations would be disrupted if bankruptcy were not filed. [*See e.g., In re Ford*, 74 BR 934 (Bank.SD.Ala 1987); *In re Corey*, 46 BR 31 (Bank.D.Haw. 1984) (holding that in that situation, good faith existed)] It has also been held that a chapter 11 petition involving a two-party lawsuit [*In re van Owen Car Wash, Inc.*, 82 BR 671 (Bank.CD.Cal. 1988)] or an attempt to resurrect prior unsuccessful litigation in another forum [*In re Donuts of Seekonk, Inc.*, 122 BR 172 (Bank.D.RI 1990)], were not filed in good faith. Even full compliance with procedural requirements (filing plan, disclosure statement, and operating reports) may not preclude dismissal where the debtor is not conducting business operations, lacks creditors other than insiders and professionals, has no significant business assets, where the matter can be resolved expeditiously and efficiently in the state courts. [*In re St. Paul Self Storage Ltd. Partnership*, 185 BR 580 (BAP9 1995)]

Another area ripe for a bad faith dismissal involves the "new debtor syndrome." The indicia of this are: (1) transfer of distressed property into a newly created corporation; (2) transfer occurring within a close proximity to the bankruptcy filing; (3) transfer for no or nominal consideration other than assumption of the debt secured by or associated with the property; (4) debtor has no assets other than the recently transferred property; (5) debtor has no or minimal unsecured debt; (6) debtor has no employees and no ongoing business; and (7) debtor has no means, other than the transferred property, to service the debt on the property. [*In re Duvar Apartments, Inc.*, 205 BR 196 (BAP9 1996)] A *prima facie* case of bad faith is established by showing a transfer of distressed property to the debtor within close proximity to the bankruptcy filing. Once a prima facie case is established, the burden shifts to the debtor to demonstrate a good business reason for the transfer and filing. [*Id.*]

## CHAPTER 13

To determine bad faith in a chapter 13 case, the bankruptcy court must review the "totality of the circumstances." [*In re Eisen*, 14 F3d 469 (CA9 1994)] Among the factors courts have considered are: (1) the nature of the debt, including the question of whether the debt would be nondischargeable in a Chapter 7 proceeding; (2) the timing of the petition; (3) how the debt arose; (4) the debtor's motive in filing the petition; (5) how the debtor's actions affected creditors; (6) the debtor's treatment of creditors both before and after the petition was filed; and (6) whether the debtor has been forthcoming with the bankruptcy court and the creditors. (*In re Lilley*, 91 F3d 491 (CA3 1996)] A debtor's history of filings and dismissals may also be indicative of lack of good faith. [*In re Nash*, 765 F2d 1410 (CA9 1985)] As in chapter 11 cases, bad faith also exists where the debtor only intended to defeat state court litigation. [*In re Chinichian*, 784 F2d 1440 (CA9 1986)] Although refusal to confirm a plan is not ipso facto cause to dismiss a chapter 13 case, it is a factor to be considered in determining the existence of good faith. [*In re Gier*, 986 F2d 1326 (CA10 1993)]

Creditors will usually move for relief in the alternative: dismissal of conversion. Under § 1307(b) a chapter 13 debtor has an absolute right to dismiss and the court must do so on the request of the debtor. May a court nonetheless convert the case to a chapter 7 if the debtor requests dismissal before the order of conversion becomes effective? Although one circuit court has held that the court need not dismiss in such cases [*In re Molitor*, 76 F3d 218 (CA8 1996)], most lower courts, including the Ninth Circuit BAP [In re Beatty, 162 BR 857 (BAP9 1994)], have held to the contrary. Given the language of § 1307(b), it appears that § 1307(b) trumps § 1307(c) and the court must dismiss, not convert the case.

## SANCTIONS

In addition to dismissal or conversion, the court may impose other sanctions in the case of "bad faith" filings. One remedy is the imposition of sanctions on the debtor and/or the debtor's attorney under FRBP 9011. [*In re Marsch, supra*] In imposing sanctions under FRBP 9011, bankruptcy courts must consider both frivolousness and improper purpose on a sliding scale, where the more compelling the showing as to one element, the less decisive need be the showing as to the other. The combination of a flimsy legal basis with a robust showing of improper purpose demonstrates that sanctions are in order. [*Id.*]

The ultimate sanction that the court may impose is an order barring the discharge, in a later bankruptcy case, of debts that were dischargeable in the case dismissed [§ 349(a)], frequently referred to as "dismissal with prejudice." A permanent bar to discharge is sometimes referred to as "the capital punishment of bankruptcy" for it removes the major benefit of the bankruptcy system. For this reason, this sanction is rarely imposed and is warranted only by particularly egregious misconduct that demonstrates not only bad faith but seriously prejudices creditors. [*See In re Tomlin*, 105 F3d 933 (CA4 1997)] Moreover, the order of dismissal must include language clearly indicating the intent of the court that the order bar future discharge; merely stating "dismissed with prejudice" is insufficient to invoke such a draconian sanction. [*Id.*] As the court in *Tomlin* points out, the term "with prejudice" without more is commonly used to trigger the provisions of § 109(g) barring the debtor from refiling a petition for 180 days for willful failure to obey court orders or to appear in prosecution of the case; a much less drastic sanction. Thus, § 349(a) allows a bankruptcy court "for cause" to permanent disqualify a class of debts from discharge but not to deny future access to the bankruptcy court except as specified in § 109(g). [*See In re Friehouf*, 938 F2d 1099 (CA10 1991) *cert. denied*, 502 US 1091 (1992)]

## *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):

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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 99501-2004
(907) 264-0415

Fourth District:
Ron Woods
604 Barnette St. Rm 202
Fairbanks, AK 99701-4576
(907) 452-9201

# 1998 Alaska Bar Association
# Annual Convention
## Westin Alyeska Prince Hotel, Girdwood, Alaska
## Thursday - Saturday, May 7-9, 1998

## Convention Highlights

### CLEs

**Thursday, May 7**
Morning


Newman

**Alaska Appellate Update**
Theresa Newman, Lecturer in Law, Duke University School of Law, and General Editor of the Alaska Law Review

**Alaska Bar Association Annual Business Meeting**
11:00 a.m. - 12:00 noon


Oleska

Afternoon — Concurrent Sessions — Choose One
**A Global Perspective on the Law, the Courts, and Cross-Cultural Issues**
Rev. Dr. Michael J. Oleksa, Dean, St. Herman's Seminary, Kodiak, educator in intercultural communications


Garner

**Advanced Legal Writing**
Bryan Garner, LawProse, Inc., Dallas, nationally known lawyer, teacher, consultant on legal writing

**Friday, May 8**
Morning
**State of the Judiciaries Address**
Chief Judge James K. Singleton, Jr., U.S. District Court
Chief Justice Warren W. Matthews, Alaska Supreme Court

**U.S. Supreme Court Opinions Update**


Arenella


Chemerinsky

Professor Peter Arenella, UCLA School of Law
*and*
Professor Erwin Chemerinsky, Sydney M. Irmas Professor of Law and Political Science, USC Law Center

Afternoon
**Current Native Law Issues: 1997 Indian Law Cases Decided by the U.S. Supreme Court; Venetie: What the Case Did and Didn't Decide, and Native Law Developments at the Alaska Supreme Court**
Mark Kroloff, Section Chair; Lloyd Miller, 1997 Tenth Annual Alaska Native Law Conference Chair and past Section Chair; Bruce Botelho, State of Alaska Attorney General (invited)

**Saturday, May 9**


Chu

10:00 a.m. - 3:00 p.m.
**44 Winning Tactics to Use Before Trial**
Morgan Chu, acclaimed trial attorney and litigation innovator, partner in law firm of Irell & Manella LLP, Los Angeles

Mauri Long, Dillon & Findley, Anchorage; Ray Brown, Dillon & Findley, Anchorage — Moderator

**No Section meetings will be held in Girdwood. Call the Bar office for section information. Section Updates will be available at the convention.**

### Special Events

**Thursday, May 7**
7:30 - 8:30 a.m.
**Bar Presidents' Breakfast**

6:30 - 8:00 p.m.
**President's Reception**
Take the tram to the Glacier Express for food and fun atop Mt. Alyeska!

8:00 - 9:00 p.m.
**Poetry Reading**
Join bench and bar members who have been inspired by the Muses. To rhyme or not rhyme — that is the question.

**Friday, May 8**
7:30 - 8:30 a.m.
**Section Chairs' Breakfast**

6:30 p.m. - 10:00 p.m.
**Annual Awards Reception and Banquet**
Speaker: Don Mitchell — "Alaska History, Alaska Law, and the Future of the Bar in the Twenty-First Century"

### Convention Information

**Hotel**
The **Westin Alyeska Prince Hotel** is the convention hotel for 1998. The hotel is located at 1000 Arlberg Road, Girdwood, Alaska 99587, phone 907-754-1111/fax 907-754-2200.

A block of rooms has been reserved for the Alaska Bar. Rates are $110 plus tax single/double for run of the house rooms and $135 plus tax single/double for prime rooms.

**Please make your reservations by April 3. Space is limited. Book your reservations now! Call Reservations at 1-800-775-6656 (long distance in Alaska) or 907-754-1111.**

Check-in time is 3:00 p.m. and check-out time is 12:00 noon.

**Recreational Facilities**
**Swimming, Hiking, Climbing**
Hotel guests are invited to use the Fitness Center and lap pool and sauna. Non-guests may pay a daily $5 per person fee to use the Fitness Center.

Tennis facilities are nearby and bike rentals are available at the hotel. There is also a skateboard park in the area.

Hiking and climbing are right outside the hotel's back door.

**Transportation from Anchorage International Airport**
The Alyeska Resort has a special arrangement with **Anchorage Taxi Cab** for a $50 one-way fare from the Airport to the Westin Alyeska Prince Hotel. Call 907-245-2222 to arrange for Anchorage Taxi Cab service.

**Or you may want to rent a car. AVIS Rent a Car is the official car rental agency for the convention. See below for details.**

**Travel**
**JAY MOFFETT** 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.

**Car Rental**
**AVIS Rent a Car** is the official convention car rental agency. Special car rental rates are available for all Alaska Bar members. Call AVIS in state at 800-478-2847, ext. 237 and out of state at 800-331-1212 or Jay Moffett at 907-786-3274 to reserve a car. Be sure to indicate you are with the Alaska Bar Association and give the Alaska Bar reference number A677400.

**Hospitality Suite**
The Hospitality Suite hosted by the **Anchorage Bar Association** will be open from 12:00 noon daily in the Royal Suite, Room 831, 8th floor, Westin Alyeska Prince Hotel.

**VISIT THE CONVENTION EXHIBITORS AND WIN A NORDSTROM SHOPPING SPREE COURTESY OF ALPS!**
Visit the exhibitors to qualify for a Nordstrom shopping spree! Three Nordstrom gift certificates donated by **ALPS** will be raffled off at the convention! Details will be at the convention registration desk.

**Registration Fees • CLEs**
All 3 days: $175
Any full day: $90
Any half day: $50

**Special Events**
Lunches: $19 — no programs/speakers are scheduled during lunches
President's Reception: $25
Awards Reception and Banquet: $40
Poetry Reading: No charge
State of Judiciaries Address: No charge
Alaska Bar Association Annual Business Meeting: No charge

***WATCH FOR THE CONVENTION BROCHURE IN THE MAIL!***

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Call the Alaska Bar office 907-272-7469/fax907-272-2932 or e-mail alaskabar@alaskabar.org for more information.