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The Alaska BAR RAG

Volume 9, Number 3 | *Dignitas, Semper Dignitas* | November, 1985

Malpractice rates climb

by Keith E. Brown

Alaska lawyers preparing applications for renewal of their malpractice policies are being greeted with shockingly high quotes for the new policy year. The reasons for the rate increases are numerous and complex. Writers in the field have suggested that more malpractice claims are being filed against lawyers and that losses are growing higher annually. Insurance experts suggest that the soaring cost of legal malpractice premiums are caused in large measure by a rapid compression of the market capacity created in part by lower interest rates. Many suggest that the more competitive rates available in the early 1980's were, in fact, inadequate to cover the losses incurred during the soft market then existing. Much can and has been written about the reasons for the current crisis but the more immediate concern is the impact upon members of the Alaska bar who are seeking coverage for the upcoming policy year. Their options are quite limited.

The Alaska Bar Association's newly-appointed Professional Liability Insurance Committee is currently investigating the availability of malpractice coverage within the state. The committee is gathering information relating to loss experience by the carriers which have previously done business in this jurisdiction and is in the process of determining what, if anything, can be done to stabilize or improve the current situation.

The High Cost of Practice

Malpractice rates show steady increase.

Based upon information available to date, it appears that there are five sources of professional liability insurance available within Alaska. The carriers currently writing in Alaska include National Union Fire Insurance Company, Fremont Indemnity Company, Crum & Foster Insurance Group, Underwriters at Lloyd's and two carriers represented by Shand Morahan which usually places coverage with either Evanston Insurance Company or Imperial Insurance Company.

Of those sources, only National Union and Fremont appear to be currently accepting new business. The remaining carriers appear to be writing on a renewal basis only except, perhaps, in the instance of Underwriters at Lloyd's. As a rule, Underwriters require a prospective insured to submit an application before quoting; their quotes have been uniformly high. INA/CIGNA, which carried the bar sponsored program under the name INAX, has withdrawn completely from the Alaska legal malpractice insurance market.

Perhaps more disturbing than the small number of carriers still continuing to market legal malpractice insurance in Alaska are the current rates and the limited amount of coverage which can be purchased. As of this writing, it appears that Fremont Indemnity is able to offer a primary policy with limits of $250,000. Fremont apparently has not been able to negotiate a reinsurance treaty which would provide excess or umbrella coverage beyond the primary policy amount. Our understanding is that Fremont is continuing to search for a reinsurance market and expects to have one in place at some point in the near future. However, even if they are successful in negotiating a reinsurance treaty, the excess limits that will be available to their policyholders will be substantially less than the current levels. It is anticipated that with reinsurance in place Fremont will only be able to offer excess coverage of up to $2 million. Current estimates suggest that for an

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An inside look at Dan Hickey

by Dean Guaneli and Barry Stern

In 1971 when Attorney General John Havelock went to Washington, D.C., to testify before congressional committees on the proposed Alaska pipeline, little did he know that a routine interview at Georgetown University Law School would bring to Alaska one of the most influential legal personalities in our state's brief history.

But in those days Dan Hickey did not inspire such awe. He was a short, pudgy, fresh-faced young law student with a liberal outlook. (Years later a full beard and a full-time penchant for controversy would take its toll on the fresh face; he's still short, but he thinks he's less pudgy.)

Hickey grew up all over the world as an Air Force brat. He was taught by Irish Christian brothers in Newfoundland, graduated from high school in Paris, and stayed in Dayton, Ohio, long enough to become a devoted Cincinnati Reds fan.

Perhaps it was this wanderlust that made him choose the Alaska Attorney General's Office over the Philadelphia Public Defender. Whatever it was, one sunny day in 1971, Dan and his wife, Julie loaded up their brand new VW bug and drove to Alaska. Dan still has the ferry tickets that got him to Juneau. He also still has that 1971 VW.

Hickey proved to be a quick study in legal and political matters (some would say: intrigue). In the early 70's he almost got no-fault insurance passed, despite heavy opposition. He also wrote an opinion proclaiming the longevity bonus program to be unconstitutional—14 years before the Supreme Court.

From Shoeboxes to District Attorney

Hickey got interested in criminal law by working on a few appellate briefs, but he maintained a certain distrust of the police from his law school days in Washington, D.C. For example, he was particularly offended by rumors of secret intelligence files kept by state troopers (headed by Ed Dankworth) on 3×5 cards in shoeboxes. So when the AJIS computer system was developed in the early 70's, Hickey made sure the AIJS statutes and regulations were drafted so it would be difficult for the police to use the computer as simply a new place to store the secret files. Dankworth was angry. "You'll force us to go back to shoeboxes," he once told Hickey.

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'Village Journey' report signals Native change

By Robert E. Price

VILLAGE JOURNEY. By Thomas R. Berger. Hill and Wang. 203 p. 1985.

Justice Thomas R. Berger is the author of Village Journey. It has the subtitle The Report of the Alaska Native Review Commission. The Inuit Circumpolar Conference established the Alaska Native Review Commission in 1983 and appointed Berger to be commissioner. In 1983, the World Council of Indigenous Peoples became co-sponsor of that commission. The commission was directed to examine and report on the socio-economic status of the Alaska Natives,

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President's column

Harry Branson

Future Planning

At its August meeting, the Board of Governors set aside one day for a long-range planning session. The result has been a commitment by the Board to a number of new programs designed to benefit the Bar and public.

Beginning with the subject of Bar admissions, we decided to find out what could be done to improve the performance of minority applicants. We asked Board members Andonia Harrison and Bob Wagstaff to put together a special committee of the Bar to address this issue.

The Board discussed the possibility of instituting a program to help alcohol and drug dependent members of our profession. Anchorage attorney John Reese volunteered to chair a feasibility study committee. He suggested a working committee of four to five members of the Bar—some of whom might be recovering alcoholics. The Board agreed that John should seek out those individuals he felt would make the sort of commitment needed to establish a program. He agreed to return to the November Board meeting with a report regarding structure, costs, publicity, and necessary rule changes regarding confidentiality.

A Delicate Balance

The Board voted to purchase a 13 segment videotape program entitled "The Constitution—A Delicate Balance" for use in law-related education projects. Suggested audiences include the University of Alaska, local community colleges, the Alaska public high school system, Learn Alaska, fraternal and other groups such as local chambers of commerce. The program would be employed with attorneys and judges as speakers or moderators. The tapes were recently shown on PBS in Alaska. They involve group discussion and problem-solving centered around contemporary constitutional issues; and feature, among others, ex-Supreme Court Justice Potter Stewart, former President Gerald Ford, Henry Kissinger, and a number of prominent television news commentators, newspaper and magazine editors, politicians and legislators, jurists, religious leaders and other notables from businesses, government, law and the arts. Each session is moderated by a professor of law, and lends itself to further discussion among its audiences. The Board saw this program as an excellent teaching tool with an obvious benefit to the public.

Bridge the Gap

The Board discussed setting up a "bridge the gap" or "mentor" program designed to improve the skills and performance of recently admitted attorneys. A committee has been appointed to undertake a year-long study and development of a series of seminars and materials on basic topics of particular interest and practical application for new practitioners. Stan Ditus will serve as Board liaison with the committee.

Chief Federal Court Judge James Fitzgerald attended the meeting by invitation of the Board. He emphasized the willingness of the Federal Court to participate in programs designed to improve the competence of recently admitted attorneys. He addressed the increased filings in Federal Court, discussions with the State Court Judges on the subjects of seeking more uniform standards of practice and ways to tie in CLE programs with Federal practice.

The topic of dramatically increasing malpractice insurance rates was addressed by Anchorage attorney and former Bar President, Keith Brown. The Board voted to set up another special insurance committee similar to one chaired by Karen Hunt a few years ago when we were having a great deal of difficulty finding agencies that would write policies for Alaska attorneys.

The Board also voted to retain Duke Nordlinger Stern, a prominent national insurance expert, to assist us in finding the best coverage for the best rates possible.

IOLTA

Former Par President, Mary Hughes, appeared on behalf of the Alaska Bar Foundation. She discussed the IOLTA project (Interest on Lawyers Trust Accounts) with us. If instituted in Alaska on a voluntary basis (with authority from the Alaska Supreme Court), it would permit attorneys to designate interest accumulated by local banks on their trust funds to go into Bar Foundation projects which either offer legal representation to the poor or provide law-related education for the public.

Follow Up

A number of important meetings took place in the weeks following the Board meeting. The first of these was a meeting with the Federal bench to discuss cooperative CLE efforts. I, along with Executive Director Deborah O'Regan, CLE Director Linda Nordstrand, and CLE Chair Maryann Foley, met with Chief Judge Fitzgerald, Judges Holland and Williams, Magistrate Roberts, U.S. Attorney Spaan and State Superior Court Judge Serdahely. Chief Judge Fitzgerald indicated the willingness of the Federal bench to cooperatively present with the Bar association legal education programs focused on improving the standards of trial practice.

CLE

Other important meetings were a 6½-hour Saturday meeting of the CLE Committee, an Annual Convention Committee meeting, and a meeting of Law Section Chairs.

Maryann Foley chaired the CLE Committee meeting which covered a number of future CLE programs. The committee enthusiastically endorsed the education needs identified by the Federal bench; and, as a result, a Federal "Off The Record" program has been scheduled for Saturday, January 11, 1986 and a series of six Evidence mini-seminars (breakfast meeting format) will begin February 11, 1986.

Valdez '86

The Convention Committee outlined programs that so far include: a stress management seminar using local experts if possible; a criminal law panel including the Anchorage District Attorney Victor Krumm, Public Defender Dana Fabe, and Public Advocate Brant McGee; a civil law program on Inverse Condemnation with a speaker or speakers from the attorney general's office; a program on personal injury practice; a family law program featuring Robert Kaufman, noted Los Angeles domestic law practitioner, on "Pre-Marital Agreements: From Preparation to Enforceability."

We tried to entice John Mortimer, the author of the *Rumpole of the Bailey* series of books upon which the public television programs are based, to come to Valdez as our banquet speaker. Instead of spending a small fortune, we put together a package that included free airfare from London and back (courtesy of British Airways), a free trip to the North Slope (courtesy of ARCO), and cost-sharing on the ground courtesy of a local television station (KAKM).

He didn't respond. We next invited Fred Graham, a nationally known television news commentator. He agreed to be our banquet speaker. His address will cover Supreme Court/Justice Department directions; he will also participate in the news media panel luncheon on Saturday.

Finally, in order to pack in all the free entertainment we can get, we are inviting next year's gubernatorial candidates to address us.

Sections

At a recent meeting the chairs of the executive committees of the Substantive Law Sections reviewed a Section Handbook prepared by Bar staff. Included in the handbook is a "how to" section on preparing CLE seminars. In the near future, the sections will begin publication of a monthly newsletter to be sent to all section members.

The level of commitment and enthusiasm on the part of the attorneys participating in each of these meetings was extremely encouraging. The consistent thread that ran throughout the discussions was the expressed determination by the participants to put together the best programs possible on a cost-efficient basis.

The editor's desk

If you think that some of the opinions expressed in the Bar Rag are outrageous, try reading the Dartmouth Review. It was founded in 1980 by a few irreverent spirits at that bulwark of freedom and liberal thinking, and was promptly attacked by an outraged faculty, which voted to censure it by a plurality of 113 to 5. The editor was assaulted (severely bitten) by a college official, and all of the traditions of freedom of thought and fair play, for which this and other Ivy League schools have a well-deserved reputation, were violated because the students poked fun at a few sacred cows (see *Poisoned Ivy*, by Benjamin Hart).

It only demonstrates that the liberals can become just as orthodox as the conservatives, with a similar tendency to attack anyone who is not a true believer. It doesn't do much to encourage constructive criticism, or humor. As Justice William Brennan (currently the great dissenter on an increasingly conservative United States Supreme Court) pointed out in a recent seminal address at Hastings, the function of dissent is to keep the majority from getting too comfortable. It's another way of saying that if there's not somebody around to point out that the Emperor's new clothes are a little flimsy, he's eventually going to catch his death of cold, and the rest of us are going to continue to make fools out of ourselves. The purpose of the First Amendment, as Mr. Justice Douglas repeatedly warned, is not to protect popular speech, but to encourage freedom of the mind. This is not to say that the writers who have been kind enough to contribute to this edition are necessarily marching to the beat of a different drum—but if I'm doing my job right, there ought to be something in here for everyone to disagree with.

Popular Anchorage attorney and bon vivant Steve DeLisio serves notice on the court system that he will not endure any more indentured servitude, while defense attorney John Murtaugh and Assistant District Attorney Betsy Sheley (the head of the Sexual Assault Unit in the Anchorage District Attorney's Office) engage in a spirited debate on the merits of defending accused child molesters. Appellate attorney Walter Share dissects the Court of Appeals, and Jack Boots (a senior policeman who prefers to remain anonymous) reveals the inner workings of Steve Branchflower's intake empire.

For students of Alaska history, Juneau trial lawyer Doug Gregg has supplied an affectionate portrait of his old friend and mentor, Howard Stabler, and Roger Connor has provided important historical information on his fellow Justice, and companion, John H. Dimond. Continuing in a biographical vein, Dean Guaneli and Barry Stern reminisce about their years with a complex, talented, and little-understood Alaskan—Dan Hickey.

For those of you who insist that the Rag should have educational value, Fairbanks Private Investigator Leroy Cook explains how to use an investigator in a civil case, while Anchorage PI Gary Veres (known to readers of "All My Trials") makes a similar presentation for the criminal lawyer.

Finally, the awesomely intellectual Bob Price of Homer, Washington, D.C. and Juneau provides a book review that should electrify everyone concerned with Native Land Claims. Keith Brown sounds a warning concerning malpractice insurance, and former president of the Alaska Bar, Donna Willard, invites us to re-examine the benefits of membership in the American Bar Association. Our regular columnists are on the job as well, and J.B. Dell's analysis of settlement negotiations is, hopefully, only the beginning of a series.

As I have stated in various ways, the purpose of the Bar Rag is not to offend anyone, or to stir up controversy—but to provoke thought, and communication. As far as I can determine, everyone enjoyed Phil Weidner's article in the last issue—but where are the reader responses? Can't any of you conservatives write as well as he does?

Gail Roy Fraties

The Alaska Bar Rag

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In the Mail

Comments asked by committee

Deborah O'Regan
Executive Director
Alaska Bar Association
P.O. Box 279
Anchorage, AK 99510

Dear Deborah O'Regan :

Thank you very much for including this following notice in the next issue (November 1985) of the *Bar Rag*. As chair of this committee, I am trying to get notice to all of the legal community so we can get as much input as possible.

As background let me explain that Chief Justice Rabinowitz has appointed an advisory committee to the supreme court on the civil pattern jury instructions. The committee consists of Judge Pegues, Judge Beckwith, Russellyn Carruth, James S. Crane, Theodore E. Fleischer, William McNall, Janalee Strandberg, and Don Bauermeister as Reporter.

Beginning immediately, the committee will consider revisions and updates to tort articles 3, 4, 5, 7, 8, 12 and 17. We are seeking input from all bar members who have any of the following three things: (a) recommendations for substantive changes due to decisions and/or statutory changes in the law; (b) recommendations for stylistic changes; and (c) recommendations to update the "Use" section of the above-numbered instructions.

We would appreciate any input from the members being received within 30 to 40 days of the publication of the next *Bar Rag*.

Again, thank you so very much for including this notice in the next *Bar Rag*.

Karen L. Hunt
Superior Court Judge
Aug. 29, 1985

Demise of a Ficus

August 16, 1985

To D.A.'s Office Staff
Anchorage, AK

It is with deep regret that I report to you that there was a death within the office last night.

At approximately 9:42 p.m. my ficus tree passed away.

Many of you, I am sure, are as saddened as I am. During the difficult period when it became apparent that the ficus was dying, your comments and expressions of concern were comforting.

Courtesy the (Portland) Oregonian, Tribune Media Services

I can recall the first sign of the impending tragedy when Jan commented that the leaves of the ficus seemed to be falling off. Jan suggested that maybe the plant needed more water and direct sunlight, so the ficus was moved to my office window.

Trooper Kilpatrick then suggested that the ficus was getting too much sun and too much water because many more leaves fell off. The ficus was again moved and waterings were decreased.

Maggie Borreco suggested that the ficus should be pruned, so all branches without leaves were cut off. In the process, I might add, Maggie hurt her hand with the scissors.

A sunlamp was purchased at Fred Meyer in hopes it would revive the ficus. Then Steve Branchflower noticed tiny black bumps on the ficus and rendered an opinion that the ficus may have "bugs." Steve noted that some of his trees have from time to time had bugs so he sprays them with alcohol. I sprayed the ficus with alcohol but the "bugs" did not seem to go away.

During the impeachment proceedings when many attorneys huddled around my T.V., many attorneys accidently leaned up against the ficus and became somewhat attached to it. Of course, the ficus was of little aid in determining which way the wind was blowing at that time.

All of us will miss the ficus, I am sure. At least we can take comfort in the fact that the ficus was loved while it was in the office.

George Schaeffer
Assistant District Attorney

Thoughts on general deterrence

With winter approaching rapidly, I decided that all those logs in my yard should conform their conduct to my expectations—they should be split. I took my shiny, deadly axe and powerful maul and put them directly in front of the logs. That should get the message to them. I went to sleep confident that the morning would bring better things.

But, no, the next morning the logs boldly sat there, uncracked, unsplit, totally unimpressed with my show of force. I'd show them—if I whack away on a few of their peers, right before them, they'd have to learn. I sat the chopping block directly in front of them so they couldn't say, "I didn't know." I put on my best cross-examine-a-drug-snitch scowl, so they couldn't say, "I didn't understand how serious it is," and split one-half of one percent of them. That'll get the message through. I retired for the day with the chopping block in full view of the masses and the consequences of noncompliance lying shattered all over the yard.

Yet, the next day, nothing was different. Perhaps they didn't understand, perhaps they needed my help to change, perhaps some could change over time. I didn't care—I burned them all.

General deterrence—deterrence of others—operates under a similar optimistic view of nature. The consequences to one member or cell of a society will be directly communicated to the others through a mysterious shared consciousness. (We can't rely on the newspapers to communicate the message—the earthquake in Mexico knocked 10 sentencings out of the paper just this week). A society whose members drink after the funerals of DWI victims and nervously smoke cigarettes while awaiting news of a loved one's cancer prognosis is said to be able to cure psychological and emotional weaknesses by virtue of the pain inflicted on people unknown to them.

While this may impact crimes based on greed, where there is a cost benefit matrix, it cannot have any impact on a behavior pattern that inflicts pain as a direct consequence. Limiting considerations to those sexual offenders that know their conduct is wrong, know their conduct is hurting people close to them, and thus themselves, and yet cannot break away from these terrible patterns, it is clear that whatever pain "X" and his family received in court yesterday cannot modify their conduct. "X's" family's pain "to deter others" falls on ears already closed by personal gain.

While the prosecution will argue that the healing arts cannot help these people, despite hours of therapy and counselling, it parodoxically suggests that if a patient fortuitously reads of a sentencing while waiting to see the doctor—he will cease his conduct. If he reads National Geographic while waiting to see the doctor, he is doomed to presumptive perdition.

The offender is caged—but no one goes to the zoo. The offender's family is broken—the zookeepers have no time to fix them, more cages must be built, the zoo must be filled. But, no one goes to the zoo.

Name withheld by request

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Common Problems Lead to Disputes

Recently, the Alaska Bar Association pulled together an index to issues decided by the Fee Arbitration Panels since January 1, 1981. These decisions show a definite pattern to the problems that led to the fee dispute. Portions of the index are printed here in the hope that practitioners will benefit.

Billing Practices

83-58 (11/26/84) Clients should not be charged for both attorneys' time in intra-office discussions.

83-30 (9/24/84) Billings that do not show hourly rate, number of hours spent, type of services performed, and who did work are inappropriate.

83-18 (8/31/84) Claim for fees may not exceed fees included in the statements provided to client.

82-11 (1/6/83) and 82-13 (11/22/82) Regular monthly billing could have avoided dispute.

81-19 (12/11/81) Attorney can be required to segregate billings to allow client to identify tax-deductible items.

81-16 (7/30/81) Attorney will be held to an agreement to represent for a flat fee.

81-14 (7/17/81) Problems created by failure to keep accurate records must fall on attorney. Any questions must be decided in client's favor.

80-43 (12/12/80) Separate billing for routine secretarial services disallowed.

Contingency Fees

82-39 (12/5/84) No prior discussion of contingency fee with client resulted in discipline referral.

80-60 (1/12/81) Heavy burden on attorney to adequately explain contingency fee agreement and alternatives to client. In absence of such explanation, fee cut in half.

Failure to Communicate Terms of Fee

83-50 (11/19/84) Client not advised how fees were to be calculated. Client not given accurate explanation after he inquired about fees. Fees accrued after inquiry were disallowed. All fees for staff time charges which were never mentioned to client were disallowed.

83-30 (9/24/84) and 81-2 (6/5/81) Increased fee disallowed when attorney failed to advise client of increased rates charged.

Ibid. Fees charged for the time of others working on the case disallowed when client not notified that this time would be charged.

Ibid. Attorney must be sensitive to necessity to adequately communicate to client not conversant in English language to explain the nature and extent of the legal services being performed and firm's practices and procedures. Use of an interpreter may be required.

83-13 (2/6/84) Responsibility of attorney to advise client of anticipated fees in a realistic manner and to advise of potential high fees associated with continuation of dispute over legal issue.

83-23 (12/22/83) Client not advised of attorney's increased concerns about the economic feasibility of the case. Client not advised what total amount would be needed to bring the matter through trial or to some other clear crossroads in the litigation. Fees reduced.

82-18 (3/18/83) Charges for paralegal time were never discussed or agreed upon by the parties. Charges disallowed.

81-24 (9/14/81) Attorney should have made greater efforts, in light of client's mental state, to advise of the magnitude of the expense she was incurring.

80-33 (2/21/81) Failure to advise client of difficulty of action, probable duration, the high cost total cost of his fees, and the possibility that costs and attorney fees could be assessed against client if she is lost. Fees substantially reduced.

80-32 (7/16/81) and 80-13 (1/16/81) Failure to advise client more accurately of the ultimate fee to be incurred during representation resulted in reduction of fee.

Interest

83-18 (8/31/84) Interest cannot exceed 10.5% in absence of written agreement.

83-16 (2/9/84) Interest disallowed when no agreement to charge interest.

82-11 (1/6/83) Interest disallowed when failure to comply with Consumer Credit Disclosure Act.

Loss of Contact with Client

80-19 (8/28/81) Attorney may charge, but only for necessary services, to protect client's interests after loss of contact with clients.

Non-Refundable Retainer

83-22 (10/4/84) Non-refundable retainer is invalid if nature of retainer is not communicated adequately to client in advance.

81-7 (8/20/81) Non-refundable retainer of $5,000.00 in a divorce case may be unfair and excessive.

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Tribute to judicial leader

Dimond holds place in history

By ROGER G. CONNOR

First of two parts

In 1918, John H. Dimond was born in Valdez, Alaska. No one could then have known that he would be connected intimately to the history of Alaska for the rest of his life. Ultimately, he had a major role in shaping the governmental and legal institutions of Alaska, both as a territory and a state. He also left behind many acts of personal kindness and good will which, though of a different order, are as significant as his achievements in public life.

The Dimond Family

John's father was Anthony J. Dimond; his mother was Dorothea Frances Miller. His father was born in 1881 and was reared in upstate New York. After several years as a schoolteacher, Anthony J. "Tony" Dimond came to the Valdez area of Alaska in 1904, where he was a prospector and miner until 1912. He suffered an injury which kept him indoors for a rather long period. During that time, he took up the study of law. In 1913, he was admitted to the Alaska bar, and practiced in Valdez in partnership with T.J. Donojoe. Valdez at that time was the seat of the U.S. District Court for the Third Division of Alaska.

In 1916, Tony Dimond married Dorothea Frances Miller, who had grown up in the Prince William Sound region of Alaska. Their three children, in order of birth, were Marie Therese, John Henry, and Anne Lillian.

Tony Dimond served as mayor of Valdez from 1920–22 and 1925–33, a total of 11 years. While mayor of Valdez he also served in the Alaska Territorial Senate in 1929-32. From 1933 until 1945 he was elected each two years and served as Alaska's sole Delegate to Congress. A territorial delegate could speak, but was without a vote, in the House of Representatives.

From 1945 until 1953, Tony Dimond served as the District Judge for the Third Division of Alaska, the court by that time being located in the growing city of Anchorage. He died in 1953.

Many persons who knew Tony Dimond recall him as an energetic man, of keen mind and of the utmost integrity in his dealings with other persons, both as a lawyer and as a public servant. His ideology was broadly humanitarian. He was one of the most prominent public figures in the territorial period of Alaska government.

The Dimond family cannot be fully portrayed without mentioning religion. They were staunch Roman Catholics. But, if John Dimond's actions were typical of the family, they practiced great toleration toward those of other persuasions.

It is also plain that the Dimonds put a high premium on obtaining a thorough education.

Marie Dimond obtained a Ph.D. degree in biology. She became a professor of biology, and eventually chaired the department of biology in Trinity College, Washington, D.C. She was, and still is, a member of The Sisters of Notre Dame de Namur. Although she has now retired from active teaching, she has continued with her research activities. She has been the recipient of a number of prestigious foundation grants. She has traveled a number of times to India in order to pursue the study of turtles, which is one of her specialties.

Anne Dimond obtained an M.A. in English literature. She married Thomas Reilly, an Alaska businessman. In the 1960's, Tom Reilly secured a position in the Agency for International Development. He and Anne spent a number of years abroad, mostly in Asia. Anne died at a relatively young age in Bangkok, Thailand, in 1971.

John Dimond's Early Years

One has the impression that John grew up, as did many in frontier Alaska, with considerable exposure to outdoor activities such as hunting and fishing, and demanding physical work. His boyhood friends describe him as physically robust. He was one who could hike long distances in the rugged terrain around Valdez without fatigue. By the time of his adulthood, he stood six feet, five inches, and was lean and strong. He wore a size 14 shoe.

His foot size caused John to pay attention to being shod properly throughout his life. For a person who was physically active, it was most important to have shoes and boots that gave proper support and fit. John always had to plan ahead as to how he would replace his shoes and boots. It could be nearly crippling to be without the proper size. Throughout his life he always spent time in cleaning, waxing, and maintaining his shoes.

A young John Dimond in uniform.

The problem of shoes became critical when he was in combat duty in the U.S. Army. John would prevail upon the supply people to find and obtain proper boots through whatever channels of information and supply were open to them. Once on Bougainville in the South Pacific, a pair of long-ordered boots came into the main base supply station. The supply people loaded that pair on a truck, as the sole cargo, tied down with chains. The truck made its way along primitive roads, through swamp and jungle, to deliver the consignment personally to Lt. Dimond, so that he would carry on effectively with his duties.

Thus, we can take the old cliche, "few can fill his shoes," and apply it literally in the case of John Dimond.

One other anecdote has been related about John's size and strength as a youth. Once in Valdez, in the 1930's, Bill Egan, later to become Alaska's first governor after statehood, was giving boxing lessons to some young fellows, who included John Dimond and George Sullivan (later mayor of Anchorage). When John's turn to spar with Bill arrived, John with his first punch knocked Bill through a window and onto the ground outside. The lads inside waited for Bill Egan to reappear, but several minutes went by. When Bill finally came through the door he said, "O.K. boys, the lesson is over for today."

School in the Capital

After their father's election as Delegate to Congress, the Dimond children attended school in Washington, D.C. John was enrolled in a school operated by the Christian Brothers, noted for their intellectual and behavioral discipline. During many summers John managed to come back to Alaska to work.

During the summers of 1935 and 1936, he accompanied Bernard Hubbard, S.J., on various expeditions into the Alaska wilderness. Father Hubbard was a professor of geology at Santa Clara University. He was world renowned as an explorer, lecturer, and filmmaker, and was known as "The Glacier Priest." His summers were normally spent in what were then the Alaska wilds, accumulating information and making films. The assistants in his expeditions had to be strong and capable of packing into the wilderness, and living there for extended periods.

It was during this time with Father Hubbard that John experienced the first of a number of physical setbacks which would occur throughout his life. Father Hubbard helped the building of the Shrine of St. Theresa, northwest of Juneau, by having supplies hauled in one of the boats under his control. On one of these missions, the boat became grounded on the Juneau Bar, across from the present Juneau Airport. John was present, attempting to free the vessel. It exploded, and John was burned badly about the face and arms. He was unable to attend college that fall, as he was hospitalized for several months.

During the summers of 1938–40, he worked for Mrs. Ed Bartlett, the mother of Bob Bartlett, at that family's Independence Creek Mine near Circle, Alaska.

From 1937 until 1941, he attended Catholic University of America in Washington, D.C., graduating with a Bachelor of Science degree in applied chemistry. He had barely started a career as an industrial chemist with a rubber company in Cleveland, Ohio, when the U.S. entered World War II. Immediately, he applied to be released from a draft deferment. He enlisted in the Army in February of 1942, and was initially stationed at Fort Richardson, with the 297th Infantry Regiment.

A Military Career

In 1942, he completed Officer Candidate School at Fort Belvoir, Virginia, and was commissioned as a second lieutenant to serve in the combat engineers. He later became a first lieutenant and a platoon leader in the 57th Combat Battalion, Americal Division, in the South Pacific. He took part in three military campaigns: Bougainville in the Solomon Islands, Leyte and Cebu in the Philippines.

By the end of his service, he had been awarded the Silver Star Medal, the Bronze Star Medal, the Purple Heart Medal, the American Theatre Medal, the Asiatic Pacific Medal with two bronze stars, and the Philippine Liberation Service Medal with one bronze star.

The selection of John Dimond as an officer in the combat engineers is one of those instances in which the military, whether by design or chance, correctly matched the man to the job. With his Alaska upbringing, his academic degree in applied science, his practical experience in the goldfields of Alaska, and his robust physique, he was eminently fitted to carry out his battleground assignments.

The vicissitudes and practical problems of warfare do not always leave a complete record of what took place but, from the written record that does exist, we can glean that both his superior officers and the men he led in combat admired and respected John Dimond.

Combat engineering troops in World War II were often, though not always, part of the frontal attack on enemy positions. In the combat phase of their work, it was their job to accompany the forces attacking enemy strongholds, and to build, as rapidly as possible, the physical facilities to enable the other fighters to achieve their mission. The offensive activities of combat engineers consisted of such things as punching in roads, building airfield and bridges, deactivating mine fields and other traps, and sealing off and securing the enemy's fortifications. This was extraordinarily dangerous work. The combat engineers were often subjected to cannon, mortar, machine gun, and sniper fire, as well as aerial attack and the explosion of mine fields and booby traps.

The Bougainville Campaign

One of these combat experiences was in the campaign on Bougainville in the Solomon Islands. Those islands lie several hundred miles east of New Guinea. Bougainville is the largest of them. It is about 125 miles long and 20 to 30 miles wide. It is not a place that one would choose for an idyllic South Seas vacation.

A spine of rugged mountains traverses the center of the island. It is near the equator, it has narrow beaches, behind which lie vast miasmal swamps and a tenacious jungle, infested with many varieties of snakes, reptiles, and insects. Intense tropical rains normally fall in the afternoons. The forces of nature conspired there in a most cruel way to illustrate the dictum that war is hell.

The occupation of Bougainville was part of the overall island-hopping strategy of the United States military command. The mastery of Bougainville was important because it could be used as a support area for air raids on the heavily fortified Japanese base at Rabaul on New Britain.

The Japanese had occupied Bougainville for nearly two years. They had installed six air bases on the island, and the ground was defended by a large army. The Japanese commander had been humiliated by losing the battle for Guadalcanal, and he was determined not to be defeated on Bougainville.

The American forces landed on Empress Augusta Bay in the middle of the island on November 1, 1943. In order to entrench themselves they had to drain swamps, clear land, cut roads, and build an airfield. The initial phases of the work were performed by

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The movie mouthpiece

Edward Reasor

Chautauqua Institution is an international summer resort on Lake Chautauqua near Jamestown, N.Y., some 80 miles south of Buffalo but only three hours by car from Pittsburgh. It's centrally located, and New York City is only 300 miles away.

The institution is Victorian houses and wood concert halls located on a lake full of muskelbunge and bass. Chautauqua Institution offers many weeks of morning lectures on world affairs, economics, national affairs, literature and business, followed by afternoon lectures on poetry, religion, philosophy and other in-depth disciplines. World-famous speakers (nine presidents thus far starting with Ulysses S. Grant) draw crowds that average 6,000 in an 1870's amphitheater. It's a cultural resort every Alaskan attorney should visit at least once.

Evenings at Chautauqua include the Metropolitan Opera, popular entertainers (Ray Charles, Henry Mancini) and Chautauqua's own symphony. A professional theater also presents old and new plays and that's how I met actor Tom Hulce.

Hulce, who was absolutely perfect as Mozart in "Amadeus" (winning an Oscar nomination even) was at Chautauqua for a one-week stint to play Tom in Tennessee Williams' famous play "The Glass Menagerie." In Chautauqua's adaptation, Hulce's acting abilities were again stupendous, although in the first opening moments his southern accent seemed strained.

A former North Carolina drama student, Hulce's early momentary lapse only reemphasized the age-old but true adage that no matter how many plays one has starred in (or opening statements given) there are always the first few good true moments of nervous anticipation. He recovered immediately and sounded like he'd just left Chapel Hill that morning for the remaining two acts. Because of Hulce's fame in "Amadeus" coupled with the combined acting abilities of co-star Melissa Gilbert ("Little House on The Prairie") and Teresa Wright (Oscar winner as Best Supporting Actress in "Mrs. Miniver"), and "Amadeus" own eight Oscar awards, the play was a complete sell-out for three performances running. I saw all three.

Tom Hulce, star of 'Amadeus,' jokes with Ed Reasor, the Bar Rag's movie mouthpiece. Kevin Lahey

Besides watching and talking with Hulce at "The Glass Menagerie," I and other nationwide correspondents interviewed him formally (radio taping and television recordings) for one hour before the play. I also visited with him at the local airport, where without fanfare of any kind he drove a borrowed car to pick up a fellow actor.

My impression of Hulce is of a young, dynamic, energetic, pleasant man who enjoys life—and more, loves his profession. He's blessed with tossled hair, wears a clean shirt and jeans, and affects an unassuming attitude that sometimes asks: "Why are so many people interested in me?"

"Amadeus" fame has not gone to Hulce's head, nor I suspect will his continuing success. He's going to win an Oscar.

One reason Tom Hulce is level-headed is simply that he has paid his dues. From theatre school in Broadway to starring roles in "Equus" and "Romeo and Juliet" took time, patience, and immense talent. Although a mid-Western student (Michigan and Wisconsin), Hulce at 15 decided what he wanted to do for a living was act, so his registration at the North Carolina School of the Arts to acquire that knowledge seemed perfectly plausible. Why bother with anything else? At 19, his formal training complete, Hulce headed for New York because that's where plays are staged. "Equus" occupied his life for 15 solid months. Only then did he acquire an agent.

Movies followed Broadway! "Animal House," "September 30, 1955," "Those Lips, Those Eyes" and "Echo Park" presented a new medium and a new observer—the movie camera which is unfailing in its unequaled ability to record not only greatness but errors, omissions, even attitude.

The role of Mozart in "Amadeus" was not handed to Tom Hulce on a silver platter. First he met with both the producer and director in New York to voice a desire to play the part. Then he read for the director, performed scenes with various other aspiring actors, and then filmed a 5½-hour screen test.

Hulce is such a personable guy that he even answered inane questions at the formal press conference (asked by yours truly, naturally).

Q—E.J.R.: "I've read that you only received $80,000 for 'Amadeus,' which seems a pittance in light of the movie's success. . . ."

A—"That's absolutely not true! Please don't believe all the things you read about my 'Amadeus' adventure in other newspapers. We were all well paid, well paid indeed. Definitely quite a bit more than $80,000."

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Using the private eye in criminal cases

By GARY VERES

I have been in the investigative business, in one form or another, for over 20 years. I started my career in 1965, with the Los Angeles Sheriff's Department.

This was a very interesting time to become a policeman in Los Angeles, since that was the first year of what is now called the "Annual Watts Festival." That first year, we in the trade simply called it a riot.

Anyway, I worked my first four years of patrol on night shift in the West Watts area of Los Angeles, called the Vermont District. It proved to be quite a training ground.

After that, I spent two years working under cover for the Intelligence Bureau in Los Angeles. My job there consisted of infiltrating "militant and subversive" groups. They were quite busy in those days, so I was too; besides, I looked great in my beard and ponytail.

Having had all of the fun that I could stand in Los Angeles, I moved to Redding, California, in 1971. I was an officer there until 1978, my last few years working as a major crime detective. At that point, after some encouragement from local attorneys, I started my own business, and have been at it ever since.

Although a good portion of my work here in Alaska is of a civil nature, the *Bar Rag* has asked me to discuss the private investigator's part in criminal defense cases, no doubt due to my background.

What is the most important ingredient of a prosecutor's case? Obviously, the investigation. Shouldn't this also be true in the defense of a criminal case?

National statistics show about a 90% conviction rate. I feel it reasonable to assume that most accused are not innocent, but that question can only be answered through proper investigation:

- Was the search and seizure proper?
- Was the arrest proper?
- Who are the witnesses and are they telling the truth?
- What is the physical evidence and what does it mean?
- Has the law enforcement agency done a thorough job?

Some of these questions can possibly be answered from behind an attorney's desk, but in my opinion, none adequately without the benefit of a proper investigation.

Very few attorneys use investigators in the defense of criminal cases. I would assume that their case strategy is usually based mainly on the police reports and what the client has to say.

Obviously, cost is a factor in many of these cases, and the "Team Concept" of investigator and attorney cannot always be afforded. However, an attorney probably should not take on a case in which the client can't even afford to at least have a few witnesses examined, and check into the law enforcement agency's investigation at least to some degree. If these things aren't done, don't we begin to border on malpractice?

Due to our high crime rate, all levels of law enforcement personnel do not have the time to thoroughly and completely investigate all alleged criminal offenses, other than "big news" type crimes.

The real problem lies with the prosecutor. He is unable to spend nearly the time necessary in case preparation due to his tremendous case load. In one article I read, it was indicated that in most cases of this type, the file is not reviewed by the prosecutor until the night before. From past experience I can go one better than that. As a police investigator, I remember many times being asked by the prosecutor to come into his office a half hour before court time to discuss the case with him. Upon my arrival, the conference would start with his question, "What the hell is this case all about?" Unfortunately, at times (especially in Los Angeles), I couldn't remember either. Those trials were "fun," but, believe it or not, almost all of them resulted in convictions.

Now, if an attorney opts to handle a criminal case and has all intentions of handling it thoroughly, he will probably save his client money by utilizing a competent investigator. The investigator's rate is no doubt lower than the attorney's, costing less for witness contacts, crime scene visits, and so forth.

Leroy Cook on investigators for *civil* cases—Page 24.

Not to mention that these types of things, under most circumstances, will be handled more adequately by a good investigator. Through experience, he should be able to more easily deal with the types of people one will usually be dealing with in a criminal case. He should be streetwise, and be able to "comfort" some of these witnesses better than some attorneys.

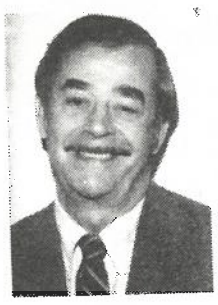
As a police officer, especially on a "no biggie" case, there always seems to be a tendency to gather and to record only information useful to the prosecution's case, and just to the point where he can "close by arrest." More often than not, there is a lot of follow-up work to be done that is not pursued unless noticed by the prosecutor, who then has to contact and direct the officer or officers further.

I have contacted witnesses listed on the police report who had a lot more to say than their original statement reflected, including other witness names that were not followed up. This type of thing frequently leads to new information useful to the case.

I once worked a felony case here in Anchorage with Gail Roy Fraties (then a defense attorney), that resulted in an acquittal. Subsequent to the judgment, the judge actually chewed out the police investigator and the prosecutor for presenting such an ill-prepared case before his court.

Once again, I want to stress that these things happen, in my opinion, due to the workload carried by the agencies involved in the prosecution of these "less than sensational" cases. They are put into a position in which the need is to get rid of them and get on to the next stack.

A defense investigator should approach each case, carefully examining both sides. After crime scene visits, interviews, the taking of statements, gathering of evidence, and following up of all leads (not only newly developed ones but ones developed by the police and not pursued), a theory should be present. By looking at *all* evidence, and evaluating the strengths and weaknesses of both the prosecution's and defendant's cases, he should be able to present a valuable package to the defense.



All my trials

Gail Roy Fraties

J. Gerald Williams may no longer be a household word, at least among the younger attorneys, but in his prime—roughly between the years 1962 and 1973, when he was the presiding judge of the local bankruptcy court (a function now fulfilled by his son, J. Douglas Williams II), he could be counted on for a significant donation to the speech making at any bar function. It was the unique ability currently demonstrated by popular Anchorage attorney and raconteur Stan Ditus, whose recent contribution to the retirement roast of Superior Court Judge Ralph E. Moody is only now gradually fading from the bar's collective memory.

Inside Darkest Alaska

Judge Williams was no great respecter of persons either, and he rose to one of his frequent high points at the investiture ceremony of Justice James M. Fitzgerald, when he left the Alaska Supreme Court to become the newly appointed Federal District Court Judge in Anchorage.

Dignitaries abounded from all over Alaska and outlying areas, including the presiding judge of the Ninth Circuit Court, who attended with his family and retinue. These august personages were in a state of cultural shock on being introduced to Alaska. Moreover, none of them were prepared for J. Gerald Williams. His normal speaking voice, at that time, was several decibels higher than pain level and—as an old-fashioned type orator—he raised it considerably above that when making a public address, which he did on this occasion.

Everyone had told affectionate little stories about Justice Fitzgerald, most of them emphasizing his scholarship and integrity, and Judge Williams decided to throw some light on the real character of the nominee.

"WE WERE ON A DUCK-HUNTING TRIP," he began on a gradually ascending pitch, "AND OF COURSE OLD FITZ HAD HAD QUITE A FEW DRINKS—IT WAS ALMOST 9:00 A.M. BY THAT TIME. WE WERE ALL STANDING IN THE CAMP, AND JIM WAS HAVING SOME TROUBLE MAKING IT IN FROM THE DUCK BLIND. HE KEPT FALLING DOWN AND CRAWLING."

"Here it goes," said former Attorney General G. Kent Edwards, who was standing beside me. I glanced toward our visitor from the Ninth Circuit, and although his eyes glittered slightly, he maintained his composure and continued to listen, with a fixed smile on his lips.

According to Judge Williams, one lone duck appeared on the horizon, flying at a very high altitude. It was alone in the October sky, and in the early morning light was all but invisible against the overcast. The hunting party watched with concern as their friend staggered to his feet once more, and, focusing his bleary eyes on the target as well as he could, lifted his shotgun in one hand and fired. To their delight and amazement, the duck was stopped in mid-flight, and fell out of the air—seeming to take many minutes of tumbling end over end before it landed at their feet, dead as Christian charity.

They were all enthusiastic, of course, and congratulated him roundly. "I've never seen a shot like that in my life," said one of their number. "How did you ever do it?"

The narrator paused in his story to make sure that he had the undivided attention of his audience, particularly the dignitaries from Seattle, which indeed he had.

"JIM FITZGERALD HAS ALWAYS BEEN A MODEST MAN," roared Judge Williams, "AND THIS WAS NO EXCEPTION." 'HELL,' HE SAID, 'THAT WAS NOTHING. WHEN A FLOCK LIKE THAT GOES OVER YOU'RE BOUND TO HIT AT LEAST ONE OF THEM.' "

The Show Must Go On

Superior Court Judge Karl S. Johnstone of Anchorage is another interesting study in judicial restraint. A complex man, he has a quick wit and an equally quick temper. If he isn't Irish, he ought to be—inasmuch as he shares with that beguiling race the combination of charm and temperament that have made them a leaven to the world's population. He doesn't abide fools gladly, either, and is easily irritated if the courtroom performance of the lawyers who appear before him drops below his high professional standards.

As I've had occasion to mention before in this column, the courtrooms in Anchorage leave a great deal to be desired—and that of Judge Johnstone is no exception. It's not as bad as Courtroom H (AKA "The Guppy Tank," Superior Court Judge Victor D. Carlson presiding), but as a disaster it's in world class. To paraphrase Walt Whitman's heartfelt comment about lawyers and hearsehorses, something about designing a courthouse makes an architect snicker.

Anyway, we were trying a murder trial in Judge Johnstone's court last week, and anything that could go wrong, did—in spades, doubled. The judge had put up with a series of delays occasioned by malfunctioning equipment, and his already volatile temper was in an unstable and explosive state. The videotape of the crime scene had been consumed by the VCR, a cassette was partially erased by one of the officers pushing the wrong button, and the use of a slide projector by the prosecution had required the entire courtroom to be plunged into stygian darkness. It gradually emerged over a period of approximately half an hour, the power saving sodium lights flickering on one by one, giving a surreal and disturbing mood to the whole story proceeding. As a final jarring note, one of the witnesses was late.

We were very near the end of presentation of evidence, and Judge Johnstone manfully restrained himself from a natural urge to tear both attorneys to quivering bits and dance on their remains. When the last defense witness finally arrived, however, he was a very old gentleman who had the traditional problem of affixing the microphone to his shirt. In Alaska, as some of my stateside readers might not know, we record everything rather than using a court reporter—which requires the tiny microphone used by the witness to be affixed to a collar or some other article of clothing. When these little numbers drop off, as this one did several times, the amplifying system makes it sound like a stegosaur's death rattle.

"As you ladies and gentlemen will notice," said Judge Johnstone to the jury with a grim smile, "we have a $50,000 piece of sound equipment here, which is entirely dependent upon its being connected to the witness by a fifty cent tie clip."

The jurors giggled nervously, and listened carefully to the witness's brief contribution. There was a no cross-examination, and on being dismissed, the elderly witness stood up and started to walk away from the stand without detaching the equipment. The clip remained in place, but the microphone fell to the podium once more with a resounding crash.

There was a deathly silence in the courtroom, and everyone looked toward the embattled judge for some comment. "Take the clip," he said with deep feeling. "Leave the microphone."

The Saga Continues

In response to reader inquiries concerning the well-being of Marvin, whose contribution to law enforcement as a perennial victim was reported in the August Bar Rag ("All My Trials," subsection 'Power Negative Conditioning'), I am happy to report that his madcap social life at the Jade Room continues unabated. I dropped in there to report to the owners the conviction of Marvin's latest assailant (they had also appeared in the trial as witnesses), and he and his friends kindly bought me a drink. One thing led to another, and by the time I left the party was well under way.

The next morning, I repeated all of this to paralegal assistant Pamela Barkhoefer, who had also become friends with all of the witnesses in the trial, particularly Marvin, due to his long association with this office. She was mystified, therefore, when she received a call from him later in the day inquiring in a subdued voice as to whether the verdict had come in. He sounded a bit off his feed.

"Why, Marvin," she said, "Didn't Gail go by the Jade Room last night to tell you that the jury had come back with a conviction of first degree robbery? They believed your people, and we won the trial."

Marvin was delighted with the news. "I guess that's what we were celebrating," he said.

Challenge for Probable Cause

Some people just don't want to be jurors. We had one of them in courtroom D the other day (the turf of Superior Court Judge Mark C. Rowland), where I was attempting—with indifferent success—to prosecute a pathetic looking, tiny Vietnamese gentlemen over the determined opposition of Public Defender Venable Vermont. The charges were burglary, as well as assaults purportedly committed on an investigating policeman and his dog by the knife-wielding little oriental.

Before beginning the voir dire of the individual jury members, Judge Rowland permitted me to direct a number of general questions to the panel as a whole, in order that the attorneys might make notes for future questioning. One of the prospective jurors, a cross looking gentleman seated in the first row, answered all of them in the affirmative. I asked if anybody on the panel had ever been the victim of a violent crime, and he (among others) raised his hand. In response to the inquiry as to whether or not anyone would have problems judging police testimony by the same standards applied to other witnesses, his hand went up again. He responded positively, as well, to questions designed to find out whether prospective jurors had philosophical problems with sitting in judgment on another person, whether the circumstance that the defendant was an oriental would prejudice anyone, and whether the fact that a canine had been injured would elicit undue sympathy.

After the second or third affirmative response I caught Venable's eye, and he smiled slightly. We knew what was going on. So did Judge Rowland who, having been approached by the reluctant juror during the break, spoke to counsel briefly off the record before the jury was reconvened.

"That guy in the front row came up to see me at half time," said the judge, "and told me that he was once attacked by a gang of orientals with knives whom he had surprised in the act of a burglary. He thinks that it would affect his judgment on the case."

"I'll bet it would," said Venable. "He didn't happen to identify my client as one of them, did he?"

Quotable Quotes

Anchorage Public Defender Cynthia "Cindy" Strout, on hearing that Eagle River house candidate Sam Cotton was calling for an even tougher insanity defense standard than the stringent legislation presently in effect: "I don't think the higher primates will make the cut."

•

Anchorage Police Officer Greg Baker, revealing that he drinks a full pot of fresh ground strong Columbian coffee every morning before he goes on beat: "It gets me so wired up I'm ready to arrest anybody—I don't give a shit whether they've done anything or not."

•

Recidivist Willie Roundtree to Anchorage Superior Court Judge Rene Gonzalez, during his remarks in allocution, "Your Honor, I'm real good at being rehabilitated."

•

Head of the Office of Public Advocacy, defense attorney Brant McGee, recalling some of the typically charming classic bad actors he has represented in his career: "I never met a psychopath I didn't like."

•

Anchorage Police Officer Mark T. Mew, dutifully filling out form ST-10 (APD Property & Evidence Report) on an item seized among the purported loot of a burglary suspect:

Type of Article: Masturbation Device:
Size, Calibre, etc.: "Fits all."

•

Timid looking gentleman from the audience, having heard Anchorage attorney and State House Representative Don Clocksin (a strong proponent of protection of women from domestic violence) remark that we can't have women being beaten, there's just no excuse for it: "Well (hesitantly), "what about if she just goes on . . . and on . . . and on—?"

The Alaska Court of Appeals

The Lights Are On But Is Anyone Home?

by Walter Share

Arguing before Alaska's Court of Appeals reminds me of running rapids in a kayak after you've dropped your paddle. The Court of Appeals is unique and invigorating. You may not like the results of their opinions but one thing is clear: The lights are on and the Court of Appeals is alive and kicking. The Alaska Court of Appeals has written many an opinion over the last years with which I definitely disagree. However, it's clear that the Court of Appeals is a young court, still enthusiastic, well prepared, and in the process of maturing. Much like criminal law in Alaska, the court is still relatively wide open, and unsettled. When you add in the relative newness of the Alaska Criminal Code and Alaska law, arguing before the Court of Appeals can be anybody's guess and is often like a shooting match.

> **". . . in the last fiscal year, 40% to 50% of the cases that came before the Court of Appeals were either reversed, vacated or remanded for further findings."**

The Court of Controversy

If you don't like controversy, then arguing before the Court of Appeals is an unsettling experience. The Court of Appeals is one of the most active and articulate courts in oral argument that I have been before. I have yet to see them unprepared on the facts or the law (I can't wait). They also have the cutting edge. They specialize purely in criminal law and write 90 percent of the criminal decisions. They certainly ought to know what they're doing. It's impossible to match their vast wealth of knowledge.

There are three judges of the Court of Appeals who are young, active and compulsive. Each judge has two law clerks, fresh out of law school and eager to prove their abilities by finding errors in counsel's cases and briefs. The court also has three full-time staff attorneys if the above isn't enough. If you are the type of attorney who likes to keep control of things and direct the flow of argument, don't go before the Court of Appeals. It's clear that you won't be steering the bus from the moment you walk into the room. The Court of Appeals is not predictable. You can't guess which issues the judges will choose to discuss or which arguments they might buy. You have to be prepared on every issue which has been raised.

Who Are These Guys Anyway?

It's impossible to "peg" the Court of Appeals. They are not as "liberal" as the Alaska Supreme Court used to be in the 1970's. I think I came here in part because in the 1970's the Alaska Supreme Court was well known and respected. Given a smaller caseload, there were law journal type decisions, usually on the liberal and cutting edge of the law. The court that brought us *Ravin v. State*, (marijuana is constitutionally protected in the house) and repeatedly held that Alaska's constitution granted more protection than the stingy protections afforded by the federal constitution, was certainly one of the more liberal courts in the country.

Those days are no longer here, one must concede. But the Alaska Court of Appeals is still a "liberal" and open court by comparison to America. Compared to the courts outside, they still listen and can think, even if they don't always get the time to do so. They are a more technical court than the Alaska Supreme Court used to be. You can win or lose based on more analytical and rational arguments than ever before.

The old Supreme Court was more of an equity court by my memory, fully capable of finding "plain error" or reversing on an issue which neither side on appeal saw or raised. The new appellate court is more technical in that you have to dot your "i's" and cross your "t's" and play ball according to the rules more often. They are not likely to find "plain error" and not likely to fill in the blanks for errors made in the trial court below. If there is a way they can affirm a conviction they will do it.

It used to be, in the 70's, that the State Supreme Court was always more liberal than the federal court. If you lost in the Alaska Supreme Court you could hang up your spurs and go home because generally you weren't going to get anything out of the Federal District Court of Ninth Circuit. Now, the above is not always true. The relative trade-offs between state and federal courts have changed. The Federal District Court judges these days are growing more liberal and are listening to federal constitutional claims. The Ninth Circuit is now the most reversed circuit in the country. If you pull a liberal panel in the ninth circuit you might do much better than the Alaska Court of Appeals. If you pull an average or conservative panel on the ninth circuit, our appellate court looks brilliant and liberal, by comparison. While the Court of Appeals is on the more liberal, intelligent, and well prepared side of the spectrum, the time has come when they have become a "court system" and where the federal system might offer alternatives.

Can't Get No Satisfaction? Who Needs the Court of Appeals?

I must concede I am tired of attorneys saying "Why raise issues on appeal?" I have heard numerous attorneys scream, "You don't get anything from the Court of Appeals anyway." Gail Fraties (who has urged me to write this article for the last six months), finally blackmailed me by threatening to promise his readers that in the next issue I would come up with an article titled "The Court of Appeals. Who Needs Them Anyway?" He threatened to tell readers that my article would be titled "Arguing Before Alaska's New Court; The Three Stooges" if I didn't come through for this month's publication. The fact is that lots of people need the Court of Appeals. Especially defendants and apparently those superior court judges who never took criminal or constitutional law in law school. To those who claim that you just don't get anything from the Court of Appeals anyway, I've got some news for you. You're wrong. If you look at the statistics, they show that in the last fiscal year, 40% to 50% of the cases that came before the Court of Appeals were either reversed, vacated or remanded for further findings. I doubt if you can find another court in the country where defendants do so well (with the exception of a tennis court where about 50% of the people win).

Statistics from the annual report for fiscal year 1985 show there were 103 published opinions. Of those 103, 51 were affirmed. Thirty-eight were reversed, remanded or vacated, and the remaining 8 to 14 were affirmed in part or reversed in part. In other words, approximately half of written opinions the court granted some relief to an appellant. This is not a court that is afraid to act.

The Court of Appeals also decided 238 memorandum opinions and judgments (MO & J). Of these 238, 164 were affirmed (approximately two-thirds). Combine all of the above, and of the 341 cases resolved on the merits about 40% were reversed or remanded. Two weeks ago the Court of Appeals reversed four of five. This week they reversed nine of 10, (albeit one was reversed *for* the state). Justice Berger and crew don't ever do that. Few courts do.

The above statistics reflect several things that are still true in Alaska. (1) the court is open to finding error if properly preserved and good issues are raised. They are still a relatively new and open court; (2) they are not a defendants' or prosecution court on appeal. While like most courts they tend to affirm, the status quo, all other things being equal, they are capable of understanding and following the constitution; (3) the law is still very undefined in Alaska and we are still litigating the new and foolishly drafted criminal code which was drafted, in my opinion, with a reckless mental state as defined in A.S. 11.81.900(a) and; (4) there are still some judges on the Superior Court and District Court in Alaska who think that the term "constitution" is limited to their digestive tracts. While I could rant and rave about particular decisions, the Court of Appeals is a valuable alternative which many attorneys are not taking seriously enough.

Your Guess Is as Good as Mine

Based on the above statistics, I'm constantly unable to predict the outcome of my case. My clients always want to know, "Are we going to win?" "What are my chances on appeal?" That's when I take out the Ouija board. To this I am usually incapable of giving answers. I'd rather bet on when the ice will break in the Nenana Ice Classic than how the Court of Appeals is going to rule on most issues. I have never been in an oral argument where I haven't been asked numerous questions that I've never dreamed the court would think of no matter how much I prepared. I've never come out of oral argument with any better idea of how the Court of Appeals is going to rule than when I went in. I've seen the Court of Appeals completely obliterate one side (often myself) only to turn around and rule for that side. I've seen them turn around and argue inconsistently right in the middle of argument. Those people who seem to have pegged the Court of Appeals as a liberal court or a conservative court seem to know something I don't know. I spend 90 percent of my time doing only appellate work, and on many cases, your guess is as good as mine.

Are Three Heads Better Than One?

The other intriguing matter is that when you argue to our appellate court you're not arguing to one court. You've got three distinctive judges who are fully capable of disagreeing and coming to different views.

> **"the court is open to finding error if properly preserved and good issues are raised."**

None of the three judges can be termed either "liberal" or "conservative" and all of them are capable of changing their minds in a flash. They are feisty, and as a general rule, their confrontive and argumentative nature is not to be taken personally. They just like to argue.

Link to Old England

As you look at the bench, on your left is Judge James K. Singleton. He is neither liberal nor conservative. He lives for the world of concepts and legal constructs, well removed from the mundane directives of mere politics. He is highly intellectual and very historical. He is rarely concerned with what century we are in when he asks questions. Of the three judges on the bench he is definitely the most academic.

In one oral argument, the issue turned on the fact that the trial court had a secretary gather some evidence outside the presence of counsel and outside of court. This, it was suggested, was rather adversarial role for a judge. Defense counsel was in the midst of expressing a most compelling display of disdain, shock, horror, chagrin and constitutional repugnance when Judge Singleton noted, "Of course counsel, judicial gathering of evidence is only contrary to the Anglo-American tradition. In the accusatorial system (i.e., France and no doubt Cambodia and Iran) judges often take an investigative role." There was a small silence in the courtroom. Indeed it was hard to respond to that point. Counsel regained composure in time to ask Judge Singleton to take judicial notice that Alaska is no longer Russian . . . it now falls within the jurisdiction of *AMERICA*, and to volunteer supplemental briefing since neither side had researched that issue.

Judge Singleton is also the master of the reference to the undiscovered law review articles, cases or statutes which nobody in their right mind could find but Judge Singleton. You often see him in the law library doing his own research, probably because he likes it. Usually he's reading those books which crumble in your hands if handled without great care. The ones with yellow pages and broken bindings. I recall the middle of one argument, where the dialogue went almost as follows:

> JUDGE SINGLETON . . . Excuse me counsel, what do you think about the tentative draft of the 1947 model penal code which was adopted by the Michigan State Senate, but rejected by the Michigan State House . . .? Does this legislative history help at all in defining the legislative intent in our criminal code? Does this provide a clue for why the drafter of our model penal code chose not to put any criminal mental state into this provision of Alaska statutes?
>
> COUNSEL . . . Had I read the first draft (which neither side cited in their briefs) I might be in a position to argue from that Judge Singleton . . . does it support the defense on appeal?
>
> JUDGE SINGLETON . . . Basically it could be construed to assist your argument.
>
> COUNSEL: Then I think it controls.

Judge Singleton, as noted above, is also the master of the five-minute question, oft times more of a speech with a slight rise in inflection at the end than actually a question. Oft times counsel is left helpless watching valuable time tick away as Judge Singleton's questions take us back to 18th Century England. Judge Singleton is not shy. He'll jump right into the middle of an argument and let you know exactly what the concerns are. His historical and academic approach to the law does add a necessary balance to the court. This necessary "balance" is great if it helps your side. It's difficult, however, explaining to your client that you just lost the appeal because the judge who authored your opinion finds your argument inconsistent with a decision of the Queen's bench.

The Chief Judge

Judge Alexander O. Bryner sits in the middle and is the chief judge. He has a much different approach, less historic and more directly to the point. He is active in argument and always well prepared. He has a tendency with his questions to cut directly to the jugular. While Judge Singleton is capable of taking one back several centuries, Judge Bryner always manages to get things back to the present tense, and keep the issue focused. In one argument the exchange went as follows:

> COUNSEL: May it please the court. I represent the appellant and my name is. . .
>
> JUDGE BRYNER: Mr. Share, in your first argument of your brief you ask for reversal. How can you even make such an argument when it wasn't objected to in the trial court, counsel below seems to have waived any possible objection, the prejudician evidence was cumulative, and the four eyewitnesses would render any error harmless to begin with?
>
> COUNSEL . . . I'm glad you asked that question Judge Bryner. Moving on to argument II of my brief. .

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The good old days

Lawyers v. attorneys: A tribute to Howard D. Stabler

By DOUG GREGG

Law clerking for an experienced trial attorney has its advantages. Lawyers must communicate difficult concepts, summarize and clarify. Howard D. Stabler, my first mentor in the law, explained this to me and, drawing on an incident that occurred back in the 20's when he was a telegrapher in Sitka, told this story as an example: An old Indian chief could not understand, after a number of tries, how messages could be sent by cable between Juneau and Ketchikan. It was no use until someone decided to draw on the chief's prior experiences in life, as follows: "There is a dog in Ketchikan with a long, long tail. The tail goes under the water all the way to Sitka. When we step on that dog's tail in Sitka, the dog barks in Ketchikan." The chief's broad smile and nod signified that the basic idea was grasped.

In Howard's lexicon, there was a difference between "lawyers" and "attorneys." He would explain: "Anybody with a law degree can become a bureaucrat—those are the attorneys. To succeed in the practice of law takes a lawyer." (I never knew anyone else who made that distinction.)

Born November 11, 1887, in Bethany, Ohio, Howard D. Stabler started out railroading at a very young age. Telegraphy was his love and he traveled widely working for what he called "The Big Four"—the B & O, Southern Pacific, the SP&S and a fourth I cannot now recall. That experience eventually led him to Sitka.

After his railroading days, he went to Chicago to study law, later was admitted to the Washington state bar, and then settled into private practice in Spokane for about a year. He enlisted in the Army during World War I, joining the Signal Corps, and went to France. After a transfer home, he worked for awhile on the Alaska cable system until the armistice and his discharge. He then decided to go to Sitka where he continued as a telegraph operator on the cable system until he was admitted to practice in the Territory of Alaska in 1919.

Howard was a Republican, which helped to secure his appointment in 1921 as Assistant U.S. Attorney for the First Judicial Division with offices at Juneau. Later, he was appointed to the position of United States Attorney for the First Judicial Division. A vigorous and highly successful federal prosecutor for 12 years, Howard learned his trade during prohibition—a period of heavy criminal activity. The Alaska Reports for this period show that Howard handled the majority of the criminal appeals taken to the Ninth Circuit from the First Judicial Division. When FDR was elected, he appointed a new U.S. Attorney, and Howard went into private practice in Juneau. That continued from 1933 until his death in 1963. Thus his total time at the bar was only a bit short of 50 years.

Prosecutors, in the prohibition days, had their share of problems. On one occasion a bootlegger poured sugar in the tank of Howard's new automobile, ruining the engine. The culprit went to jail on the bootlegging rap but was never prosecuted for the "prank." Howard took to carrying a small semi-automatic for protection when things were particularly active and, even in his later years, he would not sit between the water and the light while relaxing at the family retreat on Auke Bay. Unfortunately, Howard was neither the first nor the last prosecutor to bear such burdens.

A code pleader at heart, Howard cared little for the Federal Rules of Civil Procedure. He used them with success, but never tired of extolling the virtues of code pleading. To him code pleading was a thing of beauty, an art form.

Howard D. Stabler

He once told me about the dangers of filing demurrers. His first case in Spokane was defending a civil suit. His opponent was an old-timer and Howard thought the complaint was defective. He demurred and won the motion. The amended complaint was likewise deficient and Howard demurred again. This state of affairs persisted for four rounds and Howard was feeling mighty proud of himself. Finally, the complaint was in proper form, the case went to trial, and Howard lost. It didn't take him long to realize that he had succeeded only in outpointing his opponent for four rounds, while leaving the plaintiff with a well-pleaded cause of action. (There are downside risks to a motion to dismiss, too, but stating a cause of action today is not so technical.)

His lovely wife, Gladys (now Gladys Wynd of Eugene, Oregon), practiced with Howard for the last 20 years of his career and, following his death, formed the firm Stabler, Gregg and Meuwissen. (Shirley Meuwissen later became Shirley F. Kohls.) The firm metamorphized over the years, Gladys retired in the interim, and the name ultimately became: Gregg, Fraties, Petersen, Page and Baxter. Although the name "Stabler" was no longer on the letterhead, Howard's presence continued to be felt. His portrait never left its place of honor in the office. The latter firm dissolved in name, if not in spirit, in 1977, but Howard's picture still graces the library wall here in Juneau.

A 33rd degree Mason who for many years wrote and conferred the Scottish Rite degrees, as given in this jurisdiction, Howard was deeply committed to the separation of church and state. He understood that public financial support of private school systems would ultimately be at the expense of the public school system, since all compete for the same dollar. His dedication to the First Amendment's doctrine (separation of church and state) was consistent with the Republican philosophy of his time. One wonders, though, how Howard D. Stabler would have reconciled his beliefs to the beliefs of the Republican leadership today—the beliefs of those whose legislative battering ram would

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The American Bar Association. Who Gives a Damn?

by Donna C. Willard

Over 325,000 lawyers can't all be wrong. There must be some reason why, each year, they pay substantial dues for the privilege of belonging to the world's largest voluntary professional organization. Most certainly, monthly receipt of the ABA Journal does not provide sufficient incentive so, what is it?

The answers are undoubtedly as varied and diverse as the membership. For one person, it may be the lofty goal of improving the administration of justice. For another, it might be the inner satisfaction gained from service on any one of a multitude of committees devoted to virtually any topic arguably falling within the legal arena. Yet another might utilize the organization as nothing more than a source for research. But one fact is undisputed, there is something for everyone. Just consider the following.

There are 23 Sections and Divisions and six Forum Committees each devoted to a distinct area of legal specialty. To name but a few of the areas covered: administrative law, antitrust law, real property, probate and trust, general practice, individual rights and responsibilities, labor and employment law, litigation, public contracts, public utilities, taxation, economics of practice, criminal justice, urban, state and local government law and tort and insurance practice.

A lawyer can give, or for that matter take, as much or as little as he or she desires when joining one of the sections or divisions. From simply sitting back and reading the monthly or quarterly periodicals which are provided to active service on a committee or council, the options are virtually limitless.

The eight stated goals of the American Bar Association include the promotion of improvements in the American system of justice, improvement of the delivery of legal services, leadership in improvement of the law, the increase of public understanding of the law and the legal profession and assurance of the highest standards of professional competence and ethical conduct.

To achieve those objectives, there is one primary resource, the volunteer professionals willing to devote time. The vehicles are numerous committees, both standing and special, as well as commissions and task forces. Among them are those labeled ethics and professional responsibility, federal judicial improvements, professional liability, lawyers' responsibility for client protection, professional discipline, delivery of legal services, dispute resolution, election law and voter participation, legal services and the public, public education and youth education for citizenship. Thus, anyone interested in service to the profession is presented with a wealth of opportunities via the ABA.

If those types of resources and opportunities for involvement hold little appeal, perhaps ABA/Net would be of interest. For an initial subscription fee of $75 and a minimum monthly charge of $10, an attorney can become a member of a nationwide communications network which permits electronic transmittal and receipt of mail, access to the major newsservices, the official airlines guide, the financial and commodities exchanges, and an electronic business library.

Not only is it an easy system to operate, but it is faster than the mail and less expensive than express delivery services. One very practical feature for the practicing attorney is the ability to transmit documents almost instantaneously to far removed counsel and clients.

In addition, the system accesses AMBAR which provides a wealth of information on the ABA itself, including lists of publications, articles and audio-visual programs which are available to members. In the near future, it is also expected that one or more computer research sources will be available at attractive rates.

If computers are anathema, consider the ABA continuing legal education programs. Not only does the Association provide national institutes and regional seminars but it offers a library of more than 250 videotapes. A catalog of the available topics is provided to members at no cost.

If, however, neither intellectual enrichment nor service are priority goals, ABA membership also offers numerous economic benefits, including:

- an unsecured line of credit of up to $50,000;
- a retirement plan;
- Hertz rental discounts;
- a discount upon signing up with Westlaw; and
- the choice of five different group insurance programs including life, disability and major medical.

To get to the bottom line, whatever criterion is employed, membership in the ABA has positive benefits. It can assist an attorney financially, provide the opportunity for public service, aid in continuing legal education or function as an invaluable research tool. In addition, and perhaps most significant, active involvement is not only personally rewarding but serves to strengthen the profession.

If you are not already a member, why not consider joining?

SUCCESSFUL BAR EXAMINEES

A total of 98 men and women passed the Bar exam, according to the results tallied earlier this month. Successful examinees follow, listed in alphabetical order:

Last Name	First Name	M.I.	Last Name	First Name	M.I.
Adams	Samuel	D.	Lohman	Thomas	L.
Amodio	Thomas		Mahlen	Jeffrey	D.
Aschenbrenner	Theodore	W.	Marston	Blythe	W.
Ashton	Paul	H.	Marston	Erin	B.
Auth	Robert		Matson	Gayle	M.
Barnes	John	L.	Matthews	Thomas	A.
Basler	Pamela	T.	McGee	John	F.
Behr	Deborah	E.	McLaughlin	Cathleen	N.
Billingslea	Sidney	K.	McLaughlin	Michael	S.
Bissell	Marcia	H.	Meachum	Robert	F.
Blurton	David	M.	Mitchell	Michael	G.
Burns	John	J.	Munson	Johanna	M.
Christensen	Lynn	H.	Murphy	Dennis	P.
Clarkson	Kevin	G.	Nagy	Casey	A.
Corey	Michael	D.	Novak, IV	John	J.
Crnich	Kimberly	A.	Odland	Marjorie	L.
Dittman	John	C.	Ogg, Jr.	R. Danforth	
Driscoll	Louise	R.	Periman	Deborah	K.
Dunn	Kim		Pinkerton, II	A. Duane	
Espenshade	Virginia	M.	Price, Jr.	James	D.
Evans	Neil	J.	Randall	Susan	L.
Floerchinger	David	D.	Reinhold	Rhonda	L.
Geddes	Mary	C.	Rickey	Douglas	K.
Greenan	Thomas	G.	Ridenour	David	W.
Griffin	John	P.	Robart	James	L.
Groh, II	Clifford	J.	Rochester	Valarie	J.
Harper	Jorge	G.	Rohlf	Joan	E.
Hegyi	Karen	R.	Royce	Robert	A.
Heideman	Sara	E.	Schaffhauser	Elizabeth	J.
Herzog	Leonard	H.	Schierhorn	Joseph	M.
Holcombe	Glenn	D.	Schlemlein	Garth	A.
Hooper	Robert	J.	Sedney	Jocelyn	M.
Horter	Penelope	W.	Silvey	Gregory	G.
Huber	Gerald	E.	Smith	Douglas	
James	Joyce	M.	Spangler	N. Deliza	
Janet	Bernadette	S.	Stephens	Trevor	N.
Jones, Jr.	Homer	W.	Stevens	Merrill	R.
Kelley	Pamela	R.	Stowers	Craig	F.
Kery	Susan	C.	Stuart	Duncan	A.
King	Nora		Taylor	Scott	L.
Kinney	Suzanne	B.	Tindall	John	H.
Knapp	David	H.	Towne	Robert	E.
Kornberg	Mindy	R.	Tupper, Jr.	James	A.
Larsen	Anne	L.	Uhr	Steven	E.
Leinweber	Holly	B.	Utermohle, III	George	E.
Lewis	Amy	L.	Wendl	Ernst	
Leyba	Kenneth	P.	Williams	Paula	
Liston	Angela	A.	Williams	Susan	M.
Loeffler	Karen	L.	Winters	Sheldon	E.

The good old days with Stabler . . . Continued from p. 8

crumble that wall of separation.

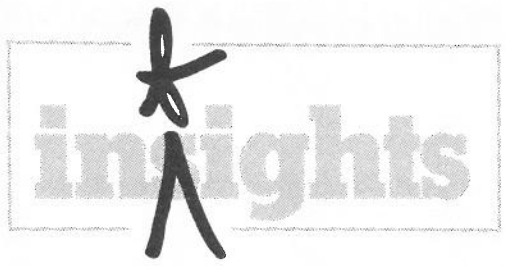
Famous names in Alaska Bar history like Wickersham, Kehoe, Shoup, the two Hellenthalls, R. E. Robertson, H. L. Faulkner, Henry Roden, George Folta and Walter B. King—all these and more were Howard's colleagues.

The old lawyers were, in many ways, superior. The Stablers never hired and did not need secretaries. Both excellent typists, they produced quality work in every sense. Modern and wonderful innovations notwithstanding, I wonder at times if the slower days, the older ways, were not the best. Norman C. Banfield summed up the feelings of the bar about Howard in a tribute given in the old courtroom in the State Capitol Building in 1963:

> "His memory and his example remain with us, as well as his contribution to the body of Alaska law as we find it. For this we express our gratitude. He was an outstanding lawyer."

Defending the accused child molester

by John M. Murtagh



Betsy: Well, I guess it's better to talk to you about this case than it is to deal with that no good mother who doesn't want to have to sell their home and live on welfare, or those squealing brats who think they want their father at home.

John: My basic purpose is to see if we can talk about this particular family as individuals and see if any of the impacts on people other than the offender are very important.

Betsy: It's cut and dried. If it happened while mom was in the home and she didn't know about it, she is no damn good, so I don't care what she says. If she did know about it and paid attention to what her 15 year old daughter said and what her father said and didn't want to have him in prison until after Anchorage gets the Olympics, then she's still no damn good.

John: I had thought the fact that the father tried to commit suicide and has finally shaken off years of alcohol dependency, as validated by the experts you suggested, was something we could consider in determining how to treat this family.

Betsy: What do you mean, treat? The only person I know who doesn't think they should get just eight years other than you, is some guy in Juneau by the name of H.B. What does he know about these things?

John: Well, Betsy, I've got to talk to my client and explain what roughly you have in mind.

Betsy: Well, he's got ten digits and a penis, and a tongue, and she has at least two orifices that he's violated, so that's 24 counts. . . 24 times 8 equals 192. . . I'll round it down to the nearest century by letting you mitigate one count. Be sure to tell your client if he doesn't plead to one count that encompasses all his sleazy rapes over the last ten years that he's going to get between 100 and 192.

John: Betsy, what about the *Andrews* decision where the court suggested that there is to be no objective price for asserting one's constitutional rights?

Betsy: They're as messed up as H.B.

John: On a different subject, I saw S.M.'s kid last week and things aren't going very well for them. They are having real trouble getting the hang of the welfare system and there doesn't seem to be much in vocational opportunities for mom.

Betsy: S.M.? S.M.? S.M.? Who's that?

John: That's the kid you were so nice to during the pretrial phase and indicated you were so concerned about at sentencing.

Betsy: Oh, them? That's the dingbat that still thinks he loves his father and wishes he and his mom lived in that nice house now that dad's stopped drinking?

John: That's the family. Besides, in the case that we've been talking about, the daughter told the grand jury that she knew that the incident took place over Christmas vacation here in Anchorage because all the trees were in bloom and they were playing softball on the parkstrip. It seems to me you are having some problems with the dates.

Betsy: Well, didn't you read the indictment, it says on or about sometime during the life of the victim, this conduct took place. I figure half the jurors will know when Christmas is and the other half will know when the trees bloom. That's 12 jurors right there and that's all I need.

John: But, didn't you see that in *Covington*, we have to have some notice for the periods of time we can defend against? After all, my guy was in an iron lung at least five months every year since the kid was born.

Betsy: Yeah, but I know what he was thinking about when he was in it.

John: Isn't it important that the therapist for the mother, the therapist for the daughter and the therapist for the father have been arranging group therapy under approved settings?

Betsy: By whom?!?! What neanderthal would permit these people to get together again just because they think they love each other and want to work through a problem?

John: The Department of Law (Attorney General's office).

Betsy: More do-gooders.

John: Well, my basic principle is that as advocates we probably have very little neutral information and very few neutral opinions on the subject. My suggestion is that since in his complete, candid, remorseful, post-suicide effort confession to everyone he could find, he acknowledged some conduct back in the pre-presumptive days. What about just pleading him to open sentencing on lewd and lascivious conduct, statutory rape, and anything else you can find back in there?

Betsy: What?! And give a judge the authority to decide what this man's sentence will be? Never! I'll see you in court.

CLE

CLE WINTER SCHEDULE

January 11	Off the Record (Federal)
January 18	IRVING YOUNGER on Credibility and Cross-Examination and Jury Selection
February 11	Anticipating Proof Problems (Evidence Mini-Seminar, "Breakfast" Series)
February 17	Natural Resources and the Public Trust Doctrine
March 3–10	Trial Techniques and Tactics (Hawaii)
March 25	How to Get Documents Into Evidence (Evidence Mini-Seminar, "Breakfast" Series)

Convicting the accused child molester

by Elizabeth H. Sheley

A dialogue between Betsy, prosecutor of child molestors, and John,* a defense attorney who is one of the few people who can talk faster than Betsy. No name changes necessary. Neither one of them is an innocent.

John: I'm here to persuade you to give some consideration to my client.

Betsy: Is this the one who's been doing his teenage daughter since she was three? Or is this the one who can't seem to keep his hands off the church Boy Scout troop?

John: The former, of course. The Boy Scout leader has decided that he could get all the unnatural sex he wanted in jail. Besides, the victim's parents apparently have forgotten their deeply held religious beliefs and are ready to do a live production of Fox's *Book of Martyrs* with him as the star attraction.

Betsy: I see, we're here for the pitch on why are you prosecuting this nice man with no prior criminal record who just has this small sexual problem?[1] Whine away.

John: The way I see it, prosecution just punishes the victim. She doesn't want to see him go to jail.

Betsy: Funny. I talked to her the other day. Told her about the eight year prison term. She says, "Good. He can't get to my little sister now."

John: We're not quarreling with the need for criminal conviction. It's the jail term that's the problem. My man is willing to accept responsibility. But eight years is tough. Obviously a legislative oversight brought to you by the people who, in a fit of madness, brought you presumptive sentencing.

Betsy: Not likely.[2] Seems to me they view your incest defendant the same way we do—"a lazy pedophile."[3] By the way, did I tell you the grand jury's reaction when I told them your man could get an eight-year prison term? They said, "Is that all?"

John: Neanderthals. Why listen to the rabble? Your obligation is to do justice. Just look at this psych report. My man's not a pedophile. He just does this because of marital stress.

Betsy: Is this the shrink who says all these guys screw kids because of stress? Kind of ignores the sexual gratification angle, don't you think?

John: Incidental, I assure you. See where he says here that this "is an isolated incident and not a product of any mental illness."

Betsy: Isolated? Guess someone neglected to tell him about the two daughters he did from the prior marriage.[4]

John: Sorry. My oversight. Must have been marital stress fogging my brain. Listen. Here's the bottom line. This family wants to reunite eventually. The shrink says he is treatable. The children's court or probation officer will monitor the situation. Give it a chance.

Betsy: Who is your guy? Executive director of the Morris B. Chapter of the William Seymour Fan Club?[5] You expect the social worker or P.O. to live with this guy? The mother's been there and she hasn't been able to stop it. Besides, name one study that even says these guys can be treated at all. Could be they just like having sex with kids.

John: Parents United claims a 98% success rate—only 2% reoffend.

Betsy: My favorite study. Based on rearrest rates for a crime that is more underreported than any other.[6] How did they get a figure like that?[7] Ask the victims if dad is still at it? Fat chance the kid will report a remolest. It didn't help her to tell the first time and she knows the breadwinner goes bye-bye now if she does. Maybe you're relying on his lovely slightly obese wife to report a remolest? The lady who was in my office yesterday begging me not to prosecute her husband because she was going to lose her house because of the lies told by her runaway drug-addicted promiscuous daughter?

John: Okay. You win. My guy is willing to have no contact with children. Just let him work and get treatment.

Betsy: We could arrange a work release. How about a job at the Public Defender Day Care Center?[8] He'll get treatment anyway. He will just get it in jail—where he can trade "how to" stories with his fellow kiddie rapist and get his weekly "peter meter" check to make sure he's controlling those unwholesome thoughts.

John: But look at all these letters from his friends and family. They all say, he's real sorry for what he did. They all say, "There is nothing to be gained by putting him in jail with a bunch of criminals."

Betsy: Last time I heard, there aren't any kids in jail. So we get eight years of no new victims from this guy and he gets to catch up on his reading.

John: There you go again. Being overzealous and cynical. You never trust these experts or your own social workers. . . How about reduction to attempted first? Five years out of my man's life is enough, isn't it?

FOOTNOTES

[1]The best retort came from retired Judge Ralph Moody. "Counsellor everyone has a sexual problem. The problem is how he handled it."

[2]In 1983 the legislature did a major revision of the child sexual abuse laws. They decided to retain the classifications in the prior law which treat serious incest offenders the same as people who molest children outside their family. The legislature also significantly increased the penalties for sexual contact within the family. Rumor has it that some poor soul who had the nerve to propose decreasing the eight year presumptive term to five years was laughed out of the House Judiciary Committee.

[3]A phrase coined by social worker Lucy Berliner of the Harborview Sexual Assault Center in Seattle. Ms. Berliner and others at Harborview believe it is not fair to treat the incest offender more leniently than the man who seeks his victims outside the home, especially since all the literature says that the average incest offender causes more damage to the victim. *See* D. Finkelhor, *Sexually Victimized Children* at 97-108 (1979).

[4]Child molestors are very prolific fellows. According to Dr. Nicholas Groth, in his study of incarcerated offenders in Connecticut, the average age when offenders start committing sexual offenses is 16. A New York study a few years ago of incarcerated sex offenders shows an average of 68.3 victims can be expected in a study of a prison population, but counsellors of offenders who are not incarcerated also find that their clients have multiple victims. Steve Wolf, who treats child molestors as outpatients at Northwest Treatment Associates in Seattle, says in his years of practice he has yet to see someone who has molested only one child, although they may have been convicted for only one child. He estimates the offenders he sees average five to six victims each.

[5]Morris B. is an Anchorage incest offender who was not prosecuted for years of fondling his daughter back in the old days before prosecution of these cases took over the court system, to wit: 1980. He was handled through the children's court system which returned him to the home because of the recommendation of his psychologist and that he would not reoffend. Within days of the reunification, he started having sex with his daughter—every night for two years before she reported it.

William Seymore of Fairbanks was prosecuted, but given an SIS and no jail time so that the family could reunite since he was considered cure. He kept having sex with the same daughter following the reunification, who unfortunately did not report it until after Seymore "successfully" completed his probation. *Seymore v. State*, 655 P.2d 786 (Alaska App. 1983).

[6]Only between 6 to 10% of child sexual abuse crimes are reported to the police. D. Finklehor, *sexually victimized children* at 137 (1979).

[7]The only study which claims any significant success in treating sexual offenders was one done by Henry Giarretto, who was reviewing his own Parents United program which he founded. The 98% figure comes from his book, *Integrated Treatment of Child Sexual Abuse* (1982).

[8]The surest test of a defense attorney's commitment to his client is whether he or she would take the client into his or her own home. This test was apply illustrated by a Bloom County cartoon from last year. Defense attorney Steve Dallas was arguing ardently for the bail release of his elderly ax-murdering client and he won. The judge released the old lady to Steve Dallas with the final parting, "Good luck, Mr. Dallas. Or should I say—good bye?" as the old woman swings her ax at her new custodian.

***John M. Murtaugh, Popular Anchorage Defense Counsel.**

Behind the scenes in the personal injury game

By J.B. Dell

WILLIAM V. SOLITARE
ATTORNEY & COUNSELOR OF LAW
807 ALLEYWAY STREET, SUITE 109 (LEFT HALF)
ANCHORAGE, ALASKA 99701

ADMITTED IN:
SUPERIOR COURT
DISTRICT COURT
TAX COURT
SUPREME COURT
PROBATE COURT
PEOPLE'S COURT

SPECIALIZING IN:
PERSONAL INJURY
WORKERS COMPENSATION
CIVIL LITIGATION
DOMESTIC RELATIONS
CORPORATIONS
OIL AND GAS
CONDEMNATION

24 HOUR TOWING

KENAI OFFICE
604-7792

CORDOVA OFFICE
206-1187

MAUI OFFICE
212-3490 (ASK FOR WALLY)

July 25, 1985

George S. Trueblood
Nasty, Vile, Brutish & Short
2604 Pinstripe Road, Floors 8 and 9
Anchorage, Alaska 99512

Dear Mr. Trueblood:

As you know, this office represents Ms. Sylvia Poorbottom in her claim against Nicholas "Nick" Chesterfield who is insured by your client, Arctic Casualty Indemnity Liability and Serendipity Assurance Company. Because of the carelessness and negligence of your insured, Nick Chesterfield, my client, Sylvia Poorbottom, has been seriously crippled and has substantial permanent disabilities. These severe disabilities have made her unable to continue her career development at the Pants Magic Laundry and Dry Cleaning Center, where she had risen to the position of Superintendent of starched shirts. Additionally, whereas she was once a vibrant and energetic wife to Stanley Poorbottom, she has since been unable to perform consortium. I will likely be representing Stanley in pursuit of his consortium claims.

We are willing to enter into a relatively modest settlement at this time in order to avoid the cost and emotional pain of litigation. Therefore, our settlement demand is as follows:

Past Chiropractic Bills	$ 8,622.00
Past Medical Bills	76.00
Home Traction Unit	232.00
Future Weekly Chiropractic Adjustment	96,000.00
Past Pain and Suffering	50,000.00
Future Pain and Suffering	250,000.00
Future Lost Consortium	126,322.87
TOTAL	$531,252.87

This offer will remain open for a period of twenty (twenty) business days.

Sincerely yours,

William V. Solitare

cc: Sylvia Poorbottom

WILLIAM V. SOLITARE
ATTORNEY & COUNSELOR OF LAW
807 ALLEYWAY STREET, SUITE 109 (LEFT HALF)
ANCHORAGE, ALASKA 99701

ADMITTED IN:
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SPECIALIZING IN:
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WORKERS COMPENSATION
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CORPORATIONS
OIL AND GAS
CONDEMNATION

24 HOUR TOWING

KENAI OFFICE
604-7792

CORDOVA OFFICE
206-1187

MAUI OFFICE
212-3490 (ASK FOR WALLY)

July 25, 1985

Sylvia Poorbottom
1702 Mincemeat Drive, Apt. 3-C
Anchorage, Alaska

Dear Sylvia:

I think it is time that we had a serious talk about settlement in this case. I know that you have been hoping to use the settlement money to buy retirement property in Arizona and also to fill your house with brand new furniture. However, a three day vacation in Arizona and reupholstering your sofa would be a more realistic settlement goal.

I assume that Mr. Chesterfield's attorney will soon learn that you had been seeing a chiropractor twice a month for the preceeding ten years before this auto accident. He will also discover that you originally hurt your back in 1973 when you were performing as a dancer and fell off the stage at Peppy's All Girl Revue.

Regarding your husband's consortium claim, I think again we are going to be in trouble since Chesterfield's attorney will learn that your husband ran off with the Amway lady two months before your auto accident.

I recommend we settle this case for approximately $30,000.00. Under our proposed contingent fee plan, I would receive 40% of the total recovery, after which I would also have to be reimbursed for costs such as long distance telephone calls, photocopying, paper, typewriter ribbon, secretarial time, overhead, and rent. Still, you would have a few dollars to kick around.

I think I can probably convince Chesterfield's attorney to accept the $30,000.00 settlement. Please give this matter your most urgent attention.

Very truly yours,

William V. Solitare

WVS:tf

NASTY, VILE, BRUTISH, & SHORT
ATTORNEYS AT LAW
(A MULTINATIONAL CORPORATION)
2604 PINSTRIPE ROAD, FLOORS 8 AND 9
ANCHORAGE, ALASKA 99512
CABLE ADDRESS: MEGABUCKS

HOWARD B. NASTY (1955-1963)
STUART W. VILE (1961-1979)
LOUIS M. BRUTISH (almost dead)

LEONARD P. SHORT
(OF COUNSEL)

KENNETH P. HARRIMAN
THOMAS A. WRIGHT
LAWRENCE S. MANLEY
SIMON F. SMART
NEAL R. RICHMOND
TIMOTHY M. JONES*
HAROLD L. STUFFY†
MORRIS O. LYNCH
ERIC C. CLAYTON**
HOWARD FAST
SYLVIA SCHWARTZ-SHAUGNASSY
ABRAHAM MOSKOWITZ††

STANLEY M. BAILEY
DAVID S. BAKER
STEVEN M. PIERCE
WALTER JENKINS
BRUCE F. THOMAS*
MILTON N. CROSS
LAWRENCE Q. KING**
KEITH V. HOLMES
GEORGE S. TRUEBLOOD†††
EDWIN B. STUBBS
THEODORE A. SWAN
BENJAMIN R. TUCKER

* Admitted in Washington Only
** Admitted in Washington and Alaska
† Admitted in the District of Columbia and Alaska
†† Admitted in New York only
††† Wears pleated trousers

July 26, 1985

Freddie Capastrano, Senior Claims Adjuster
Arctic Casualty Indemnity Liability
and Serendipity Assurance Company
226 Noogie Road
Anchorage, Alaska

Dear Freddie:

Enclosed is a copy of a settlement letter which I am sending to Sylvia Poorbottom's attorney, William Solitare. As you know, our insured, Nick Chesterfield, was driving on the wrong side of the road when this accident occurred. Seventeen empty beer cans were found in Chesterfield's car and evidence indicates that he was playing on a portable Pac-Man Machine just before the collision. Your records will also reflect that Chesterfield has a very poor traffic record and was insured as part of your company's Ultra-Hazardous Risk and Nuclear Indemnity Policy.

Nevertheless, in order to put ourselves in the best possible settlement posture, I am having a private investigator follow the activities of Sylvia Poorbottom. Also, I have scheduled a rigorous series of independent medical exams which should dampen her enthusiasm for litigation. Attorney's fees incurred by us to date are $44,000.00. I feel it will take two attorneys from this firm to try this case, plus a paralegal, one secretary, two file clerks, and a messenger. All pleadings and correspondence in this case will be reviewed by my senior partner, Kenneth Harriman, at his usual hourly rate of $175.00 per hour. Enclosed is a bill for this past month's attorney's fees. As you know, this case was formerly handled by Clarence Wimbleton who has left this firm. Therefore I had to bill you for reviewing the file, reviewing the pleadings, reviewing medical records, staff conferences with Mr. Harriman, conferences with my secretary, initial research, intermediate research, and advanced research.

Very truly yours,

George S. Trueblood

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†† Admitted in New York only
††† Wears pleated trousers

July 26, 1985

William V. Solitare
807 Alleyway Stsreet, Suite 109 (Left Half)
Anchorage, Alaska 99701

Dear Mr. Solitare:

At this time, we are willing to settle the Poorbottom claim for a nuisance sum of $5,000.00. You should urge your client to accept this generous offer. My client, Nick Chesterfield, bears no liability whatsoever for the car crash in which you client Sylvia was allegedly injured. The reason that Mr. Chesterfield was driving in the wrong lane of traffic was because he had just taken evasive action to avoid colliding with a flock of pigeons. This defense was recognized even at common law, as I am sure you are aware. Additionally, Mr. Chesterfield has an outstanding reputation in this community and he would make a very credible witness in his own behalf.

Should your client refuse this settlement offer, I have scheduled the following independent medical examinations to be conducted in order to determine the validity of her claim.

October 3 - Myelogram
October 8 - EMG
October 12 - Spinal Tap
October 18 - Brain Tap
October 23 - Colonoscopy

These procedures should reveal whether there is any organic basis for your client's subjective complaints. Also, have your client execute the enclosed Medical Release, Employment Record Release, School Record Release, Past Sexual History Release, and Waiver of Priest Penitent Privilege.

Very truly yours,

George S. Trueblood

GST:tf

Intake: a contradiction of terms

By Officer Jack Boots

On any late summer evening, if the light is just right and the setting sun behind Mount Susitna strikes the Captain Cook Towers at the proper angle, a shaft of reflected sunlight pierces the Denali Towers at about the level of the fifth floor at the southeast corner of the building.

The effect is somewhat ethereal to anyone casually observing the phenomenon from inside the offices up there after hours. A tranquil, almost pastoral glow permeates the rooms, warm and deep as polished bronze, touching here and there on leather-bound books and briefly giving life to the dead eye of a Displaywriter. Running in golden rivulets from portal to portal, the light is diffused and scattered in as many directions as there are facets in an emerald cut topaz.

The murmuring mechanical rumblings deep within the building underscore the peace which has now settled over this quiet battlefield.

Past pictures of Disney's Mouse the light flows, past long dead trout on the walls, pausing to seductively caress framed prints of exotic foreign automobiles and on, through the fronds of languid green plants to rest upon a cold blue plastic sign reading "Police Officers," glued to a plain wooden door to a small detached and colorless room.

The room . . . a room into which no light falls save that in the eyes of those who come to make their pleadings; the light which some call hope but others see as deep inner fires, transformed to featureless black markings on cold white pages, a clinical, concise distillation of mayhem to a more palatable form.

Hi . . . got your attention? This is Officer Jack Boots coming back to you from your right side, if you get my drift. So how's tricks out there in Lawyerland? Old Officer Jack is back, fresh from a leave of absence in El Salvador. I took a year off from the P.D. to teach banjo tuning to the Contras as a Peace Corps volunteer, but I gave it up. The only thing those boys wanted to strum was made by Colt's Patented and could only play one note, staccato. They might not have been much on the strings but they were sure into brass. And just so you don't get any ideas that Off. Jack went to some kind of writing school, I don't claim the first two paragraphs.

See, what happened was this. After my little sojourn South of the border, I came back to Anytown P.D. and discovered *tout de suite* that there was more lead flying around here than in a Sandinista ambush.

Well, in no time flat, I picked up a couple of those first degree assault-with-intent-to-cause-serious-physical-injury-not-mitigated-by-the-defendant-suffering-from-flatulence-or-absence-of-radial-tires-on-his-Saab (or 20 other ways to weasle out of a shooting beef which in a State with normal laws would have called for summary execution of the defendant on the spot) cases.

Good cases . . . for instance. Call to a residential area. Shots fired. Joe Citizen comes home from the races and finds Mrs. Citizen astride the local stallion doing some racing herself and heading towards the finish line. Mr. C. expresses his displeasure with a Smith and Wesson and the interloper replies in kind. As the last echoes of these supersonic insults resound around the neighborhood, my partner and I roll up.

We pause briefly at the bedroom door and catch our breath in an atmosphere heavy with Chanel No. 5 and DuPont Smokeless. A small stream of water loops in a lazy arc from somewhere near the middle of the bed. Bits of plaster drift slowly downward from above. Mrs. C. has withdrawn to a neutral corner and stands clutching a Cannon queen size sheet to her breast, smeared mascara encircling her eyes. She is making little squeaking noises. Mr. C., reclining on the floor at the foot of the bed, has the ceiling covered with a thousand-yard stare, and last but not least, the other duelist is hopping on one foot, half in and half out of a pair of Levis Action Slacks.

Chainsaw, our canine companion, lunges forward and grasps the offensive weapon in his jaws whilst I remove the pistol from his hand. My partner adeptly screws the muzzle of a Remington Model 870 into a convenient nostril and brushes the safety to the "off" position. Casanova is allowed a moment's reflection on the present state of affairs, and then makes a hollow-sounding tape recorded confession. I suppose the poor quality of the recording is because Remington gives little or no thought to acoustics when they build their shotgun barrels.

This leads me to the opening paragraphs of this piece. See, I mentioned to a guy in the D.A.'s Office what a son of a bitch it was to get a good clean case like this one through Intake which, incidentally, is probably the greatest misnomer since somebody called the Titanic unsinkable. So he says, "If you don't like it J.B., write to the *Bar Rag* again." And I say, "Well, it's probably a fluke that first piece I sent to them was printed, because I write like a duck with epilepsy." And he says, "I've got a friend who is a professional writer and he can write it in such a way that lawyers will understand it" and I say "OK" and he calls the guy and he says, "What do you want to say?" and I tell him about what a sonofabitch it is and the first two paragraphs is what he sent me.

He probably went through a half pound of Yuppie Yummies giving birth to that. I hope his BMW is sexually assaulted by a garbage truck some bright morning. I went to my friend in the D.A.'s office and asked him if this guy got his training at Morningside or what. He wouldn't tell me.

Anyway, when you want to take a case to Intake (ha!) you have to have an appointment. Look, I don't want to have my appendix taken out, I just want to give these guys a good case. Feather in their caps and all that. But no, you have to get an appointment like it was somebody real important or something. I'm surprised they don't have a matched pair of eunuchs out front with those big curved Arab swords. Then, even with an APPOINTMENT, you wait. Not long, if you consider $147.95 in overtime parking tickets on your day off not long. And the room . . . I bet I've counted the points of identification on Lou Hastings shoes a thousand times. How's about a change in decor? Eventually, it's your turn.

There're four of them back there. Since I've been back, I've only seen two, the Irish guy and the Italian guy. The Italian guy has the good office—the one with the sunshine. (See first paragraphs.) Both of them have German cars. Probably wear French cuff shirts. Screw the trade deficit.

Both of these guys will hit on your case like a dope dog on a suitcase from Colombia. Their styles differ slightly. The Italian guy writes down everything that's wrong with your case. He has got the only belt-fed cartridge pen I've ever seen in my life. Doesn't have to stop to reload once he's on a roll. You leave there with a fix-it list that looks like the one they wrote up for Hiroshima after the Enola Gay flew over. Mucho de profundis.

If you happen to draw the Irish guy, and your name isn't Mulligan or Finnegan or something with a "gan" or "phy" on the end, take off your name tag, spray paint your uniform green and make sounds like a four-leaf clover when you get to his office. Maybe, just maybe, he'll listen to you. Tell him you'll buy a sweepstakes ticket and that March 17 is your mom's birthday. If you can't handle the four-leaf clover noise, try an impromptu Ferrari 308 or Testarossa impersonation. He likes those. Whatever you do, don't try to imitate an Irish sports car, unless you have holes in the membranes of your nose or your name is De Lorean; in which case you belong in the Italian guy's office next door. He's got the same surname hangups as the Irish guy.

I can't tell you much about the other two, but I saw a delivery guy bring up 20 cases of anti-aircraft shells to one of their offices. Could explain all the shredded police reports and scorch marks the maintenance people keep complaining about on the sidewalk out front.

Oh, before I go . . . the Italian guy is a latent MTV addict. Next time you're in his office, hum a few bars of something by Dire Straits and watch what happens.

Educational aids offered

The following is a list of materials added to the CLE library in the last year. Prices quoted include videotape and course materials. If you wish to rent videotapes and/or purchase course materials, please contact the Bar office.

Hazardous Waste Litigation

Up-to-date information on significant legal issues involving hazardous wastes. Recent legislative and judicial developments are reviewed and analyzed.

October 1984 $35.00
Book 300 pages
Videotape 7 hours

Alcohol Testing

Testing and law enforcement experts present information on the operation, advantages and limitations of the Intoximeter 3000; the retesting of the preserved breath samples; and field sobriety tests being conducted in Alaska.

February 1985 $35.00
Book 75 pages
Videotape 6 hours

Insurance Bad Faith Litigation in Alaska

This seminar presents an opportunity to learn the basics of bad faith, to receive practical tips useful to every plaintiff or defense lawyer and to survey bad faith litigation as it has and is being developed in Alaska.

February 1985 $35.00
Book 50 pages
Videotape 6 hours

Trial Advocacy: Techniques & Strategies

This 135 page manual on "Trying Cases to Win," prepared by U.S. District Judge Herbert J. Stern, was used as course materials at the 1985 Hawaii CLE seminar. (Quantity is limited.)

March 1985 $25.00
Book 135 pages
Videotape not available

Reading and Understanding Medical Records

A medical expert shows attorneys and legal assistants how to read and understand medical records.

March 1985 $25.00
Book 200 pages

Sitka Convention CLE

1. "Alaska Native Claims: 1991"—Reid Peyton Chambers, Lloyd B. Miller, Donald C. Mitchell, David S. Case
2. "Discovery"—Roger S. Haydock
3. "Litigation Negotiation"—Roger S. Haydock
4. "The Emerging Doctrine of Wrongful Discharge"—Elizabeth I. Johnson, Richard H. Friedman
5. "The Pros and Cons of Presumptive Sentencing"—Daniel W. Hickey, Robert H. Wagstaff
6. "What's Happening in Community Association Law: Cases & Trends"—Wayne Hyatt

May 1985
Topic handout & 3-hour videotape $15.00
Bound Manual (topics 1, 2, 3, 4 & 6) $15.00

1985 Tax Conference

A program for practicing attorneys, CPA's and estate planners on new developments in corporate taxation and real estate tax planning, new interest and accounting rules, income taxation of estates and trusts, the IRS new 1041 audit program, and new divorce taxation rules.

June 1985 $35.00
Book 250 pages
Videotape 13 hours

Alaska Workers' Compensation Law and Procedure

A basic course in compensation and vocational rehabilitation claims procedure before the Alaska Workers' Compensation Board and an exploration of recent developments in Alaska workers' compensation law.

July 1985 $35.00
Book 128 pages
Videotape 6 hours

Arthur R. Miller on Current Programs of Federal Civil Litigation

Well-known authority presents recent developments in federal civil procedure and discusses the 1983 amendments to the Federal Rules of Civil Procedure.

August 1985 $35.00
Book 100 pages
Videotape 7 hours

Common Ethical Complaints and How to Avoid Them

This program offers sound, straight-thinking suggestions on how to avoid the unintentional grievances lawyers often unwittingly cause or fail to prevent and provides hints on developing techniques for a "complaint free" law practice.

September 1985 $35.00
Book 50 pages
Videotape 6 hours

Board of Governors Schedule

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

January 9, 10 & 11, 1986
March 20, 21 & 22, 1986
June 2, 3 & 4, 1986 — Valdez

ALASKA BA
New

Ethics opinions: Judicial candidates, experts, witnesses, credit cards

85-1—Applicability of Canon 7 of Code of Judicial Conduct to Candidates for Judicial Appointment, ABA Informal Opinion No. 85-1513

The Ethics Committee has been asked whether the political contribution proscriptions set forth in Canon 7, Section A, of the Code of Judicial Conduct, apply to candidates for judicial appointment under the Alaskan system used for the appointment of state judges. In response to this request, the Alaska Bar Association Ethics Committee requested an opinion from the American Bar Association. On April 27, 1985, the American Bar Association issued Informal Opinion No. 85-1513.

American Bar Association Informal Opinion 85-1513 holds that the provisions of Canon 7, Section A, of the Code of Judicial Conduct, apply to a candidate for judicial office by gubernatorial appointment pursuant to a merit selection plan. Accordingly, candidates for appointment may not participate in political fund-raising events. The opinion further holds that the candidate becomes subject to the provisions of Canon 7, Section A(1) when the candidate submits an initial application for the judicial position to the Alaska Judicial Council.

American Bar Association Informal Opinion 85-1513 is adopted as the opinion of the Alaska Bar Association Ethics Committee. Additionally, Canon 7, Section B(1) is also applicable to candidates for judicial appointment, from the time of the filing of the initial application with the Alaska Judicial Council.

Adopted by the Alaska Bar Association Ethics Committee on August 8, 1985.

Approved by the Board of Governors on August 23, 1985.

Informal Opinion 85-1513
Applicability of Canon 7 of Code of Judicial Conduct to candidates for judicial appointment
April 27, 1985

The political activity proscriptions of Section A of Canon 7 of the Code of Judicial Conduct apply to candidates for judicial appointment under a merit selection plan.

When a state court judicial vacancy occurs in the State of X, the State Judicial Council advertises the vacancy and solicits applications from qualified attorneys. The State Judicial Council then circulates the names of the candidates on a poll to the members of the Bar Association and some law enforcement agencies, soliciting comments and ratings on the candidates' qualifications for the vacancy sought. The Council also seeks comments from the public. After the poll is completed and comments received, the Judicial Council then publishes the result of the poll, interviews all candidates, and submits the names of some of the candidates to the Governor of the State for potential appointment. The Governor then makes the final appointment to the judicial vacancy. There is no requirement for legislative or other confirmation of the Governor's appointment. The name of the new judge is then placed on the ballot at the first general election held more than three years after the appointment. The question asked is whether the judge should be retained in office. Thereafter, each judge is subject to approval or rejection in a like manner at times which vary depending upon the level of the court involved.

A lawyer in State X applied for an initial appointment to a then-existing judicial vacancy. The lawyer was solicited to attend a "Governor's Birthday Party" which, the Committee is informed, is in effect a political party fund-raising event. The lawyer asks whether Canon 7 of the Code of Judicial Conduct prohibits attendance.

Canon 7, subsection A(1) provides in part: "A judge or a candidate for election to judicial office should not . . . (c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions, except as authorized in subsection A(2)."

Subsection A(2) provides: "A judge holding an office filled by public election between competing candidates, or a candidate for such office, may, only insofar as permitted by law, attend political gatherings, speak to such gatherings on his own behalf when he is a candidate for election or re-election, identify himself as a member of a political party, and contribute to a political party or organization."

The inquiring lawyer is not a judge. If the lawyer is not, in the words of subsection A(1) (c), a candidate for *election* to a judicial office, the prohibition against contributions and ticket purchases for political party dinners, as well as the prohibitions against serving as an officer of a political organization, speaking for candidates and publicly endorsing candidates, would not apply to any lawyer-applicant for *appointment* to judicial office. That interpretation would, however, be inconsistent with the underlying purpose of Canon 7 which is to ensure both judicial impartiality and the appearance of judicial impartiality by placing limitations upon the political conduct of judges and candidates for judicial office.

This Committee stated in its Informal Opinion 1468: "The essential thrust of the Code of Judicial Conduct is to disfavor activities of judges which would tend to reduce public confidence in the integrity and impartiality of the judiciary. Accordingly, judges are asked to accept restrictions on their public conduct that do not apply to other citizens." To ensure that the conduct of lawyers who are candidates for judicial office is equally free from questionable political overtones, both the ABA Model Rules of Professional Conduct (Rule 8.2(b)) and the former ABA Model Code of Professional Responsibility (DR 8-103) require a lawyer-candidate for judicial office to comply with Canon 7 of the Code of Judicial Conduct.

This purpose would not be given full effect if the provisions of Section A of Canon 7 were inapplicable to candidates under merit selection plans. For example, if Section A were not applicable, the candidate could make direct political contributions to the Governor who will select the successful candidate as judge. An examination of the language of Sections A and B persuades the Committee that this was not the intent of the drafters of the Code of Judicial Conduct.

Section A governs "Political Conduct in General." By distinguishing between a "candidate for election to judicial office" in subsection A(1) and a candidate for a judicial "office filled by public election between competing candidates" in subsection A(2), the drafters clearly recognized that "election" includes a selection process other than a "public election between competing candidates." Similarly, in Section B

Continued on Page 16

Referral service needs lawyers

The Lawyer Referral Service is a statewide public service program sponsored by the Alaska Bar Association. A staff member receives phone calls on the Service's toll free line from members of the public who are searching for a lawyer. The caller is given the names of up to three lawyers in the caller's area of the state who practice law in the legal field of the caller's problem.

While there are currently 125 lawyers enrolled in the program, the service needs to expand to meet the enormous public response and we seek the support of all interested lawyers. During the first three quarters of 1985, there have been a total of 6,616 calls seeking referrals statewide. Last quarter there were 88 calls for referrals from Juneau and 90 calls from the Kenai Peninsula area. Since there is only one law firm signed up in Juneau and two listings in the Kenai Peninsula area, many of these callers had to be told that there were no attorneys listed in the categories requested.

Many lawyers have told us that the lawyer referral service has brought sizeable repeat business to them. At the same time it allow them to participate in a worthy public service program.

Lawyers may sign up for the lawyer referral service by paying an annual registration fee of $25 per panel (area of law). The lawyer is charged a fee of $2 for each referral.

If you are interested in participating in the program or want more information, contact the Alaska Bar Association office.

Listed below are the referrals made in the various categories for the first 3 quarters of 1985.

Administrative	244
Admiralty	38
Bankruptcy	299
Commercial	671
Construction	19
Consumer	336
Criminal	603
Discrimination	64
Eminent Domain	11
Family	1,851
Immigration	52
Insurance	49
Labor Relations	319
Landlord/Tenant	216
Malpractice	61
Mining	14
Negligence	516
Patent/Copyright	93
Real Estate	353
Tax	79
Traffic	409
Trusts, Wills, & Estates	195
Workers Compensation	119
TOTAL	6,616

Discipline imposed on attorneys

Probation

FRED W. TRIEM was placed on probation for a two-year period, effective August 1, 1985, based on his pattern of neglect of legal matters entrusted to him and failure to answer bar complaints.

Public Censure Imposed by Supreme Court

ROBERT L. WOODWARD received a public censure on August 12, 1985, for failure to respond to a bar complaint.

Private Reprimand Imposed by Board

Attorney A received a private reprimand for collecting a fee in violation of federal law from a client in a federal workers' compensation case. He was also ordered by the Supreme Court to pay restitution.

Attorney B received a private reprimand for destroying original tapes related to litigation, part of which he had inadvertently damaged. The evidence showed that the conduct was the result of frustration and stress rather than any attempt to conceal evidence.

Attorney C received a private reprimand for failing to follow the formalities required for notarization of documents and preparation of a corporate document for his clients. Attorney C's conduct was mitigated but not excused by the fact that he was accommodating his clients' wishes and was not deriving any personal gain.

MEMORANDUM

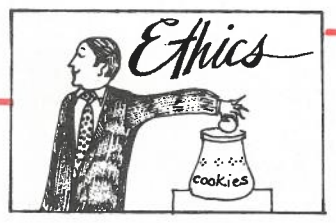
TO: ALL ACTIVE MEMBERS OF ALASKA BAR ASSOCIATION
FROM: DISCIPLINE SECTION
DATE: SEPTEMBER 19, 1985
RE: ATTORNEY ADVERTISING

The Discipline Section has been made aware in recent months of the use of the word "specialist" or a derivation of it in attorney advertising appearing in the Yellow Pages of a phone directory and on firm announcement cards. Disciplinary Rule 2-105 specifically prohibits a lawyer from holding himself or herself out publicly as a specialist practicing in certain areas of the law. The prohibition exists because the Alaska Bar Association currently has no program which certifies that an attorney practicing law in Alaska possesses specialized training or skill in a particular field of law.

Unless DR 2-105 is changed or a program of specialization is adopted by the Bar Association, the Discipline Section will enforce this prohibition against the use of the word "specialist" or its various word forms in future lawyer advertising.

ASSOCIATION & Notes

mber, 1985



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Revised 9/6/85

Committee works to present quality convention

The Board of Governors at its August meeting authorized the formation of a Convention Committee to work on preparations for the 1986 Alaska Bar Convention, June 5–7, in Valdez. Members Bill Bonner, Bill Bixby, Harry Branson, Maryann Foley, Linda Nordstrand, Joe Perkins and Diane Vallentine, the Anchorage and Valdez Bar Associations, and the Valdez Convention and Visitors Bureau are working diligently to present a top-quality schedule of educational programs, speakers, and social activities.

To reduce the amount of time away from the office, the Committee decided on an activity-packed three-day convention beginning with registration on Thursday and concluding with the banquet on Saturday evening. The annual meeting will be Friday morning.

The Thursday afternoon and Saturday morning education programs so far include seminars on stress management, inverse condemnation, personal injury practice, premarital agreements, and criminal law. Friday afternoon, all 12 sections will hold their annual meetings, present written and verbal updates, and elect new executive committee members.

To liven things up, we are offering the gubernatorial candidates an opportunity to participate in a "meet the candidates" forum. We already have preliminary commitments from several candidates to participate in the Saturday afternoon program. You won't want to miss this!!

Members, their families and guests will want to participate in a number of special activities. Tours of the Alyeska Pipeline will be offered at several times throughout the convention. Showings of several films including segments of the PBS production "The Constitution—A Delicate Balance" are scheduled in the civic center auditorium.

The traditional bar footrace will be held Thursday afternoon. The course being plotted by the Valdez Bar Association will wind through scenic Valdez and Mineral Creek Canyon.

Evening events include a softball tournament and barbecue, dining on a sumptuous buffet while cruising the Sound, and a banquet featuring Fred Graham, CBS News Law Correspondent. Based in Washington, D.C., Graham, an attorney, covers the activities of the Supreme Court, the Justice Department, the FBI, and the legal profession. Graham covered the Watergate cover-up trial, the White House tapes controversy, and a number of criminal cases, including various ABSCAM trials, and the trials of Daniel Ellsberg, John Connally, John Hinckley and John DeLorean. He has received several honors for his reporting, including a George Foster Peabody Award and, in 1973, three Emmy Awards for his coverage of the Watergate and Agnew resignation stories.

The Valdez Convention and Visitors Bureau personnel will be on hand at the civic center to help you plan other activities while you're in Valdez, such as whitewater rafting, halibut fishing, hiking, kayaking, or camping.

So leave your desk and endlessly ringing phone behind. Fly, drive or take the ferry to Valdez. Greet old friends, see new faces, learn, challenge, debate, run, eat, and enjoy!

NOTICE!

If you have one of the following CLE Library videotapes, please contact the Bar office. Thank you.

Alaska Native Tribal Sovereignty, June 1984
Modern Commercial Real Estate Financing, September 1984

The Alaska Bar Association CLE Committee announces the 1986 Evidence Mini-Seminars "Breakfast Series"

February 11	Anticipating Proof Problems
March 25	How to Get Documents Into Evidence
April 8	Hearsay Objections
April 29	Impeachment of a Witness
May 20	Liability and How to Present It
June 17	How to Present Damages

All seminars will be held at The Hotel Captain Cook, 7:00–9:30 a.m., and will include breakfast. Watch for details in January.

Conflict center helps in fee disputes

The rate of fee arbitration filings has slowly but steadily increased over the years. From 37 filings in 1982 to 62 petitions for fee arbitration already filed at the close of the third quarter of 1985, there has been a growing backlog of matters to be scheduled for hearing. Until the spring of 1984, no staff time was officially dedicated to the scheduling of fee arbitrations. Finally, in the spring of 1985, when there were more than 50 cases ready to be set for hearing and limited staff resources to resolve the problem, the staff sought alternative means to administer the program.

The Conflict Resolution Center (C.R.C.) has come to the rescue. Because C.R.C. has expertise in getting groups of people together for hearings, the Bar Association requested C.R.C. to help us administer the fee arbitration program. At a very reasonable price, C.R.C. is now sending out the letters and doing the telephone calling necessary to move fee arbitrations through the system. *The rules governing the fee arbitration process and the panelists on fee arbitrations have not changed.* Section III of the Alaska Bar Rules, (Volume Three of your blue plastic Rules of Court binders), governs the fee arbitration process. Fee Review Committee members serve three-year terms after appointment to the committee by the president of the Bar Association. Teresa Williams, one of the discipline counsel, continues to supervise the fee arbitration process. Questions about the scheduling of an individual matter should be addressed to the staff at C.R.C. Questions about policies or procedures can be addressed to Teresa.

Ethics opinions adopted. . .Continued from p. 14

which governs "Campaign Conduct," specifically subsection B(1), there is reference to judicial office "filled either by public election between competing candidates or on the basis of a merit system *election*" (emphasis supplied). That section not only distinguishes between the two systems but uses "election" specifically to refer to the merit selection process. Subsection B(2) further makes this distinction; in recognition of the political realities involved in public elections between competing candidates, it permits certain activities by candidates in such elections not permitted candidates in merit system elections.

This interpretation of "election" is consistent with the following statement of Professor E. Wayne Thode, Reporter to the ABA Special Committee on Standards of Judicial Conduct, which was responsible for the current revision of the Code of Judicial Conduct:

> "Section A of Canon 7 prescribes general standards of political conduct for all judges and *all candidates for judicial office* (emphasis supplied). Section B, applying to public elections between competing candidates and to merit system elections, set the campaign standards for judges and challengers who are running for elective judicial office."[1]

This interpretation of "election" to include merit selection is consistent with its accepted meaning. While in its most common usage, "election" normally implies a choosing by an electorate, the *Oxford English Dictionary* defines it simply as: "the action of choosing . . ." and lists as the first meaning: "1. The formal choosing of a person for an office, dignity or position of any kind; *usually* by the votes of a constituent body" (emphasis supplied).

This conclusion is consistent with Formal Opinion 312 which interpreted Canons 28 and 30 of the Canons of Judicial Ethics in effect prior to the adoption of the Code of Judicial Conduct in 1972. That Opinion set forth a list of proscriptions of political activity of judges. It concluded that all of those proscriptions applied to candidates for appointment as well as election to judicial office.

Accordingly, the Committee's opinion is that the provisions of Canon 7, Section A do apply to a candidate for judicial office by gubernatorial appointment pursuant to a merit selection plan and prohibit participation by the applicant in political fund raising events.

A difficult question remains: whether the lawyer-applicant becomes subject to the provisions of Section A(1) when his/her name is submitted to the Governor of the State or when the lawyer submits his/her name to the Judicial Council for consideration. The Committee believes that the latter conclusion represents sounder policy. If the underlying purpose of Canon 7 is to ensure the preservation of the independence and impartiality of the judiciary, and the appearance of the same, then it seems to us important to impose upon all those who serve or would serve in judicial office these restrictions upon their political activities. And if the restrictions are uniformly applied, then all lawyer-applicants will accept them knowingly and voluntarily, understanding that others similarly situated will be similarly bound. Likewise, by making this position clear to persons in political office, the discomfort, even the embarrassment, attendant upon the refusal of lawyer-applicants to become politically involved should be avoided.

[1]*Thode, E. Wayne, Reporter's Notes to Code of Judicial Conduct*, 95 (1973).

This opinion is based on the Model Rules of Professional Conduct and to the extent indicated the former Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, codes of professional responsibility and opinions promulgated in the individual jurisdictions are controlling.

American Bar Association Standing Committee on Ethics and Professional Responsibility, 750 North Lake Shore Drive, 11th Floor, Chicago, Illinois 60611. Telephone (312) 988-5305. CHAIRMAN: Robert O. Hetlage, St. Louis, MO; David R. Almond, Oklahoma City, OK; Samuel Dash, Washington, DC; Angus G. Goetz, Jr., Birmingham, MI; F. Evans Harvill, Clarksville, TN; Zona F. Hostetler, Washington, DC; Seth Rosner, New York, NY; Richard Sinkfield, Atlanta, GA. Center for Professional Responsibility: Robert S. Wells, Ethics Counsel; Lisa L. Milord, Assistant Ethics Counsel.

85-2—Reconsidering and Vacating Ethics Opinion 84-8, Ex Parte Communication with Experts Retained by Opposing Counsel

The Committee has received several requests for reconsideration of Ethics Opinion 84-8, which holds that nondeceptive ex parte attorney communications with expert witnesses or consultants retained by an adverse party are not prohibited by the Code of Professional Responsibility. These requests point out that the Committee has not considered the provisions of Alaska Civil Rule 26(b) (4), which sets forth the method for formal discovery of facts known and opinions held by experts, acquired or developed in anticipation of litigation or for trial. Actually, the Committee did consider Alaska Civil Rule 26(b) (4) in its issuance of Ethics Opinion 84-8.

Ethics Opinion 84-8 was intended to deal only with the initial ex parte contact, and not with the requirements of formal discovery. The procedure envisioned was that the initial ex parte contact could be made. At that point the expert could either consent to or decline to talk to opposing counsel. The attorney hiring the expert could protect against disclosure of information by directing the expert not to discuss the case with other persons.

Subsequent to the issuance of Ethics Opinion 84-8, certain things have taken place which have convinced the Committee that the procedure approved in Ethics Opinion 84-8 has serious inherent problems. Three developments have taken place since the issuance of Ethics Opinion 84-8, which militate against the procedure approved in that opinion, as follows:

> (1) The Ninth Circuit Court of Appeal in *American Protection Insurance Co. v. MGM Grand Hotel—Las Vegas, Inc.*, No. 83-2674, 83-2728 (December 3, 1984), stated that a law firm could be disqualified from representing its client because of ex parte contacts made with a confidential employee and expert witness of the opposing party. The court recognized that ex parte contacts may result in the disclosure of confidential information to the opposing parties. The party seeking disqualification must show only a possibility or the appearance of the possibility of obtaining confidential informaiton in order to obtain disqualification. *(Trone v. Smith*, 621 F.2d 994, 1001 (9th Cir. 1980)) The Second Circuit, in fact, has held that disqualification is required where an attorney is only potentially in a position to use privileged information. *(Board of Education v. Nyquest*, 590 F.2d 1241, 1246 (2d Cir. 1979)) In *American Protection Ins. Co.*, the Ninth Circuit stated that the District Court should resolve doubts in favor of disqualification—not only to protect the parties involved, but also the integrity of the courts and the public perception of the legal profession.[1]
>
> (2) On June 13, 1985, the Alaska Bar Association circulated a memorandum to all members pointing out that the Disciplinary Board had recently privately reprimanded an attorney for using a subpoena as a discovery device to obtain materials from a nonparty. The subpoena was not accompanied by a notice of deposition, and no notice was provided to the parties to the case. The Disciplinary Board found that the attorney had intentionally circumvented the Civil Rules to obtain possession of documents to which he might otherwise have been denied access, had the Civil Rules been followed. The Board found that the attorney's conduct violated Disciplinary Rule 1-102(A) (5), which prohibits conduct that is prejudicial to the administration of justice, and Disciplinary Rule 7-106(c) (7), in that he intentionally violated an established rule of procedure. The purpose of the memorandum was to notify all attorneys that subpoena without notice, as a discovery device, was improper.
>
> Since Civil Rule 26(b) (4) provides the approved method of obtaining formal discovery from expert witnesses, it would appear that operating outside of that rule may also violate the rationale of the June 13, 1985, memorandum.
>
> (3) Ethics Opinion 84-8 has apparently been used to justify approaches to expert witnesses which were never intended to be permitted. One of the requests for reconsideration pointed out a situation where the opposing counsel had contacted several of the attorney's retained experts and repeatedly asserted to them that they were "required" to discuss their testimony with him. The experts were dismayed, confused, and in one case outraged, by being contacted. Most experts refused to discuss the case. However, one expert, not as sophisticated or experienced as the others, apparently sent the opposing counsel a copy of his expert report and underlying factual data before these had even been seen by the attorney who retained the expert.

Accordingly, upon reconsideration in light of subsequent events, Ethics Opinion 84-8 is vacated. Ex parte contacts should not be made with expert witnesses retained by an opposing counsel or party. Discovery from expert witnesses to whom Alaska Civil Rule 26(b) (4) applies shall be done only in a manner agreed upon in advance with opposing counsel or in the manner set forth in Alaska Civil Rule 26(b) (4).

Adopted by the Alaska Bar Association Ethics Committee on August 8, 1985.

Approved by the Board of Governors on August 23, 1985.

[1]The opinion in *American Protection Co. v. MGM Grand Hotel—Las Vegas, Inc.* was originally reported at 748 F.d 1923. The opinion itself was subsequently vacated by the Ninth Circuit, and the appeal dismissed. However, the rationale of the opinion, and the fact that ex parte contacts should result in disqualification if there is only a possibility or the appearance of the possibility of obtaining confidential information, militates strongly against allowing ex parte contacts with retained experts. In *Marine Petroleum Co. v. Champlin Petroleum Co*, 641 F.2d 984 (D.C. Cir. 1979), the court did not consider whether ex parte contacts with an expert would be permissible, but the rationale of the opinion appears to prohibit them. Finally, in *Campbell Industries v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980), the Ninth Circuit upheld the District Court's finding that an attorney's ex parte contact with an opposing party's expert was a flagrant violation of the provisions of Federal Rule of Civil Procedure 26, deserving strong sanction.

85-3—Shold a Firm Be Disqualified as Trial Counsel When It Is Necessary to Call a Former Associate of the Firm as a Witness on Behalf of Client?

The Committee has been asked to determine whether a firm may represent a client at trial when it is necessary to call a former associate of the firm as a witness on behalf of the client.

Law Firm A was Mr. X's personal attorney. When Mr. X became president of Corporation Z, Law Firm A became counsel to the Corporation. Associate B did work for the Corporation as corporate counsel. A disgruntled customer sued the Corporation, Mr. X, Associate B, and other corporate officers alleging that they had fraudulently induced him to purchase the Corporation's product. All defendants except Mr. X have now been dismissed (by reason of settlement or bankruptcy). Law Firm A has been retained to represent Mr. X at trial and has determined that it should call its former Associate B to give testimony helpful to Mr. X's defense. It is not expected the Associate's testimony will be disputed.

DR 5-101(b) prohibits a lawyer from acting as trial counsel when the attorney also will be called to testify at trial, except in certain limited circumstances. None of the exceptions are applicable to the facts.

DR 5-105(d) states if a lawyer is required to decline employment, then "no partner, or associate, or affiliate with him or his firm" may accept or continue employment. *See also, Aleut Corp. v. McGarvey*, 573 P.2d 473 (Alaska 1978).

DR 101(b) would prohibit Associate B from representing Mr. X as trial counsel. The question, therefore, is whether DR 5-105(d) should be read to mean that Law Firm A, as Associate B's former employer, also is disqualified from representing Mr. X. The Committee concludes this question should be answered in the negative.

Ethical Considerations 5-9 and 5-10 and ABA Form Opinion 339 explain that the primary concerns behind DR 5-101(B) are that a lawyer's ability to act as advocate for his client is, or may be, impaired by his interest (financial or otherwise) in the outcome of the case and that a lawyer should avoid the "unseemliness" of arguing his own credibility.

The Committee believes that the purposes behind DR 5-101(B) are appropriate when applied to an individual lawyer or team of lawyers acting as trial counsel. Although DR 5-105(d) requires disqualification of the firm when any lawyer of the firm is disqualified, the Committee notes that ABA Model Rules of Professional Conduct Rule 3.7(b) expressly states that a lawyer may act as advocate even though another lawyer in his firm (not acting as a trial counsel) will be called as a witness (provided doing so does not cause a conflict of interest).

The Committee believes that no legitimate ethical consideration is served by extending the prohibition of DR 5-101(b) to instances where a former associate will be called as a witness.

Adopted by the Alaska Bar Association Ethics Committee on August 8, 1985.

Approved by the Board of Governors on August 23, 1985.

85-5—Payment by credit card; Interest on overdue accounts.

The Committee has received a request for an opinion regarding the propriety of allowing clients the voluntary option of paying attorney's fees and costs through the use of their individual credit cards. The request also asks for an opinion regarding specific methods of charging past due balances.

The Committee concludes that the use of credit cards is permissible, provided that any plan is formulated and administered within the framework of all applicable laws and ethical considerations. Past due balances may be charged against the client's credit card only upon current consent of the client at the time the charge is made, and cannot be done automatically pursuant to an agreement executed prior to the time the charges and expenses were incurred. Interest may be charged on overdue accounts.

The Use of Credit Cards is Permissible

In the 1960's and 1970's, the propriety of the use of credit cards for the payment for legal services and expenses was a matter of great controversy. By the mid and late 1970's, however, the use of credit cards for the payment for legal services and costs was generally accepted as being permitted under the ABA Code of Professional Responsibility, if specified guidelines were followed.

American Bar Association Formal Opinion 338 (November 16, 1974) approved the use of credit cards for the payment of legal expenses and services under the provisions of the ABA Code of Professional Responsibility. Numerous states issued similar opinions, some states adopting the guidelines of ABA Formal Opinion 338, and other states imposing their own or additional guidelines. [See ABA/BNA *Lawyers Manual on Professional Conduct* 41:602 (1984)]

Some states have expressed concern with the terms of the agreement between the attorney and the credit card issuer. Kansas has disapproved a credit card program with a buy-back provision under which the attorney must agree to buy back any drafts from the bank over which the cardholder disputes the performance or quality of service, since that type of plan may place the attorney in a position where the full discharge of the duty to the client would be impaired. (Maru, *Digest of Bar Association Ethics Opinions*, 8463, Kansas Bar Association Opinion 45, May 17, 1970) Maine has stated that any credit card arrangement must be on a recourse basis, and the client must be so advised. (Maru, 11206, Maine State Bar Association Opinion 49, March 1, 1977) Massachusetts has stated that any assignment of the obligation to the bank by the attorney must be without recourse. (Maru, 8648, Massachusetts Bar Association Opinion 74-1, February 9, 1974) Oklahoma has also stated that the credit card issuer can have no recourse against the attorney. (Maru, 9375, Oklahoma Bar Association Opinion 268, December 14, 1972) New Hampsire has stated that the issuer must waive all holder-in-due-course defenses, and the attorney must reserve the right to decide whether or not to sue

Ethics opinions adopted

. . .Continued from p. 16

on a disputed or unpaid obligation. (Maru, 8792, New Hampshire Bar Association, 1975) New York has also stated that the issuer must waive all holder-in-due-course defenses. (Maru, 9122, New York State Bar Association Opinion 362, October 25, 1974)

Some opinions have stated that it is improper to use credit cards for certain purposes. Maine prohibits the use of credit cards to advance funds for the payment of fines and and judgments. (Maru, 11206, Maine State Bar Association Opinion 49, March 1, 1977) The Chicago Bar Association has stated that it is improper to accept credit cards in certain situations, such as divorce and bankruptcy proceedings. (Maru, 11051, Chicago Bar Association Opinion 79-4, 1979) Montana has stated that fees for bankruptcy matters may not be financed with credit cards. (Maru, 11980, State Bar of Montana Opinion 3, 1976) Ohio has stated that credit cards may not be used in bankruptcy, criminal, or domestic cases. (Maru, 9678, Ohio State Bar Association Opinion 29, February 1975) Oklahoma has stated that a contingent fee cannot be financed by a credit card. (Maru, 9375, Oklahoma Bar Association Opinion 268, December 14, 1972)

Summaries of the State Ethics Opinions regarding use of credit cards are collected in ABA/BNA *Lawyer's Manual on Professional Conduct* (1984), beginning at 41:602. Some of these opinions express considerations other than those referred to above. Some of the considerations expressed relate to attorney advertising, which has been substantially affected by developments in the law subsequent to the issuance of the opinions.

In Alaska, credit cards may be used for the payment for legal services and costs, subject to the following conditions:

> (1) The client must be fully advised, in advance, of all terms and conditions under which a charge is to be made.
>
> (2) Charges made pursuant to a credit card plan shall be only for services actually rendered or cash actually paid on behalf of a client. (ABA Opinion 338, November 16, 1974)
>
> (3) In participating in a credit card program, the attorney shall scrupulously observe the obligation to preserve the confidences and secrets of the client. (ABA Formal Opinion 338, November 16, 1974)
>
> (4) Any credit card plan shall not adversely affect the client's right to fee arbitration pursuant to Alaska Bar Rules 34 through 42; shall not adversely affect any other right or remedy available to the client under any law or principle of legal ethics; nor may it adversely affect any duty of the attorney to the client relating to payment in the event of a fee dispute or regarding the use or application of disputed funds or other property.
>
> (5) The credit card plan must be formulated and administered within the framework of all applicable laws and ethical considerations.

There are certain situations in which it would be improper to accept a credit card. Other states have recognized bankruptcy, domestic relations, and criminal proceedings, as examples of these areas. At this point, however, the Committee will not broadly prohibit the acceptance of credit cards in cases involving specific areas of substantive law. This question will be left open for later opinions upon more particular facts, if it becomes necessary. At this point, the Committee will do no more than point out that there are problems involving the rights of others, including the issuer, which might exist when a credit card is accepted in a bankruptcy, domestic relations, or criminal case. Attorneys should be particularly careful in accepting credit cards in these types of cases, to insure that all ethical principles and requirements of law are followed.

Interest May be Charged on Overdue Accounts

A necessary correlary to the use of credit cards is the charging of interest on delinquent accounts.

Attorneys may charge interest on any delinquent account, regardless of whether or not a credit card is involved. The client must be advised that the attorney intends to charge interest, and the client must agree to the payment of interest on accounts that are delinquent for more than a stated period of time. The client must be fully advised as to the rate of interest, and other terms that may be applicable. The interest charged must not exceed the rate, or be in other violation, of any applicable law or regulation.

Generally, Credit Card Charges May be Made Only by Contemporaneous Agreement

The Committee has been requested to opine as to the following:

> (1) The propriety of charging against the client's credit card account those attorney's fees and costs which have remained past due for a specified period of time when done in conjunction with a provision in a written retainer agreement by which the client has agreed that any fees or costs which remain past due for a length of time *without dispute* shall be deemed reasonable and necessary, both in terms of the quality and quantity of work, and that such undisputed fees and costs which have remained past due for the specified length of time could be charged against the client's credit card account, and
>
> (2) The propriety of automatically charging against the client's credit card account any fees or costs which remain past due beyond a specified period of time when there is a provision authorizing same in the written retainer agreement. Unlike the situation in paragraph 1 above, the retainer agreement would contain no provision as to the client's implied consent as to the quality and quantity of the services.

With respect to proposal (1), it is not appropriate for an agreement to provide that any costs or fees, which are incurred in the future, and which remain past due for a length of time without dispute shall be deemed reasonable and necessary, both in terms of the quality and quantity of the work. The client cannot know with certainty, at the time of signing a retainer agreement, that the services to be performed in the future will be reasonable and necessary, both in terms of quality and quantity. That decision can be made by the client only after the work in question has been performed.

Additionally, with respect to both proposal (1) and (2), the Committee envisions serious problems in a contractual provision authorizing credit card charges based on future nonaction by the client, such as failure to object. It is very possible that a client may not object to a bill, simply because the client has not received it, or for some other valid reason. An automatic credit card charge in such a case, where the client in fact would have objected to the charge, could result in an ethical violation. Additionally, a charge on the client's credit card, unanticipated by the client, particularly in a large amount, could create undue or unwarranted financial hardship or embarrassment to the client in the use of the credit card to deal with third parties.

Accordingly, credit card charges for work performed and expenses incurred in the future cannot be authorized by nonaction of the client. Pursuant to this opinion and ABA Formal Opinion 338 (November 16, 1974), charges to the credit card may be made only for services actually rendered or cash actually paid on behalf of a client. The credit card charge may be made only if the client actually consents to the charge, with full knowledge of all the relevant facts and circumstances, at the time the charge is made. In addition to consenting to a single charge, a client may also give a current consent to a program of periodic payments, such as to the payment of an indisputed $500.00 charge by a credit card charge of $100.00 per month for the next five months. Any consent given by the client may be withdrawn, and further charges to the credit card may not be made, in the event of a bona fide fee dispute.

Accordingly, the procedures set forth in paragraphs (1) and (2) above are disapproved.

Adopted by the Alaska Bar Association Ethics Committee on August 19, 1985.

Approved by the Board of Governors on August 23, 1985.

Foundation prepares to expand service

by The Cub Reporter

Recently the Alaska Bar Foundation has been making headlines with its Alaska Legal Network Zenith program. As most of you are aware, any attorney in Alaska may call the Foundation's toll free number, (800) 478-7878, and receive copies of cases, treatises, Law Review articles, briefs, periodicals, and any other information which the lawyer is unable to obtain in the locale in which he or she practices. The toll call is free and the service is also free. The advent of Alaska Legal Network prompted the question, what or who is the Alaska Bar Foundation? Luckily, Mary Hughes, president of the Alaska Bar Foundation, was available for questioning.

TCR: What is the Alaska Bar Foundation?

MKH: The Alaska Bar Foundation is a nonprofit corporation, having an IRS Section 501(c)(3) status. The Foundation was established originally as a depository of funds given the Foundation by the heirs of the late Supreme Court Justice George Boney. The Boney gift, as well as the yearly contributions from the John Manders Foundation, accounted for much of the Foundation's capital for many years. Those particular funds were spent on scholarships for students from Alaska attending law school.

Although scholarships are still a part of the Alaska Bar Foundation program, an even more important item of concern to the trustees is the provisioning of services for Alaskan lawyers and the Alaskan public. With those lofty goals in mind, Alaska Legal Network's Zenith line was commenced September 1.

TCR: When was the Alaska Bar Foundation originally organized?

MKH: The Alaska Bar Foundation was originally organized in October of 1972 as a depository of the Boney endowment. The Foundation stagnated until 1979, at which time the Board of Governors of the Alaska Bar Association appointed trustees, hoping that the Foundation would move forward. For various reasons, the Foundation languished and from 1982 through 1984, the Board of Governors studied the ailments of the Foundation in order to determine its viability. In 1984, the Board of Governors appointed a new Board of Trustees. Those trustees were and are: Winston Burbank, John Conway, Mary Hughes, Bart Rozell and Sandi Saville. In the fall of 1984, those trustees had their first meeting and in March of 1985 adopted bylaws.

TCR: How is the Alaska Bar Foundation funded?

MKH: Funding for the Alaska Bar Foundation comes from the members of the Alaska Bar Association, endowments from families of deceased members of the Bar, local bar associations, and public funding as can be obtained. As a matter of act, each and every member of the Alaska Bar Association will have the opportunity in January to donate $7.00 to the Alaska Bar Foundation in conjunction with the payment of his or her dues to the Alaska Bar Association.

TCR: There is an indication in the press release with respect to the Zenith line that it is the first phase of Alaska Legal Network. Do the trustees have additional plans for Alaska Legal Network?

MKH: The trustees of the Alaska Bar Foundation are committed to serving not only the members of the Alaska Bar Association but also the public. With that in mind, discussion has taken place between the Foundation, the Alaska Pro Bono project and commercial, as well as public, television entities. It is the hope of the Foundation to produce substantive law programs for the public and the Foundation is proceeding toward that goal.

Additionally, since March, the Alaska Bar Foundation has been involved with presenting a rule relative to interest on lawyers' trust accounts (IOLTA) to both the Alaska Bar Association and the Alaska Supreme Court. Since the concept involved in IOLTA needs some explanation, IOLTA will have to be a subject of another Foundation article.

TCR: What are the immediate goals of the Alaska Bar Foundation?

MKH: The Foundation desires to provide lawyers in Alaska assistance in practicing law and serving their clients. The trustees are striving toward that goal.

(IOLTA will be the topic of the Foundation's next Bar Rag article)

The Rag is trendy

DeLisio speaks out

'If appointed, I will not serve'

By STEPHEN S. DeLISIO

Most people thought that serfdom went out with the Middle Ages. Not so! This infamous institution is alive and well in the Alaska Criminal Justice System, with the private members of the Bar being the serfs.

In September, 1984, I was appointed to represent an indigent charged with sexual abuse of a minor in Palmer, Alaska. I declined the appointment, was found to be in contempt of court and was ordered to jail, unless I accepted the appointment. The Supreme Court stayed the contempt order pending appeal, and subsequently the trial judge withdrew the jail sanction.

After much effort and expense, a substantial record on appeal was developed and an appeal was filed with the Alaska Supreme Court. Although our brief was filed in May 1985, it was not until September 29, 1985 that the State got around to filing an opposing brief. We are now in the process of preparing a reply brief.

I. Grounds for Appeal

Our principle grounds for appeal, which we believe are more comprehensive than any appeal taken in Alaska on this issue in the past, are:

A. State Preemption of Responsibility To Provide Counsel for Indigents.

In 1969, as a result of the efforts of many of us in the Alaska Bar Association, the legislature adopted the Public Defender Act, whereby the State acknowledged its responsibility to provide qualified counsel to defend indigents charged with crime. The State thereupon delegated to the court system the responsibility for appointing attorneys in such instances where the Public Defender Agency was unable to take on the representation. Effective July, 1984, the legislature repealed that portion of the Act that delegated court appointments to the court system, and transferred that responsibility to the Office of Public Advocacy (OPA).

Throughout the years, since 1969, the court system has exercised the appointment power under the Public Defender Act. However, as of July, 1984, that delegation of power by the legislature was removed from the court system and vested in an administrative agency, the OPA. Inasmuch as the court's appointment power under the Public Defender Act was a power delegated by the legislature, the court had no greater power to appoint than did the body that delegated that body to it, to wit the legislature. I am not aware anybody has ever seriously argued that the legislature has a constitutional right to order attorneys, against their will, and regardless of adequacy of compensation, to represent persons charged with crime. Nevertheless, in deciding such matters as the *Wood* case, the court spoke as if these court appointments were made under some sort of inherent power of the court system.

Our appeal addresses this so-called "inherent power" of the courts to appoint attorneys to represent indigents charged with crime, and attempts to point out the fallacies of that concept both on historical and constitutional grounds. Also we question the constitutionality of appointments via the legislative delegation.

B. Pro Bono Services

Granted the Bar has traditionally provided pro bono representation to persons unable to afford legal services, both in civil and criminal matters. However, pro bono service has been voluntary and in accordance with the skills and experience of the attorneys providing the service. Not only do attorneys have an ethical responsibility to provide pro bono services, but more important we have an ethical responsibility not to attempt to provide services on a pro bono, court-appointed or any other basis in situations where we lack the commensurate skills and experience to adequately represent the client.

However, the state argues that this traditional responsibility of pro bono services somehow has risen to a compulsory function to which every attorney is committed simply by virtue of admission to the practice of law. Thus, a noble and long-standing tradition of the Bar is now being wielded by the State as the club of involuntary servitude.

C. Arbitrary Disqualification by Public Defender

Our investigation revealed that there is virtually no check on the Public Defender's office with regard to when and under what circumstances it conflicts out of indigent cases. In at least one instance, it was reported by a new attorney appointed to defend a major criminal charge that the public defender had conflicted out of his case, based simply on the fact that the Public Defender was "too busy." Our research revealed that neither the judges nor the District Attorneys' offices ever look behind the Public Defender's assertion of a conflict of interest to ascertain the validity of that claim, prior to the withdrawal of the Public Defender being permitted. Further, when we inquired into the practices of the Public Defender's office regarding how it determined the existence of conflicts, there appeared to be few if any statewide standards, nor were such standards as appeared to exist designed to operate as narrowly as ethically possible. In fact, they appeared to be designed to permit conflicting out in the broadest number of possible situations.

D. Least Skilled Attorneys To Represent Most Serious Crimes

Our research revealed that, all too frequently, where multiple co-defendants were charged in the same case, the Public Defender's office (which had first choice) selected the easiest defendant to defend, the contract law firm(s) (which had the next choice) selected out the easiest to defend of the remaining defendants, and the most complex and difficult to defend clients were then assigned to the court-appointed counsel.

A major purpose for a Public Defender Agency is to insure that indigents have the benefit of counsel from attorneys specialized in criminal law. In hiring law firms for purposes of contracting to take overflow from the Public Defender's office, the court system (now the OPA) required stringent conditions regarding the skill and experience of the prospective firms in criminal law. However, the court appointment process functioned in virtually complete disregard of the qualifications of private counsel being appointed to represent the remaining indigents.

The net effect has been to appoint, in the overwhelming number of cases of multiple defendants, the least experienced attorneys to represent those defendants with the most complex and difficult defenses to prepare and present.

E. Lawyers Singled Out

If anyone suggested that the court system, the legislature or any administrative agency had the power arbitrarily to compel any profession, other than attorneys, to provide services to indigents without the professional's consent and adequate compensation, our court system would issue opinions ringingly denouncing such attempted practice.

In the State of Alaska, lawyers are virtually the only classification of occupation regarding which a branch of government seeks to compel involuntary servitude. This smacks of denial of equal protection under the law to lawyers as a class.

F. Lawyer's Services Constitute Supplemental Appropriation

Unfortunately, rather than compelling the legislature and the executive branches of government to fulfill their constitutionally and legislatively mandated duty to provide indigents charged with crime with qualified legal representation at the sole expense of the State, our court system has seen fit to engage in a separate appropriation process—the appropriation of the time, energies and money of the private members of the Bar to provide this service. In large part funding by the legislature to the court system under the pre-existing system, and funding to the Office of Public Advocacy under the present system has proved, at least in recent years, to be grossly inadequate to meet the needs of indigents charged with crime, even given the parsimonious levels of compensation proved by the court system for court-appointed counsel. Reportedly, in a discussion last fall with representatives of the Alaska Bar Association and the Anchorage Bar Association, the executive director of the Alaska Court System acknowledged that court-approved payments to court-appointed counsel to indigents charged with crime during the pending fiscal year were substantially in excess of double the amount of funds appropriated by the legislature to the court system for that purpose. As a result, reportedly attorneys were given the choice of accepting either a portion of the amounts approved by the trial bench or nothing at all. For whatever reason, the court system apparently did not see fit to seek a supplemental appropriation to take care of this shortfall.

G. Prejudice to Other Clients

Quite apart and in addition to the hardship imposed on the court-appointed attorney, this process completely ignores the rights of clients who have already engaged the services of attorneys to receive those services on a timely basis. Typically, the criminal appointment imposes on the appointed attorney a priority of scheduling that effectively precludes many, if not all, of the attorney's other activities pending completion of the assignment. One incident report involved an attorney who, on the eve of leaving town to go to another part of the State to try a multi-million dollar construction case, was notified that she would be required to appear at an omnibus hearing (whatever that is) in a criminal case she was appointed to defend in Anchorage on the same day her civil trial was to begin. The fact that she was committed to commencing a major trial out of town was not accepted as an adequate basis for excusing her, and she escaped contempt only as a result of another attorney stepping in and volunteering to take over the appointment for her, so that she could proceed with the civil trial she had been preparing to try for many months.

Clients other than indigents have contractual and constitutional rights to timely representation by counsel of their choice. Their matters involve various priorities, some of which are as pressing as the need of an indigent to get his criminal case to trial. Yet our court appointment system cares nothing for the harm that these clients suffer by the abrupt preemption of their attorney into the criminal justice system.

H. Inequitable Selection Methods

Even if the court appointment system could pass constitutional muster conceptually, the manner in which it has been administered leaves a great deal to be desired. How can the system justify appointing private practitioners, but systematically excluding other members of the Bar (including all corporate entities)? At the time of my appointment, this was common practice. After my appointment, the court system began appointing in-house counsel on occasion, but, to the best of my knowledge, has continued to exclude public attorneys or judges from court-appointed responsibilities. Yet, all of these lawyers are members of the Bar, and certainly have the same professional, ethical, and "traditional" responsibilities as any other member.

Moreover, the system gives no consideration to the relative magnitude of court appointments. If one is unlucky enough to get an appointment that requires thousands of hours of work, the next time his/her name comes up on the list the appointment is made without regard to the huge contribution just completed.

II. Will the Office of Public Advocacy Change Anything?

The creation of the Office of Public Advocacy further emphasizes the fact that the State of Alaska has voluntarily undertaken the constitutional and financial responsibility for providing competent legal counsel to all persons charged with crimes who are not otherwise able to afford their own attorney. Delegation by the legislature of the responsibility to appoint conflict counsel has now been expressly removed from the court system and lodged with that office.

Unfortunately, in funding the OPA, the legislature appropriated a fund for the first fiscal year of that agency which exceeded the appropriation to the court system by only about $500,000. Already the OPA has apparently acknowledged the inadequacy of its budget. Furthermore, within the past few weeks, I have again begun receiving relatively frequent telephone calls from private attorneys who are again being appointed to defend indigents. Apparently, the OPA system has already exhausted the availability of contract law firms and its own staff, and is resuming the practice of appointing large numbers of private attorneys.

I am unaware of the methodology used by OPA, but the attorneys who have contacted me were not volunteers. The system of passing down the most complex cases to the appointed OPA becomes increasingly burdened with criminal defense practice, it will logically have a tendency, in multiple defendant situations, to spin off the most complex defenses to contract law firms, which in turn will continue to have an economic incentive to spin off the most complex of the defendants left to the appointed member of the Bar.

What constitutional right does an administrative agency of the state have to order involuntary service on the part of any occupation, including attorneys? The courts have not yet seemed to go quite so far as to approve such a practice.

Suffice it say that, unless the system of providing counsel to indigents charged with crime is fully corrected, sooner or later the court will resume its appointment process under its so-called "inherent power." Hence, the respite that many members of the Bar thought the OPA Act would provide is illusory and will soon come to an end.

III. Response of Attorneys Disappointing

I have fought this issue because I believe the system is wrong and that standing up to it is the only way to get it corrected. years ago I worked with other attorneys to draft the Public Defender Act as a solution to the problem, only to find that, as the crime rate increased and budgetary demands for things other than criminal defense increased, the Public Defender Agency did not eradicate the involuntary servitude aspect of the private practice of law.

I took up the fight not because I wanted better pay for representing indigents, or because I had anything against providing pro bono services as an attorney. I did so simply because the process is egregiously wrong.

Not only are we compelled against our will to represent people we do not wish and are not qualified to represent, but we are exposed, against our will, to disciplinary action and payment of damages for malpractice arising out of our unqualified efforts to represent people in a field which requires highly specialized, experienced practitioners to do a competent job. Nothing in the law insulates attorneys against such exposure. When I took up the cudgels, I received a great outpouring of verbal support from lawyers all over the state (as well as a small amount of criticism from those who felt my action would be poorly received by the general public and misunderstood as greed

Continued on page 19

DeLisio speaks out . . . Continued from p. 18

on the part of the Bar). Additionally, I have received unqualified positive support from all members of the public who have been in contact with me. Somehow the public senses in the issues involved here, better even than many attorneys and judges, the fundamental individual rights of the attorney and the person who is compelled to accept that attorney's services in a criminal proceeding.

From a few attorneys there has been a very generous outpouring of financial support. To date, it has cost in excess of $22,000 to fight this court appointment, of which approximately $7.600 still remains due and owing. As against this sum, slightly more than $8,200 was contributed by other attorneys or law firms. Now that the state's brief has been received, we will have to prepare a reply brief and present oral argument. As a result, we can expect the total cost of this battle ultimately to exceed $25,000. Hence, it is not too late for anyone out there who may wish to help.

IV. Conclusion

Until all members of the Bar and Bench are prepared to deal with this problem in a forthright committed fashion, it will continue to fester and remain a serious blight on the sound administration of the criminal law. This problem that can no longer be ignored or resolved by the "bandage" approach. We must collectively come to the recognition that the responsibility for qualified adequate criminal defense of indigents charged with crime rests squarely on the shoulders of the State of Alaska as a collective body. it is not the individual responsibility of private attorneys nor the collective responsibility of the Alaska Bar Association.

Where, in other circumstances, the court learns that the State of Alaska is failing to properly fund its responsibilities, the court system has taken firm and swift action to compel performance. An example of this has been in dealing with overcrowded jail conditions. The same kind of resolute action on the part of the court system is required now in this area. Without question, provided there is reasonable compensation available, there are sufficient numbers of attorneys having the requisite skills and experience to provide, on a fully voluntary basis, all legal services required by indigents charged with crime that are not represented by the Public Defender or the Office of Public Advocacy. If my struggle results in nothing more than galvanizing the Bench and Bar to press the legislature for adequate funding of the system, it will all have been worthwhile.

Fee arbitration . . . Continued from p. 3

Secured Fee

84-36 (7/28/85) Client argued that attorney was overreaching when he required him to execute promissory note at termination of attorney-client relationship, secured by a deed of trust against real estate valued substantially more than the amount of the promissory note. Panel found that there was not more appropriate security for the note and that a creditor is allowed to secure his debts.

81-9 (8/10/81) Unconscionable for attorney to retain benefit of foreclosing on real estate security when benefit greatly exceeds fee claim plus expenses of foreclosure.

Withdrawal

84-3 (6/28/85) Attorney should bear the costs of any duplication of effort and inefficiencies resulting from his withdrawal and transfer of file to a new attorney.

82-11 (1/6/83) and 82-13 (11/22/82) Attorney entitled to fees for necessary services rendered while motion to withdraw pending before court.

82-13 (11/22/83) Attorney cannot charge for time spent in preparing withdrawal paperwork.

82-42 (6/20/83) Attorney should have taken steps to withdraw when communication and confidence broke down.

82-31 (7/6/83) Representation after order of withdrawal cannot be charged to client.

82-18 (3/18/83) Because of attorney's withdrawal, services were of reduced benefit to client.

82-21 (3/7/83) Attorney withdrew from representation in contingency fee case and then claimed fee. Panel found that client does not owe fee until favorable judgment is obtained.

82-10 (11/16/82) Attorney entitled to fees for necessary services rendered until relieved by court of duty to represent.

Written Fee Agreement

84-14 (11/30/84), 83-51 (11/8/84), 82-44 (7/6/83), and 80-60 (5/20/81) In the absence of a written fee agreement, the client's understanding of the fee must prevail.

83-23 (12/22/83) Attorney "failed to adhere to good professional practice in the manner in which financial arrangements were made with petitioners at the outset of the litigation. Financial arrangements were not reduced in writing either in the form of an agreement or a confirming letter to the client. *See, Code of Professional Responsibility*, Ethical Consideration 2-19."

81-27 (1/12/82) and 81-18 (8/11/81) "This committee has long advocated to attorneys involved in domestic relations matters to obtain a written fee agreement explaining the matter of the services to be rendered, the fees to be charged, and the nature of the charges and costs, and the extent of the services and fees.

81-7 (8/20/81) Fee contract so vague as to be unenforceable.

Ibid. Contract that allows attorney to set fee in his sole discretion between $5,000.00 and $15,000.00, without regard to any standard and without client notice in the contract of how the fee will be set is unconscionable.

'Village Journey' report

. . .Continued from p. 1

primarily within the context of the Alaska Native Claims Settlement Act (ANCSA). In the course of his study of the Alaska Natives, Berger held roundtable discussions in Alaska with Indian law experts and other persons knowledgeable about ANCSA and held village hearings throughout Alaska. It is one of the most comprehensive studies of the Alaska Natives, and cost $1.5 million to complete.

Berger is a former member of the British Columbia Supreme Court and currently is a professor of law at the University of British Columbia in Vancouver. He is familiar to many of us as the Commissioner of the MacKenzie Valley Pipeline Inquiry which, in 1977, recommended that the Canadian government not permit the Arctic Gas pipeline proposal along the Coastal Route or the Interior Route. The principal reasons for his decision were environmental and interference with the Indian culture at Old Crow. (See *Northern Frontier, Northern Homeland,* James Lorimer & Co., 2 Vol., 1977.) He is also the author of *Fragile Freedoms,* a collection of essays on civil liberties in Canada. One essay of particular interest in that book in the area of Indian law is the chapter on The Nishga Indians and Aboriginal Rights. (See *Fragile Freedoms,* Clarke, Irwin & Company Limited, 1982.)

This report of the Alaska Native Review Commission is evidence of interest in American Indians and other tribal peoples by the international community. Both of the sponsors of this report have non-governmental observer (NGO) status at the United Nations. It is the impact of economic development on hitherto virgin areas and the indigenous people that live there that has caused this interest. In 1982, the World Bank recognized this problem and took the position that it would not support projects on tribal lands, or that would affect tribal lands, unless the tribal society agreed with the objectives of the project. (See World Bank, *Tribal Peoples and Economic Development,* 1982.) In the case of Alaska, it is the development of the petroleum industry with its accompanying population increase that creates international interest. Alaskans are now beginning to realize that the unique culture of the Alaska Natives is of concern to the world community. It is one of the benefits of *Village Journey* that it underscores that world concern.

There is no question that *Village Journey* will cause controversy in Alaska, It is on account of the Berger recommendations on Native sovereignty that there is this controversy and, therefore, it would be best to set out those recommendations at the outset. The recommendations set out in Chapter 7 are these:

Land. The ANCSA village corporations that are concerned that their land may be lost should transfer their land to tribal governments at once. Congress should pass legislation to facilitate these transfers without regard for dissenters' rights under state corporate law.

Village corporations. Most village corporations should be dissolved.

Regional corporations. Regional corporations should transfer the subsurface of village lands to the villages. They should also transfer other lands adjacent to the villages either to the village or regional tribal governments.

Self-government. Native villages should exercise Native sovereignty. Tribal governments would hold the land in fee simple but, if there are villages that want the Department of the Interior to hold the land in trust, this should be done. These lands should be described as Indian Country, or, as the case may be, Eskimo Country or Aleut Country.

Subsistence. The tribal governments should have exclusive jurisdiction over fish and wildlife on Native lands. In the case of state and federal lands and waters, the tribal government should have management jurisdiction subject to federal or state oversight for conservation purposes only.

One of the first questions which comes to mind is, why did Berger make such proposals? Although not an Alaskan, he spent about two years in Alaska on the report. He was advised at the roundtable discussions that there would be problems in Congress for enactment of legislation that did more than merely reform certain problems with ANCSA. The former counsel to the Senate Interior Committee at the time of the enactment of ANCSA and presently practicing law, as well as lobbying, in Washington, D.C. advised Berger: "Finally, I'd go into this commission proceedings and everything else you do over the next couple of years with a heavy, heavy sense of political realism about what it's going to be possible to get done in your legislature and the federal Congress. And I wouldn't create any expectations that are too large because if you do, those of you with village and regional corporations, you're going to have real, real problems." (See testimony of William Van Ness, Vol. IV, p. 386, Transcript of Proceedings of Alaska Native Review Commission.) Another attorney, a specialist in Indian law familiar with congressional settlements for Indian tribes also explained problems of preemption of state jurisdiction in Indian legislation: ". . . if you look at all of the settlement legislation that has been passed dealing with Indian by Congress in recent years, none of it . . . certainly none of it overrides any state. If the state takes the position they want jurisdiction over the Indian country, none of the legislation overrides that." (See testimony of Reid Chambers, Vol. XXIV, p. 2428, Transcript of Proceedings of the Alaska Native Review Commission.)

In response to the question why did Berger make such recommendations despite the counsel of Washington observers that such radical proposals have no chance of passage in Congress, I believe that Berger understood his role to be a reporter of the views of the Alaska Natives who testified at the commission's village hearings. "Don't they deserve, at least an opportunity for change on their own terms? This opportunity is the one thing I claim my recommendations will provide: they are based on what the Native peoples told me they want to do for themselves." *(Village Journey,* p. 186.) Accordingly, the question for an explanation of the reasons for these recommendations must be addressed to the many Natives who testified at the village hearings. This is the serious part of the problem. If the Alaska Natives in the villages want Native sovereignty over their lands and wildlife resources necessary to mmaintain their subsistence culture, and if the State government and the Federal government will not agree to that sovereignty, then all Alaskans may expect turbulent times ahead on this issue. Further, if Berger is correct that tribal government is essential to the maintenance of Alaska Native culture, then the failure to resolve this problem could lead to the destruction of that culture.

The main problem for an attorney who reads *Village Journey* is the brevity of the legal discussion of significant legal issues associated with ANCSA and the report's recommendations. I suppose that Berger had to pick his audience and (it may surprise some of us) that there are more nonlawyers than lawyers in this world (at least, now).

The principal legal issue which confronts the Berger recommendations is the question of dissenters' rights. Most attorneys would concede the authority of Congress under the Indian Commerce Clause to provide for Native sovereignty in the Alaska Native villages despite the Tenth Amendment. See, for example, the special provisions concerning Alaska Natives in the Indian Child Welfare Act. However, there is a Fifth Amendment taking issue associated with the repeal of dissenters' rights under state corporate law which is summarily dismissed in the report. "Congress has the power under the Commerce Clause to authorize retribalization of ANCSA land without regard to the rights of dissenting shareholders in Alaska state law." (See *Village Journey,* p. 158. See also, id., p. 197.)

The basis for the Berger conclusion is a paper prepared for the Alaska Native Review Commission by Professor Ralph Johnson of the University of Washington School of Law. (See Johnson, Ralph W., "Alternative Approaches to Alaska Native Land And Governance," Vol. XXVIII, pp. 42–48, Transcripts of Proceedings of Alaska Native Review Commission.)

There are legal memoranda written by other attorneys who have reached a similar conclusion.

First, it is somewhat surprising that Berger would recommend the elimination of dissenters' rights without just compensation. There is nothing in his earlier book *Fragile Freedoms,* which dealt with the rights of minorities in Canada, which would suggest such a recommendation. On a similar taking issue, I believe Justice William O. Douglas set out the correct policy if not the law when he wrote: "It is difficult for me to see how Congress has power to change the scheme without payment of just compensation. After all, Indians are beneficiaries of the Due Process Clause of the Fifth Amendment." *(United States v Jim,* 409 U.S. 80, 87, 34 L. Ed 2d 282, 287 (1972).)

Second, the Indian Commerce Clause may not as a matter of law authorize a taking of ANCSA shareholders rights, and the various advocates for that position may be wrong. *Irving v Clark,* 758 F2d 1260 (8th Cir. 1985) held a provision of the Indian Land Consolidation Act unconstitutional because it violated the Due Process Clause of the Fifth Amendment.

A section of the Indian Land Consolidation Act provides that de minimis shares of land allotted in trust to individual members of the Oglala Sioux Tribe may not pass by intestacy or devise but instead escheat to that tribe.

The court reasoned that the original allottees as well as successors to whom land had actually passed prior to the enactment of the Indian Land Consolidation Act had acquired vested property rights. These rights were the rights to control the disposition of their property at death. "Furthermore, disposition of property at death has always been an integral and distinguishing factor as to types of property interests, and the power to control such disposition predominantly characterizes the 'white man's ways' which the Indians were to assimilate. The individual Sioux thus had 'enforceable expectations' that that power was part of the rights received in return for relinquishment of their claims to former tribal lands." *(Irving v Clark,* p. 1268.) The Fifth Amendment is certainly pertinent to any discussion of the elimination of dissenters' rights for ANCSA shareholders.

A broader question is whether the Alaska Native village view of Native sovereignty is the only solution to the threat of destruction of Native culture in Alaska. There is scant discussion of federal land state activities to protect subsistence under Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA). "In practice, state and federal policy have provided little protection for Native subsistence activities." *(Village Journey,* p. 63.) However, Berger does not set out in detail the specific reasons for this conclusion. At times, the objections to wildlife management are more philosophical than factual. With reference to 1985 restrictions on bowhead whales by the International Whaling Commission, Berger writes: "I ask myself whose rules should prevail here. The ancient laws of the Inupiat, which govern the relationship between the hunter and the whale, the distribution of the harvest, and the

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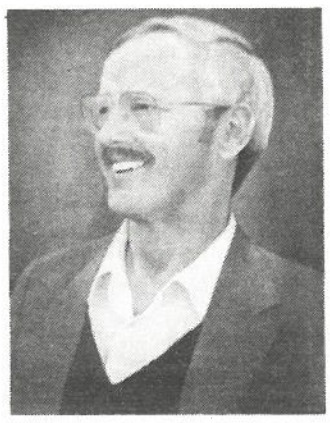

Random Potshots

John Havelock

The guy up there on the bench before me I read like Rumpole doing one of his soliloquies. He got that fat eating off insurance company expense accounts before he went on the bench. If you wonder why insurance rates have gone so high, just look at a decade of his billings. He developed bad faith negotiation into an art form. Before joining the private bar, he was one of the most unfeeling state prosecutors of his generation. He is particularly tough on sex offenders maybe because he regularly gets jolly by imagining himself in the shoes of the offender, as it were. His father's frat brother became dean at Michigan which got him in with a 500 LSAT. Grandpa's development of fast food franchising, "back when," guaranteed him a nice law firm offer when he got tired of stamping out what he calls "the criminal element" (or was it the long hours?). He thinks that anybody can make it in America with a little gumption. In short, my usual client doesn't have much of a chance.

What we have got going is the possibility that somewhere along that road from law school to his present domain, some insight from the pain of losing cases, from a conversation with a senior colleague or from some article he happened to read in a legal journal caused some small trickle of sense regarding the role of a judge in our society to leak through a crack in that flinty cranium.

A judge is not perfectly impartial but she should try to be. A judge is not independent, but he should try to set aside old loyalties and associations. A judge is not free of prejudices but should be suspicious of their influence particularly in herself. A judge cannot divest herself of a lifetime's collection of opinions and comfortable orthodoxies but she must try to set them aside when sitting in judgment in a particular case. Judges will reveal themselves in small ways but should learn to avoid larger improprieties of appearance.

We live, the judge and I, by myths regarding our roles which allow each of us to do a job that gives credence to the proposition that we live under a government of laws in which disputes are heard before independent courts by judges before whom litigants stand equal in right. Particularly, the government enjoys no presumption of merit. It is never, as an abstract proposition, true. But my client comes before the court hoping it may be nearly true in his case.

Our systems for the selection of judges, in varying degrees, reflect our perception of the unique role of the judicial decision maker. We give assurances of tenure to encourage judicial independence. If judgments are to be political, well then, let us have an elected system so that, at least as political circumstances change, the decision makers can be changed, too. We no longer have a government committed as firmly to upholding the rights of a minority but at least we are still democratic.

The life tenure given in the constitution to federal judges reflects the idealism of the founding fathers. They believed that a person committing the rest of his professional life to the judiciary would be above politics and above the goals, inevitably to be overtaken by time, of any incumbent administration and above the passions of transient majority opinion.

Now, I am a practical person. I understand that any administration will want to appoint people of sympathy to the administration's philosophy. In present times, for example, I expect that successful candidates for the federal judiciary will be, by and large, persons of impeccable Republican background. I expect their personal histories to reflect commitments to causes of interest to one or another of the last several Republican administrations. But it will be hard to view the successful candidate as a judge, if the test of his qualification is an oral examination on his loyalty to current executive branch goals with respect to specific types of controversy.

Candidates for the federal bench, including the candidates for appointment to the United States District Court for the District of Alaska, are now being interviewed—that is screened, in or out, based on how well they answer questions relating to the right or wrong of current matters being hotly contested by the executive branch before the courts of this country. In these interviews, the executive branch is searching for an affirmative predisposition on issues such as abortion, the death penalty, affirmative action, the environment and heaven knows what else. The heads of several divisions of the Justice Department are given an opportunity to test the responsiveness of candidates for the judiciary by questions on topics sensitive to their litigation objectives.

This is judge shopping with a vengeance. It reflects a generic contempt of the judicial process. The U.S. Attorney General, who is sponsoring this procedure, apparently believes that judicial decision-making is an extension of the executive decision-making process. The fudging of this distinction is, of course, the rule in countries which do not recognize the importance to human liberty of an independent judiciary.

It is troublesome that the executive branch should have such a powerful role in judicial appointments. It is intolerable that its officers should now undertake this new intrusiveness as gatekeepers to the judiciary. It is unethical for a government lawyer to ask questions intended to elicit a predisposition on litigation to come before the court and for candidates to answer in the same vein.

Since this procedure goes on in secret, what are we to think about the eventual successful candidate and what will that candidate think of herself? What do you do when you are asked "Who is your favorite Supreme Court Justice?" and you know that the correct answer is "Rehnquist"? Do you say "bizarre," as you should, when asked what you think about strict governmental neutrality toward religion and should you agree that the execution of fourteen-year-old children raises no constitutional questions, in keeping with the expressed prejudices of Mr. Meese? Can you bring yourself to say, "It would be inappropriate for me to answer that question," when the consequence may likely be that you will be dropped from the list?

This is a system to screen out ethical candidates.

'Village Journey' report . . . Continued from p. 20

celebration that follows? Or the laws established by officials who live thousands of miles away? The ancient rules are enforced from within the community; outsiders impose and enforce the new laws." *(Village Journey*, p. 50.)

Surely Berger must understand the complexities of management of an endangered whale species better than the thought expressed in that quotation. At times, Berger attacks the entire concept of a legal regime for the management of fish and wildlife. "Subsistence is a dynamic enterprise, but government regulatory regimes try to confine subsistence activities within a steel web of exact definitions, exact locations, and exact numbers. Such precision cannot respond quickly to ever-changing human needs and environmental conditions." *(Village Journey*, p. 67.) Of course, there is a question of balance between generality and specificity in any draft of a statute or regulation, but that does not mean that there should be no legal parameters to govern subsistence.

There is also one sour note in *Village Journey*. There is a certain resentment in the Alaska Native community at the present time against the payment of attorneys' fees in ANCSA cases. Berger notes this Native concern, and then characterizes the problem in an unfortunate way. "For most village corporations, the story is a sad one. Undercapitalized, without corporate experience, with virtually no business prospects, the corporations were at the mercy of the lawyers, advisers, and consultants who flocked to the villages like scavengers. Now the money is largely gone, and the land itself is at risk." (*Village Journey*, p. 9.) It is a statement such as this that will cause some to question other Berger conclusions which are set out without an evidentiary basis. The Alaska Bar Association should attempt to determine the basis for this allegation.

In conclusion, Berger has written an often eloquent defense of Alaska Natives and their culture in *Village Journey*. The recommendations are controversial, but, according to Berger, those are the recommendations of the Native villages. He is only the messenger. From my perspective, *Village Journey* has neither the fine legal analysis of *Fragile Freedoms* or the full evidentiary exposition of *Northern Frontier, Northern Homeland*—but that may be accounted for by Berger's choice of an easier style in order to interest a broader readership.

YULETIDE GREETINGS

Inside the Appeals Court . . . Continued from p. 7

Judge Bryner, just like Judge Singleton, tends to zero in on his major concerns and while you can never guess what his vote will be, at least you know from his questions the major issues he believes will turn the case one way or the other. You had better figure out in advance what issue you have to concede on. If you are forced to argue an illogical or absurd position, Judge Bryner isn't going to let you go far with it, and can make a paper shredder look tame. He can be both caustic and logical, which is great if you've got a strong issue. Look out if you don't. I wouldn't try selling Judge Bryner a used car, hoping he won't look under the hood. Again, it's impossible to suggest that Judge Bryner is a liberal or conservative. I've seen him come down with decisions that amazed me on both ends of the spectrum.

The Judge of Few Words

Judge Robert G. Coats is once again a different question. He appears to believe that he should give counsel a chance to speak their mind and tends to listen more and question counsel less than the other judges. Perhaps this is because he never needs to ask questions since both Judge Singleton and Judge Bryner are usually busy grilling counsel. In any event, Judge Coats tends to sit there with a cheshire grin and just listen. It's impossible to tell his concern sometimes since he is equally polite to both sides (as opposed to Judge Singleton and Judge Bryner who are equally confrontive to both sides). One might think from his silence that Judge Coats is unprepared. But he is not. At least once per argument he will ask a question that's so on the money that you realize he is right on top of both the facts and the law. Perhaps it's better I don't always know what he's thinking. He is neither liberal nor conservative, and tends to respond more to the practical than the academic.

I usually try to split my time: 20 minutes in opening and 10 minutes for rebuttal. The argument is the last thing the Court of Appeals is going to hear before they conference and make a tentative vote. The argument can impact the decision. The Court of Appeals is extremely well prepared and always appears to have read all of the briefs. Nevertheless, that oral argument can sometimes make the difference. If you make the mistake of using all 30 minutes in opening, you can be in big trouble if the State gets up and misrepresents the facts while you sit there silently burning. In the first 20 minutes, the object appears to be to quickly frame the facts (if the Court of Appeals doesn't stop you) and then jump on my strongest issue to find out if or where there are problems in the court's mind. I'm always prepared for a full 20 minutes of silence, but I'm always interrupted in the first few minutes. One has to be prepared to swap issues, jump out of order, and attempt to direct the court's attention on the issues you feel are the strongest.

The 10-minute rebuttal is usually saved to correct the State's representations or to counter their arguments. To the extent that's not required, it's time to hammer home your strongest pitch, and throw in the American flag. Problems always arise, however, when nearing the end of the 20 minutes of opening, one of the judges asks a five-minute question which you have to ask him to repeat. "This time please using commas and punctuation." If a three-minute debate follows, you have approximately one minute for rebuttal. Once I remember talking Judge Bryner into two extra minutes, based on the above problem, but it was not an easy task (in fact it took me two minutes of argument to get him to agree). The biggest challenge of arguing before the Court of Appeals is getting their attention onto your issues and where you think you have the best chance, without offending anybody.

> **"One has to be prepared to swap issues, jump out of order, and attempt to direct the court's attention . . ."**

There Are No Time Outs in Argument

The biggest problem I have with the Court of Appeals is the inflexible time limitations. Judge Bryner runs the clock with little mercy since there are usually other cases to follow. Unlike football, you can't call time out following tough questions and run to the side line for consultations. Judge Bryner won't even stop the clock for injuries.

Opening counsel gets 30 minutes as the appellant. The appellee then gets 30 minutes. The appellant gets to split time between opening and rebuttal. Unlike trial work, the defendant on appeal is usually the moving party. We get to organize the issues, set the tone, frame the arguments, and attempt to make the facts compelling and crystal clear. The State by contrast usually plays the more traditional role of the defense attorney by trying to confuse and obfuscate the facts, and convince the court "Come on . . . it's not so bad."

The Opinions; Assembly Line Justice

The opinion-writing stage is a different question. There is an enormous diversity in the quality of the opinions that are rendered. Sometimes we get the Cadillac: a 40-page opinion which is well documented and footnoted. Sometimes we get the economy class: a one-page short decision or "Memorandum, Order & Judgment."

Under the rules, the court may write a short memorandum order and judgment "MO & J" (which really refers to "Maybe our judgment") where the issue is one that's already been resolved and there is no new or novel issue before the court. The practice, however, goes well beyond the intent of that rule. The Court of Appeals as noted above is issuing a substantial amount of "MO & J's." These decisions are not published and the Court of Appeals appears to feel less accountable for these decisions since their grandchildren won't be reading them when they go to law school. An "MO & J" might issue if the three judges can't agree that the law should be binding or are unsettled and do not want to give the case precedential value. I've seen 35 page MO & J's (hardly a "short" decision) on questions of first impression where all three judges disagree on the reasoning of the case. It is becoming a quick ticket to resolving a case without any form of judicial accountability.

As you can tell, I disagree with the concept of the MO & J. I think all decisions should be published, and courts should be publicly accountable for the actions. I don't think a criminal case should be decided without that form of accountability and I don't think that important issues should be resolved and "swept under the mat" without publication.

> **". . . all decisions should be published, and courts should be publicly accountable for the actions."**

By the same token I take objection to the one- and two-page decisions which are per-curium and assure counsel that the court has "reviewed the record" and the case is affirmed. I think if the court has indeed "reviewed the record" as it suggests, and has reasons, it can't be that much of a burden to put the reasons down on paper so that my client can understand why he's on his way to Lemon Creek. Such statements as "We have carefully reviewed the record and find there is sufficient evidence to sustain a conviction" is not in my mind judicious unless supported by an opinion indicating what evidence *is* sufficient. Even my dumbest clients complain that if the court has indeed "carefully reviewed the record" and there are reasons, why not put them on paper? A good question.

Sometimes I think the Court of Appeals is caught in the assembly line of justice and seems to forget that attorneys have clients who are real people and deserve reasons. Incorrect reasons or poor reasons are even better than none. One of the functions of the court system is to assure the litigants that they've had their days in court. Even if they lose, it assures them that three judges have reviewed the matter and have reasons for affirming a conviction. And while it is true that some arguments may not deserve the time of day, still, a litigant, especially one who is on his way to jail, deserves to be told why. That function is sadly lacking in some of the decisions that come down, and leaves litigants with the wrong impression that the lights are on but nobody's really home.

Keep It Simple and Brief

Although the above is beyond a doubt my strongest complaint, the problem results from a burgeoning caseload. The complaint I have lodged above, while not excusable, nevertheless reflects the fact that the caseload before the Court of Appeals has jumped significantly over the last years. If you want to get your case across, you've got to stay simple and brief on most cases.

Cases take from six months to 1½ years to decide after argument. In fiscal year 1985, the recent annual report reflects 103 published opinions and 238 MO & J's, for a total of 341 opinions. The Court of Appeals also disposed of 120 cases by petition for review. That's a total of 461 cases per year. The Court of Appeals must resolve 461 cases and actually write 341 opinions. That's almost one written opinion a day (if you count weekends) and well over that if you consider cases denied without opinions. The above statistics mean the Court of Appeals obviously has no choice but to allocate its resources in a reasonable and limited fashion. They simply can't write a law review on every, let alone most, cases.

From the point of view of litigants, the lesson is simple. Stick to the basics, focus on your strongest claims, and to the extent your client will let you, weed out the losers. Overlength briefs are a thing of the past. I've had overlength briefs rejected by the court under circumstances where in the past they would have welcomed the help. If you can, stick to the 50-page limit for openings and 20 pages for reply. If the issue can't be fully explained in 70 pages, you're probably in deep trouble to begin with. When you think about the fact that the State also gets 50 pages, if you take your full 70 pages, that totals 120 pages of briefing before the court even gets to the law clerk's pre-oral memorandum. It makes it kind of impossible for a judge to digest that much briefing at the rate of one case per day.

Humoring the Court

The Alaska Court of Appeals, while an open court has become a "court system." Due to the increase in the caseload, you should try and stand out to the extent you can and make your case notable. Be it by humor, juggling, standing on your head, screaming, or emphasizing the more intriguing parts of your gruesome criminal facts, you've got to catch the Court of Appeals' attention, or you could fall between the cracks.

My favorite example was in argument for *Arnold v. State*. Jeff Feldman, counsel for the defense was arguing ineffective assistance of counsel, mandated reversal. The court asked Mr. Feldman if they should write a "short unpublished decision" or if ineffective assistance of counsel was widespread enough to merit a full opinion. The dialogue went:

> THE COURT: Do you think the issue of ineffective assistance of counsel is so widespread as to merit a broad prophylactic ruling?
>
> MR. FELDMAN: Well, it's kind of like AIDS. It's not so common, but when it hits it's lethal to a fair trial.

When the room stopped laughing and the argument was over, that case no doubt stood out above the others. And while Mr. Feldman's AIDS analogy was not adopted in the full decision, I'm sure the Court of Appeals was wearing gloves when they authored the opinion.

The Gateway to the Ninth Circuit

From the point of view of defense counsel, it's true, you do lose a lot of cases in the Court of Appeals (about half). But the attorney who writes off the Court of Appeals as a half fruitless asset and fails to properly raise or think about the appellate record, is doing a client a great injustice and possibly pitching away an important chance at getting a fair trial. To the extent that criticism of the Court of Appeals holds true, I have a simple suggestion. Make your objections in the trial court below, based on state *and* federal grounds. That way if the Court of Appeals doesn't give you what you want, you can always go to the Ninth Circuit. The restaurants in Seattle and San Francisco are far superior to Alaska, if not the quality of law.

Dimond profile . . .Continued from p. 4

Seabees, but then the Army troops took it over. The Japanese attacked ferociously. It took six months of obdurate warfare before Bougainville was secure. By then, the casualties on both sides were quite large, though the Japanese losses were by far the greatest.[1]

By coincidence, James M. Fitzgerald, now Chief Judge of the U.S. District Court at Anchorage, was on Bougainville on several occasions in 1944. He was an aerial gunner in a Marine torpedo bomber squadron. According to him, the U.S. forces secured only parts of the perimeter of the island, leaving many of the Japanese troops immured in the inland areas. He confirms that Bougainville was physically a repulsive place on which to serve. In his own case, he only spent a few nights there from time to time, while waiting to fly on missions elsewhere.

In March of 1944, John Dimond was gravely wounded. The official citation reads:

> TO ACCOMPANY THE AWARD
> OF THE SILVER STAR
>
> First Lieutenant John H. Dimond,
> Corps of Engineers, United States Army.
>
> For gallantry in action at Bougainville, Solomon Islands, on 13 March 1944. Upon learning that a carrying party had received a heavy concentration of enemy mortar fire resulting in several casualties, Lieutenant Dimond, without regard for his own safety, advanced 250 yards to assist the fallen men. While aiding a wounded soldier amidst bursting mortar shells, Lieutenant Dimond was hit in both legs by shell fragments. Although painfully wounded, he refused evacuation until all other casualties had been removed. Lieutenant Dimond's courageous action was an inspiration to his men, and exemplifies the highest traditions of gallant leadership.

John's wounds were something more than merely "painful." He nearly lost one leg. He was hospitalized for more than three months, but returned to combat duty before his wounds were completely healed. Thereafter, he participated in two campaigns in the Philippines, at Leyte and Cebu. At Cebu he was awarded a bronze star medal. That citation reads:

> For meritorious service in connection with military operations against the enemy at Cebu, Philippine Islands, from 31 March to 18 April 1945. Lieutenant Dimond, in charge of a demolition team, supervised the destruction of enemy emplacements, cleared mines and booby traps and sealed caves and gun emplacements. He also supervised the security detail for a bulldozer operating in the forward area. Lieutenant Dimond's leadership and ability, with complete disregard for his own safety, were instrumental in saving the lives of many of the infantrymen by the removal of these obstacles and aided materially in the success of the operation.

Altogether, John was in combat status for two full years. During that time, he also contracted malaria, and had a long struggle to overcome its debilitating effects.

The War Ends

The war ended. In November of 1945, John returned to Alaska to Fort Richardson, in preparation for mustering out. He became engaged to Roberta "Bobbie" Dooley, a vivacious, bright, Celtic-looking young woman who had grown up in Cordova. They were married in a ceremony performed in Anchorage on January 11, 1946. Shortly afterward they took passage on an Alaska steamship passenger vessel bound for Seattle.

Not long after arriving in Seattle, John was discharged from the Army with the rank of captain. At that time, it was his intention of entering the Colorado School of Mines at Golden to pursue an advanced degree in metallurgy. When he and Bobbie arrived there, it turned out that there was some difficulty about transferring some of his undergraduate credits.

At this point, John put in a telephone call to Bob Bartlett, who was then Alaska's Delegate to Congress. John said, "I've been thinking things over. Do you think I should study law?" Bartlett replied, "It's what I've always thought you should have done in the first place."

That decided the matter. John and Bobbie hastened to Washington, D.C., and John was able to enroll in law school at Catholic University of America.

During the law school years, Bobbie worked in the offices of Delegate Bartlett. John accelerated his graduation by taking summer courses at George Washington University.

At that time, military veterans were allowed to take the District of Columbia bar examination if they had completed a certain number of credit hours of study. John qualified, passed the examination, and was admitted to the District of Columbia Bar in April of 1948. He obtained his law degree in June of 1948. He and Bobbie then returned to Alaska. John was admitted to the Alaska Bar in October of 1948, and began his career as a practicing lawyer.

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[1]About the war in South Pacific, generally, and Bougainville in particular, see J. Costello, *The Pacific War* (N.Y. 1981), 421–27, 457–58; C. Bateson, *The War With Japan* (Hong Kong 1968), 275–76.

Former Alaska Supreme Court Justice Roger Connor now works with the firm of Smith, Robinson, Gruening & Brecht.

Continued in next issue

Malpractice rates . . .Continued from p. 1

eight-person firm the premium for a $2 million policy would be approximately $15,000 annually on a claims made basis with a substantial deductible. These figures represent an Anchorage agent's best "ballpark" guess as to what the immediate future may bring and should not be utilized for planning purposes. Again, we are told that Fremont has no excess coverage currently available.

At this point, the only carrier which we are aware of with excess limits exceeding $2 million is National Union Fire Insurance Company. Currently, the sole practitioner seeking $5 million in professional liability insurance with National Union would pay $15,833 annually for that policy, which carries a $10,000 deductible on a claims made form. The dramatic increase in premiums is illustrated by the following information obtained from National Union Fire Insurance Company's Anchorage managing general agents, Bayly, Martin & Fay.

Prior to September 1, 1983, the approximate premium level for $1 million of liability insurance with a $1,000 deductible was $1,000 annually. On September 1, 1983 that premium increased to $1,200 annually; by September 1, 1984 it had increased to $1,600 and on September 1, 1985 it had doubled from the previous year to $3,200 per attorney.

National Union's rates appear to be reasonably firm at this point; a rough estimate as to projected premium increases can be obtained by multiplying $3,200 per attorney for $1 million in primary coverage times the number of attorneys in the firm. As can be seen from the earlier examples, the availability of excess insurance over that primary layer is no longer without substantial additional cost.

Attorneys monitoring the sharply rising rate structure were well advised to have considered the possibility of cancelling short their existing coverage and renewing before November 1, 1985. For example, a seven-attorney firm renewing before November 1, 1985 with National Union would be looking at an annual premium of $31,426 for $5 million in coverage. After that date, the premium will increase to $35,926 annually. At lower levels the contrast is less extreme because a seven-attorney firm which renewed before November 1 could expect premiums of $28,711 and thereafter would look at an increase to $29,908 annually for $3 million in coverage. Two million dollars coverage would be available at the rate of $23,926.00 for the same size firm with no November 1, 1985 deadline. Finally, I should note that the only market for coverages in excess of $5 million of which we are currently aware is that provided by National Union and, possibly on a case-by-case basis, through Underwriters at Lloyd's.

Those attorneys who have been labeled as distressed accounts because of prior adverse claims experience may find insurance unavailable from any source. The current information suggests that Fremont and National Union will carefully screen attorneys with a history of prior claims.

Based upon the professional liability committee's initial investigation, it appears that there is little immediate relief in sight. However, your committee is exploring ways of improving the rate structure, including the possibility of entering into another bar-sponsored program similar to the now defunct INAX program. We are exploring the possibility of entering into a regional pool similar to a proposal now being investigated by members of the Jack Rabbit Bar Association. Oregon has a professional liability fund providing primary coverage of $200,000 which Alaska looked at closely nearly 10 years ago and will again reexamine.

One of the problems likely to be encountered in any effort to participate in a regional pool or to affiliate with a captive insurance company is the past claims history in Alaska. National Union Fire Insurance Company's incurred loss and expense ratios from 1979 through the current year do not bode well for our prospects. National Union Fire Insurance Company reported incurred loss and expense ratios on a cumulative basis for 1979 at 357%; they remained at that figure for 1980. In 1981 the ratio was at 271% and increased in 1982 to 282% and in 1983 was 239%. The figures for 1984 and 1985 were 200% and 189%, respectively, but are considered to have very little credibility since that loss experience has not matured.

As indicated earlier, the committee is in the process of getting claims experience information from various carriers. Presently, we have received a computerized printout of the claims experience for National Union Fire Insurance Company which we have not yet analyzed. We hope to have additional claims documentation from INAX and Fremont, although Fremont's experience in the Alaska market is relatively new and their claims may not have matured sufficiently to provide accurate data.

Finally, the Alaska Bar Association has engaged the services of Duke Nordlinger Stern, nationally known legal malpractice expert, who will be assisting the bar association in matters of risk management and legal malpractice. It is anticipated that Mr. Stern will be presenting a series of seminars directed to the avoidance of legal malpractice claims. In the interim, members of the bar are urged to meet with their insurance agents to review their own insurance situation. The professional liability insurance committee is interested in additional data on rates and availability and, to the extentj that information as to insurance availability and rates quoted to bar members differs from the rates set forth in this report, the committee is interested in pursuing any lead to increased availability or lower rates.

Keith E. Brown is a partner in the Anchorage firm of Hagans, Brown & Gibbs and is the chair of the Alaska Bar's Professional Liability Insurance Committee.

Using investigators in *civil* cases

by Leroy Cook

What mistakes do attorneys most often make in attempting to use an investigator? This question was posed to a sampling of experienced investigators from several states and foreign countries at the 60th Annual Convention of the World Association of Detectives recently. Their answers were nearly unanimous. From such diverse places as California, Singapore, Jerusalem, and Ecuador the answer was the same: "Inadequate communication."

If the attorney doesn't know and/or have previous experience with the investigator being considered, the lack of communication is worse than poor procedure, it is dangerous. A pre-assignment briefing session with the investigator where the theories and known facts are discussed will give the attorney some basis for judging the investigators competence. With malpractice being a common vocabulary word no one needs an agent (the investigator) running around thinking they can do what they see Magnum do on T.V. A good investigator must not only understand liability and damages, they must be aware of the cannons of ethics the attorney is bound by. If during the pre-assignment conference the investigator refers to the electronic bugs he or she can use you know immediately they have been watching too much T.V., have a circuit breaker tripped, or all of the above.

A more subtle thing to watch for is the investigators understanding of your adversarial role. Insurance adjusters and police officers should not be adversaries and the good ones are not. Training in these fields however, where most investigators come from does not even address the adversarial role played by attorneys in our system. Most non-legally trained people think attorneys come by their "unreasonable, one-sided, aggravating," position as a result of a personality flaw. A former adjuster or police officer who doesn't know when to report verbally or when to just have a nice conversation instead of taking a statement might do a great job of winning the other sides case.

Other than saving you from embarrassment and wasting your money, what else can be gained by that extra few minutes going over the file together at the onset? Good investigators are generally well educated individuals. They frequently have diverse backgrounds and have pursued education and training in many areas both academic and non. If they have survived in the profession through the first two or three year shake-out period you can be sure they have inquiring, analytical minds that are capable of creating a synergism with your mind. This potentially valuable benefit is lost when cases are worked on a "specific instruction" basis. Without formal legal training and day to day exposure to the statutes and rules of court the investigator is in a better position to see things from a jurors' perspective.

After a good discussion of the theories involved and the facts they are based on between the attorney and investigator, the investigators' first job is to see how many of the facts provided by others are wrong. Any investigation pursued without this first step is almost as dangerous as no investigation at all. Always following this first step helps avoid negative surprises down the line. If there are areas of testimony in the policy or accident reports or in the information provided by your client about which you have questions, be sure the investigator is aware of your curiosity. This level of communication greatly increases the possiblity of the investigator coming up with positive surprises like additional defendants with deep pockets, previously unknown product defects, independent intervening causes, additional insurance, et cetera.

Having a good investigator do an errand or carry out a specific instruction without bothering to brief them on the case is sometimes appropriate but in most cases it is like buying a computer and only using it as an adding machine.

One of the greatest boosts to my ego happened seven or eight years ago when I was asked to work on a case which had bounced around from attorney to attorney for two or three years. I was provided with an apple box full of files and about forty hours later gave a list of thirteen things I felt were worth pursuing to my client. To my delight, a week later I got a copy of my client's letter to the principle recommending essentially the same items I had listed. I got the go-ahead and a few months later a witness was dug up who made it possible to resolve the case very favorably for our side. The frank admission on the part of the attorney who gave me the assignment that it was a white elephant he knew very little about got us started in the right direction and the results were good. Sending me out to conduct specific investigative activities without allowing a full review of the file would have been an exercise in futility for both of us.

One war story leads to another to make my last point. Professional investigators have a network of other investigators, specialists, and contacts that can only benefit you and your client if the investigator knows what you need. My greatest coup for a client saved the principle millions of dollars. I was asked to get some information in a foreign country. I took the appropriate part of the file with me and went directly to the office of a fellow investigator I knew both personally and by reputation in that country. We went over the case and the depositions together and his agents did the leg work. They got what we needed and the opposition's case was totally destroyed. Ironically, my bill for services was nominal because of airfare wars and the good time I had while the locals did the door-knocking. I expect to get payed in every case however, whether the case is won or lost and whether my client collects from the principle or not. Since that is the way the game is played I don't mind missing those occasional big ones. The initial briefing with the investigator should include a discussion of fees and/or financial limits. If you don't bring it up it is not unreasonable for the investigator to assume results are more important than budget.

The most successful attorneys I have worked for over the past ten years have demonstrated the principles I am recommending in this article. I have adopted them in using other experts and investigators on a sub-contract basis. They have kept me out of trouble and given good results; and I am only human. Think what they will do for you.

The years with Dan. . . Continued from p. 1

Dankworth was the only person Hickey knew who ever used the word "shoeboxes" to mean secret files—until years later, that is.

Hickey's interest in criminal law, and his liberal leanings, prompted John Havelock to appoint him Juneau District Attorney in 1973. Hickey's government know-how made him valuable in working with the legislature, the police, and the Governor's Commission on the Administration of Justice, which doled out federal funds for law enforcement uses. Hickey's statewide perspective on criminal justice issues caused Havelock (and later Av Gross) to rely on him more and more in running all the other prosecution offices.

Until the mid-70's there were only six district attorney offices (Ketchikan, Juneau, Anchorage, Kenai, Fairbanks, and Nome) reporting directly to the Attorney General, but there was pressure to open new offices in Bethel, Kodiak and other areas. Then-Attorney General Av Gross began to realize that he needed a Deputy Attorney General to handle criminal affairs.

The Ban on Plea Bargaining

By 1975, it was critical that there be a new Deputy because Av Gross was about to embark on his great Alaska experiment—banning plea bargaining—and he needed someone to implement that policy. Dan Hickey was the logical choice.

There was only one problem: Hickey was the ultimate wheeler and dealer in criminal cases. He still relishes telling of the days when he and prominent Juneau defense attorney Gail Roy Fraties would sit down with sixty or seventy cases and bargain for hours.

Prosecution was a different practice in 1975 than it is in 1985. In 1975, the first thing that Juneau Public Defender, now Superior Court Judge, Walter "Bud" Carpeneti, told his new intern (one of the authors of this article) was that "these guys *never* go to trial." He was right.

There was also very little case screening by prosecutors. A lot of bad cases got filed because the cops would scream if a case was declined for prosecution. The police thus had little incentive to do very good investigative work. These bad cases could of course never be brought to trial, so they had to be bargained. Bargaining became the only way to practice—bad cases, good cases, they all got bargained. Prosecutors were also a bit afraid of trial—fear of the unknown perhaps.

> "Hickey was the ultimate wheeler and dealer in criminal cases."

In mid-1975 a murder in Sitka had to be bargained down in mid-trial by Dan Hickey's office to manslaughter (and no extra jail time) because of a shoddy police investigation. The victim's family complained and the Judicial Council held hearings in Juneau, taking testimony from, among others, the prosecutors and the judge. Only defense attorney Gail Roy Fraties was not criticized. That was the last straw for Av Gross. (Gross had represented the defendant briefly, and Hickey believes Gross probably knew he was guilty of premeditated murder.) Shortly thereafter Gross announced that there would be no plea bargaining for cases filed after August 15, 1975. The district attorneys (with the exception of Harry Davis who does things his own way in Fairbanks) were uniformly opposed to the ban. The most vocal opponent was Dan Hickey.

Deputy Attorney General for Criminal Affairs

Hickey's other capabilities were obviously more important than his (temporary) opposition to the ban on plea bargaining. He was appointed Deputy Attorney General for Criminal Affairs at the ripe old age of 29.

But Hickey couldn't take over the new job just yet. He had one more thing to do as Juneau District Attorney—he had a trial to do. For those who know Dan Hickey's compassion for those in our society who are most vulnerable (and his zealous pursuit of those who lie and fail to take responsibility for their conduct) it will not be surprising that he would postpone his promotion until he could personally handle a case that contained both of these elements.

The same Dan Hickey who could stand cheek-to-jowl and trade jibes with the Ed Dankworths, Bill Rays, and Alex Millers of the world, also enjoyed chatting at night with the janitors who took care of the state offices in Juneau. One rainy night one of these old gentlemen was run down in front of the Capitol Building by a drunk driver and left to die. Dan Hickey didn't have to look into the faces of the other janitors to know that this case was different. There would be no bargains, no deals. See, *Lupro v. State*, 603 P.2d 468 (Alaska 1979).

> ". . . he formulated policies for prosecution offices, gave attention to budget matters, and provided a consistent level of legal services to criminal justice agencies like the state troopers and the state prison system."

By the end of 1975, Hickey finally began to devote all his energy to his new job. With a staff of two lawyers, he formulated policies for prosecution offices, gave attention to budget matters, and provided a consistent level of legal services to criminal justice agencies like the state troopers and the state prison system. In 1976 he also changed his title from the awkward "Deputy General for Criminal Affairs" to "Chief Prosecutor." Hickey wanted it to be known who was in control of the district attorney's offices. The emphasis back then was on "Chief"—not "Prosecutor."

A New Organization

Hickey also began to analyze the way the Criminal Division of the Department of Law did its work. He saw the value of the ban on plea bargaining and slowly, painfully, took advantage of it. Case screening got tighter; police were forced to do a better job at investigating. One-by-one, office-by-office, Hickey won over converts, sometimes solely on his personality and the strength of his commitment.

> "Some of his innovations are the most successful new programs in the criminal justice system."

Hickey also wanted to do something about the inconsistent and often inadequate positions taken by the various offices in criminal appeals. So he set up the Office of Special Prosecutions and Appeals (OSPA). In addition to appeals, the office was created to handle white collar crime, which was another thing that wasn't being done well. As with most other innovations, there was resistance to OSPA by the other offices. However, better appellate results and increasing caseloads convinced prosecutors that OSPA could do a better job. When the last D.A. holdout was sanctioned for late briefs in three consecutive cases, the transition was complete.

But Hickey didn't stop there. Some of his innovations are the most successful new programs in the criminal justice system: trial training for prosecutors from the National Institute of Trial Advocacy; sexual assault prosecution teams to focus on the dramatic increase in sex cases; victim-witness assistants, who assist victims and witnesses to

Continued on page 25

An inside look at Dan Hickey, the first and last chief prosecutor: 1975–1985

cope with the trauma of testifying in court; pretrial diversion, to permit nonviolent, first offenders to avoid the criminal justice process. Each new innovation followed the same pattern: resistance, grudging acquiescence, and ultimately complete dependence on the new service.

A Legacy of New Laws

Virtually every important criminal law in Alaska was changed by the legislature during the last ten years. The revision of the criminal code, the adoption of presumptive sentencing, the tightening of the insanity defense, the expansion of the drunk driving laws, and the drug law revision, to name a few major pieces of legislation, fundamentally transformed the practice of criminal law in Alaska. Perhaps more so than anyone else, Dan Hickey played a major role in getting this legislation passed.

Few will dispute that Dan Hickey was extremely successful with most of his legislative initiatives during this period. These new laws have made the prosecutor's job easier and, correspondingly, the job of defense attorney that much more demanding. As Dan Hickey wrote in the last issue of the Bar Rag, some lawyers believe that the new laws have "taken the fun out of being a defense attorney." Vol. 9, No. 2, page 5 (August 1985)

It would be a mistake, however, to also conclude that Hickey adopted a "kneejerk" reaction to legislation and supported any proposal which expanded the reach of the criminal law and/or resulted in harsher sentences. In many cases Hickey took positions contrary to the desires of law enforcement groups and legislators who had carefully cultivated the "law and order" label.

"Virtually every important criminal law in Alaska was changed by the legislature during the last ten years."

Brian Wallace

Dan Hickey in his office

Hickey followed a simple rule: if a proposal furthered the goal of establishing a fair, rational and predictable criminal justice system, it would be supported. Changes which were inconsistent with this goal were opposed, even though the proposal may have made it easier to obtain a conviction or a harsher sentence.

For those of you who were around in 1978 when the legislature passed the revised criminal code, you may recall that one of the early and most vocal opponents of the revision was the Alaska Peace Officers Association. The Association's suspicions about Hickey and his idea for a revised code were triggered a year earlier when the Departments of Law and Public Safety convinced Governor Hammond to support a rewrite of the drug laws which, among other things, reduced the penalty for the possession of cocaine to a misdemeanor. The Association opposed the change even though it was consistent with federal law. The Association's opposition eventually caused the Commissioner of Public Safety to withdraw his support, which in turn resulted in the death of the proposal. After that the Association became convinced that the criminal code revision was another Hickey attempt to reduce the penalty for crimes, and to make the job of peace officers more difficult.

As the criminal code bill gained support in the legislature, the Police Officer's Association took the offensive. In an Anchorage Times headline which appeared several days before the House was scheduled to vote on the revision, the chief lobbyist for the police referred to the bill as a "radical" proposal that undermined the state's ability to prosecute crime. The Association subsequently proposed numerous amendments to the code, some of which were eventually adopted, but many of which were opposed by Hickey and were not enacted into law.

Four years later, Hickey's continued opposition to draconian measures placed him on a collision course with the chairwoman of the House of Judiciary Committee, Ramona Barnes.

The event which triggered Barnes' hostility was Hickey's opposition to her proposal to increase the maximum penalty for sexual assault in the first degree for a first offender to 99 years.

Barnes was particularly furious when Hickey's opposition to her proposal was endorsed by the women's shelter groups and the Department of Public Safety. From that point on, Barnes tended to view Hickey and his staff as the "enemy" and shortly thereafter told Hickey's primary legislative person (one of the authors of this article) that he should be careful what he said in testimony before the Judiciary Committee since she could ensure that the department's budget was cut if it opposed her bill. When Hickey was told of Barnes' threat he said to simply ignore it.

When it became apparent to Barnes that she could not gain Hickey's support merely by threatening to cut his budget, she took another approach. One morning, three hours before a scheduled hearing, she took a brand new bill to Governor Hammond and went through it section by section. Never having seen the bill before, and never having discussed its contents with the Department of Law, the Governor told Barnes that the changes seemed okay to him.

Hickey and his staff got a copy of Barnes' bill approximately an hour before scheduled testimony on it. Among the bill's numerous provisions was a section which made it a crime to cause injury to a police dog and provided a higher penalty for harming a police dog than for causing injury to a human being. Barnes began the hearing by informing the committee that the testimony of Hickey's staff was largely irrelevant since the Govenor had already expressed his support for the bill. With Hickey's full support, his staff opposed roughly a third of Barnes' proposal. During one part of the testimony the police dog crime was called a "joke," which got one of the authors of this article banned from the Committee for the rest of the legislative session.

The Hohman Case

Dan Hickey's lasting impact on the state will no doubt be his body of new criminal justice legislation. But his controversial reputation grew up as a result of his prosecutions of public officials. Most people will only remember him for the Hohman and Dankworth cases, and the recent impeachment proceedings. Few will recall the much greater number of police officers and mid-level bureaucrats who were prosecuted by the Criminal Division during his tenure.

As far as the Hohman case goes, Tim

"Dan Hickey's lasting impact on the state will no doubt be his body of new criminal justice legislation."

Petumenos will always remember being awakened in the middle of the night in May, 1980. "Catch the first plane to Juneau," Hickey told him, "and don't bring that awful orange suit with you." (Tim donated his burnt-orange suit to the Criminal Division when he left state employment in 1983. It is now proudly enshrined in OSPA.)

What Petumenos found when he got to Juneau was that Representative Russ Meekins was claiming that Senator George Hohman had tried to bribe him. At the time, Hohman was chairman of the Senate Finance Committee and one of the most powerful legislators. He had always had a good relationship with the Criminal Division, as chairman of the Senate Judiciary Committee in 1978, and had been very supportive of Hickey's ideas on the revised criminal code. But he had crossed that line—the line that separates hard ball politics from corruption.

"Under federal law, a public official with a conflict of interest who breaches his duty of honesty and loyalty to the public can be guilty of fraud."

To Hickey there was only one course.

The investigation revealed a great deal of circumstantial evidence that corroborated Meekins. However, the grand jury investigation was delayed for several months because a critical witness had refused to testify. Hickey used the case to bring the question of immunity to the Supreme Court and prosecutors were given the power to grant immunity and thereby compel testimony. See, *Surina v. Buckalew*, 629 P.2d 969 (Alaska 1981).

A recent article in the Bar Rag asserted that Hohman was convicted under "overbroad and vague provisions" of the bribery statute. Weidner, Vol. 99, No. 2, page 18 (August 1985). However, if offering "a sackful of money" isn't clearly covered under our statute then I'd like Phil Weidner to tell us what is covered.

The Dankworth Case

During the proceedings against Hohman, the *new* chairman of the Senate Finance Committee was busy trying to sell his pipeline camp to the state. In May, 1982, one of the legislature's top budget people and a state legislator came to Dan Hickey and told

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The years with Dan . . . Continued from p. 25

him that Senator Ed Dankworth had manipulated the budget process to create a large pot of money that could be used to purchase the pipeline camp.

To Hickey there was no question that another legislator had crossed the line. Dankworth had a clear conflict of interest, which is punishable under Alaska law as a misdemeanor. The only question was a legal one: was Dankworth immune from prosecution because he was a legislator? After a complete investigation, the advice given to Dan Hickey by his staff was this: Don't risk an uncertain result in the state courts; take the case to the U.S. Attorney's Office for prosecution under federal law.

> "Hickey wanted to get the issue of state legislative immunity resolved once and for all."

Under federal law, a public official with a conflict of interest who breaches his duty of honesty and loyalty to the public can be guilty of fraud. See, e.g., *U.S. v. Keane*, 522 F.2d 534 (7th Cir. 1975). However, legislative immunity under the federal constitution does not apply to state legislators, and legislative immunity under the state constitution is irrelevant in a federal prosecution. Hickey could have easily used the federal cross-designation program (where state prosecutors are designated in federal court as special assistant U.S. attorneys) to avoid the state doctrine of legislative immunity that Dankworth ultimately prevailed on in state court.

But Hickey was not simply out to "get" Dankworth. He viewed the case as a state problem that ought to be dealt with under state law. Here was a state legislator, manipulating the state budget, so that state funds could be used to buy his pipeline camp. Besides, Hickey wanted to get the issue of state legislative immunity resolved once and for all. The resulting grand jury indictment was ultimately dismissed because of Dankworth's immunity under the "Speech and Debate Clause" of the Alaska Constitution. See, *State v. Dankworth*, 672 P.2d 148 (Alaska App. 1983).

The 1983 Legislature

The *Dankworth* case led to pressure for a code of legislative ethics which became an issue in the 1982 elections. However, Dankworth continued to wield tremendous political influence that was undiminished by the publicity surrounding his legislative machinations. According to many knowledgeable sources, in late 1982 Dankworth singlehandedly organized the majority coalition in the Senate and thus had as much power as when he was a senator.

It was early in the 1983 session when we began hearing certain senators in the majority coalition say that Hickey kept "shoeboxes" (i.e., secret files) on legislators. It was the first time in many years that Hickey had heard Dankworth's term used. And it came as no surprise that that particular word was being passed around among the senators most influenced by Ed Dankworth.

The 1983 session was crazy. The Governor's political enemies made allegations about his post-election fundraising trip to collect money from oil companies in Houston and Denver. Both Hickey and a special prosecutor determined that there was no basis for prosecution. Some legislators, particularly in the House, continued to press the attack on the governor and threatened to not confirm his cabinet appointments. The House coalition, under the leadership of Joe Hayes, Ramona Barnes and Charlie Russell, began to travel. Partially this was the result of an incident where a member of the House claimed that a legislative staffer tried to get him to bug a conversation with one of the governor's cabinet members to gain ammunition for the upcoming confirmation hearings.

> "Both Hickey and a special prosecutor determined that there was no basis for prosecution."

Hickey investigated, pursuant to a formal request from the Speaker of the House, but found no basis to take action against either the staff member or his legislative employers. If Hickey was as diabolical as many believe, he would not have passed up this opportunity to expose the silliness of internal legislative plotting. Despite Hickey's "hands off" approach, reliable reports (from a legislator who was present) indicated that paranoia was rampant and that during several House majority caucus meetings a few members said that Dan Hickey was out to "pick them off, one-by-one."

The House adjourned without confirming the governor's cabinet appointments. The Senate forced the House back into session and the governor convened a joint session. The President of the Senate put a "call" on the House and asked the State Troopers to bring in the recalcitrant members. Dan Hickey helped advise the governor and the troopers and, as a result, was named in a federal civil rights action by two members of the House. The suit was ultimately dismissed by the federal district court and affirmed by the Ninth Circuit. However, documents filed in the case reflect that the confirmation fight may have been over one man: Dan Hickey. Given the paranoia over Hickey, it was not surprising that many legislators wanted him out. News articles at the time quoted Charlie Russell as saying that there was a deal proposed whereby all the cabinet members would be confirmed if Hickey was fired. During the recent impeachment proceedings Governor Sheffield testified that early in his administration he was approached by several legislators who asked him why he kept Hickey around since "half the state hates him." But Attorney General Norm Gorsuch (like all other attorneys general before him) put his foot down: Hickey would stay.

The impeachment proceedings of this past summer are recent enough in everyone's memory that they need no further discussion here. You can all come to your own conclusions. For those of us who have worked with Hickey, his conduct has been consistent throughout his entire career. For better or worse, whether you agree with his decisions or not, he believed that what he was doing was in the best traditions of the public prosecutor's ethical obligation to "do justice."

Dean Guaneli is an Assistant Attorney General in Juneau who worked under Dan Hickey from 1976 to 1985.

Barry Stern is a Professor of Law at Western New England College of Law in Massachusetts. He worked under Hickey from 1979 to 1982.

The title "Chief Prosecutor" has been abandoned by Attorney General Hal Brown, in favor of "Chief of the Criminal Division."

In the Mail

. . . Continued from p. 3

Novel tactics

November 13, 1985

Dear Editors:

I thought our readers would be interested in a new innovative technique developed in Columbia to facilitate the filing of late briefs.

Very truly yours,
Clark, Walther & Flanigan
Michael W. Flanigan

Bar Rag Slime

October 1, 1985

Gail Roy Fraties
1031 W. 4th Ave.
Suite 520
Anchorage, AK 99501

Dear Gail:

"The Bar Rag" a family newspaper—after the smut and slime you wrote in it. Come on, Gail!

The White Knight
aka Thomas R. Wickwire, Fairbanks

More fan mail

Dear Gail,

I got a real kick out of Phil's article. Ha! Ha! Ha! He's such a kidder.

Randy Johnston
State Trooper Headquarters

P.S. All the white collar gumshoes really enjoy the paper. Thanks.

Flanigan's plan UPI/Reuter

A Colombian army tank batters down the main door of the Supreme Court building in Bogota.

More fan mail

October 23, 1985

Gail Roy Fraties
Editor in Chief
The Alaska Bar Rag
c/o Alaska Bar Association
310 K Street, Suite 602
Anchorage, Alaska 99501

Dear Gail:

Thank you for a copy of the August 1985 edition of The Alaska Bar Rag. It is nice to now have a convenient forum in which to eulogize yourself.

Best regards,
Stephen M. Blumberg

'Amadeus' takes the stand

At the airport, Hulce admitted that he would like to take full credit for the creative laugh-song of Mozart (one of the distinguished features of the film) but it had been written in the script. Mozart was supposed to be a giggly sensualist. "It was up to me, however," Hulce added, "to come up with something outrageous, which I did after a few drinks." I told him he'd feel at home in Alaska, where almost everyone feels outrageous after a few drinks. He'd like to come but only in the summers, which are calendared well in advance now.

Few actors have any appreciation at all for the screen writer. They mistakenly think that their interpretation of the written word alone is what makes an outstanding performance. Hulce, thank God, is an exception. He loves the written word and admires those who create it. Since "Amadeus" he is in the envious position of receiving script after script but so far he is waiting for a script that really excites him.

My closing moments with Tom Hulce led me to believe that secretly he wanted to write a script and star in it himself, a rather common practice among big actors (i.e. Sylvester Stallone in "Rambo"). So I asked. "No," he replied, "I can't write. I've played a lot of autobiographical parts of writers, but the fact is I'm intimidated by a blank page. It's a mystery to me how one can create something out of nothing."

Oh well—literature's loss is filmdom's gain. Tom Hulce's performance in "Amadeus" alone will be written about a good half century from now whether he ever writes a published word or not.

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