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The Alaska BAR RAG

Volume 10, Number 2 | *Dignitas, Semper Dignitas* | $2.50 | May, 1986

Convention opening set

Valdez! What comes to mind when you think of Valdez? A small town nestled at the foot of picturesque mountains? Columbia Glacier? Cruising Prince William Sound? Halibut fishing? Kayaking? Hiking alpine meadows? A bar convention? A BAR CONVENTION??!! Yes, Valdez is the scenic setting for the Alaska Bar Association Annual Convention, June 5–7, 1986. Don't miss this opportunity to combine bar business with a chance to do the "distinctively different" in Valdez.

Educational Opportunities

A variety of educational opportunities are available to bar members and guests. Three continuing legal education programs are scheduled for Thursday afternoon, June 5, 1 p.m. to 4 p.m. at the Civic Center. Two additional programs are scheduled for Saturday morning, June 7, from 9 a.m. to noon.

Your civil client calls you at 3 a.m. Friday morning. He tells you his son has had an accident. He's been charged with drunk driving and a passenger is seriously injured. By 3:30 a.m. the passenger has died. Your client asks you to represent his son. You are representing a co-defendant in a drug sale conspiracy case. The defendant has made a statement to law enforcement officers and his belongings have been searched. For each of these cases what do you do pre-trial, e.e., bail, discovery and motions? The previously featured CLE on "Criminal Pre-Trial Motion Practice" will cover more than just motion practice, so we've renamed it "Criminal Pre-Trial Practice." The state's case features Public Defender Dana Fabe, and District Attorney Vic Krumm. The new Federal Public Defender, Nancy Shaw, and U.S. Attorney Mike Spaan will present the fed's case. Chief Judge of the U.S. District Court James M. Fitzgerald will serve as moderator.

For the second CLE program on Thursday, we have invited James S. Burling, an attorney with the Pacific Legal Foundation (PLF), Assistant Attorney General Mike Rorick and John Sedwick of Burr, Pease and Kurtz, to present a CLE program on "Inverse Condemnation" or regulatory taking. PLF is a national non-profit law firm committed to defending individual rights in the free enterprise system.

The third CLE program scheduled for Thursday is on "Pre-Marital Agreements: From Preparation to Enforceability" and features a speaker who is not a newcomer to Alaska. Robert Kaufman of the Beverly Hills law firm of Fain, Kaufman & Young has tried complex custody cases in the Anchorage Superior Court. He has served, over the last 15 years, on Family Law Committees of the American Bar Association and has been a guest speaker and lecturer on family law topics for national and local bar

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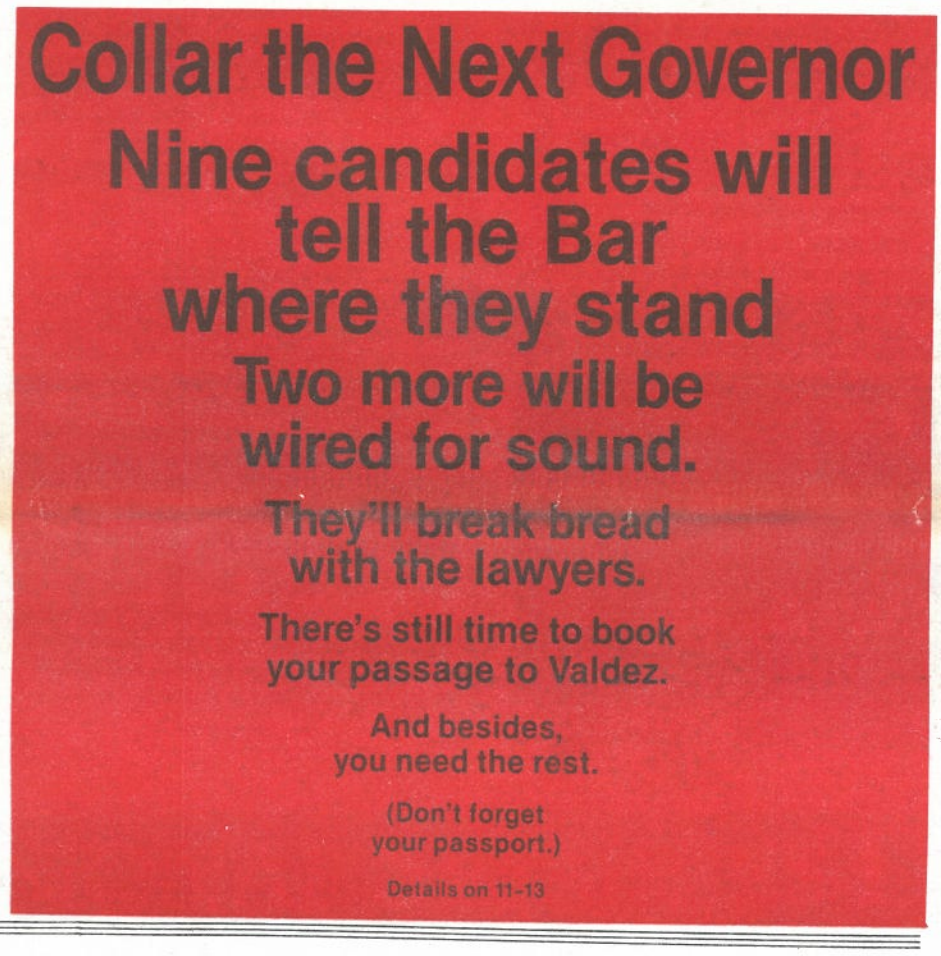

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Show me the way to go home

By Laurie H. Otto

The art of using a credit card for survival was taken to new heights last winter in the ancient Eskimo village of Wales. Although I am a past master of the creative uses of plastic cards, it was necessity guiding my arm as I diligently applied my American Express card to the task of scraping ice from the wings of a small airplane. As I bent to the task, I could see a VISA card at work on the propeller, and chips of ice flying as a MasterCard cut away the icy jacket that coated the right wing.

The workers wielding their credit cards with such vigor on that chilly December day were the legislative members of the Local Option Committee. The Committee members and I, as the Committee's lawyer, had been waylaid in Wales as we journeyed through the dark cold skies of winter to chronicle the scope and severity of Alaska's alcohol abuse problem.

Our travels to eighteen widely separated, and often remote, towns and villages in the month before Christmas 1985 proved to be an epic undertaking. The warmth with which the Committee was received in many villages, and the good-natured manner with which Committee members faced adversity, were in sharp contrast to the stories of suffering and tragedy which filled the Committee record day after day.

The hearing in Shishmaref had been typical. We arrived in the village three hours late, and found that those who had wished to testify had all gone home long before we arrived. Our appearance was announced over the CB, and soon villagers began describing the community problems with alcohol abuse. By this time the pattern of testimony was familiar: all of the felony crime in the village is alcohol-related; children are abused by drinkers; the abuse of alcohol is threatening the structure of the extended family.

After the Shishmaref hearing, we hurried to the airplane that was waiting to take the Committee to a hearing in Nome. Fog and snow forced the single-engine plane to take the coastal route around the Seward Peninsula to Nome, instead of a more direct path that required flying over mountains. The weather worsened during the flight and when the coastal cliffs disappeared into a fog bank, the pilot landed in Wales, the closest mainland village to Russia. The pilot, the Committee members and I trudged from the airstrip, through the blowing snow and past the silent standing frames of old whale bone houses, to the home of the Ryan Air agent.

The still and silent image of Wales disappeared as soon as we entered the small warm home where chaos reigned. A major housecleaning project was in progress; it appeared as though every object the family owned had been

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Fred Graham speaks here

One of the highlights of this year's convention will be the banquet on Saturday evening, June 7. Our guest speaker is Fred Graham, CBS News Law Correspondent. Based in Washington, D.C., Graham, an attorney, covers the activities of the Supreme Court, the Justice Department, the FBI, and the legal profession.

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President's column

Harry Branson

The Board of Governors met in a three-day session March 20, 21st and 22nd, 1986. One of the highlights of the meeting was a four-hour public forum on the insurance crisis and the tort reform movement. The meeting was held in the Supreme Courtroom in the Alaska Court building in Anchorage. The Alaska Bar Foundation arranged to videotape the proceedings for later showing on the Public Broadcasting System channels and Learn Alaska Network, of an edited one-hour tape.

The format of the program was a series of six speeches by persons knowledgeable on the subject followed by questioning by members of the Board of Governors. The speakers, in order of their appearance, were:

Dr. David A. McGuire, a prominent Anchorage surgeon, President of the Alaska Medical Society and Leader of the Tort Reform Movement in Alaska.

Eric Sanders, an attorney engaged in a Plaintiffs' personal injury practice in Anchorage in the Law Firm of Young and Sanders.

Keith E. Brown, a former President of the Alaska Bar Association, Chairman of the Bar Association's Professional Liability Committee in private practice engaging in insurance defense work in the Law Firm of Hagens, Brown and Gibbs in Anchorage, Alaska.

Sandra K. Saville, a Senior partner in the Anchorage firm of Kay, Saville, & Coffey, Hopwood & Schmid.

Richard L. Block, President of the Alaska National Insurance Company and a former insurance commissioner for the State of Alaska. Mr. Block is admitted to the practice of law in both Alaska and California.

Robert M. Libbey, President of the Alaska Academy of Trial Lawyers and senior partner in the Law Firm of Libbey, Suddock and Hart in Anchorage, Alaska.

Transcripts of the entire program are available at the Bar office. Video portions will be shown at the upcoming annual convention in Valdez.

Bar Exam Lauded

The Alaska Bar Exam was lauded as a "state of the art" exam by Dr. Stephen P. Klein, a senior research scientist with the Rand Corporation and the Alaska Bar Association's exam consultant. Dr. Klein made a presentation before the Board of Governors at the March meeting, covering the goals, structure and grading process of the Alaska Bar Exam.

Factors contributing to the quality of the Alaska exam include: the calibration of each essay question by a five-person team before grading begins; two graders for each essay question; reconciliation of scores which are more than one point apart (on a five-point scale) by the two graders; a provision for rereading the exams of applicants one point below the passing score; the passing score of 140 is a fixed standard; the weights assigned to the parts of the exam are reasonable; and the fact that the essay portion of the exam is tied into the MBE portion, so that the graders can't affect the pass rate (by grading too leniently or too strictly).

All of these factors help to make the Alaska Bar Exam as free from chance or systematic bias as possible.

Dr. Klein's presentation was videotaped and is available for viewing by contacting the Bar office.

New Programs Assist Applicants

The Board of Governors has established a loan program and a tutoring committee to assist applicants who are taking the Alaska Bar Exam.

Alaska Mutual Bank has agreed to provide signature loans to applicants to cover the cost of the bar exam and the bar review course. Applicants will be eligible for the loans as long as they don't have bad credit ratings. Alaska Mutual Bank will pay the Bar Association or the Bar Review course directly and applicants will have up to a year to repay the loan.

The Board plans to have a tutoring committee in place in time for the release of the February, 1986 bar exam tutoring assistance. Each tutor on the committee would be assigned to tutor a reapplicant. The Bar office will provide past bar exams for the student to use as practice exams, which can then be reviewed and evaluated by the tutor.

An orientation and training session will be held for the tutors on June 10. The session will cover a review of what the exam graders look for and how to approach the process of tutoring.

The Board would like to establish as large a pool of tutors as possible so that the program always has sufficient tutors before each exam. If you have done tutoring on an informal basis, or know someone who would be a good tutor, please help us out and contact the Bar office to volunteer. We are looking for attorneys who are good writers and skillful communicators.

Volunteers Needed

The Substance Abuse Referral Program is nearly in place. A request for volunteers for this program was recently mailed out by the Substance Abuse committee. Volunteers will provide assistance in three areas: 1) review of any cases forwarded to the committee by any referring authority (e.g., the Alaska Bar Association and the Municipality of Anchorage Prosecutors Office); 2) provide counseling on information about the identification and availability of substance abuse programs; and 3) perform interventions upon request by persons having a relationship with a substance abusing attorney.

Volunteer attorneys will be provided training. If you are interested, please return the card provided in the mailing. For more information, contact John Reese or John Abbott.

Duke Stern Reports

Our Malpractice Insurance Consultant Duke Nordlinger Stern reported efforts being made to entice new carriers interested in writing insurance in Alaska. He discussed risk management programs and regional or multi-state self insurance pooling with the Board.

Keith Brown, insurance committee chairman expects to be able to give the membership a further update on the availability and cost of casualty insurance coverage for Alaskan attorneys at the convention.

Annual Convention

By now, you have all received the Valdez convention pamphlet and registration forms. I believe the convention center in Valdez is the best facility of its kind in the State. The Valdez Bar and Convention Committee have put more time and effort into this convention than anyone could expect. I believe the program and the surroundings are top notch. There is something for everyone in this year's program, including spouses and children. Whether you attend the convention for the CLE, the fellowship, the business of the Bar, the partying, just to get away from your office for a few days, any combination or all of the above, you can find what you are looking for this year June 5th, 6th and 7th in Valdez. I hope to see you all there.

Annual Report: The Year So Far

One of the duties of the outgoing president is to give a report of the year's activities by the Board of Governors to the membership present at the Annual Business Meeting. I have tried to highlight some of the programs that we have undertaken in the President's Column in each edition of the Bar Rag. The following represents a partial summary of Board and Staff activities and efforts to date:

1. Substance Abuse Program for Attorneys. This program is moving out of the planning stage. We expect it to be fully operational sometime this summer. To date, we have received over 60 responses to our call for volunteers to work in the program.
2. "The Constitution: A Delicate Balance." The Board purchased a 13 segment PBS television program special on the Constitution for use in programs with Public High Schools and community groups. So far, the Kodiak Bar has utilized some of these tapes in their community high school. Deborah O'Regan and I have met with representatives of the Alaska State Educational System to explore ways to introduce this program into the regular curriculum. These tapes are available to local Bar Associations throughout Alaska for law related public education projects upon request to the Bar office in Anchorage.

Continued on page 3

The editor's desk

I have always thought it was Goethe who first said "Those who do not study history are condemned to relive it." I am sure that one of you intellectuals will correct me—maybe it was Will Durant. Anyway, the message is the same—and it is directed at the younger members of the Bar.

About fifteen years ago or so, a group of young Turks literally took over the Democratic party in Alaska by the simple process of going to its annual convention, which no one else had bothered to attend. They formed what was then called the "Ad Hoc Committee", and ruled the roost for a very long time. Many of their members went on to successful careers in politics, and they had a lot of fun raising hell with the older membership and generally improving things. The older democrats, of course, took up arms against them—and the party emerged from all the infighting stronger and better supported than ever before.

The point is that we're going to have a Bar Convention in Valdez early in June, as many of you no doubt have noticed by glancing through the rest of this edition. It is suppose to be a pretty little town, with a wonderful convention center, and quite close to Anchorage—where the majority of Alaska's lawyers reside, including the younger ones. What's to keep you turkeys from going down there and taking over?

Many years ago, when bar conventions were better attended, I heard my old friend, Chuck Cloudy, a senior partner in the Ketchikan firm of Ziegler, Cloudy, King, and Peterson make a brave speech. We were meeting in Vancouver, B.C., at the time—and an Anchorage lawyer was threatening the rest of us with dire consequences if we didn't have more meetings in Anchorage, where the majority of young lawyers could afford to attend. He made this demand on the premise that it was unfair to deprive them of a vote at the annual business meeting, because so many important things were decided by resolution at the annual bar convention.

Chuck said, as I recall: "I am well aware that a lot of important things take place at bar conventions. That's why I make it a point to go to them." He never attended again, of course, and neither did most of the Anchorage lawyers, young or old, when subsequent conventions were held in this city.

I am sure I will be called a traitor to my class (old boys and other assorted dinosaurs), but I would enjoy seeing an invasion of young lawyers in Valdez, voting every resolution they can think of for the improvement of the bar and their own circumstances. If they do that, I am sure that Chuck and all his semi-retired friends will be in attendance at the next one, and we'll all be the better for it.

Having been given this warning, I am sure all of you realize that you will miss this particular bar convention at your peril. Nobody read the Communist Manifesto, either, until it was too late.

—Gail Roy Fraties

The Alaska Bar Rag

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In the Mail

Wants Havelock

April 8, 1986

GAIL ROY FRATIES
Editor in Chief
Alaska Bar Rag
Alaska Bar Association
310 "K" Street, Suite 602
Anchorage, Alaska 99501

Dear Mr. Fraties

I think the ultimate article would be a John Havelock commentary on the Anchorage "Fast Track" proposal.

I am eagerly awaiting same.

Very truly yours,
James R. Blair

Another Hickey comment

Editor
The Bar Rag
310 "K" Street
Anchorage, Alaska 99501

Sir:

"An Inside Look at Dan Hickey", (The Alaska Bar Rag, Vol 9, No. 3, Nov. 1985) contains several misrepresentations of fact which I am sure were no more than lapses of memory by the authors of the article.

The second paragraph on page 25 of the publication is an absolute misstatement of fact. The only bill I ever filed under my name dealing with sexual assault, which is a matter of record, was HB 473 of 1981. That legislation would have provided for a minimum mandatory sentence of five years for a first offense of forcible rape. Second offense would have been a minimum of 20 years. Prof. Stern goes on to say in the next paragraph that I viewed Dan Hickey and his staff as the enemy. I neither view them as an enemy nor was I afraid of Prof. Stern or Mr. Hickey.

In fact, I think that the opposite was true, since I asked Prof. Stern at the very first committee meeting which I chaired how many marijuana cigarettes you could get out of an ounce of marijuana. He mistakenly thought this was a dig at him for reporting his marijuana plants as being stolen when his house was burglarized. (I asked the question innocently because I thought he possessed the technical knowledge, not knowing that he had been robbed and his marijuana stolen.)

Prof. Stern goes on to state I told him if he was not careful in his testimony before the Committee that I threatened to have the Department's budget cut. Prof. Stern apparently had another lapse of memory and forgot that all Judiciary Committee meetings were taped and I would be willing to bet my life that if those tapes were checked, nothing of that nature would be found. I never made threats; I have at times made promises, and if I do so i do everything in my power to carry out those promises.

It is a fact that I took a brand new bill to the Governor, which had absolutely nothing to do with Mr. Hickey, but did, in fact, have something to do with Prof. Stern, since one of his favorite expressions before the Committee was "the administration position." What I wanted to find out was just exactly who Prof. Stern was speaking for; himself or the Governor. I found out later that day, of course it is on tape, that he was really speaking his opinion, although he purported it to be that of the Governor. He was furiously attacking one part of the bill that had been put in at the request of the Police Employees' Association; that which referred to the harming of a police dog, and it was he who referred to it as the "dog bill." I will point out that nearly identical legislation was introduced the following year by Rep. Al Adams, and was passed into law. Referring to this portion of the bill as a joke was not the reason he was barred from the Committee, but was over an entirely separate piece of legislation and his unprofessional conduct. That legislation was the parole board bill. Prof. Stern was adamant in his support for his bill, which he could not get out of committee. The day this legislation was calendared for floor action, Prof. Stern saw fit to come to the Second Floor and as legislators came by he was grabbing them by the arm and telling them not to vote for the parole board bill. That, of course, was not his job; he was to be a conduit of information to the legislature. The Governor has a legislative liaison to work for and against bills on behalf of the Governor. For this action, I went to see the Governor and asked that Prof. Stern not be sent back to the Judiciary Committee room.

The Governor did send Mr. Hickey to work on legislation with me, which of course I was glad to have. From that work came HCSCSSB 535 2nd Jud AM.H., which has the provision for an eight year presumptive term for forcible rape. Mr. Hickey could support this provision and it was his idea to establish a new class of unclassified felony with a term of between eight and 30 years. Although it has often been attributed to me, and I am pleased to have the credit, but I can only take credit for HB 473 with the five-year minimum mandatory sentence which did not pass and I accepted the compromise offered by Mr. Hickey. One of the arguments offered against the stiffer sentence was that it would cause prisoners of this offense to kill their victims and is oneof the reasons you will find consecutive sentencing in the same piece of legislation. I do hope this will set the record straight and help Prof. Stern with his poor memory. After all, when you're trying to do a hatchet job on someone, you really should do it from a reference of fact, not fiction.

Sincerely,
Ramona L. Barnes

Secretaries take exception

April 14, 1986
Gail Roy Fraties, Editor
Alaska Bar Rag
Somewhere on K Street
Anchorage, Alaska 99501

Dear Mr. Fraties:

In response to your (expletives deleted) article in the Bar Rag concerning the language in your office:

1. How did the witness in your office know that the secretaries *were* secretaries and not female type assistant district attorneys or paralegals?

2. If it was said secretaries, they must have picked up such language from you.

3. You should have responded to said sitness, "If you worked here, you would swear too."

4. (Deleted) you Gail, you (deleted). Why did you publish this in your (deleted) paper. You make us secretaries sound like a bunch of badmouthed (deleted).

5. Never say anything bad about the secretaries, we are the only ones who know how to find the (deleted) files!!!

Yours truly,
(Unsigned)

Classes offered

January 10, 1986

Gail Roy Fraties, Editor-in-Chief
The Alaska Bar Rag
Alaska Bar Association
310 "K" Street, Suite 602
Anchorage, Alaska 99501

Dear Editor Fraties:

Lewis and Clark Law School is undertaking a venture which I believe will be of interest to your readers. We will be sponsoring a summer program of law courses from June 9 to July 3 of this year. The courses will be taught for law school credit, but will also be open to lawyers and others with an interest in Alaskan natural resource law.

We will be offering four courses, all with an emphasis on Alaska law. David Case, who I am sure you know, will be teaching a course on the Alaska Native Claims Settlement Act. Professor George Coggins of the University of Kansas, who is co-author of the leading casebook on Public Lands and resources law, will be teaching a public lands course. Professor Barbara Safriet of Lewis and Clark will be teaching Administrative Law, and I will be teaching Oil and Gas Law. The courses will meet four days a week in the early evening.

Based upon discussions with my deam, Art LaFrance, and I had with many people in Anchorage during June of 1984, we anticipate an enrollment including some practicing lawyers, but lagely law students working Alaska for the summer. Many law students attend schools which offer few if any courses in natural resource law. I doubt if any schools offer courses in Alaska law, except for our new course, taught by my colleague Mike Blumm, on Alaska and Canadian resource law.

The classes will be held at Alaska Pacific University. We have arranged for use of their consortium library and also for limited dormitory space.

Further information may be obtained by calling (503) 244-1181.

Sincerely,
James L. Huffman
Professor of Law

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President's Column

Continued from page 2

3. Malpractice Insurance Committee. Last fall, the Board instituted an Ad Hoc Insurance Committee chaired by Keith Brown, to explore ways to provide more accessibility to malpractice insurance coverage at a cheaper cost to our members. As I write this, the Bar office is preparing a mailing which will include a survey of the membership designed to provide the Committee with vital information to be used in their project. To assist the Board and the Committee, the Board hired nationally reknowned, insurance expert Duke Nordlinger Stern.

4. Insurance Crisis/Tort Reform hearings. See infra. We hope to initiate similar public forums on legal issues in the future.

5. Tutoring program for failing applicants. See infra.

6. Applicant loan program. See infra.

7. The Breakfast Club. Some of our best attended and most successful CLE programs this year have been the breakfast programs held at the Captain Cook Hotel in Anchorage. We plan to continue these in future years.

8. "Bridge the Gap." This is a series of CLE programs targeted at the new practitioner which we have planned to initiate next fall. They will be accompanied by a handbook produced with the help of our sections. These programs are designed to literally bridge the gap between law school and the demands of practice.

9. Discipline. This is the year we caught up with our discipline backlog. This is a project that began several years, several Boards and several discipline counsel ago. This board kept up the pressure, hiring more staff in order to insure our progress continued.

10. Sections. This year more attention has been directed towards beefing up the sections, making sure they hold meetings, communicating with their members and with the Board. Linda Nordstrand, Assistant Director and CLE Director for the Bar Association has worked with the section chairpersons to implement their programs. A written section procedure manual has been assembled. We are now putting out a monthly section newsletter to all section members—wherever practical, we have tried to coordinate section and CLE committee activities.

11. Rules. The Board and the Rules Committee has rewritten the fee arbitration rules, redone the client security rules and provided the Supreme Court with an Unauthorized Practice of Law Rule.

12. Board meetings. The board has streamlined its regular meeting procedure in order to conduct its business more expeditiously at less cost to its members and to the membership at large. We have learned that we can accomplish as much in a well managed two day meeting as we used to in three days. The board has invited representatives of the State and Federal court system to each meeting. Chief Justice Jay Rabinowitz, and Anchorage Superior Court Presiding Judge Douglas Serdahely and Chief Federal Judge James Fitzgerald have attended meetings. We have also met with some of our representatives in the Legislature to determine what issues they saw coming up this session that might affect the Justice system and the Bar.

13. Atmosphere. The Bar Office has been compared in the past to a fortress with Board and Staff inside and the rest of our members outside. I believe the last vestiges of that kind of thinking are gone. We have an Executive Director and a staff we have every reason to be proud of. Their attitude and the attitude of the Board is "we are here to serve you." To use a computer term, this Bar Association office is user friendly.

14. Budget. So far this year we have managed to stay under our budget limitations.

Out With the Old, Etcetera

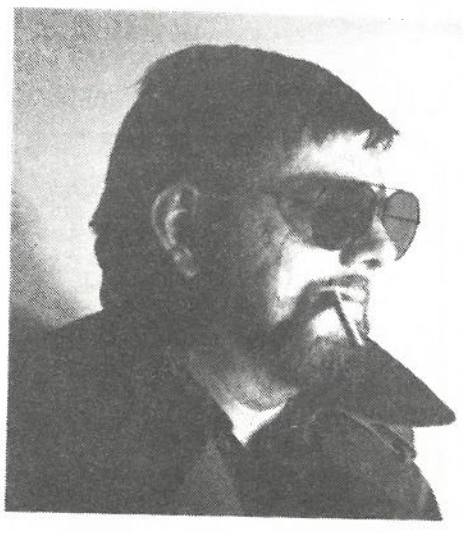
This is my last President's column. I will be succeeded in June by Ralph Beistline. I understand he has already drafted his first column. I have tried to work closely with the President Elect during the year. He assures me he is ready to say good-bye to his successful practice for a year and begin worrying about all those things, real and imaginary, that presidents think are important. I have known Ralph for about 10 years. I think he is a fine lawyer and will make a great president of the Bar.

He inherits a Bar Association that is presently economically in the black and, for the moment, not under attack by any public or private entity. I think he has one of the most, if not the most capable, hard working and dedicated Boards we have ever had. From the looks of the recent elections and run off candidates, that Board is about to be enhanced.

This is my last year on the Board and my 14th year of Bar service. It is time for some new blood. It has been a privilege and a pleasure for me to work for you.

Harry Branson

Not going to the convention, you say?



Harry Says. . .Go ahead, make my day.

Philosophical reflections on tort reform

By Richard L. Block

By the time this article is published the legislative debate on tort reform will be over. We will have seen the legislature complete its struggle to balance the interests of the injured against the interests of the society that pays the costs. I have debated tort reform before several public forums over the past nine months, over television, to legislative committees and even in a marathon debate before the Board of Bar Governors. I have been privileged to be joined in these debates by the most capable and articulate supporters and opponents of tort reform including experts from around the country, attorneys, insurance industry professionals and the most able of the multitude of industrial sectors affected by the reform. I believe that my views and the points to be made for or against various limitations in civil damage awards for bodily injury are now well known. Though I welcome the opportunity to document my views in this periodical, I think that it is not very constructive if the legislature has already decided. I choose to take this opportunity to raise some new issues, issues that I believe were only briefly touched on during the tort reform debate but which lie at the heart of the difficulties with the civil justice system.

Our historic reliance on a rule of law has taught us that a dependable civil justice system is essential to the preservation of an ordered and civil society: a simple platitude, perhaps, but worth repeating when society or the state of our economy becomes uncivil or disordered.

What is it that causes the number of suits filed in this country to grow at a faster rate than the growth of our population, our gross national product or inflation?

Why has the threat of litigation driven responsible people to refuse to serve on boards of directors of business corporations or trustees of non-profit or educational institutions?

How has the "business of law" become one of the fastest growing industries in our country with more lawyers, judges, legal services, and collateral services per capita on per dollar of gross national product than ever before in our history?

Why are whole industries ceasing to exist or be driven from the market place under threat of product liability or malpractice litigation?

I submit that, first, these are solid evidence of growing societal disorder. As we become a more civilized nation we should also become a less litigous society not a more litigous one.

I submit further that it is the civil justice system itself that has allowed cracks in the foundation of the system which allows disturbing disorder and undependability in our social and economic activities.

Our civil justice system has three essential parts; the bench, the bar and the law.

The responsibility of the bar in an adversarial system is to represent and articulate the position of their respective clients with all of the vigor and imagination of which they are capable, consistent with the highest moral and ethical standards. The lawyers have certainly fulfilled this obligation.

The law is the standard established by society by which all outcomes are to be judged. The law ought not to be a tool of any party but an impartial expression of what makes the social-economic fabric take the shape, color, drape and texture which reflects our highest sense of justice, equity and opportunity, much as an artist creates a tapestry to match his highest sense of beauty and grace. Whether the law in its current form meets society's expectations is, of course, what is currently being determined legislatively.

The bench is the protector of the fabric of the law. As a curator of a magnificent work of art chooses how and when it should be displayed yet does not materially alter the work or allow others to alter the work, so the judges must protect our legal fabric from becoming torn by the pull and tug of differing views of the artesans.

Just as art evolves and takes different shapes to suit the ever changing expectations of a changing society, so new shapes will be forthcoming in the law. The question is do we tear down established principles upon which society depends or build upon those principles without destroying them? And more importantly, should these changes to made as public policy by society expressing itself through the legislative process or by the courts who ought to be the protectors of the law.

What has contributed most to the disallusionment with the tort system has been the lack of dependability, the tearing down of established doctrines through judicial interpretation to make way for new theories of liability and extensions of liability to new parties for new reasons.

These always have been due in a large part to the pull and tug of a capable bar on the very fabric of the law itself but the bench has allowed it to take place.

The new tort reform bill will be the subject of much discussion and certainly judicial interpretation for years to come. How the courts interpret the new law will determine whether it will have the effect which the legislature, hopefully reflecting the sense of the public will, expected. In other words, if tort reform legislation had as its principle objective, lowering the cost of liability by limiting the extent of liability, hopefully the courts will consider this motivation and protect this objective in how it adds texture and shape to the loosely woven fabric of this new cloth.

If the bar is allowed to pull it apart, it will not work.

If our judiciary does not recognize the ultimate rationale for legislative changes to the civil rules of procedure and the restructuring of the rights and liabilities of the injured and the paying public then the strong public effort to reduce the cost of liability by limiting the nature and extent of the exposure will be a disappointment.

Editor's Note: Mr. Block is an attorney, licensed to practice in Alaska and California. A former director of insurance for the state, he is now president of the Alaska National Insurance Company.

New plan announced

A group medical program has been one of the most frequent benefit requests from Bar members. Until recently, a true group plan seemed out of reach for the Association, but a survey of other similar-sized state bars helped us learn what benefits we might reasonably expect to negotiate for our members, and what plan structures had been deemed acceptable by other bars.

"Our top priority," said Deborah O'Regan, Association Executive Director, "was that the program be available to law firms of all sizes, the sole practitioner as well as medium and large size firms. We also wanted options within the program so that benefits could be tailored to each firm's requirements, and an expanded list of benefits that included more than standard offerings. And we wanted the rates to be better than the quote a law firm would receive on its own."

"True group structure was an additional requirement," the Association's Controller, Gerry Downes, confirmed. "We needed our own experience-rated program with premiums based on the group as a whole, a self-supporting plan with rate stabilization features and no administrative costs to the Association itself. We were also looking for a carrier with a strong presence in the Alaska market, with the financial stability and management expertise to offer us a quality program."

The Bar Association's Group Medical Benefit Program through Blue Cross of Washington and Alaska has met the criteria. Coverage is now available for law or law-related firms of any size employing at least one member in good standing of the Association who is on either active or inactive status. Bayly, Martin & Fay of Alaska, Inc. has arranged this program and is acting as plan broker.

Q. What do you mean by "experience-rated"?

A. In April of 1987, our claims experience will be examined. This analysis will determine our group premiums for the following year. Expenses and claims will be subtracted from premiums paid. A portion of the remainder will be placed by Blue Cross into an account to pay claims run-off if the plan terminates. The balance will be used to off-set premiums, helping to stabilize our rates. Both reserves will "belong" to the plan; Blue Cross could not use them for other purposes. Our examination of claims experience leads us to believe that our experience will be good, but if it isn't, there will be no assessment to the group for any funding deficiency. Only future rates will be adjusted to reflect the group's experience.

Q. How are the initial rates set?

A. We have negotiated a substantial discount from Blue Cross from the rates in effect on May 1, 1986. The amount of discount will vary according to the composition of each firm. The discount will never be less than 5% and for some firms can be over 20%.

Q. What kind of coverages are provided?

A. Medical coverage is the heart of the program and must be chosen before other coverage can be added. Each firm has a choice between high or low option, and can add the preferred provider provision if desired. To medical coverage can be added dental, vision, life, and/or disability. Each firm can use these choices to tailor a benefit program that meets their own requirements.

Q. Is the medical coverage as good as Blue Cross coverage outside the plan?

A. It's even better. Blue Cross has taken their standard plans and added limited coverage for routine physicals and hearing aids. They've also added benefits that pay the first $100.00 of ambulance fees outside the deductible and the first $15.00 of physician office visits after a two visit deductible. The rest of physician visits and ambulance is still paid under major medical. And under our group program, the plans are available for firms of all sizes, not Blue Cross's usual minimum group of five.

PROGRAM FEATURES

Choose from two basic medical plans:

The high option plan provides 100% coverage for inpatient and outpatient hospital charges. For other major medical charges, including physician fees, prescription drugs and surgery, there is a $100 deductible and the plan pays 80%. After you have paid $375 on top of the deductible, it pays 100%.

The low option plan has a $100 deductible and pays 80% of hospital and major medical charges until you've spent $600 (above the deductible). It then pays 100%.

Either plan can be written with a provision which lowers rates if Providence hospital in Anchorage is designated as "preferred provider." If this provision is taken, there are coverage penalties for employees who do not use Providence. The penalties do not apply in an emergency or if a procedure cannot be performed there. The "preferred provider" provision is not available for those employees residing outside the "Anchorage area."

Both plans require a second opinion for some surgical procedures. The second opinion need not be followed. It is paid at 100%. The plans also require pre-notification to Blue Cross and review before non-emergency inpatient hospital admission.

Both plans have a $1,000,000 lifetime maximum. They treat maternity the same as any other condition. Sublimits differ among the plans for certain care such as psychiatric and rehabilitative services. Neither of the plans contain a sublimit for chiropractic. Both plans require a maximum of three deductibles per family each year.

Extra benefits are included in both options.

We have negotiated several benefits otherwise not available from Blue Cross and usually not available from other insurers. $25 toward physical exams for employees is payable every two calendar years. Up to $400 is payable at 80% for hearing care every three years. The first $100 of ambulance charges is not subject to the deductible and up to $15.00 is paid for home and office calls each visit after two visits each year, without being subject to deductible or coinsurance.

The following may be added to either options:

Dental coverage is available. The calendar year maximum is $2,000 per person. It pays 100% of preventative or diagnostic care, 80% of regular service, and 50% of prosthetic service. It may be taken with no deductible. A $50 deductible is optional.

The vision option will pay "usual and customary" for exams (1 per year) and lenses (2 lenses per year). Only contacts and frames have scheduled maximum dollar amounts. Frames are payable to $45, and contacts to $100 every two years.

A life and disability package may be included at reduced rates for all sizes of firms. The life insurance is Term coverage with dependent life available as an option. Both short term and long term disability coverage is available.

Please note that, per our broker, the above is a general description of coverage only, not a contract.

Q. I'm a sole practitioner. Can I still get dental and vision?

A. Yes. A sole practitioner is considered a firm of one employee and can add any or all of the plan additions (dental, vision, life, disability) to the high or low medical benefit options.

Q. How is coverage for a firm approved?

A. The plan is "guarantee issue" to firms of four employees or more. For our program the term "employee" includes both attorneys and support staff. Employees of firms of three or less must complete a health questionnaire to qualify. Blue Cross could refuse to cover individual employees of these firms. Physical exams are not required. Statistically, over 90% of the individuals Blue Cross medically underwrites are accepted.

Q. My firm has two employees. Why must we medically qualify?

A. Our group experience will determine the rates for everyone covered by the plan. Large firms, by virtue of their number of employees, have already spread their claims risk and will not adversely affect the group. We negotiated with Blue Cross to make the minimum firm size for "guarantee issue" as small as possible while still safeguarding the risk profile of the group as a whole.

Q. Must my firm qualify separately for life and disability?

A. No, they are "guarantee issue" for all size firms. Long term Disability is "guarantee issue" up to $6,000 per month.

Q. My firm already has a good medical plan. Why should we switch?

A. According to our research, the Bar's plan should offer better coverage at a better price in almost all cases. Our broker can obtain a quote for you to analyse and compare.

Q. What about claims service? Will we be dealing with a huge bureaucracy?

A. Blue Cross has a highly efficient computerized claims processing service. With a Blue Cross card, participating hospitals should not request separate payments from you and through our broker we will have access to a special coordinator who can take direct action on claims problems should they arise.

Q. My firm would like to join the Bar's program, but I've already paid my deductible and coinsurance share on our present plan.

A. Feel free to join; credit will be given for deductible and coinsurance payments already made on prior plans for groups of four or more. If your firm's present plan is individual Blue Cross for each employee, this credit will also be given when the firm converts to our group plan.

Q. Can we use our current broker?

A. Our plan has been arranged by Bayly, Martin & Fay and they have been designated exclusive broker. You may continue to use your current broker for your other insurance programs.

Q. What about pre-existing conditions?

A. Blue Cross has a six month wait for coverage for pre-existing and certain named conditions. After six months you are covered, however, even if you are still being treated. Some plans require waits of a year or more if you've been under continuous treatment. If your firm has four or more employees and you've satisfied the pre-existing clause of your previous plan, you will be considered to have satisfied the Blue Cross waiting period when you transfer. If you've been covered by a Blue Cross individual policy, you also will receive credit.

Q. Is there a set fee schedule for benefit calculations?

A. Charges are paid at the "usual and customary" rate for your area. "Usual and customary" to Blue Cross means that 90% of physicians, dentists, and other health-care providers charge fees no greater than the fee being billed for the service provided.

Q. Am I covered if I travel outside of the U.S.?

A. Yes, our program will reimburse for covered hospital and medical services received anywhere in the world.

Q. Blue Cross has been publicizing their preferred provider arrangement with Providence Hospital. Is this part of the Bar's plan?

A. The preferred provider arrangement is an option open to all firms. Rates without the Providence provision will still be lower than non-Bar Association rates without the provision. Rates with the provision will be lower than the Association's regular rate and will be even lower than non-Bar rates with the provision.

Q. Must all employees of my firm participate?

A. Yes. Although sole practitioners without other employees may join, the plan is designed to include all employees of a firm, not just Bar members. It also requires that 75% of the eligible dependents join.

Q. We have a different plan now and our contract doesn't expire for a few more months.

A. Most contracts have no penalty for early cancellation. Notable exceptions are Humana's and Delta Dental's. Check with your present broker to be sure. Our broker can time your firm's conversion to the Bar's plan so you will have no duplication or lapse in coverage.

Q. The Bar's plan seems right for us. How do we join?

A. Contact Bob Hagen or Denise Smith at Bayly, Martin & Fay. Their office is located at 1031 W. 4th Ave., P.O. Box 7502, Anchorage, AK 99510-7071. You may telephone them at (907)276-5617.

For a quote, they will need the age and gender of your employees. They also need to know the proportion of premium the employer pays for dependents. If you would like a dental quote, they will need to know whether you have dental coverage at present and, if so, for how long.

Coverage under the Bar's program can begin as early as June 1, 1986. Call now for further plan details or a rate quotation.

FLASH TO FIRMS OF TWENTY AND OVER

You heard it here first:

Three weeks ago, the Consolidated Omnibus Budget Relief Act (C.O.B.R.A.) was enacted. Hidden among tobacco price supports and pension plan rules is "Title X", affecting firms with twenty or more employees.

Title X requires 18 months of continuing medical coverage for terminated employees, and 26 months for divorced spouses, surviving dependents, and others. However, the employee or dependents may be charged for the premiums. The act applies to plan years beginning after June 30, 1986. Non-compliance penalties are tough no deductibility of premiums and an E.R.I.S.A. violation.

What does this mean for our plan? First, our broker and Blue Cross are setting-up administrative procedures to comply with the regulations when they take effect. Second, medical insurers say the Act will worsen experience. Premiums will probably be raised in anticipation of this but not for us. Our Blue Cross rates for the year are based on a discount of Blue Cross rates in effect in the second quarter of 1986. When our rates change on June 1 of 1987, they will be based on our actual experience. We don't expect C.O.B.R.A. to have substantially impacted claims by then; our rates should remain reasonable.

All my trials

Gail Roy Fraties

"You'll never guess what my client did to me the other day."

The speaker was Anchorage trial attorney Harry Branson, and he knows—as do all of my faithful readers—that I am incurably addicted to war stories. We were having lunch at the Tokyo Gardens, which is behind the Flash Cube Building (where the Public Defender's offices are located). Harry likes their sushi, and I use this enticement to troll him away from his frantic domestic law practice on occasion. As is true of many trial lawyers, he is a wonderful raconteur, and I urged him to continue.

According to Harry, he and his client were appearing before Judge (Name Withheld by Command) on a very serious issue, involving presentation of legal authorities and argument of the existing facts. Given the nature of Harry's practice, it concerned matters of child custody, property settlement, and other parental and post-marital rights and privileges.

"At the door of the courtroom," said Harry, "this turkey tells me 'Mr. Branson, I've been keeping something from you.' I told him for God's sake to let me in on it, and I didn't realize when I used that expression how apropos it was."

He had been looking for the waitress while he talked, but he paused for a moment to make sure he had my full attention. He needn't have worried.

"He told me," he continued with a grim expression, " 'Well, Mr. Branson, I had a vision the other night, in which my true identity was revealed to me. I am Jesus Christ, formerly of Bethlehem and Nazareth, the Risen Lord—Savior of Mankind.' "

Harry leaned across the narrow table, and fixed me with his intense gaze.

"And I told him ," he said with deadly emphasis, " let me do the talking ."

What the Lord has joined together

The Lord seems to visit our courtrooms frequently, perhaps to check us all out. Anyway, He appeared before Judge Ralph Stemp in District Court not long ago, with exciting consequences. The Judge and I have been friends for many years, and when I saw him on one of my rare visits to the State law library the other day, he brought me up to date on the latest news of his courtroom.

"I came in this morning for arraignments," he related, "and the bailiffs were all smiling. It was some sort of an in-group joke, and they wouldn't tell it to me, so I just got on with it."

Things proceeded uneventfully, as most of the prisoners were being arraigned and/or sentenced on minor charges. However, misdemeanants in Alaska—as is probably true in most states—more than compensate for the petty nature of their offenses by their flair, originality, and enthusiasm.

The Judge noticed that two of them, who were sitting together, were exchanging angry looks—and it wasn't long before a brief but spirited fight broke out between them.

"One of these dudes," he explained, "was under the impression that he was the Devil, and the other thought he was Jesus. Naturally, the bailiffs handcuffed them together."

He smiled reminiscently.

"It wasn't working," he said.

What's in a word

Anchorage attorney Max Gruenberg is presently representing his district in the second session of the Fourteenth Alaska State Legislature, but when they aren't in session, he has the same sort of practice that Harry does. I asked him one time how he could stand doing divorce work all the time, and he responded that he couldn't see how I did criminal. He has a point, of course. If anything, the criminals are much more tolerant of the police and prosecution than divorce litigants are of each other.

Some years ago I had the honor of being a partner in a firm in Juneau headed by the venerable Doug Gregg of that city. I say "venerable," because he now bills himself as the "oldest living member of the Juneau bar," whatever that means. I recently asked him not to use the expression around me, since we're about the same age.

One morning, an attractive woman in her middle years came into the office. She was exquisitely groomed, well-spoken, and emphatic in her request for our representation in a divorce action against her husband. He was a local doctor (they left Alaska fifteen years ago), and, as sometimes happens, had become enamored of his nurse. As I remember, this rather mysterious creature had convinced him that he was a former prince of the Kingdom of Atlantis, where she claimed to have known him. Whatever she told him had obviously been strong medicine, if that is the expression I'm looking for, and he had fallen desperately in love with her—a phenomenon that appeared to occur periodically in this particular marriage.

These were people who obviously were very attached to one another, but about every three or four years the marriage went on the rocks—and since there was plenty of money in the family, everybody chose up sides and hired lawyers. We didn't know this at the time we took the case, but the doctor (after the reconciliation that routinely followed our action) once told me that he had paid for three divorces and never got any of them. He didn't get this one either, but it was exciting while it lasted.

According to our client, she had become suspicious of his latest romantic escapade when she called by his office during business hours and found the doors locked. His excuse to her was that he was "giving dictation" to the party of the third part, and when his wife found out what he was really giving said nurse, that particular word became her euphemism for the activity she was sure was actually taking place.

"Alan really looks tired recently," she said on one occasion. "He's probably been giving that little bitch too much 'dictation.' "

We had a hearing on an interim support order and, due to Mr. Gregg's excellent legal briefing on the subject, secured for our client the highest weekly interim support known to the Juneau bar up to that time. The parties, however, remained on speaking terms.

"Those lawyers of yours are really sharks," he complained to her on the telephone that night. "Why, do you realize that you're making more than my secretary does?"

"Of course I do," she responded with saccharine venom, "and I don't have to take all that 'dictation' either."

The vanishing wilderness

Misdemeanants are interesting, at least to me, because although felony cases are usually sad affairs, your average misdemeanant is a nice person who has gotten crosswise with the law and is often completely torqued about the whole affair. This is particularly true of Fish & Game cases, as every sports-minded Alaskan knows. Fish & Game regulations are sometimes hard to understand, anyway, and the zeal with which they are enforced seems to vary in inverse ratio to their intelligibility.

We all respect the Wildlife Protection agents, and there's no question that they have a tough job. However, it is also clear that many Alaskans, particularly those who like to be let alone (a high percentage), view their activities with deep misgivings, and don't like to be questioned by them. This probably hurts their feelings, as illustrated by a story my old friend, Ed Whiteman (presently in Seattle, but formerly a Protection Officer) told me some years ago. Ed likes to fly, and carried out his duties airborne as often as possible.

One autumn afternoon in the Interior, Ed obtained the use of an airplane for the ostensible purpose of counting predators on the ground. A caribou herd was expected through the area within a month, and it was of some passing interest to Fish & Game to anticipate how many bear and wolves might be present to celebrate its arrival. However, as Ed told the story, he was primarily flying for the fun of it.

"I went way up a river system, into country you couldn't possibly reach except by an extended canoe trip," he recalled. "There were very few places for planes to set down, and no evidence that any ever had. As I was about to turn back, I noticed that there was—in fact—a canoe pulled up on the bank of one of the tributaries, with a fisherman standing beside it casting into the water. I had been on outpost duty for weeks, and hadn't talked to anybody except by radio—so I thought I'd drop in and see him. There was a sand bar about half a mile away perfectly suitable for landing."

Ed landed the plane, and patiently trudged through willow underbrush for about three-quarters of an hour before reaching the bank. The fisherman was oblivious to his presence, and lost in the pleasure of fly casting in this beautiful, unspoiled, and hitherto lonely environment.

"He was startled to see me," Ed remembered, "and I didn't want to tell him that I was lonesome to talk to somebody—so by way of making conversation I asked him if I could see his license."

The lone fisherman's reaction was completely dramatic and unexpected. With an oath, he broke his beautiful flyrod over his knee and cast it into the middle of the stream. Then he reached down and threw in after it two large Arctic char that he had landed. Finally, he tore off his fishing hat, complete with an assortment of flies, and after stamping on it, threw it in the water as well.

"I was never so embarrassed in my life," Ed continued. "After I got him calmed down, it turned out that he had been hassled by one of us some years before and had taken to fishing remote areas to get away from it all. I guess he thought I had flown all that way just to make sure he was legal."

For a moment, we were both lost in thought—I with a vision of the remote stream, and Ed with his memories.

"He had a license, too," he concluded.

Quotable Quotes

Juneau Assistant District Attorney James L. Hanley on the subject of defense counsel winning a criminal case: "It only encourages them."

•

Anchorage District Court Judge Michael N. White, arguing a criminal case to the jury in his former incarnation as District Attorney in Palmer: "As the Court advised you, this man deserved a fair trial. He's had one—now go in there and convict him.

•

Anchorage trial attorney Greg Oczkus, on being asked whether his mother (the source of his knowledge on the subject) still shares my interest in astrology: "No, thank you, Gail, she's better now."

•

Public Defender Venable Vermont, on leaving an urgent phone message for his equally busy opposite number in the District Attorney's office misrepresenting that he wanted to plead out the defendant as charged in a particularly difficult murder case: "I lied. I just wanted to make sure you'd return the call."

•

Bethel Police Captain Peter LaMere, on arriving at the scene of a purported crime where two over-enthusiastic recruits had conducted a warrantless search: "Gentlemen—I think we have just committed a burglary. We'd better get the hell out of here before the police arrive."

•

Anchorage District Attorney Victor Krumm, on being asked whether he knew anything about motions to satisfy: "I'm not sure. I just do the best I can."

An ounce of prevention

You can avoid most malpractice claims by taking simple preventative measures.

by Stephen M. Blumberg

Legal malpractice claims have reached epidemic proportions. Nationwide, about one of every 17 attorneys receives a malpractice claim each year. In California, approximately one of every eight attorneys is subjected to a claim annually. On the basis of that figure, new California lawyers can expect to face at least six malpractice claims during their careers.

Being a scholar of the law or a lawyer who wins cases and earns large fees is no protection. Malpractice claims are being filed against attorneys who have excellent reputations in their communities and the best Martindale-Hubbell ratings.

Malpractice claims immediately jeopardize your personal insurability. In the near future they may even affect your ability to obtain employment with a law firm. Thus every attorney who wishes to remain in practice must master the skills necessary to avoid malpractice claims. While some claims are truly unavoidable, they are the exception. At every stage of each case, including non-litigation matters, you must consider whether you have protected yourself from a malpractice claim. The suggestions in this article can help you decrease the odds of incurring an avoidable claim.

Lawyers' Mutual Insurance Co. estimates that 20 percent of malpractice claims result from missed deadlines. These malpractice cases generally are indefensible as to liability, and insurance companies have become reluctant to renew malpractice insurance when an attorney has missed more than one statute of limitation.

Since careful calendaring can eliminate this hazard, it is imperative to have a fail-safe, dual calendaring system. Both you and your secretary should keep a current and complete date book. Get in the habit of calendaring everything. Every morning your secretary should give you a list of matters calendared for attention that day. Cases in litigation must be calendared for both pleading deadlines and adequate lead time. Every non-litigation case should be calendared for follow-up action before the file is returned to the file drawer. Each open file should be reviewed at least once a month as another safeguard against inadvertent neglect.

Another 10 percent of malpractice claims arise in connection with fee disputes between attorneys and their clients. Here is a typical scenario: The attorney takes a case without a firm fee agreement; the case result is less than perfect from the client's point of view, and the attorney fees exceed the client's expectation or ability to pay. The client doesn't pay or communicate with the attorney, who finally sues to collect his fees. The client goes to another attorney to defend the suit and decides to cross-complain for legal malpractice, asking for an award that exceeds the unpaid fees.

The attorney still doesn't have his fees; but he does have a claim to turn in to his malpractice carrier. The carrier incurs the expense of hiring a law firm to defend the attorney. The likelihood of the attorney's malpractice insurance policy being renewed diminishes regardless of the outcome of the claim. Even if the insurance is renewed, the premium usually increases dramatically.

Generally, you can avoid having to sue for fees by (1) drawing up a written fee agreement at the outset of each case which establishes the basis for billing, (2) collecting a reasonable retainer and (3) sending monthly billings. If a client doesn't pay the monthly billing, talk with the client to resolve the matter instead of allowing the bill to mount up until the case is concluded.

Because of the inherent risk of a countersuit, avoiding suing a client for fees unless (1) there was a good result in the case, (2) an experienced attorney has reviewed your conduct of the case and found no errors or cause for complaint, and (3) there was awritten fee agreement with the client which you followed in every detail.

Rejecting cases

Newer attorneys, especially, hesitate to turn away potential clients. But any attorney who has practiced awhile learns that certain cases should never be accepted.

Following are some examples of case characteristics that should prompt you to investigate the potential client and his case thoroughly before entering into an attorney-client relationship:

o The case has already been rejected by one or more firms. This may indicate that something is wrong with the case, perhaps the nature of the client or the compensation.

- The client is changing attorneys in the middle of the case. Contact the former attorney, since the reason for the switch may be that the client was unreasonable, refused to follow advice or wasn't paying his fees.
- The case has an element of "avoidable urgency." If a client has had 30 days to answer a complaint and brings it to you on the 29th day, he may be a difficult client with whom to work. Working in haste invites errors.
- The client has already contacted multiple government representatives (for example, the mayor, governor, legislators) to plead his case. This client may have a legitimate claim, but his behavior suggests that he may be difficult to please.
- The client wants to proceed with his case because of "principle," regardless of cost. A client-defendant has the right to spend $5,000 to prevent paying $500 that he "doesn't owe." However, such cases often drag on, and the client's ardor for principle often cools as a result of his frustration over not obtaining an immediate result. Even if you win the case, such a client may be dissatisfied if he feels he did not get the 100-percent vindication he was seeking.
- The client has already done considerable legal research on the case in proper. The potential problem with this type of client is that he may want to look over your shoulder, and he may demand that you proceed in a way contrary to your best judgement.

Waiver of rights

What should you do if you tell a client that he has a certain legal right, and he chooses to waive it? Make sure you protect yourself against a possible later claim that you did not properly advise him of the consequences of his waiver.

In an actual case, the purchaser of a business was advised of the advantages of publishing a bulk sales notice and of the protection it would afford him. But the buyer was in a hurry to consummate the transaction, and he insisted on waiving publication of the bulk sales notice. Later, when the seller's undisclosed creditors surfaced, the buyer sued the attorney for failing to advise him of the need for the bulk sales notice, even though the notice was waived in writing and the document was signed by both buyer and seller.

What could the attorney have done to prevent this unreasonable malpractice claim? He could have refused to consummate the transaction without the statutory publication of the bulk sales notice. Another approach would have been to spell out in the sales agreement the basics of the bulk sales law and the protection it affords the buyer. It might also have been a good idea to state the buyer's reason for demanding the waiver and the fact that he was demanding the waiver contrary to his attorney's advice.

Attorneys should check the accuracy and accountability of secondary sources of legal information. In one recent malpractice case, an attorney sought advice on whether a wife's receipt of cash for stock in a family business was taxable. The attorney telephoned an accountant who said the transaction was not taxable. The advice was wrong, and the attorney was held fully liable for the woman's tax bill.

Instead of accepting the accountant's telephone advice, the attorney should have paid reasonable compensation to a certified public accountant or tax attorney to obtain a written opinion. Had he done so, the other professional would have shared responsibility for the advice and likely would have given a more carefully considered opinion. But even if the advice was still wrong, the attorney would have had an action by way of indemnity against the other professional.

Clients' expectation

Whether the client is satisfied with the outcome of your effort depends in large part on his expectations. Therefore, be conservative when you discuss what you can accomplish in a case. It is tempting to tell a client he has a very strong case, but it is difficult to go back to a client later and say, "Your case isn't nearly as good as it seemed when we agreed to proceed with litigation." Reserve judgment on the merits of your client's case until you can evaluate the accuracy of the facts that will be alleged by the other side. Make sure your client appreciates the difficult aspects of his case, whether it is litigated or settled. You can be realistic with your client and still reassure him that you are entirely on his side.

Some attorneys are unlikely to be sued because they form strong attorney-client relationships and are respected and admired by their clients. Other attorneys, who may be more intelligent or more experienced, are sued again and again because their working relationships with clients are poor.

To establish the best possible rapport with your client, let him know that you care about his case and his well-being—not just about your fee. Consult with your client regularly, return his phone calls promptly and give him copies of your work product. Never conclude a trial without asking him if he feels any additional testimony or evidence should be introduced. Strange as it may seem, the client's perception of your good faith efforts on his behalf may be more important to him than winning or losing the case.

Get expert help

Attorneys handling specialty matters are generally held to the standard of care of a legal specialist in that field. If you don't have access to experienced supervision in cases involving areas of the law in which you are not proficient, refer the cases outor associate experts. Even an attorney who specializes in one facet of a particular field of law, such as real estate law, should not automatically feel competent to handle a case in another specialized area of the field. If, for example, you specialize in landlord/tenant law and are asked to defend a specific performance case involving a $5-million-dollar ranch, your position would be comparable to that of a personal injury attorney who is asked to handle a corporate dissolution.

If you do refer a case out, have your client approve the referral in advance and select the attorney with care. You could be liable for a negligent referral.

Conflicts of interest

Refuse cases in which you have or appear to have conflicts of interest. You must have an undivided loyalty to each of your clients. It is important to ferret out any conflicts at the beginning of a case, as a client will incur damage and unnecessary expense if later discovery of your conflict requires him to obtain new counsel.

A good test to determine if there is a potential conflict is to ask yourself if your advice to one client could work in any way to the detriment of another client. For example, be very careful in representing more than one client when attempting to recover.from one limited source of recovery. Representing several parties may result in conflicts over the division of the proceeds. It is also generally unwise to involve yourself in litigation against a recent client, even if you have no special knowledge pertaining to the new case.

Improper conflicts commonly arise when an attorney represents both parties to a divorce, a landlord and tenant, or more than one partner in an enterprise. If you are asked to draw up a partnership agreement for all partners, include in the agreement that you represent only one partner and that the others have been advised to seek independent counsel. It is best to insist that independent counsel is in fact obtained.

Legal malpractice has been defined as an attorney's failure to apply such learning, skill and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in performing the tasks they undertake. In essence, malpractice is negligent practice, which can be avoided in most cases by taking a careful, introspective approach. It is well worth your time to analyze each facet of your practice and to eliminate any short-coming or habit that might lead to a claim, meritorious or not.

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Stephen Blumberg, a partner in the Fresno law firm of Blumberg, Kerkorian, Andreen, Seng & Ikeda of Fresno, California, has served as a director of Lawyers' Mutual Insurance Co. since 1978. He and the Editor were fraternity brothers at Stanford in the late middle ages. For you sports buffs, his partner Gary Kerkorian played quarterback there at the time.

Graham Speaks

Continued from page 1

Graham reports regularly on the "Law" segment on "The CBS Morning News," and anchors "News Notes and Comments" each weekend on the CBS Radio Network. He serves regularly as the substitute moderator of the CBS News broadcast "Face the Nation."

Graham covered the Watergate cover-up trial, the White House tapes controversy, and a number of criminal cases, including various ABSCAM trials, and the trials of Daniel Ellsberg, John Connally, John Hinckley and John DeLorean. He has received several honors for his reporting, including a George Foster Peabody Award ("During the troubled events of 1974," the citation read, "his singular expertise fully equipped him to clarify for the American public many confused, widely misunderstood issues.") And, in 1973, he won three Emmy Awards for his contributions to CBS News coverage of the Watergate and Agnew resignation stories.

Graham came to CBS News from The New York Times, where he had been Supreme Court correspondent since 1965. Prior to that, he served as Special Assistant to Secretary of Labor W. Williard Wirtz, during which time he also served as Deputy Chief Counsel of the President's Committee on Equal Employment Opportunity.

In January 1963, Graham became Chief Counsel of the Senate Judiciary Subcommittee on constitutional amendments, also serving as legislative counsel for the Subcommittee's chairman, the late Estes Kefauver. From 1960 to 1963, he practiced law in Nashville, Tenn.

Graham received an LL.B. from Vanderbilt Law School (1959), serving as managing editor of the Law Review. He was also a member of the Order of the Coif. He then attended Oxford University on a Fulbright Scholarship, and was awarded a Diploma in Law in June, 1960.

Graham entered journalism as a reporter for the Nashville Tennessean in January 1956, remaining a full-time staff writer until June 1958, when he became press secretary to Mayor Edmund Orgill of Memphis in his unsuccessful gubernatorial campaign.

Fred Graham

A 1953 graduate of Yale University, Graham served as an officer in the U.S. Marine Corps (1953–55), and saw duty as an infantry and intelligence officer in both Korea and Japan.

A native of Little Rock, Arkansas, he served as a consultant to the President's commission on the Causes and Prevention of Violence, and is the author of three books: The Self-Inflicted Wound, concerning the criminal law decisions of the Warren Court; Press Freedom Under Pressure, about the news media and the First Amendment; and The Alias Program concerning the Justice Department's witness relocation program. He was a founding member of the Reporters Committee for Freedom of the Press, and in 1980 was a Regents Lecturer at the School of Law at the University of California at Berkeley.

Show me the way

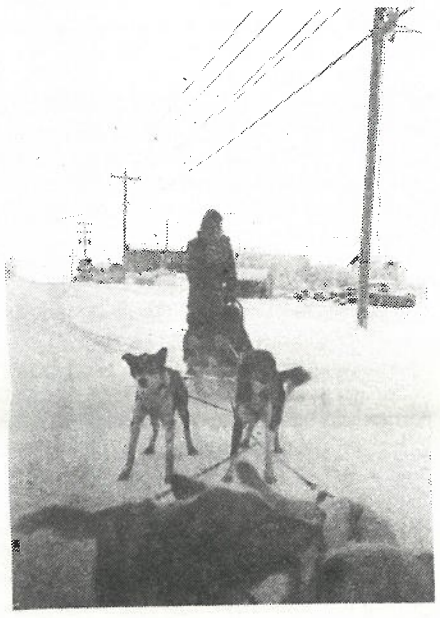
Continued from page 1

taken from the closets and shelves and spread upon the floor. Amid the confusion, children were playing, and a screaming television set competed for viewers with a blaring videotape machine three feet away.

Our arrival was taken in stride. As others made arrangements for our return to Nome, I sat at the kitchen table and listened to the family's 84-year-old grandmother. The grandmother told me the story of her Siberian Eskimo father coming to Alaska in a ski boat, meeting her Alaskan Eskimo mother, and the pair leaving in the boat to make a life on the coast of Russia.

When word arrived that the weather had lifted, we rushed back to the airstrip and hoped that the visibility would hold until we reached our destination. However, one more task had to be completed before take off was possible. While we had been warming ourselves in the home of the agent, a thick crust of ice had accumulated on both the wings and the propeller of the plane. Credit cards proved to be efficient ice scrapers, and we were soon in the air and on our roundabout way to Nome.

In Shishmaref, and throughout the hearing process, testimony presented to the Committee detailed the havoc wreaked by alcohol abuse on the lives of Alaskans. Witnesses pleaded with the legislators for the power to ban the possession of alcohol. Most were under no illusion that banning possession in the village would magically solve the alcohol problem, but they agreed with the Committee Chair that banning alcohol is comparable to applying a tourniquet in an emergency; it is not an ultimate solution, but it may keep the victim from bleeding to death



Rep. Hurley in sled with local musher in Arctic Village.

until more help arrives.

At times the work of the Local Option Committee was like that of a "M.A.S.H." unit—searching for ways to provide immediate temporary relief to a bleeding social wound. Day after day, in village after village, we were immersed in stories of tragedy and suffering. Like a M.A.S.H. unit, the Committee sometimes found relief from the seriousness of its work by laughing at the crazy situations in which we found ourselves.

As a seasoned traveler in the Alaska Bush, I have learned to carry survival gear: extra pants, socks, sweater, scarf, gloves, sodas, candy bars and, of course, a credit card. For protection against the cold, I wear a beaver hat and a full-length otter coat. Although the coat is warm and works well as a wind break, I discovered that this otherwise sensible garment has a disadvantage; the fur is extremely slick in combination with a plastic snow machine seat.

Upon arriving for a hearing in Selawik, we were met by a villager on a snowmachine trailing a sled, who brought us into the village. I rode as a passenger on the snowmachine, and the legislators were packed into the plywood sled we towed behind. The sun was rising over one of Selawik's two bridges as we crossed the frozen river and climbed up the steep bank. Unfortunately, my attention was on the sunrise and not on staying on the snowmachine. As we headed up the bank, I was irrevocably launched on a smooth, slow-motion roll off the seat and into a snow bank. The legislative gallery in tow found my unexpected acrobatic performance to be highly entertaining.

An unexpected event on St. Lawrence Island was one of the month's high points. At a well-attended hearing in Gambell, the serious mood of the audience suddenly changed, as if an electric current had passed through the room. One by one, the participants left the hearing room until the only people remaining were older women, the mayor and members of the committee. I asked a man on his way out the door what was happening, and he explained that some men had just landed a Beluga whale and two bearded fur seals.

En route to Point Barrow, left to right, are Sen. DeVries, Rep. Hurley, Sen. Fischer, and the author.

Meeting at Gambell

(Left to right) Sen. Fischer, Rep. Hurley, Attorney Otto and Committee Chairman Binkley with Bush transportation.

As soon as the testimony was finished, we borrowed snowmachines and headed for the gravel beach where a group of villagers had gathered to help butcher and distribute the catch. The blubber had been stripped off the whale and was laid out and divided into equal portions for the various village families. Many men were working together to haul first the mammoth seals, and then the boats, out of the ice cold Bering Sea.

Muktuk, or whale blubber, is a delicacy—an important item for families in Gambell. The man in charge of butchering the whale had been one of the witnesses who had testified at the hearing. When he saw us down on the beach, he leaned over, sliced off a chunk of fresh muktuk, and laughingly handed us each a piece to eat. The muktuk was tasty—its flavor was vaguely like hazelnuts—but very, very chewy. Fifteen minutes later everyone laughed when two of the legislators were discovered still busily laboring away, chewing on their muktuk.

Travelling the width and breadth of Alaska in winter was an exciting and awe-inspiring experience. But the pleasures of travel were in stark contrast to the bleakness of the world described by those testifying at the local option hearings. Listening to the testimony was a sad and moving experience. Innocent non-drinkers seemed to be those suffering the most from alcohol abuse. Witnesses described the children who had suffered, and would suffer for the rest of their lives, because of fetal alcohol syndrome, and the elders with medical problems caused by anguish and worry about an adult child who was abusing alcohol.

Some of this worry and fear touched the Committee the day it flew to Nunapitchuk for a hearing. As the plane swooped low over the broad, frozen expanse of the Kuskokwim River, we could see that it was dotted with dozens of dark spots—holes punched in the ice so that nets could be let down to drag for the body of a person who had drowned in an alcohol-related accident.

Listening to witnesses describing their lives, I learned more about the legal problems of rural Alaska than I had in years of reading reports and practicing law. I learned how badly our system of government works or, more accurately, doesn't work in many Alaska communities. I came to the conclusion that in too many instances, state government is both insensitive and inappropriate to meeting the real and pressing needs of the people.

For example, villagers want minor criminal problems committed within their community to be addressed while the problems are minor, in order to prevent more serious crimes from occurring in the future. But the troopers make plain that they do not investigate misdemeanor cases; and when local officers make arrests, the cases are frequently dismissed by district attorneys who find that village police investigations are inadequate to support criminal charges. Yet, when villagers ask the state to cooperate in setting up alternative systems to handle problems within the village, they are not only told that alternative systems are impossible, but are also told that no changes will be made in the way the current state system is operated. In other words, we won't help you and we will fight you if you try to help yourselves.

In recent years, governmental solutions to the problems of rural Alaska have involved sending in more and more money and creating more and more social programs. These "solutions" have increased the dependency of villagers on state government, but for the most part they have not proven to be effective in dealing with the social problems in the villages. In light of what I learned studying alcohol abuse and the problems related to it, it is difficult for me to be optimistic that state government will find, or be able to implement, adequate and realistic solutions to rural Alaska's social ills. Good clear-cut solutions to the problems do not seem to exist within the current framework of state government.

Of all the villages to which the Committee travelled, Arctic Village was unique. It is the only place where alcohol was not identified as the major community problem.

Arctic Village is spectacularly beautiful—a small grouping of log houses nestled in a

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Show me the way

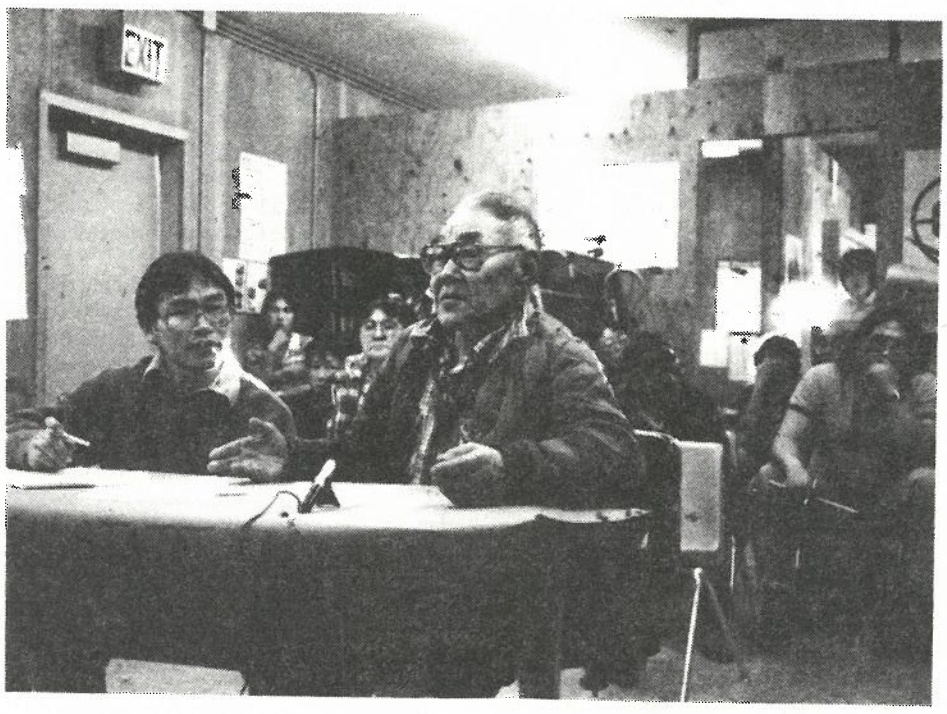
Continued from page 8

wooded valley with peaks of the Brooks Range rising on either side. The sun reflected brightly off the mountainsides on the cold, clear morning we flew into the village. Arctic Village is part of the old Venetie Reservation, and is one of the very few communities in Alaska that chose to opt out of the corporate structures set up by the Alaska Native Claims Settlement Act.

In the Committee hearing, the people of Arctic Village testified that they had banned alcohol many years ago. They described how they exercise their prerogative as private landowners to search anyone coming into the village and to destroy any alcohol they find. People that do not consent to the search are not allowed into the village. Post-hearing investigation confirmed testimony that there has not been a felony committed in Arctic Village since the early 1970's.

The children of Arctic Village were the highlight of the entire month of hearings. We were lucky enough to arrive on the same day that the Air Force flew in Santa Claus with a sackful of hand-picked presents. Continuing a twenty-year tradition, the villagers put on a potlatch for Santa and his Air Force escort. Huge pots of caribou stew and platters of baked caribou vied for table space with mounds of homemade biscuits and steaming hot fried bread during the potlatch feast.

While the adults ate and talked and laughed, the children of the village—dressed in beautiful moose skin shirts and dresses intricately decorated with beadwork—gathered around Santa Claus waiting for their names to be called. Sometimes, a child would be paralyzed when her name was called, or would run to his parent for reassurance, before finally approaching the man in red and accepting Santa's gift. As we left for the Arctic Village airstrip, I realized that this was the first time I had left a community during the entire month of hearings without feeling depressed and hopeless about the future.



Akiachak village elder William Lomack with interpreter

If the future is to be brighter for rural Alaska, changes must be made in the relationship between the government and the villages. The longer I listened to the people of rural Alaska, the clearer it was that the social problems of rural Alaska simply do not fit within the framework of the existing state government; and the existing framework seems incapable of effectively fitting itself to the problems it is called upon to address. The Local Option Committee learned to adapt the tools familiar to western life, like credit cards, to new and creative uses in rural Alaska. The existing government and policy framework needs to be adapted in new, and previously uncontemplated, ways to address the crises which is corroding the social fabric of rural villages.

Laurie Otto travelled the Alaska Bush with the members of a joint legislative investigation committee comprised of Senators John Sackett, Vic Fischer and Edna DeVries together with Representatives Johne Binkley (Committee Chairman), Katie Hurley and John Sund. Her more complete findings may be reviewed in her report to said committee: "A Search For Control—The Effect of Alcohol on Public Rights and Private Wrongs."

The success of this effort is reflected in the recent passage by both houses of HB700. This "Local Option" legislation will allow the passage by individual villages of local regulations forbidding the possession of alcohol—the measure that has proved in Arctic Village effective.

Editor

. . .Continued from p. 3

In the Mail

Dogfile

Editor
Alaska Bar Rag
310 "K" Street, Anchorage, Alaska 99501

Dear Sir:

The paean penned by Dean Guaneli and Barry Stern, extolling the development of Alaska Criminal Justice under Dan Hickey, was most enlightening. Recent events have perhaps confirmed Mr. Hickey's and Professor Stern's views on one aspect of the 1982 criminal law legislation.

Professor Stern discusses his work as the front man for Hickey's opposition to "Draconian Measures" proposed by Ramona Barnes. While not discussing the "Draconian Measures" attributed to *Chairman* Barnes (she always eschewed the label of "Chair" or table or doorstop or any other such item, in favor of the traditional one. . .perhaps another reason to be suspicious of that lady as less than a devoted member of the fuzzy New Age Movement), I will comment on the "dog story" covered by Professor Stern.

He points out that during one part of his testimony to the 1982 House Judiciary committee, the police dog crime was called a joke, and indicates that this linguistic blunder caused his banishment from the Judiciary Committee room. The history of that aspect of the matter is that the rewritten so-called Omnibus Crime Bill—rewritten from the from sent over by Hickey and Professor Stern to both Houses at the beginning of the Session—was carried up to Governor Hammond's office. There I was able to explain the entire bill to the Governor in the course of an hour's discussion, and I found that he easily understood the arguments for and against the proposed changes in Titles 11 and 12. From the comments which had been made up to that point by the representatives of the Department of Law, at Judiciary Committee meetings, one would think the Governor of the State had little interest in, and less comprehension of the enforcement of criminal law in Alaska.

Anyway, I specifically remember the Governor being interested in the "police dog crime" which punished the physical (not the psychological) attack on a police dog while on duty. This portion of the bill had been placed there at the specific request of the Anchorage Police Department Employees' Association, and we did not anticipate a great deal of opposition to it. Governor Hammond pointed out that his wife would particularly like that aspect of the bill, since she had such affection for their own canine pet (can't recall the exact name of the dog in question, although I'm sure it was not "Checkers"). He considered the entire rewrite of the bill, found it favorable, and assured us of his support, dismissing me with a spontaneous recitation of an ode to lawyers (I should have jotted it down).

It is true that this was all done without going through the "proper channels" or, in other words, without benefit of the previous imprimatur by Hickey and Stern. When Stern showed up, about two hours later, to review the rewrite of the bill one could virtually see steam pouring out of his ears, and an angry glare in his eyes. The committee meeting commenced, perhaps an hour later, and I recall that Stern was the first to testify, that he quickly zeroed in on the "dog section". He did state that when he first read it he thought it was a joke, and indicated that it did not appear to be justified legislation: that is, punishing the assault on a police dog while on duty. This, despite the source of the idea for the legislation and the fact that similar legislation had already been adopted in the worthy state to our south, Washington. I believe the "police dog bill" died that session, thanks to Stern and Hickey.

Well, now it seems that Professor Stern's comments were not treated with proper respect, (considering his prosecutorial experience by that time in 1982 and his esteemed position as a professor law back on the East coast at this time. Of course, Hickey himself had prosecuted a case once, too).

All this was brought to mind by the recent article in the Anchorage Daily News (February 16, 1986) which I am enclosing and which perhaps you can arrange to reprint. The article discusses the acquittal of the Ketchikan man charged there under the eventual legislation which sought to protect police dogs from molestation. As near as I can tell from the article, the defendant was accused of psychologically damaging that canine, who was on official duty with the Ketchikan Police Department. Having committed such heinous acts as barking at the dog, and otherwise acting with a lack of decorum acceptable to the Ketchikan authorities, the malefactor was duly prosecuted under that "police dog" law. Apparently he was "arrested on the spot and spent the night in jail" although he eas eventually acquitted by a jury of his peers.

The article states that "District Attorney Mary Anne Henry, who has been very busy lately on a case involving eight murders (presumably spending a bit of that time on presenting and representing evidence to various grand juries), defended the decision to prosecute: " 'We've got this new statute on harming a police dog,' she said. 'We had felt this fellow had deliberately tried to aggravate the dog. So we said 'Let's try it and see what happens.' " Good thing the fellow didn't set out to deliberately aggravate *Mary Anne!*

I am familiar with the zealousness of Ramona Barnes in protecting animals, particularly dogs, from the incursions of cruel and thoughtless human beings. Why, I recall her bringing the subject up to the Nome City Council—that is the subject of the "dog rapes" going on in that area asking what would be done about the problem. It had been brought to her attention by the then Nome District Attorney, Michael White (now a District court Judge and also Superior Court Judge Pro Tem) who was quite disturbed over the dog molestation problem on the Seward Peninsula in 1981, and sought her intervention. (I believe that Mike's dog had been a victim of bestiality by some polar pervert.) I don't know what happened up in Nome, but I know that at least that concern, coupled with the Anchorage Police Department Employees' Association concern over their canines' physical integrity, eventually resulted in the law in question. Too bad that the rest of us could not have avoided a "knee-jerk reaction" as Mr. Hickey did on a number of occasions, per report of Stern. It seems that Professor Stern's jurisprudential analysis may have been right all along, and that the whole dog law has turned out to be a bad joke, if someone like Mr. Demmert in Ketchikan can be prosecuted to the fullest extent of the criminal law for barking at a dog. . .even a police dog. . .even a Ketchikan police dog.

Then again. . .could it be that the problem is not with the law, whether it was "jokingly passed" or not, but with the prosecutorial application of it—let's try it and see what happens"—?

William D. Cook
Attorney at Law

JURY FINDS BARKING MAN NOT GUILTY

A man arrested after barking at a police dog in Ketchikan got the last howl. Last week, a jury found Craig Demmert, 28, violated no law.

The victim, a German shepherd named Gauner, 6, missed the trial.

District Attorney Mary Anne Henry, who has been very busy lately on a case involving eight murders, defended the decision to prosecute.

"We've got this new statute on harming a police dog," she said. "We had felt this fellow had deliberately tried to aggravate the dog. So we said, 'Let's try it and see what happens.'

"We saw what happens."

Task force to look at public defense appointment

The problem of abuses in appointment of public defenders across the state is receiving a close look at this time because of the need to trim dollars from both state and local budgets. A task force made up of city and state officials, judges, defense attorneys and prosecutors has been meeting for the past several months to try to find the causes of the problem and come up with realistic solutions. This group, chaired by Al Szal, the Area Court Administrator for the Third Judicial District, has focused on four major areas for discussion: indigency standards, pretrial services staffing, use of voluntary attorneys, and efforts by individual judges to screen defendants.

There are far too many "war stories" of crazy appointments that should never have been made. How about a DWI defendant who is appointed a public defender, then ordered to reimburse the state up to $4,000 for the cost of his defense? Why shouldn't he be paying the money to a private attorney instead of to the state? Or the defendant who asks for an O.R. release so that he can return to work on the North Slope and then is appointed a public defender?

The task force views the lack of standardized indigency screening guidelines as the crux of the problem, and one of the first steps to be taken by the task force will be a poll of the entire State Bar membership. The poll will be taken to try to determine the actual costs for defending different crimes in the various jurisdictions. With the results of this poll, the task force will be able to draft better indigency standards for use by the judges when making appointments.

Another major problem being faced by the task force, once the standards for indigency are determined, is how to acquire the information necessary to make a proper determination of indigency in individual cases. For example, in Anchorage there is currently one person serving in the Pretrial Services office. This person has the responsibility to carefully question defendants as to their financial status and ability to pay for representation and, based upon this interview, make recommendations to the court. One person, however, cannot possibly handle all the cases in the Anchorage area.

Unfortunately, under the current budget crunch, increased staffing is highly unlikely. Since the legal responsibility for determining indigency falls upon the court, it is the individual judges who eventually carry the burden of this task. For most judges, this means spending valuable time on the bench asking questions about a defendant's financial status, digesting the often sketchy information on the spot, and then making an immediate decision. When the information is vague or incomplete, the judge has no time to further inquire, and often will simply appoint the Public Defender as the safest or easiest course of action. The result is a substantial number of defendants with free counsel who could and should be providing their own.

A substantial number of the "problem" cases are misdemeanors, and of those many are DWI cases. A large majority of misdemeanor cases are resolved short of trial. Some misdemeanor defendants simply want to consult with an attorney before finally deciding what plea to enter. Many of these cases are resolved after only a few hours of work by the attorney, work which could easily have been paid for by the defendant.

The general opinion of the task force meeting in Al Szal's office is that the right solution will end up being a win-win situation. If any defendant who can afford to pay is taken off the public defense case list, the taxpayer realizes a substantial savings. At the same time, the private bar will then be in a position to have additional private clients who pay for the services being provided.

The task force has inserted a survey form in this Bar Rag in an effort to prepare accurate standards by this summer. We need the cooperation of practitioners throughout the state to insure that we devise accurate standards for each judicial district. Please return the survey as indicated. In the meantime, if anyone has any suggestions or can offer assistance, you can call Al Szal at 264-0415.

ALASKA BAR ASSOCIATION
News & Notes

Gubernatorial Candidates Converge on Valdez

"Twelve!"

"Yes, that's what I said, 'twelve candidates for governor.' "

"You've got to be kidding."

"I'm not kidding; after all this *is* Alaska!"

So went a recent conversation of mine with a CLE colleague in another state. Alaskans, I explained later, take their politics very seriously and the crowded pre-primary field of candidates proves it. Further proof? Nine of the 12 gubernatorial candidates, as we go to press, have indicated they will participate in the "Meet the Candidates" gubernatorial forum event scheduled for the Alaska Bar Association Annual Convention in Valdez this June.

The forum, open to the press and public, will take place at 2:30 p.m., Saturday, June 7, in the theatre of the Valdez Civic Center. Those accepting the bar's invitation to participate are Joe Hayes (R), Ed Hoch (Lib), Bob McGrane (R), Dick Randolph (R), Bob Richards (R), Ron Somerville (R), Arliss Sturgulewski (R), Joe Vogler (Ind), and Donald Wright (R). Both Governor Bill Sheffield (D) and Steve Cowper (D) are unable to attend because of other commitments. However, both Sheffield and Cowper will be available to participate by phone.

Dave Call, Elizabeth "Pat" Kennedy and William "Bart" Rozell are following candidates and campaign issues and will be prepared to direct some pertinent, perhaps tough questions at the candidates. Candidates will also have an opportunity to make statements to the bar. During a break in the afternoon event, members of the audience will have an opportunity to submit additional questions to the candidates.

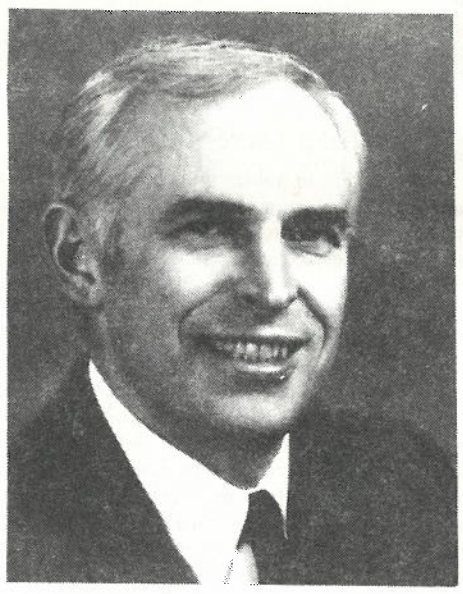
This is an event you won't want to miss!

—Linda Nordstrand, CLE Director.

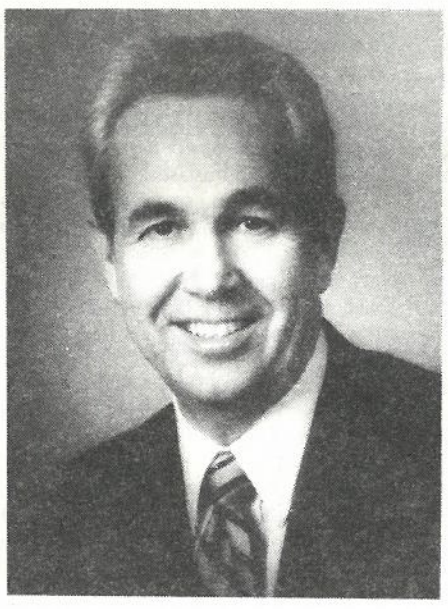
Don Wright

Arliss Sturgulewski

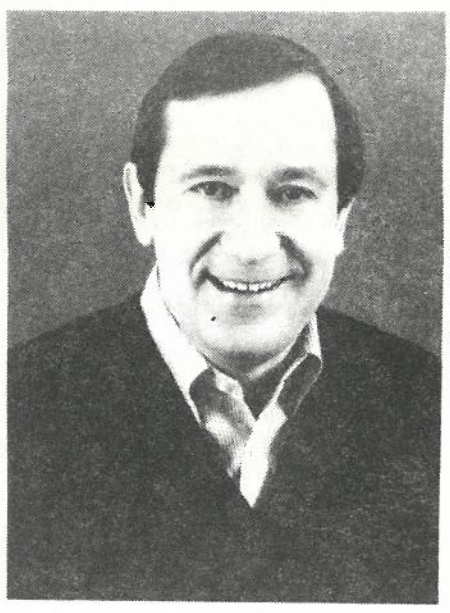
Dick Randolph



Ron Somerville

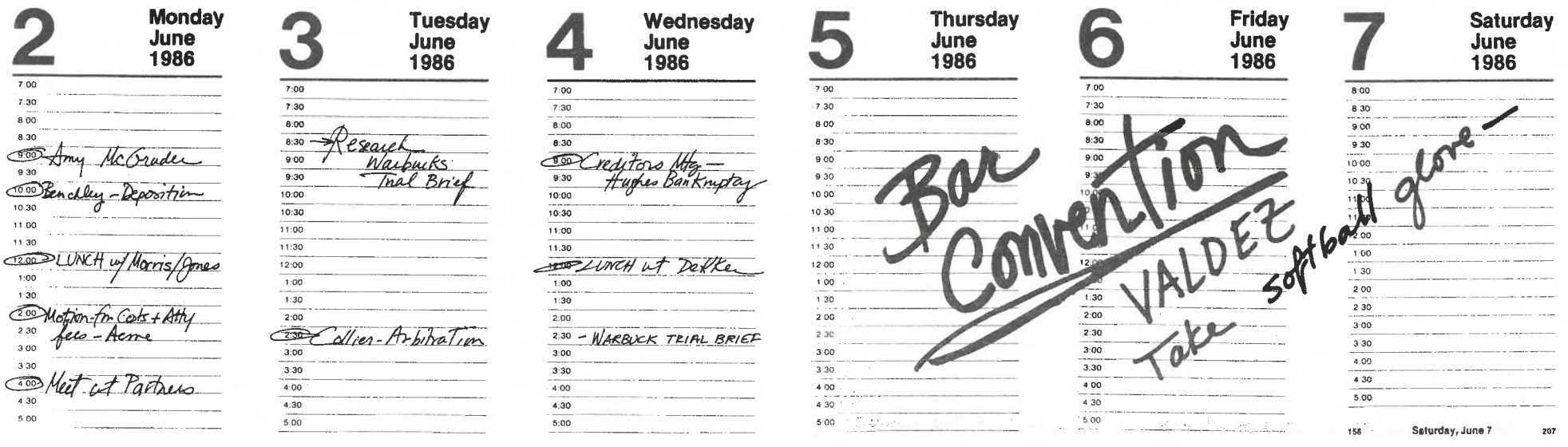


Joe Hayes



Bob Richards

Bob McGrane



Board of Governors Schedule

The following is a list of the meetings of the Board of Governors during Harry Branson's term as president. If you wish to include an item on the agenda of any Board meeting, you should contact the Bar Office or your local Board member at least three weeks before the Board meeting.

June 2, 3 & 4, 1986 — Valdez

ALASKA BAR News

Don't Miss Convention '86

Continued from page 1

associations and seminar groups. Kaufman's clients have included Bob Dylan, Ali McGraw, Vidal Sassoon and members of the Fortune 500 families.

There is perhaps no more hotly debated topic confronting the bar at present than tort reform. Saturday morning, Bernie Kelly, Michael Thomas, Michael Geraghty and Joe Young will bring you up to date on the latest in developments of this controversial issue.

Feeling stressed-out? Saturday morning, bar members, spouses and guests are welcome to attend a seminar on "Stress Management." Bruno Kappes, a UAA psychology professor, a licensed psychologist in private pratice and director of the Anchorage Biofeedback Clinic will discuss what is and isn't stress, relaxation strategies and coping, and occupational and family stress.

Bar Business

The Alaska Bar Association will hold its annual business meeting on Friday, June 6, beginning at 9 a.m. in the Civic Center theatre. Members will discuss and vote on resolutions submitted for their consideration (see "Resolutions" in the center section of this Bar Rag), hear the reports of the President and President-Elect, elect new officers to the Board of Governors, hear committee reports and the results of the CLE survey. As an added attraction Hal Brown, Alaska's Attorney General, has been invited to speak to members during the business meeting.

All of the substantive law sections will hold their annual meetings on Friday afternoon. Section committees are preparing their annual Professional Updates on the latest in their respective areas of law. Section members will also elect new executive committee members for the coming year.

Exhibitors

Twelve exhibitors will be on hand to ply their wares. Some will be familiar from previous conventions: The Michie Company, West Publishing, Book Publishing Company, Matthew Bender & Company, and the Alaska Pro Bono Program.

There are also some new exhibitors: Bayly, Martin & Fay of Alaska, Executive Travel Service, the Conflict Resolution Center, Litigation Support Services/Arcade Electronics, Bancroft-Whitney Company, the Valdez Convention & Visitors Bureau, the Blue Cross of Washington and Alaska

Executive Travel Service, the bar's travel agent, is donating a $250 travel gift certificate to the winner of the exhibitors' drawing. Each convention registrant will need to have their drawing entry card initialed by a representative of each exhibit to be eligible for the drawing. The winner will be announced at Saturday evening's banquet.

Fun

What's a convention without some socializing and good eating! Relax, greet old friends, see some new faces at Thursday's informal "Get Reacquainted" buffet lunch. Work out the kinks from sitting through the afternoon CLE programs by participating in Thursday afternoon's Mineral Creek Run footrace. This event is co-sponsored with the Valdez Parks and Recreation Department, so expect a good turnout from local running enthusiasts.

Bar members, spouses and guests are encouraged to get in some throwing and batting practice for Thursday evening's softball tournament at the fabulous Valdez softball facility, the Valdez Gold Fields. An all-you-can-eat barbecue is being prepared for winners, losers, family and guests.

Friday evening begins with a cocktail reception at 6:30 p.m. compliments of the Sheffield Valdez Hotel. From the hotel it is a short walk to the Sheffield Dock to climb aboard the *Vince Peede* or *Glacier Spirit* for a cruise of Prince William Sound. Enjoy a sumptuous meal in a warm and dry environment while experiencing the beauty and grandeur that is Alaska. Warm, casual dress is recommended. Space is limited, so don't delay registering for this event!

Don't miss the "Meet the Media" luncheon scheduled for noon on Saturday. Guest speakers include Sheila Toomey of the *Anchorage Daily News*, John Larson of KTUU-TV, John Marrs of the *Peninsula Clarion*, and Fred Graham, CBS News Law Correspondent. Hear their views on the bar and the media and have an opportunity to ask some questions of your own.

"Meet the Candidates" for governor in a gubernatorial forum scheduled for 2:30 p.m., Saturday afternoon, in the Civic Center theatre. Dave Call, Pat Kennedy and Bart Rozell are keeping track of candidates and issues and will direct some tough questions at the candidates.

The culminating event of the Alaska Bar Association 1986 Annual Convention will be Saturday evening's banquet featuring guest speaker Fred Graham, CBS News Law Correspondent. Graham's topic is "Law in the Reagan Era." The evening and the convention will conclude with Harry Branson passing the gavel to new Alaska Bar Association President, Ralph Beistline.

Arrive a few days early or stay on after the convention to enjoy many of the activities in and around Valdez. This is a convention you should not miss!

Getting There

Fly to Valdez and then enjoy a relaxing return trip via cruise ship through Prince William Sound. Or cruise to Valdez and return by motorcoach or bus. ERA/Alaska Airlines Commuter Service offers several flights daily to and from Valdez and, if demand is high, will add flights to accommodate bar members' travel plans. Alaska Sightseeing Company has added a new touring yacht, the *Glacier Seas*, for the 1986 season. Westours also offers their cruise aboard the *Glacier Queen*. Both companies also offer motorcoach trips along the Richardson and Glenn Highways. The Valdez-Anchorage Bus Line and the Alaska Marine Highway System are additional transportation alternatives.

Take advantage of special group airfares or get together a group and charter a bus. Hook up with another couple—one couple can drive while the other couple cruises, then switch for the return trip; making getting to Valdez a scenic adventure.

1986 CLE SUMMER SCHEDULE

Date	Time	Topic
May 20	7:00 a.m.–9:30 a.m. The Hotel Captain Cook	Liability and How to Present It (Evidence Mini-Seminar, "Breakfast Series")
June 5	1:00 p.m.–4:00 p.m. Valdez Civic Center	Inverse Condemnation Criminal Pre-Trial Practice Pre-Marital Agreements
June 7	9:00 a.m.–12:00 noon Valdez Civic Center	Tort Reform Stress Management
June 17	7:00 a.m.–9:30 a.m. The Hotel Captain Cook	How to Present Damages (Evidence Mini-Seminar, "Breakfast Series")
July 10 and 11	9:00 a.m.–5:00 p.m. Egan Convention Cente	1986 Tax Conference
July 24	To Be Announced	Law Office Economics
August 16	To Be Announced	Effective Legal Writing

Recent arbitration decisions summarized

RECENT DECISIONS

85-02 (3/10/86) Fees, interest and costs charged for the purpose of rendering requested services allowed. Fees incurred for the purpose of withdrawing from law suit disallowed.

85-06 (10/25/85) Portion of fees charged for the purpose of drafting and filing a motion to withdraw disallowed. Attorney may not charge for time unrelated to efforts on behalf of a client. Attorney may not, during the course of a fee review adjust fees upward.

85-07 (10/25/86) Good business practice and basic considerations of contract law suggest that fee arrangements, particularly contingent ones, should be in writing. In the absence of a writing, the issue of a fee understanding is resolved against attorney and in favor of client's "assumption" of an hourly fee. Fee reduced by $2,016.67.

85-14 (1/24/86) Attorney may not unilaterally modify fee agreement after legal services provided, even though attorney was substantially under compensated for his time in connection with matter. The measure of the fee, if it is to be based on economic benefits to the client, rather than actual amounts of damages recovered, must be expressly agreed between attorney and client. Fee reduced by $1,561.

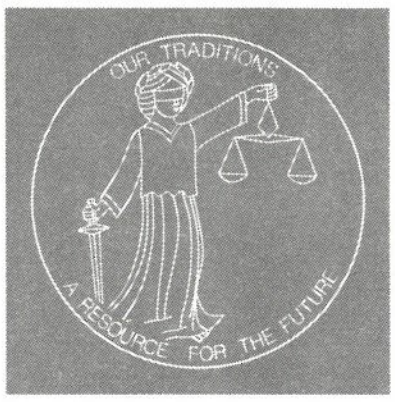
85-21 (12/31/85) Attorney fees time barred and disallowed when no claim made against the estate for attorney fees when it was obvious that client was acting to the benefit of the estate prior to appointment as personal representative.

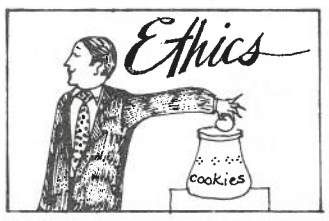
85-28 (4/3/86) Having given an estimate of the maximum charge, it was incumbent upon the attorney to discuss situation with client as soon as it became apparent that those charges would be exceeded. Attorney should have advised client and obtained authority before exceeding the limit and expectation of the client. Having omitted to reduce fee agreement to writing, having failed to explain hourly rates, having failed to notify client that charges would exceed estimate, attorney must abide by clients understanding of fee agreement, even though attorney clearly earned three times that much.

85-32 (3/17/86) Client sought refund of fees paid because of delays and poor judgement of attorney. Panel found that attorney performed bona fide work for which attorney is entitled to recover. Makes no finding as to effectiveness of work.

On separate case, contingency fee disallowed when client was severely injured and taking pain medication when asked to sign fee agreement. Attorney's duty is to adequately inform client of terms and conditions of contingency fee agreement. Attorney compensated at $120 per hour.

ASSOCIATION
Notes





Opinions adopted

Serving on credit committees
ETHICS OPINION NO. 86-2

Re: Service of an Attorney or Firm on a Creditor's Committee Formed Under a Petition in Bankruptcy Filed by a Former Client

The Committee has been asked whether a law firm may serve on a creditor's committee formed as a result of a petition for relief filed by a former client under Chapter XI of the Bankruptcy Act. The firm is one of the largest creditors due to fees owed by the former client; during the past representation of the client, the firm gained knowledge or had access to the client's financial affairs.

The Committee has concluded that a law firm should not serve on a creditor's committee under these circumstances, unless an informed an effective consent has been obtained from the former client.[1] Service on a creditor's committee creates a fiduciary duty of the committee members toward the class of creditors represented by the committee; the law firm may not be able to discharge this duty without violating confidences of the former client.

DR 4-101, Code of Professional Responsibility, provides an exception to the requirement that an attorney maintain confidences of a former client where necessary to collect a fee. DR 4-101 provides in part.

> "(B) Except when permitted under DR 4-101(C) and (D), a lawyer shall not knowingly during or after termination of the professional relationship to his client:
>
> (1) Reveal a confidence or secret of his client.
>
> (2) Use a confidence or secret of his client to the disadvantage of the client.
>
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.
>
> (C) A lawyer may reveal:
>
> (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
>
> (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
>
> (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
>
> (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.
>
> (D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee." [Emphasis supplied.]

The Committee believes that the firm may therefore pursue its claims in bankruptcy, and may reveal matters necessary to achieve protection of those claims. However, DR 4-101 would still restrain the firm from revealing matters learned during the course of representation of the former client to the creditor's committee, if those matters were not required to be revealed to protect the firm's claims and would violate DR 4-101(B)(2) or (3). Such limited participation on the creditor's committee may itself be a breach of fiduciary duty owed by the firm to the class of creditors represented by the creditor's committee. See *Re Christian Life Center, etc.* (1981, BC ND Cal) 16 BR 35 concerning the fiduciary obligations of the members of creditor's committee.

Under the facts presented, the Committee has assumed that no professional relationship would exist between the firm and the members of the creditor's committee, although such relationship is possible under the bankruptcy laws. See 11 U.S.C.S. Sec. 1103(a). This situation would be similar to that involving representation of a third party against a former client, where there is a substantial possibility that knowledge gained during the course of that representation is clearly prohibited from disclosure by DR 4-101 and Alaska law. See *Aleut Corporation vs. McGarvey*, 573 P.2d 473 (Alaska 1978) and *Burrell v. Disciplinary Board of Alaska Bar Association*, 702 P.2d 240 (Alaska 1985).

Adopted by the Alaska Bar Association Ethics Committee on March 11, 1986.

APPROVED BY THE BOARD OF GOVERNORS on March 21, 1986.

[1]See *Committee to Study Unauthorized Practice of Law Report to the Vermont Supreme Court*, October 28, 1983.

[1]Of course, a law firm may serve on a creditor's committee without debtor consent if no present or former attorney-client relationships existed between the firm and the debtor.

Summaries of private admonitions

Attorney A received a written private admonition for stipulating to dismiss an appeal after telling his client that the client had to find another attorney willing to take the appeal by a certain deadline. Attorney A had decided that the appeal would not be successful. Attorney A was advised that if an attorney disagreed with the client's decision to continue the appeal, the only alternative was to request withdrawal. An attorney has no authority to dismiss an appeal without the client's consent.

Attorneys B and C received written private admonitions because, as members of the same firm, they represented separate businesses with interests opposed to each other and also openly discussed separate client matters with each other. As a result, there was a conflict of interest and disclosure of client confidences and secrets.

Attorney D received a written private admonition for continuing to practice law after he had been suspended for non-payment of Alaska Bar Association dues and penalties. The circumstances showed unintentional but nevertheless grossly negligent conduct by the attorney.

Attorney E received a written private admonition for expressing his personal opinion concerning a case during trial and engaging in undignified and discourteous conduct before the court by making various pejorative references to opposing counsel during the trial.

Attorney F received a written private admonition for communicating with a party he knew to be represented by counsel without that counsel's consent.

NEW DATE!

Medico-legal Aspects of AIDS in Alaska

PANEL DISCUSSION
Wednesday, June 18, 1986; 5:30 p.m. to 7:30 p.m.
Bar Association Conference Room, 310 "K," Suite 602, Anchorage

The Alaskan AIDS Assistance Association (AAAA), a nonprofit Alaskan corporation dedicated to disseminating up-to-date educational information on the presence of Acquired Immune Deficiency Syndrome (AIDS) in Alaska, its transmission, treatment, prognosis and other factors, as well as helping patients suffering from the syndrome, is presenting a panel discussion for members of the Alaska Bar Association concerning AIDS and legal needs of AIDS patients. The areas the panel will cover include the medical features of the disease, how it affects patients, the epidemic as it has touched Alaska and the probable future spread in this area, the AIDS test and its significance both to the patient and the public, legal needs which could be anticipated by "risk" groups and which arise upon onset of symptoms of AIDS or AIDS-related disability, and civil rights connotations of public reaction to the disease.

Dr. Frederick J. Hillman, founding member of AAAA, physician and family therapist, will moderate the meeting, adding his own comments on research and information he has compiled on the subject. The panelists will be:

Martin Palmer, M.D., also a founding member of AAAA and an Anchorage internist in private practice. Dr. Palmer was trained at Johns Hopkins and Tulane, and he will be devoting his discussion to the medical aspects of AIDS and observations he has made in treating afflicted patients.

Mary Lee Cook, RN, supervisor of the Sexually Transmitted Disease Clinic of Anchorage. Ms. Cook is not only a registered nurse, but she has a Master of Public Health degree. She will be discussing the AIDS test, the counseling involved and will give insights on the incidence of the syndrome in Alaska.

An attorney participant, to be named to the panel, will speak to the legal needs which concern both the patient and the patient's family, preparation in relation to business interests and settling estate questions.

Allison Mendel, J.D., of Alaska Legal Service will be speaking on civil rights as it relates to the AIDS epidemic. She is a graduate of the University of California, Davis Law School, and is a member of the Bars of California, Washington state and Alaska. Before becoming affiliated with Alaska Legal Services, she served as a law clerk for Judge Betty Fletcher of the 9th Circuit in Seattle, and she specializes in anti-discrimination, equal employment and family law.

Submitted by Sylvia L. Short

Election year reminder

As election year activities increase, there have been several flyers distributed to members of the Bar Association soliciting their contributions and support to various political campaigns. The Discipline Section would like to remind members of the Association that members of the judiciary are prohibited under Canon 7 of Judicial Conduct from acting as a leader or holding office in a political organization, making speeches for a political organization or candidate or publicly endorsing a candidate for public office, soliciting funds, paying assessments or making a contribution to a political organization or candidate, attending political gatherings, or purchasing tickets for political party dinners or other functions. Bar members or others purchasing membership labels from the Bar Association for these activities should request that the staff delete the labels of judicial members.

Internships sought

The German-American Lawyers Association (GALA) is interested in compiling a list of law firms that would be interested in hosting a young German lawyer for approximately a three-month legal internship. These students are in the second phase of their German legal education. The law student (Referendar) must complete a practical phase of 2½ years of seven internships, each a duration of 3 to 4 months. As the Referendar receives a salary from the state, no financial burden need be placed upon the firm. The cultural and professional experience gained by the Referendar would be significant. If interested, please contact Linda Nordstrand, CLE Director, at the bar office, at 272-7469.

Volunteers needed

The Alaska Association of Legal Assistants is requesting volunteers to videotape their CLE seminar which is being held in conjunction with the National Federation of Paralegal Associations (NFPA) Region I Conference this fall. The seminar will be held on Saturday, September 27, at the Hotel Captain Cook. Three volunteers are needed: one to tape the morning session from 9:00 a.m. to noon and two to tape two concurrent sessions from 1:30 p.m. to 4:30 p.m. Anyone interested should contact Anne M. Andritsch, Alaska Association of Legal Assistants, P. 0. Box 101956, Anchorage, Alaska 99510-1956.

ALASKA BAR ASSOCIATION

Resolutions waiting for your vote

1. WHEREAS, the Conflict Resolution Center (CRC) was established in 1982 as a direct result of the efforts of the Alternative Dispute Resolution Committee of the Alaska Bar Association to provide alternative dispute resolution services to the Anchorage community at large; and

WHEREAS, CRC has provided and continues to provide high quality conciliation, mediation, arbitration, family mediation, landlord/tenant and fee arbitration services to thousands of residents of Southcentral Alaska annually; and

WHEREAS, the Alaska Bar Association wishes to commend CRC for its continuing successful activities which the Association continues to support.

NOW, THEREFORE, BE IT RESOLVED, the Alaska Bar Association hereby publicly commends CRC for its contribution to the improvement of the administration of justice in Alaska and invites CRC to present a report on its activities to the membership assembled at the Association's Annual Convention in Valdez, Alaska, on June , 1986.

Signed by 10 members of the Bar.

2. Be it resolved that the Alaska Bar Association shall make its best efforts to secure, at the earliest possible time, creation of an additional Superior Court position at Kenai and an additional Superior Court position at Palmer.

3. Be it resolved by the Alaska Bar Association that the Executive Director of the Bar is directed to investigate the possibility of setting up a self-insurance pool for all members of the Bar Association pertaining to errors and omissions insurance coverage, with the Executor of Director to report to the board of Governors by December 31, 1986 as to the feasibility of such a plan and proposing various alternative self-insurance plans.

Submitted by the Kenai Bar Association.

4. Be it resolved by the Alaska State Bar Association that the Bar Association shall to petition the legislature to provide for a statutory scheme relating to claims made against attorneys for malpractice or other errors or omissions similar to the medical peer review board provided by AS. 09.55.536 and burden of proof provisions similar to AS. 09.55.540.

Submitted by: Kenai Bar Association

5. Be it resolved that a new Disciplinary Rule be adopted:

DR 2-11 Telephone Calls from Lawyers

A lawyer is subject to discipline if he or she refused a telephone call from another lawyer on the basis that he or she is with a client or in conference.

Submitted by: Tanana Valley Bar Association

6. Be it resolved that a new Disciplinary Rule be adopted:

DR 2-11 Instructing Office Personnel on Basic Courtesies to Counsel

A lawyer shall instruct all of his or her office personnel to read the yellow page listings of attorneys, or a directory of attorneys, and learn the names of the local attorneys and how to spell them and to refrain from asking any local lawyer calling that office to spell his or her last name.

Submitted by: Tanana Valley Bar Association

7. Be it resolved that the Alaska Bar Association recommend to the Alaska Legislature that the Department of Health & Social Services, Division of Family & Youth Services, be abolished.

Submitted by: Tanana Valley Bar Association

8. Be it resolved that the Alaska Bar Association do no business with South Africa or Libya.

Submitted by: Tanana Valley Bar Association

9. WHEREAS, the Tanana Valley Bar Association has been made aware of an outrageous sum held as surplus by the Alaska Bar Association, and;

WHEREAS, the Tanana Valley Bar Association is mindful that such excess is the result of a surplus of dues paid by members of the Alaska Bar Association over operating expenses of the Alaska Bar Association, and;

WHEREAS, the Tanana Valley Bar Association is fearful that such surplus will become the prey of such predators as the Alaska State Legislature and other eleemosynary organizations, and;

WHEREAS, it is the belief of the Tanana Valley Bar Association that if we don't spend it first, someone else will, and;

WHEREAS, it is the belief of the Tanana Valley Bar Association that if somebody else spends it for us we will receive little if any benefit, and;

WHEREAS, the Tanana Valley Bar Association is mindful of the long and harsh winters that occur in the State of Alaska and the effect of such winters on the members of the Bar;

NOW, BE IT RESOLVED, that the Tanana Valley Bar Association recommends to the Alaska Bar Association that any surplus of funds existing at the end of the last fiscal year of the Alaska Bar Association be spent for the benefit all members of the Alaska Bar Association, and be it

FURTHER RESOLVED, that such surplus be spent on a ROAD TRIP.

Submitted by: Tanana Valley Bar Association

10. BE IT RESOLVED that the Board of Governors of the Alaska Bar Association shall expend every effort to eliminate the practice of the involuntary appointment of private members of the Bar to represent indigent persons charged with a crime or otherwise in need of services;

BE IT FURTHER RESOLVED that all members of the Bar are encouraged to render legal services, without charge, in areas in which they are qualified, whether civil or criminal, on behalf o persons who do not otherwise have the means to pay for those services.

Signed by 10 members of the Alaska Bar Association

Jeff Feldman elected to board; Run-off for other two seats

Jeffrey M. Feldman, a partner in the firm of Gilmore and Feldman, was elected to one of the two 3rd Judicial District seats open on the Board of Governors. Feldman received 385 votes, which was more than a majority of the eligible ballots cast.

Kenneth P. Eggers and Robert C. Ely were the next two candidates receiving the highest number of votes. A run-off election is being conducted for the remaining 3rd district seat.

A run-off election is also being conducted for the at-large seat on the Board. Elizabeth "Pat" Kennedy and Gail Roy Fraties are the two run-off candidates.

Ballots for the two elections will be counted on May 22.

Following are the results of the Board elections:

Third Judicial District

Ronald Wm. Drathman	66
Kenneth P. Eggers	253
Robert C. Ely	194
Jeffrey M. Feldman	385
Deidre S. Ganapole	119
Robert J. Mahoney	172

At-Large Position

Gail Roy Fraties	290
Joseph A. Kalamarides	95
Elizabeth "Pat" Kennedy	265
Jeffrey Roth	79
Phillip Paul Weidner	147

Willard elected as ABA Delegate

Donna C. Willard was elected as Alaska's Delegate to the American Bar Association's House of Delegates. Ms. Willard receive 349 votes and Stephen J. Pearson received 162 votes.

Douglas B. Bailey is the current ABA delegate. His term will expire at the close of the 1986 ABA Annual Meeting. Ms. Willard will then serve a two-year term.

ALSC advisory poll result

At its next Board meeting June 2–4, the Board of Governors will consider the results of the Alaska Legal Services Board of Directors Advisory poll. The Board will be appointing one regular and one alternate member to the ALSC Board for the 3rd, 1st and 4th Judicial Districts.*

Following are the results of the poll:

THIRD JUDICIAL DISTRICT—Regular	
David S. Case	113
Joel A. Rothberg	15
David B. Snyder	35
Harold W. Tobey	107
James A. Tupper	10
Alternate: Marion Yoder	
FOURTH JUDICIAL DISTRICT—Regular	
Eugene P. Hardy	9
William B. Schendel	52
FIRST JUDICIAL DISTRICT—Regular	
Bruce Davies	29
Arthur H. Peterson	56
Alternate: Richard C. Folta	

* Only one person in each District submitted her/his name for the alternate position, so that name will be submitted to the Board for consideration.

CLE scheduled at Elmendorf AFB

On July 24, the American Bar Association Standing Committee on Legal Assistance For Military Personnel will sponsor a full day of Continuing Legal Education. The CLE program will consist of a morning session focusing on tax and estate planning and an afternoon session focusing on domestic relations. The speaker for the estate planning portion will be Mr. Clay Burton, who is the chairman of the sponsoring ABA Committee. The comestic relations portion will be presented by local attorneys, including Mr. John Reese and Ms. Carla Huntington, co-chairpersons of the Alaska Bar Association Family Law Section, and Ms. Janet Platt. The domestic relations program will include discussion on divorce, child support and custody, and domestic violence. The cost for both sessions will be $15, which includes lunch and all materials. The program will be conducted at the Elmendorf AFB Officers Club and will begin at 0800 on July 24. You can register at the door. For further information, contact Captain Michael Gilbert at 552-3046.

DREAM ANALYSIS FOR LAWYERS

By Irving Dell

(This month J.B. Dell has been on vacation and his cousin Irving Dell will be filling in for his monthly column. Dr. Irving Dell is a Distinguished Professor of Law and Psychoanalysis at the University of Vienna and is currently touring the United States for various speaking engagements. The following article is the result of several years of dream research among members of the legal profession. These are actual case histories of dreams reported by lawyers to Professor Dell. The dreams and Dr. Dell's interpretation appear below.)

Dream No. 1: I arrive at my office in the morning to be greeted by a beautiful secretary who turns out to be Vanessa Williams. She looks at me, she walks softly toward me, caresses my arms and advances to give me a kiss. Just before our lips meet she turns into Moms Mabley! I run from the office screaming. This dream occurs at least once a week.

Interpretation: This particular attorney was a well-known civil rights activist who devoted so much of his time to pro bono activities that his financial life "turned sour." His lack of revenue resulted in a continual hounding by creditors and yet he felt he could not give up his civil rights activities. Through counseling, we decided that the attorney would devote a small portion of his practice to municipal and corporate bonding work. He was thereafter able to make his monthly overhead in the first ten minutes of the month while still continuing most of his civil rights activities. The dreams vanished instantly.

Dream No. 2: I am walking through the stacks at the law library doing research. I pull a Reporter from the shelves and open the book only to find the number "56" in large letters printed on every page. Panicking, I examine the other books and they are all the same. I go to the phone to attempt to call my office and find that only the numbers "5" and "6" appear on the phone dial. I then looked at my watch to check the time and find that the watch face similarly covered only with "5" and "6". I wake in a cold sweat.

Interpretation: Brief analysis revealed that this patient was suffering from sumajudexophobia, or "fear of summary judgments." This is a relatively common disorder among attorneys and stems from unpleasant childhood memories associated with overly strict toilet training. Therapy for this individual consisted of dyeing the number "56" in large numerals on all his undershirts. Thereafter the attorney convinced himself that he was invincible and began filing summary judgments.

Dream No. 2: I am in court about to conclude a long medical malpractice trial. As I stand to give my final argument, I notice that I am sinking into the floor which has turned into large mounds of chopped liver. I try to run from the courtroom but I am unable to move. I suddenly hear music coming from the adjoining room. I look up at the jury and all twelve of them look exactly like my uncle Moe.

Interpretations: Several years of analysis were required to break this difficult dream cycle. It turns out that this patient, at the time of his Bar Mitzva, promised his Uncle Moe that he would become a doctor. He instead entered law school but never overcame the guilt of having disappointed his uncle who subsequently died of a broken heart. This patient was helped only through drama therapy wherein his original Bar Mitzva was reenacted with me playing the role of Uncle Moe. During the festivities, I casually mentioned to the patient that what I meant is that he become a doctor of jurisprudence. The dreams subsequently disappeared.

Dream No. 4: My husband and I are about to go to a Bar Association dinner/dance. I then receive a phone call from one of my clients who states that he is currently in jail having been charged with ordering 17,000 pairs of Hagar slacks through the mail with no intention of paying for them. I tell my husband to meet me at the dinner/dance as I go off to my client's arraignment. When I arrive at the dance I see that my husband is costumed and made up to look like Carman Miranda and is flirting with several judges. I am humiliated.

Interpretation: This career-minded woman was facing rather typical "role-identity problems" stemming from the fact that she was a successful attorney while her husband sold fruit and soft pretzels from a vending stand. The dream revealed difficulty determining "who wore the pants in the family." Unfortunately, no cure was possible and this marriage ended in divorce.

Dream No. 5: I am back in a law school classroom and a professor asks me to stand and explain the Socratic method. I stated that Socrates would generally ask a girl out to dinner and then take her to a show before inviting her back to his apartment to seduce her. The rest of the class laughs but the dean walks in and instantly expels me from the school.

Interpretation: This individual had given up all normal social life while enduring the rigors of law school. He thereafter felt cheated and resentful over his missed youth. This meaning was explained to the patient and he spontaneously recovered.

Dream No. 6: I walk out of my chambers and assume the bench in the courtroom when instantly the attorneys and litigants break out in laughter. I then notice that my judicial robes are not black but instead resemble a Bozo the Clown outfit. My nose is bright red and about the size of an orange. A small monkey is on my bench wearing a page boy cap and throwing peanuts at the jury.

Interpretation: This judge harbored an early childhood desire to be an entertainer which conflicted with his inhibited role as a trial judge. These two desires appeared to be in irreconcilable conflict. However, because he was such an outstanding jurist, special dispensation was obtained from the Supreme Court to allow the judge to deliver a monolog and perform a few card tricks prior to beginning each trial.

Law North of the Pecos ..... *Probation in Arctic Alaska*

By John Cook

Well, Bar Rag readers, here is the article I promised on some of the unique ways field probation works in rural Northwest Alaska.

First, I'll give a brief background on my work experience in this part of the state.

I first came to Nome as a social worker in 1968. I spent 3 years in Nome and 4 years in Kotzebue in that profession until I resigned in 1975 for the megabucks on the North Slope. In 1979 I was hired as a Correctional Officer in Nome, and in 1981 became a Probation Officer there responsible for the Kotzebue caseload. I traveled to Kotzebue and the surrounding villages at least once a month, spending 5 to 10 days there. I moved to Kotzebue in February, 1986 when an office was opened here.

The reason for giving that background is because some of the experiences I will relate pertaining to travel were done while I was a social worker. No matter what type of work you do up here, travelling is pretty much the same.

Performing the duties of a probation officer in Arctic Alaska is no different than in the urban areas in many ways. But there are, however, some significant, interesting, and sometimes humorous differences. Some examples follow:

Perhaps it is appropriate to start off with the subject of crime—the basic reason we're here—our "job security" so to speak. Of course, the same offenses committed in the cities are committed in the Bush. But due to conditions and circumstances that don't exist in urban areas, often the offenses are unusual, and sometimes quite humorous. Burglarly, for example, is a felony and a serious crime. But sometimes the offense itself is very minor here. We call such crimes "The basic Kobuk River burglarly." I'll give some examples.

In one of the villages, three young men broke into a quonset hut used by the school to store garden equipment and fertilizer. They took a few things of small value and some fertilizer. The only reason I can think of for the burglarly is because their marijuana plants were starving. In the arctic, fertilizer is not in much demand and of course not stocked in village stores. Anyway, the school probably would have given them the fertilizer if they had dreamed up a believable reason.

In another village, a young man broke into the health clinic. No doubt he wanted some really neat drugs, right? Wrong, all he took was three dozen condoms. He got caught when he sold some of them to his friends. Again, the health aide probably would have given them to him if he had asked. A high price to pay for being bashful. I don't think many people in the cities break into drugstores to steal rubbers! Kobuk River burglaries aren't much of a problem as long as they're the first felony, but presumptive sentencing forces defense attorneys scrambling to find mitigators.

Usually you think of DWI and joyriding as somebody getting drunk and stealing a car. Up here it can go a bit beyond that. I remember interviewing a guy for a presentence report. When we got to his prior record I noticed he had numerous DWI and joyriding convictions involving cars, pickup trucks, boats, three-wheelers, motorcycles and snowmachines. I couldn't resist telling him, "You know, you've been busted for DWI and stealing every type of commonly used vehicle in Alaska except a supercub, a ferry boat, and the Alaska Railroad." (I don't think dog teams count for DWI, do they?)

Another subject is transportation. Like the DWI expert above, since I moved to Northwest Alaska I have traveled officially and for pleasure in all possible ways. These trips have been sometimes extremely pleasurable and sometimes completely terrifying. Shortly after moving to Nome, a co-worker and I had to visit clients in Teller and Brevig Mission. We took a Cessna 180 to Teller. After completing our work we looked for local transportation to Brevig, seven miles to the west. A reindeer herder offered to take us there by dog team for a modest fee. That was my first dog team ride and I enjoyed it immensely. We had to pay in cash, though, because dog mushers don't take State TR's.

Can you imagine anything more fun than hitching a ride on a State Trooper boat and going from Noorvik to Kiana on the Kobuk River on a clear, cool day in late August—counting moose and watching ducks and geese and other critters—and getting paid for it? That isn't uncommon.

Next to flying, going to the villages by snowmachines is the most common means. These days, I limit those trips to the closer villages, such as Noatak, Noorvik, Selawik, and Kiana. A co-worker and I once went all the way to Shungnak. On the way back we got stuck in Ambler for four days because it was more than 60° below. Finally, we got impatient and heated the engine heads with a blow torch and took off. It was 62° below. Between Ambler and Selawik we had to camp one night because carburetor ice slowed us down. When we got to Selawik it was 30° below and felt hot! I'll never do anything that stupid again.

Some of the terrifying trips are what you would normally expect—flying in bad, often turbulent weather. November and December are usually the worst. I've been scared enough that I just won't go if it's bad anymore. I use what is known as a "fly/no fly" card. It's a 3"×5" card colored a light blue with a pin hole in the center. You hold it up to the sky and look through the hole. If what you see through the hole is the same color as the card, you fly. If it isn't, well, then I'll go anywhere as long as I can keep one foot on the ground.

One scary flight is worth mentioning, though. Jim Gould was the D.A. in Nome and wanted his paralegal, Bob Lewis, to go to Diomede to interview some people. Gould thought I should go along also to interview people for a presentence investigation. It was in late November and the ice wasn't set in yet, so we had to take a helicopter. (You can only fly fixed wing to Diomede from January to May because you have to land on the ice. There isn't enough level ground for a runway. The largest level spot on the island is the school gym.) The weather was lousy and got worse when we left the mainland. Forward visibility got down to less than a mile, I would guess, and the pilot slowed down quite a bit. I asked him how he would find the island and he said, "We'll just hold this heading till we get there."

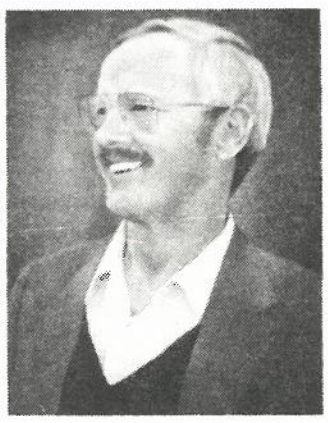
Needless to say, I was very concerned we might be off course enough to hit Big Diomede. I sure wasn't interested in doing hard time in a Russian jail, or worse, getting shot down. Finally, an island came in sight and the pilot hovered. I asked him if it was Big or Little Diomede. He said he didn't know, but wasn't going any further until he was sure. We paralleled the shore until he recognized a landmark and said it was Little Diomede. We had only a day's work to do and were supposed to get picked up the next day. The weather got worse and we ended up there for four nights. Bob and I agreed if we had to eat walrus meat for Thanksgiving we were going to shoot Jim Gould.

Out here court work has some differences also. With few exceptions it's the same courtroom, same judge, same D.A., same public defender and same probation officer. Usually, if the public defender has to conflict out, the local private attorney, Richard Erlich, gets appointed. We get to know each other pretty well.

Scheduled hearings after don't take place as planned and have to be postponed. It's not unusual to be sitting in the courtroom 15 minutes after a hearing was to have started and the public defender gets a phone call from the defendant saying the plane couldn't make it, or the Evinrude broke.

For me, the most enjoyable times in court are when we have sentencings in the villages. Usually the calendaring clerk sets up a charter and we all go on the same plane, each agency sharing the cost. If the defendant is out on bail or third party release he usually is at the airport to meet the plane. I'd like to think this is so he can have more time to talk with his attorney, but sometimes I suspect it's to see if there's an empty seat or if the plane is full. If there's an empty seat it might be for him, and that means jail. A full airplane—SIS and probation! Whoopy! But of course, that prediction doesn't work. Troopers have airplanes too. A makeshift court is set up in either the armory, city office building, school, or public safety building. The bench is usually a folding table and everybody sits on folding chairs. The clerk sets up the portable recording equipment and court begins. Usually there is a larger audience in the villages. If a witness is an older person, often we have to take a recess and hire a translator.

Well, I hope that gives a feeling for how probation officer work is different out here. At times it certainly has its difficulties, but I figure the rewards far outweigh them. I enjoy working alone. I'm pretty much my own boss and don't have to supervise anyone other than my secretary. I have a choice of walking to work or riding my snowmachine or three-wheeler. And if I come to work in a bad mood, it's not because I got caught in a traffic jam.



Random Potshots

John Havelock

Notwithstanding the pollyannaism of Anchorage's oldest newspaper, there is every reason to be gloomy about this state's economic fortunes for the next four years or so. Unless Ronald Reagan does an about-face on energy policy, we can expect declining oil revenue to dry up progressively a variety of economic activities both public and private.

We can expect a significant, if not cataclysmic, restructuring of the private practice of law. It is no accident that, this year, a bankruptcy section of the bar is newly established. Have you noticed that there are more clients coming in who want to fight over failed transactions than to discuss the legalities of expansion plans?

Also, and more visibly, there will be a cutback in the resources devoted to public law enforcement and to the administration of justice, the management of which is the subject of my potshot this month.

The legislature's commitments to new prison capacity should secure against attack much of the growth in the budget for the Department of Corrections which has occurred in the last few years, as it struggles to keep the new bastiles open. Its problem will be that increases in funding for staff will not keep pace with built in increases in demand. But we can expect declines in the support services provided by the Department of Health and Social Services and further cuts in police, prosecution, defense and courts.

Inevitably, the nature of the cuts in criminal justice administration will reflect the changeable politics of the state and the biases of individual judicial, legislative and executive officers, some of whom will be informed, others not. But there is also some room for systematic planning.

A quick once over of the history of criminal justice budgeting reveals that while there may be some reason, there has been little rhyme to the process. Individual functions have enjoyed or lost support (and budget) depending upon popular but ephemeral notions of priority, or the political advocacy skills of agency leaders and many other factors but there has been little recognition of the need for symmetry throughout the system despite increased awareness of this need among system managers.

The criminal justice system would benefit from the development of a program approach to criminal justice budgeting which would acknowledge the close relationships in resource commitments between functions. In the long run, it might even be possible to develop formula funding, a method we already use in providing for public education in the state, though for the first few years, we need the flexibility of guidelines rather than rules.

Formula funding for criminal justice is obviously much more problematic than for education. The educational establishment has been rocked by continuing debates over appropriate standards for teacher training, the educational significance of capital investment in computers, library, classrooms, etc., teacher-pupil ratios and many other relationships necessary to the development of a formula.

No one has really thought much about the proper ratios between police, prosecutors, defense attorneys and judges, much less the comparative allocation of dollars within each component, sentencing for trial, for example. National comparisons will show these proportions vary all over the lot. While police agencies complain that Anchorage (or any other city) have lower police to public ratios than national averages, there is no recognized criterion for what constitutes an appropriate ratio, nor could there be without controlling for many other varibles of which the easiest and most obvious is city size. We do observe that resources committed to police services, both nationally and in Alaska, have increased substantially over the past two decades as crime rates have risen. Each increase has been both cause and effect. An army of private police has also been assembled almost without public notice.

Over the past decades there has been a substantial expansion in the procedural safeguards afforded to defendants. I doubt that anyone would want to go back to the "good old days" though the efficacy and social impact of the most recent changes is a subject of continuing, legitimate, public debate. But there has not been a commensurate attention given to the questions of resource allocation involved. Yet the resource questions have, in my opinion, a much greater impact on the quality of justice which we afford not only to the accused citizen but to witnesses, victims and the public.

The balance of resources allocated to each side of the adversarial system has more to do with the perception and the reality of fairness in a system of justice than does the balance of procedural advantages, given some minimum observance of procedural fairness. As a practical matter, the availability of a wide variety of dispositive alternatives means more to an accused offender than the chance to duke it out in pretrial motions or in court.

But if, as is widely thought to be the case, the public defender's office is badly outmatched at the resource level by the prosecutor's office, then the availability of procedural safeguards becomes a paper shield. If there is no diversion, no probation or parole, no bail and O.R. program, no extensive presentence analysis, no work release, no treatment options, no prison programs because therre is no funding, then not only do average defendants believe they have been shafted, but the public is not getting what it needs most: maximum public protection at minimum cost.

It happens that I view the case for substantial resource inequality between public defense and prosecution resources to be unproven but, in the absence of comparative standards based upon a notion of rough equality of resources, the average person cannot be blamed for believing that the system is tilted: unequal and unfair and in danger of becoming more so.

This situation is likely to become worse in times of economic exigency when public defense inevitably comes under greater pressure for cuts than prosecution. A climate of retrenchment makes for a bureaucratic dog-eat-dog world in which each agency advances its special appeals and overall goals of justice administration are obscured in the dust of inter-agency combat. As has been the case historically, the meat axe will tend to fall on the limbs of the less nimble and many a shelter will be preserved.

In the absence of a model framework of commitment to overall resource rationality we can expect substantial skewing and a loss in the Alaskan quality of life of which a fair and efficient justice system is a part. But if we are able to systemize the cutting of prosecution and defense proportionately, we may produce a system that is streamlined at little or minimal cost and with maybe even an increase in fairness.

Whatever may be its theoretical foundations, we need to look at criminal justice administration more from the perspective of comparative resource commitment. We should also face up to the reality of inevitable retrenchment, not for just this year, but to be carried out over a period of three or four years. If we recognize this reality, and make a commitment to long term budget planning for criminal justice administration, public efficiency and the quality of justice can both benefit, or at least (lest I too be accused of pollyannaism), the quality of justice will suffer minimum impairment.

Capital Punishment

A prosecutor's case against

By Peter Gruenstein

The chief justice of the California Supreme Court, as of late last year, had the opportunity to pass on 37 death sentences. In each case she voted to reverse. Which may not surprise Rose Bird's critics. But of more significance is the fact that she voted in the majority in all but three of these cases.

CBS's *60 Minutes* featured a story not long ago on "the deadliest D.A.," a North Carolina prosecutor who is listed in the Guinness Book of Records for having won more capital cases than anyone else—nearly 40 death sentences in 12 years. Yet only one of these death row inmates has been executed. And, mind you, North Carolina is no bastion of judicial activism; this is Jesse Helms' territory, not Rose Bird's.

The moral-legal case against capital punishment—anchored to the 8th Amendment's prohibition against cruel and unusual punishment—is, in my view, persuasive. But the purpose of this article to approach the capital punishment debate from a purely pragmatic view, and to argue that the putative benefits from capital punishment are not only illusory—as the above examples help illustrate—but counterproductive to effective law enforcement.

The case for the death penalty rests largely on the assertion, unsupported by available empirical data, that only the severest of punishment will deter murderers. That the data fail to substantiate this argument is hardly surprising.

First, as various studies have repeatedly shown, it is not the severity of punishment that deters individuals inclined to commit crime, but the likelihood of punishment. Second, as the North Carolina and California examples above help illustrate, only the tiniest handful of murderers from among the thousands who are convicted in capital punishment states each year of that crime are ever executed. And it frequently takes a decade or more to gain that ultimate resolution. Given the extraordinary due process requirements that apply in death penalty cases, it is hard to imagine even the most calculated potential murderer weighing the possibility that, if caught, he could fall within that less-than-one-percent minority of murder defendants who, an average of ten years after committing the heinous deed, are put to death.

Moreover, murder is generally considered among the most difficult of offenses to deter, even though in every state—with or without capital punishment—it is the crime which of course carries the severest penalties. My own experience as a prosecutor tends to support this.

I have prosecuted about 20 homicides, and in reviewing them in my mind for this article I can't think of a single one where I believe the existence of the death penalty would have detered the offender or altered the outcome. For example:

- A native male in the Illiamna area who, in a drunken stupor, killed his sister and cousin with two almost perfectly placed shots, and who the next day had no idea how or why.
- A mental patient who had previously been found not guilty-by-reason-of-insanity for murder who, while on work release from a psychiatric institution, killed four teenagers after being caught in the act of stealing several cassette tapes from their tent.
- Three kids, the oldest 18, who decided to kill an old woman in Cantwell in order to steal her car.
- An intoxicated male who, after losing a fight, shot the victor in the back four times.
- A 45-year-old female artist living in Glennallen who, never having had so much as a parking ticket before, shot six bullets through the head of her unfaithful lover after much anguish and some premeditation.
- A bigoted white male who, after getting into a bitter argument on Fourth Avenue with a black hooker, became so infsensed at another white male coming to her aid that he shot him.
- An alcoholic who wanted to teach his girlfriend a lesson for having finished a bottle of Vodka without him by using her head for target practice.

I have prosecuted two contract killings—one of a Korean tailor and another of an airline pilot—in which in both instances the assassins were willing to kill someone and risk the rest of their lives in prison for a few thousand dollars. It strikes me that, even in these most deliberate and planned murders, the offenders were individuals of such poor judgment—willing to risk so much for so little gain—that the additional threat of the death penalty would hardly have mattered.

But the case against capital punishment is, in my view, much stronger than the argument that it is an ineffective deterrent. Capital punishment detracts from effective law enforcement by draining vast amounts of resources, and by mischievously distracting attention away from criminal justice issues of real substance. Here are some of the effects of the death penalty has on the justice systems of the jurisdictions in which it is applied:

1. Trials are far longer. Jury selection alone in capital cases in California averages six weeks, rather than a few days. Defense lawyers can ill afford to leave any stone unturned; no expense is too great when an individual's life is at stake. The prosecution must respond in kind.
2. Juries impose a higher burden of proof when they know that a person's actual life may depend on their decision. A conscientious jury in a capital case may require proof beyond virtually any doubt, not merely proof beyond a reasonable doubt. I can think of several murders I've prosecuted which I believe would have resulted in not guilty verdicts had they been death penalty cases.
3. Just as juries wil place additional burdens on the prosecution, so too will judges. A conscientious judge will be that much more careful in insuring that the prosecution meet every conceivable procedural burden, and that every defendant is granted any even arguable due process right. Less conscientious judges, realizing their rulings will be subject to extraordinary appellate scrutiny, will be less willing than they otherwise would be to rule in the prosecution's favor during either motion practice or trial.
4. Assuming conviction and the imposition of a death sentence, the appellate process is incredibly costly and nearly interminable. Moreover, the defense appellate strategy has become highly refined and hugely successful, as the North Carolina and California cases illustrate. Appellate courts tend to be even more demanding than juries and trial judges in death penalty cases—requiring not merely a fair trial but something approaching a perfect one.

There is at least one additional pragmatic argument to be made against capital punishment: the criminal justice system is not perfect. Mistakes can be made; and when they are made after someone has been executed, they are irrevocable. And it is not merely the rare mistake of an innocent person being convicted that we are talking about here. Frequently, the application of the death sentence to a particular offender turns on much finer questions relating to his precise role and the manner in which the murder was committed. Was there deliberate cruelty? Premeditation? Was the offender the shooter or an accomplice? The leader or the follower? In my own experience, I can think of at least two multi-defendant murder cases in which the legal accountability of the offenders for murder was much clearer than the precise role each played. In one case where both of the defendants were convicted of first degree murder, it was almost clear beyond a reasonable doubt which of the two was the shooter. *Almost.* In a death penalty case where the establishment of such a fact might be vital to the imposition of a death sentence, would some prosecutors have been tempted to try to stretch this proof a bit?

Much of the strength of the pro-death penalty advocates is drawn from the fact that a large majority of the public—both in Alaska and Outside—strongly support it. But it is important to examine why the pro-capital punishment position commands such a majority. There are, I believe, at least two reasons.

The first is that the vast majority of citizens believe that an individual who intentionally takes another's life, in the absence of mitigating circumstances, loses his or her right to live again among free people. This belief stems in part from both a desire for retribution (community condemnation, reaffirming societies norms, call it what you will) and a feeling that, in the case of a murderer, society should not be required to take *any* risk that one of its members will be harmed by such a person in the future.

The second is the public perception—not entirely incorrect—that when murderers are sentenced to prison, they are rarely removed from society on a permanent basis. Judges give lenient sentences. Life imprisonment doesn't mean anything of the sort. Parole boards let even heinous murderers out after a relatively few years. In other words, the only way to really remove murderers from society is to kill them.

Promoting the death penalty is thus an easy target for politicians wishing to appear pro-law enforcement and, at the same time, appease their constituents' anti-judiciary feelings.

The problem is that not only is the death penalty a false solution, but it diverts both attention and vital resources away from the criminal justice systems' real needs. The talent and the vast sums of public monies that are now spent in exhaustive and often futile efforts to execute the odd murderer in death penalty cases could be far better spent addressing the real needs of the criminal justice system, such as: establishing task forces of police and prosecutors to target career criminals; providing the resources necessary to make our court system not only fair but efficient; and creating a correctional system that not only warehouses offenders but makes some meaningful attempts to train and rehabilitate them.

Lawmaker supports death penalty

By Representative Fritz Pettyjohn

Capital punishment is a highly symbolic statement of a society. It is a statement of affirmation in ourselves and our values. It is a statement of confidence in ourselves; of the vigor and commitment we bring to our own defense.

Legal arguments about a sentence of death in Alaska must begin with the case of Chaney v. State, 477 p.2nd 441, 1970. There, our Supreme Court laid down five criteria to be used in reviewing any criminal sentence. They are: 1) deterrence to the individual, 2) deterrence to others, 3) isolation of the defendant, 4) rehabilitation, and 5) the reaffirmation of societal norms.

Items 1 and 3 are completely satisfied by capital punishment. An executed criminal is absolutely deterred. He will not kill again. And he is isolated from the rest of society with complete finality.

Deterrence of others is a more thorny question. Scholarship is divided. I am convinced that "others" are deterred. The post World War II decline in imposition of the death penalty preceded and then was congruent with the rise of the murder rate in the United States.

But my belief in the deterrence of others is based more than anything else on my experience on the parole board, where I interviewed 350 convicted felons who had applied for parole release. Many were convicted murderers. Very few of them were "crazy." Most seemed quite rational. They did a fair job of trying to convince the board that they had changed, that we could now trust them out on the streets. On the surface at least, they weren't that much different from, say, my fellow legislators. . .which means to me they were capable of being deterred.

If one rapist decides against killing his victim for fear of being executed, there has been enough deterrence to satisfy me.

On the other hand, he is not rehabilitated. Some argue that this violates Article I, Section 12 of Alaska's Constitution which states, ". . .Penal administration shall be based on the principle of reformation and upon the need for protecting the public. . . ." However, the Supreme Court of Alaska has found that sentences extending beyond a normal lifespan—essentially life in prison without parole—are constitutional. In some cases, the principle of protecting the public outweighs the principle of reformation.

I am also convinced that all of the numerous safeguards in our system will prevent an innocent person from being executed. The same jury which finds, beyond a reasonable doubt, that the defendant is guilty of the crime, also imposes the death penalty. It is an acknowledgement by our courts that the desire of the people for justice is an important factor in sentencing.

We call heroes those who are willing to lay down their own lives in defense of their fellow man. The existence of such people, and our admiration of them, is to say that we care about each other. . .we will go that far to protect and defend.

My intention is not that capital punishment be applied as a matter of routine, but only in especially heinous cases that shock the conscience of the community. Every sentence of death must be considered justified by both the trial judge and the Alaska Supreme Court.

Legal, constitutional, and statistical arguments on the subject are important. But the critical question is beyond those levels. It is a question of *justice*. The classic Greek definition of that term has not, in my opinion, been improved upon.

Justice means giving people what they deserve. Can any conduct be deserving of death? Of course.

By pointing a gun at a child's head and threatening to kill him, a person has placed himself in a position where he himself could be killed justifiably. The hard question comes when that person is not merely threatening to kill the child, but goes ahead and does it. Can that person still be killed justifiably?

Viscerally, the answer is easy. But in a rational, humane, and civilized society, does calm analysis support the viscera?

I say yes. The death penalty is the ultimate sanction. There is no penalty greater. To satisfy the rule of porportionality, the conduct which makes one "deserving" of the death penalty must itself represent the supreme affront to society.

When an Anchorage man raped, tortued, and murdered a large number of women, he committed a series of acts which make capital punishment proportionate to his acts. In my view, to confine him to prison for the rest of his life—feeding and clothing him, letting him watch TV and write his memoirs—is not proportionate punishment.

It is not just, because it is not what he deserves.

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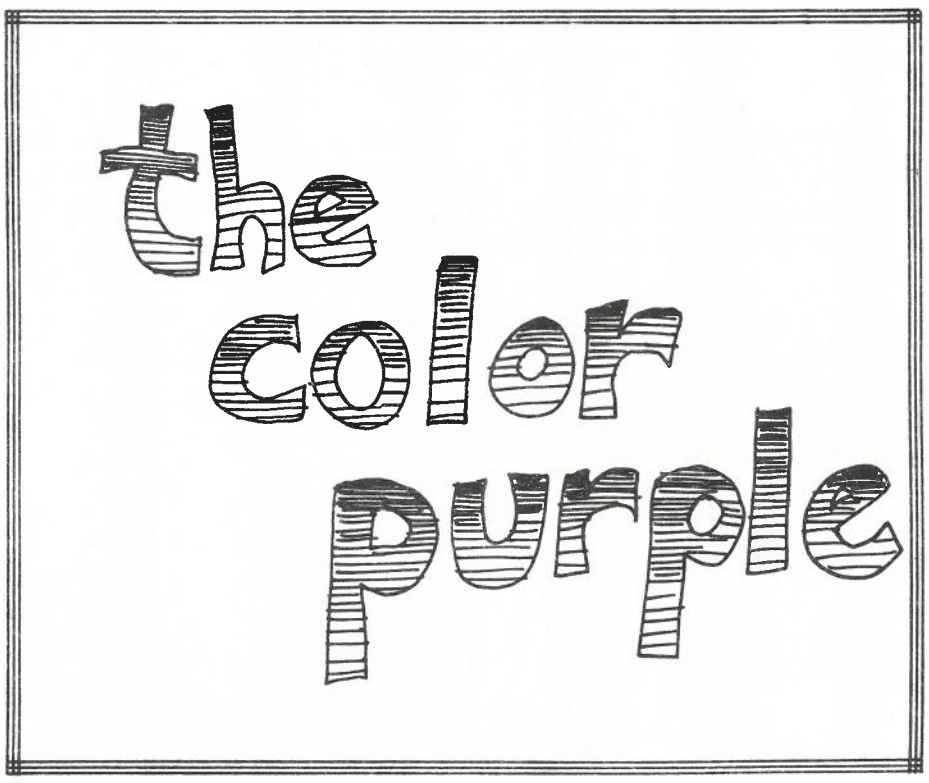
The movie mouthpiece

Edward Reasor



What do aspiring judicial candidates of the Third Judicial District and the movie stars and producers of "The Color Purple" have in common? Well, regardless of the self-serving declarations fed them by members of their own industry (the Chief Justice and the Judicial Council vs. the Board of the Academy of Motion Picture Arts and Sciences), the best does not always prevail! In fact, the best may very well lose, thanks to that common evil known as the body politic.

I hope that this column and the tragedy of this year's Academy Awards is of some comfort to the A. Lee Petersens and Bill Erwins of this world as well as the Whoopi Goldbergs, and Margaret Everys of Hollywood. To be nominated for 11 Academy Awards, all in separate categories, and not to win a single one, can only be attributed to politics, and organized politics at that.

Yes, but is the movie "The Color Purple" worth it? Indeed it is. Artistically, story-pacing-wise, acting wise, soundwise, and that sheer magic of involving one's soul in what is happening on the silver screen all leap out in one combined magical form to cause a prudent viewer to shout "Bravo! Bravo!"

"The Color Purple" was the best made motion picture of 1986, the Academy non-awards notwithstanding.

Alice Walker, a smooth-skinned, earring-dangling type, a lovely woman whom most men would find exotically attractive, won a Pulitzer Prize when she wrote "The Color Purple." She spent years trying to get her story on the screen, but it took Steven Spielberg (who wasn't even nominated as Best Director) and a bushel basket of money to finally get the job done. Walker, now a dazzling 41, drove back to Eatonton, Georgia when "The Color Purple" was released. This is where she grew up. This is the rural country and population of her book. This is also the same sleepy town of 4,000 or so that required her during her teenage years to sit in the balcony with fellow blacks when she wanted to watch a film—any film. But the magic and hope that those films gave her prevailed; not only did she write "The Color Purple," she also advised the filming crew on location, helped on script rewrites, and perhaps more importantly, let Spielberg direct it without interference.

"The Color Purple" was touted by some sharp press agents as a "saga of rural Southern black women." It certainly is that, but much more: a saga of how one can become all one wants to be by simply learning to read and then reading; also a story of family love between sisters that transcends distances, cultures, poverty and even cruelty; and finally a story of fundamental good time religion in a depressed rural environment where all the young people dream of doing things other than what their parents do.

One of the best establishing shots (those few brief moments that set the tone of the film) Hollywood has ever produced opens "The Color Purple": Two young sisters laughing and playing together on a warm, sunny day in a field of purple daffodils backgrounded by the wonderful music of Quincy Jones. The heroine of the film is then told by her father as the credits begin to roll onto the screen: "You've go the ugliest smile this side of creation." Later in the film Whoopi Goldberg shows that the heroine has a lovely smile, a large, warm, stir-your-soul and cause you to smile kind of smile. She just has so little to smile about, having been downtrodden by her father, husband and the male children of her husband by another woman. She hides that smile until a gospel singer turned blues wailer (Margaret Avery) teaches her how to smile openly and even how to love.

In a small Georgia town in early 1906 and years later, young Celia (14) played by Whoopie Goldberg, gives birth to two children, fathered by a man she thinks is her father, a man who takes the infants from her at birth. The close bond of her younger sister Nettie (Akosua Busia) who has learned to read at public school and who faithfully teaches Celia this wonderful art is the only sanctuary she has against "Mr." (Danny Glover) a widower with four children she is given to by her father. "Mr." is unsuccessful in his attempts to seduce Nettie, so Nettie is sent packing, eventually to a missionary family in Africa. One of the best sequences in this fine film is when Celia, with the help of a preacher's daughter turned singer, (Marga Avery), finds years of letters from her sister that her husband hid from her in a hollow space under a floor board in a metal cash box. The voice over narratives combined with the one-to-one out loud reading of Celia and Shug Avery of these mysterious letters from Africa in a drab bedroom as the sun penetrates the sullen darkness causes the words to renew hope and an awareness of one's own worth. Who can resist the opening lines of the first letter of sister Nettie: "I love you and I'm not dead."

Eventually Celia's sister and her own two children return from Africa and the movie ends on a happy, warming thought—a reconvergence of loved ones, poetic justice to those who mistreated her, and for the cynic, a strong musical theme of the redeeming healing power of love.

Some, when they view "The Color Purple," see red. They feel the movie is a one-sided perception of black men as cruel, unaffectionate and domineering, but I found it a thought provoking, entertaining film that required a second look. Filmed largely on location in North Carolina, filled with the original music of Quincy Jones—from traditional gospel to joyful jazz and earthly blues, "The Color Purple" depicts reality without the aid of fantasy or special effects and effectively conveys the varied moods of unsympathetic characters as well as dynamic personalities.

The lighting and camera work of "The Color Purple" became the prime responsibility of Alan Daviau ("E.T.: The Extra Terrestrial") who photographed most of the exterior shots in the early morning on location using two camera crews. One filmed the action itself and the other using a Panaflex shot weather and lighting changes for later intercutting. Some of the storm and cloud scenes so effective in the morning were photographed on different days and at different times while the main camera continued to capture the story line.

Those scenes of blues singing and evening relaxing in the "juke joint" were actually filmed during the day on an interior set located on the sound stage of Universal City. Here an authentic 60-year-old country nightclub was built without windows, the lighting coming through the spaces between boards and a screened porch as well as by kerosene lanterns. The kerosene lamplights are backed by high intensity halogen lights so cleverly concealed that I couldn't see them, but they had to be there, because one needs light to record inside a re-made nightclub.

The completed photography took eight weeks on location in North Carolina and three weeks of interior shooting at Universal, all of which came to a negative film cost of about fifteen million dollars. When individual videocassettes sell for about thirty dollars, buy "The Color Purple," not only for entertainment but as a show piece for anyone who inquires: "Why do I have to read this stuff?" Celia will show them.

High tech hits the streets

By Officer Jack Boots

In the old days, it was just a matter of who was toughest; not only in the physical sense but there was a built-in psychological advantage that made it next to impossible to get the edge on the beat cop. Of course he was on foot, in the neighborhood, knew your mom and dad (and had since they were your age); knew the troublemakers and where to find them and more often than not, meted out dosages of summary justice with his billy club. And did so with impunity.

The beat cops big advantage was not so much entrenched in fear, but of mutual trust of those he policed. If you came home late with a welt on your southern exposure and the old man found out you got it from the neighborhood cop—he'd give you one on the other side to match. The old man knew that Officer Grounowski would not have belted you if you hadn't deserved it.

Then they put Grounowski in a car and made him something akin to a canned ham. All the cans look the same, but you don't know what you got until you take it home and open it up. Cops lost the personal touch with the people they policed. Not all at once, but gradually, as the public became more mobile, so did the cops. And they seemed to be going in opposite directions.

About the same time as cops took to cars, everyone else in the whole United States seemed to discover the Constitution simultaneously. Stuff like the Bill of Rights and the Fourth Amendment. It had been there all along and every once in a while, the Supreme Court heard a case or two and declared one thing or another as being so or not so as squared with the Constitution. Most states were underwhelmed by all this and went on their own way, leaving the Federal guys to wrestle with the Constitution. Somewhere in the last two or three decades, there has been a Constitutional Renaissance, a collective legal awakening to this plucky document set down 200 plus years ago by some gentlemen from Virginia and environs, who to demonstrate their belief and conviction in what they had written, drop kicked the crown's militia from Boston to Charleston and back again. And well it should be so, else this democratic deposition may have appeared as a bit of erratum in the unabridged history of the British Empire. Having so established our credentials with the rest of the world, we went on with building what we have today.

What has evolved from this "Constitutional Awareness" is the legal equivalent of the fast lane, with the off ramp terminating in the Supreme Court parking lot. Seems like every issue lately goes "Federal Express." Which brings me to how I met Dave from the Honeydew Computer Corporation.

I was just returning from the cleaners with Officer Humphrey, a fellow expatriate from Patrol Division. We had picked up our respective costumes; Traffic Toad and Careless Cat.

Permit me to digress a moment. Careless Cat, aka Officer Humphrey, is my antithesis. In the scenario we present to the kids, Careless is prone to dashing out into traffic from between parked cars. To that end, he has a set of radial tire tracks fastened to the side of his cat outfit, along with several large band aids. In the classroom, Careless runs out of the door in an unblemished state, into the hallway, which the children have been told is a busy street. Once out of sight, Humphrey throws some pots and pans around the hall and makes screeching noises. The appliques are fastened to his outfit and he then staggers back through the doors. Traffic Toad then vilifies him for his stupidity and Careless promises to never do it again. A small lecture follows to reinforce the lesson. Universally, the kids enjoy seeing Careless run down much more than the safety lecture.

Anyway, back to Dave. And police cars. And the Supreme Court and cops in police cars. And Supreme Court Decisions.

As we crossed the parking lot, Humphrey and I saw a guy leaning against one of our patrol cars. The car was somewhat removed from the rest of the units and it had several additional antennas mounted on the roof and trunk. What really caught our eye was a sign taped to the side of the car. . ."Honeydew Computer Corp. O.B.S.C.E.N.E. Demonstrator."

"I've got to see what this is" I said to Humphrey. "Take the outfits inside and I'll be there in a few minutes."

I walked up to the car. "Hi. I'm Dave" said the guy leaning on the car, extending his land. "Hi." I said "What's O.B.S.C.E.N.E.?" "Glad you asked" says Dave. "Let me explain." "O.B.S.C.E.N.E. is a computerized information system, designed by Honeydew, that provides the street cop wth the latest Supreme Court Decisions, both State and Federal, along with local, State and Federal statutes, rules, regulations, ordinances, all at the push of a button. O.B.S.C.E.N.E. displays this information on a CRT right in your car and the information is presented in language which policemen readily comprehend. There is also a built-in speech analyzer that works on the same principal as a voice stress analyzer. This device warns officers of an impending conflict with court decisions while engaging in conversation with a suspect in your car. The CRT display is augmented with an audible alarm once the system detects a conflict."

"Will it work in Alaska?" I asked. "Yeah," says Dave. "We had to add a couple of gigabytes to the memory for all the State stuff, but it works."

"OK" I says. "I can't stand it any longer. What does O.B.S.C.E.N.E. stand for?" "Two things" says Dave. "It relates back to what I said about displaying information in terms that cops understand and it characterizes the nature of the computer system itself. O.B.S.C.E.N.E. means Onboard Barrister-Selected Computerized Essays of Nonlegal Exhortations. Get in the car and I'll show you how it works."

There, mounted in the dash, was a small T.V. screen, several rows of buttons and some small blank squares like the idiot lights on the instrument panel. Dave poked a few of the buttons and the screen lit up.

"OK" says Dave, "it's ready. Here's what I want you to do. Rather than have it go through all the statutes and stuff, I'm going to show you how the warning system works. Advise me of my Miranda Rights but leave one of them out."

I recited Miranda, leaving out the one about having an attorney present during questioning, which is number three. As I started to read number four, a chirping noise came from the dash and one of the idiot lights came on. It read: GAS.

Dave says, "OK, you've got GAS." I say to Dave, "Your breath ain't a bed of roses either, pard."

"No, no" he says, "G.A.S.—General Alarm System. The computer has detected a conflict. Push the red buttom marked A.S.S.—Alarm Sub-System. It will tell you in general terms what the conflict is." I pushed ASS, beginning to understand what Dave meant by terms cops could comprehend.

FLATULENCE appeared on the TV screen. "What's this?" I asked. "Press EXLAX" says Dave. I found the square brown button so marked and pressed. "It will EXplain LAst EXample." Dave commented.

Failure to Legally Advise in a Timely, Uniform, Lengthy Enunciation of New Court Edicts appeared on the screen. "Now" says Dave, "It's telling you that you have an advisement problem. Ask it to tell you what's wrong specifically. Push EXLAX again.

F.A.R.T., Miranda and the complete text of the Miranda Rights appeared on the screen followed by C.R.A.P. Without being told, I pushed EXLAX again.

Failure to Accurately Recite Text appeared. Court Requires Re-Advisement of Rights Post-Haste.

"See," says Dave "it follows a logical sequence to resolve the conflict and provides the remedy." "Yeah" I says, "can it do anything else?"

"Sure; here's another situation. You've arrested me fleeing from the scene of an armed robbery with a gun and a bag of money and now you are trying to get me to confess, OK?"

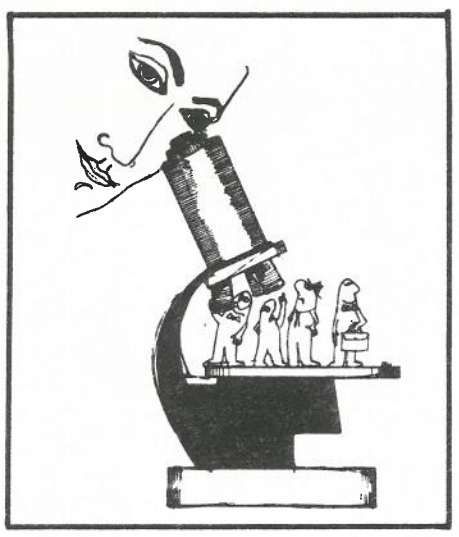
"Do you want to tell me about this holdup?" I said. I immediately got GAS. I pushed EXLAX. I got FART—Miranda. I started to recite Miranda—T.U.R.D. appeared on the screen. I pushed EXLAX. Tape recorder Under Right side of Dash appeared. Sure enough, there was a small tape recorder on the passenger's side under the glove compartment.

I started to read Miranda into the tape recorder. I got GAS again. I pushed EXLAX again. 'Recorder Malfunction' flashed across the screen. Extenuating circumstances, I thought to myself, and continued reading Miranda. I got an audible warning and GAS again. Back to EXLAX. EATSHITANDDIE was displayed. Boy, this thing knew how to get a guy's attention. Push EXLAX. . . .

Elect Another Tactic Stephan Harris Is Timely And No Decision Deviation Is Effective. This time the words remained on screen and flashed. Dave said, "This is the computer's way of telling you that you're in deep trouble. You must make an electronic recording of Miranda and the subsequent confession. There is a backup for the tape recorder, built in for such situations. Go to A.S.S. and press. It will automatically activate the Vehicle Area General Information Network Accumulator." I did as instructed, the system cleared itself and I took the confession.

I thanked Dave for his time and wandered slowly back to the closet Humphrey and I shared as an office. My eyes went to an old billy club hanging on the wall. I stared at it for a while, so long, in fact, Humphrey finally asked me what I was doing.

"Just trying to figure out a way to plug that thing into a computer," I said.



As Others See Us

By Guest Columnist: Gayle Gebhart

Gayle Gebhart is the 1985/86 Alaska National Director for the National Association of Legal Secretaries. She is presently legal secretary to Steve DeLisio, senior partner of the Anchorage office of Schaible, Staley, DeLisio and Cook.

Asking a legal secretary to write an article about how she and other legal secretaries view attorneys is pretty risky business. Especially when she's told to "tell it like it is" and "give us some real insights," with regard to our perception of lawyers. But since you asked for it, you got it.

Now you have to keep in mind that I've only been a legal for four years. During that time I've worked with approximately 26 different attorneys from four different law firms, and every single one of those attorneys is unique. However, there are some things that almost every one of those attorneys is guilty of, which leads me to believe that there must be an awful lot of other attorneys out there who do the same sort of things. (Please note, that I said *almost*. There are, of course, a few of those unique individuals who are perfect, but more about those rare birds later.)

I've been asked to tell you, or "provide some insight" into a few of the things that drive legal secretaries bonkers. Please remember that this is just an opinion from one legal secretary (one who is writing this with some trepidation for fear of being a bit too bold, losing her job and then finding it difficult, if not impossible, to get another one for what's to follow in this article). I did ask other legal secretaries their opinion of attorneys and got some very interesting responses which I have included herein. (Herein, what a word. I like to throw in that kind of attorney talk whenever I get a chance. This is especially fun when you're around your friends who aren't in the legal field and have absolutely no idea what it is you're saying. They must feel the way I do when I read, and attempt to comprehend, some of the pleadings I've typed in the past.)

Now, one of the most common complaints I heard was. . .yes, you guessed it PROCRASTINATION. (Of course, right at the start I want to let you know that this can also be said of some legal secretaries, myself included. I've always said that I keep meaning to join the Procrastinator's Club but I just keep putting it off.)

"Why do today what can be put off to tomorrow" seems to be a rule that a lot of lawyers live by. This is also the sort of behavior that makes legals go to lunch and never come back to the office—ever again. Or makes us so crazy we bite the head off of anyone who comes near us because we have a 60-minute tape to transcribe, it's 2:30 p.m. and the pleading has to be filed by 4:30 that day! I think a lot of attorneys figure that once they have something dictated, it's done.

Well this simply isn't the case. Think about it for a minute. How long does it take you to dictate a 15-minute tape? Certainly not 15 minutes. You have to get the file, read the correspondence or pleading you're responding to, organize your thoughts before you start to dictate, etc., not to mention the constant stream of interruptions from phone calls to attorneys, paralegals and secretaries all wanting to ask you something. Well, it takes us (or at least it takes me) longer than that to transcribe a 15-minute tape. We have to get the file if you haven't dictated the address or pertinent caption information. We have the same constant interruptions, because most of the attorneys, paralegals, secretaries, etc., who interrupted you while you were dictating, interrupt us first to see if you're busy before they interrupt you! Then, after we have transcribed the tape the document has to be proofed (either by the word processor or by the legal secretary) and then you get whatever it is you dictated. A 15-minute tape can take as long as an hour to transcribe if you get interrupted every other minute. Besides the fact that when you are interrupted, it takes a minute or so to get back into the swing of typing again before you're going at a full clip.

Let me give you an excellent example of one of the worst cases of procrastination that I've ever experienced. There was a workers compensation hearing scheduled for a Friday, second up in the afternoon. The attorney had a couple weeks notice of the date of the hearing. After he told his secretary that he would have the brief dictated and to her by Monday of that week, she finally got it on Thursday afternoon around 2:00. Of course that was only the first installment. There would be three more tapes dictated before it was all said and done. Not to mention the two tapes that a paralegal had dictated. Someone had to stay late that night and finish up typing the brief. Then the attorney stayed and revised all 30 pages of it and left it on the secretary's chair to revise Friday morning. After two and a half hours of revisions, another draft was run so that the attorney could make any more revisions. Fifteen minutes before the time when the brief had to be completed, revisions were still being made. Another attorney had to simply take the remaining ten pages or so of the brief and not let him make any more changes to it so that it could be finalized.

The stress this kind of situation puts on the secretary doing the brief, not to mention the other secretaries in the office who get dumped on with work from her other boss because she's too busy working on this rush brief to do his typing, is something that can be avoided. We've heard it all before, so don't tell us you work better under pressure. Maybe *we* don't. Some of us might type faster, but quality usually goes out the window in situations like that. We can't spend as much time on something like that as we'd like to. Proofing isn't done because there simply isn't enough time. Also, when you have to

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Proposed definition—practice of law

The Ethics Committee has completed its work on proposed Alaska Bar Rules 33.3 and 63 defining the practice of law. The proposed rules, as well as a commentary by the Ethics Committee, are being printed here so that the membership may comment. The Board of Governors has reviewed the proposed rules, but is soliciting comments from members before submitting the rules to the Supreme Court. Please address all written comments to Stephen J. Van Goor and Susan Daniels, Discipline Counsel, at the Alaska Bar Association.

RULE 63
DEFINITION OF THE PRACTICE OF LAW FOR THE PURPOSES OF AS 08.08.230

For the purposes of AS 08.08.230 (making unauthorized practice of law a misdemeanor):

(1) a person not authorized to practice law in any jurisdiction commits the crime of unauthorized practice of law by representing himself or herself to be an attorney or lawyer and performing any act in that capacity.

(2) a person authorized to practice law in another jurisdiction, but not authorized to practice law in this state, commits the crime of unauthorized practice of law by representing himself or herself to be an attorney or lawyer authorized to practice law in this state and performing any act in that capacity.

ALASKA BAR RULE 33.3 UNAUTHORIZED PRACTICE OF LAW; STANDARD OF CARE; INJUCTIVE RELIEF.

Section 1. UNAUTHORIZED PRACTICE OF LAW PROHIBITED. No person may practice law in the State of Alaska, unless that person is an active member in good standing of the Alaska Bar Association.

Section 2. "PRACTICE OF LAW" DEFINED. For the purposes of Rule 15(7), and this Rule, the practice of law includes any act, other than that excluded by Section 3 of this Rule, whether performed in court, an office or elsewhere, with or without compensation, which attorneys or the courts customarily identify as the practice of law, including; but not limited to:

(a) Holding oneself out as an attorney or lawyer;
(b) Providing advice as to the legal rights and duties applicable to the specific circumstances of any person;
(c) Appearance in or conduct of litigation or performance of any act in connection with proceedings, pending or prospective, before any court or any governmental body constituted by law in this state which is operating in its adjudicative capacity;
(d) Preparation of pleadings and other documents to be used in legal proceedings;
(e) Preparation of documents and contracts by which legal rights are affected, or,
(f) Engaging in any act or practice determined by any court of this state to constitute the practice of law.

Section 3. EXCEPTIONS TO DEFINITION OF PRACTICE OF LAW. The following acts shall not constitute the practice of law for the purposes of Section 2 of this Rule:

(a) acts performed for and on behalf of oneself as an individual,
(b) acts described in Sections 2(b) and 2(e) of this Rule, when performed for and on behalf of immediate family members,
(c) acts performed as an assignee of a legal right or claim of another, but only if the assignment is not made in whole or in part for the purpose of avoiding any prohibition against the practice of law by a person not authorized to do so by Section 1 of this Rule,
(d) acts described in Section 2(b) and 2(e) of this Rule when performed as a part of the regular conduct of a business organization which has a primary purpose other than the performance of those acts,
(e) acts described in Section 2(b), 2(d) and 2(e) of this Rule when performed as part of the regular conduct of a not-for-profit human rights, human services, counseling or public interest organization when done for the benefit of a member of the constituent group which the organization serves,
(f) acts performed by a government employee in the course and scope of employment within the agency by which he or she is employed,
(g) acts performed by a public official as part of the duties of that official,
(h) acts performed by a paralegal or legal assistant under the supervision and control of an attorney who is admitted to practice law in this state, and who is both legally and ethically responsible for the acts of the paralegal or legal assistant,
(i) acts performed before a court in this state in the representation of another, if authorized by the judge or justices of that court, pursuant to Section 4(a) of this Rule,
(j) acts performed in connection with proceedings before the Alaska Worker's Compensation Board in accord with AS 23.30.110(d), if authorized pursuant to Section 4(b) of this Rule,
(k) acts performed in connection with proceedings before any governmental body of any type, if authorized or permitted by the rules or regulations of that body before whom the proceeding takes place,
(l) acts performed for the purpose of influencing legislation or rule-making, including lobbying,
(m) acts performed pursuant to the authority and in accord with the provisions of Alaska Civil Rule 81(a)(2) and Alaska Bar Rules 43, 43.1 and 44.

Section 4. PRACTICE OF LAW BEFORE COURTS AND GOVERNMENTAL BODIES.

(a) In any particular case, except a case where the right to counsel exists as a matter of constitutional, statutory or case law, any court may allow a person not authorized to practice law in this state to represent the interests of another person before that court. In deciding whether to allow non-attorney representation, the court should consider the type of case, the of the issues, the availability and willingness of attorneys authorized to practice law in this state to handle the case, relevant cost or economic factors, the desires of the parties, the protection of the public, and any other factors which might justify a departure from the principle that representation of another before a court should ordinarily be done by an attorney. Where the right to counsel exists, a person may be represented before a court only by a person who is an active member in good standing of the Alaska Bar Association, or who is authorized to do so in accord with the provisions of Alaska Civil Rule 81(a)(2) or Alaska Bar Rules 43, 43.1, and 44.
(b) Any governmental body, including but not limited to the Alaska Worker's Compensation Board, may determine whether and under what conditions any person not admitted to the practice of law in this state may represent the interests of another before that agency or body.

Section 5. STANDARDS OF CARE, SANCTIONS. Any person who performs any act within the provisions of Section 2 of this Rule, whether or not such act is excluded from the provisions of Section 2 by Section 3 of this Rule, is:

(a) held to the same standards of care and skill in the performance of the act which are applicable to attorneys admitted to the practice of law in this State, in addition to being held to the same standards of care and skill as are applicable to the person because of the business being conducted, the relationship of the parties, or any other applicable principle of law, and
(b) subject to the sanctions which may be imposed upon attorneys pursuant to Alaska Civil Rule 95.

Section 6. REMEDIES FOR UNAUTHORIZED PRACTICE OF LAW. The Attorney General or any affected person may maintain an action for injunctive relief in the superior court against any person who performs any act constituting or which may constitute the unauthorized practice of law within the provisions of this Rule. The superior courts may issue temporary, preliminary or permanent orders and injunctions to prevent and restrain violations of this Rule, without bond.

Section 7. DEFINITION. The term "person" as used in this Rule includes a corporation, company, partnership, firm, association, organization, labor union, business trust, bank, governmental entity, society, or any other type of organization, as well as a natural person.

Ethics Committee comments on changes

The Ethics Committee of the Alaska Bar Association has prepared Proposed Bar Rules 33.3 and 63, defining the practice of law in Alaska, and recommends that these rules be approved by the Board of Governors and adopted by the Alaska Supreme Court. The purpose of this commentary is to explain some of the factors taken into account by the Ethics Committee in drafting the proposed rules.

The general approach adopted by the Ethics Committee follows the general trend of law relating to unauthorized practice. In recent years, most states have moved away from using the criminal law to sanction the unauthorized practice of law. There are three reasons for this. First, it is difficult to create a sufficiently precise definition of unauthorized practice of law so that a person can clearly know how to conform his or her conduct to the law. Second, procedural requirements are difficult to use. Third, the real desire of the State is to stop harmful conduct, and protect the interests of consumers, rather than to criminally sanction the persons who engage in such conduct. The modern method of policing the practice of law is through the use of injunctive remedies in the trial courts!

The two rules proposed by the Ethics Committee utilize this approach. Proposed Rule 63 provides a definition for the practice of law for the purposes of AS 08.08.230, which makes unauthorized practice of law a Class A misdemeanor. Proposed Rule 63 directly parallels the existing statutes relating to impersonating an officer (AS 11.56.830 and 11.46.570). Under the proposed rule, criminal unauthorized practice of law consists simply of a misrepresentation by a person that he or she is an attorney, and the performance of any act in that capacity.

The actual control over the practice of law in Alaska, in accord with proposed Rule 33.3, is placed in the Superior Courts, with, of course, appellate review by the Supreme Court if necessary. In drafting proposed Bar Rule 33.3, the Committee considered numerous factors, including the practice of law as it presently exists and the interests of the consumers of legal services. There are many areas in which services, traditionally classified as legal services, are rendered quite competently by non-attorneys. In some cases, legal services cannot be obtained from attorneys as a practical matter, either because of the type of case involved, economic factors, location, or other reasons. Consumers of legal services have an interest in securing high quality services from competent people at a reasonable cost, and accomplishing this goal does not necessarily require that services be performed by an attorney. Individuals have a freedom of choice. Courts and administrative agencies have an interest in controlling representation before them, and the conduct of their own proceedings, in order that the proceedings may be conducted fairly and expeditiously. The Committee's proposal consists of a balancing of all the interests which are necessary to be taken into account in drafting a rule relating to the practice of law.

The rule itself is divided into seven sections, as follows:

(1) Section 1 simply requires that a person must be an active member in good standing of the Alaska Bar Association to practice law in Alaska.

(2) Section 2 defines the practice of law.

(3) Section 3 describes exceptions to the definition of the practice of law, which are types of things that may be done by a non-attorney.

(4) Section 4 deals with the authority of courts and governmental bodies to allow a person who is not an attorney to represent the interests of another before that tribunal.

(5) Section 5 sets standards of care in the interests of the protection of the public and the authority of a tribunal to control proceedings before it.

(6) Section 6 clarifies the injunctive remedy available.

(7) Section 7 provides a broad definition of the term "person".

The Committee has the following comments on some of the proposed sections:

Section 1

Section 1 is self-explanatory. It is adopted under the inherent authority of the courts to control the practice of law in the State of Alaska. It simply states that no person may practice law in the State of Alaska, unless that person is an active member in good standing of the Alaska Bar Association. What can be done by non-attorneys is set forth in Section 3 of the proposed rule.

Section 2

The Committee initially considered whether a distinction should be made between the non-attorney and the attorney who has been disbarred or suspended pursuant to the Alaska Bar Disciplinary Rules. The concern was that the public might need more protection from a disbarred or suspended attorney, who has already been found to be unethical, than from a non-attorney who should be presumed to be ethical until demonstrated otherwise. The Committee concluded, however, that there were problems with such a distinction, and that it would not work as a practical matter. Accordingly, non-attorneys and disbarred or suspended attorneys are treated in an identical manner for the purposes of this rule.

Practice of law is broadly defined by Section 2. Exceptions are created by Section 3. Section 2 is divided into general areas of activities which constitute the practice of law.

Section 2 is divided into holding out, providing legal advice, appearance in dispute resolution, preparation of documents for legal proceedings, and preparation of documents affecting legal rights. Since it is impossible to draft a rule defining the practice of law for each individual case, subsection (f) allows a court to determine what does or does not constitute the practice of law.

For the purposes of appearances before governmental bodies, subsection (c) differentiates between the body operating in an adjudicative capacity and a rule-making capacity. Appearances at hearings before a governmental body operating in its rule-making capacity are performed by non-attorneys quite regularly. In testifying on the effect of a proposed rule, the non-attorney witness will necessarily be giving legal opinions, including how the proposed rule will affect the legal rights of others. As a practical and public policy matter, appearances in rule-making proceedings cannot be limited to attorneys. Appearance in adjudicative proceedings, where an individual situation of a particular person is being considered, is a situation in which control over representation is appropriate. That control is described in detail in Sections 3(j) and (k) and Section 4(b), which allows the governmental body itself to determine who may represent others before it in adjudicative proceedings.

Dispute resolution before bodies other than governmental bodies, such as arbitrations pursuant to an agreement, are also excluded from this Rule by subsection (c). The parties to an arbitration may agree to conduct the proceeding using non-attorney representatives. This happens quite regularly in employment and minor business dispute situations.

Section 3

Section 3 delineates the activities which may be performed by non-attorneys. Certain activities should be permitted to be done by certain types of non-attorneys. The permitted activities differ, however, depending upon the circumstances of each individual situation.

Subsection (a) allows one to represent or perform acts on behalf of one's self.

Subsection (b) allows the giving of advice to and preparation of documents which affect legal

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Ethics Committee comments

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rights for members of one's immediate family. Preparation of documents to be used in legal proceedings and appearance in litigation, however, is not allowed as a category of exception. The Committee is aware of situations of abuse involving the practice of law by suspended attorneys where the representation of a family member is used as a subterfuge to avoid the suspension order. Pursuant to Section 4, representation of family members may be allowed by the tribunal in a particular case.

Subsection (c) deals with one of the principal areas of abuse, both by non-attorneys and suspended attorneys. The person simply takes an assignment of all or part of the claim and then prosecutes the claim as his or her own, rather than as a representative of the true claimant. The prohibition can be tied only to the intent of making the assignment, which this rule does. There are many true assignments of claims, however, which are not made to avoid any prohibition against the unauthorized practice of law. If the assignment does not have a purpose of avoiding any prohibition against the unauthorized practice of law, then the assignee may prosecute the claim pursuant to this subsection.

Subsection (d) allows the advising of rights and the preparation of documents in the conduct of a non-law business. This is a well-recognized exception, which includes real estate brokers and agents, banks, insurance agents, accountants, and numerous other businesses. By the nature of the business, advice is given and preparation of documents affecting legal rights are prepared. No blanket exception is granted for the preparation of documents to be used in legal Proceedings, or appearances in legal proceedings, however.

Subsection (e) allows the giving of advice, and preparing documents by which legal rights are affected, including those to be used in the conduct of litigation, by public interest organizations. This exception is broadened from the business exception in the public interest. Organizations such as those dealing with domestic violence actually assist in the preparation of legal documents which are to be used in court, and such activity should not be prohibited.

Subsections (f) and (g) are self-explanatory, allowing work by governmental employees and public officials as part of their duties.

Subsection (h) allows acts performed by paralegals, but requires that the paralegals be under the supervision and control of an attorney who is admitted to practice law in Alaska. Allowing paralegals to practice independently, not being under the supervision and control of an attorney, would simply mean that anyone could open an office for the practice of law. The supervision and control requirement is also imposed as a matter of the ethical responsibility of an attorney, and in the interests of the protection of the public.

Subsections (i), (j) and (k) deal with the representation before courts and administrative bodies, and refer to Section 4. The Alaska Worker's Compensation Board is listed in a separate section, because of the existence of AS 23.30.110(d) which deals with representation before that Board by non-attorneys. The intent of the Committee is that the Alaska Worker's Compensation Board representation be treated in the same manner as the representation before other governmental bodies.

Subsection (l) deals with the well-recognized exception of lobbying and appearances at hearings to testify on legislation or rule making. It confirms the exception for rule making set forth in Section 2(c).

Subsection (m) recognizes the existing rules allowing the practice of law by non-Alaskan attorneys, which include those applicable to out-of-state attorneys, legal services personnel, military legal personnel, and legal interns.

Section 4

Subsection (a) allows a court to determine, in individual cases, who may represent others before it. It also provides some guidance to the court as to what factors should be considered. Where a right to counsel exists as a matter of constitutional, statutory or case law, however, the Committee views that a higher standard is required. Allowing the representation of persons by non-attorneys in a case where the right to counsel exists is simply an invitation to a claim of ineffective assistance of counsel under present case law. Accordingly, where the right to counsel exists, that person must be an attorney. It is also the view of the Committee that the provisions of this rule cannot be avoided by the person who has the right to counsel. The waiver of the right to counsel may be deemed simply to be an insistence on the constitutional right of self-representation. Such a waiver does not mean that a right to representation by a non-attorney exists.

Subsection (b) simply allows a governmental body to determine the conditions under which a person may represent the interests of another for the purposes of Section 2(j) and (k).

Section 5

This subsection is inserted for the protection of the public and the proceedings themselves. If a person may practice law within an authorized exception, then the public interest requires that a person be held to the same standard of care as an attorney, or the business in which that person is engaging, whichever is higher. Since standards of care are determined by the courts through case law, it also appears appropriate for this court to determine standards of care by rule. Additionally, such a person should be subject to the Civil Rule 95 sanctions so that the courts can control the proceedings before them.

The Committee considered whether or not a judicial review section should be placed in this rule, particularly with respect to the adoption of rules and regulations relating to the practice of law before administrative bodies pursuant to Section 4(b). The Committee concluded that judicial review was available under existing law, including the Alaskan Administrative Procedures Act, if applicable.

In summary, it is extremely difficult to define the practice of law. This rule represents a concerted effort by the Committee to balance the interests involved.

The Committee will be available to assist with the presentation of this rule to the Alaska Supreme Court. We will also be pleased to assist with the consideration and evaluation of any comments that might be received about this rule from others.

Kenneth P. Jacobus
Chairman
Alaska Bar Association
Ethics Committee

Proposed amendments to rule of court

By William Cotton
Court Rules Attorney

The purpose of this article is to keep the bar informed of significant changes in the Rules of Court and proposed amendments to the rules. Comments and proposals may be submitted to me at 303 K Street. Administrative Rule 44 covers the form of a rules proposal.

Amendments Adopted by the Supreme Court

1. Letter size paper. The court approved Supreme Court orders (SCO) 685-88 which will begin the changeover from legal to letter size paper. Both types of paper will be allowed from May 1, 1986 to January 1, 1988. Related changes are that one-and-one-half as well as double spacing is allowed. The only change in the document length limitations is that a petition for rehearing may now be five (rather that three) pages.

2. Venue. In SCOs 682 and 683, the court approved new venue rules effective May 15, 1986. The rules do not make major substantive changes, but are intended to make determining venue, especially in criminal cases, an easier process. A map showing venue districts and a city and village index will accompany the criminal rule. The rules and index were attached to the last monthly activity report. They should be published by early summer.

3. Local Orders. The court, effective July 15, 1986, has implimented Administrative Rule 46 which limits the power of local judges to issue standing orders or directives. The purpose of the rule is to weed out improper local orders and attempt to make the remainder available to attorneys who must follow them. The SCO containing the list of approved local orders, and the orders themselves, will be distributed in a notebook to all state law libraries and court locations. Only those local orders which are either approved by the supreme court in its initial review, or issued later and not then rejected by the court are valid.

4. Proof of Service. In SCOs 694 and 695, effective September 15, 1986, the supreme court amended Civil Rule 5(f) and Criminal Rule 44(e) to allow proof of service by certificate of an authorized agent of an attorney and a *pro se* litigant. Prior to this amendment, only attorneys could prove service by certificate.

5. Small Claims Jurisdiction. Under a recent statute passed by the legislature and SCO 692, the jurisdictional limit for small claims cases will increase to $5,000 as of July 1, 1986.

6. Practice by Non-Alaska Bar Members. In SCO 696, effective September 15, 1986, the court amended Civil Rule 81 to remove the requirement that an outside attorney associate with an Alaska bar member who has an office in the district where the litigation is taking place. The attorney not admitted to practice law in Alaska must still associate with an Alaska bar member.

7. Pro Tem Judges. In SCO 690 and 691, effective September 15, 1986, the court approved major changes in the rules governing service of *pro tem* judges. Generally, the changes allow *pro tem* judges to act as paid arbitrators and mediators, but not practice law. However, the practice of law by a retired judge does not prevent the judge from being appointed after withdrawing from his or her practice. In addition, a procedure for reviewing the performance of *pro tem* judges has been established. The Chief Justice will review the judges' performance every two years based upon an evaluation by the Judicial Council, a survey of bar members and judges, and a review by the presiding judge. Comments and suggestions concerning the review process should be directed to Francis Bremson at the Judicial Council.

Major Proposed Rule Changes

1. Medical Malpractice Advisory Panel. Several private practitioners and judges have proposed that a civil rule be adopted which would specify the procedures to be followed when an expert advisory panel is appointed in medical malpractice cases. A draft proposal is now being considered by the Civil Rules Committee. I will forward any suggestions or proposals to the committee.

2. Number of peremptory jury challenges. The presiding judges have proposed that the number of jury challenges in criminal cases be reduced to five for the defense and three for the prosecution. The proposal is now before the Criminal Rules Committee.

3. The 120 day rule. There are a number of proposals to extend the 120 rule (Criminal Rule 45) for various reasons. The presiding judges have proposed extending the limit for 60 days when a judge is peremptorily challenged. Judge Tunley has proposed extending the limit when a defendant is being examined for diminished capacity (as well as for insanity) and when the indictment is dismissed. These proposals are being considered by the Criminal Rules Committee.

4. Selection of Alternate Jurors. Judge Pegues has proposed that alternate jurors not be specified until after trial. Thus, 14 jurors would listen to the evidence without knowing who the final 12 would be. This proposal will be referred to both the Criminal and Civil Rules Committees.

5. ICWA adoptions. The Chief Justice has suggested that a new civil rule might be appropriate to specify the applicable procedures in Indian Child Welfare Act adoptions. If you have any comments, suggestions or would be willing to participate in the drafting of such a rule, please contact me.

As others see us

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type something that quickly, you don't (or at least I can't) pay nearly as much attention to the flow of the dictation. So if it doesn't make sense, or doesn't read the way it should, or track, you can't let the attorney know because you don't have time to comprehend what's being dictated. You only have time to hear the words and find the appropriate characters on the keyboard.

So if you value the sanity of your secretary (and hope to keep her around for a while) this is a situation that you definitely want to avoid.

(I was supposed to be humorous in this article in providing insight. So far, I don't think I've said anything very funny. So on to a new train of thought.)

Let's hear about that rare, almost extinct character—the PERFECT BOSS/ATTORNEY.

I know of one such attorney from a legal secretary friend of mine. The stories this woman tells me are almost unbelievable. As a matter of fact, if I didn't have a first-hand knowledge of some of them, I wouldn't believe them. Now this guy has got to be from another planet. He does everything the way it's supposed to be done. He's always (or at least 99.9% of the time) very pleasant to work with. When he dictates, he spells those new and improved words, not names such as Brown because he also appreciates the fact that his secretary has a brain and not just ten fingers. He spells bizarre words, medical terms, names, etc. He knows more about punctuation and grammar than a Ph.D in English. As a matter of fact (and this takes a lot of courage to admit), I would still be putting quote marks on the inside of periods and commas if I hadn't done a tape for this attorney. When he dictated "comma, quote," I thought to myself this is great, I can finally prove this guy makes a mistake because I just know its the other way around. So I got out my handy dandy Gregg reference manual and lo and behold, *I* was wrong and *he* was right! I'd probably still be doing it wrong if it wasn't for this attorney. Now, admittedly, this sort of perfection doesn't come around every day. As a matter of fact, this is only the second one I've encountered in captivity. But this gives all you NSPB/A's (Not-So-Perfect Boss/Attorneys) something to strive for!

Okay, so far you've read about two different types of attorneys, the PROCRASTINATOR and the PB/A. But what about that attorney who falls right in the middle, the normal type attorney that most of us work for? This attorney has *some* of the characteristics of both of the others, but not enough to be one or the other. He or she, (sorry all you lady lawyers out there, I have always thought of attorneys as men, even though I've worked for a number of excellent lady lawyers in the past—it's a hard thing to change conditioning, I probably watched too much Perry Mason as a kid) when dictating, occasionally spells bizarre words, but more frequently will spell a name such as Marshall and then in the next sentence won't spell Aniafski (believe it or not this is TRUE, it happened to me). This common creature also likes to make up words when he can't think of one. To cure the problem of trying to find the correct spelling of these so called "words" in my paperback desk dictionary, my boss bought me the latest edition of Webster's Unabridged Dictionary. (The thing weighs an absolute ton. I think he really bought it to tie to my ankle so I have to stay at my desk and just type, type, type the rest of my life.) This is also the attorney who occasionally lets deadlines get a bit too close for comfort but he will usually get it for you at least 24 hours in advance. He sometimes loses files (usually in his own office buried under the pile in his IN basket), sometimes gets cranky, but is cheerful for the most part, and in general is a really good person to work for. We all know this type of attorney because most of us work for one or two of them. And to tell you the truth I wouldn't trade the one I work for now for all the perfect attorneys in the world. It's nice to know that your boss makes mistakes because then when you do there isn't a heck of a lot they can say about it.

As I finish this article up, I can think of a dozen or so more things to say. Things like do we or don't we make coffee (since I don't drink it, I don't make it). Or personal errands, personal typing that takes priority over office typing, etc., etc., etc. But since time (and space) is of the essence, I'll save those for anther time (that is, if I'm ever given the opportunity to do this again).

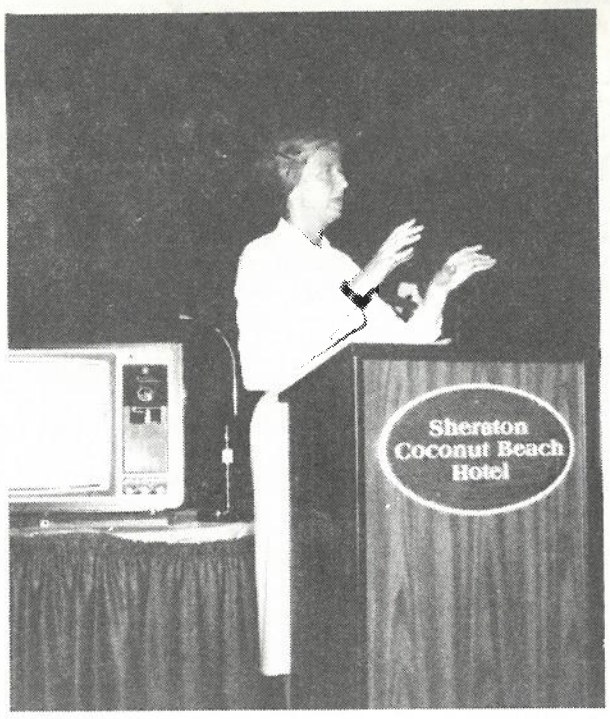
I have to admit it was a lot of fun writing this article because it gave me a chance to really let you have it. But some of you would possibly like the same opportunity with regard to us legals. So, if that is the case, the Anchorage Legal Secretaries Association publishes a monthly bulletin. If any of you out there are interested in writing an article such as this one only in the reverse, please let me know. I'm sure ALSA would be more than happy to publish it.

Hawaii CLE Candids

Spaan-Tone memorial sing-along led by Ken Terry

Maryann Foley, CLE chair, (left) and Linda Nordstrand, CLE director, enjoy a relaxing evening.

Guest Speaker Deanne Siemer



PROFESSIONAL SERVICES DIRECTORY