The Alaska BAR RAG

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Inside:

Anchorage District Court initiates two new programs

PEOPLE WITH DISABILITIES OFFERED ALTERNATIVES IN JUDICIAL PROCEEDING

The Anchorage District Court has initiated two new programs for the mentally disabled:

- The Coordinated Resources Project (a specialty court for mentally disabled misdemeanor of fender) and
- The Department of Corrections' Jail Alternative Services Program for mentally disabled misdemeanor offenders.

COORDINATED SERVICES PROJECT (CSP)

In an effort to better serve the mentally disabled misdemeanant by preventing clinical and legal recidivism, and to improve public safety for the community, effective April 14, 1999 there is established within the Anchorage District Court a Coordinated Resources Project. (Administrative Order No. 3AN-99-02) This project is a mental health specialty court to serve mentally disabled misdemeanor offenders.

Background

Cases involving mentally disabled offenders require a more individualized approach than other criminal cases. Early identification and resolution of the unique needs of mentally disabled offenders results in improved outcomes for the offender, victim and the community in general.

The court recognizes that failure of the justice system to coordinate resources between the correctional system, the court, the agencies, and community mental health providers for the mentally disabled misdemeanant leads to a revolving door of clinical and legal recidivism among the mentally disabled and increased risks to public safety and order.

CRP Objectives

The CRP is modeled after two similar courts, the Broward County, Florida, Mental Health Court and the King County District Court Pilot Mental Health Court Program.

The project's objectives are faster case processing, improved access to community mental health resources, relief of jail overcrowding, reduced clinical and legal recidivism and improved public safety and order.

The CRP will provide a single point of contact with the court system and with designated prosecutors and defense attorney., when possible.

Participating defendants will come before the court for either a bail review hearing or a change of plea and sentencing hearing. Mentally disabled defendants requesting trial will continue to receive regular trial assignments before any available judge.

Deputy Presiding Judge John Lohff and Judge Stephanie Rhoades are the assigned judges. Each has received, and will continue to receive, specialized training in mental health issues.

Judge Rhoades is assigned to coordinate existing resources between corrections, the court, prosecuting and defense agencies and community mental health providers, in order to emphasize appropriate community based treatment for the mentally disabled offender.

1. Identification of Mentally Disabled Misdemeanor Offenders to the Project

Defendants may be referred to the CRP Project from a variety of sources: law enforcement, Department of Corrections, mental health providers, attorneys, family members and other judges in the district court.

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PREPARE FOR Y2K FALLOUT

40 state court judges take "Law Day" to communities

As part of the national celebration of Law Day, state court judges and magistrates across the state participated in school and community programs to expand awareness of the rule of law and the American justice system. Although many judges have participated in classroom presentations in the past, this was the first coordinated, statewide effort.

The Alaska Supreme Court has encouraged every judge and magistrate to contact schools in their local communities to offer their services as classroom speakers, as hosts for programs for school classes at courthouses, or in conjunction with other programs which will promote a better understanding of the justice system.

Justice Dana Fabe, the Alaska Supreme Court's coordinator for this statewide effort, said that she expects the program to be repeated and expanded in future years. "This is a wonderful opportunity for kids in communities throughout the state to meet with judges, ask questions, and learn more about the important role of the courts in our democracy," she said.

Law Day is May 1 of each year. In 1957 American Bar Association President Charles S. Rhyne envisioned a special day for celebrating our legal system. In 1958, President Dwight D. Eisenhower established Law Day U.S.A. In 1961, May 1 was designated by a joint resolution of Congress as the official date for celebration of Law Day.

Since May 1 fells on a Saturday this year, most of the school programs occured

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Brunner, DeWitt honored with awards at convention

Professionalism Award: Roger Brunner

Roger Brunner (left), sole practitioner, is the recipient of this year's Alaska Bar Association Professionalism Award. President Will Schendel presents the award.

The Professionalism award recognizes an attorney who exemplifies the attributes of the true professional, whose conduct is always consistent with the highest standards of practice, and who displays appropriate courtesy and respect for clients and other attorneys. The Professionalism award has traditionally been presented to an attorney in the judicial district where the convention is being held.

Roger graduated from Michigan State University with a B.S. in Computer Science. He received his law degree in 1975 from Notre Dame Law School and was admitted to the Alaska Bar in May, 1976.

He joined the law firm of (then) Rice, Hoppner & Hedland in Fairbanks, and is today a sole practitioner in Fairbanks.

Roger is a long-time member of the Bar Association's Fee Arbitration Committee.

For additional convention reports, see pages 9,12, and 23.

Distinguished Service Award: Jim DeWitt

Jim DeWitt of Guess & Rudd in Fairbanks is awarded the Distinguished Service Award. Joe Faulhaber, longtime friend and public member of the Board of Governors, presents the award. Also pictured is Joe's special trophy—awarded to Jim for his optimistic description of the size of Chena River grayling.

The Distinguished Service award honors an attorney for outstanding service to the membership of the Alaska Bar Association.

Jim graduated from the University of Oregon. He received his law degree from Northwestern University Law School in 1975.

He was admitted to the Alaska Bar Association in May 1976.

He first worked for (then) Birch, Jermain, Horton, Bittner & Monroe. In 1977 he worked for (then) Call, Haycraft & Fenton. He is now a partner in the Fairbanks office of Guess & Rudd.

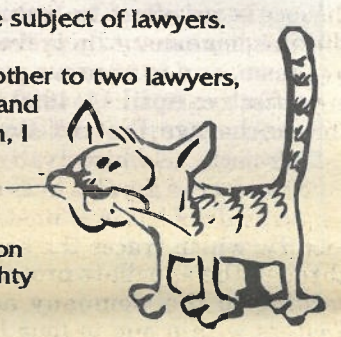
Though born in Stockton CA, he lived in Bethel from 1952-1958, and from 1958 on, he lived in Fairbanks, except for college and law school.

Jim is

- currently serving his second term on the CLE Committee;
- he is the Subcommittee Co-Chair for the pilot project on the Trial Court Opinions Database;
- he is the Internet Committee Chair;
- he developed the biannual non-profits CLE seminar presented in cooperation with United Way and,
- he is the author of the Volunteer Legal Handbook

POET'S CORNER AT THE CONVENTION

Not often does a non-lawyer have the opportunity to expound as an expert on the subject of lawyers. However, my qualifications as such an expert are long-standing and impeccable: I've spent almost 50 years living with the Honorable James M. Fitzgerald; I'm mother to two lawyers, Debra and Kevin Fitzgerald; and I'm mother-in-law to two more lawyers, Tom Amodio and George Trefry. For the record, and so you will be able to understand the following poem, I should also tell you that George not only is a bright and capable lawyer but also, an entrepreneur extraordinaire, who proudly owns and operates two "Laser Car Washes" here in Anchorage.



What follows is a poem which I wrote for and read at the recent Alaska Bar Association Convention in Fairbanks. Many thanks to Debra and Kevin for helping me with the weighty legal issues involved.

LIVING WITH LAWYERS

We sat at the table,
That bright summer day,
Just me and the lawyers,
There were five, did I say?

I breathed a big sigh,
Then spoke to the group.
The problem's a cat,
And here is the scoop.

You know how I value
My flowers and plants,
Well, they're a litter box now,
For a feline named Lance.

I pled with the owner
To restrain her bad kitty,
But she laughed in my face,
And said, "Call up the City."

So, I went to the City,
And found I could rent
A trap guaranteed
To be money well spent.

It looked like a cage,
Fake mouse on the floor,
With no harm to the cat
Who'd come through the door.

That's what I did,
I brought that thing home,
All baited with catnip,
It sat there alone.

Now look out the window,
I said to the five,
There's Lance in the cattrap
And very much alive.

First a dead silence,
Then the uproar did start,
My daughter the lawyer
Said, "Have you no heart?"

How can you be sure that Lance
Is the one?
There are others, you know,
Who this could have done.

You've conducted no line-up!
But I'll give you this hint,
You cannot be sure
'Til you've taken his prints.

Then son-in-law George,
Who'd rather wash cars,
Said, "Hand me a club,
That cat will see stars!"

"Just joking," he laughed,
But I know how you feel.
What you've done is *so* right,
It's not a big deal.

Then Tom, an attorney
And son-in-law, too,
Added *his* two cents
To the hullabaloo.

That cat's got rights!
Yes, rights fundamental.
The right to be free,
Why, it's elemental.

What process is due
To that cat in the pokey?
Full trial with lawyer,
Or something more hokey?

Up speaks my husband,
The federal jurist,
Whose theories on law
Are none but the purist.

Our great system of laws
Is for his protection.
He's lucky, that cat,
He has the selection

Of an impartial jury,
A judge and a clerk,
He gets counsel by right,
Who's paid not to smirk.

He's got rights, remedies,
Writs of *habeas corpus*,
If he did what you say,
Did he do it on purpose?

And if he's unlucky
And goes to the slammer,
No doubt he'll be trained
As a computer programmer.

Now my son, Kevin,
The former D.A.,
He piped up quite loud,
For he'd something to say.

Due process and cats' rights,
They're all overrated,
Not to benefit cats
Was the system created.

Reasonable doubt there is none,
The evidence is clear:
He's pooped in her garden
From there to here.

He's guilty as hell,
That cat behind bars.
The club might work wonders
To make him see stars!

A bang like a gavel
Sent the dishes all flying,
It was clear that the judge
Found the advocates trying.

Enough of this bickering,
You're all out of order!
Just read my last case
In the federal reporter.

I left them all yelling,
As I slipped out the door.
I wouldn't be missed,
This had happened before.

The guy from the Pound
Had come for the kitty,
They missed the whole thing,
And more is the pity.

By: Karin Fitzgerald,
Nonlawyer

The Alaska BAR RAG

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Bar Letters

Unsolicited endorsement

I read with considerable interest the article in the January-February 1999 Edition of *The Alaska Bar Rag*, entitled "What Trial Court Opinions Would You like to See In the Alaska Bar Searchable Database," that prompted me to write this letter to let others know that I am aware of a great new product provided by West Group. *KeyCite* is a new online citator service program that was developed to create time-saving case law research in the practice of law. Some of the unique features of this program are: Flags to warn you of a negative history for a case; Stars to tell you how much your case is discussed by citing references; Citing References to ALR and law reviews; Integration of citator information with West's key number system; and Flexibility to customize your results.

From a single *KeyCite* result you can trace the history of a case to see if it is a good law. You can see a list of all cases and secondary sources, such as ALR annotations and law review articles, cited in your case. *KeyCite* gives you the power to limit your results to only the information you need and helps you to track legal issues decided in a case. For example, if the issue you are researching is related to damages, you can limit your result to only cases that discuss that issue. The Table of Authorities feature can help find weaknesses in your case (or your opponent's case) by showing whether the cases on which it relies have significant negative history.

Coverage of *KeyCite* is as comprehensive as WESTLAW itself. Direct history, which traces the same case through the appellate process, is according to the Company added to *KeyCite* within one to four hours of receipt of an opinion at West Group. It also provides history for federal cases beginning with 1754 and for states cases beginning with 1879.

Instead of paging through newspapers, you can click on-line and quickly scan the information saving valuable time. Its sorting, case flagging and step-by-step instructions allow you to more efficiently access information. A red flag warns that the case is no longer good law for at least one of the points it contains; a yellow flag warns that the case has some negative history, but hasn't been reversed or overruled; and a blue "H" indicates that the case has some history. *KeyCite* also has a system of stars (four stars for in-depth discussion down to one star for a mention) which indicate the depth which your case is discussed in the cited case.

—David B. Roger
Attorney at Law

Timid Critic

The Alaska Supreme Court has recently appointed an Appellate Delay Committee to look into why it takes so long for an appeal to reach its ultimate conclusion. It is rumored that this committee previously met back in the 1980's, and that the minutes of that prior meeting will be published shortly. But seriously, appellate delay is a topic that should be of concern to us all. When it takes 8 weeks just to get an appellate case number assigned, even routine denials of Petitions for Review are subject to inordinate delay.

Has anyone read AS 22.05.140(b) lately? It appears that the spirit of this statute is being ignored. It takes between two to five years from oral argument for a decision to be issued. With delays of this magnitude, criticizing the Supreme Court's efficiency is like shooting fish in a barrel. The real question is what can be done to improve the situation. Here are two modest suggestions:

1) more memorandum decisions. Many of the court's published opinions simply repeat and apply existing law. These could be condensed to one or two paragraph orders affirming or reversing the trial court.

2) spend less time re-weighing the evidence. In some cases, it is obvious that the court is trying to find a way to reverse the jury's or trial court's factual findings. The jury has seen the witnesses live and has had a chance to evaluate their credibility. The court should accept the jury's factual findings and look only at the legal issues.

Yes, I probably should sign this letter, but I am not that brave.

A tribute to Edgar Paul Boyko

I am writing to you as Editor In Chief of The Alaska Bar Rag, prompted by Sheila Toomey's front-page article which appeared in the April 2, 1999 edition of the Anchorage Daily News ("Flamboyant lawyer to leave Alaska").

Although Mr. Boyko was most renown for his high-profile cases (murder defenses, *Hickel V. Hammond,* the 1990 Hickel "body snatching" of the Alaskan Independence Party), he also from time to time delved into some truly arcane areas of practice. Nearly twenty years ago, when I was an Assistant Attorney General (and in that capacity counsel to the Alaska Public Utilities Commission), Mr. Boyko undertook a challenge to a certain "Letter Order" issued by the APUC. This Letter Order attempted to mediate competition between the Anchorage Telephone Utility and various companies who sold key systems and private branch exchanges. Mr. Boyko represented one of ATU's competitors. After the encounter was over and all of the "blood" had been mopped up, I wrote a poem about the event which I used to recite at APUC gatherings.

Now, in tribute to Mr. Boyko, I have transcribed and annotated the text.

—Robert E. Stoller

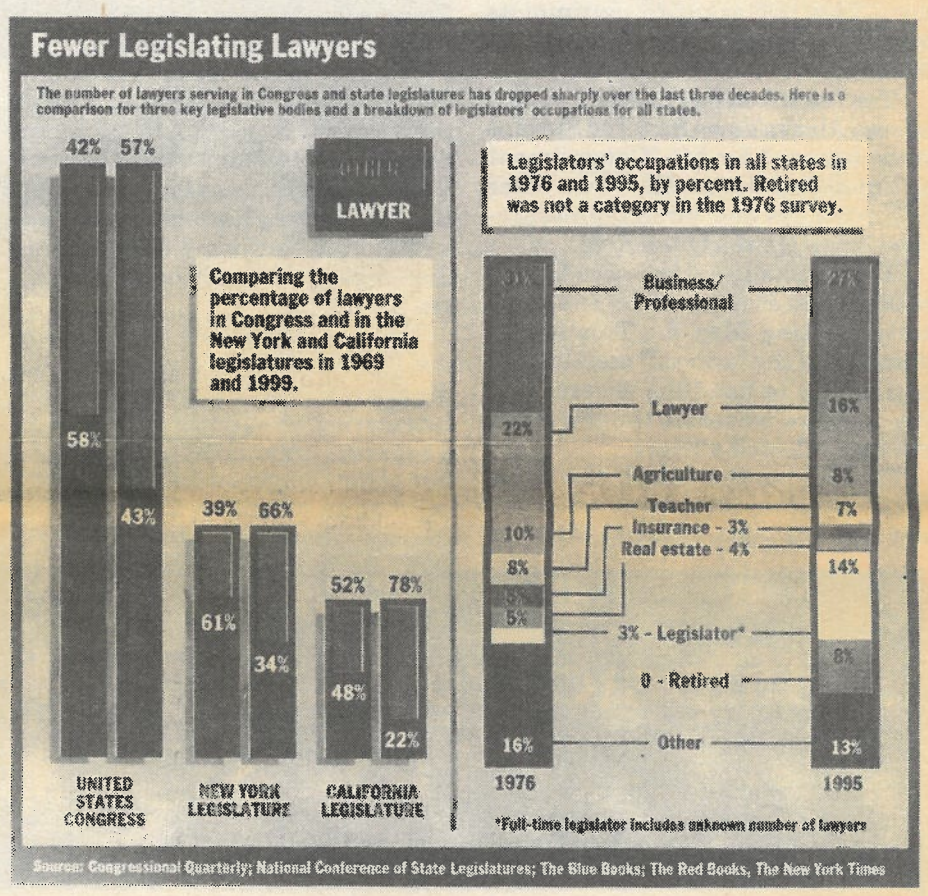
Ed Note: See the poem on page 8

Lawyer legislators

Enclosed is an article from the April 1999 California Bar Journal (see below) on the number of lawyer legislators. Alaska lawyers may find this of interest.

In 1985 there were three Alaska lawyer senators out of 20 (*15%*). There were five lawyer representatives out of 40 (*13%*). In 1991 there was only one lawyer senator (5%) and four lawyer representatives (10%) including one not admitted in Alaska, a total of 5 lawyers out of 60 legislators (8.3%). In the current 1999 legislature, lawyer senators include Dave Donley (R. Anch.), Sean Parnell (R. Anch.), and Robin Taylor (R. Wrangell) (*15%*). Lawyer representatives include Ethan Berkowitz (R. Anch.), Eric Croft ([). Anch.), Beth Kerttula (D. Juneau), and Lisa Murkowski (R. Anch.) (10%), a total of 7 lawyers out of 60 legislators (*11.7%*).

—Max F. Gruenberg, Jr.



Classified Advertising

Anchorage District Court initiates two new programs

Continued from page 1

Any person wishing to identify cases involving mentally disabled defendants to the court may do so by contacting the office of the assigned judges at 264-0666 and speaking with Kathy Brown.

Nothing in the creation of this project is intended to affect any right that any party currently enjoys under Alaska Statutes or Court Rules.

JAIL ALTERNATIVE SERVICES PROGRAM

The Jail Alternative Services Program (JAS), within the Department of Corrections, is a pilot project funded by the Alaska Mental Health Trust Authority.

This program serves up to 40 incarcerated, pre-sentenced, mentally disabled misdemeanor offenders. The Program Coordinator assesses defendant eligibility, links individuals with community treatment programs, and compiles a treatment/release plan.

Only those offenders agreeing to enter the JAS program and comply with the treatment plan may participate.

JAS cases are heard by the CRP assigned judges. At sentencing, the judge orders that the defendant follow the treatment/release plan as a condition of probation. These conditions are then monitored by the Program Coordinator for compliance.

Submitted by Presiding Judge Elaine M. Andrews and Judge Stephanie Rhoades

A quick update

☐ Arthur H. Peterson

ALSC folks would prefer to talk about interesting cases and the help they provide to the indigent. But money matters demand our attention. So I'll mention right off the bat that the state legislature has appropriated for ALSC in FY 2000 the amount requested by the governor—$125,000–which is the same amount appropriated for the current fiscal year (and down from the $1.2 million in the early 1980's).

And it looks like Congress will be appropriating to the national Legal Services Corporation the same amount as appropriated for the current fiscal year—$300 million. It also looks like the state legislature's approach to funding municipal assistance will negatively affect some of our grants from municipalities. ALSC recently filed its application for a $200,000 grant to continue its work under the Violence Against Women Act.

The American Bar Association has chosen Alaska's own Sen. Ted Stevens to be honored for his "Commitment to Equal Justice for All." Two other U.S. senators and three representatives were similarly honored.

The Alaska Legal Services Corporation board of directors held its quarterly meeting May 8. This one is designated the "annual" meeting, so, in addition to handling several routine matters, we seated the new members and elected officers.

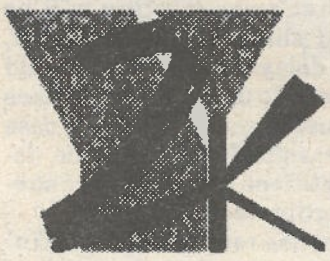
Serving on the board, the three "new" attorney members are actually the old ones. Mason Damrau (Fairbanks), Greg Razo (Kodiak), and I (Juneau) either were re-elected or ran unopposed. And Jonathon Solomon (Fort Yukon) was re-appointed as a lay member by the Tanana Chiefs Conference. Attorney alternates Cam Leonard (for Mason Damrau) and Steve Cole (for Greg Razo) also will continue for another term. The board of governors is appointing Keith Levy to serve as my alternate. The TCC reappointed Lee Titus (Northway) to serve as Jonathon Solomon's alternate. John P. Andrew (Kongiganak) and Louie Commack (Ambler) were also appointed as alternates.

All officers and executive committee members were re-elected. Here's the roster: Bryan Timbers, president; Art Peterson, vice-president; Vance Sanders, secretary-treasurer; Loni Levy, Greg Razo, Antone Anvil, and Margie Nelson will continue on the executive committee, chaired by the president.

The board received the report of the Post-*LASH* Committee. That's the group of staff and board members considering whether and how to form a separate organization that will be free of the Congressional restrictions imposed on recipients of federal LSC money. Those restrictions (not just the income limits) on who may be served and the types of matters that may be handled also affect the *pro bono* program. (See my reports in the March/April 1997 and March/April 1999 issues of the *Bar Rag*.) Nothing was decided, but a tentative letter seeking LSC review of several points was approved.

The board expressed to Seth Eames its appreciation for his 15 years of service as the *pro bono* coordinator. He has been responsible for making sure that thousands of low-income Alaskans received the legal advice and representation they needed. And we thank those of you who have helped him make a success of that program. Seth will be going back to the East Coast in a few weeks to be closer to family. We will miss him.

The next meeting of the board is set for September 25, 1999, in Anchorage.



Y2K help for your office & clients

The Alaska High-Tech Business Council (AHTBC) has initiated a statewide Y2K Assistance project to help small businesses, non-profit organizations and small local governments prepare their systems for the Y2K computer date rollover.

Assisted by a grant from the Alaska Science & Technology Foundation, the Council has developed several workshops that are available to groups. Topics include system assessment and testing; legal & liability implications of the Y2K issue; solutions planning; and contingency planning.

Several attorneys have assisted in developing the workshop programs: Michael Jungreis and Ken Lord of Heller Ehrman White & McAuliffe and Chris Canterbury of Preston Gates & Ellis.

As Y2K immunity legislation has been adopted in 25 states, similar statutes in Congress and Alaska are being considered. Lawsuits for damages arising out of Y2K failures are projected to range from $1 to $3 trillion.

The High-Tech Business Council workshops are designed to assist organizations in avoiding failures and protecting themselves against disruptions beyond their control. For more information on the AHTBC assistance project or to participate in workshop presentations (presenters' stipends, lodging and per diem are included), call 276-4822.

News from the Bar

This proposed amendment is being proposed by the Board of Governors. Please submit comments to Debra O'Regan by Aug. 1

BYLAWS, ARTICLE VIII, SECTIONS 1 & 5

PROPOSED AMENDMENTS ALLOWING ANNUAL MEETING TO BE HELD DURING ANY MONTH OF THE YEAR, AND ALLOWING PUBLIC BOARD MEMBERS TO VOTE AT ANNUAL MEETING

(Additions italicized; deletions bracketed and capitalized)

ARTICLE VIII

Association Meetings

Section 1. Annual Business Meeting. The annual business meeting of the Alaska Bar Association shall be held [IN CONJUNCTION WITH THE BAR'S ANNUAL CONVENTION AND SHALL BE HELD] within the State at the time [DURING THE MONTHS OF MAY OR JUNE OF EACH YEAR] and at the place that is selected by the Board of Governors. Notice of the annual business meeting shall state the time and place scheduled for holding the meeting, and shall be provided to the members of the Alaska Bar Association at least six months before the meeting.

* * *

Sec. 5. Votes. Each active member in good standing and public members of the Board of Governors in attendance at the annual business meeting shall be entitled to cast one vote on each matter presented for consideration. Proxy votes are not permitted.

Bar elections end in April

The following are the results of the Bar elections held this spring, with final results tallied April 13 following two run-offs.

Board of Governors
1st District: Bruce Weyhrauch (unopposed)
2nd & 4th District: Lori Bodwell (unopposed)
3rd District: Kirsten Tinglum (Runoff: Kirsten Tinglum (345) and William Morse (311 ballots)

Commission on Judicial Conduct
(Advisory Poll results forwarded to Governor for appointments)
1st District: Art Peterson (unopposed)
2nd & 4th District: Michael McConahy (Runoff: Peter Aschenbrenner (14); Michael McConahy (47) and Becky Snow (40).)

Alaska Legal Services Corp.
(All unopposed)
1st District
Regular seat: Art Peterson
Alternate seat: No candidate; Keith Levy appointed by Board of Governors
Kenai/Kodiak
Regular seat: Greg Razo
Alternate seat: Steve Cole
4th District
Regular seat: Mason Damrau
Alternate seat: Cameron Leonard

ATTORNEY DISCIPLINE

FRANCES PURDY SUSPENDED FROM PRACTICE FOR FIVE YEARS

The Alaska Supreme Court on March 26, 1999 suspended Anchorage lawyer Frances S. Purdy for five years. The suspension from practice followed Purdy's conviction for forgery and the discovery that she made deceptive statements at a motor vehicle administrative hearing.

In 1994 Purdy bought a car but failed to transfer registration to her name. A year later she received a ticket for expired license tags. Purdy fabricated a power of attorney from the original owner (who had left Alaska), giving Purdy authority to transfer title. She signed the owner's name, then used a co-worker's notary seal to notarize the document. Using the power of attorney, Purdy transferred ownership of the car. But she did not pay the ticket. The ruse came to light when a collection service contacted the original owner about the overdue fine. Following a police investigation, Purdy entered a plea agreement to misdemeanor forgery. She received a suspended imposition of sentence, performed 80 hours of community service, and completed a one year probation.

The Alaska Supreme Court deemed Purdy's forgery to be a serious crime and on July 28, 1997 placed her on interim suspension. Bar Counsel opened an ethics investigation, which included inquiry into Purdy's attempt to avoid paying the ticket for expired tags. Purdy had filed an appeal of the ticket on the grounds that at the time of the ticket she was not the registered owner of the car. At the appeal hearing Purdy under oath denied knowing the date on which she bought the car and denied remembering how long she had possessed the car.

Bar Counsel concluded that Purdy's forgery and her misleading statements to the hearing officer violated Alaska Rule of Professional Conduct 8.4. Part (b) of the rule prohibits a lawyer from committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness to practice law. Part (c) prohibits conduct involving dishonesty, fraud, deceit or misrepresentation.

Purdy and Bar Counsel entered a stipulation for discipline by suspension for five years, retroactive to the date of her interim suspension. The Disciplinary Board and the Supreme Court approved the agreement. The stipulation is available for review at the Bar Association office in Anchorage.

Anomalies found in Alaska negligent infliction of emotional distress cases

By Joe Sonneman[1]

In the September-December 1992 *Bar Rag*, Michael Schneider related Alaska's history of negligent infliction of emotional distress [NIED] torts. He wrote that he focused on NIED because insurance policies consider NIED a separate injury with new policy limits, unlike 'derivative' loss-of-consortium cases.

I planned only to summarize that pre-1992 Alaska NIED history and then to teach the post-1992 Alaska NIED cases in the classroom. Artfully ambling along this almost academic avenue, I accidentally approached apparent anomalies.

EARLY HISTORY OF ALASKA NIED

Schneider started by reporting California's influential *Dillon*[2] decision, which allowed NIED claims to a person near an accident scene, who suffered direct emotional impact from contemporaneously seeing the sudden accident and its horrendous effect on the viewer's close relation.

California later strictly construed the *Dillon* factors,[3] but Alaska instead viewed *Dillon* factors as broad guidelines. In *Tommy's Elbow Room*—Alaska's first valid NIED case—the father did not see the accident, but saw his injured daughter at a nearby hospital soon afterwards, a fact the Court called foreseeable.[4]

Schneider reported that Alaska also allowed an NIED claim when, as reported in *Croft*, close relations saw a sexual assault (not 'accident') victim soon after the event.[5] No other Alaska case allowed "bystander" NIED claims without a motor vehicle accident, but emotional distress was in *Croft* called foreseeable, because the assault occurred near the relatives' home and the victim was likely to return there, where her relatives were likely to see her and to be distressed by her distress.

Schneider also reported that the Alaska Supreme Court in *Mattingly* said the plaintiff's travel time for the 150-mile distance to a related accident victim took too long for a valid NIED claim[6], while the Court approved an NIED claim for the plaintiff's travel time over a 6-mile distance to the related accident victim in *Beck*.[7]

These cases showed that the "viewing" in valid NIED "bystander" cases had to be part of the flow of post-accident events, allowing bystanders no time to "steel themselves" against likely emotional distress.

Schneider also reported *Hancock*[8], in which the Court disallowed an NIED claim of home buyers against builders who allegedly varied from construction plans. The absence of a bystander plaintiff may make *Hancock* Alaska's first case showing a *possible* independent-duty NIED.

FILLING IN THE GAPS

Questions on close cases remain, but Alaska's Supreme Court later filled in some gaps, for example, distinguishing between "bystander" claims and "independent duty" claims, and by limiting the "foreseeability" standard that Dillon and especially *Tommy's Elbow Room* suggested.

NIED NEEDS INJURY OR DUTY OR BYSTANDER CLAIM

In *Nome Comm'l*[9], a bank-customer contract case, the Court repeated the rule that a successful NIED plaintiff had to show either a physical injury or a pre-existing duty. But the Court did not here explain if in bystander cases it was the victim or the bystander who had to be hurt physically.

More recently, the Court in *M.A.* wrote that plaintiffs--to recover for NIED--need either a viable "bystander claim" or to establish that--independently of the injury to another--defendants owed plaintiffs a preexisting duty.[10] In *M.A.*, the Court disallowed a mother's NIED claim when a government doctor allegedly too late diagnosed the daughter's pregnancy; the Court said the doctor's duty ran only to the pregnant daughter, not to her mother.

CONTRACT CASES CONSIDERED

Compare *Nome Comm'l* with *Hancock:* both are contract cases.

The Court considers that valid NIED independent duty contract cases arise only from "highly personal" contracts "laden with emotion"--such as a "contract to marry, to conduct a funeral, to sell a sealed casket, to conduct a cesarean birth, [or] to surgically rebuild a nose".[11]

Neither the *Nome Comm'l* contract between a bank and its customer nor the Hancock construction contract qualified for NIED.

PHYSICAL INJURY FROM E.D.

The "injury rule" usually meant the injury to the bystander plaintiff--not to the initial accident victim the bystander relative saw. The rule required bystander plaintiffs themselves to physically manifest emotional distress--by stroke, sleeplessness, nervous twitches, headache, etc. But this rule had its problems.

The Alaska Court recently agreed[12] with California that the old rule requiring an ED plaintiff to show physical injury was "both overinclusive and underinclusive" and encouraged "extravagant pleading and distorted testimony.[13] Both states' Supreme Courts discarded the rule.[14]

But if *Chizmar* means NIED **plaintiffs** need not themselves prove ED by showing the slightest physical injury, *Croft* asks what injury or accident **victims** must suffer to validate a bystander NIED claim: is the victim's emotional distress enough or is an accident needed?

BYSTANDER: MUST BE (ALMOST) CONTEMPORANEOUS

In *Mattingly,* the Court required that the bystander's "shock result more or less contemporaneously with the plaintiff's learning of the nature of the victim's injury."[15] This rule was still true even in 1998.[16]

But "more or less contemporaneously" is not "simultaneously." Relatives with time to "steel themselves" before seeing an injured relative will not have a valid NIED claim in Alaska. Time is the key: "Bystander" NIED may exist only if the plaintiff sees the victim within "the continuous flow of post-accident events."

INDEPENDENT DUTY

Chizmar may be Alaska's first successful "independent duty" NIED case. In that misdiagnosis-of-HIV case the plaintiff personally asserted an NIED claim, instead of relying on an accident or injury to a relation. The Court found persuasive, clever, and forceful the argument that if wrongful diagnosis of a relation presented a valid NIED claim, wrongful diagnosis of one's self would be no less stressful. The Court said the doctor in *Chizmar* owed a duty directly to the patient, which duty if breached could justify the patient's NIED claim.

DUTY FACTORS

In *Hawks*[17] the Court said negligence cases begin by determining if defendants owed plaintiffs a duty of care. In Hawks, the Court said the State had no duty to a mother to promptly identify her daughter's body--hidden by a murderer--in part because of the murderer's acts and in part because to allow such claims would 'open the judicial floodgates.' (Remember these "floodgates" of litigation; they'll be important later).

Karen L.[18]--where the Court denied a mother's NIED suit against the State arising out of alleged mistreatment of her CINA [Child in Need of Aid] child--quotes *Chizmar*, at 896 P.2d 203, as similarly limiting NIED recovery to cases where defendants owe plaintiffs a pre-existing duty.

PRE-EXISTING DUTY

When does a pre-existing duty exist? The *Hawks* court cited *D.S.W.*[19] as adopting a list of factors to answer that policy-laden "duty" question.

The *D.S.W.* factors include:
foreseeability of harm to plaintiffs, certainty that plaintiffs suffered harm, closeness of confection between defendant's conduct and plaintiff's harm; moral blame of defendant's conduct, policy of preventing future harm, burden on defendants, community consequences of imposing a duty, and insurance considerations (availability, cost, prevalence, risks).

FORESEEABILITY

Foreseeability was key to some tort cases[20], but *D.S.W.* shows that other factors also apply.

Actually, foreseeability alone is not enough. In *Beck*, 837 P.2d at 110, the Court said that "policy and reason dictate the law should not" compensate plaintiffs who suffer even foreseeable harm from [remotely] learning of a relation's death or injury, or from much later observing that relation's pain, suffering, or injuries.[21]

Similarly in the "independent duty" context, the *Hawks* Court found the State had no duty to the mother of a murdered child whose hidden remains were unidentified for years.

But courts do not always determine "duty."

STATUTE OVERRIDES D.S.W.

The *D.S.W.* "duty" factors do not apply where a statute imposes a duty, as in *M.A.*, where Alaska's medical malpractice law imposed a duty on doctors.[22]

This rule of statutory primacy means the Legislature does have the first option to make policy-laden decisions about when a duty exists; Courts apparently make that policy decision only if the Legislature is silent.

POLICY & PHILOSOPHY

When the law should--or should not--recognize NIED claims is essentially a policy question. Policy may in the first instance be for the Legislature to decide, but Alaska's courts show no shyness at grasping that nettle.

Alaska at first broadened the limiting *Dillon* factors by treating them only as "guidelines," per *Tommy's Elbow Room.* Then Alaska's courts leaned toward *not* recognizing NIED claims, especially in *Beck* leaning towards limits on liability.[23] Now Alaska may have swung back towards the plaintiff side, by agreeing with California that bystander NIED plaintiffs need not themselves exhibit physical manifestations of their emotional distress.

But even the present observation of a close relative's pain and suffering still wins no approval of bystander NIED claims from Alaska's courts, excepting *Croft* conditions.

ANOMALIES?

Is *Croft* anomalous? The Court there concentrated its attention on the brief time between the sexual touching and the parental viewing of their daughter's distress, and upon the foreseeability of the parental viewing.

But the Court paid little or no attention to the similarity or difference between a sexual touching in *Croft* and the severe, immediate, and often traumatic physical injury or death of the victim of a sudden [motor vehicle] accident in other Alaska "bystander" NIED cases.

If in *Croft* the victim's emotional distress can justify NIED of close relatives viewing the victim soon after a distressful event, doesn't that imply a valid NIED bystander claim to close relatives who see their relation-victim soon after any event which causes emotional distress to their loved one? What about pain and suffering, which under most other current interpretations is barred as a cause of NIED claims? But, if courts disallow pain and suffering as starting NIED cases, then why was *Croft* a valid NIED case, when no accident occurred?

Was *Croft* an 'independent duty' case? Maybe: An employee visited the employer's home and then took the employer's daughter for a ride on a three-wheeler, allegedly improperly touching her during that ride. Was there an implied contract so personal and emotion-laden that an independent NIED existed, which extended to the bystander parents who did not see what happened? If so, the Court did not address it. If not, how to explain accident-less *Croft*?

How also to explain that courts--a branch of government--don't seem to impose independent NIED duties on government defendants?

At first mere coincidence might seem the answer, because so few cases of this type exist—*Hawks*, *Karen L.*, *M.A.*--or because government defendants do not usually form so personal and emotion-laden a relationship. (*Beck*, where courts held a State defendant liable for NIED, is not apposite, because *Beck* is a "bystander" case but here we review independent duty cases).

Worse, the Court only in *Hawks* specifically relied on the "floodgates of litigation" argument, an argument soundly discredited in most other Alaskan civil cases.[24]

The "floodgates" argument essentially says not to deliver justice because too many people might ben-

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Anomalies found in Alaska negligent infliction of emotional distress cases

Continued from page 6

efit from it. So the *Hawks* Court's most unusual reliance on that discredited "floodgates" argument kills the coincidence theory.

Sherlock Holmes advice is that once you eliminate the impossible, whatever remains--however improbable--must be the truth. Here, "coincidence" is impossible as an explanation for government courts absolving government defendants from independent duty NIED claims.

Readers can deduce the improbable truth that remains.

CONCLUSION

While these decisions leave some questions open, principles reported here may help practitioners more accurately predict which plaintiffs have NIED claims that Alaskan courts now consider valid. But because law is dynamic, because courts change with time, and because Alaska relies on reason and policy as well as precedent[25], the past presents only a partial path to the future.

(Translation: this might not help much after all!)

FOOTNOTES

[1]Joe Sonneman earned a Ph.D. in government; he is also a lawyer in Alaska, Hawaii, and Massachusetts.

[2]*Dillon v. Legg,* 441 P.2d 912 (Cal. 1968).

[3]*Thing v. La Chusa*, 771 P.2d 814 (Cal. 1989).

[4]*Tommy's Elbow Room V. Kavorkian*, 727 p.2D 1038, 1043 (Alaska 1986) (NIED allowed if risk of harm to plaintiff was reasonably foreseeable, even if accident itself not observed).

[5]*Croft v. Wicker,* 737 P.2d 789 (Alaska 1987) (Alaska adopts Dillon guidelines to determine foreseeability and duty of care, extending NIED to relatives of sexual abuse victim, though relatives did not observe the event)

[6]*Mattingly v. Sheldon Jackson College*, 743 P.2d 356 (Alaska 1987) (denying NIED to relation who had time to "steel himself" against emotional impact of seeing accident victim relation in distant hospital).

[7]*Beck v. State DOTPF*, (837 P.2d 105 (Alaska 1992) (NIED allowed to one who, voluntarily or involuntarily, makes sudden sensory observation of traumatic injuries of close relation soon after the accident, but NIED not allowed to one who learns of injury or death, or who sees pain and suffering only after enough time to 'steel onesself').

[8]*Hancock v. Northcutt*, 808 P.2d 251 (Alaska 1991) (construction contract does not give rise to valid NIED claim).

[9]*Nome Comm'l Co. v. Nat'l Bank of Alaska*, 948 P.2d 443, 453 (Alaska 1997) (bank contract does not lead to valid NIED claim)

[10]*M.A. v. U.S.*, 951 P.2d 851, 853 (Alaska 1998), citing *Chizmar v. Mackie*, 896 P.2d 196, 201, 203-04 (Alaska 1995); see also *Hawks v. State,* 908 P.2d 1013, 1016 (Alaska 1995).

[11]*Nome Comm'l*, quoting *Hancock v. Northcutt*, 808 P.2d 251, 258-59 (Alaska 1991).

[12]*Chizmar,* 896 P.2d at 202.

[13]*Chizmar quoting Molien v. Kaiser Fndtn. Hosp.*, 616 P.2d 813 (Cal. 1980) (en banc).

[14]*Chizmar* thus adopts the argument urged in Hancock but not then adopted.

[15]*Mattingly,* 743 P.2d at 365-66, quoted with approval in Karen L. V. State, 953 P.2d 871, 875-6 (Alaska 1998).

[16]*Karen L.*; see succeding note.

[17]*Hawks v. State*, 908 P.2d 1013, 1016 (Alaska 1995).

[18]*Karen L. v. State*, 953 P.2d 871 (Alaska 1998) (mother who claimed emotional distress because of State treatment of her CINA child held NOT to have valid NIED claim).

[19]*D.S.W. v. Fairbanks N. Star Boro. Sch. Dist.*, 628 P.2d 554, 555 (Alaska 1981).

[20]For examples, *Ira S. Bushey & Sons v. U.S* 398 F.2d 167, 171-72 (2nd Cir. 1968) (employer liable for foreseeable acts of employee), cited with approval in *Doe v. Samaritan Counseling Center,* 791 P.2d 344, 347-48 (Alaska 1990), modified in dicta in *Veco. Inc. v. Rosebrock*, 970 P.2d 906, 924 n.36 (Alaska 1999) and *R.E. v. State*, 878 P.2d 1341, 1346 (Alaska 1994); *Division of Corrections v. Neakok,* 721 P.2d 1121, 1125 (Alaska 1986) (cited in *Karen L. v. State*, 953 P.2d 871, 875 (Alaska 1998).

[21]Showing the continued connection of Alaskan and California courts, *D.S.W.* factors were quoted from *Peter W. v. San Francisco Unified Sch. Dist.*, 60 Cal. App. 3d 814, 131 Cal.Rptr. 854, 859-60 (1976).

[22]*M.A. v. U.S.*, 951 P.2d 851, 853 (Alaska 1998) (medical malpractice statute imposes duty on doctors, so *D.S.W.* does not apply). In *M.A.*, Alaska's Court answered a question certified to it by the U.S. District Court, holding *inter alia* that a doctor owed no duty to the mother of a patient whose pregnancy might have been diagnosed late.

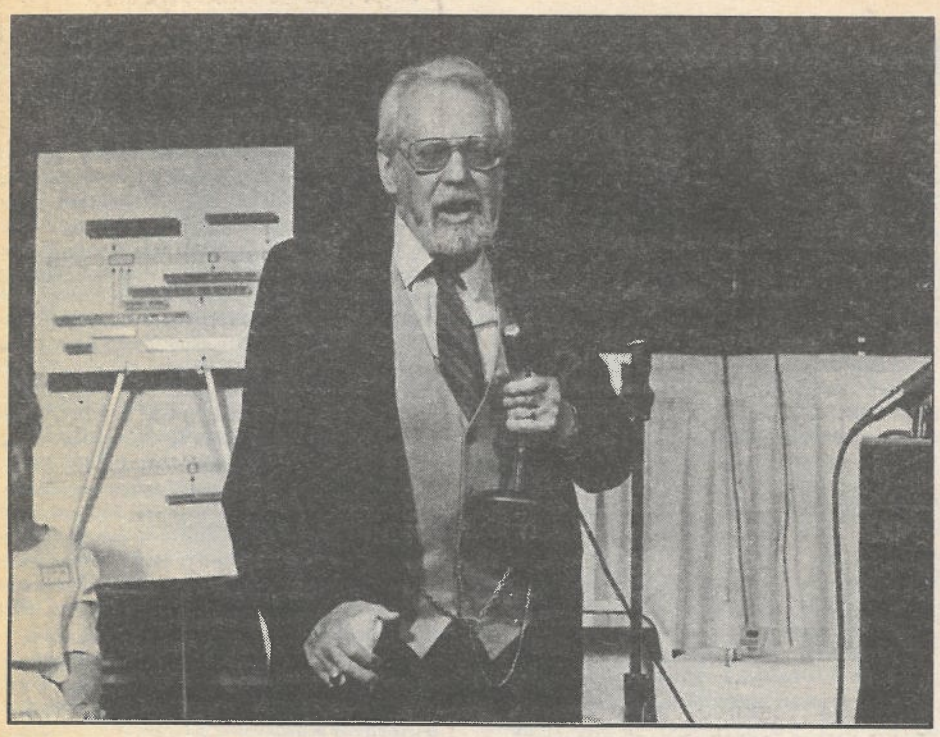
[23]*Nome Comm'l*, 948 P.2d at 449-50 (party never liable merely for insisting on legal rights, even when certain emotional distress to plaintiff results); *Beck,* 837 P.2d at 110 (courts to apply foreseeability and duty concepts in NIED cases, "with a view toward a policy favoring reasonable limitations on liability").

[24]See for example: *Bolieu v. Sisters of Providence of Washington*, 953 P.2d 1233 (Alaska 1998) (risk of frequent litigation is low, because claim hard to prove and damages modest); *Chizmar,* 896 P.2d at 202 ('floodgates' already open because even slight physical injury allows emotional distress claim); *Fox v. Alascom. Inc.*, 718 P.2d 977 (Alaska 1986) (in worker's compensation, "unsubstantiated" that threshold requirements for mental injury should be higher than for physical injury, because of allegations that mental injury easier to fake or harder to detect); *Allred v. State,* 554 P.2d 411, 425 n.3 (Alaska 1976) (dissent of Rabinowitz, Dimond, JJ) (this Court consistently rejected 'floodgate' arguments); *Wernberg v. State*, 516 P.2d 1191, 1200-01 (Alaska 1973) ('floodgates' argument against compensation to upstream land owners overcome here to allow inland owners compensation when access to open waters lost); *Marwell Const. Inc. v. Underwriters at Lloyd's, London,* 465 P.2d 298, 309 (Alaska 1970) (Court declined to adopt "floodgates" argument to adopt *Lamb-Weston* rule requiring proration in all insurance cases). *See* also the case urged in *Hancock*, 808 P.2d at 258, *Rodrigues v. State*, 472 P.2d 509, 519-20 (Hawaii 1970) ("little weight" given to 'floodgates' argument, because courts which have decided derivative mental distress causes of action can also decide independent causes of action, because juries and courts can weed out dishonest claims, and because the standard of proof required is some guarantee of genuineness). *But see* in the criminal context *George v. State*, 944 P.2d 1181 (Alaska App. 1997) (reporting passage of federal Prison Litigation.

Reform Act to slow flood of "meritless" prisoner claims) and *Warwick v. State ex rel. Chance,* 548 P.2d 384, 399 n.40 (Alaska 1976) (suggesting that retroactivity is disfavored in criminal cases because of concern for flood of habeas corpus cases).

[25]*Guin v. Ha*, 591 P.2d 1281 n.6 (Alaska 1979) (court uses precedent, reason, and policy [*not* "justice," "fairness" or "equality"] to determine rule of law).

AN ENCOUNTER WITH A LIVING LEGEND



Edgar Paul Boyko

BOYKO AT THE BAR

By Robert "At Your Service" Stoller
Inspired by Casey At The Bat

It looked extremely rocky for The Telephone Company's[1] "show",
For just last week Judge Rowland had denied their TRO.
So when Shute and Johnson's[2] case before the APUC went bust,
A pallor wreathed the features of the fans of anti-trust.
First ACI, and then Wire-Comm, had departed the melee, Leaving all the interconnect hopes riding on TTC.
But where was that mighty champion, that wizard of the law, Who could wrestled-down the Commission, and prevail for Alden's[3] cause?
Good lawyers, at best, are hard to find, and fewer yet know regulation. Why, according to the ABA, there are but 5000 in the Nation.[4]
And TTC had further complicated its position By naming as defendants ATU - - and the Commission![5]
But then from gladdened Alden there went up a joyous yell. It rumbled up on Flat Top, and it rattled in the dell;
It sounded on the Hillside and rebounded to the stars - -For Boyko, Mighty Boyko, was advancing to the Bar.
There was ease in Boyko's manner as he stepped into his place. There was pride in Boyko's bearing, and a smile on Boyko's face.
And when he pulled a sheaf of cites from his cavernous briefcase, No stranger in the court could doubt - -here stood a legal ace.
Two dozen eyes were on him, as he analyzed the facts Charging both defendants with a host of wrongful acts.
After an hour's tirade, that was crammed with precedent He smiled up at Judge Rowland[6] and summarized his argument:
"The Commission has conceded that its Order lacks support, And ATU's activities are a classic business tort!"
But the cases cited by Boyko he had hopelessly mis-read - -"Objection!" shouted Stoller.[7]
"Overruled!" Judge Rowland said.
Kemppel[8] moved, then, for production of the interconnect system's cost, On the theory it related to whether sales had been lost.
In support now of his motion all his legal skills he trained - -But Boyko then objected, and Judge Rowland said, "Sustained!"
From the benches black with people there went up a muffled roar, Like the beating of a storm-wave on a stern and distant shore.
"Kill him! Kill that liar!" Weatherly[9] shouted from the stands, And its likely Pistorious[10] would have killed Boyko, had not Rowland raised his hand.
With a smile of judicial charity Great Rowland's visage shone, He stilled the rising tumult, and bade argument go on.
He signaled then to Stoller, who opposed the A.J. test,[11] But Rowland just ignored this, and Boyko puffed his breast.
"Fraud!" cried the enraged Stoller, and Great Kemppel echoed, "Fraud!" But one awesome look from Rowland and defense counsel were awed.
Rowland signaled then to Boyko who would have the final say, And Boyko bounded to the lectern a Snow Tiger[12] on his prey.
The smile is gone from Boyko's lips, his teeth are clenched with rage. He gestures and he postures, like an actor on a stage.
"The Commission's policy must be stopped! It violates the laws!" "But where", inquired Rowland, "have you shown me proximate cause?"

* * *

Somewhere, in the Great North Land, the Midnight Sun shines bright. Wordprocessors churn somewhere, and somewhere hearts are light.
Somewhere clients are laughing, and law clerks and paralegals shout - -But there is no joy in Anchorage, Mighty Boyko has crapped out!

[1]At all times pertinent to this poem (Summer of 1979), The Telephone Company ("TTC") sold key systems and PBX telephone switchboard systems in competition with the Anchorage Telephone Utility ("ATU"). TTC and other "interconnect" companies (including Automated Communications, Inc. ("ACI") and Wire Comm, Inc.) believed with some justification that ATU was intentionally and unfairly underpricing its competitive telephone systems.

The issue before the Court was whether ATU might, under any circumstances, be permitted to compete with the interconnect companies in the area of equipment sales while a protest to ATU's pricing practices was being litigated before the APUC. In the hearing described in this poem, TTC (through Boyko), was seeking an injunction to permanently disable competition by ATU.

The APUC had issued a Letter Order provisionally allowing ATU to compete, subject to retroactive price adjustments including possible increases (which would make ATU relatively less competitive).

TTC/Boyko won a battle by ultimately convincing Judge Rowland that the Commission's Letter Order was, in operation, a regulation which had not been adopted in conformance with the procedures specified in the Alaska Administrative Procedures Act (AS 44.62.180 et seq). But TTC/Boyko ultimately lost the war. The verbatim text of the Letter Order was formally adopted as a regulation (3 AAC 48.390(d) and (e)), effective January 19,1980. See, Re: Regulations Relating to the Definition and Use of Special Contracts By Vendors and Customers of Public Utility Services (Order U-79-70(1)) 2 APUC 516 (APUC 1979).

[2]Brian R. Shute and Elizabeth I. Johnson were the two young lawyers who first represented TTC before the Alaska Public Utilities Commission in the administrative proceeding which challenged ATU's pricing practices. Mr. Shute later reappeared for TTC in the subsequent regulations proceeding, vigorously opposing Assistant Attorney General Robert E. Stoller's proposed regulations. See 2 APUC at 517-518.

[3]John Alden was the President, Chief Executive Officer and major shareholder of TTC at the time of this case.

[4]In the Summer of 1979 there were just over 5000 lawyers who were members of the American Bar Association's Section of Public Utility, Communications and Transportation Law.

[5]The Telephone Company v. Municipality of Anchorage d/b/a Anchorage Telephone Utility and Alaska Public Utilities Commission, (Alaska Superior Court, 3d Jud. Dist. No. 3AN-79-2537 Civ.).

[6]Anchorage Superior Court Judge Mark C. Rowland presided at the oral argument.

[7]At all times pertinent to this poem, Assistant Attorney General Robert E. Stoller was counsel to the APUC and its Staff.

[8]Roger Kemppel of the firm Kemppel, Huffman & Ginder (now Kemppel, Huffman & Ellis) represented ATU in this proceeding.

[9]APUC Commissioner Marvin R. Weatherly monitored the oral argument for the APUC.

[10]Al Pistorious was the General Manager of ATU at this time.

[11]A.J. Industries, Inc. v. Alaska Public Service Commission, 470 P.2d 539 (Alaska 1970) was - - and still is - - the Alaska Supreme Court's leading case on the standards a litigant must satisfy to secure either a preliminary injunction or a stay pending appeal. Boyko's argument relied heavily on his reading (misreading?) of the A.J. case.

[12]Boyko's regular column in the Alaska Bar Association's monthly newsletter was entitled, "Roar of The Snow Tiger".

40 state court judges take "Law Day" to communities statewide

Continued from page 1

on April 30, In which some communities programs took place earlier or later because of scheduled school in-service days or other scheduling demands.

Law Day activities were coordinated in each of the four judicial districts by each district's area court administrator, a court manager who works at the direction of the presiding judge. The following are some examples of the 1999 programs.

1ST JUDICIAL DISTRICT

• In the first judicial district, Magistrate Joyce Skaflestad of Hoonah worked with a community group on a Law Day presentation focusing on justice and cultural diversity. She invited school officials, Native community leaders, city staff and any members of the public to attend.

• Mike Jackson, Magistrate in Kake, has already held a Community Circle Peacekeeping workshop with the Kake Tribal social services, City of Kake officials, police, school students and community health staff. Ketchikan District Court Judge Trish Collins recently visited Hydaburg on Prince of Wales Island and met with school students, elders, community leaders and the public about the court system.

• Craig Magistrate Christine Ellis conducted a similar program in the community of Thorne Bay.

• Hollis students from Prince of Wales Island planned a day trip to visit the Ketchikan courts in May.

•Supreme Court Justice Walter Carpeneti and District Court Judge Peter Froehlich served as judges and lecturers at Juneau-Douglas High School in mock appellate arguments and subsequent discussions based on historical cases raising constitutional issues.

• In Sitka, Superior Court Judge Larry Zervos and Magistrate Bruce Horton hosted five classes of 5th graders (approximately 150 students) from Verstovia Elementary for a mock trial at the courthouse. Local attorneys and court personnel participated.

• On April 15, approximately 80 teenagers from Mount Edgecombe held a mock trial at the Sitka courthouse. And Judge Zervos and Magistrate Horton scheduled presentations to approximately 120 students in four government classes at the Sitka High School.

2ND JUDICIAL DISTRICT

In the second judicial district, Barrow Superior Court Judge Michael Jeffery and other court staff held a mock trial with 8th grade students.

• Judge Richard Erlich of Kotzebue organized an essay program with the school district, for which Supreme Court Justice Alex Bryner will judge the students' entries.

• In Nome, Judge Ben Esch spoke to a high school government class and to a junior high class.

3RD JUDICIAL DISTRICT

In the third judicial district, Anchorage District Court Judge Sigurd Murphy coordinated the effort of the judicial officers.

Judge Murphy taught six separate half-hour classes at Huffman Elementary School to Grades 3 to 6 on topics ranging from our court system, the importance of juries, a comparison of civil and criminal law, and participating in a just society.

• District Court Judge Peter Ashman is conducted a mock trial for a 5th - 6th grade class at Chugach Optional School in Anchorage.

• Anchorage Superior Court Judge Larry Card made a presentation at Mountainview Elementary School.

•Anchorage Children's Master Bill Hitchcock and Anchorage District Court Judge Stephanie Rhoades made presentations to classes at Stellar Secondary School.

• Seward Magistrate George Peck participated in Law Day activities at Seward High School.

• Other Anchorage judges also made school presentations:

Anchorage Superior Court Judge Milton Souter visited Lake Hood Elementary; Anchorage Superior Court Judge Sen Tan visited Romig Middle School.

•Anchorage District Court Judge Gregory Motyka visited Wendler Middle School; Anchorage Superior Court Judge Rene Gonzalez visited Clark Middle School; Anchorage Superior Court Judge Eric Sanders visited Service High School; Anchorage Superior Court Judge Elaine Andrews visited Birchwood Elementary; Anchorage District Court Judge Stephanie Joannides will visit Spring Hill Elementary; and Anchorage District Court Judge Natalie Finn visited Atheneum Middle School.

4TH JUDICIAL DISTRICT

In the fourth judicial district, Presiding Judge Ralph Beistline spoke to a school class in Fairbanks concerning a project they are studying on prison alternatives and to a youth group concerning the role of law in their lives. Judge Beistline also did a presentation for the Chamber of Commerce and an article for the newspaper relating to the important role jurors play in the legal system.

• Fairbanks Superior Court Judge Charles Pengilly invited 6th grade children to the court to hold a mock trial. He also spoke at the University of Alaska at Fairbanks campus to criminal justice students.

• Fairbanks Superior Court Judge Niesje Steinkruger spoke to a government class at Lathrop High School on May 3, and also gave a presentation on sentencing to high school students at Lathrop High School.

• Fairbanks Superior Court Judge Mary Greene spoke to a 3rd grade class from Immaculate Conception School.

• At the Fairbanks courthouse, District Court Judge Jane Kauvar and Magistrate Ron Smith held a Law Day program for 4th, 5th, and 6th grade students.

• Fairbanks District Court Judge Ray Funk visited Badger Elementary School and did a mock trial at Weller Elementary School for 5th graders.

• Bethel Superior Court Judge Dale Curda and Magistrate Craig McMahon planned a program beginning with a "mock crime" at a Bethel school, followed by a mock trial. Sixty to 80 students from the Alternative School and Bethel Regional High School were expected to participate. The effort also involved members of the Bethel legal community, the Alaska State Troopers and staff from the Bethel court.

• In Delta Junction, Magistrate Tracy Blais and Fairbanks District Court Judge Jane Kauvar held mock trials for local school children. Other 4th district magistrates also worked with their local schools to plan programs.

Justices from the Alaska Supreme Court and judges from the Alaska Court of Appeals also made Law Day presentations: Justice Robert Eastaugh conducted a law day program at Hanshew Middle School; Justice Dana Fabe addressed five classes at Goldenview Middle School; Justice Alex Bryner judged student entries in an essay contest in Kotzebue; and Chief Justice Warren Matthews was the keynote speaker at a luncheon at the Elmendorf Air force Base Officer's Club.

Alaska Supreme Court oral arguments held April 12 - 15 were broadcast on Gavel to Gavel in communities statewide on April 16. Additional arguments were broadcast the following week on public television stations.

The goal of this pilot project was to increase public understanding of the judicial process, allowing citizens throughout the state to observe the work of the state's highest court.

Issues before the court included a challenge to an oil and gas lease sale, a challenge by a Native village to a permit allowing a rock quarry, due process in criminal cases, and aspects of municipal pension fund administration.

MCLE rule update

As the Supreme Court deliberates on details of the mandatory CLE rules, two resolutions regarding MCLE were considered by the membership at the Association's Annual Meeting in Fairbanks on May 13, 1999.

The first resolution opposed MCLE and requested that the Supreme Court not adopt a mandatory rule. That resolution failed by a close margin.

The second resolution requested a membership referendum on the issue of whether MCLE should be adopted. That resolution passed and the Board will be conducting a referendum in the weeks ahead.

The continuum of dispute resolution

☐ Drew Peterson

So just what is the big deal about media tion anyway? Many people, particu larly attorneys, just don't get what all the excitement is all about. They have been to mediation sessions and found them no different than what is offered through the normal legal process. Why pay a retired judge $1000 a day to hold a "mediation" session, when a settlement conference can accomplish the same thing for free? And what is this nonsense about the parties feeling "empowered" or "transcending" their dispute? It sounds like New Age mumbo-jumbo to many. Don't things work out for the best with the assistance of head-knocking advocates just like they always have?

As the field of Appropriate Dispute Resolution (ADR) matures, more and more people are aware of alternatives to the traditional litigation model for resolving disputes. Twelve years ago, when I began working as a mediator, the majority of people, including most lawyers, did not know what the word "mediation" meant. They confused it with meditation, or with something medicinal, or occasionally with arbitration.

At the present time, in contrast, the word "mediation' is in the vocabulary of most; certainly every lawyer and sophisticated client has heard about mediation and is somewhat familiar with it.

The irony of the situation, however, is that there remains as much ignorance about ADR (Alternative Dispute Rosolution) as ever. And attorneys are the worst culprits. Moreover those of us in the ADR field are in part to blame, through our overly simplistic use of the language of ADR.

Imagine if you will a continuum of the ways people resolve disputes. On one extreme are the simplest methods of dispute resolution, like simple avoidance of the issue, or immediate capitulation. Such methods may fester, and may not always be satisfactory in the end, but the vast majority of disputes are ended quickly in such a fashion. They are based primarily on avoidance of the dispute by at least one of the parties.

To the other extreme of the continuum are the most destructive methods of resolving disputes, such as war, terrorism, mayhem and murder. Such methods resolve disputes by forcing the weaker side to capitulate to the will of the stronger, often at a terrible cost. (Interestingly, some other methods of dispute resolution that are not often thought of as radical are also based upon the application of force, such as strikes, boycotts, and non-violent civil disobedience, in the tradition of Ghandi and Dr. Martin Luther King Jr.)

Between the two extremes of the continuum are myriad different approaches to dispute resolution, but of two primary flavors.

The first of these are collaborative dispute resolution methods, whereby the disputants themselves resolve the issues through different kinds of negotiation processes, either individually or with assistance.

The second are rights-based dispute resolution methods, whereby the dispute is turned over to a third party decision maker. This third party will decide the matter based upon a determination a who is right and who is wrong on the particular issues presented.

All four of these methods of dispute resolution: 1.) avoidance based methods, 2). collaborative methods, 3.) rights based methods, and 4.) power based methods, have been around since the beginning of civilization. There is nothing new under the sun, as Ecclesiastics states.

The only thing new and different about ADR is its approach. The predominant formal dispute resolution method in the United States has been rights-based, namely through the courts. ADR tries to focus the dispute resolution method more on the collaborative side of the continuum. In its initial incarnation, ADR stood for "alternative dispute resolution," specifically referring to alternatives to formal litigation.

Many of us in the ADR field act as if alternatives to court resolution are solely to be found in the purely collaborative realm. We go on and on about the great benefits to parties of resolving their own disputes; how the parties feel empowered, and can often transform their disputes into a win-win scenario. The parties can end up transcending their particular disputes, the mantra goes, and build long lasting and closer relationships with their adversaries.

THE REALITY OF ADR PRACTICE, HOWEVER, IS THAT MANY PEOPLE WHO GO THROUGH THE ADR PROCESS -- INDEED THE MAJORITY OF THEM -- DO NOT FEEL EMPOWERED AND TRANSFORMED.

The reality of ADR practice, however, is that many people who go through the ADR process -- indeed the majority of them -- do not feel empowered and transformed. They often feel no different than litigants after a decision in court.

The point struck home for me early in my ADR career, when, acting as an attorney, I participated in a settlement conference in a divorce. The case was a vitriolic one, with issues, primarily financial which should have been settled. I thought the judge did a masterful job of cutting through the parties' emotional states and leading them to a reasonable settlement. A mere month later, however, in talking to my client about the experience, he described the process as something that had happened to him. He thought of it just as if it had been a court decision rather than a settlement that he had agreed to.

Reflecting upon my client's experience, I believe that is exactly the impression most parties have of settlement conferences. They are lost and bewildered by the process, and see it as something the attorneys and the judge control, with they, themselves, having little power. Indeed, I still regularly reflect on my client's comments, with the goal of making the experience of my own mediation rooms different.

It can be different. Within the world of ADR, and especially mediation, there are many different styles, some of which do indeed empower the disputants and transcend the disputes (at least for some participants). On the other hand, there are also many styles that are much more asimilar to conference model, - where the disputants come out feeling as though something has been done to them by the mediator and the lawyers involved in the case.

Recent leading books in the ADR field, notably *The Promise of Mediation,* by Robert A. Baruch Bush and Joseph P. Folger (Jossey Bass, 1994), have noted the phenomenon that the settlement style of mediation is winning in the marketplace, particularly in the court-annexed mediation world. While the mediation gurus are advocating the transcendent, empowering mediation style, the mediation cases are going to the mediators who use the settlement conference style, especially in the non-family mediation world.

Admittedly, some kinds of cases are more suited to the transformative style of mediation than others, notably those involving the need for a continued relationship: divorces, family disputes, partnership dissolutions, and the like. Empowering methods of dispute resolution are amenable to all types of cases, however, and I believe should generally be tried first, because of the much greater satisfaction level of the parties when they are successful.

The problem is that many consumers of ADR, and particularly attorneys, are unaware of the differences in ADR practice styles. They see ADR as being one generic alternative to court. At most they may differentiate between mediation and arbitration, but they have little concept of the different potential benefits for their clients of different ADR styles and methods.

To some extent those of us in the ADR field are atfault. We have failed to differentiate the different kinds of ADR methods, or to adequately educate consumers and their advocates about them. Indeed we have even perpetuated the problem, through acquiescence to the use of confusing terminology, such as "advisory mediation," or my own pet peeve, "non-binding arbitration.

When I first became involved in ADR, I saw a major task as educating people, particularly my attorney colleagues, about the meaning of mediation. At the present time, my passion is to educate about the different styles of mediation, and how importante it is to understand the differences.

The legal world is becoming more sophisticated about ADR every day. It is essential that attorneys not only understand that options to litigation exist, but also that there are many different ADR flavors, some of which may be ideally suited to the particular needs of their clients. Only with a sophisticated understanding of ADR can attorneys guide their clients to that dispute resolution method which will provide them with their optimum resolution of their disputes.

Discharge of student loans: A quandary

☐ Thomas Yerbich

Effective October 7, 1998, the Higher Education Amendments of 1998, PL No. 105-244, changed section 523(a)(8) of the Bankruptcy Code that designated all government insured student loans as nondischargeable, regardless of when the loans became due. These loans are now nondischargeable unless the debtor can prove undue hardship.

This change applies to bankruptcy cases commenced after the date of enactment and thus applies to loans incurred before the date of enactment. The 7-year "safe harbor" no longer exists.

In May 1998, Judge Singleton held that the Eleventh Amendment precluded dischargeability actions from being brought against ACPE in the bankruptcy court. [*Nutter v. Alaska Commission on Postsecondary Education (In re Nutter)*, No. A98-0050 CV(JKS), 5 ABR 398 (D.Ak. 1998)] Thus, the appeal was dismissed for lack of subject matter jurisdiction.

Now that all student loans are nondischargeable unless the borrower can establish "undue hardship," there will no doubt be an increase in litigation over whether a student loan is discharged. The question is, in what court, and will some debtors be subjected to a multiplicity of actions? For example, assume an Alaska debtor with three student loans: (1) an ACPE loan; (2) a Pennsylvania Higher Education Assistance Agency ("PHEAA") loan; and (3) a United Student Aids Fund ("USAF") loan. USAF is not a state agency, therefore, an action to determine discharge of that loan would be properly brought in the bankruptcy court. However, under the Eleventh Amendment, dischargeability of neither the ACPE loan nor the PHEAA loan could be adjudicated in the bankruptcy court. Moreover, the Alaska court would lack jurisdiction over PHEAA and a Pennsylvania court would lack jurisdiction over ACPE. Result: three separate actions!

The current situation is fraught with uncertainty and possible inequities for borrowers and lenders alike. Should the borrower be proactive or reactive? That is, should the borrower make a preemptive strike and file a declaratory relief action or should the borrower simply wait until sued and raise the affirmative defense of discharge in bankruptcy? Can one loan be discharged and another not?

I assume for the purpose of this article that Alaska and Pennsylvania would apply the three-part *Brunner* test for a bankruptcy discharge of a student loan used by the bankruptcy court. First, the debtor must establish that she cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans. Second, the debtor must show "that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans." The third prong requires "that the debtor has made good faith efforts to repay the loans" [*In re Pena*, 155 F3d 1108,1111 (9th Cir. 1998)]

The first problem we face is if our hypothetical borrower meets the first prong, how is that borrower supposed to fund the legal battle to determine dischargeability in three separate actions, at least one of which will be 4,000 miles removed from where the debtor lives? Does a "minimal" standard of living include legal fees in prosecuting or defending against a dischargeability action? Unless counsel is willing to undertake the action on a *pro bono* basis, student loan dischargeability actions can be very expensive. Having tried more than a couple of these cases, I can attest to the fact that counsel for the borrower, even if he/she does not intend to take the case on a *pro bono* basis, more often than not it ends up as at least a partially, if not mostly, *pro bono* endeavor.

Not infrequently, a situation exists where there are multiple lenders and a borrower with some, but limited, capacity to repay the loans. That is, it would be an undue hardship for the borrower to repay all the loans in full, but it would not be an undue hardship to repay a portion of the loans. In that case, it is possible one or more of the loans could be discharged and another loan(s) not. An inequitable result for the lender whose loan is discharged.

How does the court deal with loan(s) the dischargeability of which has not been determined? Does the court presume the other loan(s) will also be discharged or is the presumption it(they) will not be? Who has the burden of showing that it is more likely than not that the other loans will or will not be discharged and how is that burden met? This could be critical because if the other loan is not discharged, making payments on both loans may create an undue hardship, but not making payments on the loan *sub judice*. Also what consideration, if any, should the first court give to the probable outcome in the second court if the loan being adjudicated by the first court is discharged or not discharged? Either way the presumption works, one or more lenders may be the "goree." Any way one looks at it, the first court to address dischargeability is placed in a position similar to the proverbial monkey chasing its tail around the flagpole.

Assume it is presumed (or established by a preponderance of the evidence more likely than not) that the other loan(s) will not be discharged and an undue hardship would exist if the borrower had to make payments on the nondischarged loan(s) and the loan before the court. In that event, the first loan adjudicated would be discharged but, since the first loan was discharged, the second loan would not be discharged. The second lender gets paid but the first does not.

Alternatively, assume it is presumed (or established by a preponderance of the evidence that is more likely than not) that the other loans will be discharged and an undue hardship would not exist if the borrower had to make payments on the loan before the court if he/she did not have to make payments on the discharged loan(s). In that event, the first loan adjudicated would not be discharged, but, since the first loan was not discharged, the second loan would be discharged because paying both it and the nondischarged loan would constitute an undue hardship. The first lender gets paid, the second does not.

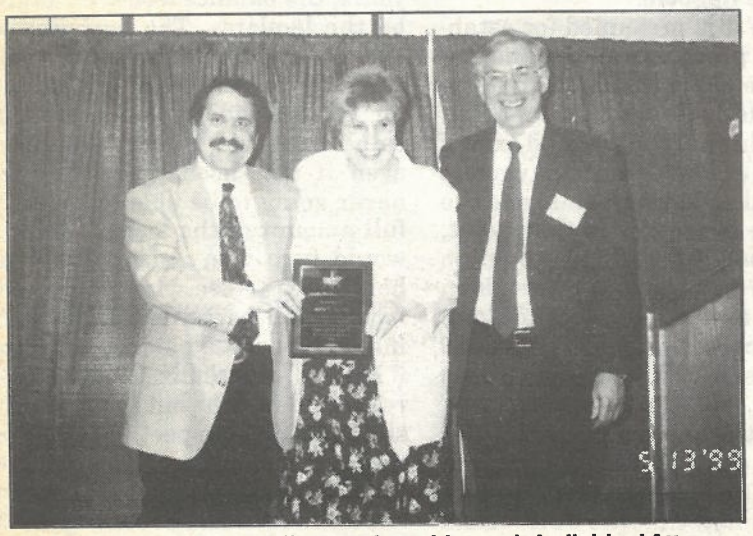
This result may be avoided if all lenders are joined in a single proceeding. I represented a student loan guarantor in a student loan case several years ago in which there were seven lenders and aggregate loans of $100,000. My client, a private nonprofit, held nearly 30% of the loans and PHEAA held another 20% (ACPE was a minor player in this scenario). All seven were joined in a single action in the bankruptcy court. It quickly became obvious that, while the borrower could afford to pay a fairly significant portion of the loans, she could not pay 100% to all seven lenders without creating an undue hardship. We resolved this case by a stipulated judgment in which all seven lenders joined (the hardest part was to get the three smallest lenders on board). That stipulated judgment was similar to collection agreements made by the Internal Revenue Service. The loans were not discharged but, if the borrower to made certain minimum payments, plus a graduated percentage of her income over specified amounts, over a period of years, the balance would be forgiven by the lenders. The borrower was also required to submit her tax returns for review on an annual basis for verification purposes. Realistically, from the lenders standpoint, even if not discharged, they were never going to be able to collect the full amount of the loans. In fact, it would turn into a donnybrook of a horse race to see who could get the most! The borrower had incentive make the partial payments because, if she did, she realized a substantial reduction in debt but, if she did not, she faced the prospect of lenders continuing to hound her. Today, achieving that result is impossible because not all the lenders could be joined in a single action.

What exists today with respect to student loan discharge is a procedural riddle, wrapped in an enigma, cloaked by a mystery. A situation that benefits or favors neither borrowers nor lenders. Even if the borrower defaults in a collection action and the lender obtains a judgment, the lender faces a very real practical hurdle: collection, *i.e.*, the borrower is essentially judgment proof. What is the solution? Clearly, as the Supreme Court made clear in *Seminole Tribe of Florida v. Florida*, 517 US 44 (1996), Congress can not solve it. What it will take is each of the 50 several states to waive its Eleventh Amendment immunity with respect to student loans. A course of action the Alaska legislature would be wise to consider for ACPE to avoid becoming the "goree." For both borrowers and lenders, the current situation is akin to shooting craps in Las Vegas with loaded dice, only one does not know in what manner the dice are loaded: snake eyes or boxcars.

Annual Conve

FAIRBANKS, ALA

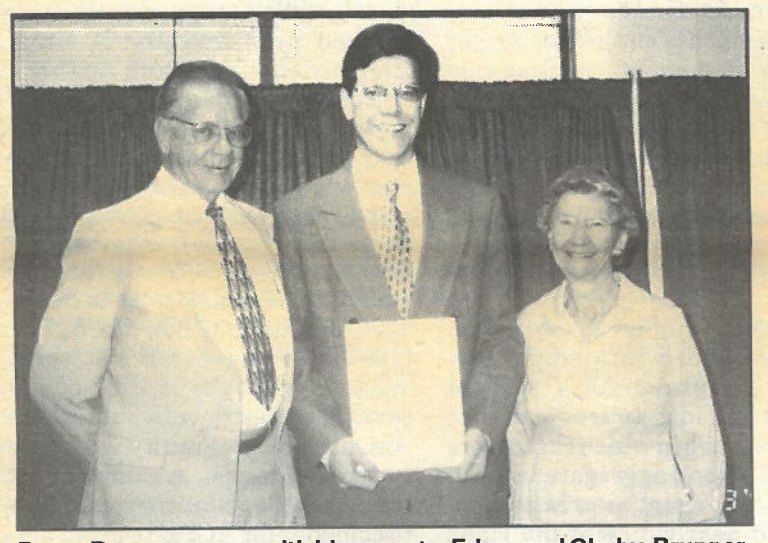
President-elect Kirsten Tinglum presents outgoing president Will Schendel with the artwork from this year's convention brochure. The "Behind Rainbow Ridge" oil painting was the work of Fairbanks artist Bill Brody.



Fairbanks attorney Rita Allee receives this year's Individual Attorney Pro Bono Award from Seth Eames, Pro Bono Coordinator, and Chief Justice Warren Matthews.

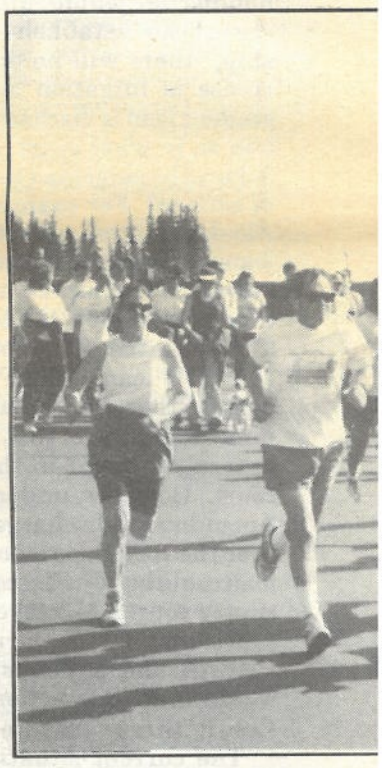
The firm of Schendel & Callahan was the recipient of this year's Law Firm Pro Bono Award. L-R: Dan Callahan, Will Schendel, Seth Eames, Pro Bono Coordinator, and Chief Justice Warren Matthews.

Chief Justice Matthews presen
15 years of outstanding servic
legal profession as the coordi
leaving the Pro Bono Prograi
moving to the Washington D.C



Roger Brunner poses with his parents, Edgar and Gladys Brunner, at the Awards Banquet. (His parents were present at the Banquet to see him receive the 1999 Professionalism Award, thanks to the well-honed, behind-the-scenes skills of his wife, Judge Niesje Steinkruger.)

Race Marshal Bob Groseclose lays down the law at the Fun Run sponsored by West Group.



Fun Runners zip across the sta

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FLEET OF FOOT IN

Men

1. Mike Kramer	19:45
2. Scott Brandt-Erichsen	20:00
3. Robert Eastaugh	20:23
4. Alex Bryner	21:06
5. Lach Zemp	22:04
6. Bob Groseclose	23:00
7. Robert Hickerson	23:41
8. Paul Ewers	24:46
9. Oppenworth	24:50
10. Randall Farleigh	26:00
11. Will Schendel	26:01
12. Bob Lintott	27:35
13. Larry Ostrovsky	28:01
14. Joel Bolger	28:48
15. John Lohff	28:58
16. Paul Eaglin	29:13
17. Fred Torrisi	29:32
18. Charlie Cole	29:51
19. Gary Zipkin	31:17
20. John Kaufman	33:24
21 Robert Reges	37:
22. Randal Buckendorf	37:
23. G. Kinney	44:
24. David Hooper	45:
25. Mike Jeffrey	49:
26. Peter Michalski	50:
27. Art Robson	51:
28. Andrew Kleinfeld	51:
29. Harold Curran	56:
30. Roberts, C.	58:
31. John Roberts	58:
32. John Suddock	58:

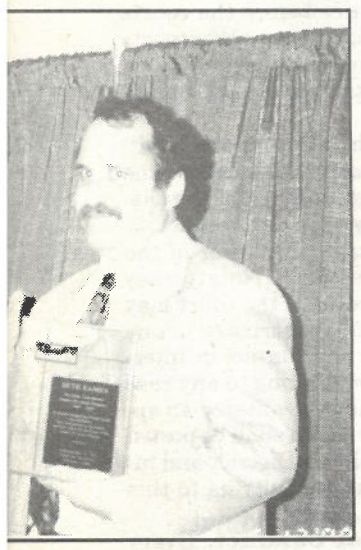
Women

1. Leslie Dickson	25:
2. Diane Smith	27:
3. Wendy Lyford	27:
4. Angel Floyd	28:

Photos

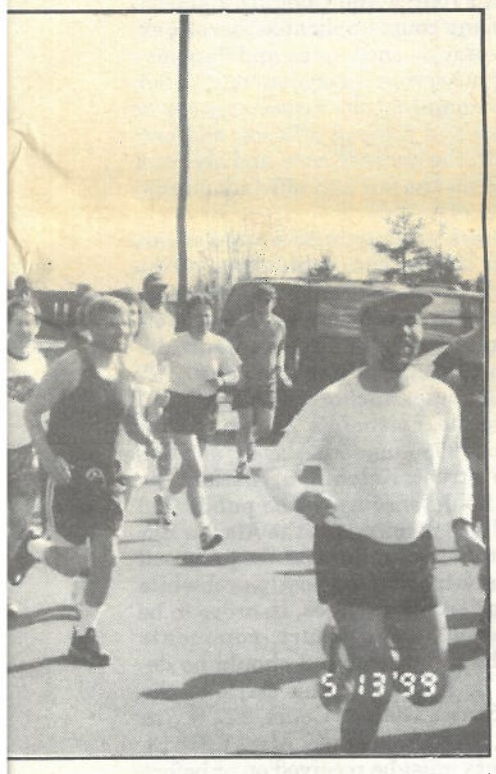
tion Highlights

A • MAY 12-14,1999



cial award to Seth Eames for his community, the courts, and the the Pro Bono Program. Seth is une and he and his family are

Outgoing president Will Schendel passes the gavel to president-elect Kirsten Tinglum.



Robert Hickerson sweeps across the finish line. He is greeted by Keith Beler, West Law trainer.

E 5K FAMILY FUN-RUN

5. Stephanie Cole	29:23
6. Lori Bodwell	33:23
7. Elaine Andrews	31:09
8. S.J. Lee	35:48
9. Bev Cutler	34:16
10. Hooper	50:05
11. Barbara Schuhman	50:26
12. Donna DeMoss	50.27
13. Carolyn Peck	50:28
14. Marla Greenstein	50:30
15. Julie Kauver	52:47
16. Marty Beckwith	52:48
17. Shelly Higgins	52:50
18. Ruth Bohms	53:39
19. Karen Ince	54:24
20. Maryann Foley	54:24
21. Penny Agallianos	54:24
22. Aragon	56:18
23. Jody Davis	56:19
24. Julie Webb	56:52
25. Stephanie Joannides	58:14

Youth

Under 18

Annie Hooper	28:38
Allison Athens	58:11

Under 15

Alex Hooper	33:23
Jane Groseclose	50:06
Noah Athens	58:12

Under 7

Gabriel Reges	37:15
Michael Hooper	50:04

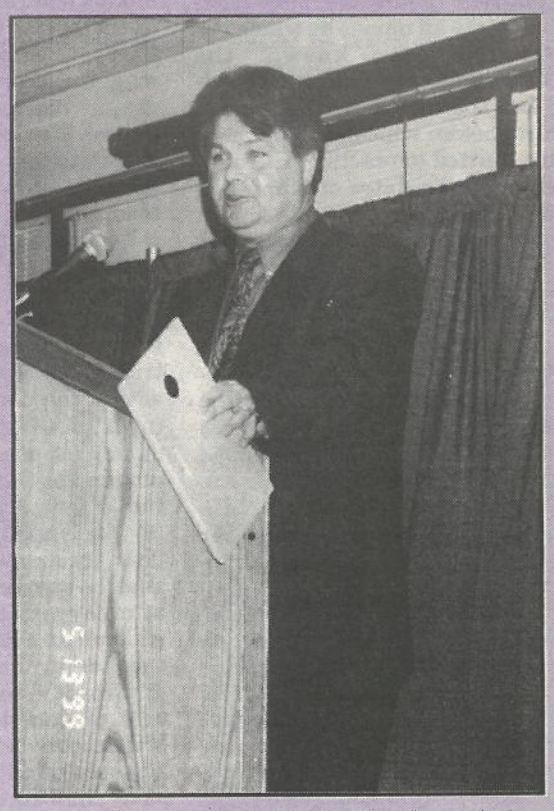
(For some runners, marshals had only their last names. Our apologies if you're in the wrong category on the list.)

Steve Van Goor

More presentations

Anchorage Bar Association president Rhonda Fehlen presents this year's Outstanding Service Award to Judge James Wanamaker. Judge Wanamaker is involved in several outreach projects intended to bring the court system closer to the community.

Chief Judge James Singleton addresses the Bar during the State of the Judiciaries address.



For the first time, the Alaska Bar Association recognized and honored a member of the public who has given distinguished service to the profession. Richard Green of Fairbanks, long-time member of the Fee Arbitration Committee, was presented with the award.

Comments due July 6

U.S. District Court proposes new attorney fee rules

IN THE MATTER OF AN AMENDMENT TO DISTRICT OF ALASKA LOCAL RULE 83.1 GOVERNING ATTORNEYS.

MISCELLANEOUS GENERAL ORDER NO. 825

In recent years the judges of the United States District Court for the District of Alaska have addressed the question of attorney admission fees by general order. This conforms with the practice in many districts throughout the United States. On reflection, however, the judges have decided that the matter of admission fees, like the matter of admission in general, should be addressed in the District of Alaska Local Rules. The Court proposes amendments to District of Alaska Local Rule 83.1 to address the question of fees. The Court also proposes certain amendments governing non-resident attorneys to clarify the application that such attorneys must make in order to appear *pro hac vice* in a specific case.

IT IS THEREFORE ORDERED:

The members of the Alaska Bar Association and the general public be notified of the proposal to amend District of Alaska Local Rule 83.1 so that it reads as follows:

LR 83.1 Attorneys

(a) Eligibility.

(1) Any attorney at law, upon presenting satisfactory proof to the clerk of this court of having the requisite qualifications to practice as an attorney and counselor at law before the courts of the State of Alaska, is eligible for admission to practice in the United States District Court for the District of Alaska except as provided in D. Ak. LR 83.l(a)(2).

(2) No one serving as a law clerk to a judge of this court shall engage in the practice of law while continuing in such position. After separating from that position, practice as an attorney in connection with any case pending during his or her term of service before the judge for whom that person worked shall be limited by Rule 1.11 of the Alaska Rules of Professional Conduct.

(b) Procedure for Admission.

(1) All attorneys at law admitted to practice before the former District Court for the Territory of Alaska on February 20, 1960, shall be deemed admitted to practice in this Court without further procedure for admission.

(2) In all other instances, each applicant for admission shall file with the clerk a petition requesting admission which shall state all names by which the applicant has been known, the applicant's residence and office addresses, and the names and addresses of all courts before which the applicant has been admitted to practice. The petition shall state the dates of admission and the dates of suspension or other such action on account of disability or other reason in any of the jurisdictions or courts before which the applicant has practiced.

(3) The petition shall be accompanied by proof of the requisite qualifications to practice law in the courts of the State of Alaska. Such proof shall consist of a certificate signed by a justice or the clerk of the Alaska Supreme Court or the Executive Director of the Alaska Bar Association, and the certificate shall bear a date no more than 90 days prior to the date of the application.

(4) The petition shall be accompanied by proof of service on the Alaska Bar Association.

(5) Each applicant for admission, at the time of filing the application, shall tender to the clerk a fee of $100, of which such amount as may be required by law shall be deposited into the treasury of the United States and the balance of which shall be deposited into the Court Fund.

(6) After a 20-day period for the filing of objections has elapsed, the court shall determine whether to order admission, and, if admission is ordered, the clerk shall issue a certificate of admission. The court may, on its own motion or in response to an objection, make further inquiry of the applicant or others and determine what response to the objection in the form of a hearing or other procedures is appropriate. Service of the petition on the Alaska Bar Association, proof of service, and the objection period shall not apply for new admittees to the Alaska Bar Association if the petition for admission is filed in this court within 60 days of the date the Alaska Bar Association certifies the person for admission to the Alaska Supreme Court.

(7) An accepted applicant shall take an oath substantially in the form as may he prescribed from time to time by the Administrative Office of the United States Courts or by miscellaneous general order of this court.

(c) Annual registration. Each member of the bar of this court shall renew his or her membership the year following initial admission and each year thereafter on a form to be provided by the clerk. Each applicant for renewal, at the time of filing his or her renewal application, shall tender to the clerk a fee of $25 to be deposited into the Court Fund.

(d) Practice Within the District of Alaska. Active members of the bar of this court may appear and act in all respects on behalf of parties anywhere in the District of Alaska unless the court finds good cause to require association with an active member of the bar of this court residing in the place within the district where the case is pending.

(e) Non-Resident Attorneys.

(1) A member in good standing of the bar of another jurisdiction, who is not an active member of the bar of this court, may be permitted by the court on motion to appear and participate on behalf of a party in a particular case, but non-local counsel will ordinarily be required to associate with an active member of the bar of this court. The court may permit a member in good standing of the bar of another jurisdiction, on a sufficient showing, to appear and participate without association with an active member of the bar of this court.

(2) If a motion pursuant to D. AK. LR 83. 1(c)(2) is filed, the attorney applying may appear and participate from the time of filing as though it had been approved unless the court orders otherwise, and approvals shall be deemed to be effective as of the time of filing of the motion unless otherwise ordered. The motion shall either designate a member of the bar of this court in accord with the above paragraphs or else show cause why, in accord with the above paragraphs, no association should be required. Motions for leave to participate without local counsel will not be approved as a matter of course, and if denied, the parties represented by non-local counsel will be given a reasonable period within which to associate local counsel.

(3) If a non-local attorney appears for a party, whether from outside the District of Alaska or outside the location within the district where the proceeding is located, the court may at any time during the proceedings, *sua sponte* or on motion, for good cause, require association of local counsel.

(4) The motion for permission to appear pursuant to D. AK. LR 83. 1(e)(1) shall be supported by an affidavit of the attorney seeking admission. The affidavit shall disclose all names by which the applicant has been known, the applicant's residence and office addresses, and the names and addresses of all courts before which the applicant has been admitted to practice. The affidavit shall state the dates of admission and the dates of suspension or other such action on account of disability or other reason in any of the jurisdictions or courts before which the applicant has practiced. The affidavit must recite that the applicant has read these local rules. The affidavit shall be accompanied by an appropriate certificate attesting that the applicant is currently an admitted member in good standing of the bar of one of the states of the United States or of one of the United States District Courts.

(5) Each non-resident attorney seeking admission to appear in a particular case shall at the time of filing the motion tender to the clerk a fee of $100, which shall be deposited into the Court Fund. A separate fee will be assessed for each case in which the non-resident attorney appears.

(f) Attorneys for the United States Government and the Federal Public Defender Agency. Any attorney representing the United States Government (or an agency thereof) or any attorney employed by the Federal Public Defender's Office may appear and participate in particular cases in an official capacity without submitting a petition for admission, so long as he or she is admitted to practice and in good standing before the highest court of any state. If such attorney is not a resident of this District, then the resident United States Attorney or Federal Public Defender, as the case may be, shall be associated initially, but upon application demonstrating good cause, the court may dispense with such association.

(g) Appearances, Substitution, and Withdrawal.

(1) Whenever a party has appeared by counsel, such party may not thereafter appear or act in his or her own behalf in the action unless an order of substitution has been entered by the court, after notice to the attorney of such party and to all other parties. The court may exercise its discretion to hear a party in open court notwithstanding the fact that such party has appeared or is represented by counsel.

(2) Partnership, corporations, trusts and associations may not appear *in propria persona*, but must be represented by an attorney admitted to practice in this court either as an active member of its bar or as a non-resident attorney who has applied for and been granted authorization to appear in the particular case in conformity with this rule.

(3) Withdrawal as counsel requires leave of the court. A motion for leave to withdraw shall be accompanied by: (A) written consent of the client; (B) substitution of counsel and formal appearance of substituting counsel; or (C) other showing of good cause. Any party or attorney may oppose the motion, and the court may deny such a motion even if consented to or unopposed. If the withdrawal would leave the formerly represented party without an attorney of record, the motion shall provide the party's last known address and telephone number, and the attorney proposing to withdraw shall arrange a hearing and give the client at least 20 days written notice of the hearing, unless he shows good cause why such a hearing should not be required. Notwithstanding the foregoing provisions, attorneys employed by a governmental entity may substitute as counsel without leave of court and without written consent of their client so long as all parties to the action are immediately notified of such substitution, with such notice including the full name, telephone number, and mailing address of the substituting attorney.

(4) Parties appearing pro se (without an attorney) are bound by these rules and the Federal Rules of Civil Procedure. A party proceeding pro se shall at all times keep the court and opposing parties advised as to current address and telephone number.

(h) Disbarment and Suspension.

(1) Whenever it appears to the court that any member of its bar or any non-resident attorney permitted to appear or who has applied to appear has been disbarred, suspended from practice, or convicted of a serious crime as defined by the Alaska Bar Rules, or similar authority in a state other than Alaska, such attorney shall be suspended forthwith from practice before this court. Unless good cause to the contrary is shown within 5 days after notice has been mailed to the attorney's last known place of residence, there shall be entered an order of suspension or disbarment for such time as the court fixes.

(2) If a suspended attorney requests, in writing, reinstatement to practice before the court, and the court has received notification that the attorney has been reinstated to practice before the courts of the State of Alaska or such other courts where the suspended attorney practices, an order of reinstatement may be entered.

(i) Contact With Trial Jurors. No attorney admitted to practice before the United States District Court for the District of Alaska may seek out, contact, or interview at any time any juror of the jury venire of this court. No attorney without prior approval of the court may allow, cause, permit, authorize or in any way participate in any contact or interview with any juror relating to any case in which the attorney has entered an appearance. This subsection shall be posted in the jury rooms of this District and jurors shall be instructed fully as to this matter.

(j) Professional Conduct. Every member of the bar of this court and any attorney admitted to practice in this court under D. AK. LR 83. 1(c)-(d) shall be familiar with and comply with the Standards of Professional Conduct required of the members of the State Bar of Alaska and contained in the Alaska Rules of Professional Conduct and decisions of any court applicable thereto, except insofar as such rules and decisions shall be otherwise inconsistent with federal law; maintain the respect due courts of justice and judicial officers; and perform with the honesty, care, and decorum required for the fair and efficient administration of justice.

The clerk shall publish a copy of this order in the official publication of the Alaska Bar Association, and make copies available for review at the various clerk's offices of the District Court, located in the federal courthouses at 222 W. 7th Avenue, Anchorage, Alaska; 101 12th Avenue, Fairbanks, Alaska; 709 W. 9th, Room 979, Juneau, Alaska; and 648 Mission Street, Ketchikan, Alaska. The notice should encourage the public and particularly members of the Alaska Bar Association to comment on the proposed amendments and suggest worthwhile modifications or changes. In order to be considered by the Court, comments should be in writing and should be delivered or mailed to the clerk of the United States District Court, 222 W. 7th Avenue, No. 4, Anchorage, Alaska 99513. Comments must be received on or before **Tuesday, July 6, 1999, at 12:00 p.m.** in order to be considered. The projected effective date of the amended rule is August 2, 1999.

Dated at Anchorage, Alaska, this 10 day of May, 1999.

/s/JAMES K. SINGLETON, JR.
Chief United States District Judge

/s/H. RUSSEL HOLLAND
United States District Judge

/s/JOHN W. SEDWICK
United States District Judge

Oh, *nolo!* You've hit the Big Four O!

Happy Birthday Tom Matthews

SOLID FOUNDATIONS

IOLTA funds granted

☐ Leroy Barker

The Board of Trustees of the Alaska Bar Foundation held its annual meeting on Saturday, May 22, 1999.

IOLTA grants were made to the following organizations:

- Alaska Pro Bono Program - $180,000
- Alaska School Activities Association - $500
- Alaska Women's Resource Center - $5,500
- Anchorage Bar Association (High school mock trial competition) - $3,500
- Catholic Social Services - $15,000
- Kodiak Youth Services Center - $3,000
- The Courtwatch Program, Service for Victims for Justice - $7,500

The Board scheduled its next meeting for Saturday, November 13, 1999. If there is any matter you would like to bring to the Board's attention, I would appreciate it if you would submit to me, in writing, in advance of that meeting so it may be included on our agenda.

I wish to give a general reminder to all of you regarding Rule 1.15(e) of the Alaska Rules of Professional Conduct, regarding IOLTA accounts. The rule provides, in part:

A lawyer or law firm who elects not to maintain the account described in paragraph (d) shall make such election on a Notice of Election form provided by the Alaska Bar Association. If a Notice of Election is not submitted, the lawyer or law firm shall maintain the account described in paragraph (d).

We understand several lawyers are not maintaining IOLTA trust accounts and have not filed the Notice of Election form as required by the Rules of Professional Conduct.

I urge each of you to make sure that you have complied with this requirement by either setting up an IOLTA account or submitting a notice of election form to the Bar Association.

Bar People

Anthony M. Lombardo, formerly a senior attorney with the FDIC, has returned to Anchorage after a seven-year absence. Tony's career with the FDIC took him from Anchorage to Newport Beach, California and Washington, D.C. He is now an associate attorney with Sisson & Knutson. Just prior to his return, Tony spent a six-month sabbatical cruising Mexico aboard his sailboat, Snow Leopard.

The Alaska Association of Legal Administrators has elected its officers for the 1999 membership year They are: President Diane Pennington of Davis Wright Tremaine LLP; President-Elect Su Flanders of Wohlforth, Vassar, Johnson & Brecht; Vice President Dawn Gray of Richmond & Quinn: Secretary Kathy Waggoner of Guess & Rudd; Treasurer Sheila Miller; and Director At Large Tammy McCutcheon of Wilkerson & Associates. Linda Bruce will succeed to the office of Past President. The Alaska chapter Is part of The Association of Legal Administrators, an international organization with more than 9,000 members, whose mission is to "imp rove the quality of management in legal services organizations."

Elizabeth Cuadra has returned to her home in Juneau (ecuadra@ptialaska.net), after completing her two years of Peace Corps service in Nepal.....**Bob Ely** has retired from law practice and will pursue business and overseas volunteer opportunities.....**Russell Walker**, formerly of Preston, Gates & Ellis, is now with the Peace Corps in Kenya, Africa.

Patton Boggs LP opens Alaska office

Bringing over 70 years of Alaskan legal experience to Anchorage, the law firm of Patton Boggs announces the opening of an Alaska office. The new Alaska Patton Boggs office, with three partners and two associates, creates a strategic and legal public policy link for the Alaska business community.

The new office is located at 1031 W. Fourth Ave., Suite 504.

The four attorneys joining Patton Boggs were formerly with the Anchorage office of the Seattle-based law firm Bogle & Gates.

Douglas J. Serdahely, partner, has practiced in Alaska since 1972. He served as Alaska Superior Court Judge from 1981-1989 and as the Presiding Judge of the Third Judicial District between 1985-1988. He represents clients in complex litigation, including the litigation revolving around the Exxon Valdez Oil Spill.

Michael R. Spaan, partner, has practiced in Alaska since 1973. He served for eight years as the U.S Attorney for the District of Alaska from 1981-1989 and is a former legislative assistant to Senator Ted Stevens (R-Alaska). In addition to commercial and environmental litigation, Mr. Spaan also represents companies and individuals under investigation for environmental crimes, bankruptcy fraud, and numerous business-related offenses.

Keven D. Callahan, partner, has practiced in Alaska since 1984 and is a former assistant public defender for Alaska's Public Defender Agency. He concentrates his practice in complex litigation, natural resource/environmental law, and criminal defense.

Barat M. LaPorte, associate, is a former law clerk to Alaska Supreme Court Chief Justice Daniel A. Moore and Justice Dana Fabe. Ms. LaPorte represents companies and individuals in complex civil and criminal litigation and federal investigations for environmental crimes.

Kyle W. Parker, who has been based in Patton Boggs' Alaska project office since 1996, is a former assistant attorney general with the State of Alaska. He Parker concentrates his practice in natural resources and environmental law.

Patton Boggs attorneys have a nearly 40-year history representing the Alaskan business community and the State of Alaska, and have participated in creating legislation that has shaped Alaska's history, including the Alaska Native Claims Settlement Act (ANCSA), the Alaska National Interest Lands Claim Act (ANILCA), and the Trans-Alaska Pipeline System (TAPS), as well as revising the statutes to the Alaska State Constitution.

Stuart M. Pape, managing partner of Patton Boggs, said, "Opening an Anchorage office is a natural extension of our past participation in Alaska law and politics. Our four new attorneys provide a good marriage of experienced and respected local Alaska counsel plus very powerful resources to draw upon our DC base which includes public policy, administrative/regulatory law, government contracts, and litigation to provide a full spectrum of legal services to Alaska clients."

Patton Boggs LLP is a 273-attorney firm with its principal office located in Washington, DC. The firm maintains additional offices in Dallas, Texas; Denver, Colorado; Greensboro, North Carolina; and Seattle, Washington. Patton Boggs represents clients throughout the United States and around the world in federal and state regulatory and legislative matters and before various courts and other tribunals.

-- Press release

New court reporting partnership in Juneau

Lynda Batchelor and Danni Kennedy, formerly with Taku Stenographic Reporters in Juneau, have formed a new partnership, Glacier Stenographic Reporters, to provide computerized court reporting services throughout Southeast Alaska.

Glacier Stenographic Reporters' offices are at the former Taku location at 9218 Lee Smith Drive, Juneau, Alaska, 99801. Their mailing address is P.O. Box 32340, Juneau, Alaska, 99803. Glacier's new phone number is (907) 789-9028, and their new fax is (907) 789-8076.

Lynda Batchelor, RDR, started her freelance court reporting career 24 years ago in Seattle, moving to Juneau in 1980! Lynda has earned progressively higher certifications through the National Court Reporters Association (NCRA), culminating with the Registered Diplomate Reporter designation. In 1986 Lynda spearheaded court reporter participation in the Alaska Pro Bono program, and was the 1989 recipient of the Alaska Pro Bono Award. Lynda has participated in several Alaska Bar Association seminars, most recently as a presenter in the CLE seminars in Anchorage and Juneau on the "Do's and Don'ts of Complex Deposition Practice."

Lynda Batchelor

Danni Kennedy

Danni Kennedy, RPR, is a Certified Shorthand Reporter in Hawaii, where she started her freelance court reporting career in 1975 in Honolulu. She later earned NCRA's Registered Professional Reporter designation, and moved to Juneau in 1991. Danni is an active participant in the Alaska Pro Bono program, and assisted in the Bar Association's March '99 CLE seminar on deposition practices.

Glacier Stenographic Reporters will combine Lynda's and Danni's wealth of court reporting experience with new computer and internet technologies that best serve their clients' needs.

—Press release items submitted by firms

The delight of depositions

☐ William Satterberg

I love depositions.

They are the closest thing that I usually get to a vacation. They allow me to meet strange, new attorneys, explore exciting offices, and steal clients as I lounge in the opposition's waiting room.

As an often-needed respite, depositions also allow me to catch up on necessary work, read junk mail, and enjoy the view from 11th floor offices as rich defense counsel lambaste my hapless clients. I get to write letters. I get to write pleadings. And I get to write *Bar Rag* articles—like this one—as an attorney (known only to him and me) sits opposite me, flipping through reams of incomprehensible medical records, undoubtedly wondering what I am so rapidly scribbling down, as I drink his firm's designer coffee from his firm's designer coffee cup which I may even try to swipe to use when I leave for target practice this weekend at the local gunnery range. (In that regard, I have generally found that the dark, Hughes Thorness cups tend to stand out much better in winter at 100 yards than the white ones that Birch Horton uses. However, I recently have entirely ceased to use the Bogle and Gates cups due to their new value as a collector's item.)

Admittedly, depositions can be a dry affair, but they do not have to be. Fortunately, when I entered the practice of law in 1976, I did so with the State Attorney General's Office under the very capable tutelage of Dick Kerns and Ross Kopperud, the auspicious granddaddy and granddaddy-to-be of the State of Alaska Attorney General's Office, Transportation Section.

Dick Kerns once wisely told me as I sat obediently at his feet, "Bill, don't try your case in the deposition." It was good advice and should generally be followed unless you plan to settle the case pretrial and want to try to intimidate the opposing party into taking your ridiculous settlement offer as soon as possible.

I remember one story that Ross told me about Dick and depositions. During a deposition, Dick had objected to a question. Rather than simply noting the objection and requesting the deponent to answer, the attorney became flustered and tried to meet the objection, which, obviously, was a futile exercise, since no judge was present to rule. Each time the attorney would attempt to cure the objection, Dick would object, and the attorney would try again. The deponent, however, was never instructed not to answer. Nor was it an objection that had to be cured at the deposition. The exercise went on for several minutes until finally the exasperated attorney announced, "I guess I just cannot ask any more questions," to which Dick reportedly replied, "That may very well be," whereupon the deposition simply concluded.

In telling me the story, Ross advised me that, if I could ever replicate the event, I would have climbed the mountain.

Well folks, I did just that, and on my very first deposition to boot! I had traveled to Juneau on a right-of-way encroachment case. Seeing an opportunity to object, I did. Sure enough, the attorney became flustered and, in short order, stated "I guess I can't ask any more questions," to which I dutifully replied, "That may very well be," accompanied by giggles. To my surprise, the deposition concluded and I returned home the prodigal son, transcript in hand to prove I had captured the flag. The case, incidentally, was a Tok case.

When I bragged about my victory, I was quickly reminded that it was the same Juneau attorney from Ross' story that I had vanquished. (After all, it was a Juneau attorney.) The wind left my sails immediately. Still, I had found that depositions can, in fact, be fun.

When I prepare my clients for depositions, I try to give them good advice. I usually show them a short video to set the mood, "My Cousin Vinny." I next advise them on how to answer questions. I tell them to keep their head shakes and nods subtle and unpredictable. Vary the effect, if possible. "Ums" and "Ah-has" can be particularly effective, as can guttural grunts, which should be distinguished from my own stomach growls.

I tell my deponents that any eye contact with the questioner should be scrupulously avoided. Instead, try to fiddle with the microphone wire, or clean your fingernails.

If it is a video deposition, that is the best time to work on that troubling facial blemish. If passed an exhibit to review, try to draw stick pictures on it with an indelible marker. And when the moment allows, such as when the oath is being given, I tell my male clients to break uncontrollably into a torrent of tears, if the mood strikes.

Recently, the Supreme Court passed some rules pertaining to depositions, limiting both the length and number of depositions that can be taken. From the perspective of contingent-fee plaintiff's attorneys, it is a great rule. Undoubtedly, the defense bar felt the economic crunch imposed by the new rule, but that is only a slight concession in light of the recurring tort reform legislation Alaska experiences every two years or so.

The rule limiting the length of the deposition has a sound basis. Several years ago, I was invited to attend what was reputed to be a three hour deposition with Fairbanks attorney Scott Taylor. It was an extensive fire loss case, later to appear in the Alaska Reporter as *Arctic Mechanical v. Matomco*. I figured it would be the usual affair—a few questions on liability, a general discussion of damages, and a recess for lunch.

The liability questions went well enough. After all, the building had exploded and my client had an airtight alibi. It was when we got to damages that it became the deposition from hell. My client was claiming nearly 900 items of personal property loss. A plumber, he was the consummate packrat – a regular auction aficionado, of which Fairbanks has many, including myself.

Rather than asking the general building loss questions and accepting my client's damage list on its face, Scott decided to ask my wise client extensively about each and every item claimed lost, including the description, purchase price, depreciated value, location in building, and how my client had arrived at his damage calculations.

To my surprise, my client was legal game to this exercise and, armed with three bankers' boxes of receipts and a slew of equipment catalogues, the two went at it for six endless days. By the conclusion of the exercise, we had gone through three court reporters, and I had caught up on all of my pleadings and mail, including even the three-foot-high stack of junk mail from law book distributors which accumulates daily.

Ironically, at trial, my client was never even cross-examined about the individual losses, even though it took me almost five days to cover each individual item as an element of proof of loss (Scott would not stipulate to our calculations.)

We won the case but, "but for," a single jury instruction among more than 100 given in a two-hour liturgy of instructions (the judge was Lutheran and used to liturgies).

The case was predictably reversed by the Supreme Court, once again "ineluctably" stating that the instructions must be correct, even if offered by the losing side. (Someday, I plan to exercise my First Amendment and Freedom of Press rights to write an article about our ineluctable duties.)

Clients can also sometimes provide hours of delight in depositions, similar to playing a laser-beam tag on the living room floor with a neurotic cat.

In one deposition, the table jerked slightly, causing me to awaken. My client then indignantly announced to all present that he felt that he had been kicked by the opposing counsel. I knew it could not be me, since both of my feet had long been propped upon the chair next to me, facilitating my slumber. A regular give and take ensued, however, as the client and counsel launched into a classic "Did so!" "Did not!" exchange. Wisely, I simply kept quiet and let the squabble run its course. It apparently had the desired result, however, as the attorney glanced about the room fitfully for a chair for his own feet as my client continued to glower suspiciously at him for the remainder of the proceeding. After all, everyone can use a good alibi from time to time.

In another case, my client allegedly became so frustrated by the process that he immediately produced an inhaler, which he promptly and loudly sucked upon virtually every time that a question was asked. I later called it the "Please don't hit me – I'm wearing glasses maneuver."

In yet another deposition, one of my clients decided to eat a particularly obnoxious lunch, replete with garlic, onions, and other gaseous substances. The deposition was short-lived, much to my client's obvious delight, as well as the delight of all others present, including the innocent court reporter, when recess was called.

Which reminds me: In depositions, never forget the court reporter. They never forget you, so why should you forget them? Court reporters can easily make you look either good or bad at a deposition. Just hold one beyond their bathroom time, and watch how they manage to type up all of the "Ums," "ahs," and profanities that you let slip during a deposition, which just as easily could be labeled the proverbial "inaudible." Until science develops a bionic bladder, do your court reporter a big favor and take a break – at least once every six hours.

At one deposition I attended in Seattle years ago, counsel became rather agitated at each other. In fact, it became loud and possibly even potentially violent. It had to do with a very important, landmark issue which I can no longer remember. But I do remember the court reporter. In a world currently dominated by female court reporters, this one was an exception. This reporter was a monster, with rippling and a hint of a mustache to boot.

The mustache, I believe, was directly related to this court reporter's overabundance of male hormones—not that unusual, however, considering the fact that the court reporter was a large male who had recently retired from the U.S. Marines, where (I later learned) he had probably served honorably as a drill instructor.

Apparently, he must have forgotten where he was in the heat of the

Continued on page 18

THINGS THAT YOU PROBABLY CAN'T LIVE WITHOUT

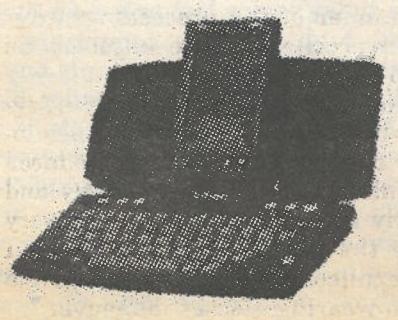
18 Gadgets From the ABA Techshow

One of the highlights of the annual American Bar Association TechShow is the fast-paced "50 Gadgets in 60 Minutes" presentation by entertaining attorneys sum nerds Ross Kodner, Michael Jimmerson, Daniel Coolidge and David Hambourger. (Coolidge, for example, is said to have a "reputation for home-building mega-PCs that subsequently turn into flame-throwers.")

Jimmerson didn't make TechShow 99 in March, but the other three actually did cover 50 gadgets in the allotted hour. Here are some of them.

THE PASSPORT WIRELESS HOME NETWORK. Network two home (or office) computers without wires for $129. *(www.intelogis.com)*

STUFF FOR YOUR PALM PILOT. DeLorme's Solus *Pro Earthmate Global Positioning System* for the Palm Pilot, so you'll never be lost *(www.delorme.com)*. LandWare's *GoType! Keyboard* connects your PDF to a regular keyboard. *(www.landware.com)*. Or try the *Palm Navigator Compass* by Precision Navigation *(www.precisionnav.com)*. For under $40, plug this attachment to the Palm Pilot and turn it into a magnetic compass. And the *Pentopia*, by Pilot Pen Corporation of America, has developed a dual-use retractable stylus and ball point pen for the Palm Pilot. Available in all sorts of styles, there's also a model that adds a mechanical pencil *(www.pilotpen.com)*.



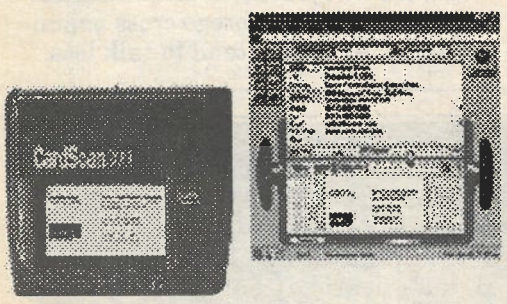
Palm keybourd

BELKIN OMNIVIEW SE SMART SWITCHING SYSTEM. For the multitasking individual, this switch allows the connection of up to four PCs to one mouse, monitor and keyboard. *(www.belkin.com)*.

DRIVE DEFENDER. Everybody hates backing up, despite Joe Kashi's advice. This software does it for you, automatically, in the background, by saving everything you do to two different drives (EIDE and DMA drives only). *(www.promise.com)*.

PGP FOR PERSONAL PRIVACY 6.02. (McAfee software). Billed as "encryption so easy there's NO excuse not to use it." Or, e-mail encryption for dummies. *(http://store.mcafee.com)*

CARDSCAN 300. A slick, special-purpose accessory that flawlessly scans ordinary business cards into your computer database, by Corex Technologies Corp. *(www.cardscan.com)*



Rolodex-like CardScan screen

SONY MZR-50 MINIDISK RECORDER. "Stunning audio" totally digital recording, using mini-discs that look like CDs on a diet. *(www.sel.sony.com)*

AFFORDABLE LAPTOP LUXURIES. Addonics Technologies earned two spots on Coolidge's gadgets list: The *Pocket MirrorDrive Kit* connects any size additional hard drive to your laptop. And the *Pocket CD 98 Portable CD* drive weighs just 14 ozs. No more swapping out floppy and CD drives. Both devices connect via PC Card slot *(www.addonics.com)*. Called a "must have" by the group, the *USB Networking with EZ-Link* device by Anchor Chips seamlessly connects your laptop with home or the office—full access to all drives & peripherals at 3 mbps speed. *(www.ezlinkusb.com)*. American Power Conversion Systems now has the next-gen *Notebook SurgeArrest Pro*, a slim and compact device connecting inline with your power brick, with added modem/fax filters for RF and AC line noise *(www.apcc.com)*. And Mobile Office Outfitters' $40 *AutoDesk* turns your car's steering wheel into a laptop "desk." Called by the group as the "single most terrifying mobile computer accessory," it slides over your steering wheel, making a desktop for your laptop (full deployment for PI lawyers). *(www.mobilegear.com)*.

Turtles

FOR FUN. The Museum of Modern Art joins the nerds with plastic red, lime green, yellow, gray & black "*Turtles*" that wrap and hide those unsightly cables & wires that snake out of the back of your computer. Search "turtle" at *store.moma.org*). And *Emoticon Coffee Mugs* are an inexpensive, techie substitution for those firm-imprinted mugs Satterberg likes to use for target practice *(www.computergear.com)*.

Sally J. Suddock

JUNE - AUGUST 1999 CLE CALENDAR

(NV) denotes No Video

Program #, Date & CLE Credits	Program Title	Program Location	In Cooperation With
#37 June 1-4 25 CLE Credits 3 Full Days	25th Anniversary Conference (NV)	Boston Massachusetts	International Bar Association
#11 June 10 - 11 13.0 CLE Credits	Estate Planning Seminar (NV)	Regal Alaska Hotel Anchorage	ALI-ABA
#20 July 14 CLE Credits TBA Half Day	New Developments in Alcohol Treatment	Anchorage Hotel Captain Cook	Anchorage Bar Association and Alaska Bar Lawyers Assistance Committee
#32 August 4 CLE Credits TBA Evening	Off the Record with the 9th Circuit Court of Appeals	Museum of History & Art Anchorage	US District Court
#10 August 26 CLE Credits TBA Afternoon	Technology in the Courtroom		US District Court

The 9 enabling hardware technologies

By Joseph Kashi

In prior issues of the *Bar Rag*, I've discussed what I term "enabling technologies," the basic technological infrastructure that helps you perform high level tasks more efficiently. I believe that there are nine common enabling technologies:

1. Local area networking.
2. Voice recognition and dictation.
3. Online electronic filing systems available across a local area network.
4. Optical character recognition.
5. Electronic mail.
6. Electronic faxing from your desktop.
7. Internet access across local area networks.
8. Legal research available across local area networks.
9. Groupware such as Lotus Notes, Novell Groupwise 5.5 or Office Logic.

Some of these basic automation functions require specialized hardware. You'll notice that all but three of these products (voice recognition, optical character recognition and desktop faxing), become efficient only when they are sharing information across a local area network. In that sense, networking your office is the fundamental key to efficiency. If you are not networked, you are practicing solo.

LOCAL AREA NETWORKS

Luckily, efficient high-speed networking has become easier, more reliable and less expensive than ever before. Last year's high-end 100Base-T Ethernet networking is now today's entry level system. The newest models of the Intel EtherExpress Pro 100+ and 3Com's 3C905B provide essentially optimum networking performance along with a host of additional features for about $50 per network interface card. When using any network card, though, it's important to download and install the most recent drivers from the vendor's website. Often, network problems result from old network interface card driver software. If you have loaded the latest Intel or 3Com driver software for your network card and it still doesn't work in Windows 95, then you'll need to get a competent technician. At that point, you've either got a resource conflict or the Windows 95/98 "plug and pray" operating system has failed to recognize and properly register your Ethernet card.

You will also need best quality cabling to physically connect the network cards in each computer and in the file server. Luckily, high performance Category 5 UTP cabling is very common at this point. Don't settle for older Category 3 or Category 4 cabling when high performance cabling only costs a few cents more per lineal foot.

Tying the cabling and the network cards together is an Ethernet hub, required for every modern Ethernet network. The hub switches, amplifies and synchronizes the signals between the various computers. Your system won't run without a hub. Until recently, 100Base-TX hubs were quite expensive and law offices often used a slower 10Base-T hub as an interim measure. Within the past year, we've seen many vendors ship low cost, high performance, reliable 100Base-T hubs. I've used, with real success, a dual speed 10/100 Mbps 16 port hub from Edimax (408-496-1105). The Edimax hub supports computers using both older 10Base-T cards and modern 100Base-TX cards. At a cost of about $20 to $22 per port, the 16 port Edimax hub is a real bargain. You'll undoubtedly be able to find similar products from other established vendors but I haven't had the opportunity to evaluate them. I'd be more cautious, however, about using no-brand network interface cards. 3Com and Intel are the market leaders and provide stable, fast, frequently updated hardware at very reasonable prices. Although you might purchase a hub from a third-party vendor, stick with a brand name for your network cards. The key to network reliability is software quality. Network cards require up to date software drivers but network hubs are dumb relay devices that do not use any software at all.

Most small offices can get by using the built-in peer to peer networking of Windows 95/98/NT. There are some advantages with peer to peer networking, mostly cost and initial ease of setup. The disadvantages are lower performance, greater instability (particularly when you're using a Windows 95/98 computer as the file server) and potentially more complex administration when you go beyond about 10 computers. Despite those limitations, an office on a tight budget or with minimal demands can do adequately well with Windows 95/98 peer to peer networking. But I certainly prefer the greater stability of Windows NT 4.0.

NT 4.0 Workstation includes some basic peer to peer networking services while NT Server provides additional capabilities. Don't overlook Novell Netware 5, however. Novell lost its market dominance to Microsoft some years ago, but in many respects Netware 5 retains a major performance lead over NT Server 4.0, particularly in small to medium offices. Even earlier versions of Netware, such as versions 3.2 and 4.2, provide an impressive level of reliability for basic file and print services.

If you use peer to peer networking, then I recommend that only a single dedicated computer be used to store shared program and data files. Otherwise, administration and backup will be time-consuming, inefficient and haphazard, leading to the potential for serious data loss. Given the today's very low prices for even fast, high capacity computers, it makes a lot of sense to simply buy a reliable system from a vendor like IBM or HP and then dedicate it to exclusive use as a central file server, even if you are using Windows 95/98/NT's peer to peer networking. It's false economy to use this computer to also run application programs; if your application program locks up, then you'll probably cause everyone on the network to lose their current work.

The computer that's used as the file server should have its hard disk partitioned into a relatively small C

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Product Notes

FastSearch Corporation, is giving away its flagship product, the FastSearch-CFR, along with quarterly updates, for one full year. At no charge. The CD-ROM contains everything found in the Code of Federal Regulations, the previous 12 months of the Federal Register, plus a complete set of Human Resources regulations. This represents more than 100,000 regulations in all, completely searchable in the popular Folio Views integrated search sofiware.

The disk represents more than 450 volumes of the CFR and the Federal Register, or about two bookcases completely filled. The FastSearch-CFR is Windows based (3.1, 95, 98, or NT) and can be searched simply be typing in a keyword or two. To receive a free CFR set with updates, fax your request on your letterhead to FastSearch at (800) 605-7244.

❑

Agility Software Company Inc. has been issued a U. S. patent for its Interactive Computerized Document Assembly System. This invention enables attorneys to be in complete control of the process of quickly creating draft documents. When a document is drafted in the assembly program, the attorney works right in the document displayed on the screen. Before answering a question, the attorney can see the context of the answer in the document. As soon as the question is answered, the results are *immediately* visible in the document. There is no separate merge step as in word-processor based products. (www.agilitysoft.com)

The delight of depositions

Continued from page 16

battle, for in the middle of the delightful discussion between counsel, he suddenly turned off his recorder and stood up.

"Gentlemen!," he bellowed. "You ***will*** be quiet and behave as professionals!"

Snapping to attention, we both meekly responded, "Yes sir!"

"You mean, yes sergeant! I work for a living!"

"Yes, sergeant!"

"I can't hear you!," came the thunderous reply, whereupon the combined cry, "Yes, sergeant!," came from two adjacent conference rooms, as well.

The remainder of the deposition was uneventful. Needless to say, that it was one way to shut up counsel when they get out of line. But it is not the only way, I later learned.

At a recent deposition in Southeast Alaska, where memories apparently are longer than I thought, I added some of my "Helpful Hints" straight out of Heloise to my client's testimony. As usual, both counsel got a little out of sorts. My opponent said he would tell the judge. "Go ahead," I taunted. Sort of the "nanny-nanny, boo-boo" thing I used to do in high school and college. But, to my surprise, he did tell the judge! And, to my even greater surprise, the judge told me to be quiet! What gall!

Yet, according to some attorneys, who are actively trying to locate the case caption, the motion and accompanying order should be copyrighted and made mandatory reading to all bar applicants. Perhaps I would not feel so hurt if my own co-counsel weren't so obvious about wanting to foam-board a copy of the order, and to offer it as an exhibit in every deposition which I attend. On balance, I think I will just stick to writing *Bar Rag* articles and forego cross-examination. At least I tend to talk less.

The 9 enabling hardware technologies

Continued from page 18

drive, used to boot the system and a relatively large D partition, to be shared as a consistent drive letter throughout the office. When everyone's sharing a single partition, it's much easier to administer the network, set up users, and ensure prompt backup of your data. It's most important that you provide for efficient backup of the shared disk data partition. Recently, I've used some excellent new tape backup hardware, Onstream's ADR tape drives. These high capacity drives use new technology that's fast, inexpensive and quite reliable. The lowest drive has 30 gigabytes of compressed space while the largest drive has a 50 gigabyte compressed capacity. Onstream's included Echo software has some very interesting features that should work particularly well with Windows 95/98.

I found that using the Onstream Echo program with Windows NT 4.0 was less reliable, resulting in intermittent conditions where CPU and DRAM resources were exhausted and the system slowed to a halt. The solution for NT 4.0, by the way, is to simply install Onstream's NT driver and backup, instead, with NT's included tape backup program listed under the administrative tools folder. If you install one of the SCSI tape drives on your peer to peer file server, then you'll find that backup is easy and efficient. I don't recommend Onstream's less expensive parallel port tape device, because the parallel port is too slow for a daily backup (it's perfect, though, for off-site electronic discovery purposes) or their IDE tape drive because Windows 95/98 occasionally has difficulty reliably configuring IDE tape drives. Onstream's SCSI versions run twice as fast as the IDE device and SCSI configuration tends to be more stable and certain. SCSI is worth the extra cost.

VOICE RECOGNITION

Every year always seems to be THE year for voice recognition technology, in fact every year since 1994. Sadly, voice recognition usually ends up being a little more work than it's worth for the average lawyer. So far, the best legal voice application that I've seen is Corel's WordPerfect Legal Suite bundled with a basic version of Dragon Naturally Speaking. Dragon Systems also sells a professional legal version that includes legal templates, and the upgrade is well worth the purchase price. IBM ViaVoice Gold and Lernout and Hauspie also provide comparably good voice dictation packages. All three work with the latest versions of Microsoft Word and Corel WordPerfect. Lernout and Hauspie claims an extra level of integration with Microsoft Word, but I haven't been able to test it.

SADLY, VOICE RECOGNITION USUALLY ENDS UP BEING A LITTLE MORE WORK THAN IT'S WORTH FOR THE AVERAGE LAWYER.

What sort of hardware will you need? With voice recognition and dictation, you never seem to have quite enough hardware capability. I'm using a 300 megahertz AMD K6 with 128 megabytes of 100 megahertz PC100 SDRAM memory, a large 7200 rpm IBM Ultra2 SCSI hard disk and a 64 bit Soundblaster Pro AWE sound card. Even that doesn't appear to be enough horsepower, at least if you speak as fast as I do. Rumor has it that later versions of these products will work with the enhanced digital signal processing capabilities now emerging in Intel's new Pentium III. If that's so, then that extra hardware boost should provide for a much higher level of accuracy and would be worth the cost.

However, software using those new hardware capabilities isn't yet available and Pentium IIIs are substantially overpriced for the small incremental performance boost they provide to regular applications. Unless you really need voice recognition capabilities now, my continuing recommendation is to wait until next year. If you can't wait, however, then I recommend at least a 400 megahertz AMD K6-3 or Intel Pentium II along with 128 megabytes to 256 megabytes of PC100 SDRAM, a very fast hard disk (preferably a 7200 rpm model), and the best sound card and microphone that you can afford. In many ways, the quality of the sound card and microphone are the greatest determinants of speech recognition accuracy. If you're not pressed to buy a new computer immediately, then wait four or five months and purchase a lower cost Pentium III system in the anticipation that voice recognition vendors will use the Pentium III's more capable digital signal processing.

ONLINE ELECTRONIC FILING SYSTEMS

In contrast to the perpetual adolescence of voice recognition technology, building your own networked online filing system is well within the reach of most law offices. The first requirement, of course, is that the office be networked. The effort involved in building and maintaining an online filing system is too costly to justify for a single user.

Ideally, your electronic filing system's data should be stored as open file format optical images on the network computer acting as the document file server. Realistically, I recommend installing and using a second file server hard disk devoted solely to electronic imaging. A 9.1 gigabyte or 18.2 gigabyte IBM Ultra2 SCSI disk would be ideal and they're generally very reasonably priced given their reliability, size and performance. If you're on a budget and if the computer used as the designated document server uses IDE drives, then adding an 8.4 to 16 gigabyte IDE hard disk should suffice and will be very economical, on the order of a few hundred dollars. I prefer the Fujitsu, Western Digital and IBM brand IDE drives. Any second IDE drive should conform to the newest UDMA specification and should be set as a slave UDMA drive. A document server computer should be relatively fast, particularly if you are using a Windows NT Server rather than Novell Netware. Compared to Netware, NT Server requires a substantially faster computer with more DRAM to achieve comparable performance. A 300 Mhz K6-2 or 350 MHz Pentium II should be fast enough.

Beyond that, all you'll need is a scanner, a fast printer and some software. Scanner companies come and go, and given current low hardware margins, they're mostly going. No-brand scanner compatibility with your intended software is always a problem, too. For these reasons, I usually recommend spending a little more money and getting an HP scanner with a document feed assembly. You'll probably want a flat bed scanner with an automatic document feeder assembly because this gives you the broadest flexibility to scan both large batches of documents along with the occasional flat photograph or other exhibit. Fujitsu scanners tend to be more expensive than the HP scanners but these are usually faster, higher end units. Many of the more serious document imaging programs support Fujitsu scanners and you should consider them as well.

CD-ROM PLAYERS, . . . ARE NOT ADEQUATE AS A MEANS OF ENSURING THE INTEGRITY AND COMPLETENESS OF YOUR ELECTRONIC FILING SYSTEM. FOR THAT YOU'LL NEED A TAPE DRIVE.

Sooner or later, you'll need to print a lot of those imaged documents, typically in a hurry, just before trial. A slow printer will probably cause you to rip out your hair. For that reason, I recommend a fast network printer on the order of a HP 8000 or HP 8100. These produce 24 pages per minute and 32 pages per minute respectively and are quite reliable. Be sure to install extra RAM in these printers.

If you're really on a budget, then the HP Laserjet 3100 is a good option. This multifunction device combines a very nice plain paper fax along with scanning, low volume copying and laser printer capabilities. Expect to spend about $700 for a LaserJet 3100.

Most popular litigation support programs such as Summation and Case Map support document imaging, but only in specified file formats. Avoid programs that allow you to scan only in proprietary file formats: Given software vendor business failure rates, most document imaging programs will be orphaned within a few years and your data, if scanned in a proprietary file format, probably will not be usable by any future program. As a result, when choosing an optical imaging program as part of your networked electronic filing system, get a program that allows you to use a de facto open standard optical imaging format such as PDF or TIFF. That's your best assurance of long-term usability even if your vendor later goes under. Some case management programs, such as Time Matters, allow you to record and view every document in a case, displaying the optical image of that document when you click on it. Once you've integrated your optical imaging into your litigation support and case management, then you're really leveraging your work to best advantage.

Most scanners come with a basic scanning program that's usually not sufficient for use with an electronic filing system where you need to manage your documents and be able to retrieve them using both full text and index key words. Generally, you'll need a higher end document imaging program. Among the least expensive and most effective is Adobe Acrobat, which uses the widely popular PDF format. Anyone can download the free Acrobat reader, but you'll need to purchase the scanning, capture and indexing portions of the program suite. Adobe, however, is very reasonably priced. LaserFiche and Paperless Office are two other higher end products that are intended to serve as the foundation for an online electronic filing system. These are well focused and effective products but more expensive.

Backing up your electronic filing system at least every day, if not more often, is going to be critical. Imagine the malpractice risks if the document database for all of your cases becomes unpredictably incomplete due to some hardware failure or a catastrophe. It would be difficult to know which documents are restored by a slightly out of date backup and which are missing. Any efficiencies gained by using an online filing system will be promptly lost if you're required to use tape or an electronic filing system in parallel. Thus, reliable tape backup is an absolute necessity.

CD-ROM players, while very desirable for archiving selected portions of your electronic filing system and for packaging a particular case for use outside the office (such as in the courtroom) are not adequate as a means of ensuring the integrity and completeness of your electronic filing system. For that you'll need a tape drive. We record on the Onstream 30 and 50 gigabyte SCSI tape drives discussed above. Because document imaging databases become so large, you'll really need the extra capacity and speed of these SCSI drives.

Finally, you'll need a CD-ROM writer to copy selected portions of your database, up to 650 megabytes per disk, to more permanent and portable CD-ROMs. Although CD-ROM disks only have an expected shelf life of 5 to 25 years, they are among the more reliable archival products available and the only realistic way to take the litigation support documents, including transcripts and the like, to court. I like the Smart and Friendly SCSI series of CD-ROM writers. These can double as a regular CD-ROM drive and the included Adaptec CD writing software works reasonably well. Again, there are some IDE CD-ROM writers available at a lower cost, but their operation is less reliable and more proprietary.

OPTICAL CHARACTER RECOGNITION

OCR allows you to transform printed text into computer readable, computer manipulatable files where the only hardware requirement is a scanner. Because you're scanning into a computer readable format, such as Microsoft Word or Corel WordPerfect, you'll not be concerned about archival capabilities or avoiding proprietary file formats. Most scanners with a document sheet feeder will work reliably. HP, of course, is always a safe and reliable choice and works with most of the high end optical character recognition programs. Visioneer's Paper Port is another favorite but has some proprietary hardware and software constraints. Of the optical character recognition programs, Xerox's Text Bridge Pro98 and Caere's OmniPage are favorites.

Next issue: The rest of the 9 Enabling Technologies.

ESTATE PLANNING CORNER

Tax deferral can be costly

☐ Steven T. O'Hara

Tax deferral is rarely tax avoidance. Indeed, tax deferral increases tax where the taxpayer is subject to a higher tax bracket when the tax is imposed. Tax deferral can also waste opportunities to create valuable tax credits.

Recall that a married couple (both U.S. citizens) generally can defer federal estate tax until both have died. This deferral occurs by reason of the unlimited marital deduction available to the estate of the first spouse to die for qualified transfers to or for the benefit of the surviving spouse who is an U.S. citizen (IRC Sec. 2056(d) and 2056A).

As discussed in the last issue of this column, the marital deduction is not always desirable. The marital deduction generally results in tax deferral, rather than tax avoidance, since the property for which the deduction is taken is includable in the surviving spouse's gross estate (IRC Sec. 2033, 2041 and 2044).

This tax deferral may increase estate taxes because if no estate tax is paid on the death of the first spouse to die, then the lowest marginal estate tax brackets otherwise applicable at that time are wasted. The marginal estate tax brackets begin at 18% and generally go up to 55% (IRC Sec. 2001(c)).

The last issue of this column illustrated this point with a hypothetical husband and wife, each owning $3,000,000 in assets. There it was shown that at least $213,000 in estate tax could be saved by not claiming the marital deduction on the death of the first spouse to die.

Real cases are more persuasive than illustrations based on hypothetical facts. A case that shows the possible high cost of tax deferral is *Estate of Howard v. Commissioner*, 910 F.2d 633 (9th Cir. 1990).

In this case, $294,322 in estate tax could have been saved by not claiming the marital deduction on the death of the first spouse to die. Moreover, the husband and wife in *Howard* appear to have had far less in assets than our $6,000,000 hypothetical couple. Although all values are not provided, it appears from the facts that the couple in *Howard* had roughly $2,500,000 in assets (*See Id.* at 635, IRC Sec. 2001 and 2010).

Mr. Howard died April 24, 1983, survived by his wife. The due date for his federal estate tax return was nine months later. No extension for filing was obtained and used. On January 24, 1984, Mr. Howard's federal estate tax return was filed. The full marital deduction was claimed under the return. Thus Mr. Howard's personal representative elected to defer all federal estate tax otherwise due.

Mr. Howard's wife, Rose, died February 11, 1984. As a result of Rose's death, federal estate tax of $835,648 became due (*Howard*, *supra*, at 635). This large tax bill was created, in part, by the tax deferral that was elected under Mr. Howard's estate tax return filed just 18 days before Rose's death.

If no marital deduction had been claimed under Mr. Howard's estate tax return, $294,322 would have been saved. Specifically, with no marital deduction claimed, $379,562 in federal estate tax would have been due by reason of Mr. Howard's death. Then by reason of Rose's death, $161,764 in federal estate tax would have been due. So, if no marital deduction had been claimed, the total federal estate tax would have been $541,326 (i.e., $379,562 plus $161,764). This $541,326 is $294,322 less than the $835,648 in federal estate tax determined to be due in *Howard*.

The *Howard* case illustrates at least three good points relating to tax deferral and the marital deduction. First, *Howard* illustrates a significant benefit of having cash to pay estate tax on the death of the first spouse to die is being able to use the lowest marginal estate tax brackets. Using the lowest tax brackets at the death of the first spouse to die can create substantial estate-tax savings.

Second, *Howard* illustrates that more estate-tax savings can be obtained where the estate of the surviving spouse is able to use the credit for estate tax paid at the death of the first spouse to die (IRC Sec. 2013). In *Howard*, a tax credit of $151,295 would have been available had no marital deduction been claimed under Mr. Howard's estate tax return (*Howard*, *supra*, at 635). In other words, because the full marital deduction was claimed at Mr. Howard's death, no federal estate tax was paid by reason of his death and, thus, no tax credit was created.

Third, *Howard* illustrates the wisdom of obtaining an extension for filing the estate tax return. If an extension had been obtained in *Howard*, then by the due date of Mr. Howard's return everyone would have known that Rose had died and that $294,322 could be saved by not claiming the marital deduction.

Tax deferral is the mantra of many financial advisors. Clients ought to consider, however, that at least in the transfer-tax area, tax deferral can be costly.

Public's access to legal information improved

The Association of Trial Lawyers of America (ATLA) entered into an agreement, April 27 with Advice & Counsel, Inc. to improve the public's access to legal information and attorneys nationwide using the Internet.

As part of the agreement, ATLA has endorsed the company's FreeAdvice.com and Attorney Pages.com units. ATLA will communicate to its members that AttorneyPages.com is an endorsed online directory. FreeAdvice.com, offers consumers easy-to-understand answers to common legal questions, prepared by attorneys from many of America's leading law firms. AttorneyPages.com provides consumers a national list of attorneys.

"FreeAdvice.com and Attorney Pages.com are recognized as leading Internet resources in helping consumers understand their legal rights and directing them to lawyers," said Thomas Henderson, executive director of ATLA.

"Both websites provide a highly professional way for consumers to contact our members and for our members to help consumers. We are pleased to endorse Attorneypages.com's directory of attorneys and recommend it as a valuable benefit to our membership."

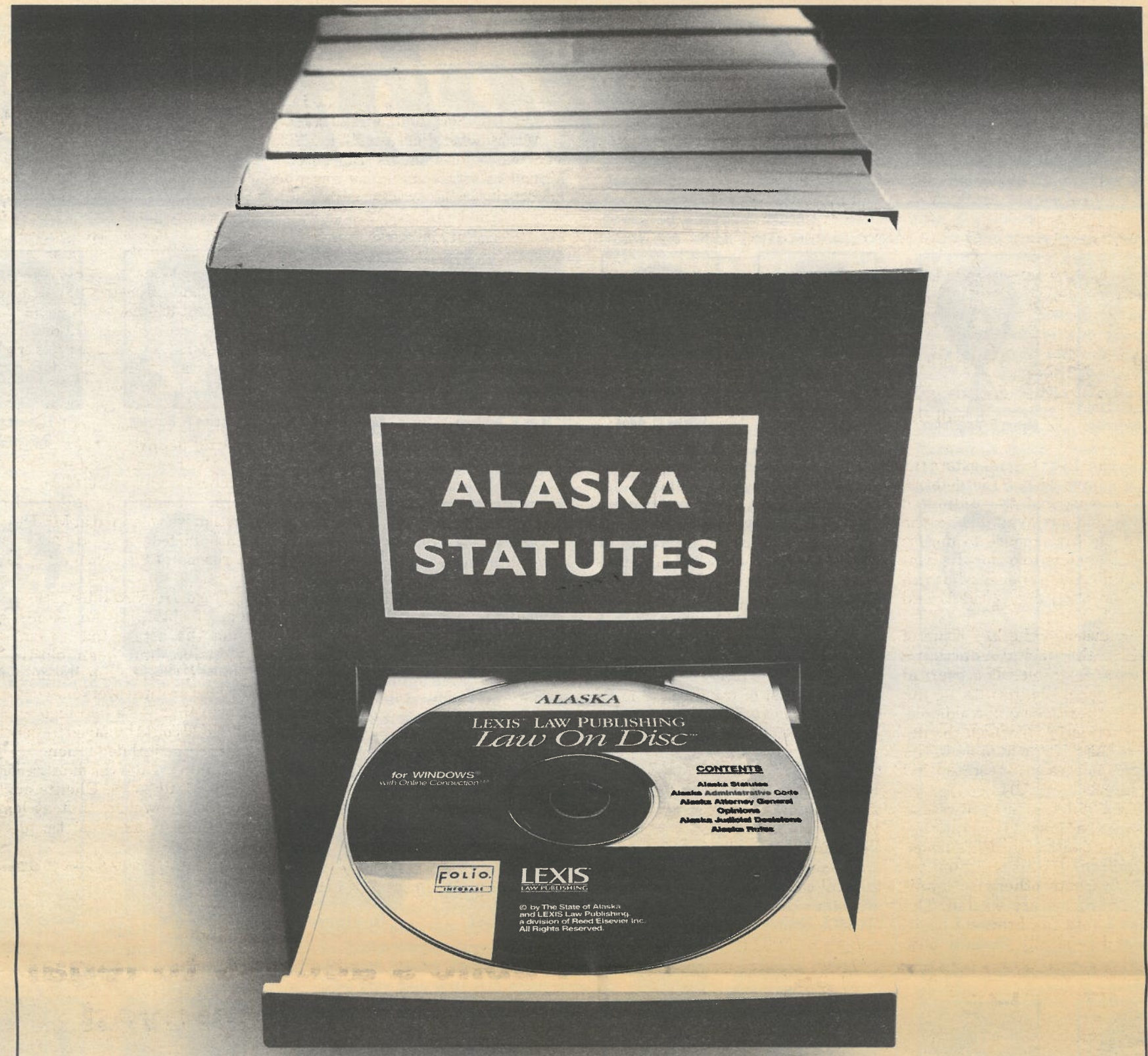
Consumers seeking legal information can visit http://FreeAdvice.com on the Internet. Attorneys interested in being listed on the http://AttorneyPages.com directory should contact Brian Brown toll-free at 800/487-5342.

ATLA, headquartered in Washington, DC, is the world's largest trial bar, with over 57,000 members worldwide, including attorneys, judges, law professors, and law students as well as paralegal affiliates.

—Press release, Business Wire

Articles Welcome: *Guidelines*

- Ideal manuscript length: No more than 5 double-spaced pages, non-justified.
- E-mail and .txt: Use variable-width text with NO carriage returns (except between paragraphs).
- E-mail attachments & disks: Use 8.3 descriptive filenames (such as author's name). May be in Word Perfect or Word.
- Fax: 14-point type preferred, followed by hard copy or disk.
- Photos: B&W and color photos encouraged. Faxed photos are unacceptable. If on disk, save photo in .tif format
- Editors reserve the option to edit copy for length, clarity, taste and libel.
- Deadlines: Friday closest to Feb. 20, April 20, June 20, Aug. 20, Oct. 20, Dec. 20.



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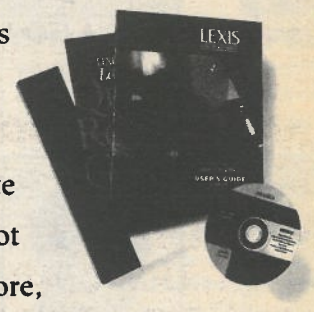

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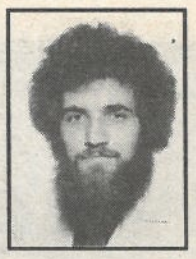
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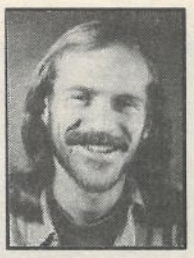
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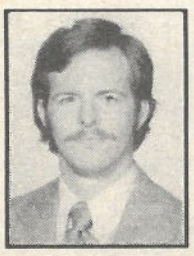
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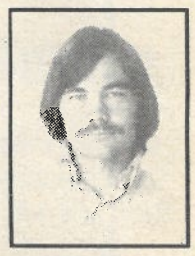
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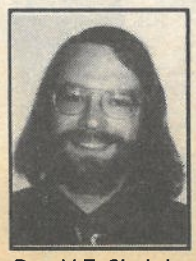
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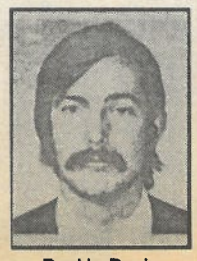
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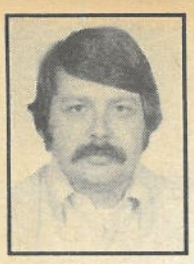
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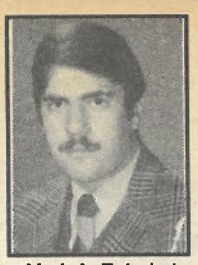
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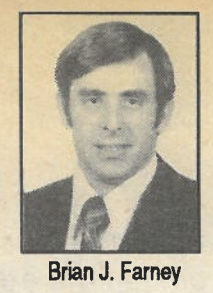
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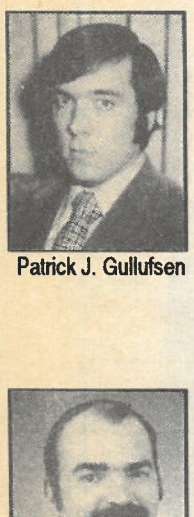
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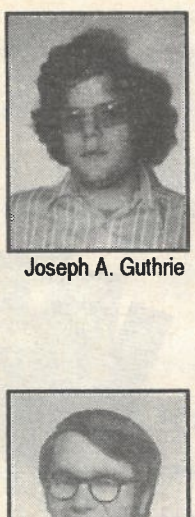
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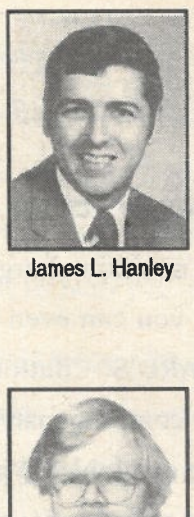
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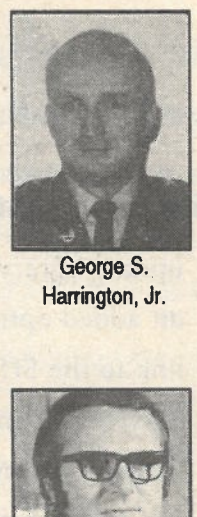
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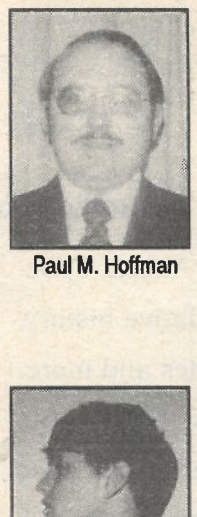
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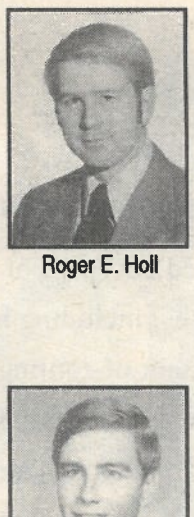
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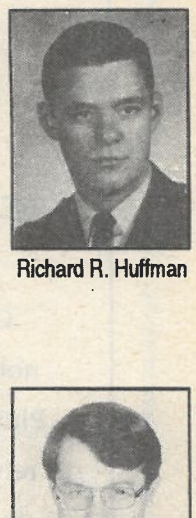
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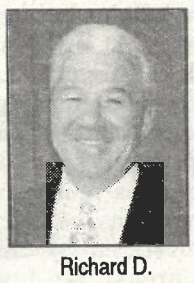
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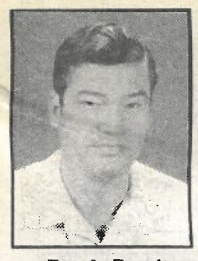
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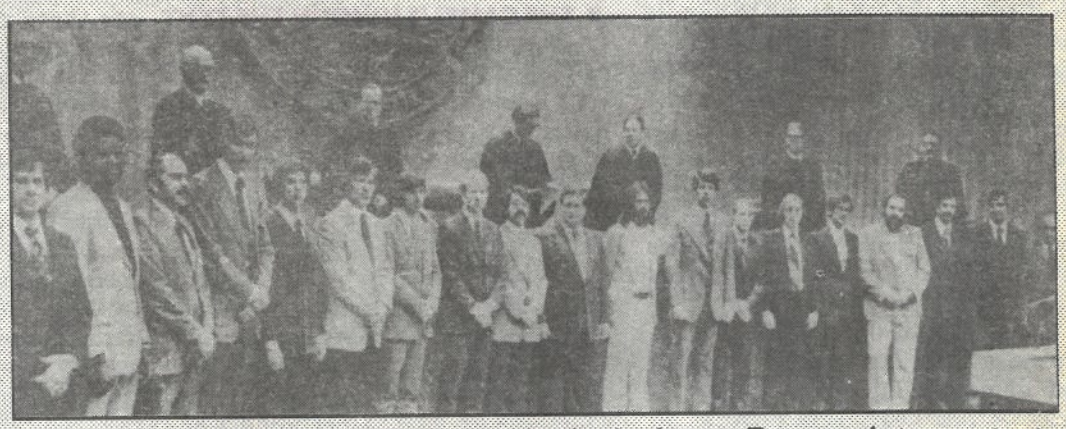
ATTORNEY MILESTONES — THEN AND NOW



Nineteen new bar members were pictured by the Anchorage Times at their swearing-in ceremony June 5, 1974.

(L-R) James Parrish, Fred Torrisi, David Mannheimer, Robert Johnson, Barbara Schuhmann, Randall Farleigh, Mark Ashburn, Matt Jamin, and Dick Thwaites, receive certificates recognizing their 25 years in the practice of law at the May convention.

Admitted in 1974 — A Photo Gallery: *Pictured are members who responded to our request for permission to print a photo — either a recent one or the original one submitted to the Bar. Most of the members who responded said to go ahead and print their original photo.*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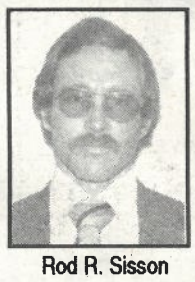
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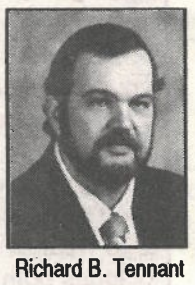
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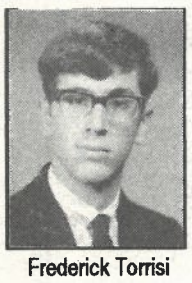
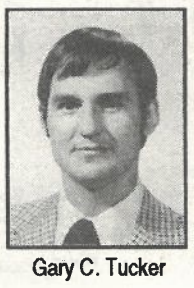
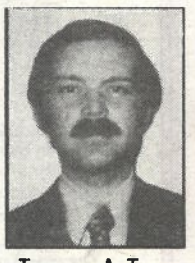

Frederick Torrisi


Judd E. Tuberg


Gary C. Tucker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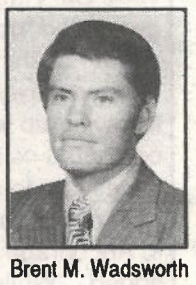
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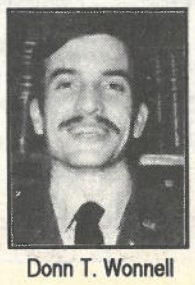
Jerry Wertzbaugher


Alan Wilken


Thomas K. Williams


Thomas E. Williams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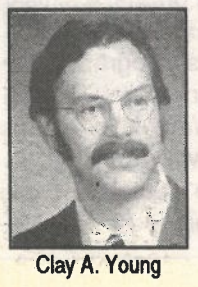
Richard L. Yospin


Clay A. Young

Not pictured

John Bosshard, III
Patrick T. Brown
Edward L. Garnett
Peter C. Ginder
Michael J. Keenan
Karen A. Kirby
James M. Morgan
Timothy J. Rogers
Clem H. Stephenson
James F. Vollintine

The view from Pennsylvania

Specialty certifications and the general practitioner

By Keith McLennan

Perhaps I am a dying breed, one day I will be doing a trademark application and the next I will appear in court to finalize an adoption. The next day I will prepare a computer consulting contract while being interrupted when a client calls to inform me that their family member died and they want me to handle the estate. What is unique or "special" about this kind of practice? You never get bored since you are usually challenged and you serve as a "counselor" in the historical sense of being a lawyer. You come to the table with a broad range of experience from which you can derive the best advice for our clients. To me, this is a good thing. To others, it is antiquated.

If you fit this description even in the most basic sense, read on. Our way of practicing law is under attack. A few years ago I wrote an article about the "push" of several groups within the Pennsylvania Bar Association to liberalize the specialty certification process in Pennsylvania. Perhaps, a bit of historical review is appropriate. As a result of a case known as *Bates v. Arizona* the Supreme Court of the United States provided that a state could not prohibit a lawyer from advertising his or her services and attaching the words specialist to that advertisement so long as that lawyer received a basic amount of training and/or experience in that discipline or area of law. From that case, numerous "educators" sprung up who sought to provide lawyers with a "certification" of a specialty.

Fortunately, for the general practitioners in Pennsylvania, the Pennsylvania Supreme Court, in conjunction with the Pennsylvania Bar Association, developed a certifying and review board designed to, in effect, certify the certifiers. Before any educator seeks to provide specialty certifications to Pennsylvania lawyers, those educators must satisfy a rigorous qualification test developed by and, for our simplistic purposes, controlled by the Pennsylvania Bar Association. To date, only a handful of educators have sought to obtain such certification to certify specialty areas for lawyers in Pennsylvania.

Many people in the PBA feel that the PBA's role in certifying the certifiers is a mistake. They feel that the PBA should seek to have its committees and sections certified as certifiers of specialists in Pennsylvania. They believe that since the PBA, in effect, controls the certification process, it would be either a conflict of interest or appear to be a conflict of interest if the PBA had certifying authority over its own committees and sections. In effect, what these members of the PBA seek is to get the PBA out of the business of certifying the certifiers so that the PBA can expand specialty certifications of lawyers in Pennsylvania by allowing the PBA and its committees and sections to provide specialty certifications to its over 28,000 members. Now this may sound good for the PBA's revenues, but it is bad for its largest constituency, the general solo and small firm practitioners.

The problems that I and others have noticed with this attempt are numerous, the primary of which are as follows:

1. THE PROVERBIAL CAMEL WILL HAVE HIS NOSE IN THE TENT

Once specialty certifications expand, expect that your malpractice insurance carrier will ask you whether you have a specialty certification in the areas that you practice. If you do not, you may find yourself suffering with a higher premium and/or not covered at all. This already happens in the areas of intellectual property, which is perhaps the longest existing specialty certification.

2. THE CAMEL'S HUMP IN THE TENT

Not only will your malpractice carrier take note and expect that you, a solo and small firm practitioner, must undertake numerous hours of classroom work and training to obtain the certification but, before long, the Disciplinary Board of the Supreme Court will look to one's specialty certification to provide the basis for disciplinary action. If you do not have a specialty certification and you perform services in an area which allowed for certification, you may find yourself subjected to disciplinary action for failing to obtain certification prior to practicing in that area.

3. THE CAMEL IN THE TENT

Expect claims made by your clients that you committed malpractice to increase. Clients are not stupid, if they are unhappy with a result in a case (which, in the vast majority of cases there is a modicum of unhappiness) or if the client doesn't want to pay your bill, guess what, if you are not a certified specialist then you should expect that your client will use that as a sword to defeat your efforts at getting paid.

4. SPECIALTY CERTIFICATIONS STIFLE CHOICE

I guess the good old days are gone but I am not prepared to part with them yet. Our role as lawyers is to counsel our clients. The proliferation of specialty certifications will inevitably require that our clients have multiple lawyers in various "specialty areas". There will be no counselor in the true sense that will oversee those various legal areas to tie them all up into a complete package for the benefit of our clients. You probably already experience this today, as the law becomes more and more complex, (complexity, which I believe, has been fostered by this notion of specialty areas). We lawyers have been both looked up to in society because of this skill at "controlling" our clients and guiding them through the maze of the various and sundry legal concepts. In this age of "pigeon holing" and the experience of the medical profession which is only now recognizing that it's shift toward specialization we must recognize that specialty certifications are a mistake. General practitioners are best for patients and clients. We should be promoting a macro view of law, not a micro view.

5. SPECIALTY CERTIFICATIONS ARE NOTHING BUT ADVERTISING IN SHEEP'S CLOTHING

Why do certain groups want to expand specialty certifications? The reason should be rather evident; they hope to promote their practices through advertising by indicating that they are certified specialists in this area and that.

Obviously, we solo and small firm practitioners cannot compete with that kind of advertising from the medium to large size firms who will have the bodies to send out obtain those certifications and then promote them. Will you get the same amount of clients once those firms saturate the market with that kind of promotion if the client comes to you and asks whether you have certifications in all of the core areas? Don't be fooled; the legal market place is driven by promotion and advertising like every other commercial enterprise in this country.

6. COST AND TIME

As solo or small firm practitioners we can ill afford more regulation of how we practice law and make a living. We already have a requirement of 12 CLE hours a year. Specialty certifications will require additional time out of the office to attend classroom type education, which only restricts our ability to bill, and earn a living. Similarly, with specialty certifications will come user fees and tuition which has a tendency of increasing as time goes by. Make no mistake, the proliferation of specialty certifications will directly and adversely affect your bottom line and the way you practice law.

The author practices in Pennsylvania and is active in the American Bar Association General Practice, Solo & Small Firm Section.

"LAW SUIT" CLOTHING DRIVE SET FOR JUNE 1-4

Pacific Law Offices in Anchorage is coordinating a donations drive to assist low income persons in returning to work.

"Between June 1 and June 4, 1999, we will collect the old "law suits" donated by Alaska lawyers for Anchorage welfare-to-work programs," says Gregg Brelsford. During that time, Pacific Law Offices will arrange for the donated items to be picked up at the donor's office or the items may be delivered to Pacific Law Offices.

"We want to match up the fancy 'courtroom' and 'business meeting' clothes and accessories that lawyers have outgrown or no longer wear with low income persons who need them to attend job interviews or to wear at work. Of course this includes both women and men," he said.

Brelsford said the December 1998 *Bar Rag* article on the project generated "dozens of offers to donate clothing from both women and men lawyers. We will be following up with lawyers who have contacted us already and it is not necessary to do so again.

"We encourage all of the lawyers in Anchorage to participate," he added. "While we have not heard from any lawyers outside of Anchorage, we also hope that lawyers in other cities will organize similar programs," said Brelsford.

The "Law Suits" program is co-sponsored by Pacific Law Offices and the United Way of Anchorage. The United Way will provide receipts for these charitable contributions for tax purposes. The clothes will be donated equally to three Anchorage welfare-to-work programs: Nine Star Enterprises, the Cook Inlet Tribal Council, Inc. "Bridge to Success Program," and the UAA "Work First!" program. Anchorage lawyer Pamela Scott and her staff have also volunteered to help collect donated clothing and accessories.

To arrange your donation between June 1-4, please contact Pacific Law Offices at 907-277-6175 (telephone), 907-277-6181 (fax) or by email at: international.law@ibm.net