Happy Holidays

Joe Slusser and the Call of the Wild —Page 7

Four New Judges —Page 17

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The Alaska BAR RAG

Volume 12, Number 4 — *Dignitas, Semper Dignitas* — November-December, 1988

IRS abuse

Taxpayer Bill of Rights coming

Sends Russians to Barrow

Elvis saves whales

By Thomas A. Matthews

We have all heard the horror stories about the heavy handed collection actions being taken recently by the Internal Revenue Service ("IRS"). A little girl's savings account or piggy bank is seized to pay her parent's back taxes. The only money in the account had come from the girl's collection of aluminum cans. Since her parent's names were required on the bank account, the IRS seized the funds. Another little boy's bicycle is taken to pay his parent's taxes. Could the IRS possibly net any funds to be applied to the delinquent taxes after paying the expense of selling the bicycle? For those of us living in Alaska, are our children's permanent fund dividend checks in jeopardy?

In the wake of these, and many other horror stories about IRS abuse of taxpayer's rights, many people have questioned whether the 1986 Tax Reform Act broadened the IRS' power to collect taxes from delinquent taxpayers, or has the IRS simply become more heartless in its collection efforts. In an effort to curb the apparent abuses by the IRS, seven bills were introduced in Congress this year calling for a taxpayer bill of rights.

This article will briefly discuss the rights and remedies of taxpayers and the IRS under the current state of the law, and then highlight in general the provisions of the Taxpayer Bill Of Rights legislation. As of the date of this article, Congress has not yet passed a Taxpayer Bill of Rights. However, if such legislation is to be passed out of Congress this year, it is likely to be associated with S-2238, the Technical Corrections Act of 1988.

For those taxpayers who, for one reason or another, fail to voluntarily compute and timely pay all taxes owed to the federal government, the IRS is empowered with a statutory scheme of forced collection procedures set forth in the Internal Revenue Code and accompanying treasury regulations.

Essentially, the scheme empowers the IRS to assess a federal tax, impose a lien for the amount assessed upon all property belonging to the taxpayer, and, if the taxpayer still refuses voluntarily to pay the tax, to sell the property of the tax-

... and when you can clean out old files See Page 24

payer until the proceeds of the sale satisfy the obligation.

To facilitate these procedures, the IRS is given the authority to summons documents and other information, including testimony, from taxpayers and third parties. All of these powers may be exercised without prior judicial approval. The collection scheme also grants taxpayers certain rights and remedies.

Unconfirmed reports from an anonymous source indicate that Elvis Presley, formerly of Memphis, Tennessee, spent several days during mid-October of 1988 in Barrow, Alaska.

The King of Rock and Roll, who has recently been spotted throughout the country, but who has shunned publicity since his death in August of 1977, reportedly flew to Alaska on a humanitarian mission where he secretly, and undetected by the National media, extracted the young whale, "Bone," from the Arctic ice and delivered it to safety.

Reports suggest that Presley, who was sporting a full beard at the time, was in good health and enjoyed the whale adventure. He was particularly amused by reports that the young whale had drowned and likened rumors of Bone's demise to those of his own.

Although Elvis remained incognito for most of his visit to Barrow, he was spotted on one occasion within the city

Continued on Page 2

MORE TAXING SUBJECTS

Special Report, Starts Page 14

"75 cents! Oh God no, NOT 75 cents!"

Tax claims in bankruptcy

By Jan S. Ostrovsky

To most practitioners, bankruptcy itself is confusing. To bankruptcy specialists, the treatment of tax claims is confusing and vague. This is unfortunate since tax problems seem to abound among independent and spirited Alaskans. Many of us see clients with tax problems far too often, so it is important to have some idea of possible bankruptcy options.

With that in mind, let's examine some of the basic aspects of tax claims in bankruptcy cases.

The big picture is simple—most tax debts, state or federal, just are not dischargeable in any type of bankruptcy. But, as you'll see, bankruptcy can be a help in paying some of those debts.

DISCHARGE

Discharge is denied regarding substantially all pre- petition taxes (§523(a)). Narrow exceptions do exist for income and certain other taxes more than three years due (by return date) or income and receipts assessed more than 240 days prior to the petition date (see §507(a)(7) for details).

In addition no tax is dischargeable if a required return is unfiled, fraudulent, or filed late within two years of the bankruptcy petition (§523(b)).

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FROM THE PRESIDENT

Larry Weeks

Next spring the Board of Governors will be in the bad position of having six vacancies up for election at the same time.

Four Anchorage positions will be open because Dana Fabe and Mike Wolverton went to the judiciary and Jeff Feldman and Ken Egger's terms are due to expire. In addition, the at-large position, now held by Pat Kennedy from Anchorage, will also be open. Finally, Ketchikan's Michael Thompson's term expires. This is two-thirds of our lawyer members and one-half of our total Board. It is important that the Board of Governors continue to get new people involved in the responsibility of running the Bar. At the same time it is also nice to have some of the older people around who have addressed the same problems on the prior trips through the cycles. The issues of mandatory CLE, public or private discipline, admissions procedures, abolishing or renewing the law review, deficit financing, and how to attract people to the Bar Convention seem to be recurring themes.

The public Bar has become more interested in the Board of Governors recently. All segments, public and private as well as other interest groups within the Bar should persuade people to *apply* to the Board and to get out the vote. Diversity on the Board will help us to make better decisions for the long-term benefit of the profession. I've been heartened by my experience on the Board. We've had many profound differences, sometimes hotly disputed, but never in such a manner that people became bitter or unfriendly. Although there's not always been a great respect for the other person's views, there has always been a willingness to allow others to have them. The lay members have been responsible, contributing and concerned about the profession as well as the public interest.

The Association is busy and is doing more for its members. Bar dues have dropped to seventh in annual dues charged per member across the country. Wisconsin, Delaware, and Connecticut, among others, all pay larger annual dues than Alaska. The staff is now handling over 750 calls a month for lawyer referrals. They are trying to give the members more services than before. CLE is at an all-time high. There is a Directory of all members being distributed free of charge at the end of the year. They have recently sifted through insurance proposals to provide a disability insurance plan for our members. The Association is going through the traumatic process of changing computers while doing these things.

Convention planning for 1989 in Juneau and 1990 in Anchorage continues. We haven't given up hope of having some Soviet participation in both of those conventions. At the Juneau convention we will undoubtedly be facing a resolution calling for mandatory Continuing Legal Education. We have invited national media figures to participate in a "Media and the Law" theme. There will be a trip to Tracy Arm and Sawyer Glacier with a salmon bake one night. We saw seals on icebergs and calving glaciers there this year. Spouses will have a guided tour of the Governor's Mansion, the House of Wickersham and a private viewing at the state museum. We're going to have some interesting music and some good times, too. Hal Brown, Av Gross and Tom Koester have agreed to fiddle, guitar and bass numbers. Linda Rosenthal has been invited to do a concert. There's an optional one-day trip to Glacier Bay for anyone who hasn't been there or anyone who has and wants to go again. Lowell Thomas Sr. called Glacier Bay one of the seven natural wonders of the world. The teenagers in our family found it "awesome".

We have invited the judges' conference to the Bar Convention and hope they will come to Juneau. The court's initial reaction has been negative, but we hope they will reconsider. We will do anything reasonable to accommodate a joint convention, including making speakers available and sharing facilities. The Juneau Bar wants to provide day care, houses to share, boating and fishing experiences and racketclub facilities without charge.

Our IOLTA (Interest on Lawyer's Trust Accounts) program has collected in excess of $65,000 for disbursement by the Bar Foundation in its first year of operation. The concept of IOLTA was commenced 11 years ago by a lawyer in Florida. Since that time, over $150 million has been collected and distributed for legal aid to the poor. This is all money that 11 years ago was profit for the banks. Alaska is now considering an opt-out rule. Unless you refuse to participate you will be signed up. The voluntary programs (like Alaska) collect about 24% of the lawyers, opt-out programs get about 60%. Many states now have mandatory IOLTA.

There's a lot going on at the Bar Association. We have a proposal for adopting the new model ethic rules, we are up for sunset with the legislature; and we are appointing a joint committee with the Alaska Medical Association to review the procedures used in medical malpractice litigation in Alaska and to recommend ways to make improvements. There's an active lawyer-in-the-schools program going on in several communities. We are encouraging the CLEO (Continuing Legal Education Opportunities) committee to help us make the association better meet the needs of minority members. There are a host of other activities.

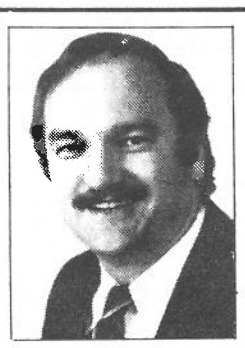
No matter what your interest, there's a place for you in the Bar. It's rewarding to you and beneficial to the profession.

• Elvis lives!

Continued from Page 1

limits near an undisclosed hotel down at the end of Lonely Street. After having been recognized, Presley left the city, but thereafter persuaded Russian officials, who have long since been his fans, to send ice breakers to save the two remaining mammals.

When contacted concerning Elvis's presence in Barrow, the local Bar feigned ignorance. The Asssistant District Attorney, who visited the ice at the same time Elvis is believed to have been there, had no comment, and representatives of Alaska Legal Services declined comment on the grounds that they could not disclose attorney/client communications.



THE EDITOR'S DESK

Ralph Beistline

A debate is now raging among the Bar Rag staff as to who was responsible for the *color* of the last edition of the Bar Rag. No one accepts the blame! **Rumors that it was an editorial decision are unsubstantiated.**

As Editor, I have launched an intensive investigation into this matter and have assembled a blue ribbon team of investigators who have left only a few stones unturned.

Leads have taken us from one suspect to another—but candor has been lacking. Not surprisingly, a crucial page from the minutes of the last staff meeting before publication is missing, and persons with otherwise flawless memories have become forgetful.

It now appears that the perpetrator has escaped our nets, or at least that's what he or she may believe. We know, though, that such pranksters frequently return to the scene of their crime, and therefore have been especially vigilant as the present edition goes to press. We have surreptitiously recorded the conversations of anybody remotely involved and have carefully monitored their activities—looking especially for telltale marks of dye in, under, and around fingernails.

As an additional precaution, samples of printers ink will be randomly tested by Bar personnel as the current edition is printed.

Whether these precautions will deter the shiftless scoundrel(s) from sabotaging the present edition, with its red highlights, remains to be seen, but a view of the front page will tell.

The aforesaid efforts have not deterred us in preparing the present edition of the Bar Rag, which features news of new judges, articles by new and old correspondents, humor, of sorts, and matters of general interest to the Bar.

Anyone, however, who may have witnessed any suspicious activity in downtown Anchorage during early September, 1988, when the last edition was published, is encouraged to inform Rag staff. (Note: This information should be delivered to Rag staff, NOT past president Wag staff who has been under especially close surveillance since his trip to Provideniya.) Your identity will remain *strictly* confidential until the next publication of the Bar Rag or before.

Announcement

The United States Bankruptcy Court for the District of Alaska has moved its offices and court from the U.S. Courthouse at 701 "C" Street to the Old Federal Building, 605 West 4th Avenue, Suite 138, Anchorage, Alaska, 99501-2296. The new public telephone numbers for the Bankruptcy Clerk's office are 271-2655 and 271-2656. The new public telephone number for the Bankruptcy Judge's office is 271-2631.

The Alaska Bar Rag

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Alaska Bar Association
1988-1989

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President Weeks has established the following schedule of Board meetings during his term as president. If you wish to include an item on the agenda of any Board meeting, you should contact the Bar office (272-7469) or your Board representative at least three weeks before the Board meeting.

Sept. 9 and 10, 1988
Oct. 21 and 22, 1988
Jan. 20 and 21, 1989
March 17 and 18, 1989
June 5 - 7, 1989, Juneau
June 8 - 10, 1989, Annual Convention
Centennial Hall, Juneau

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IN THE MAIL

Attacks inconsistent

I find myself reminded of the Latin of my law school past. Two phrases in particular apply to the judicial retention issues facing voters: *non sequitur and reductio ad absurdum.* I leave to the reader the fine points of definition.

In any language the attacks on Justice Rabinowitz and Judge Johnstone are inconsistent with the intent and design of our judicial retention process.

In the case of Judge Johnstone a statistical tool is being used as a supreme test of judicialness. In instances other than judicial retention, the law and its shepherds, the lawyers have a suspicious view of such evidence. In our popular view statistics are often used to lie and conceal. At least the pronouncement on Judge Johnstone is brought forth so that the public can consider the credibility of such "evidence."

In the case of Justice Rabinowitz more traditional allegations are made and by identified individuals. Alas the lawyers again seem to have departed from the cautious and orderly procedure that otherwise is reverently set out and followed in the Court Rules. Justice Rabinowitz by his position and those Rules cannot campaign against this smear or any other attack. Even if he could the timing of this ambush rivals the most infamous of the political mailings cases of the past.

Hopefully the public will accept neither of these reprehensible affronts to our constitutional system of selection.

Yours truly,
Robert A. Rehbock
REHBOCK & REHBOCK

Double Standard Flauntings

Should North Slope defendants have their trials delayed while they take the Bar Exam to get equal treatment?

Should secretaries or anyone who could achieve personal gain be on juries?

If juries can find attorneys not guilty because they can't look into their minds to see their intentions, then why shouldn't DWIs be not guilty because we can't see their minds to determine if intoxication was their intent?

If it is never allowable for a supervisor to make sexual advances to an employee, because a request by a supervisor may be seen as a demand — then why should it be acceptable for an attorney supervisor to request $1,000 donations from employees when the request could be seen as a demand by employees and other observers?

If attorneys uphold the taking from others of amounts way beyond their liability, to compensate themselves and victims, then how can the citizens uphold and respect said attorneys as the sole source of our judges and expect justice?

If attorneys and citizens are not satisfied with the present limited selection process, why aren't the citizens able to tap our total human resource with open election of judicial officers (limit campaign donations to majority affordability), to help squelch the double standards?

Red Smart, President
Alaska Tea Party
Mat-Su Branch

Lawyer raises a big stink, says prosecutor fouled case

By RON DeLACY
Bee staff writer

SONORA — A defense attorney said Wednesday he will appeal his client's conviction, charging among other things that the prosecutor disrupted the four-week trial by repeatedly passing gas.

"It was disgusting," said Clark Head, a Calaveras County lawyer who represented burglary defendant Gary Davenport of Long Barn.

Davenport, 37, was convicted of five felony counts and one misdemeanor stemming from a September 1986 break-in at a state highway maintenance yard.

Head said he was considering basing the appeal, in part, on "misconduct" by Tuolumne County Assistant District Attorney Ned Lowenbach.

"He farted about 100 times," Head said. "He even lifted his leg several times."

Head said he went on the record to protest the tactic after Lowenbach passed gas during the defense's closing argument.

"The closing argument is supposed to be sort of sacred," Head said. "It's like the defendant's last chance, and you aren't supossed to interrupt it. Certainly not by farting and making the jury laugh."

Head said Lowenbach apologized once, and said it was an accident.

"But I don't think it was," Head said. "He just kept doing it, as if to show his disrespect for me, my case and my client. I have been through 50 jury trials, and I have never seen anything like this."

Head said the prosecutor also continually "moved around and ripped pages of paper" during the trial.

"And then he would fart again," Head said. "It was impossible to concentrate."

Lowenbach, who does not have a listed telephone number, could not be reached for comment Wednesday night.

His boss, District Attorney Eric DuTemple, declined to put The Bee in touch with Lowenbach.

"We simply are not going to respond to such a ridiculous charge," DuTemple said. "It's absurd, and we are not going to dignify it with a response."

Defendant Davenport was found guilty of five felony counts — first-degree burglary, second-degree burglary, two counts of auto theft and one count of receiving stolen property. He was also convicted of misdemeanor negligence in a fire that destroyed a truck, and he was acquitted on one burglary charge.

Reprinted from Modesto Bee, October, 1988

PRACTICAL POINTERS

How to find a qualified family mediator

BY DREW PETERSON

Having discussed more noncontroversial matters in previous articles about family mediation, I turn this issue to a more unsettled subject, namely how to locate a good family mediator.

There is no one method yet established for the certification and licensing of family mediators. Therein lies the single biggest danger in the use of family mediators as an alternative to the traditional methods of resolving family legal disputes.

The Ideal Family Mediator: Half Lawyer, Half Counsellor. Even this point will be disputed, but it is submitted that the ideal family mediator is half lawyer, and half counsellor, trained to the Master's or Doctorate level with a particular emphasis on family therapy.

Depending on who you talk to, authorities will dispute which of the two professional disciplines is the most important. Historically the legal community has been the most critical, complaining of negative consequences of using mediators not extensively trained in family law. No less compelling, however, are the arguments of mental health professionals as to the potential for disaster resulting from mediation by lawyers trained to advocate, without knowledge or understanding of the dynamics of family interraction.

As an audience predominantly comprised of lawyers, the readers of this article are presumably concerned about the potential harm that could come to clients referred into family mediation by mediators who are insufficiently grounded in the law. Reality tells us that the majority of family mediators are not attorneys, however, but come instead from a mental health background. Moreover, even those mediators who are attorneys may have very little practical experience with the family court system in the particular locality.

Fortunately, the primary protection against bad decisions in mediation comes from the mediation structure, itself, and not from the specific legal knowledge of the mediator. Experienced family mediators agree that for mediation to work best, all participants should have their own independent legal advice and representation throughout the mediation process.

One of the primary ethical requirements for Attorney-Mediators under the American Bar Association's "Standards of Practice for Lawyer Mediators in Family Disputes" is that "The mediator . . . advise each of the mediation participants to obtain legal review prior to reaching any agreement." Thus the protection afforded individuals to insure that they are not treated inequitably comes not from the mediator but from the individual's own attorney. This is as it should be. Mediation in no way eliminates the need of individuals for independent legal advice. Contrary to the impression of many, the economic savings which are often caused by family mediation come not from the use of one less attorney, but from the fact that the attorneys are being used productively — in meaningful negotiations — rather than in unproductive litigation.

It follows that an important element to look for when evaluating potential family mediators is their attitude towards the participants' use of outside counsel. If they encourage independent legal consultation during mediation, the participant will have an important independent source of protection. If they discourage the participants from obtaining independent legal advice, however, it is a good sign that they are either insecure about their own competency or inexperienced in the field.

Some of the earlier experiments with family mediation, as set forth in some of the earlier books on family mediation, involved mediating without independent legal advice. Such techniques have now been almost universally repudiated, however, by the leading authorities in the field. Thus, while it is remotely possible that an otherwise good mediator might discourage obtaining outside leagl representation, it is submitted that the risk of damage from using such a mediator is too great. The safer tactic is to be certain that the mediating parties have access to their own independent legal advice throughout the mediation process.

Family Mediation Training — The 40-Hour Requirement. A number of the professional organizations operating in the field of family mediation require or at least encourage specific training in the various substantive disciplines most commonly involved with family mediation. Thus the membership standards of the Academy of Family Mediators (AFM) require specialized training in family mediation of at least 40 hours, with a minimum of five hours in each of the areas of:

1. Conflict resolution theory;
2. Psychological issues in separation, divorce, and family dynamics;
3. Issues and needs of children in divorce;
4. Mediation process and techniques; and
5. Family law, including custody, support, asset distribution and evaluation, and taxation as it relates to divorce.

Similar if less specific requirements for family mediation training are set forth in the Standards of Practice for Lawyer Mediators in Family Disputes of the ABA, the Ethical Standards of Professional Responsibility for the Society of Professionals in Dispute Resolution (SPIDR), and the Model Standards of Practice for Family and Divorce Mediation of the Association of Family and Conciliation Courts (AFCC).

While minimal, the 40-hour training requirement at least demonstrates a commitment to the field of family mediation by the mediator. It only makes sense to ask the proposed mediator the source and extent of his or her formalized training in family mediation. If he or she changes the subject, or tells you that such training is a normal part of the expertise acquired in a different professional discipline (say law, social work, or psychology), look for a new mediator. Family mediation is a specific field of expertise requiring specialized knowledge and training. In the absence of such training it is unlikely to succeed.

Professional Membership and Status. As with the 40-hour training requirement, membership in the various professional groups involved with family mediation says more about the commitment of the mediator to the field than about his or her expertise. It is nevertheless worth inquiring into the mediator's membership in such organizations. In addition to the ABA, AFM, AFCC and SPIDR, all noted above, many family mediators belong to the American Arbitration Association (AAA). Ask which set of initials your proposed mediator is affiliated with.

In the case of the Academy of Family Mediators (AFM), the type of membership status is indicative of the extent of education, training and experience in the field. Thus anyone may be an "affiliate member," while to become an "associate member" requires specific training in mediation and at least an undergraduate degree. Becoming a "senior member" requires further experience and case consultations, while the highest level in the Academy, a "fellow," requires all of the above plus five years as a senior member and a demonstrated contribution to the field of family mediation, as approved by a two-thirds vote of the Academy's Board.

SPIDR has similar but less stringently defined categories of individual membership, differentiating between "members," "associate members," and "honorary members" of the Society. To become a "member" of SPIDR requires a minimum of three years of substantial experience in the field.

While such levels of professional membership are arbitrary, and the methods of qualification uncertain, they nevertheless are well worth inquiring into in view of newness of the field of family mediation. Unless a direct referral can be made to a known mediator (the obvious best method) the author recommends referrals to mediators who are at the level of "senior member" or higher in AFM, or a "member" of SPIDR. Such caution seems the safest course in view of the unsettled state of the field. The primary drawback to such an approach, however, is the simple scarcity of mediators trained to such a level. Luckily, Alaska is ahead of many states. Trained family mediators can be found in most of the larger towns in the state.

Educational Level. One of the more controversial issues concerning qualifications to be a family mediator are minimum educational requirements. This is so because there have been a number of effective mediation programs which have trained community lay mediators to work on a volunteer basis. This has worked particularly well in mediating neighborhood disputes and disputes involving children, whether between parent and child, teacher and student, or child to child.

These volunteer mediation programs usually have not involved family mediation in the sense most often thought of by lawyers, namely divorce mediation. But they do constitute a form of family mediation nevertheless. To then say that a certain level of formal education is necessary to obtain certification as a family mediator seems insulting and demeaning to some of the very individuals who have been the most dedicated, hard-working, and innovative in the field.

The other side of the coin is the desire to ensure that family mediation is a truly professional discipline and that not just anyone be allowed to practice in the field. The clear trend has been towards establishing minimum educational levels, to guarantee certain minimal levels of professionalism among practitioners in the field. The AFM's requirements are currently the most stringent, requiring a minimum of a bachelor's degree to become a senior member of the Academy in all but the most exceptional cases, and making it easier to obtain full membership with a master's, but a law degree. SPIDR's educational requirements are less stringent but require three years of direct experience.

It is the author's view that the need for formal education by mediators varies greatly from case to case, depending upon the complexity of the issues. In

Continued on Page 25

What they *don't* teach you in law school

By Julie A. Clark

There are things they don't teach in law school: how to find the courthouse, how to pick a secretary, and the meaning of professional courtesy. No, the law school, be it Harvard or Podunk U., glosses over the things that really count.

When I began practice I had never heard the term "professional courtesy," or maybe I was sleeping while the professors droned on about it. So, when as a brand new attorney, 12 years ago, I was appointed by the state to represent a young man in a fishing village on a charge of burglary in a dwelling, I got on a plane and attended the preliminary hearing. Back then, for you newer attorneys, the state appointed us to represent indigent criminal defendants. We got $35 per day for expenses—not enough for room and board in the remote areas, let alone any liquid refreshment.

Anyway, I met my client's father (my client was in the pokey), and his young girl friend, who insisted on taking me to all the watering holes in town, five of them, and all thriving. In many remoter areas of Alaska there is a quaint custom, six-packing. Six of whatever one is drinking.

This started at about six in the afternoon and I had to pour them in my boot, in the potted plants and give them to the resident drunks plastered on the bar like limpets. Yet at one point late in the evening, I counted 23 drinks sitting on the bar in front of me. Etiquette dictates that one take a sip out of each, but I had to give up when my stomach registered protests.

Anyway, during the evening, I met another lawyer and his investigator who, like me, were there for hearings on court-appointed cases. This attorney told me that there was no room at the inn and they needed a place to stay. Could I let them stay in my room for the evening? I hesitated and was advised that as a matter of professional courtesy, I should oblige them. Feeling no pain and not knowing what he was talking about, I agreed. After all, I figured, in their condition they'd never find my room. I wasn't so sure *I* could find it. At midnight, the bars closed and I stumbled across the street to my rented motel room and fell into bed. About an hour later the door to my room burst open.

Not in any condition to get up, I inquired politely who was there by saying "Get out!" A male voice replied "I paid $22.50 for this room and it's mine and I'm sleeping in it."

A little aside is appropriate here. Without contact lenses, I can see the eye chart, if pointed out to me. I hear that there are letters on it. The only reason I recognized the visitors in the darkness was their voices.

One of the figures promptly stretched himself out on the other twin bed (a euphemism used by motel owners for a cot about 19 inches wide.) He began a snoring that threatened to collapse the entire building. The investigator decided that he should share my bed, but a sharp elbow in the short ribs convinced him to find other accommodations. I think he was stark naked but wouldn't swear to it. Shortly there was some scrabbling around on the floor, then footsteps into the bathroom and water running into the tub. Within a minute or two snoring issued from the bath.

I considered calling the management, but realized I hadn't the foggiest notion where I was and I would have to put on the contacts so I could see my way down the dark halls. And *they* were in the bathroom. Also it was likely the management had also been among the consumers of the joy juice which had run so freely all evening. Aside from the lawyer and his investigator snoring in two different keys, A sharp and B flat, I think, and in two-four and four-four time, they weren't bothering me.

About 6:00 A.M. something woke me. It was the door closing. I peered over to the next bed. It was empty. In the gloom of early morning, I got up, tripped over something on the floor and opened the bathroom door. Something was in the tub. It stirred and snorted like a beached walrus. The investigator had fallen asleep in the cooling water. I got back in my cot and shortly a gray blur sheepishly streaked out the door. When I put on my contact lenses, I saw what I had tripped over—a gray canvas stretcher, on which the two had taken turns giving each other rides to my room from the last barroom stop. (You figure out how they did it.)

I saw the two at breakfast. The lawyer remarked to his investigator, "Bob, I've never seen you so clean!"

"Hmph" grumped Bob. "I'll never get the wrinkles out." So much for professional courtesy. But I digress. Professional courtesy does not mean giving another of your brethren a room for the night, so they can drink up *their* per diem and let *you* pay for sleeping accommodations.

For those of you fresh out of school and those who might have missed this lesson in your practice, professional courtesy is not merely refraining from making veiled references to the fact that your opponent has hair on the palms of his hands or disparaging remarks regarding his ancestry. Professional courtesy is the art of being courteous and determining when it is proper to give the opponent a break, without harming your client. Professional courtesy can make our work easier, reduce client's bills and reduce stress.

Professional courtesy is calling another attorney who you know promised to deliver some document or enter an appearance and perhaps missed it, *before* you apply for a default or sanctions or other nasty things. Attorneys have done this for me and I certainly appreciate it and try to pass on the courtesy.

I recall having to work late at night when another attorney refused to allow a few more days for discovery before asking sanctions. He then proceeded to apply to the court for everything but public flogging. The sanctions request by the attorney was refused, my client won anyway and that attorney has a time bomb in his briefcase, figuratively speaking. One day he will get his lesson, not necessarily at my hands, if this is his normal practice.

Rarely is it true that a client would not authorize a few days longer for another lawyer to answer some motion, discovery request or even the complaint once you point out that in the course of the litigation your client might need a few days grace to respond to the other party's motions, etc.

And if you are tempted to refuse a reasonable request from another attorney, remember Clark's Corollary to Murphy's Fifth Law—whatever goes around, comes around—in spades.

Another area of professional courtesy is pointing out technical errors in service of process or paperwork etc. instead of gleefully trying to dodge trying your case on the merits, by filing for dismissals, etc. Rarely have I seen a judge who will apply such Draconian sanctions except in unusual circumstances. The net result is usually higher costs for the client and delay. After all, law is supposed to be about justice. Of course, this might be inappropriate when you know it will be detrimental to your client's interests, but this is rarely the case.

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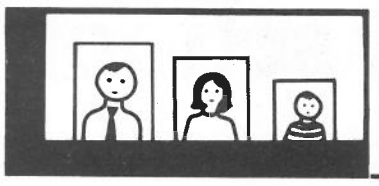


BAR PEOPLE

The Law Office of **David S. Case** has hired Carleen Faithful as an associate. . . . **Mary Kancewick** and **Eric Smith** were married May 29. . . . Sitka District Attorney **Alan Hooper** and his wife **Gloria Hanssen,** both attorneys previously practicing in Fairbanks, recently had their third child, a baby boy.

Michelle Boutin has concluded her clerkship with the United States Bankruptcy Court and has joined the Law Offices of **Diane F. Vallentine.** . . . **James M. Hagood** has moved his private practice to Denver, Colorado. . . . **Sandra J. Wicks** is now associated with the Law Office of William McNall. . . . **Brian Bjorkquist** is now with the Attorney General's office in Anchorage.

Harry G. Brelsford, recently counsel with Alyeska Pipeline Service, Co., is now retired. . . . **Daniel Beardsley** is now with the Department of Transportation. . . . **David Berry** is associated with the firm of Kemppel, Huffman & Ginder. . . . **Linda Cerro** and **Bob Landau** are now back in Alaska following 18 months of traveling around the world. (No more postcard reports for the Bar Rag.)

Debra Fitzgerald and **Thom Amodio** are just beginning their 12 months of travel around the world. (Maybe they'll send postcards.) . . . **Joseph Cooper,** formerly with the Attorney General's office, is now with the Anchorage Department of Law. **Bruce Davison** and **Shelby Nuenke-Davison** have formed the firm of Davison & Davison, Inc. . . . **Dan Duame,** formerly with ALSC in Fairbanks, is now working for Kawerak, Inc. in Nome.

The Law Offices of **R. Stanley Ditus** is now located in beautiful downtown Spenard. . . . **Richard H. Foley, Jr.** and **Susan Behlke Foley** have formed the law firm of Foley & Foley. . . . **Shelly Ditus** is now at UAA getting her teaching certificate and hopes to teach elementary students. . . . **Laurence Keyes** has recently taken the LLM exam from the University of London for an advanced degree in Maritime Law.

Nancy Meade is now working for the Attorney General's office in Anchorage. . . . **Ruth (Bessie) O'Rourke** has moved to Barrow. . . . **Michael Swanson** is now with **Larry L. Caudle** and Associates. . . . **Tom Yerbich** and **William Pace** have formed the law firm of Yerbich & Pace.

Judith Bazeley is moving to San Diego in mid-November. . . . **Mary Ann Foley** has relocated her office to the Carr-Gottstein building (the "whale" building) in Anchorage. . . . **Shelby Nuenke-Davison** and **Bruce Davison** had a baby girl in September. . . . **Sandy and Bill Ingaldson** had a baby girl in October. . . . Jennifer Ann Lampen was born to **David Lampen** and **Mary Ellen Flaherty** on October 18.

Best wishes to **Susan Lee** on her recent nuptials. . . . **Suzanne Hennessy** recently married and moved to Sacramento. . . . **Kathleen McGuire** reports that her cancer is in remission, but she will continue chemotherapy and other treatment for another year. . . . **Harry and Siri Branson** celebrated their 25th wedding anniversary on November 2. . . . **Harry Branson** and **Millard Ingraham** moved their law offices to 425 "G" Street, Suite 850.

Rick Keck, who was a Superior court law clerk in Fairbanks, is now an assistant public defender. . . . **Jim Cannon,** a former public defender, is now with the Fairbanks office of Guess & Rudd. . . . **Beau Bassett** is Associate Director of the American Youth Foundation and is living in Ossipee, New Hampshire.

Mark Woelber is now an assistant discipline counsel for the Alaska Bar Association. . . . **Ron Zobel** is now an assistant attorney general in Anchorage. . . . **John Richard** and **Renee Erb,** both assistant attorney generals, are moving to Kentucky December 1 and **Steve Pradell** is now an associate at Birch, Horton, et. al. in Anchorage.

Council elected to Judicature Society board

CHICAGO—William T. Council, a partner with the Juneau, Alaska law firm of Council and Crosby, recently was elected to the 1988-1989 American Judicature Society Board of Directors. He is among 45 new members who were elected at the Society's 75th anniversary meeting, at which former U.S. Supreme Court Associate Justice Lewis F. Powell, Jr. spoke.

A graduate of the University of North Carolina Law School, Council is a member of the Alaska Judicial Council. He received his undergraduate degree from Davidson College.

Re-elected at the meeting were AJS President A. Leo Levin, a University of Pennsylvania Law School Professor; Chairman of the Board Karl F. Nygren, of counsel with Kirkland & Ellis; Secretary Robert F. Utter, a Washington State Supreme Court Justice; Treasurer Diana E. Murphy, a U.S. District Court Judge; and Vice President William W. Crawford, senior vice president and secretary for Kraft, Inc. Shirley S. Abrahamson, a Wisconsin Supreme Court justice, and William K. Slate II, executive director of the Virginia State Bar, were elected AJS vice presidents.

Founded in 1913, the American Judicature Society is a 20,000-member national independent organization of citizens working to improve the nation's justice system.

Successful Bar examinees

Anita Alves
Nathaniel B. Atwood
Kristen F. Bomengen
Maryanne Boreen
Scott A. Brandt-Erichsen
Randall S. Cavanaugh
BethAnn B. Chapman
Carmen E. Clark
Eric R. Cossman
Allen N. Dayan
Jay D. Durych
Stewart A.G. Elgie
Anne M. Evans
Jill P. Fernandez
Terry A. Fikes
Carl C. Frasure
Andrew R. Gala
Carol L. Giles
Richard L. Goldfarb
Kenneth M. Gutsch
Michael G. Harting
Johnathan M. Hoffman
James L. Hopper
Darryl L. Jones
Vanessa H. Karns
Barbara S. Kraft
Nancyann Leeder
Lynn E. Levengood
Robert E. Lindekugel
Michael B. Logue
Michael A. MacDonald
Scott L. Mattern
Mindy H. McQueen
Bryan S. Merrell
Kevin G. Miller
Greggory M. Olson
J. Stefan Otterson
Marcus B. Paine
Douglas Parkinson
Elizabeth Phillips
John H. Raforth
Herbert H. Ray
William K. Renno
Stephen D. Rose
Michael W. Seville
Bryan C. Tipp
Ellen Toll
Richard N. Ullstrom
Jennifer A. Walker
John C. Wendlandt
Marshall S. Witt
Elizabeth A. Ziegler

'New breed' of sour in the Bush

By Joe Slusser

Ever since moving from Detroit to Alaska in 1981 to practice law in the Last Frontier, I have been lured by the call of the wild. This began as a faint whisper, but with the passage of time grew louder.

I responded to some degree in 1984 when I accepted a magistrate's position in Delta. There, I enjoyed the mountains which were only a half-hour away. However, by 1986 I was back with Hughes Thorsness Gantz Powell and Brundin and engaged in the serious practice of law which I thoroughly enjoy.

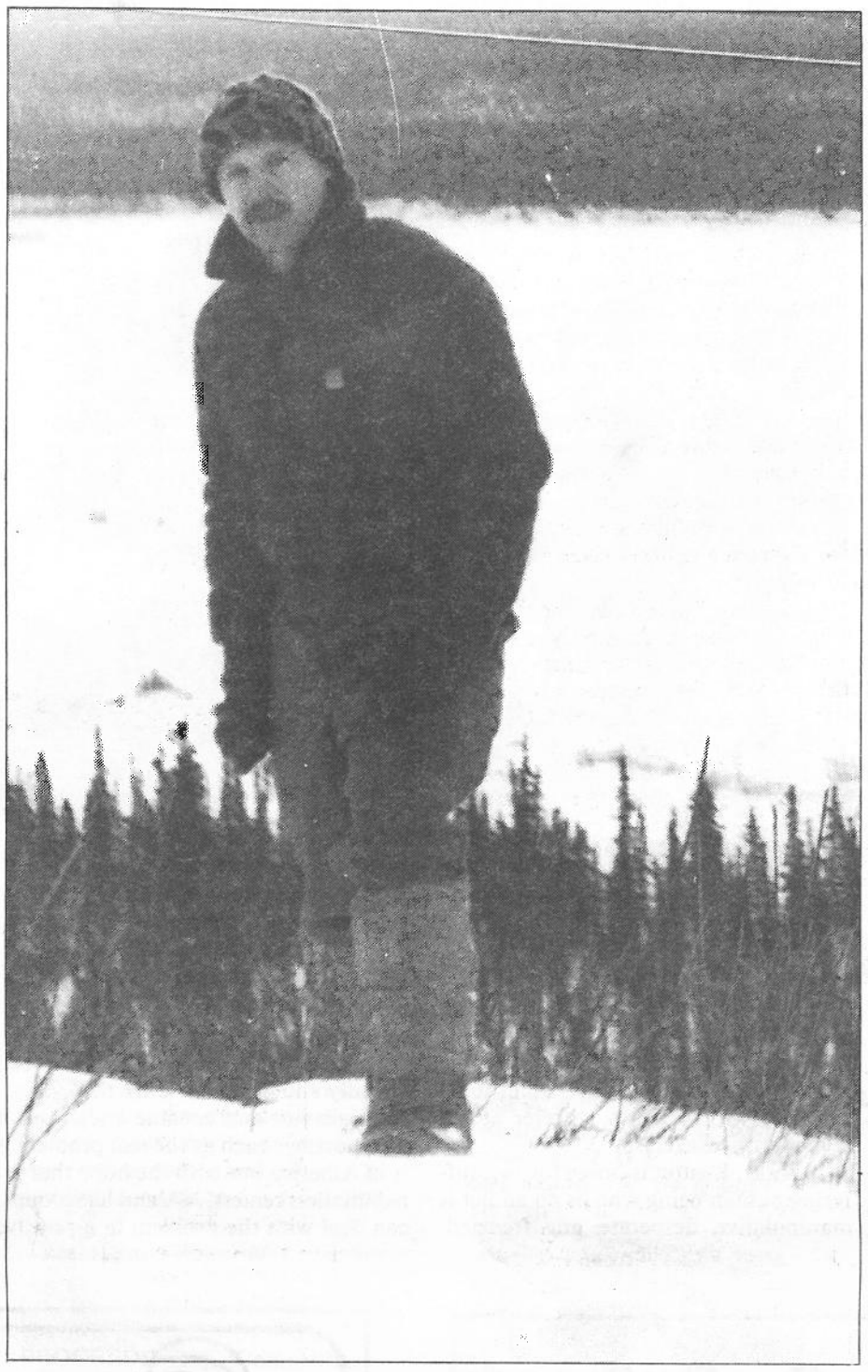
The call, though, continued . . . and I found myself torn between two different worlds. On the one hand there was the world of the big city attorney and on the other there was the challenge of wilderness adventure . . . the desire to survive in the wilds. As Robert Service has said "the lure of little voices were begging me to go."

Finally, I responded! I staked 20 acres of land North of Denali Park and entered into an arrangement with my employer that would allow me to live in the wilderness for 23 out of the next 36 months; to construct, from scratch, a log cabin; and once and for all to live the life of a wilderness adventurer.

I have received considerable support in my decision to build a cabin and spend a winter or two in the wilds. One partner has advised me kindly regarding the necessity of a garden. Another, upon hearing that wolves serenaded me for a week and a half, gently reassured me that attorneys were perfectly safe as a matter of professional courtesy. Another seasoned litigator, who recently defended a case involving a school roof being blown off, took pains to advise me of the principles of wind-loading. For my part, I am amazed at their tolerance. I thought only public defenders were allowed to take off for six months at a time.

Unfortunately, I cannot really offer a treatise on the art of wilderness log cabin-building. I have, to date, accumulated 65 logs, cut them, peeled them, and hauled them into piles. The foundations are in. Two rows are up, including the sill logs. But I have not actually *finished* a cabin. These credentials are not impressive in a land where people with more experience can be found in every bar, honky-tonk and Pay-n-Save. However, I am thoroughly enjoying my wilderness adventure and hope to complete the cabin this spring and spend next winter there.

This interest in the outdoors predates law school, although I think that it was during that period it began to become addictive. Prior to one memorable essay exam on Article 9, I recall painstakingly packing a beautiful internal frame backpack just in case I should involuntarily be presented with the opportunity to go trekking in Nepal for an indefinite period. The following months found me still in Detroit, and I took the test with a confident smile. I believe my composure not only helped my writing abilities, but also shattered the confidence of my poor classmates who mistakenly assumed that someone had mastered the U.C.C.



Who's the friend who snapped Slusser on the homestead?

Thus, while I am not an expert on log cabin building, I have made some interesting observations upon stress and possible ways to cope. This should be a subject of direct concern to attorneys. I thought I would mention hypertension and its progeny (to use a word the Supreme Court likes), high blood pressure and heart disease.

Of course, attorneys are not the only persons with such problems. But, who has not faced a caustic judge? Who has not filed a last-minute response or found a glaring error in the pleadings in the elevator on the way up to the clerk's office? Who has not collapsed into the nearest chair after catching a misplaced decimal point in an offer of judgment about to be sent out? At one time or another, we have all found ourselves muttering "if only I could get away from it all."

I still suggest a backpack tucked away in the home closet. First-year associates in large law firms might prefer to have a pack even closer at hand. In times of stress it can be a source of security. Of course, an empty pack will not do. To be effective it must contain long underwear. There should be wool pants and shirts. Gortex rain gear is a big plus. A paperback book, a sleeping bag and a foam pad are also needed. There must be a knife, spoon, insect repellent, and some freeze-dried food packages. When these objects are gathered together they tend to "go critical." You can perceptibly hear a rustling crackling sound much like the energy of the Northern Lights. With a little training it will be possible to tune in on this during times of need. You will be able to feel your blood pressure move to normal. Even the promise of wilderness adventure can be therapeutic.

One wise old woodsman has written that "all things come to you in the wilderness." Unfortunately, I have not personally found this to be true. I have spent hours, even days, missing things which never so much as hinted at an appearance. On the other hand, I made the unexpected acquaintance of a wolf pack which dropped by and stayed for 10 days. I also recall a bear which decided to spend the night. And finally, there was the genial poacher who refrained from shooting me, although we met while he was shoulder deep in illegal moose. I also remember one fine September afternoon spent notching logs up on the ridge. The birch leaves were yellow, the spruce was nearly black and I could see the lake below through the trees. The bugs were gone. Best of all, I had lost 20 pounds. Life seemed pretty good. And it occurred to me that maybe what the old-timer meant was after enough time in the bush, cares and concerns adjust until eventually you have pretty much everything you want. Things which seemed important a month ago are put into perspective. Matters were no longer life and death situations.

And then it occurred to me what I was doing. I was improving upon the old paperback idea, but on a grand scale. A cabin would provide a beacon of security which would be available in times of need. I was engaged in my own massive cyclotron project.

I felt I should share my secret with my brothers and sisters of the bar. And for a brief shining moment I had a vision of a new breed of sourdough appearing in remote and unlikely areas of Alaska. Easily identified, with attire direct from L.L. Bean's catalog, they would be seen for a day, a week, or even longer, before disappearing back to the cities. And when the word got out that these were actually attorneys, the old sourdoughs would speculate on what new conspiracy was afoot.

Joe Slusser is an associate in the Fairbanks office of Hughes, Thorsness, Gantz, Powell & Brundin.

THE MOVIE MOUTHPIECE

Edward Reasor

"The alcoholism rate among lawyers is an estimated twenty (20%) percent, almost twice as high as the general population."

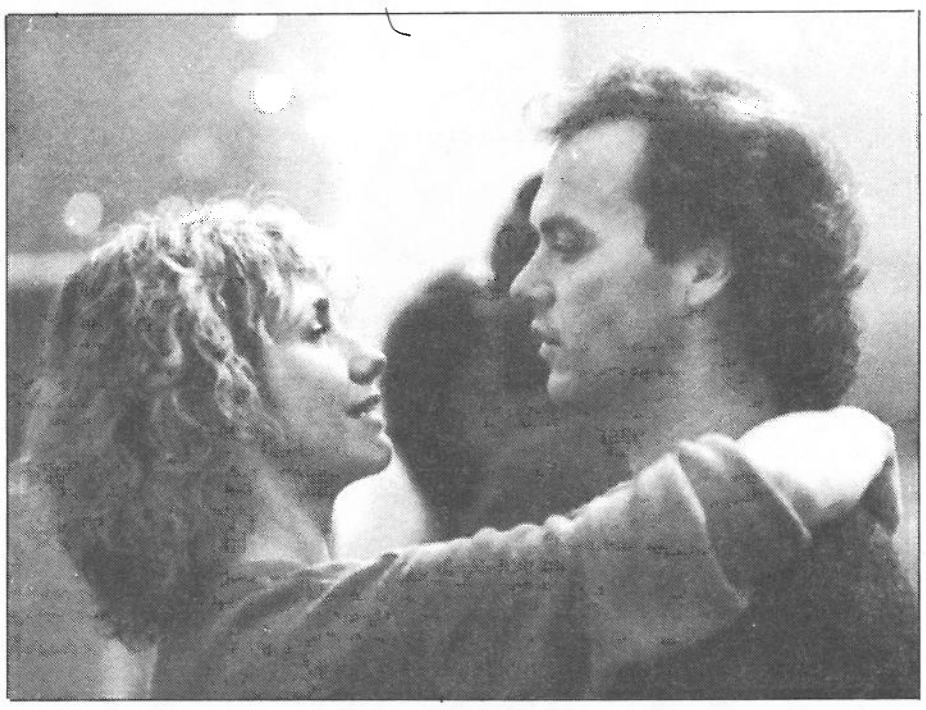
Los Angeles Times
September 16, 1988

In Alaska, the land of the Midnight Sun and the all-night bars, alcoholism among attorneys may in fact be twice the national average.

Look in your own firm, at your fellow judges or public prosecutors or public defenders, at any aspect of the genteel practice of law and ask: Do any of my professional associates have a problem with alcohol or cocaine? If so, then a close viewing of "Clean And Sober," the new Warner Brothers release starring Michael Keaton, is a must. If you don't have the problem and no one in your work environment does either, then go see "Clean And Sober" anyway, because it will help you represent the man charged with driving while intoxicated, the woman who bounces checks, and the white-collar embezzler who just can't seem to keep his trust account balanced to his clients' favor.

In a nutshell, "Clean And Sober" is a full-length (in fact 15 minutes too long) feature film that portrays a young, affluent Yuppie (Michael Keaton) who finds himself near financial and emotional ruin as a result of two diseases—addiction to alcohol and cocaine, what the boys in AA fondly call "cross-addicted."

With discovery of his misuse of clients' funds imminent and his involvement with a beautiful soulmate who overdosed in his bed, Keaton by necessity finds refuge in a Philadelphia rehabilitation center. Here, after initially overcoming the greatest defeating element to conquering alcohol and cocaine addiction—denial ("I can handle it") Keaton begins to build back his physical health and mental well-being.



Daryl Poynter (Michael Keaton) and Charlie (Kathy Baker) discuss their pasts, and their plans for the future at a treatment center graduation dance in Warner Bros.' moving new film presentation, "Clean and Sober."

But Keaton's character makes the classic mistake of beginning an ill-fated romance with a fellow sufferer at the clinic (Kathy Baker).

In short, Keaton is powerful as a suffering human being who as an addict is manipulative, desperate, and frenzied. Tod Carroll's excellent and true-to-life script as directed by Glen Gordon Caron, the creator of "Moonlighting," does more than either of our presidential candidates with regard to the problem of addiction. They both talk about the evils of drugs. "Clean And Sober" instead visually shows us not only the evils of both alcohol and cocaine addiction, it also portrays each as the real problem it is in America but with the hope that rehabilitation centers, AA and like groups, can deal with the problem in a positive manner and eventually control it.

I hope a few of our judges watching this film note that Keaton is rehabilitated not by jail but by fellow sufferers who have taken treatment, adopted AA as a way of life, and are willing to help others less fortunate than themselves.

Keaton's problems hopefully are larger than the ones an addict finds in Alaska. After all, who needs a dead girl in bed? His response to her father and others is "I didn't give her cocaine; she gave me cocaine." Who needs to be $92,000 short in trust from real estate ventures—money owed a client which Keaton invests in the stock market to make a quick profit (always with the intent of returning the $92,000) so he can continue to purchase the cocaine that he craves?

Naturally the stock market is not the answer and the funds quickly shrink to a fair market value of $42,000. Keaton can't even leave town because all of his credit cards have been cancelled due to non-payment, a typical practice of the alcoholic or cocaine addict.

I've said that "Clean And Sober" is too long and it is, yet all of the main actors do extremely well. First there is Morgan Freeman, a counselor assigned to Keaton. He's hard headed, a recovering addict himself, heard every possible story, and he knows that they're all made up out of fear and the need for the drug. He doesn't budge. That's the way alcohol and cocaine counselors are in real life. They are not concerned about your insurance coverage, which is the main problem with the treating facilities that Alcohol Screening use in Anchorage.

Continued on Page 9

• The Movie Mouthpiece

Continued from Page 8

Next is M. Emmet Walsh, Keaton's sought-after alcohol sponsor after he finishes treatment and begins regular AA meetings. Walsh loves AA, it has saved his life, he's like a new convert to Fundamentalism—there is only one way, don't drink, go to meetings, and follow the 12 steps of AA. Walsh throws all of Keaton's booze and cocaine down the sink and toilet, he even tells him to meet with his boss and make amends—to confess to the embezzlement and make it good. Walsh's eyes and facial expressions are those of a real-life sponsor—compassionate and understanding but those of an AA zealot—there is only one way to recovery and that's the one that was instructed in the detoxification and treatment center.

Both Keaton and Baker to prepare for their roles in this film visited various rehabilitation centers, attended many AA meetings, talked to hundreds of alcoholics and cocaine addicts and spent time with Dr. David Lewis, the medical expert on addiction assigned to the film as technical adviser. It shows.

I'd suggested on opening this column that it was for attorneys and their alcohol- or cocaine-involved clients. I mean it. Don't just go see "Clean And Sober," take a client or two. It's the best help you can give them.

Earn Extra Cash Be a Bar Rag Newsboy

Bar approves insurance plan

Automatic eligibility and reduced rates were main features of a far-reaching disability insurance plan for Bar members approved by the Board of Governors in an October 22 meeting.

The plan, negotiated by association staff with Crown Life, includes eligibility for a $1,000 per month benefit regardless of health for attorneys currently at work. Total benefits of up to $10,000 per month will be available at substantial rate reductions.

The Association staff recommended Crown after an extensive review of available rates and coverage.

"Crown's policy provisions and rates ranked best or near best in every category of our evaluation," said Association Controller Geraldine Downes. "The automatic eligibility was not the deciding factor in itself, but should be very important to many of our members."

Crown's policy cannot be cancelled for any covered member as long as premiums are paid. The rates cannot be increased throughout the life of the member's contract. Also, unlike most group plans, the benefit amount is not reduced by income from Social Security, Workers Compensation, or other sources.

The arrangement includes the availability of simplified underwriting up to a $10,000 monthly benefit, cost of living increases, and a liberal definition of disability. All members of the Alaska Bar are eligible.

Crown Life is rated A+ by Best's guide and is one of the top five writers of disability insurance in the United States.

Bar members should contact Bob Hagen at Bayly, Martin & Fay, 276-5617 for information about plan rates and options.

BY MARY HUGHES

IOLTA Program ends first year with $40,000=

The IOLTA program completed its first year of operations with over $40,000 contributed! In June, the Trustees distributed $20,500 to the Alaska Pro Bono Project in order to supplement funding of the elderlaw project, the advice only clinics and the landlord/tenant program. In November, a request for applications will again be published for grant dispursal in January, 1989.

Approximately fifteen percent (15%) of the eligible Alaska Bar Association members who are eligible are participating in IOLTA. The following financial institutions are participants: Rainier Bank Alaska, First Bank of Ketchikan, B M Behrends Bank, Alliance Bank, Key Bank of Alaska, National Bank of Alaska, First National Bank of Anchorage and Denali State Bank. Each institution is fully advised as to the requirements of IOLTA trust accounting.

In order to fully acquaint the Alaska Bar members with trust accounting procedures, the Alaska Bar Foundation and the Alaska Bar Association are cosponsoring a short breakfast seminar on Wednesday, November 30. In addition to discussing trust fund accounting, fee agreements, retainer arrangements and the client security fund will be highlighted by panelists John Reese, Sandra Saville, Steve Van Goor and Susan Daniels. A short presentation on IOLTA will also be made.

Any questions regarding IOLTA may be referred to the Trustees of the Alaska Bar Foundation, John Conway, Winston Burbank, Bart Rozell, Sandra Saville and Mary Hughes.

Importance of arbitration clause in un- & underinsured motorist claims

Michael J. Schneider

Scope.

This article will discuss the requirement for using arbitration to resolve disputes in Uninsured and Underinsured Motorist (UM/UIM) cases, circumstances under which the arbitration provision may be waived, and why, in my opinion, the arbitration process favors claimants and thus substantially impacts case selection.

UM/UIM Disputes Must Be Arbitrated.

Standard policy language commands that disputes between the insurance company and the insured as to whether or not the insured "is legally entitled to recover damages from the owner or operator of an uninsured automobile or underinsured automobile" or "as to the amount of payment which may be owing under the policy" shall be submitted to binding arbitration.

Policies vary considerably in the extent to which they go on to define the arbitration process. Most policies require each party to choose an arbitrator and for their respective choices to agree on a third arbitrator to complete the panel. Similarly, most policies provide that either party may approach the superior court for selection of a third arbitrator in the event that no agreement can be reached. Alaska's Uniform Arbitration Act, A.S. 09.43.010-180, should be consulted before any demand for arbitration is made.

Arbitration Can Be Waived.

Circumstances Where Claimants May Wish To Avoid Arbitration. As some of the following paragraphs set forth, arbitration, in this writer's view, generally favors claimants. There are, however, some situations where claimant may wish to avoid the arbitration process. If the carrier has acted outrageously toward the insured, but yet has some substantial hope of winning the arbitration (*e.g.* no liability on the part of the uninsured driver), it might be advisable to contend in superior court (as part of the bad-faith action brought against the insurance carrier) that the arbitration clause in the UM/UIM policy has been waived by the carrier's conduct. A more common and more important consideration is the need, in the context of a case clearly destined for bad-faith litigation, to avoid protracted contact with the carrier regarding the underlying dispute. The risk to claimant's counsel is that claimant's attorney will become one of the main witnesses as to the carrier's bad-faith conduct. This risk is very real because all of the conduct of the insurance company in handling, negotiating, and litigating the underlying dispute is likely to be admissible in a bad-faith claim growing out of it. *See* Ashley, *The Insurer's Duty of Good Faith After Litigation Begins,* Bad Faith L. Rep. (SP) Vol. II, No. l, at 1 (Feb. 1986); J. McCarthy, *Punitive Damages in Bad Faith Cases* §§1.15, 1.17 and 1.19 (4th ed. 1987).

Factors To Be Considered In Relation to Waiver. There is no single test for determining waiver. Some of the following factors have been consistently considered by the courts:

1. whether the party seeking arbitration has previously taken steps inconsistent with an intent to invoke arbitration;
2. whether the party has unreasonably delayed in seeking arbitration; and
3. whether the party has acted in "bad faith" or with "willful misconduct."

See Christensen v. Dewor Developments. et al., 661 P. 2d 1088 (Cal. 1983). *See also Carcich v. Rederi. A.B. Nordie,* 389 F.2d 692, 696 (2d D. Cal. 1968), *Weicht Watchers of Ouebec, Ltd. v. Weicht Watchers, International, Inc.,* 398 F.Supp. 1057, 1058, 1059 (E.D.N.Y. 1975); *Davis v. Blue Cross of Northern California,* 600 P.2d 1060 (Cal. 1979), and *Validity and Enforceability of Provision for Binding Arbitration. and Waiver Thereof,* 24 A.L.R.3d 1326, §§ 6 and 7. The Alaska Supreme Court has specifically acknowledged that the right to arbitration can be waived under both the Federal Arbitration Act and Alaska's Uniform Arbitration Act. *See International Brotherhood of Teamsters, Local 959, v. King,* 572 P.2d 1168, 1173 (Alaska 1977), and *Arctic Contractors, Inc. v. State,* 564 P.2d 3e0, 45 (Alaska 1977), respectively.

Our Supreme Court's most recent pronouncement on the topic of waiver in the UM context came in *Hillman v. Nationwide,* 758 P.2d 1248 (Alaska 1988). Though the record in *Hillman* demonstrates conduct by the carrier suggestive of waiver, the Supreme Court affirmed the trial court's conclusion:

> that none of the litigants herein has clean hands. The balance tips in favor of submitting appropriate issues to the contractually mandated arbitration process in light of the absence of demonstrated prejudice to the plaintiffs and the strong policy favoring arbitration.

Id at 1253.

Following *Hillman*, it is clear that a strong record of prejudice to the plaintiff should precede a claim that arbitration has been waived. *Davis v. Criterion Ins. Co.,* 754 P.2d 1331 (Alaska 1988), may also provide a way around the arbitration clause where coverage has been wrongfully denied. Though decided in a different context, the Davis court held that:

> if Criterion is found to have unjustifiably denied coverage, it has put an end to its right to demand compliance with other terms of the agreement . . .

Id. at 1332.

If you intend to preserve any claim that the carrier has waived *defenses* in the arbitration, you should make sure your client doesn't sign a "nonwaiver agreement" tendered by the carrier. *Hillman,* at 1253.

Continued on Page 16

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Satan Once Again Escapes Justice

UNITED STATES ex rel. Gerald MAYO
v.
SATAN AND HIS STAFF.
Misc. No. 5357.

United States District Court,
W. D. Pennsylvania.
Dec. 3, 1971.

Civil rights action against Satan and his servants who allegedly placed deliberate obstacles in plaintiff's path and caused his downfall, wherein plaintiff prayed for leave to proceed in forma pauperis. The District Court, Weber, J., held that plaintiff would not be granted leave to proceed in forma pauperis who in view of questions of personal jurisdiction over defendant, propriety of class action, and plaintiff's failure to include instructions for directions as to service of process.

Prayer denied.

Federal Civil Procedure 2734

Plaintiff would not be granted leave to proceed in forma pauperis in civil rights action against Satan and his servants, who allegedly placed deliberate obstacles in plaintiff's path and caused his downfall, in view of questions of personal jurisdiction over defendant, propriety of class action, and plaintiff's failure to include instructions for directions as to service of process. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.; 18 U.S. C.A. § 241; 28 U.S.C.A. § 1343; 42 U.S.C.A. § 1983.

Gerald Mayo, pro se.

MEMORANDUM ORDER

WEBER, District Judge.

Plaintiff, alleging jurisdiction under 18 U.S.C. § 241, 28 U.S.C. § 1343, and 42 U.S.C. § 1983 prays for leave to file a complaint for violation of his civil rights in forma pauperis. He alleges that Satan has on numerous occasions caused plaintiff misery and unwarranted threats, against the will of plaintiff, that Satan has placed deliberate obstacles in his path and has caused plaintiff's downfall.

Plaintiff alleges that by reason of these acts Satan has deprived him of his constitutional rights.

We feel that the application to file and proceed in forma pauperis must be denied. Even if plaintiff's complaint reveals a prima facie recital of the infringement of the civil rights of a citizen of the United States, the Court has serious doubts that the complaint reveals a cause of action upon which relief can be granted by the court. We question whether plaintiff may obtain personal jurisdiction over the defendant in this judicial district. The complaint contains no allegation of residence in this district. While the official reports disclose no case where this defendant has appeared as defendant there is an unofficial account of a trial in New Hampshire where this defendant filed an action of mortgage foreclosure as plaintiff. The defendant in that action was represented by the preeminent advocate of that day, and raised the defense that the plaintiff was a foreign prince with no standing to sue in an American Court. This defense was overcome by overwhelming evidence to the contrary. Whether or not this would raise an estoppel in the present case we are unable to determine at this time.

If such action were to be allowed we would also face the question of whether it may be maintained as a class action. It appears to meet the requirements of Fed.R. of Civ.P. 23 that the class is so numerous that joinder of all members is impracticable, there are questions of law and fact common to the class, and the claims of the representative party is typical of the claims of the class. We cannot now determine if the representative party will fairly protect the interests of the class.

We note that the plaintiff has failed to include with his complaint the required form of instructions for the United States Marshal for directions as to service of process.

For the foregoing reasons we must exercise our discretion to refuse the prayer of plaintiff to proceed in forma pauperis.

It is ordered that the complaint be given a miscellaneous docket number and leave to proceed in forma pauperis be denied.

Found by Wayne Anthony Ross while browsing Federal Rules Decisions in his spare time.

Bar plans special promotion to introduce LEXIS system

The Alaska Bar Association is proud to announce a special fall promotion to introduce the many benefits of the LEXIS service to your firm. If you join our LEXIS Membership Group program by October 31, 1988 and attend a LEXIS training seminar by November 30, 1988, you receive:

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STAFF ATTORNEY. For national conservation organization. Basic function of position is to provide a full range of legal advice and representation on conservation issues relating to Alaska, including litigation, lobbying and administrative liaison. For more information, contact Ann Rothe, National Wildlife Federation, Alaska Resource Center, 750 West 2nd Ave., Suite 200, Anchorage, Alaska 99501, (907) 258-4800. NWF is an equal opportunity employer. Women and minorities are encouraged to apply. We offer excellent benefits, including medical, dental and life insurance, and we are proud to promote a smoke-free work environment. Position closing date: January 15, 1989.

Keep those Cards & Letters Coming In

Verdict and Settlement Summaries

Case Title: ANCHORAGE, a municipal corporation, vs. RODERICK W.B. SAUNDERS, et al.
Case No. 3AN-85-300 Civil.
Brief factual description of case: Eminent domain (an easement) case. Verdict, $73,000.

Case Title: Fireman's Fund Insurance Companies v. Providence Washington Insurance Company of Alaska.
Case No.: 3AN-85-9194 Civil.
Brief factual description of case: Excess carrier sued primary carrier alleging negligent handling of a lawsuit filed against their common insured. Primary alleged comparative negligence and an affirmative counterclaim which the court ruled on prior to trial.
Description of injuries: Alleged loss of $2,000,000. which is the amount the third lawyer of excess coverage had to pay to settle the case post-judgement. Special damages, $2,000,000. Verdict, $0.

Case Title: Robert (Sam) Neidlinger v. Maytag Co.
Case No.: 3AN-84-10960 Civil.
Brief factual description of case: Plaintiff sued Maytag alleging defective design of the grounding system in a 1977 manufactured Maytag commercial dryer. Shoulder dislocation and bone chip injuries. Verdict amount, $228,000.

CLE Library of Alaska Bar Assocation

The Alaska Bar Association CLE Library contains videotapes and course materials of CLE seminars sponsored by the Association. The Library is open to Alaska Bar members who wish to rent videotapes and purchase course materials. Video rental fee is $10 per person, and course materials are available for most programs at a cost ranging from $5 to $45 each. Videotapes can be rented for up to 2 weeks outside the Anchorage area, and for 10 days within the Anchorage area. Videotapes are for rental inside Alaska only. For more information, contact Mary Lou Burris, CLE Assistant, at the Bar Office, 272-7469.

Send Us People Column News

STATE OF ALASKA

Executive Proclamation

by

Steve Cowper, Governor

Seaborn J. Buckalew, Jr., has honorably served this state as territorial prosecutor, United States attorney, private attorney, and district attorney.

He has shaped the law and history of this state in the territorial Legislature, Constitutional Convention, state Senate and in 15 years on the Superior Court bench.

He has able served his country in the Army, Army Reserve, Alaska Air Command and Alaska Air National Guard.

He has touched the lives of all who have come in contact with him with his kindness, wisdom and dedication to justice.

NOW, THEREFORE, I, Steve Cowper, Governor of the State of Alaska, do hereby proclaim September 15, 1988, as:

SEABORN J. BUCKALEW, JR., DAY

in Alaska, and wish him all the best.

DATED: September 12, 1988

Done by Steve Cowper, Governor, who has also authorized the seal of the State of Alaska to be affixed to this proclamation.

• Taxpayer's Bill of Rights

Continued from Page 1

However, these rights and remedies vary according to the nature of the case, and pale in comparison to the powers of the IRS.

In general, if the tax liability is not paid or settled at the administrative audit level, the IRS issues a notice of deficiency called a "90-day letter." Issuance of the notice of deficiency begins a 90 day stay or waiting period during which the delinquent taxpayer may file a petition in tax court. By filing a petition in tax court, the taxpayer may contest the deficiency without first paying the IRS. No assessment of any tax or collection through levy or proceeding in court may begin until after the notice has been mailed and this 90 day period has expired. When a taxpayer timely files a petition with the tax court, no assessment or collection is permitted until the tax court renders a final decision. The taxpayer may seek appropriate relief in U.S. District Court if the IRS attempts collection or assessment before the expiration of this waiting period. If, however, the IRS finds that collection of the tax is "in jeopardy" and immediate payment on demand is not forthcoming, the taxpayer's injunctive relief may be precluded.

Upon expiration of this 90 day stay, the IRS may assess the federal tax liability. Within 60 days of making the assessment, the IRS must provide notice of the assessment and demand payment from each liable party. A federal tax lien then arises upon all property belonging to the party liable for the tax. If any liable party fails to pay the full amount due within 10 days, the IRS possesses the authority to take forced collection action through levy.

The IRS' three main administrative collection tools (federal tax lien, summons and levy authority) give rise to substantial complaints about abuse, and thus deserve further explanation.

The federal tax lien, like other liens, constitutes legal notice of a claim or interest in property, and establishes priority between competing claims. The federal tax lien attaches to all property and rights to property, whether real or personal, belonging to the taxpayer. A federal tax lien arises automatically after the assessment is made, issuance of a notice of assessment, demand, and failure of the taxpayer to pay the assessment. The law does not require a federal tax lien to be filed. However, certain types of property are exempted from the reach of federal tax lien despite proper filing. Exempt property includes, but is not limited to, certain corporate and other securities, motor vehicles, personal property purchased at retail or casual sale, attorneys liens, insurance contracts, and pass book loans.

The IRS' second tool is the summons authority. The IRS possesses broad authority to "canvass" internal revenue districts in search of tax liabilities, and to issue summons to facilitate the obtainment of information pertinent to collection. A summons is an administrative remedy for which the IRS typically need not seek judicial approval. It allows the IRS to examine books, records and other data belonging to the taxpayer or third parties responsible for the taxpayer's books and records, take testimony from individuals with information regarding collection, and enter premises for the examination of taxable objects. When persons fail to timely or fully comply with the summons, the IRS may seek enforcement of the summons through court order.

The third and most potent administrative tool available to the IRS for collection is its levy authority. Without the need for prior judicial approval, the IRS is authorized to seize and sell property belonging to the taxpayer. The IRS is entitled to levy as often as necessary to collect the amount due plus the expenses of the levy.

A federal tax levy attaches upon service of notice on the person in possession of the property, whether that person is the taxpayer or a third party. Virtually all types of property are subject to a federal tax levy. A levy, however, attaches only to property owned by the taxpayer at the time of service of the levy. Thus, the levy will not attach to property transferred prior to the service of the levy, nor to property acquired afterward, excluding wages. A person who fails to surrender the property levied upon as required, may become personally liable to the United States in a sum equal to the value of the property, up to the amount of the unpaid taxes, costs and interest. Further, any person who fails to surrender property without reasonable cause is subject to a penalty in equal to 50% of the amount just described. This penalty is not credited against the amount due. On the other hand, if a person in possession of a taxpayer's property honors a federal tax levy, he is discharged of any liability to the delinquent taxpayer with respect to such property.

In addition, if the IRS is unsuccessful in collecting the unpaid taxes through its administrative procedures, it may file a judicial collection proceeding. Through such a proceeding, the IRS can reduce the tax liability to judgment and obtain judicial assistance in collecting any unpaid tax liability.

In the event that the IRS is unable to collect a tax liability from the primary taxpayer, secondary sources of payment may be examined. Examples of parties who may be liable for at least a portion of the underlying unpaid tax include (1) individuals responsible for unpaid employment withholding taxes, (2) certain lenders or financial institutions either supplying funds for employees' payment of taxes or paying employees directly, (3) individuals who act in a fiduciary capacity for delinquent taxpayers, and (4) transferees who receive property from certain taxpayers who have failed to satisfy fully their tax obligations.

With the exception of certain minor adjustments, the 1986 Tax Reform Act made no substantive changes to the IRS' collection powers. Rather, the vast majority of that act's provisions made changes to the accounting or computation provisions of the Internal Revenue code.

It is because of the perceived inequities between the IRS and the American taxpayer that Congress is currently considering legislation calling for a Taxpayer Bill of Rights. Although several bills were introduced this year, no bill has made it past the committee stage at the present time. In general, the major provisions of these bills are as follows:

1. Requires IRS disclosure of the rights and obligations of taxpayers.
2. Provides for certain safeguards for taxpayers during IRS interviews and audits.
3. Requires the IRS to discontinue an interview if the taxpayers indicates in any manner, at any time, that he or she wishes to consult an attorney, CPA or enrolled agent.
4. Provides for abatement of any penalties or interest imposed on a tax deficiency attributable to erroneous advice given to the taxpayer in writing by an officer of the IRS.
5. Provides for the establishment of taxpayer assistance orders through the office of the ombudsman.
6. Prohibits the IRS from basing employee performance evaluations on dollars collected or seizures made.
7. Provides for a preliminary letter of deficiency in advance of the traditional notice of deficiency (90-day letter).
8. Amends the levy provisions to provide for a 30 day notice instead of the current 10 day notice.
9. Increases the amount of property exempt from levy.
10. Expands the actions available to the taxpayer for recovery of fees and expenses where the IRS takes a position which is not substantially justified.
11. Provides for a civil cause of action

Continued on Page 16

Both buyer and seller in asset acquisitions must file new IRS form 8594

By John H. Raforth, III

Recently, the Treasury Department released regulations (1.1060-1T) interpreting Internal Revenue Code Section 1060. Those regulations mandate that both buyers and sellers in asset acquisitions file new IRS Form 8594. Section 1060 requires that both parties use the residual method to allocate the purchase price. Form 8594 permits the IRS to determine appropriate compliance.

An asset acquisition involves a transfer of a group of assets that constitutes a trade or business in which the buyer's basis is determined wholly by the amount paid for the assets. A group of assets is considered a trade or business if goodwill or going-concern value could under any circumstances attach to the transferred assets.

Form 8594 is filed with the buyer's and seller's federal income tax return for the year in which the sale occurs. This requirement is effective for asset acquisitions in taxable years for which the due date for the tax return (including extensions) falls after September 12, 1988. Since the effective date is based on the return's due date, Form 8594 may be required for asset acquisitions having purchase dates prior to September 12, 1988.

Practitioners representing parties involved in asset acquisitions need to be aware of Section 1060 and should take appropriate measures so that both buyer and seller report the sale in a consistent manner on their respective Form 8594 filings. Failure to do so may subject the parties to problems with the Service subsequent to the sale's closing date.

I.R.$.

• Bankruptcy and taxes legerdemaine

Continued from Page 1

Penalties relating to nondischargeable taxes are not dischargeable if they are compensatory in nature. If the penalties are "pecuniary loss penalties," they are afforded the same treatment as the tax claim upon which they are based.

The distinction between compensatory and punitive penalties has not been fully explored. A number of courts have found penalties and fines related to pre-petition tax claims assessed on federal and state tax deficiencies to be presumptively punitive and therefore subject to discharge. *See, e.g., In re Hirsch-Franklin Enterprises, Inc.,* 63 B.R. 864 (Bkrtcy. M.D. Ga. 1986); *In re Healis,* 49 B.R. 939 (Bkrtcy. M.D. Penn. 1985). Instead, these penalties are general unsecured dischargeable claims. It is the governmental unit's burden to rebut the presumption that a tax penalty is not punitive. *See In re Patco Photo Corp.,* 82 B.R. 192 (Bkrtcy. E.D. N.Y. 1988). *See also Matter of Unimet Corp.,* 74 B.R. 156 (Bkrtcy. N.D. Ohio 1987); *In re Reich,* 66 B.R. 554 (D. Colo. 1986).

Another example of a "punitive" tax penalty not entitled to priority treatment is the negligence penalties assessed by the I.R.S. under §6653 of the Internal Revenue Code. *See In re Schultz Broadway Inn, Ltd.,* 89 B.R. 43 (Bkrtcy. W.D. Mo. 1988).

If most tax penalties are presumptively punitive, what qualifies as a nondischargeable "compensatory" penalty? Pre-petition interest on priority tax claims may be one example. There is a split of authority on the question of whether pre-petition interest accrued on tax liabilities is to be given priority status along with the underlying tax claim under Section 507(a)(7). The majority view is that interest is entitled to the same priority as the tax because the interest is (a) assessed as a penalty; (b) is compensatory in nature, and is related to a Section 507(a)(7) tax claim. *See e.g. Matter of Unimet Corp.,* 74 B.R. 156 (Bkrtcy. N.D. Ohio 1987). When both penalties and interest have been assessed on pre-petition taxes, courts hold that the compensatory rule can be applied to the interest, but not to both interest and penalties. *See In re Hirsch-Franklin Enterprises, Inc.,* 63 B.R. 864 (Bankr. M.D. Ga. 1986).

Some courts, representing a minority view, deny nondischargeable treatment for pre-petition interest claims. *See, e.g., In re Razorback Ready-Mix Concrete Co.,* 45 B.R. 917 (Bankr. E.D. Ark. 1984). The court in that case recognized that interest forms part of the government's allowed claim, but reasoned that simply because a certain sum is part of a claim is not, of itself, sufficient to give that sum the same priority as the rest of the claim.

A common and important compensatory penalty is the one falling on "responsible" individuals for failure to collect and transmit withholding taxes (IRC §§ 3402(a) and 6672). Remember, an employer is required to make two types of withholding—the employees' taxes ("trust fund") and the employer's portion. One or more individuals are actually responsible for mailing withholding on behalf of the employer. The "responsible" individual is assessed a 100% penalty upon the trust fund portion which is, improperly, not withheld. Therefore, if the "responsible" person files bankruptcy, he or she cannot discharge the withholding penalty.

When an employer files bankruptcy and then, prior to confirmation of its reorganization plan, the employer pays some of its pre-petition tax liabilities, the employer does *not* have the right to direct those payments to its trust fund taxes and thereby protect its principals from personal liability for those taxes. That rule was announced by the Ninth Circuit last year in *In re Technical Knockout Graphics, Inc.,* 833 F.2d 797 (9th Cir. 1987).

It is an IRS policy that when a taxpayer submits a "voluntary" payment, the taxpayer may designate the liability to which the payment will be applied. But when the payment is "involuntary," the IRS allocates the payment as it sees fit, usually applying the payment first to non-trust fund taxes. Because the personal liability of the "responsible persons" offers an additional source for collection of trust fund taxes, this policy increases the IRS' opportunity to recover fully the taxes that are due.

The Ninth Circuit concluded that payments made by a debtor in possession after filing a Chapter 11 petition, but prior to confirmation of a plan, are "involuntary payments" and that the bankruptcy court does not have equitable jurisdiction to order otherwise.

LITTLE VICTORIES

Despite dischargeability problems, bankruptcy can be of some help.

For the debtor who can qualify, Chapter 13 (formerly "Wage Earner Plans") permits an easy payment schedule. Although taxes are not dischargeable, Section 1322 generally permits an unsecured tax claim to be paid over three to five years without interest. This, of course, is a tremendous benefit to the debtor who just can't seem to get the IRS off his back otherwise.

If the taxing authority obtains a lien before bankruptcy, it is entitled to more favorable treatment: to the extent that the lien has value, it is a secured claim and the holder is entitled to its present value (§1325(a)(5)). Basically that means the debtor must pay interest.

Remember, though, the claim is secured only to the extent the lien has value. For example, a debtor owes $50,000 in taxes and the IRS has recorded its lien. However there is only $10,000 worth of property subject to the lien. In that case, the Chapter 13 plan must pay $10,000 with interest and $40,000 without.

Chapter 13 is designed for consumer debtors. To qualify for Chapter 13, an individual (and spouse) cannot have more than $100,000 unsecured and $350,000 secured liquidated noncontingent debts.

Chapter 11 debtors are also given an extended payment schedule, but they must pay interest on all tax claims even if they are unsecured. The payment period may be up to six years (§1129(a)(9)(c)).

Interest may not accrue during the period between the bankruptcy filing and plan confirmation, even if the IRS is oversecured. However the circuits are split and the issue is currently before the Supreme Court. *In re Ron Pair Enterprises, Inc.*, 828 F2d 367 (CA. 6th), currently on cert.

Debtors contesting tax claims enjoy a substantial benefit in bankruptcy. In the Tax Court, the Claims Court, and District Court (in non-bankruptcy cases) the debtor generally bears the burden of proof. In Bankruptcy Court, the debtor need only overcome a *prima facia* presumption that the claim is correct (Bankruptcy Rule 3001(b)). Thereafter the burden probably shifts to the claim holder.

Finally, the Bankruptcy Code helps a debtor whose property has been seized by the IRS. In most instances a Bankruptcy Court will order such property returned to a Chapter 11 or Chapter 13 estate.

ANOTHER PROBLEM

Although turnover is a pleasant right for the debtor, it does not destroy a taxing authority's lien on property. In fact, the Bankruptcy Code gives tax liens a special status.

Liens which secure pre-existing debts are usually seen as preferential. Such a lien will be set aside if a bankruptcy is filed within 90 days of its attaching (§547). Thus, if a creditor obtains a judgment lien or is given a consensual lien for an old debt, a bankruptcy filed within 90 days will effectively void the lien.

Tax liens, however, are statutory and statutory liens are not subject to attack as preferences (§547(c)(6)). Thus a tax lien which attaches the day before bankruptcy will remain in effect.

The Bankruptcy Code also contains a trap for Chapter 7 debtors who are subject to tax liens. Normally a tax lien could actually benefit the debtor, since the property will be used to pay a debt which would otherwise be nondischargeable, even though other claims may have higher priorities.

However §724(b) essentially provides that the tax lien is preserved for the benefit of higher priority (under §507) debts, even though those debts (unlike tax debts) are dischargeable. Therefore a debtor's property subject to a tax lien may go to pay otherwise dischargeable debts, leaving the debtor with his or her

Continued on Page 16

Fairbanks attorney Arthur Robson penned the following verse to the IRS after receiving one too many dunning letters. It seems he initially gained IRS attention when he filed his employer's withholding form with a branch bank as opposed to the bank's main office. To make matters worse, he failed to round off his payment to the lower dollar. As a result, he was fined. Mr. Robson paid the fine and received a receipt therefor, but the dunning letters kept coming. This poem was written and mailed to get some human, as opposed to computer, reaction. To date, it has not achieved that end.

IRS Lament

BY ARTHUR LYLE ROBSON

There are strange things done, 'neath the midnight sun.
Some stranger than you'll ever guess.
But the strangest by far, (how far out they are),
Are done by the I.R.S.

Taxpayers mostly, whether corporeal or ghostly,
Are viewed as a bit of a cheat,
So a pound of flesh here, and a cut-off ear,
When the blood runs it's really neat.

While Robson, the employer, waits out in the foyer
And pays six bits too much,
We'll show him he's dirty, penalize him $130
Add another nickel or such.

A remittance not timely shows us that he's slimy
Depositing in a branch bank.
The bank posting service didn't make him nervous,
So his butt we'll have to spank.

A taxpayer dunce who has only paid once.
Paid the penalty one time too.
He should pay twice if he wants to be nice.
We'll write him, that's what we'll do.

We called him last night. We were awfully polite,
Told him his debt was fullpaid.
It surely seems plain, we'll collect again,
There's money here to be made.

Our computer's real hot. Take it out. Let it trot.
Keep him paying until next June.
Our ace debtor pic, on him we will sic.
Send a letter from Kathy Moon.

How shall we be neat and deny the receipt
Which shows the penalty full paid?
He'll never more try, on facts to rely,
Just showing the deposit was made.

Run by one more time this taxpayer slime
A demand filled with funny reason.
His ox we will gore, adding to our score,
Successful encapping our season.

Robson saw red instead of playing dead,
And sent us a note just to tell
That he'll no more pay and just wants to say
The IRS can go to hell.

• Look to finances

Continued Page 14

for damages sustained due to the IRS' failure to release a lien or for damages sustained due to unreasonable collection actions by the IRS. Damages allowable would include actual damages sustained, or $100 per day, whichever is greater, plus reasonable litigation costs.

Passage of the Taxpayer Bill Of Rights might not lessen the zealousness of the IRS in its collection actions. However, it would provide a good step towards providing some fairness in the process. It would also provide a remedy for taxpayers who are abused by the system.

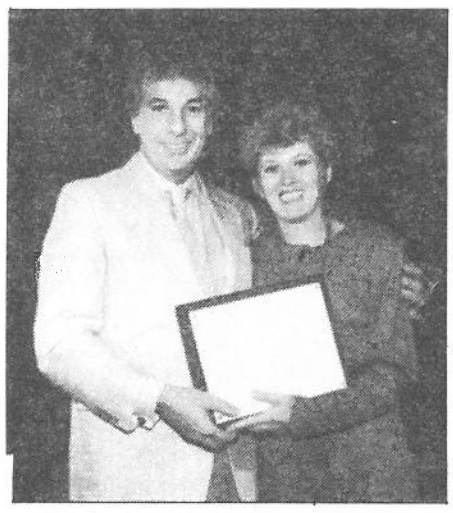
Mr. Matthews is a co-author of "A Survey of Federal Tax Collection Procedure: Rights And Remedies of Taxpayers And the Internal Revenue Service," appearing in the December, 1986 issue of the Alaska Law Review.

• Taxes & bankruptcy

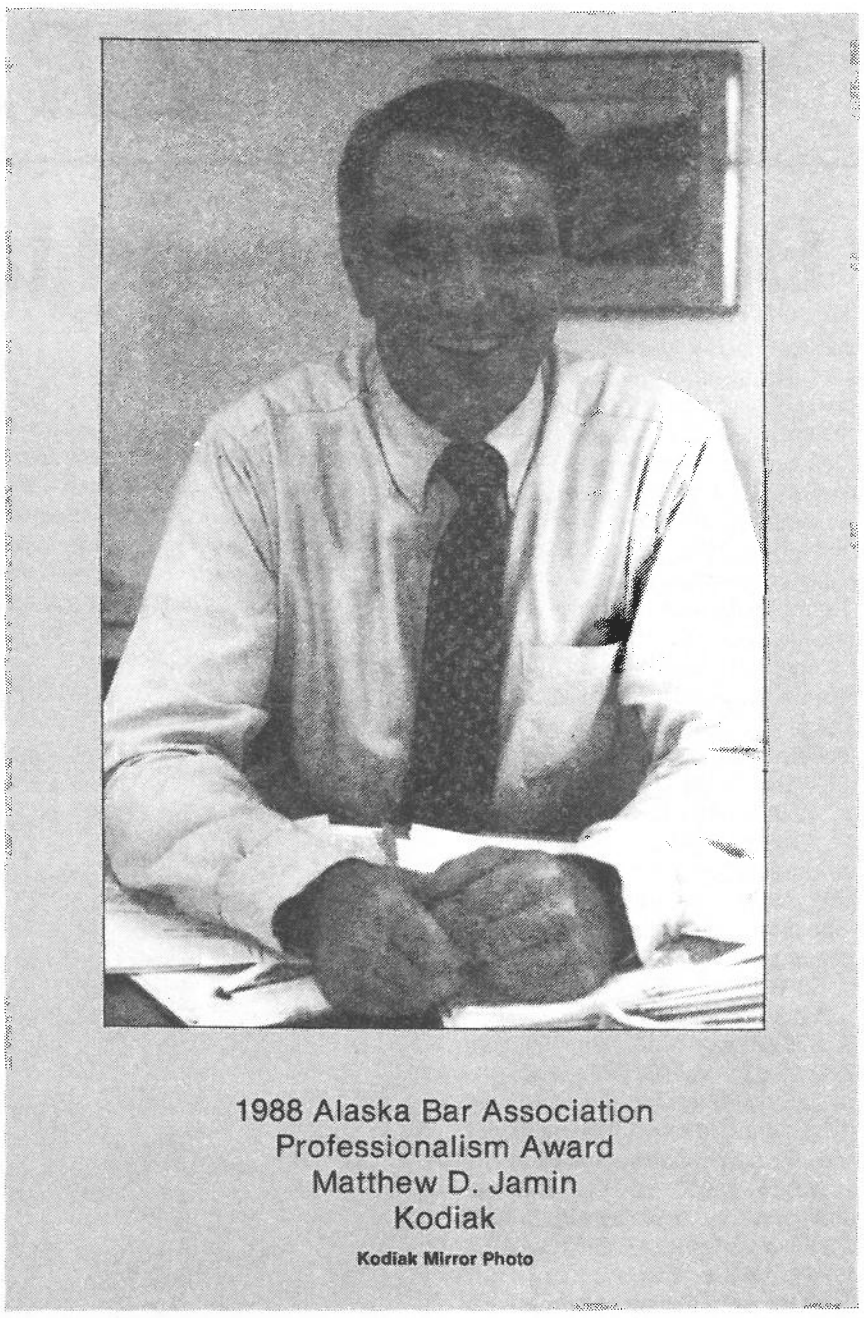
Continued from Page 15

unpaid nondischargeable tax debt.

Remember this article deals only with tax claims in bankruptcy. It does not attempt to discuss or even list the myriad other tax aspects of a bankruptcy filing. These matters (such as loss recognition, short year election by the debtor, preservation of tax attributes, and the nonbankruptcy, exceptions to income upon cancellation of indebtedness [*e.g. insolvency and debt to corporate shareholder*]) are well beyond the pale for most general and bankruptcy practitioners. Any potential debtor is well advised to confer with a tax advisor.



Marianne Lindley Girten, RPR, of Anchorage, Alaska, receives 1988 National Shorthand Reporters Association Pro Bono Award from NSRA Past President Raymond F. DeSimone, RPR, of New York City.

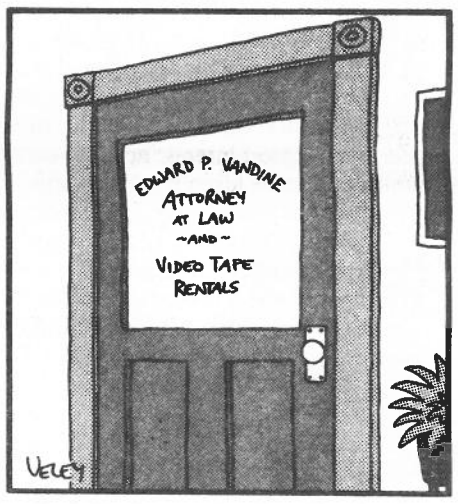


1988 Alaska Bar Association
Professionalism Award
Matthew D. Jamin
Kodiak

Kodiak Mirror Photo

TOUR A TITLE PLANT!

The Anchorage Young Lawyers and the Real Estate Section of the Alaska Bar have arranged for a tour of the Transalaska Title Insurance Company on Tuesday, November 29, 1988, from 5:30 to 7:00 p.m., located at New Seward and Tudor Road, next door to the Pierce Street Annex.



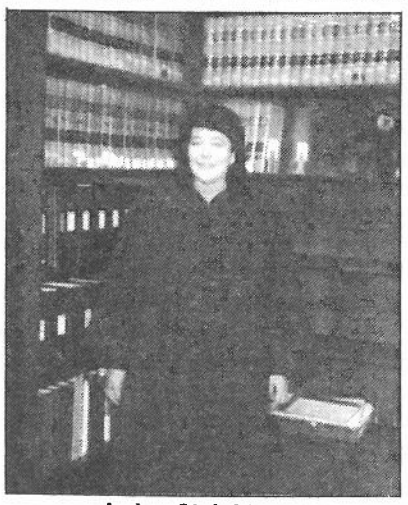
Four new judges

Steinkruger

On October 14, 1988, Niesje J. Steinkruger was sworn in as a Superior Court Judge for the Fourth Judicial District in Fairbanks, before a courtroom overflowing with colleagues, friends, family, and associates.

Niesje attended undergraduate school at Sophia University in Tokyo, Japan, and at the University of Nebraska from which she graduated in 1973. She obtained her law degree from the University of Nebraska School of Law in December of 1975. In September of 1975, Niesje interviewed with Fairbanks attorney Lloyd Hoppner in Nebraska, visited the law firm the next month, and determined to abandon her dreams of being an international transaction and tax attorney and to seek her future in Alaska, instead.

Judge Steinkruger graduated from law school in December of 1975, and later that month married Roger Brunner, who had graduated from Notre Dame law school that same month. The two traveled to Alaska and began working for the law offices of Rice, Hoppner & Hedland, in January of 1976.

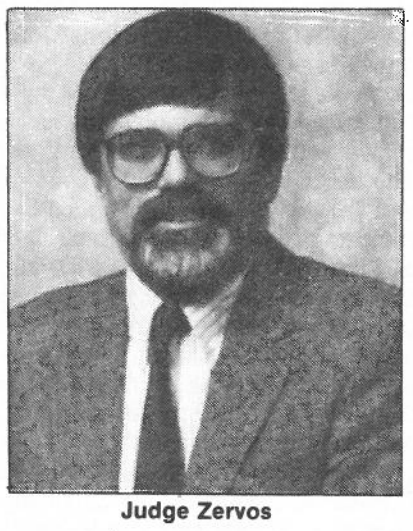


Judge Steinkruger

After three years with this law firm, Niesje went to work for the Attorney General's Office in 1979, and continued in that capacity until 1983, when she went to work for the Public Defender's Office.

In 1988, Judge Steinkruger joined the Fairbanks office of Guess & Rudd, where she worked until her recent investiture.

Zervos



Judge Zervos

On October 28, 1988, Larry C. Zervos was sworn in as a District Court Judge for the Fourth Judicial District, Fairbanks. Supreme Court Justice Jay Rabinowitz administered the oath of office to Judge Zervos and presided over the investiture ceremony that was attended by many friends, family members, and associates of the new Judge.

Judge Zervos grew up in Las Vegas, Nevada, and obtained an undergraduate degree in psychology from the University of Nevada, Las Vegas. He obtained his law degree from the University of Puget Sound in 1977, and from there traveled to New York City where he practiced law for 1½ years.

In 1979, Larry and his wife, Karla, returned to Alaska, and Larry practiced law for roughly four weeks in Kenai, Alaska. He accepted a job with the District Attorney's Office in Fairbanks in December, 1979 and practiced there through December of 1982.

Larry went into private practice with Chris Zimmerman until February of 1983, when Zimmerman was appointed to a District Court position in Fairbanks. Since February of 1983, until his judicial appointment, Judge Zervos practiced as a sole practitioner in Fairbanks where he gained the respect and admiration of his colleagues.

As a Judge, Zervos now finds himself once again sharing offices with Zimmerman.

Wolverton

Mike Wolverton was admitted to the Alaska Bar in June of 1980. He was recently appointed District Court Judge for the Third Judicial District.

Mike Wolverton was born and raised in Minnesota, attended the University of Minnesota Law School, and graduated in 1977.

Married in 1985, Mike's wife is from Scotland. The couple has one daughter, who is 19 months old, and they expect a second child in May.

Before coming to Alaska, Mike was a Public Defender in Micronesia, a group of islands and U.S. trust territory in the Pacific. At the time he left Micronesia in 1979, Mike was acting chief for that office.

Earlier, as a public defender on the Island of Saipan, he also handled divorces, immigration law and did appellate practice

Wolverton brought claims under the War Claims Settlement Act and drafted legislation for the new government of the Commonwealth of the Mariana Islands.

During Mike's tenure in Micronesia, the Chief Public Defender was Herb Soll, and the two established a friendship that would remain after the two relocated to Alaska (Soll is now the District Attorney in Bethel).

Judge Wolverton

Judge Victor Carlson was Mike's first Alaska employer (he served first as a law clerk) and Wolverton remembers he came up to Alaska with the intention of staying for one year.

He'd clerked for Judge Carlson for six months, when the judge encouraged his law clerks to take available positions. When an urgent opening came up in the Public Defender's office, Mike received a call about the position on a Thursday or Friday, and by the following week he was again a public defender.

While working for the Public Defender Agency he supervised the opening of the Public Defender office in Palmer; served one year as the Palmer Public Defender; and accepted a position as a pro tem District Court judge.

Wolverton held that position for two years, and though he traveled some, he primarily served in Anchorage, under a federally funded DWI project designed to move DWI cases through the system faster.

After two years, returned to the Public Defender Agency only to find himself drawn to the challenge of being a referee, rather than an advocate. Being a judge/referee is one thing that a person doesn t know how well he is going to do until he does it, and Mike found the work of a judge much more interesting than he had anticipated. When an opening came up he decided to seek the position.

He put his name into the ring with some trepidation. One never knows how his peers in the bar will rank him. The results of his bar poll were gratifying and heartening and were as important to him as getting the district judge position.

Mike liked the contact he had with people when he was a pro tem judge. He looks forward to renewing that interaction. He also is looking forward to the intellectual challenge.

While being a pro tem judge he heard various small claims. When parties are not represented by counsel the judge must identify and sort out the legal issues as each side presents its version of the facts. In his experience the presentation of each side's facts raised so many issues it was like a "pop quiz" in law school, he observed.

His goal as a judge is to give people their day in court. Too often courts lose sight of the fact that they are there to serve people. It is important to be efficient, but courts are inherently inefficient machines because they necessarily are people-oriented. People must be given time to explain their positions, he believes, especially when people represent themselves. It takes time for people to tell their story. It takes time to sort through their story and determine what is relevant. It is essential that people leave the court feeling that they have been treated with dignity and respect. People deserve an explanation of why the judge decided to go the way he did. Whether they agree with the judge's position or not, they have a right to hear his explanation. In order for the system to work people must feel that justice has been done.

Fabe

Dana Fabe was admitted to the State Bar of Alaska in October of 1977. She was recently appointed Superior Court Judge for the Third Judicial District.

Dana grew up in Cincinnati, Ohio. She went to undergraduate school at Cornell University in Ithica, New York, and attended law school at Northeastern in Boston. Northeastern has a cooperative legal education program in which law students are expected to work in law offices, and Dana's interest in Alaska first evidenced itself when she applied to Wendell Kay to work here in Alaska during the winter of 1974-75. She also applied for a job in Honolulu. Although she took the job in Honolulu, her interest in Alaska remained.

When Justice Burke came to Boston interviewing for clerkship positions, Fabe signed up to talk with him, returned to Hawaii and accepted immediately when the Justice offered her the job in 1976.

In 1977 she went to work for the Public Defender Agency as an appellate attorney.

Later, Fabe handled misdemeanor and felony trial work, and supervised the appellate department.

When Brian Shortell was appointed by Gov. Jay Hammond as a Superior Court Judge in 1980, he left a vacancy as director of the Public Defender Agency, a four-year fixed term position with an application procedure paralleling that of applying for a judgeship.

Dana was the Acting Public Defender until Hammond appointed her in 1981; she held the position for 7½ years.

Dana believes that her experience as the Public Defender has provided good preparation for being a judge. As the Public Defender she has had to focus on

Judge Fabe

dozens of issues daily. She was responsible for all hiring and supervision of the 12-branch offices; prepared the budget and defended it to the Legislature; sits on various boards and commissions, executive task forces, and on the Advisory Board to the University's Justice Program; and maintained her own trial and appellate caseload.

Because, as the Public Defender, Judge Fabe technically represented most criminal defendants, and will not preside in criminal cases for some time.

Dana looks forward to doing civil work, she said, seeing it as an intellectual challenge, encompassing a lot of hard work. Dana will be the fast-track judge, and said it is her understanding her case load will be over 1,000, focusing on 50 to 75 matters per week.

Dana is married to Randall Simpson, a partner at Jermain, Dunnagan & Owens. She met him in Alaska when he worked for the Judicial Council, and she clerked for Justice Burke. Randy's practice is exclusively civil, with an emphasis

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• Arbitration clause and the uninsured motorist

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The Mandatory Arbitration Clause Favors Claimants.

Arbitration is Fast. Arbitration is generally thought to be a speedier process than litigation. In my experience, this is universally the case. Most garden-variety uninsured motorist cases can be resolved faster via arbitration than under the "fast-track" provisions of Alaska Rule of Civil Procedure 16.1.

Arbitration is Relatively Inexpensive. Arbitrators have the option of issuing the equivalent of a pretrial order. When this is done, the order is rarely as detailed or onerous as that typically coming from the superior court. Extensive motion practice is not likely. A case before a panel of arbitrators will not require the preparation of jury instructions, and even relatively complex cases can be concluded from beginning to end in one to three days.

Arbitration is Relatively Efficient. While this is completely discretionary with the arbitrators, technical rules of evidence are frequently dispensed with in whole or in part. Technical and foundational objections, in my experience, are rarely well received, and arbitrations generally move forward without the pomp, circumstance, and attendant waste of time typical of court trials.

Discovery is Limited. This depends upon the policy. Some policies provide that discovery will take place in accordance with the civil rules of the jurisdiction in question. Many policies are completely silent on the matter of discovery. Under these circumstances, the matter of discovery is within the discretion of the arbitrators. Arbitration panels frequently rule that the intent of arbitration, to provide a fast, relatively inexpensive and unencumbered method of seeking the truth, is only promoted under circumstances where discovery is limited. The reciprocal obligations of good faith and fair dealing that are implied in the contract of insurance dictate disclosure of information that will be used at the arbitration hearing. With this underlying concept in mind, many arbitration panels routinely demand the exchange of relevant information, but severely limit the "fishing expeditions" that typify conventional litigation.

Arbitrators Are Sophisticated Fact Finders. While typical policy language does not dictate this result, lawyers usually end up acting as arbitrators in UM/UIM disputes. Few of us ever go to trial expecting to pull the wool over anyone's eyes. Claimants in conventional litigation face the challenge of finding a jury with the intelligence and perspective to disregard the anti-victim propaganda put forward by the insurance industry, an attention span adequate to grasp frequently complex theories of liability and difficult damage issues, the ability to see through the sophistry of the opposition, and a commitment to putting fairness before personal bias. It is my opinion that, on the whole, arbitration panels rise to these challenges better than juries.

Arbitrators Have Broad Discretion. Alaska Statute 09.43.120 discusses the grounds upon which an arbitration award may be vacated by the superior court. A.S. 09.43.120(b) states:

> "The fact that the relief is such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award."

The Alaska Supreme Court has held that an arbitrator's misconstruction of a contract is not open to judicial review, that this is the case even in the face of "gross errors," that gross errors do not fall within the "fraud or other undue means" standard of A.S. 09.43.120(a), and that arbitration proceedings are not reviewable for evidentiary sufficiency. *See Alaska State Housing Authority v. Riley Pleas, Inc.,* 586 P.2d 1244 (Alaska 1978). In the same vein, our court has ruled that arbitrators may fashion any remedy necessary to resolve the dispute before them, and that they need not follow applicable law in doing so. *See generally Board of Education v. Ewig,* 609 P.2d 10 (Alaska 1980); *University of Alaska v. Modern Construction. Inc.,* 522 P.2d 1132 (Alaska 1974); *Anchorage Medical & Surgical Clinic v. James,* 555 P.2d 1320 (Alaska 1976).

Appeals are Unlikely and Any Chance of Success is Remote. UM/UIM policies that I am familiar with do not require that arbitrations take place on the record. Our supreme court has found that Alaska's Uniform Arbitration Act, A.S. 09.43.010-180, does not require that arbitrations take place on the record. As a practical matter, there is very little that can be appealed. As a legal matter, there is precious little that could lead to an appeal absent fraud or corruption on the part of the panel. *See* A.S. 09.43.120.

Implications for Case Selection.

For the reasons stated above, UM/UIM cases have a relatively short and much more predictable life expectancy. They can be handled more cheaply and easily by plaintiffs and, particularly in the marginal or difficult case, the outcome is likely to be more favorable than that achieved in the courtroom. All of this has the effect of "moving the margin" in terms of case selection. On the average, and over the long term, a case that would be rejected for litigation in the superior court may well be accepted if it can be resolved under the terms of a UM/UIM policy.

Proposed Bylaw revision would expand Law-Related Education Committee

The Bar's Law Related Education Committee currently provides for a 15 member statewide committee, with two seats for Fairbanks and two seats for Juneau. In recognition of the increasing involvement of lawyers in other areas of the state, and the need for attorneys to work with their local community and school district, the Board proposes to expand the committee and divide it into subcommittees according to community. The bylaw would be revised to read as follows:

(5) the Law Related Education Committee, a committee responsible for presenting programs and producing publications to aid the public in understanding of the law and the legal system; the committee is divided into subcommittees in the communities of Anchorage (12 members), Fairbanks, Juneau, Kenai, Mat-Su and such other communities as the president sees fit to appoint. Lawyers are invited to send comments to the Bar office.

Fabe is named judge

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in labor law, and they have a five-year-old daughter.

Because of the financial interest her husband has in all cases in which the law firm of Jermain, Dunnagain & Owens represents a party, Dana will excuse herself from any case in which a party is represented by her spouse's practice.

Dana decided that she would apply for a judgeship when she heard that Judge Buckalew was retiring. She received a variety of telephone calls from supporters asking if she was interested in filling the vacancy. Next spring her second four-year term as Public Defender would expire, and she would soon have to decide if she wanted a third four-year term.

In making up her mind to apply for the judgeship she felt that the skills required for running the Public Defender Agency are similar to those required of a judge. She enjoyed the decisionmaking aspects of being the Public Defender and loves the courtroom, she said.

Dana greatly admires Judge Buckalew. Judge Buckalew was warm and gracious to every party and attorney who appeared in his courtroom, and all parties felt that they had been treated fairly and with respect. Judge Buckalew not only gave serious consideration to the issues before him, he also was able to communicate that concern and make the parties feel that justice had been done.

As a judge, Dana states that she will work diligently in order to render prompt and well reasoned decisions. It is also her goal to treat the parties and attorneys with respect and courtesy. She wants every person who appears in her court to feel that he or she has been given a fair hearing.

ETHICS ETHICS Ethics ETHICS ETHICS ETHICS ETHIC

ALASKA BAR ASSOCIATION
Ethics Opinion No. 88-5
Letter regarding judge standing for retention election

The Ethics Committee has been requested by a member of the judiciary to give an opinion as to the propriety of writing a letter to local newspapers supporting the retention of a judge who is being considered by the voters for retention or rejection. The letter to the news media would not be on judicial stationary, and would not identify the writer as a sitting judge. It is the opinion of the Committee that the letter would violate Canon 7(A) of the Code of Judicial Conduct.[1]

Canon 2(B) of the Code of Judicial Conduct states, in part:

> [A judge] should not lend the prestige of his office to advance the private interests of others.

Canon 7(A) of the Code of Judicial Conduct states, in part:

> (1) A judge or candidate for election to judicial office should not:...(b) make speeches for a political organization or candidate or publicly endorse a candidate for public office. . .
>
> (4) A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system or the administration of justice.

It is the Committee's opinion that a judge who writes a letter in support of a judicial candidate, which letter is not on judicial stationary and does not identify the writer as a sitting judge, would violate Canon 7(A) of the Code of Judicial Conduct. Such a letter would constitute a Public endorsement of a candidate for Public office within the terms of Canon 7(A).

The basic purpose 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, because of their offices, judges are asked to accept restrictions on their public conduct that do not apply to other citizens. (Alaska Bar Association Ethics Opinion No. 85-1; American Bar Association Informal Opinions No. 85-1513 and 1468) A judge's involvement in the retention election of another judge, particularly where the judge's position is contrary to the recommendation of the Alaska Judicial Council, could tend to reduce public confidence in the judiciary.

As a practical matter, the amount of information available for the public to become informed as to the performance of sitting judges is limited. The Alaska Judicial Council conducts a poll, and publishes the results and its recommendations. In Alaska, unlike recently in California and Texas, there has been very little campaigning or the dissemination of public information in judicial retention elections.

One of the appropriate sources of information regarding the performance of a judge would seem to be from other members of the judiciary. Such public endorsements, however, are prohibited by Canon 7(A). Other sources of information helpful to the voters are the attorneys and litigants who have appeared before the judge who is a candidate for retention election. These potential sources of information helpful to the voters should not be prevented from disseminating this information.

In this regard, attorneys need to be aware of DR8-102 of the Alaska Code of Professional Responsibility, which states:

> DR8-102. *Statements Concerning Judges and Other Adjudicatory Officers.*
> (A) A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.
> B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

Adopted by the Alaska Bar Association Ethics Committee this 20th day of October, 1988.

Approved by the Board of Governors this 22nd day of October, 1988.

[1] The Alaska Bar Association Ethics Committee will issue opinions on the propriety of conduct under the Code of Judicial Conduct at the request of a judicial officer, whether that judicial officer is an attorney or a non-attorney. The judges who are attorneys have the right to request ethics opinions regarding their own conduct in the same manner that attorneys may request opinions. The principal difference is that the attorneys are guided and governed by the Code of Professional Responsibility, while the judiciary is guided by the Code of Judicial Conduct. Additionally, as a Practical matter, the Ethics Committee is unaware of any other agency in the State of Alaska which will issue advisory opinions intended to assist the judiciary. It makes no practical sense to opine as to the Code of Judicial Conduct at the request of judges who are attorneys, and refuse to do so at the request of judicial officers who are not attorneys. Accordingly, opinions as to the Code of Judicial Conduct may be sought by both attorney and non-attorney judicial officers.

ALASKA BAR ASSOCIATION
Ethics Opinion No. 88-6
Contingent fee or lien on real property in quiet title litigation

The Committee has been asked whether it is unethical for an attorney to enter into an agreement with a client to secure the attorney's fees by means of a lien on real property which is the subject matter of litigation brought by the attorney on behalf of the client. Further, and as an alternative, the Committee has been asked if a contingent fee arrangement can be negotiated with the client under which the client would agree to assign an interest in real property subject to the litigation to the attorney as a contingent fee.

The attorney represents the former owner of a large parcel which was subsequently subdivided and sold to a number of purchasers. None of the subsequent transactions were recorded, and many of the purchasers have ceased making payments due to misrepresentations. The former owner has retained the attorney to bring suit to set aside the original conveyances. The former owner is unable to afford the fees, and the attorney wishes to either secure the fees through an attorney's lien on the property or negotiate an assignment of an interest in the property, in the event the property is recovered from the purchasers.

DR 5-103 of the Code of Professional Responsibility proves that:

> (A) A lawyer shall not acquire a proprietory interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:
> (1) Acquire a lien granted to secure his fee or expenses.
> (2) Contract with a client for a reasonable contingent fee in civil case.

EC 5-7 recognizes that it is not improper for a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens, even though by doing so he may acquire an interest in the outcome of litigation. It further recognizes that although a contingent fee arrangement gives a lawyer a financial interest in the outcome of litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice.

Based on the above, and subject to subsection (B) of DR 5-103 which prohibits an advance or guarantee of financial assistance other than the expenses of litigation, it appears that either arrangement could be made between the attorney and the client. Such an arrangement is subject to Canon EC 2-19 and Bar Rule 35(c).

The legal effect of any lien which might be asserted or created is a matter of law, rather than a matter of ethics, and is beyond the scope of this opinion.

American Bar Association Informal Opinion No. 1461 should be taken into account in determining whether or not to assert an attorney's lien. By analogy to Opinion 1461, when determining whether to secure the payment of fees by a statutory or contractual lien, the lawyer should take into account the financial situation of the client, the sophistication of the client in dealing with lawyers, whether the fee is reasonable, whether the client clearly understands and agrees to pay the fee, whether imposition of a lien would prejudice important rights or interests of the client or of other parties, whether to failure to impose the lien would result in fraud or gross imposition by the client, and whether there are less stringent means by which the matter can be resolved or the amount which is owed or will be owing can be secured.

Adopted by the Alaska Bar Association Ethics Committee this 20th day of October, 1988.

Approved by the Board of Governors this 22nd day of October, 1988.

PROPOSED RULE CHANGES

Standard of Character and Fitness

The Board of Governors proposes that Bar Rules 2, 5, 6 and 61 be amended. These amendments reflect the conclusion of the Ethics Committee that the good moral character standard established in the present Rule 2(1)(d) does not provide a workable guideline for evaluating one's fitness to practice law.

The proposed rule changes are intended to provide concrete guidance in assessing an applicant's fitness to practice law.

Members are invited to comment on the proposal rule. This will be considered for final adoption by the Board at its January 20-21, 1989 meeting.

Rule 2

Repeal Rule 2(1)(d) and replace it with:

(d) Be one whose record of conduct justifies the trust of clients, adversaries, courts and others with respect to the professional duties owed to them. A record manifesting a significant deficiency in the honesty, trustworthiness, diligence or reliability of an applicant is a basis for denial of admission.

The revelation or discovery of any of the following should be treated as a cause for further inquiry before the bar examining authority decides whether the applicant possesses the character and fitness to Practice law:

(1) a criminal conviction except minor traffic violations
(2) academic misconduct which has resulted in disciplinary action;
(3) making of false statements under oath or affirmation, including omissions;
(4) acts involving dishonesty, fraud, deceit or misrepresentation;
(5) neglect of financial obligations;
(6) violation of an order of a court;
(7) evidence of serious physical, mental or emotional disorders;
(8) evidence of drug or alcohol dependency;
(9) denial of admission to the Bar in another jurisdiction on character and fitness grounds;
(10) disciplinary action by an attorney disciplinary agency, other professional disciplinary agency or any governmental or administrative agency of any jurisdiction; or
(11) acts of sexual or physical abuse.

In weighing each of the above factors, the following should be considered in assigning weight and significance to prior conduct:

(1) the applicant's age at the time of the conduct;
(2) the recentness of the conduct;
(3) the reliability of the information concerning the conduct;
(4) the seriousness of the conduct;
(5) the circumstances surrounding the conduct;
(6) the cumulative effect of conduct or information;
(7) the evidence of rehabilitation;
(8) the applicant's positive social contribution since the conduct;
(9) the applicant's truthfulness in the admissions process; and
(10) the materiality of any omissions or misrepresentations.

Rule 5

Amend Rule 5(1)(a)(3) as follows:

(3) be found by the Board to [BE OF GOOD MORAL CHARACTER,] *meet the standard of character and fitness,* as required pursuant to Rule 2(1)(d).

Amend Rule 5(1)(c) as follows:

(c) The Board may conduct a character investigation of an applicant, or may continue such an investigation, after the applicant has been permitted to take, or has passed, the examination prescribed by the Board pursuant to Rule 4. The fact that the Board has permitted the applicant to take the examination, and has qiven the applicant notice that he or she has passed the examination, shall not thereafter preclude the Board from denying the admission of the applicant on the grounds of [LACK OF GOOD MORAL CHARACTER] *character and fitness as set forth in Rule 2(1)(d).*

Rule 6

Amend Rule 6(7)(c) as follows:

(c) Where an examination permit has been denied on the basis of character and fitness the applicant has a right to inspect the minutes of any meeting of the Board of Governors at which his application has been discussed, together with a statement of the specific grounds upon which denial of the permit was based.

Amend Rule 6(8) as follows:

Section 8. When the Board denies an examination permit on the basis of character *and fitness* the Board shall give the applicant immediate written notice of its action, together with a statement of the specific grounds on which the denial of the examination permit is based. Within 10 days of receipt of such written notice, the applicant may submit to the Board such written argument, documentation, or other material as the applicant deems relevant to the proof of his or her [GOOD MORAL CHARACTER] character and fitness. Upon receipt of any such material, the Board shall reconsider the denial in a timely fashion and give written notice of its decision.

Rule 61

Amend Rule 61(b)(2) as follows:

(2) Any member who has been suspended for a year or more, upon determination [OF GOOD CHARACTER] *of character and fitness as set forth in Rule 2(1)(d)* by the Board, upon payment of all accrued dues, in addition to a penalty of $160.00, shall be reinstated upon certification by the Executive Director to the Supreme Court and the clerks of court that the member [IS OF GOOD CHARACTER] *meets the standard of character and fitness set forth in Rule 2(1)(d)* and that dues and penalties have been paid.

Fee Arb Rules

A proposed addition to the Fee Dispute Resolution Executive Committee Rules would give the Executive Committee the authority to refer attorneys who have substantial numbers of fee arbitrators to discipline counsel for investigation.

38(c) Powers and Duties. The executive committee will have the powers and duties to:

6) *Refer a matter to discipline counsel for investigation, including attorneys who have had substantial numbers of fee arbitrations filed against them.*

The Board of Governors has voted to publish the following changes to DR9-102 which would make the Alaska Bar's IOLTA (Interest on Lawyers Trust Accounts) rule an opt-out rule. If adopted by the Alaska Supreme Court, this would provide that a lawyer would participate in the IOLTA program unless he or she opts-out of the program. The entire text of DR 9-102, as it would read if adopted, is published. Lawyers are invited to send their comments to the Board of Governors, in care of the Bar office.

DR 9-102 Preserving Identity of Funds and Property of a Client

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable insured depository accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay services charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

For purposes of this Rule, "insured depository accounts" shall mean government insured accounts at a regulated financial institution on which withdrawals or transfers can be made on demand, subject only to any notice period which the institution is required to reserve by law or regulation.

(B) A lawyer shall

(1) Promptly notify a client of the receipt of his funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

(C) *Unless an election not to participate is submitted in accordance with the procedure set forth in paragraph (D),* a lawyer or law firm *shall* establish and maintain an interest bearing insured depository account into which shall be deposited funds of clients which are nominal in amount or are expected to be held for a short period of time, but only in compliance with the following provisions:

Continued on Page 21

Proposed Rule Changes

Continued from Page 20

(1) No earnings from such account shall be made available to the lawyer or law firm and the lawyer or law firm shall have no right or claim to such earnings.

(2) Only funds of clients which are nominal in amount or are expected to be held for a short period of time may be deposited in such account. Funds which reasonably may be expected to generate in excess of $100.00 interest may not be deposited in such account.

(3) The depository institution shall be directed by the lawyer or law firm establishing such account:

(a) To remit earnings from such account, net of any service charges or fees, as computed in accordance with the institution's standard accounting practice to the Alaska Bar Foundation, Inc., at least quarter-annually; and

(b) To transmit with each remittance of earnings a statement showing the name of the lawyer or law firm on whose account the remittance is sent and the rate of interest applied, with a copy of such statement to such lawyer or law firm.

(4) The lawyer or law firm shall review the account at reasonable intervals to determine if changed circumstances required further action with respect to the funds of any client.

(D) *A lawyer or law firm who elects not to maintain the account described in paragraph (C) shall, prior to January 1, 1990, make such election on a Notice of Election form provided by the Alaska Bar Foundation, Inc. A lawyer admitted into the Alaska Bar after December 1, 1988, who elects not to maintain such an account shall submit an appropriate Notice of Election within ninety (90) days after admission into the Bar. If a Notice of Election is not submitted within the applicable time, the lawyer or law firm shall be required to maintain the account described in paragraph (C). Any lawyer or law firm may withdraw from participation on January 1 of any year by submitting an appropriate Notice of Election during the preceding month of December. A lawyer or law firm who wishes to change a previous election not to participate may do so at any time by notifying the Alaska Bar Foundation, Inc. Notwithstanding the foregoing provisions, the Alaska Bar Foundation, Inc. may for good cause permit withdrawal from participation at any time.*

Rules 21(c) & 22(b)

In a recent ruling by the Supreme Court, the court permitted the trial judge to review in camera a confidential Bar complaint file in the context of ruling on a criminal discovery request. The court requested that Board consider Bar Rule amendments to codify that holding. At its October 21-22, 1988 meeting, the Board voted to publish the following Bar Rule changes which will be considered for final adoption at its January 20-21, 1989 meeting.

Alaska Bar Rule 21(c) will be amended to read:

(c) Discipline Counsel's Files. All files maintained by Discipline Counsel and staff will be confidential and are not to be reviewed by any person other than Discipline Counsel or Area Division members appointed for purposes of review or appeal under these Rules. The provision will not be interpreted to: . . . .

(4) Deny the public facts regarding the stage of any proceeding or investigation concerning a Respondent's conviction of a crime; [OR]

(5) Deny the Alaska Judicial Council confidential information about attorney applicants for judicial vacancies; or [.]

(6) Preclude a court from reviewing in camera a confidential file upon a criminal discovery request made pursuant to Criminal Rule 16 (b) (7), and from exercising discretion as to whether to release relevant information from the file to counsel pursuant to Criminal Rule (d) (3).

Alaska Bar Rule 22(b) will be amended to read:

Confidentiality. [PRIOR TO THE INITIATION OF FORMAL PROCEEDINGS], Complainants and all persons contacted during the course of an investigation have a duty to maintain the confidentiality of discipline and disability proceedings *prior to the initiation of formal proceedings subject to Bar Rule 21 (c) . . . .*

Disciplinary Action Taken

H. John DeNault, III, received a public reprimand by the Disciplinary Board for failing to answer a grievance in conformity with Alaska Bar Rule 22(a) and for violating DR 6-101(A)(3) by neglecting a legal matter entrusted to him.

•

Attorney A received a written private admonition for a violation of DR 7-102(A)(1) because he made personal attacks on opposing counsel in a court pleading which could have had no other purpose that to maliciously injure the reputation of opposing counsel.

•

Attorney B received a written private admonition for a violation of Alaska Bar Rule 22(b) because he disclosed the existence of a nonpublic disciplinary matter to persons not connected with the grievance.

•

Attorney C received a written private admonition for a violation of DR 6-101(A)(3) because she failed to properly handle checks from third persons for estate property which had originally been transferred to her paralegal for transfer to the attorney. Because of the attorney's neglect, the checks were not negotiated in a timely fashion.

(In the Disciplinary Matter)
IN THE SUPREME COURT OF THE STATE OF ALASKA
In the Disciplinary Matter Involving:
ROGER W. CARLSON, Respondent.
Supreme Court No. S-2393
O R D E R
ABA File Nos. 85.206 & 86.137

Before: Burke, Compton and Moore, Justices. [Matthews, Chief Justice, and Rabinowitz, Justice, not participating.]

The court entered an order on May 6, 1988 adopting and affirming the decision of the Disciplinary Board of the Alaska Bar Association, which recommended that the two-year suspension of ROGER W. CARLSON from the practice of law be stayed conditioned upon his compliance with the revised plan for supervised probationary practice. The order placed the respondent on probation until February 15, 1990, and directed him to comply strictly with the terms and conditions of the revised plan for supervised probationary practice, dated April 6, 1988. The respondent was also ordered to register for and pass the Multistate Professional Responsibility Examination given in July, 1988. The Disciplinary Board of the Alaska Bar Association filed Findings of Fact and Conclusions of Law on September 9, 1988, finding that ROGER W. CARLSON failed to take the July, 1988 MPR Examination.

IT IS ORDERED:

1. The Findings of Fact and Conclusions of Law of the Disciplinary Board of the Alaska Bar Association that ROGER W. CARLSON failed to take the July, 1988 Multistate Professional Responsbility Examination are ADOPTED.

2. The order of the court of May 5, 1988 is VACATED in its entirety.

3. The order of this court of January 13, 1988, affirming and adopting the decision of the Disciplinary Board of the Alaska Bar Association of September 9, 1987, which recommended that ROGER W. CARLSON be suspended from the practice of law for a period of two years, is REINSTATED.

4. ROGER W. CARLSON is SUSPENDED from the practice of law, *effective immediately*, for a period of two years. The suspension shall continue in effect until *October 3, 1990*. Bar Rule 29(a) and (c).

5. ROGER W. CARLSON is ordered to comply with the requirements of Bar Rule 28. The respondent is specifically ordered to comply with the requirements of Bar Rule 28(f).

6. Any reinstatement to the practice of law pursuant to Bar Rule 29 shall be conditioned upon the respondent complying with the following conditions:

(a) Full restitution of $576.60 to Mr. and Mrs. Rodney L. Stovall.

(b) Passage of the Multistate Professional Responsbility Examination.

Entered by direction of the court at Anchorage, Alaska on October 3, 1988.

DAVID A. LAMPEN
Clerk of the Supreme Court

A.P.E.A. LEGAL TRUST FUND
340 NORTH FRANKLIN STREET
JUNEAU, ALASKA 99801
(907) 586-9855/6

October 10, 1988

Dear Participating Attorney:

This letter is to inform you that the APEA Legal Services Plan will no longer be able to provide benefits under the Plan for members of the General Government Unit (GGU). The decision to cease coverage was unanimously taken by the Plan's Board of Trustees in a special meeting on October 9, 1988. The decision was made because, as of 4:45 p.m., September 28, 1988, the Alaska Public Employees Association (APEA) was decertified by the Alaska Labor Relations Agency as the bargaining representative for the members of the General Government Unit (GGU).

The APEA Legal Services Plan will continue to provide benefits to any GGU member as long as the legal matter commenced (that is, an attorney's services were rendered) on or before Wednesday, September 28, 1988. However, all coverage for GGU members will cease at the close of business Thursday, November 10, 1988. If the legal matter is not completed by November 10, 1988, the member will be responsible for any further services rendered and/or costs incurred beyond that date.

Please note that APEA continues to be the official bargaining representative for the Supervisory Unit (SU) and the Juneau Education Support Staff (JESS), and therefore the Plan will continue to provide legal benefits as provided by their respective collective bargaining agreements.

Please feel free to contact us at (907) 586-9855 if you have any questions concerning this matter or any other questions regarding the Legal Services Plan benefits. Thank you.

Sincerely,
Board of Trustees
APEA Legal Fund

Records management and file retention, for the law office -or- when can we throw out the client's file without getting sued?

By Robert J. Mahoney
& John W. Silvertsen, Jr.

The general topic of records management is a subject with which nearly all law offices are forced to deal. The area of discussion involves the dual issues of the method of file storage, as well as the period of retention for documents stored in those files. Both the subjects of the method and the period of file retention are interrelated. As such, this article will simultaneously focus on both retention and disposition of records.

The Ethics Committee of the Alaska Bar Association has been asked to assist members of the Bar by proposing guidelines for the periods of time during which certain files must be retained by counsel. This question was addressed in part in Ethics Opinion No. 84-9. Further, it is the understanding of the Ethics Committee that the Association of Records Managers and Administrators (ARMA) and the American Bar Association are jointly working on a "legal model" for records management. Thus, this article should not be taken as dispositive, nor will specific retention schedules be proposed in view of the work which is pending by ARMA and the ABA. Further, this article is intended to be educational and designed to present information to members of the Alaska Bar Association as an aid to independent research and preparation of a records management system for each members law practice. It is not intended to render or to be regarded as providing legal or other professional services, opinions or advice. The readers of this article are advised to seek the assistance of a records management professional for service, opinions and advice on individual needs and requirements.

Information stored in a lawyer's files is an important tool today; it is needed repeatedly in the processes of solving problems and making decisions on behalf of clients. Information is not only the attorney's most valuable tool, but it is also one of the counselor's greatest needs. What the lawyer does and the advice that counselor renders is dependent largely upon the information received and stored as background for each such action and decision.

The creation, preparation, distribution, use, storage, retention, and ultimate disposition of records constitute an essential, but costly, operating function of any law office. A growing number of legal practioners in recent years have become aware of their problems and responsibilities in the matter of records management. Attorneys in increasing numbers are realizing that improved operating efficiency and financial savings can be achieved by establishing a carefully planned program of records control.

Organized records management programs differ markedly in scope and complexity. It would be difficult to find two identical programs in two separate law offices, even among offices of similar size or field of practice. Records management programs are as varied in structure as the law office practices which they serve.

All attorneys, office managers, associates, and their secretarial staffs are to some degree involved in the management of records. Administrative activities which are commonly thought of as "line" work produce the mass of papers and other documents which end up as records in client files and other records storage areas. Records management specialists in such activities as systems design, forms control, and correspondence management are a factor in planning the format and flow of records produced by the administrative functions of a legal practice. Secretaries, stenographers, typists, and word-processors produce the actual records; and the file clerks sort, organize, and place them into filing systems. All of these employees in performing their functions generate the volume and establish the quality of the clients' files. A successful records control program requires the assistance and cooperation of all law office personnel, including a sincere commitment by the attorneys.

Assuming that an inventory of client files, and the records contained therein, has been completed, the retention and disposition schedule can be developed. Any such schedule authorizes and provides for the periodic transfer and disposition of all the law office's records. The attorneys and their legal staff personnel may refer to the schedule as the "Records Retention And Disposition Schedule."

The overall objectives of the retention policy, the basis for the retention schedule, are: 1) To assure the protection of vital records; 2) To retain records of value and historical interest; 3) To restrict filing equipment and space to housing active records; 4) To release computer tapes for reuse as soon as possible; and 5) To destroy records which have served their usefulness.

In order to make the retention schedule easier to prepare, records contained in client files can be sorted into categories or subjects. Using record categories makes the process easier because most of the records within each group will have the identical retention period, regardless of the respective client.

One possible method, after documents are categorized, is to classify the records according to value. One conceivable classification is as follows:

1. Vital: Records that cannot be replaced and hence should never be destroyed. These records are essential to the effective, continued operation of the client's business and should not be transferred from the active section of the storage area. Examples: property deeds, legal documents, incorporation papers, contracts.

2. Important: Records that are necessary to an orderly continuation of the law office or a client's enterprise and are replaceable only with considerable expenditure of time and money. Such records may sometimes be transferred to inactive storage but are usually not destroyed. Examples: tax records, financial ledgers, sales receipts.

3. Useful: Records that are helpful for the smooth, effective operation of the client's organization. Such records are replaceable, but their loss would involve some delay or inconvenience to the

Continued on Page 23

• Record management: what to keep

Continued from Page 22

client's operation. Examples: letters, business reports, some financial statements.

4. Nonessential: Records that have no predictable value to a particular client. Since the purpose for which they were created has been filled, they may be destroyed. Examples: routine correspondence, inter-office memoranda, seasonal publications, dated material.

Another possible method of determining records retention is to consider the value of a record based on either its "hisorical, operational or legal" use. It should be recognized that the categorization according to value is not clear cut, but rather a particular document may have characteristics of more than one form of value.

First, documents in client files may have historical value if they can be used to record a history of past and present activities of an organization. Special care should be taken in preserving these records as they are retained for a long period of time.

A second use of records from client files for determining a documents value is the operational use. The retention of files for this use is decided by law office personnel, or the individual client, based upon their best judgment. Since no formal retention timetable is available, the retention schedule will have to be based on a "reasonable period of time" as decided by the most knowledgeable people within the law office, aided by the individual client to whom the documents relate. Examples of operational uses for records are financial, fiscal or administrative.

A third utilization of records is their legal use since many documents are required by local, state or federal laws. The tasks of knowing all of the legal requirements connected with records retention is gigantic and any attempt to reference them all in this article would be futile. In addition to the more than 1,000 federal statutes and regulations governing records retention, there are state, county, and municipal regulations. The applicability of each of these statutes, regulations or laws to an individual client's records or to a particular law office records management system will depend on the nature of the legal practice within each such law office and the client's own enterprise. It may become necessary at some point to seek the assistance of a professional records manager.

In the event of a records investigation (or client complaint), the best policy (or defense) by a law office may be that the retention schedules were developed on the basis of legal requirements and that the schedules are in fact observed. The records manager for each law practice must be aware of federal retention requirements, statutes, local requirements, and the changes which occur from time to time. Decisions concerning retention of client files will likely be made on the basis of the types of records contained therein, including their "value," or "use" (whether in terms of historical, operational or legal character). Members of the Bar Association and their law offices may wish to safeguard their positions by maintaining longer retention periods than are required by law.

Each attorney must make a firm commitment that the established records management policy and retention schedule will be followed in the daily practice of his or her law office. Indeed, even the best policy and schedule of client file and document management is of no merit if it is not in fact implemented and utilized. The "form letters" and "check list" included with this article are provided in an effort to assist the practitioner in developing his or her own policy which will be used and implemented in the individualized law office. It is acknowledged that the needs and requirements of each law practice are different on this subject of file retention. As such, the the included "forms" and "check list" are supplied only as examples and a guide, and not necessarily as a model or pattern. Each attorney should carefully review the needs and requirements of his law practice and the demands of his clients in developing an individualized policy and practice of records management.

Information and records management is the lifeblood of a legal practice. Without information, attorneys are stifled in their decision-making process. Without records there can be no systematic approach to information dissemination and use. Information and records management is a wide-ranging profession in its own right that can assist the lawyer is providing his services to his or her clients.

Records managers should be considered partners, not adversaries, of data processors and systems specialists. They are not concerned with the techniques and equipment of information manipulation. The records manager is concerned with the means and methods of retrieving and using data. Electronic data-processing and word-processing systems, used with increasing frequency in law offices, will not eliminate the problems of processing client files. In fact, computer utilization has often resulted in a geometric increase in paperwork volume. As such, micro-film and micro-fiche technology has been of great assistance in the storage and retrieval of those documents which are selected as needing retention. Microfilm or microfiche requires only two (2) per cent of the storage space of the original documents which are filmed. Additionally, indexing and reference is aided by its organization of processed film.

In view of the countless number of considerations which relate to the value and use of documents contained in client files, the establishment of a comprehensive retention schedule applicable to all law offices and which meets the needs of all clients, is not only beyond the scope of this article, but is in fact not possible to construct. Nonetheless, it is hoped that the above referenced factors will assist each individual legal practitioner is developing his or her own records retention and disposition policy and schedule.

Sartorial splendor in the Bush

By Sparrvohn

In the Railbelt lawyers take court clothes for granted. Men wear suits and ties, while women put on something from the Young Professional section of Nordstroms. No such luck in the bush. There, lawyers have to incorporate the nature factor into the clothing selection process.

First, there are the problems created by winter. A Sears worsted sports coat won't keep an attorney warm in subzero weather. Leather soled brouges will lay him flat on the icy paths leading to the court building. J.C. Penney doesn't sell a pair of tights heavy enough to protect a woman in a grey flannel skirt.

Things get worse when the snow melts. Spring, that period of time between winter and the mosquitoes, means big puddles and lots of mud. Some attorneys try to avoid these hazards by walking along the edge of the pavement. This preserves pants and shoes from the mud, but makes them vulnerable to cascades of puddle water thrown up by speeding taxi cabs.

Summer is just as bad. Then winds drive river silt through the air, making it look like "The Grapes of Wrath" with the local bar association playing dust bowl farmers. There goes a defense attorney now, hair stiff with silt, eyes squinting into the wind. If he is strong he will make it to court in time for 1:30 arraignments. If you think that things get better when the wind drops, you have forgotten about mosquitoes and the horizontal rain.

In spite of the environment, most rural judges enforce a dress code. In some courts anything is okay as long as you wear shoes. One judge only objects to jeans. He once found a lawyer in contempt for wearing Levis to a preliminary hearing. "But your honor," the lawyer pleaded, "I washed them yesterday and they are practically new."

Most counselors go along with the dress codes; some find loopholes. One bush law office bought a brown cordoroy sports coat for the attorneys to share. They kept it at the courthouse. Before a hearing, their lawyer would clip on a tie (like the ones kids wear for First Communion) and slip on the old brown coat. Entering the changing room as an ordinary bush citizen, they would emerge a real lawyer. The system worked great until the court hired a magistrate to help out the local judge. For the first time the law office faced the possibility of having two lawyers appearing in court at the same time.

The firm could have purchased another sports coat but that would have set a bad precedent. Instead they hired a woman attorney and promised her a clothing allowance. Sometimes principle is everything.

Dress codes are tricky things. The judge can require lawyers to wear certain articles of clothing in court. However, they can't require them to be worn in good taste. Taste is too closely akin to freedom of speech. This prevents judges from objecting to even the most revolting combination of styling and color. The fashion industry provides many opportunities to exercisé poor taste, a fact not wasted on many of those appearing in rural courts.

In one court, attorneys held an ugly tie competition. The rules encouraged contestants to enhance the tie's bad qualities with inappropriate sport coats. To qualify, they had to actually appear in court wearing the tie. A probation officer won last year's contest with his daring blue striped seersucker coat and broad daisy-tie combination.

Of course, women attorneys also find ways of exhibiting bad taste. In one court, the ladies shared an odious yellow jacket. When worn in the main courtroom it clashed with the orange colored walls. After a bout of visually induced nausea, one judicial officer ordered the jacket removed. Standing firm, the subject lawyer argued against the legislation of taste. Having thus gained the moral high ground, she closed by saying, " . . . and besides, it is not my fault that the courtroom walls were painted orange." There was nothing for the judge to say. The walls were repainted white the following week — his contempt powers having failed to effect change, he hoped to teach by example.

Bar buys flicks, proceeds to 'charity'

Recently the American Bar Association announced that it has purchased the titles to some movies, both new and old, in order to reproduce those movies with lawyer oriented themes. Below is a partial list of some of these movies and the planned story lines. All proceeds from movie ticket sales will go to the American Bar Association's special research fund for dry cleaning litigation.

Around The World In Eighty Days

When five insurance defense firms appear in a case involving a rear-end auto collision, they schedule a lengthy deposition trip as they retrace the plaintiff's life back through childhood. Filmed on location in some of America's finest hotels, the film stars Don Knotts as the beleaguered but spunky plaintiff's counsel.

Back To School

After a superior court judge is reversed 37 times in six months by the Supreme Court, he is gently encouraged to take brush-up courses at his alma mater, where coincidentally his son is attending law school.

The Best Years Of Our Lives

A young associate is sent into his firm's basement to work over and clean up the firm's dog files. He emerges four years later to find that much of the world has changed, his child is grown, his wife remarried, and non-farmers are wearing suspenders.

The Color Purple

Gay judge argues for the right to wear robes other than black. William Kunstler (who stars as himself) puts on a dramatic courtroom presentation and finally convinces the Supreme Court to allow freedom of choice.

Cool Hand Luke

Prison guard with impaired hand circulation is the subject of constant complaints by prisoners following pat-down searches. A Wave of 1983 civil rights litigation finally convinces prison authorities to order corrective surgery. Gregory Peck gives a moving performance as the vascular surgeon.

The Dirty Dozen

This moving drama involving a murder charge against a minority youth takes place in a jurisdiction that forbids the *Allen* charge. Therefore, the cranky trial judge decides to force a verdict on this "hold-out" jury by forbidding soap and water while sequestering them. Although many of the jurors wish to concede and reach a verdict, one courageous woman manages to fight for justice by stitching fresh underwear from curtains and furniture slip covers.

Explorers

This fantasy picture follows the adventures of two law clerks who attempt to find a lost file in the journaling department. Enough said.

Ferris Beuller's Day Off

Ferris Beuller is a government employee who has already exhausted his vacation leave, personal leave, administrative leave, chiropractic leave, funeral leave, and podiatry leave. He nevertheless feels the urge to skip work and calls into the office saying that his parakeet was starting to hemorrhage. In one of his last roles before his death, Jackie Gleason will remind fans of his "poor soul" character as he plays the uninspired government worker looking for fulfillment in a confusing world.

Flight Of The Navigator

This movie concerns the self-doubt and anxiety of the only physician in Alaska who does not have an airplane. In order to overcome his feelings of self-debasement, the doctor decides to become a navigator instead and assist other physicians.

The Greatest Story Ever Told

After a superior court judge has built a large collection of "affidavits in support of a motion for extension of time", he decides to select the best one and award the drafting attorney a prize for fiction. Jay Leno stars as the attorney who requested a seven-day extension of time to write an opposition brief because his German shepherd had not only eaten the research notes, but had also barfed into the hard disc drive of his word processor.

The Hiding Place

Made on the same format at the "Breakfast Club", this story involves seven associates who meet every morning in the city's downtown law library to discuss life, love, and bonuses.

It's A Wonderful Life

This movie begins when attorney George Bailey is seen atop a bridge over a river, contemplating suicide. An angel from hell appears and takes George on a walk through his life as it would have been had he not been an attorney. In this life, George sees his neighbors getting along peaceably, divorces being averted, and commercial disputes being resolved in a friendly manner without the use of litigation. Afterward, George returns to the bridge and redoubles his commitment to take his life.

The Longest Day

In a complex anti-trust case, six attorneys depose a critical witness who has a severe stuttering impediment and speaks only French.

The Old Man And The Sea

An aged plaintiff brings his limited entry permit case before the Alaska Supreme Court for the twenty-third time. A leather skinned Don Ameche plays the aged sailor and also does an impressive job of performing his own break-dancing sequences.

Pinocchio

This interesting film deals with issues of witness impeachment under the modern rules of evidence. Following the death of Gepetto, Pinocchio is embroiled in probate litigation and must take the stand to recover possession of the puppet shop. His attorney is concerned as his nose grows slightly under hostile cross-examination. Ultimately, the clever counsel obtains for Pinocchio the right to testify with a bag over his head.

Poltergeist

Strange things befall courtroom 22A during a lengthy trial. Microphones pop off of witnesses, jurors can see the bones in their hands, and a piece of filet mignon continually wiggles its way back and forth across the courtroom floor. Ultimately a short, fat woman is secured to rid the premises of evil spirits.

Weird Science

The folks at a small town sheriff's office just can't seem to get the breathalizer to work right. Hundreds of innocent persons are sent to jail before it is finally learned that suspects had been asked to blow into an old toaster.

HISTORICAL BAR

Ed and Earl

By Russ Arnett

When I was in the basement storage room of the Anchorage Court Library I saw hanging on the wall large, framed portraits of two of the first Superior Court judges in Anchorage, Edward V. Davis and J. Earl Cooper.

After statehood there was doubt, including doubt by Gov. Bill Egan, that Alaska could afford a judiciary. The statehood legislation provided that the United States District Court for the Territory of Alaska would continue to function after statehood during transition and try cases normally within the jurisdiction of state courts.

The lawyers tried everything—including litigation—to force Alaska to establish trial courts and finally succeeded. In Anchorage, the first Superior Court Judges were Ed Davis, Earl Cooper and James Fitzgerald. The salary was $16,000 per year, $1,000 more than the Territorial District Court judges had received.

As judges, Ed Davis and Earl Cooper were mostly opposites. Davis was conservative, having handled mostly insurance defense and business clients. Cooper was an extremely liberal judge, having been an old-style New Deal liberal office holder. Earl Cooper was a cut-up off the bench, while Ed Davis was always respectable and sober. Ed even had a laugh which was conservative—two chuckles.

One similarity was that Ed and Earl were both generally easy on criminal defendants. Judge Davis once gave a suspended sentence in a homicide case and Wendell Kay, who had already filed a notice of appeal, immediately walked down the hall to the Supreme Court and withdrew it. I represented a G.I. who robbed a cab driver at gunpoint and then bloodied the cab driver's skull with the pistol. Judge Cooper, notwithstanding the fact of his background as U.S. Attorney in Anchorage, gave him a suspended sentence. I personally do not think of their leniency as a weakness. Their sympathy for the defendants was genuine. I am sure both believed they were not endangering society.

I first met Earl Cooper in Nome in 1952 where he was appointed to the Territorial bench. Because Dwight Eisenhower was elected President and Earl was a Democrat, he was never confirmed. He returned to Anchorage and entered private practice. He was elected Territorial senator and I covered his office for him during the 1955 session. Later we had offices across the hall from each other. His practice was very low-pressure. He had a wall plaque of two guys slouching in their chairs entitled "We've got to get organized".

One certainty of this period would be that Earl would have coffee each morning with the lawyers and politicians at the Oyster Loaf restaurant, which was across from the Anchorage courthouse. As a neophyte, I looked forward to the conversations as the high point of my day. The lawyers would come directly from court and discuss the latest misfortune visited upon them. (The art and practice of lawyer conversation in Anchorage has sadly declined.)

Earl told a variety of jokes and his best involved a stage English accent. One involved two old colonials from India, one of whom asked "What became of old Smedley?"

"Didn't you hear. He was cashiered out of the Army."

"Whatever for?"

"He buggered a sheep."

"Really? (pause) Male or female?"

"Female of course. Nothing queer about old Smedley."

There was a massive cement block church in Fairview at the time called The Church of the Open Door. Earl referred to it as The Church of the Three-Quarter Open Door.

Someone mentioned that Red China was considering placing all male and female workers, even if married, in separated dormitories. I asked how they could maintain population growth with this obstacle. Earl said, "Oh, it's that little building in between."

He had played the lead in "Harvey", a hit play by Anchorage Little Theater.

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Ed and Earl

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saw him play Darrow in "Inherit the Wind," which was also a hit. George Grigsby would often also refer to Earl's acting ability before juries when Earl was U.S. Attorney.

Earl Cooper was at his best at the founding convention of the Alaska Bar Association in Ketchikan in the late '50's. Lawyers throughout the Territory at that time had a personal bond with each other.

To house the new Superior Court judges, the Territorial courtroom in the old Federal Building in Anchorage was split down the middle and a third courtroom was created in the basement. Judge Cooper ended up in the basement. One day after he had been on the Superior Court bench for a couple years, I was sitting in court with the jury awaiting his entrance, but he did not arrive. I next saw him in the hospital. I have wished since that I had cracked a joke or discussed politics with him during that visit but I didn't and he didn't. He retired in February 1962 and from his illness never recovered.

Ed Davis and Bill Renfrew came to Anchorage together and practiced as Davis and Renfrew from 1939 to 1951, when John Hughes became a partner. This was the biggest firm in town. Their style of practice and personalities were opposite but they always got on well. They had a successful practice during the military construction boom years of World War II and the Cold War. They augmented their regular law practice income with profits from a gold mine.

Ed was particularly systematic and efficient. I remember asking him for a file or some document and telling him I didn't need it right then. He got up and obtained what I asked for, saying "If we do it now, it's done". He operated the same as a judge. He usually decided matters brought before him on the spot and in a rational way without a lot of dinking around. He treated the bar with more courtesy and consideration than is generally the case and was particularly friendly in chambers.

I had a contested divorce against him involving a couple with seven kids. Attorneys in those days considered they had an obligation to actively promote reconciliation. He told the couple that he particularly liked Hawaii, though few Alaskans went there then, and encouraged them to vacation there. He talked pleasantly to both spouses. I thought it showed considerable class. Later, on my first trip to Hawaii, he let our family use his condo.

He wore an old G.I. parka in winter on his walks about Anchorage. He continued to wear the parka in winter after retirement when he would return to Anchorage from Hawaii as a *pro tem* judge. This is my last recollection of him.

Send Us People Column News

• Win or lose: be gracious

Continued from Page 5

When you get notice of litigation from your client and you believe that the attorney on the other side may still be wet behind the ears on this type of litigation, call him or her up and tell that person what is likely to happen in this type of case and what motions you might file, what special procedures may be necessary and what nasty things you could do, if you had a mind to. Then see if it might be settled short of a court brawl. If you think back, some grizzled attorneys probably did the same for you, back when the ink on your license wasn't dry.

Another problem with many attorneys is failure to return phone calls or respond to letters in a reasonably timely fashion. Certainly there are times when you have six brush fires all going at once and you are madly dancing on the flames, but a brief phone call to the other attorney acknowledging the communication would be appropriate.

I think we all have given or received information from other attorneys about how to handle a particular legal problem. What is shameful is charging for it. If you are the recipient of the information be appreciative and pass the favor along and if you are the giver, think twice about sending a bill. Billing a brother or sister attorney for a phone call causes ill will and divides the bar. These favors generally even out so charging for the information is crass and petty. It is a relatively new phonemenon, which has contributed to the divisiveness of the bar that I have seen grow over the past 12 years.

So you lose a case or win one. Be gracious either way. I once had a lawyer glare at me, when I tried to say something and stalk off after a trial my client won. Note that: The *client* won. Our duty is to give the best we can and our egos should not get in the way.

Why be gracious? One: See Clark's Corollary. Two: You may be able to settle your client's problem with a minimum of expense. The good will and referrals you get from that client and the opposing attorney will probably more than make up for the lack of a substantial fee in that case.

Finally, perhaps we can work toward the days when attorneys called each other everything but horse thieves in their pleadings, but there was a genuine sense of camaraderie within the bar.

• Finding a good mediator

Continued from Page 4

cases with complex legal issues, an experienced attorney mediator often is best, if one can be found. In cases involving parties with particularly difficult styles of personal interaction, a trained mental health professional background may be the most appropriate. In other cases, the educational and professional background of the mediator may be much less significant. And again recall that much of the protection provided to the mediation participants comes from their access to independent legal advice. Inquiring into the formal educational level of a proposed mediator, however, is nevertheless an appropriate question to ask.

The Best Method: Past Experience With A Particular Mediator. As is true of finding a lawyer, a doctor, or any other professional, the best method of finding a good family mediator is to find someone who has been successful in the past in a case requiring similar skills. Personal experience is generally the best guide, followed by recommendations of trusted colleagues or friends.

In the long run, the formal education of the mediator, particular method of training, and professional affiliations are less important than a demonstrated ability to accomplish a successful and equitable mediation in a similar case. There is no better gauge for future success than past success. Because of the newness of the field of family mediation, however, and the lack of certification and licensing procedures, caution is very much appropriate to the process of selecting and hiring a family mediator.

The Attorney's Oath: do we measure up?

All of us practicing law in Alaska have taken the same "Oath of Attorney." It's healthy for us all to read it occasionally just to make sure that we are measuring up.

IN THE SUPREME COURT OF THE STATE OF ALASKA

In the Matter of the Application of)
)
)
)
For admission to the Alaska Bar Association) OATH OF ATTORNEY
)

I do affirm:

I will support the Constitution of the United States and the Constitution of the State of Alaska;

I will maintain the respect due to courts of justice and judicial officers;

I will not counsel or maintain any proceeding which shall appear to me to be taken in bad faith, nor any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

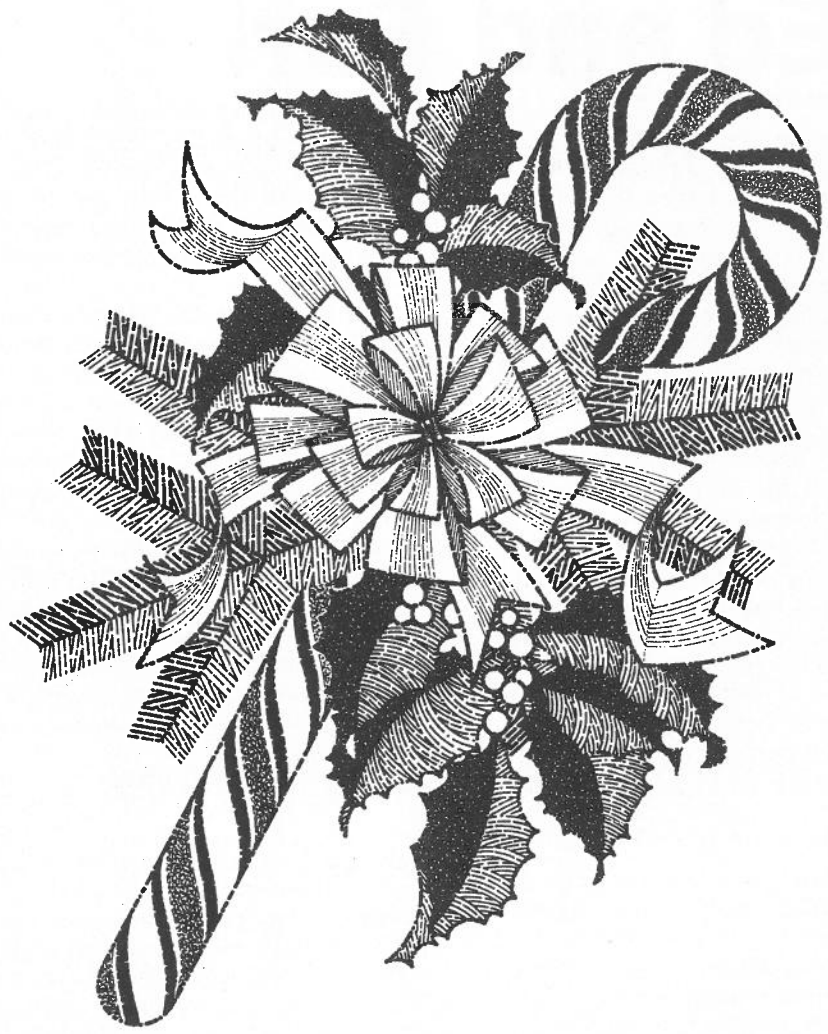
I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;

I will be candid, fair, and courteous before the court and with other attorneys, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will strive to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

Sworn to in open court in _____, Alaska, this _____ day of _____, 19____.

_____

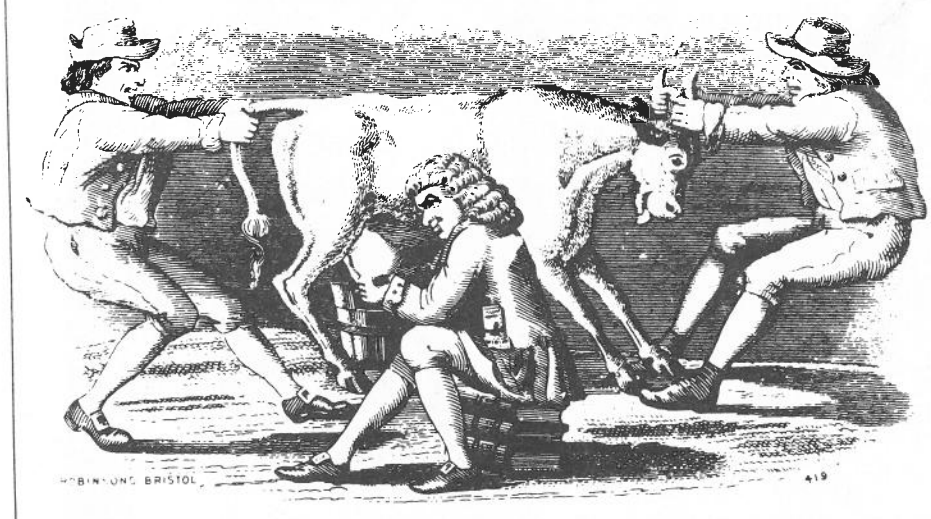


BE IT RESOLVED, that the Alaska Bar Association urges all attorneys to devote a reasonable amount of time each year to *pro bono* and other public service activities that serve those in need or improve the law, the legal system or the legal profession.

BE IT RESOLVED, that the Alaska Bar Association

1) **Urges all attorneys to devote a reasonable amount of time, each year, to pro bono and other public service activities that serve those in need or improve the law, the legal system, or the legal profession;**
2) **Urges all law firms and corporate employers to promote and support the involvement of associates and partners in pro bono and other public service activities by counting all or a reasonable portion of their time spent on these activities, towards their billable hour requirements, or by otherwise giving actual work credit for these activities; and**
3) **Urges all law schools to adopt a policy under which the law schools would request any law firm wishing to recruit on campus to provide a written statement of its policy, if any, concerning the involvement of its attorneys in public service and pro bono activities.**

THE LAWSUIT



COMING NEXT ISSUE

January-February, 1989

Bob Groseclose on Sabbaticals

•

Latest Elvis Sightings (if any)

•

Best of TVBA

•

Jeff Feldman on the Anatomy of a Judicial Retention

•

Pamela Kelley on Computer Outlines

•

And Another Incomparable Special Report

•

Professor Mirabilis Partially Reassures the Mourning Class

Stop, wait a minute!
Hold the phone! Hello!
Yes, everything. Everything
can be explained.

Death even. Even Death
Can be explained. Yes.

What did you say?
I said explained. Yes.
Not understood. No. Only
The dead are expected to know.

You will be responsible for
Chapters nine through fifteen.

Harry Branson

Alaska Bar Association CLE Calendar

1988

November 30 AM Miniseminar	Retainers & Trust Accounts: When Is That Money Really Yours?	Hotel Captain Cook
December 7 AM Miniseminar	Straight Talk for Attorneys, Pt. I: Non-Verbal Communication Skills in Jury Selection	Hotel Captain Cook
December 8 Full Day	Lawyer Trust Accounting: Doing It Right	Hotel Captain Cook
December 14 AM Miniseminar	Straight Talk for Attorneys, Pt. II: Saying What You Mean And Getting Others to Hear What You're Saying	Hotel Captain Cook

1989

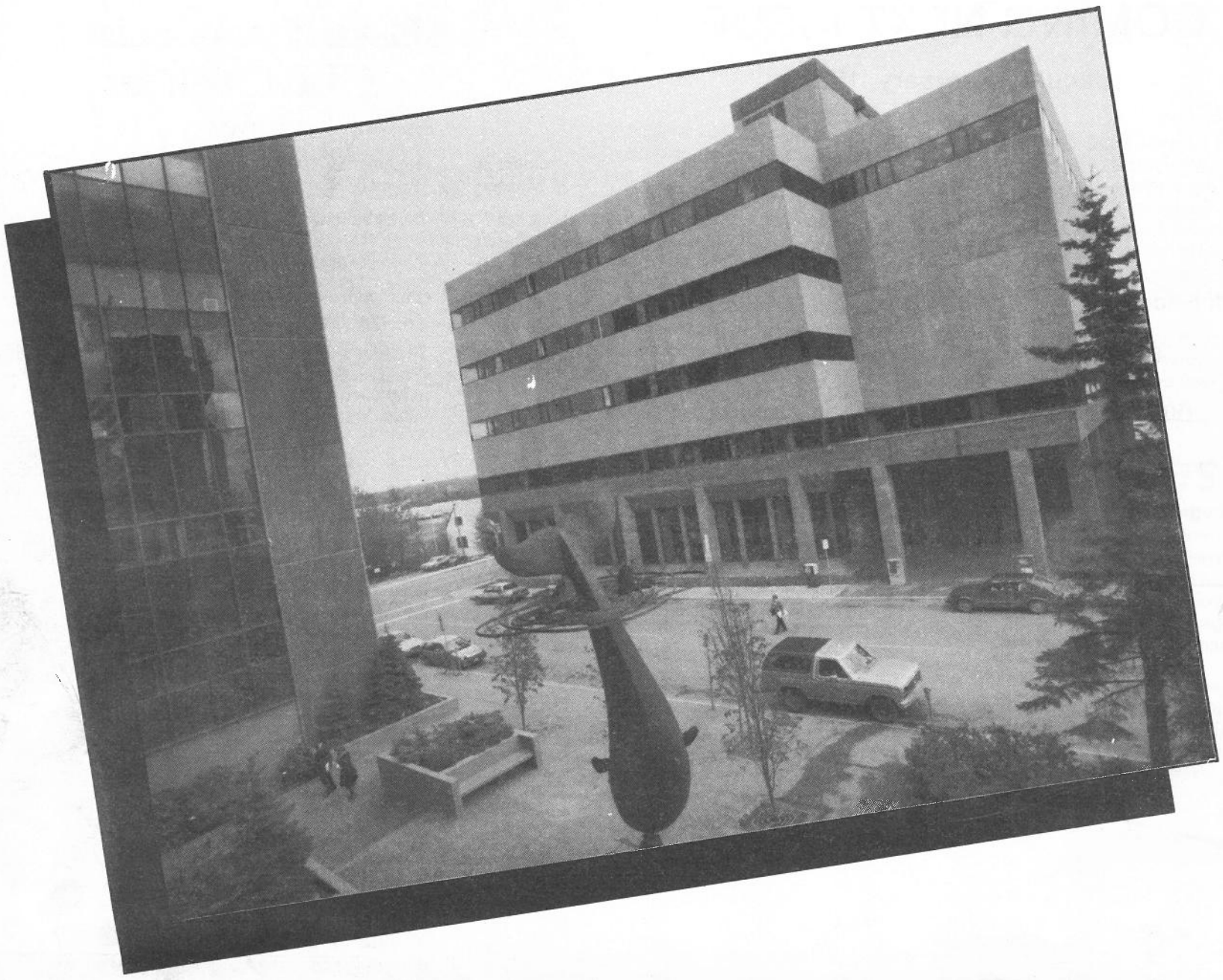
February 15 Full Day	Forensic Engineering: Testimony, Demonstrative Evidence and Exhibits	Anchorage Hilton
February 17 AM Miniseminar	Wrongful Discharge, Pt. I (ABA Tape Series & local commentary	Hotel Captain Cook
February 24 AM Miniseminar	Wrongful Discharge, Pt. II	Hotel Captain Cook
March 1 AM Miniseminar	Securities Law for Non-securities Lawyers	Hotel Captain Cook
March 7, 8, 9	Hawaii CLE: Unorthodox Trial Techniques (changed from March 6-8)	Sheraton Kauai
April 14 Full Day	Adoption Issues	Hotel Captain Cook
June 8, 9, 10	Annual Convention — CLE: Negotiations Skills (1 day) plus other topics tba	Juneau

FAIRBANKS — CONTINUING LEGAL EDUCATION SCHEDULE OF UPCOMING VIDEO REPLAYS

The following programs will be replayed at the Regency Hotel Conference Room, Fairbanks. Unless otherwise noted the programs will be full day presentations. Call Mary Lou Burris at the Alaska Bar Assoc. office 272-7469 or Jim Cannon 452-8986 for further information.

December 16	Retainers and Trust Accounts: When Is That Money Really Yours? (Half Day 1-5 p.m.)
January 6	Lawyer Trust Accounting: Doing It Right
January 13	Straight Talk for Attorneys Part I: Non-Verbal Communication Skills In Jury Selection (Half Day 1-5 p.m.)
January 20	Straight Talk for Attorneys Part II: Saying What You Mean and Getting Others To Hear What You're Saying (Half Day 1-5 p.m.)
February 10-11	Preserving the Settlement: The 1991 Amendments to ANSCA

Please pre-register for all replays. Call 272-7469 to register.



How much time do you spend in traffic? Probably much more than you realize. In fact, if most of us really analyzed what travel time costs us each year, the results might be rather unnerving.

Many Anchorage attorneys, like yourself, have discovered a way to make their time more productive. They've moved to the Carr Gottstein and 3rd & "K" buildings. . .where the courthouse, professional services, and many of the city's finest shops and restaurants are only steps aways.

Carr Gottstein Properties is now offering space in both of these buildings. Both overlook Cook Inlet, offer flexible office space and outstanding improvement allowances. View suites are available. Best of all, these prime office locations save you time. . .which saves you money.

For more information, call Susan Perri at 564-2424.

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Properties