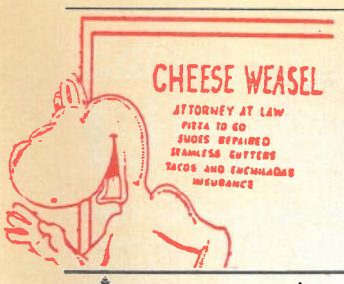


Gift ideas, amorous sea mammals & local bar news

- **The scope of legislative immunity**
- **Deeds of trust**
- **Making peace**
- **Estates, interest & fees**

$2.00

The Alaska BAR RAG

VOLUME 16, NO. 6

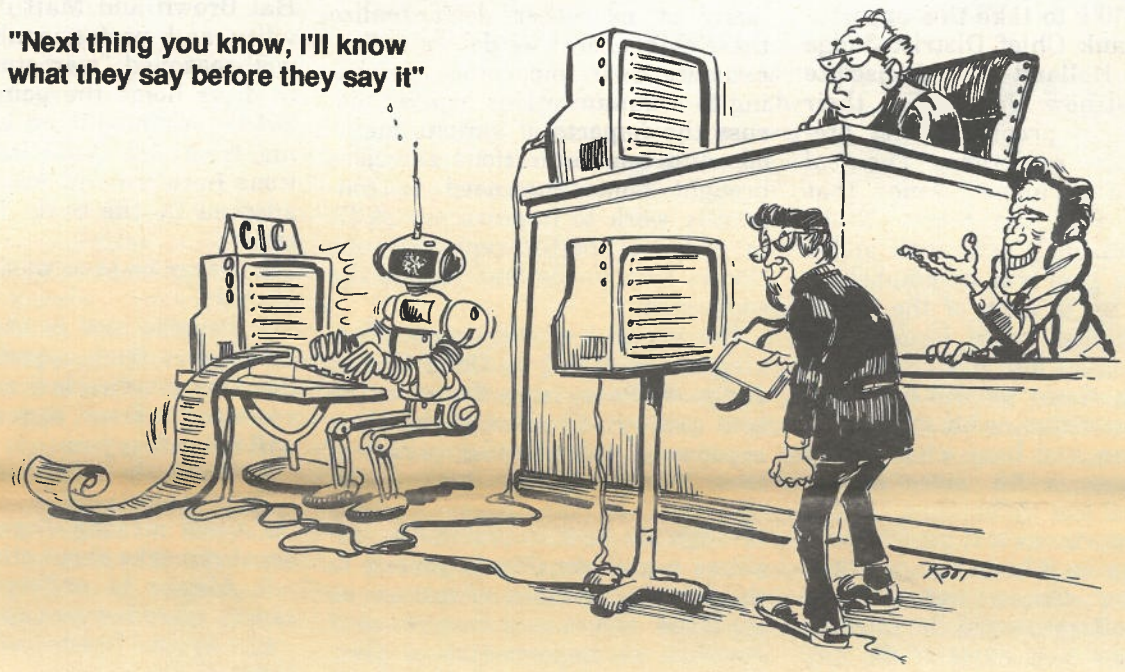
Dignitas, semper dignitas

NOVEMBER-DECEMBER, 1992

The future's here. (It was inevitable)

Technology has now invaded both the practice of law and the court room. Each season sees new innovations and efforts to streamline and reduce the cost of legal services. Once again Alaska takes the lead in these efforts.

"Next thing you know, I'll know what they say before they say it"



BY LARRY WEEKS

The reapportionment trial in Juneau started two days after the big North Slope royalty case was scheduled to commence. Before it folded, the royalty case brought high-tech to the Alaska courtroom: computers were at all (four) counsel tables, two 39-inch color monitors were before the jury, a 10-foot screen, bar-coded laser disk depositions and real time transcription were a part of that trial.

The reapportionment case was fortunate to pick up real time transcription as fall-out from the royalty case. Taku Reporters had set up their equipment for the royalty case and had recruited trained personnel from Outside. Taku agreed to a special deal with the plaintiffs because they were ready to go. The parties thought there was some chance the trial court's reapportionment decision would be appealed. The plaintiffs believed that this appeal should be done on an expedited basis.

The reapportionment trial was full of references to outlying areas and anthropologists repeating Native American terms. There is some kid from Ohio and a nice woman from Spokane who are probably the

Continued on page 10

From voice to disk

BY SCOTT A. BRANDT-ERICHSEN

I recently attended a Continuing Legal Education seminar which addressed a number of issues including updated technology available to attorneys. As usual, the various session presentations consisted of a combination of useful, mundane and downright boring topics. However, one particular presentation produced the eye popping, jaw dropping, awe of a four-year-old seeing Santa Claus in a mall.

David Cook and Darcy Readman, attorneys in private practice with the firm of Duncan and Craig in Edmonton, Alberta, gave a demonstration of voice-activated document creation software. I sat transfixed as Cook spoke into a microphone and the words appeared on his computer screen. Using a normal 386 IBM compatible computer with a Word Perfect word processing program, the voice-activated document creation software enabled Cook to access, create, edit and print documents without touching the keyboard.

Later, I realized that part of the presentation was a sales pitch. Cook and Readman have a separate business called Word Dancer Systems, Inc., marketing the voice activated document creation software. The software itself was created by Dragon Systems of Newton, Massachusetts.

Operationally, the system breaks the English language down into phonemes and phoneme blends. English has 42 distinct phonemes which together with blends create approximately 300 sounds.

Using phonemes and phoneme blends alone and in combination, the software has the capability of recognizing 30,000 words; 25,000 words of this vocabulary are fixed, with 5,000 available for user-selected utterances. The software is adapted to a particular individual's pronunciations through use, maturing with approximately 20 hours of use.

The software requires a pause of one-tenth of a second between utterances, but even with pauses can achieve 35-45 words per minute. Extensive use of boilerplate may increase this rate significantly. The software is essentially a keyboard bypass and may be used inter-

Continued on page 10

DepoNet finds reporters afar

BY LYNDA BATCHELOR

"Fast, Free And Easy" . . . That's the motto of a unique, innovative company called DepoNet, which is in the process of revolutionizing the way lawyers and paralegals find court reporting firms out of town for deposition services.

DepoNet was founded by attorneys to provide referral services directly to attorneys. With DepoNet, the attorney or paralegal dials an "800" number and then enters the zip code of the address where the deposition will be taken. They are instantly connected with a court reporting firm in that area.

More tech, pages 10-11

Law firms can be assured that the DepoNet reporting firms are of top quality because each has been

Continued on page 10

Alaska Bar Association
P.O. Box 100279
Anchorage, Alaska 99510

Non-Profit Organization
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President's Column

By Barbara J. Blasco

On October 23, 1992, the First Annual Conference of the United States District Court and the United States Bankruptcy Court for the District of Alaska was held in Anchorage. The conference theme was "Effective Communication With the Court" and the issues confronted were long-range planning, gender bias, and civility. I was pleased to be invited to attend and did so along with some 25 other lawyers from across Alaska as well as the federal district court judges, the bankruptcy judges, federal magistrates, U.S. attorneys, federal public defenders, federal law enforcement officials, and clerks of the federal courts. We were also honored by special guest J. Clifford Wallace, Chief Judge of the Ninth Circuit Court of Appeals.

I would like to take this opportunity to thank Chief District Judge H. Russel Holland and Magistrate Judge Matthew Jamin for their hard work in preparing and presenting a fine conference. The goal was to "bring home" issues that were raised at the recent Ninth Circuit Judicial Conference and I believe the goal was accomplished. It is now up to each of the attendees to discuss these issues with their colleagues and friends, and in that way perhaps we will become a bit more sensitive, a bit more willing to listen and hear what others have to say, a bit more understanding of our differences, and a bit more courteous and professional in the way in which we go about serving our clients and working with our colleagues and the courts.

One of the best parts of the day was the distribution of the name cards. I had expected the usual official card in a plastic holder telling everyone who you are and where you're from and how important you are, all in little tiny letters that you have to get up real close to see much less read. Well, what a refreshing surprise it was when large (and I do mean large) tag board name plates with multi-colored yarn strings were distributed to be hung around our necks. No titles, no extraneous identifiers. Once we all felt like we were in kindergarten again, much of the formal atmosphere we seem to operate in every day was gone. What a great idea for a communication seminar, and I heard it was Matt Jamin who came up with that one.

The first part of the day was spent in trying to learn some new communication skills, and unlearn some old habits. Lawyers, we found out, tend not to listen, they view feelings as an impediment to a rational process, and their generally adversarial style is antithetical to good communication. This may sound like obvious stuff, but too many of us either don't realize these things, or if we do, we underestimate their importance. Listening to communications experts discuss the impacts of various methods and communications exercises brought home the need to constantly work to improve our skills in order to better represent our clients both inside and outside the courtroom.

The purpose of long-range planning, as described by Chief Circuit Judge Wallace, is to dispense the best quality of justice at the least expense in the shortest period of time. Worthy goals indeed. As he explained it, the Ninth Circuit, through its circuit conference, explores a problem that is generic to the circuit, provides education on the issue, serves as a resource, and develops an implementation plan. The plan is put into practice at the district level. This way, step by step, the administration of justice in this country will be improved. Presenting the District's perspective on long-range planning was Chief District Judge Holland. His 30-year plan for the federal court in Alaska includes a new federal court facility in Anchorage and automation of the clerk's office.

The Ninth Circuit, it was reported, is the first circuit to confront the issue of gender bias. Excellent presentations were made by Collin Middleton, a member of the working group on this issue, and Nancy Shaw. While each person's experience with gender bias is somewhat different, the goal on this issue remains the same: respect each person as an individual, respect people for who they are; the goal is not some ideal notion of "equality" as an end in itself. (Gender bias will be explored again in a joint session of the bar and the Alaska Court System at the Bar Convention in June bringing this important issue even further home.)

Last but not least, we heard from Hal Brown and Matt Jamin on civility and professionalism. A few well-seasoned "war stories" served to drive home the points, and Hal Brown summed it up well by reading from the Guidelines for Relations Between and Among Lawyers adopted by the State Bar of Montana:

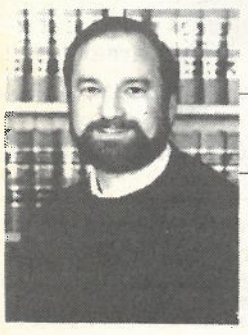
1. Never lie to or mislead another lawyer.
2. Practice law so that you need few favors from opposing counsel, but also practice law so that when you need a favor, opposing counsel will not refuse you.
3. Promptly return all telephone calls of other lawyers.
4. Avoid making disparaging personal remarks about other lawyers.
5. Always be willing to give advice to other lawyers upon request.
6. Avoid brash and militant stances.
7. Cooperate with opposing counsel in all respects not clearly inconsistent with the clients' interests.
8. Scrupulously observe all mutual understandings and strictly adhere to all express promises and agreements with other lawyers.
9. Never force an opposing lawyer to do something the hard way.
10. Don't make a practice of practicing by default, or of taking advantage of opposing counsel on technicalities.

Well, all of the things I heard and learned at the District Conference made me stop and think and re-evaluate, and I hope they do you, too. In that way, the message from the conference on the need to improve our communication skills and our professional and personal relationships as a means to directly improving our ability to represent our clients and more effectively present their interests in the courts will, indeed, be brought home.

•

On Bar business, the Board of Governors is once again soliciting your comments on two topics important to our members. First, we are requesting comment on whether the Bar should file an amicus brief urging the Alaska Supreme Court to reconsider its decision in *Doe v. Hughes Thosness, et al.*, Slip Op. 3891 (October 9, 1992). Please send your comments to Deborah O'Regan by December 20. There is a more detailed notice in the Bar Rag on this matter.

Second, you will soon be receiving a survey in the mail requesting comment on whether we should continue to fund the Alaska Law Review. The Board has decided to continue the contract with Duke University for another year, and poll the members on whether they would like the Alaska Law Review to be continued for an additional year, or two years, or not at all. We would really appreciate your taking the time to respond to this survey.



Editor's Column

By Ralph Beistline

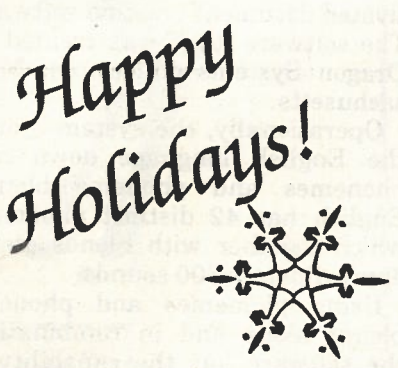
This is the last edition of The Bar Rag for 1992 and my last edition as Editor. I've served as Editor for five years now and have enjoyed the opportunity immensely. While many are taken aback by the Bar Rag's format and occasional irreverence, it does serve its purpose, i.e. to inform, educate, and entertain members of the Bar Association.

One of the greatest rewards one receives as Editor is the opportunity to meet and work with the many good and talented people associated with this publication. The newspaper also provides an outlet for one's creative juices and a forum in which members of the Bar can share their thoughts or concerns.

As Editor, I've encouraged anyone with a desire to write to contribute to the paper, and I expect that volunteers will continue to be a vital part of the paper's future.

As I pen these last few words, a new Editor for the paper has not been selected. Whoever is chosen will have my complete support. I know that he or she will find a great deal of pleasure and satisfaction in this work.

Finally, to those dedicated readers of the Bar Rag who have supported us so well over the years, I extend my most sincere thanks and my best wishes to all of you in the future.



Inactive Status Request By January 1

Members of the Bar Association who wish to transfer to inactive status must submit their requests by January 1, 1993. Please contact the Bar office for information and the required affidavit to transfer to inactive status. Members who are on active status for any part of a calendar year must pay active dues for the entire year.

The Alaska BAR RAG

The *Alaska Bar Rag* is published bimonthly by the Alaska Bar Association, 510 L Street, Suite 602, Anchorage, Alaska 99501 (272-7469).

The *Alaska Bar Rag* is published in January, March, May, July, September, and November.

'Doe' raises attorney liability issues

Enhanced duty, greater care, and . . .

In a recent decision, the Alaska Supreme Court seems to have given support to those many clients who continually expect more from their attorneys. Overturning a summary judgment motion of the Superior Court, the high court held a defendant law firm ". . . liable, as a matter of law, for its failure to obtain the biological mother's consent to the adoption of her child in conformity with the requirements of the Indian Child Welfare Act." (Jane Doe and John Doe, Appellants, v. Hughes Thorsness Gantz Powell & Brundin, Appellees. No. 3863 - June 30, 1992).

The defendant law firm argued it was not liable for any "error of judgment," as the matter was in an unsettled area of the law. This concern was recognized early by the defendant lawyers, who recommended the Superior Court decide whether the act applied, specifically not incurring costs to comply with provisions of the act beyond written permission of the biological mother for the adoption.

What this means for Alaska's attorneys is still open to much speculation. If the court intended to set a new standard for lawyers, requiring further care in the discharge of any discretionary actions, the impact could be far reaching. It could require attorneys to practice far more defensively, performing functions their clients neither want nor are willing to pay for.

There is some sentiment among legal malpractice insurers that the long-term effect of *Doe v. Hughes et al.* will create more concerns.

ALPS President Bob Minto said so in a recent letter to the Board of Governors. According to Minto, "Coverage may become harder to get and, when available, more expensive." Insurance consultant and actuary Susan Witcraft of Milliman and Robertson sees this as possible for three reasons. Says Witcraft, "Defense costs may increase soon, as insurers defend against motions for summary adjudication of liability, based on the expanded duties this decision may bring. As defense choices are restricted, the proportion of claims that resolve with payment will increase. The number of claims against attorneys may increase."

From the days of *McPhearson v. Buick*, the insurance industry has been very concerned at any broadening of duties owed by insureds. Whether or not there is reason to be concerned over this decision will become apparent as the court decides future cases and tells us whether this opinion was meant to be narrowly or widely construed.

Attorneys Liability Protection Society Analysis by Robert D. Reis, ALPS risk manager.

Loescher is 'Boss of the Year'

Joseph R.D. Loescher, a partner with Hughes Thorsness Gantz Powell & Brundin, was named the 1992 "Boss of the Year" at the Anchorage Legal Secretaries Association's 19th Annual "Bosses' Lunch" held at the Anchorage Hilton on Bosses' Day, Oct. 16.

Loescher was born in San Diego, California and first came to Alaska in 1954. He graduated from Alaska Methodist University and obtained his J.D. from Willamette University College of Law in Oregon. Loescher joined Hughes Thorsness Gantz Powell & Brundin in 1979 and became a partner in 1984. His practice focuses on natural resources and environmental law, including corporate tax and litigation defense.

Loescher was entered in the anonymous competition by his secretary of almost five years, Linda Vinson, who described her boss as "an absolute joy to work for." Vinson, who had no legal experience when she was hired by Loescher, said he gave her "the chance to expand into a field that I never dreamed possible," and went on to say that Joe "takes the initiative to ensure that new employees are properly trained and monitored," and that although a "professional to the point of almost extreme," he also "understands that taking five or ten minutes out of the day to laugh and/or capture the day's events is good for the mind and body."

Judges for the competition were Michael L. Wolverton, Presiding Judge, Alaska State District Court; Deborah O'Regan, Executive Director of the Alaska Bar Association; and Linda M. O'Bannon, 1991 "Boss of the Year." entries were graded on three categories: boss's qualities, quality of entry's contents and spelling, grammar, punctuation, and appearance.

Joseph Loescher thanks Linda Vinson, his secretary, for making his "Boss of the Year" award possible.

The ALSA "Bosses' Lunch" is held on Bosses' Day each year. This year the luncheon was sponsored in part by donations received from the following Anchorage area law firms and businesses: Birch, Horton, Bittner & Cherot; Bogle & Gates; Faulkner, Banfield, Doogan & Holmes; Guess & Rudd; Hartig, Rhodes, Norman, Mahoney & Edwards; Hughes Thorsness Gantz Powell & Brundin; Law Office of Thomas R. Lucas; Law Office of Kenneth A. Norsworthy; Robertson, Monagle & Eastaugh; Law Office of Kenneth L. Wallack; A Floral Vision; Alaska Flower Shop; Anchorage Floral Cache; Floral Expression by Carrs; Flowers, Inc.; Pink Petal Florist; Uptown Blossoms; Alaska Personal Storage; Alaska Stenotype Court Reporters; Arctic Office Products; Best Western Barratt Inn; Green Connection; Hotel Captain Cook; Ju Ju Flowers; MAPCO Express; The Office Place; Olsten Services; Personnel Plus; Simon & Seaforts; and The Print Shop, Inc.

Should bar file on Doe?

At its meeting on October 31, 1992, the Board of Governors was approached by a number of members of the Alaska Bar Association who are urging the supreme court to reconsider their decision in *Doe v. Hughes, Thorsness, et.al.,* Opinion No. 3891 issued in this case on October 9, 1992. These members requested that the Board consider filing an amicus curiae brief in this matter.

The primary concern of those making the request was that the opinion set a standard which has profound implications for the provision of legal services and for legal malpractice insurance in Alaska.

The Board was concerned that it had not heard arguments of those who may support the court's opinion and they wished to hear those positions before deciding whether the Board should request leave to file an amicus curiae brief.

Accordingly, the Board moved for extension of time in which to determine whether to seek leave to file an amicus curiae brief.

The Board is soliciting comments from members on whether the Bar Association should file an amicus brief. Please send your comments by December 20, 1992 in care of Deborah O'Regan, Executive Director, P.O. Box 100279, Anchorage, AK 99510.

PROPOSED AMENDMENTS TO BAR RULE 16(c)
ATTORNEYS FEES AND COSTS IN DISCIPLINARY PROCEEDINGS
(Additional italicized; deletions bracketed and capitalized)

Rule 16. Types of Discipline and Costs.

* * *

(c) Restitution; Reimbursement; Costs.

When a finding of misconduct is made, in addition to any discipline listed above, the Court or the Board may impose the following requirements against the Respondent:

(1) restitution to aggrieved persons or organizations;

(2) reimbursement of the [CLIENT SECURITY] *Lawyers' Fund for Client protection;* or

(3) payment of [THE] *reasonable* costs, including attorney's fees, of the proceedings or investigation or any parts thereof. *In imposing costs and fees, consideration shall be given to the following factors:*

(i) The complexity of the disciplinary matter;

(ii) The duration of the case;

(iii) The reasonableness of Bar Counsel's attorney fee rate and the reasonableness of the costs incurred;

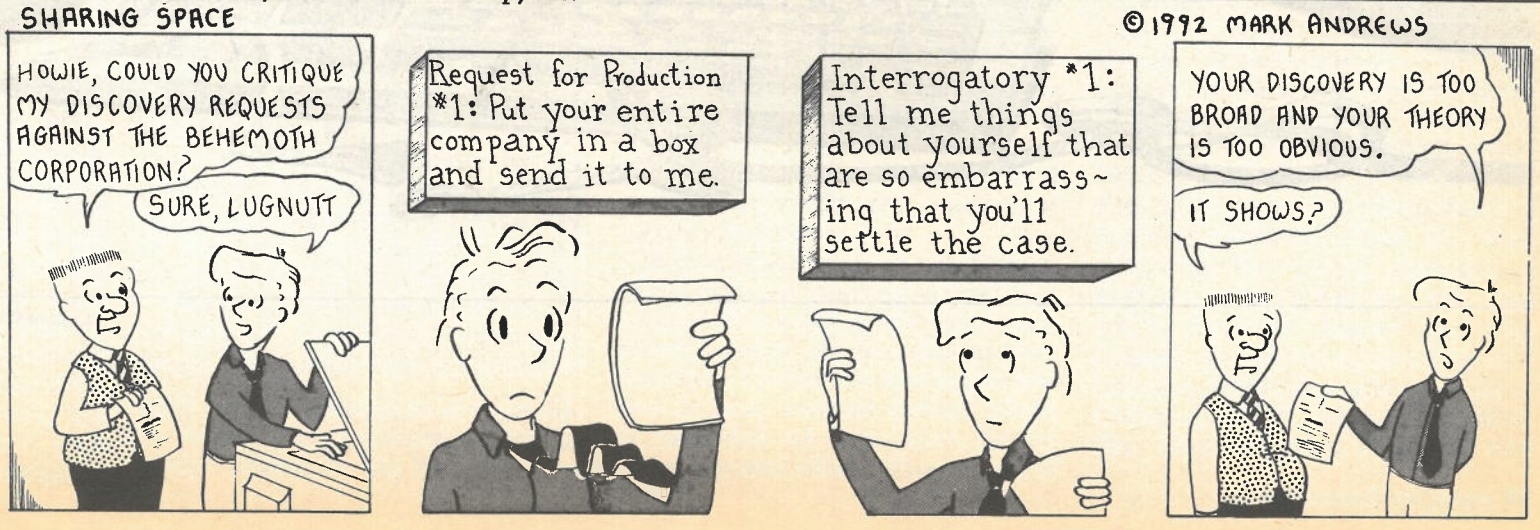
(iv) The necessity of the work performed;

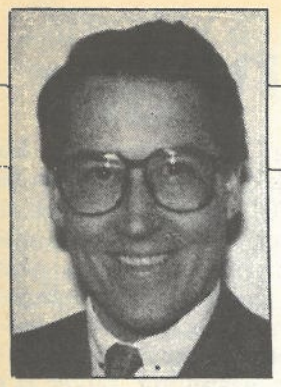
(v) The reasonableness of the claims or defenses raised by the respondent;

(vi) The extent to which the bar association prevailed on its allegations of misconduct;

(vii) The extent to which a full fee and cost award is disproportionate to the discipline imposed and therefore is unnecessarily punitive; and

(viii) The existence of other equitable factors deemed relevant.





Estate Planning Corner

By Steven O'Hara

Buy-Sell Agreements

The shareholders of every closely-held corporation should consider having a Buy-Sell Agreement. This is especially important if the enterprise is an S Corporation for federal income tax purposes, in which case each shareholder should consider getting his co-shareholders to agree to preserve S corporation status.

Fundamentally, the Buy-Sell should provide a framework through which ownership may be transferred in the event of a shareholder's death, disability, or withdrawal. This framework should identify the purchaser, price, and payment terms.

In identifying the purchaser, Buy-Sells are generally one of three forms: the redemption form, which provides the corporation with an option or obligation to purchase; the cross-purchase form, which provides the remaining shareholders with an option or obligation to purchase; or the combination form, which generally provides the remaining shareholders with the option to purchase and, to the extent that option is not exercised, the corporation with the option or obligation to purchase.

Ever present are tax considerations. Recall that "basis" is used in *determining* gain or loss (I.R.C. Sec. 1001 and 1011). If a client purchases stock for $10,000, his basis in that stock is $10,000 (I.R.C. Sec. 1012). If he sells the stock for $25,000, his taxable gain is $15,000, which is the consideration received in excess of his basis.

The redemption form of Buy-Sell can waste the opportunity of increasing the remaining shareholder's basis.

Consider a corporation that is equally owned by two individuals. It is not an S Corporation. The value of each shareholder's stock is $50,000, but each has a basis of only $1 in his stock. The parties have adopted the redemption form of Buy-Sell. Suppose a shareholder dies and the corporation redeems his stock for $50,000.

Under such circumstances, the surviving shareholder indirectly purchased the decedent's stock through the corporation, which the surviving shareholder now owns entirely. His basis in his stock remains at only $1, even though he indirectly paid $50,000 for the decedent's stock.

By contrast, if the surviving shareholder had purchased the decedent's stock directly, his basis in his stock would have been increased to $50,001.

Another tax consideration that can be controlled by the form of Buy-Sell concerns insurance. Life insurance is often purchased on one or more shareholders' lives in order to fund the buy-out. In general, life insurance proceeds are income-tax free (I.R.C. Sec. 101). An exception is that life insurance paid to a corporation (in order for it to fund a redemption, for example) could be subject to alternative minimum tax (I.R.C. Sec. 55 and 56(c)).

For this writer, the combination form of Buy-Sell is preferable. It provides the opportunity to increase basis, but without restricting the parties to the cross-purchase form.

The most challenging part of a Buy-Sell is settling upon a purchase price. There is no method that is perfect in all situations, and the parties must tailor any method to their circumstances. The method should not only be fair to all parties at the present time, but also under all foreseeable circumstances in the future.

Because circumstances can change so dramatically, this writer often recommends that clients consider a Buy-Sell that fixes the purchase price at "fair market value," which is to be determined at the time any buy-out is triggered. The valuation may then be made, when the buy-out occurs, by agreement between the seller and purchaser or, if they fail to agree, by arbitration, as may be specified in the Buy-Sell.

Leaving the purchase price to be determined at the time of buy-out has the advantage of flexibility. The parties are not locked into a specific purchase price. On the other hand, this flexibility continues a degree of uncertainty, which the parties may have wished to eliminate through the Buy-Sell.

Leaving the purchase price to be determined at the time of buy-out may also favor the survivors, at least in the case of a buy-out triggered by death or disability, because one of the best witnesses on the valuation issue may be dead or disabled. Accordingly, some clients prefer to insert a specific purchase price into the Buy-Sell, whether it be book value, a value agreed upon between the parties on an annual basis, or a valuation by formula.

The book-value purchase price has been adopted as part of Alaska's statutory Buy-Sell to which all shareholders of professional corporations are subject in the absence of a contrary agreement (A.S. 10.45.230).

Although the Buy-Sell will fix the purchase price between the parties, the IRS may assert that the Buy-Sell does not fix the value of the stock for gift, estate, or generation-skipping tax purposes. In general, in order for it to be taken into consideration by the IRS, the Buy-Sell (1) must apply to lifetime transfers, as well as buy-outs at death; (2) must be a bona fide business arrangement; (3) must not be a device to transfer stock to members of the transferor's family for less than full consideration; and (4) must be comparable to Buy-Sells entered into by persons in arm's length transactions (Treas. Reg. Sec. 20.2031-2(h) and Sec. 25.2703-l(b)).

Close consideration should also be given to the payment terms under the Buy-Sell. If a substantial portion of the stock's value will be payable to the IRS after the shareholder's death, for example, the shareholder should review the payment terms under the Buy-Sell, along with other sources of cash, to assure his estate will have sufficient liquidity (*Cf.* I.R.C. Sec. 6166, which authorizes installment payments of estate tax in limited circumstances).

Book review

'Real' Alaskans tell their tales

BY JOHN TIEMESSEN

Jean Lester recently released her second book in her Faces of Alaska series, *Faces of Alaska From Barrow to Wrangel* $49.95 hardcover (limited edition), $29.95 softcover, available from Poppies Publishing, Ester, Alaska. Ms. Lester modestly describes the book as "a glimpse of history through paintings, photographs and oral histories." At first glance, the list of subjects of this oral history book appear unimpressive, Judge Moody, Joe Usibelli, a few other familiar names but not many obvious movers and shakers. Not the sort of people who warrant inclusion in Alaska's oral history.

Wrong. These are exactly the kind of people who should be included in any book on Alaska history. Ms. Lester told me she consciously avoids the usual list of movers and shakers when choosing her subjects. Conspicuous by their inclusion are women, Natives and people of relatively modest means. The subjects of this book are the people who built and populated modern Alaska: The people who founded the first barge line into Kotzebue, the early leaders of the Teamsters union, Native elders, and a collection of mothers, professionals, poets, priests, pilots, miners and homesteaders.

Some excerpts:

Grandmother spoke archaic Eskimo that was about twenty-five thousand years old . . . I remember Grandma would talk to us before the news came on and say something was going to happen. Then we'd listen to the news and she'd be right. She would tell about what was happening in Iwo Jima and other parts of the world. We just thought it was what grandmothers did. And then she'd tell us about things that were going to come about, like man landing on the moon and that the Eskimos had already been out in the universe to learn more things and that they had sent their people out to observe other countries. And so when I took history in high school, again different areas were familiar and I thought, 'How did my grandmother know these things?' She didn't read, she didn't speak English. — *Eva Merrifield.*

* * *

One day, one of the male attorneys came in and he didn't have a tie on. So I said 'Mr. So and So, you don't have appropriate dress. You don't have a tie on. I'm going to recess and you bring fifty dollars and a tie back with you.' In a few minutes he came back in with just a kind of shoestring tie. I looked down and he didn't have any shoestrings. And I said, 'well I don't know if shoestrings are an appropriate tie, but I don't take issue with that. But you don't have any shoestrings on, so that will be another fifty dollars until you get some shoestrings.' — *Ralph Moody.*

There is a history in this book, but it is not the kind of history we are used to reading. It is the history that our parents and grandparents inadvertently taught us when they told us stories from their lives. These are histories of ordinary people and their extraordinary lives.

Reading this book is like sitting in a room filled with interesting people, listening to each one tell their life story; their victories, their losses, and some of the stuff that happened in between. Ms. Lester's portraits of each subject and the collections of historical photographs complement the text. Although the price is a little steep, the contents are worth the price.

BOG proposes new inactive dues

The Board of Governors is proposing the following amendments to the bylaws. Please submit any comments to Deborah O'Regan, Executive Director, P.O. Box 100279, Anchorage, AK 99510 by December 21, 1992.

ARTICLE III

Membership Fees and Penalties

Section 1. ANNUAL DUES. (a) *Active Members.* The annual membership fee for an active member is $450.00, $10.00 of which is allocated to the Lawyers' Fund for Client Protection. The annual membership fee for an active member, who is 70 years of age or more and who has practiced law in Alaska for a total of 25 years or more, is *one half of the amount paid by active members* [$160.00], $10.00 of which is allocated to the Client Security Fund.

(b) *Inactive Members.* the annual membership fee for an inactive member is *one third of the total amount paid by active members* [$150.00].

Understanding the "O" balance deed of trust

BY FRANK NOSEK

Like programming a VCR, we all know the principal of the "0" balance deed of trust, but we're not exactly sure how it works. It is truly the right tool for certain occasions. The primary uses for this creature are (a) divorce property settlements, (b) commercial transactions, and (c) real property sales involving an assumption of an existing deed of trust.

I. BACKGROUND. It all starts with a deed of trust, which is the preferred security document in Alaska for real property transactions.

Recall that the deed of trust is used as a security device primarily in the following situations:

1. **Purchase Money.** For payment of a deferred purchase price (the "Purchase Money" deed of trust);

2. **Security.** For re-payment of a loan (the "Security" deed of trust);

3. **Performance.** To secure *performance* of an obligation rather than a specific "debt", (the "Performance" or "Indemnity" deed of trust, commonly referred to as the "0" balance deed of trust in Alaska).

II. PURPOSE. The purpose of the "0" balance deed of trust is to secure some type of performance obligation rather than securing the payment of money. Often it is called a "Performance" deed of trust since it doesn't secure a specific balance due.[1] It is also sometimes referred to as an "Indemnity" deed of trust. The following are usual types of performance secured by this unique device:

1. Contract performance; (e.g. liquidated damages, failure to perform a contract as agreed);

2. Bond performance and indemnity guarantees (e.g. bail, surety, fidelity, indemnity against loss);

3. Divorce property settlement (H and W both on deed of trust and property given to one who promises to make all payments on the deed of trust). There are more complicated rules for securing "support,"[2];

4. Sale of property on an "assumption" (buyer assumes payment of seller's existing deed of trust. The "0" Balance has been extensively used in this area in recent years!)

III. ALASKA LAW. While little specific Alaska law (either statute or case law) currently exists, this handy tool can still be safely used. The common law has long recognized and used the performance mortgage. Generally, any obligation which can be "reduced to a money equivalent may be secured by a mortgage.[3] Alaska recognizes the "common law" in most areas where there is no statute law.[4] Alaska court decisions have told us that the "deed of trust is just one type of mortgage,[5] and both the mortgage and the deed of trust are specifically recognized by statute.[6] In 1992 a new and more comprehensive deed of trust/security foreclosure statute was proposed to the legislature. A similar proposal was made to the legislature circa 1978. For various reasons neither proposal became law. However, both recognized the "0" balance deed of trust.

IV. DIFFERENCE BETWEEN "0" BALANCE AND OTHER DEEDS OF TRUST.

The usual purchase money or security deed of trust secures a "monetary" obligation or debt which is in turn generally evidenced by a Promissory Note. The "0" balance deed of trust instead secures a "performance" obligation and not a Promissory Note. Hence, the common law name of "performance mortgage," or in the case of the indemnity, the "indemnity mortgage."

V. PRACTICAL USES. Here is how the "0" balance works in four widely used situations:

1. **Contract Example.** X wants to build a subdivision and asks the city for the necessary permissions. The city eventually says "Yes, but..." city wants X to put in underground utilities. X says it will do so, but the city wants a "guarantee" of performance, and so X gives the city a performance or "0" balance deed of trust, probably on a different piece of property. If X fails to perform, city will foreclose its deed of trust based on a default in performance, and thereby produce the funds needed to put in the guaranteed underground utilities.

2. **Bond & Indemnity Example.** Almost any surety bond or indemnity guaranty situation lends itself to the use of the "0" balance. Bail bonds posted to assure a defendant's attendance at a future court hearing are posted often with a "0" balance deed of trust. In indemnity agreements against future monetary loss in commercial transactions, the indemnity deed of trust protects against loss, i.e. R mortgages his land to E to indemnify E against loss E may sustain from embezzlements by X, whom E employed as a cashier at the request of R."[7]

3. **Divorce Example.** When H and W are both obligated on a deed of trust for a piece of marital property, and the divorce court awards the property to one. The other spouse remains obligated on the deed of trust, but no longer has title. If the spouse now solely owning the property should default in the future, the deed of trust beneficiary can pursue both ex-spouses. How can the non-titled ex-spouse be protected from a later personal judgment, deficiency judgment or non-judicial foreclosure by the deed of trust beneficiary? (For Answer see SOLUTION following "Sale on Assumption".....)

4. **Sale on Assumption Example.** When property is sold without new financing, a buyer will often "assume" or "wrap" the existing loan/deed of trust. (Careful...permission often required from beneficiary!!) Seller conveys title to buyer, but remains obligated on the deed of trust which is now assumed by buyer.

What if the buyer later defaults? Of course, the beneficiary can seek recovery from both the assuming buyer and also the seller, since they are both obligated on the deed of trust. Seller in a worst case may be pursued for a Moening case personal judgment[8] or a deficiency judgment, and in a best (?) case may have a foreclosure against his/her credit record.

QUESTION....How can the seller be protected from the effects of a future default on the deed of trust in the divorce and sale assumption situations?

VI. SOLUTION TO PROTECTION PROBLEM.

"RELEASE" SOLUTION. The best protection, of course, is to have the conveying spouse in the divorce or the seller in the sale assumption example, be specifically released by the beneficiary from further liability under the deed of trust. But, often the beneficiary is unwilling to give up one of the responsible parties and will not agree to release. So..... the "0" balance deed of trust to the rescue!

"0" BALANCE SOLUTION. The "assuming" ex-spouse or buyer gives back to the other spouse or seller a "0" balance deed of trust which does not secure a money debt, but rather secures performance by the ex-spouse or buyer of their promise to not allow the assumed deed of trust to get in default. The "assuming" buyer is now a trustor of both the "assumed" deed of trust and also the "0" balance deed of trust.

If the ex-spouse or assuming buyer does later default on the assumed deed of trust, then the "0" balance beneficiary (our conveying spouse or seller) can foreclose on the "0" balance deed of trust and sell or take the property back.

DEED OF TRUST INTERIM PAYMENTS. True, the "0" balance beneficiary will then have to make the payments on the "assumed" deed of trust during the foreclosure period in order to keep the "0" balance current and prevent its foreclosure. However, the S's interim payments will then be added to the amounts due to S under the "0" balance deed of trust.

Now at least our S (the "O" Balance beneficiary) will have a method to recover such interim payments by either (a) buying back the property (by off-set bid at foreclosure sale for amounts due under the "0" balance deed of trust), or (b) Trustee will have sold the property to a third party as a result of the foreclosure of the "0" balance deed of trust, and the price paid by the third party will have paid off the "assumed" deed of trust and any amounts due under the "0" balance deed of trust.

ADVANTAGE WITH THE "0" BALANCE DEED OF TRUST. By using the "0" balance deed of trust the S (our beneficiary of the "0" balance) can be protected against a future default by the B under the "assumed" deed of trust by both preventing a deficiency judgment or a foreclosure against his/her credit record, and also have an opportunity to recover interim payments made on the "assumed" deed of trust.

WITHOUT THE "0" BALANCE. Without the "0" balance deed of trust the ex-spouse and seller have retained no legal interest in the property (i.e. title or a deed of trust) which would allow them to protect themselves from the results of a future foreclosure, since they have given up title. Of course, they could begin making the payments on the defaulted deed of trust, but this would be solely for the benefit of the title holding exspouse or buyer and would be a pretty unattractive situation...

VII. FORECLOSURE PROBLEMS. Setting up the "0" balance deed of trust is fairly straight forward, but defining the performance "obligation" and the procedure for foreclosing on it is more complicated. It is important to define the obligation so that third parties will know the total amount of the obligations that are against the property.

How can the obligation be translated into money? What amount of money would an interested bidder bid at the foreclosure sale? Of course, there is probably no problem if the only bidder is the foreclosing beneficiary of the "0" balance deed of trust, (our Seller in the above examples) since he/she will

Continued on page 7

NOTICE FROM THE ALASKA COURT SYSTEM

WRONG

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

XYZ Corporation,)
Plaintiff,)
vs.) Case No. 3AN-92-XXXXCI
Jane Doe,)
Defendant.)

STIPULATION FOR EXTENSION OF TIME

Comes now plaintiff XYZ CORPORATION, by and through its attorneys SMITH & SMITH, and defendant JANE DOE, by

RIGHT

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
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STIPULATION FOR EXTENSION OF TIME

Comes now plaintiff XYZ CORPORATION, by and through its attorneys SMITH & SMITH, and defendant JANE DOE, by

Solid Foundations

By Mary Hughes

Although courts continue to uphold the IOLTA program, litigation persists. The most recent suite was filed by the Washington Legal Foundation, two lawyers and two consumers of legal services in Federal District Court for Massachusetts on April 22, 1991. They claimed that Massachusetts' IOLTA program (promulgated by court rule) violated the plaintiffs' rights under the First, Fifth and Fourteenth Amendments to the United States Constitution. Twelve defendants, including the Massachusetts and Boston Bar Foundations, the Massachusetts Legal Foundation, the chair of the Massachusetts IOLTA Committee and the judges of the Supreme Judicial Court, were named.

The plaintiffs raised three legal arguments: two based on the Fifth and Fourteenth Amendments, which prohibit the taking of private property for public use without payment of compensation to the owner of the property and one contending that the First Amendment prohibited use of IOLTA funds for purposes that offended their political and ideological beliefs.

Judge Joseph Tauro, in an opinion dated May 28, 1992, dismissed the complaint. He found that the plaintiffs did not have a property right in either the interest generated by the funds held in the IOLTA accounts or the beneficial use of their money that was placed in the IOLTA accounts. Judge Tauro reasoned that the IOLTA accounts create interest income that was not within the "reasonable expectation" of the owner of the principal amount and that the lawyer who holds funds such as those placed in the IOLTA accounts is not obligated to invest them for a client.

Finally, in conclusion, Judge Tauro addressed the use of IOLTA funds. He held that the IOLTA rule deals with the "process of litigation" not the "substance of any litigation." Therefore, the First Amendment argument was unsupportable.

The plaintiffs have indicated that they will appeal to the Court of Appeals.

The sporadic litigation does not appear to thwart the IOLTA programs which continue to be extremely successful in all states. Although several programs are mandatory for lawyers, the voluntary programs are attracting more and more lawyers thereby increasing the funds available for provisioning of legal services to the disadvantaged and the administration of justice.

• 3 ways to deal with obligations, bid problems

Continued from page 6

purchase the property by off-set bid for the total amount owed on the "assumed" deed of trust plus all "interim" expenditures. But what if there are a number of bidders?

There are several ways to deal with defining the obligation and the foreclosure bid problems:

First — Nonjudicial Foreclosure: State the following right in the "0" balance deed of trust (a) what the indebtedness is or what the monetary obligation will be, i.e. provide the monetary translation; (b) that the statutory power of sale foreclosure procedures or any other legal remedies can be used.[9], and (c) what the foreclosure sale bid procedures will be (for the trustee's guidance);

Money Obligation of Assumed Deed of Trust. For the surety bond and indemnity guaranty situations the dollar amount of the loss can be specifically stated.

For divorce and assumption on sale situations, the obligation or amount due on the "0" balance deed of trust can be described such that the successful bidder, if other than the beneficiary, will be required to make a cash bid to be applied toward (a) sums of principal, interest and costs then due and owing on the assumed deed of trust, plus (b) all interim payments or costs expended by the "0" balance beneficiary (our Seller), plus (c) costs of foreclosure of the "0" balance deed of trust, with any surplus going to the title holding ex-spouse or buyer, or other person entitled to it.

Contract Obligations. This is more complex, since the defaulted performance obligation may be difficult to translate into an exact dollar amount, which is generally a requirement.[10] Simplest is to provide in the "0" balance deed of trust for a liquidated dollar amount of damages, against which any sale proceeds will apply. However, it is probably sufficient if the deed of trust points to the sources or sets out a formula from which the amount due may be ascertained with certainty.[11] The obligation of the contract may ultimately be determined by a court.

Trustee Position. Trustees who conduct nonjudicial foreclosures seem to prefer having the obligation liquidated to a dollar amount and the bid procedures set out in the deed of trust. The Alaska Supreme Court has approved private remedies being agreed upon by the parties in a deed of trust.[12]

Statutory Language Problem. Some concern has been expressed that the nonjudicial foreclosure statutes can only be used when a deed of trust secures an "indebtedness," and that an indebtedness is only a money debt. Thus, even in the "0" balance situation, so the concern goes, there must be a promissory note. This is too literal a reading, and the statutory language is not perfectly precise. In AS 34.20.070 (a) there is a reference to "payment of an indebtedness." But, virtually everywhere else in Section 070 the statute refers to the "obligation" rather than the indebtedness (with the exception of the "cure" provision of Sec. 070 (b) which specifically refer to curing a failure to make "payments").

Certainly the definition of "indebtedness" includes a money obligation. However, it also includes any other obligation which can ultimately be reduced to money. The definition of "indebtedness" in Black's Law Dictionary is consistent with this idea. Webster's New 20th Century Dictionary states that one is indebted when he/she is "obliged by something received for which gratitude is due." In the broad sense and in common understanding, the word "indebtedness" means any obligation that is due and owing, whether monetary or performance.

There is nothing in a reasonable reading of the nonjudicial foreclosure statute which would prohibit use of the power of sale with the "0" balance deed of trust.

Second — Court Liquidation of obligation Coupled with Nonjudicial Foreclosure: A suit can be filed to "liquidate" the obligation due under the "0" balance deed of trust and then the summary nonjudicial power of sale foreclosure procedures can be used for the foreclosure."[13] This combination of court liquidation and nonjudicial foreclosure would avoid the 12 month statutory redemption period resulting after a judicial foreclosure.[14] Essentially the court is supplying the translation or dollar amount and the power of sale statutes are providing the bidding procedures for the Trustee to follow.

Third — Judicial Foreclosure: A judicial foreclosure of the "0" balance deed of trust can be filed, requesting both liquidation (i.e. translation into money) of the obligation and sale of the property by the court. In this situation the court determines the dollar amount of the indebtedness and also fashions the sale/bidding procedure. There will, of course, be a 12 month statutory redemption period within which the defaulting "0" balance trustor may redeem the property. Thus resale of the foreclosed property by the "0" balance beneficiary is impaired for the 12 month redemption period. Meanwhile the "0" balance beneficiary must continue making the payments on the "assumed" deed of trust in order to prevent the "assumed" deed of trust from itself being foreclosed and thereby eliminating the junior "0" balance deed of trust.

CONCLUSION. Use the "0" balance deed of trust in the above situations with confidence where the situation requires it. Be sure to set out in the "0" balance deed of trust what the "obligation" is and how it is to be translated into money, and also provide for use of the nonjudicial power of sale foreclosure/bid procedure in the "0" balance deed of trust document itself.

1. Mortgages 2d, Osborne, West Publ., Sec. 102 et seq.; Performance Deeds of Trust, Calif. Real Estate, Nov-Dec 1981, p. 27.
2. Real Estate Finance Law, 2d, Nelson G Whitman, West Publ., p. 21; Mortgages 2d, Osborne, supra at Sec. 105.
3. Real Estate Finance Law, 2d, supra p. 21.
4. A.S. 01.10.010
5. Brand v. First Fed. S&L, 478 Pd 829, (Ak 1970); Real Estate Finance Law, 2d, supra, Sec. 1.6.
6. A.S. 34.20 et seq.
7. 36 Am. Jur. Mortgages, Sec. 63; 59 CJS Mortgages Sec. 171; 1 Glenn, Mortgages Sec. 5.6; 1 Jones, Mortgages Sec. 428; Osborne, Mortgages Secs. 105, 116.
8. A.A. 34.20.160.
9. Moening v. Ak. Mut. Bk., 751, P2d 5 (Ak 1988); Conrad v. Counsellors, 751 P2d 10 (Ak 1988); A.S. 34.20.070.
10. Real Estate Finance Law, 2d, supra, Sec. 2.2.
11. Sease v. John Smith Grain Co., 479 NE2d 284, (Ohio 1984).
12. Moening and Conrad cases supra.
13. Suber v. Ak. State Bond Comm., 414 P2d 546 (Ak 1966).
14. A.S. 09.35.210 et seq.

Bar Rag editor "promoted" to bench

Third editor to don the robes

BY ROGER BRUNNER

Ralph Beistline will be sworn in on December 16, 1992, to fill the new Superior Court Judge position in Fairbanks. He has chosen traditional attire for his coronation (see photo). The seat was created by legislation changing one of Fairbanks' District Court slots into a fifth Superior Court position.

Ralph's most famous trial was his first, the Chicken Murder Case. This had nothing to do with the current U.S. Supreme Court case involving animal sacrifice in religious rituals. Instead, Ralph was court-appointed in a first degree murder case involving gold miners in Chicken, Alaska.

When Ralph told the co-defendant's attorney, "My client is innocent," the reply came — "Is this your first case, kid?" Ralph said, "Yes, but how did you know?" Beistline kept that belief in his client in spite of the rifle in his client's hands and the many bullet holes in the back of the unarmed fleeing victim.

Young, nervous, and eager, Ralph repeatedly asked the co-defendant's lawyer after each day of trial, "What happens next?" According to reports, he learned fast and did a masterful closing argument. Ralph argued that his client was a worse shot than the other guy so he probably didn't hit anybody, and if he did hit someone, it was self defense. The jury acquitted Ralph's client and reduced the co-defendant's charge to manslaughter.

After that, Ralph's phone rang off the hook with criminal defendants looking for a miracle worker. His acquitted client followed him around incessantly. One day Ralph agreed to loan him $200, knowing that would insure that Ralph would never see the man again. It worked.

Beistline worked in the Hughes Thorsness Gantz Powell & Brundin firm for 17 years, mostly doing personal injury and wrongful death litigation. Notable firsts by Beistline include:

Co-workers at Hughes Thorsness Gantz Powell & Brundin created this portrait of Ralph Beistline entirely by computer-generated graphics.

Beistline becomes the third of four Bar Rag editors to ascend to the bench, preceded by Harry Branson (the Rag's founder and first editor), now on the federal bench in Anchorage; and Gail Roy Fraties (the second editor, now deceased), who served as a superior court judge in Bethel.

James Bendell, who now has his personal injury and workers comp insurance defense practice in Alaska and Washington, was the Bar Rag's third editor. Bendell once withdrew his application for district court judgeship when a colleague lured him into a practice, and says today that he may seek a judgeship some day if his practice ever slows down.

—first Superior Court Law Clerk in Fairbanks

—first in the first law class to graduate from the University of Puget Sound in 1974 (by alphabetical order!)

Beistline is a life-long Fairbanks native whose grandparents came to Alaska in the early 1900's. Ralph and his wife Peggy Ann, have five children. He graduated from the University of Alaska Fairbanks in 1972.

Ralph is well-known for his sense of humor, which has been more widely seen in his recent years as editor of the Bar Rag. Another trait which will help him on the bench is that Ralph truly likes lawyers. Ralph will be missed by Hughes Thorsness, where he has been a valuable partner, noted for shoveling snow from the walks, plowing the parking lot, and fixing the plumbing. His "handyman" skills may soon be put to good use constructing a courtroom and chambers for himself, because it is not clear where they will put him in the courthouse! Good luck, Ralph!

Sedwick appointed U.S. district judge

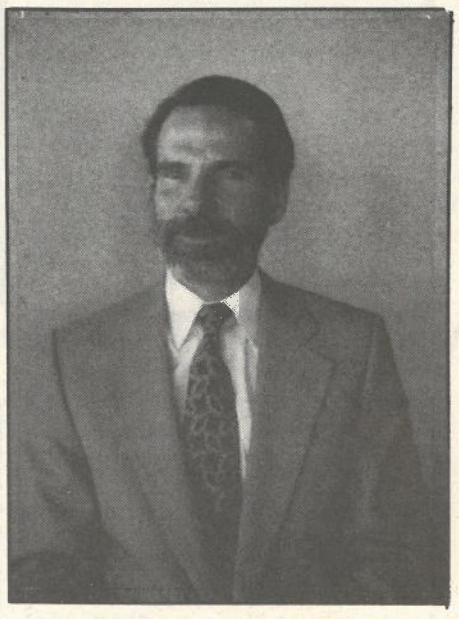
BY JOHN C. WENDLANDT

John W. ("Jack") Sedwick, after 20 years in private practice in Alaska, has become this state's newest United States District Court Judge. He was sworn in on October 23, 1992.

Judge Sedwick joins Judges Holland and Singleton as one of the three active members of the court, and fills the vacancy created when Judge Andrew Kleinfeld moved to the Ninth Circuit Court of Appeals last year. Senior Judges James von der Heydt and James Fitzgerald remain on the court.

Before coming to the bench, Sedwick was a shareholder in the Anchorage law firm of Burr, Pease & Kurtz. He practiced with that firm continuously from 1972, except for a one-year stint in 1981-82 as the State of Alaska's Director of Lands. His practice emphasized civil litigation and ranged from environmental to construction to product liability law.

Regarding his transition from advocate to arbiter, Judge Sedwick explains that he looks forward to



Jack Sedwick

the opportunity to "see the efforts of many fine attorneys in addressing all sides of the issues." He says that he is excited about being in a "learning" environment again, and likens his present situation to that of a young attorney coming into the practice.

Judge Sedwick admits that he will miss the many people with whom he has worked closely in his years of private practice. Still, he is confident that his new role will not interfere with his long-time personal relationships with many local attorneys.

Some aspects of private practice, Sedwick notes, he will not miss. One of those is marketing. Explaining that he started practicing law at a time when "doing a good job" was all that was necessary to get and keep good clients, Sedwick says that he was "uncomfortable" with the current emphasis on marketing.

A 1964 graduate of West High in Anchorage, Sedwick went on to Dartmouth College, where he received his bachelor's degree in 1968, majoring in economics. By the time that he had finished his studies at Harvard Law School in 1972, his decision to return to Alaska had been made.

Judge Sedwick is married with two children. His wife, Debbie, is a vice-president with Jack White Company in Anchorage. Son Jack is a recent graduate of Colorado College and daughter Whitney is a junior at West High School.

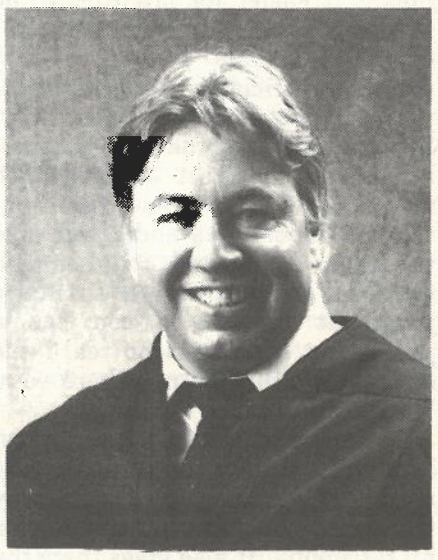
Many of us recall significant personal events such that one or two trivial details stand out. Jack Sedwick recalls that, when President Bush telephoned him to say that his name was to be sent on to the United States Senate for confirmation as a federal judge (a call that was received from the President's helicopter), the helicopter pilot was "Captain Justice."

One has to wonder if the "Green Lantern" was riding shotgun.

3rd Judicial District leadership selected

Chief Justice Daniel A. Moore, Jr. of the Alaska Supreme Court announces the appointment of Superior Court Judge Karl S. Johnstone as Presiding Judge of the Trial Courts in the Third Judicial District. Serving with Judge Johnstone will be Superior Court Judges Dana A. Fabe and Karen L. Hunt as Deputy Presiding Judges. The appointments were effective Nov. 1, 1992.

In addition to regular judicial duties, the Presiding Judge has the administrative responsibility to supervise the assignment of cases, administrative actions of judges and court personnel, keep current the business of the courts, review and recommend budgets, and review the operation of all trial courts to assure adherence to statewide court objectives and policies. There are approximately 42 judges and magistrates serving the Third Judicial District in locations ranging from Glennallen, in southcentral Alaska, to Unalaska on the Aleutian chain.



Karl S. Johnstone

Dana Fabe

Karen Hunt

Judge Johnstone received his law degree from the University of Arizona, was admitted to the Arizona and Alaska Bar Associations in 1967, and practiced law in Anchorage until 1979 when he was appointed to the Superior Court. While in practice he served as a member of the American Arbitration Association and as Salary Commissioner for the State of Alaska. He has handled both a civil and criminal case load since 1979 and served as Deputy Presiding Judge in 1985. In 1980 and 1985, Judge Johnstone developed pretrial court orders establishing court management and delay reduction in civil and criminal cases in the Third Judicial District.

Judge Fabe received her law degree from Northeastern University. She has lived in Alaska since 1976 serving as a law clerk for Justice Edmond Burke before being appointed by the governor to the Chief Public Defender's position for Alaska in 1981. She was appointed to the Superior Court in 1988. Judge Fabe has served on the Board of Governors for the Alaska Bar Association, as chairperson for the Supreme Court's committee on criminal pattern jury instructions, and as a member of the Alaska Supreme Court's civil rules committee. She is on the Board of Trustees for the Anchorage Museum Association and the Board of Directors of Soroptimist's International of Cook Inlet.

Judge Hunt received her law degree from the University of Southern California in 1973 and was in private practice in Anchorage until her appointment to Superior Court in 1984. She served as president of the Alaska State Bar Association in 1981 and was a founder of the Anchorage Association of Women Lawyers. She has regularly taught classes at the National Judicial College in Reno, Nevada, and at the University of Puget Sound in Tacoma, Washington. Prior to attending law school, Judge Hunt was a teacher in the Los Angeles city schools.

Chief Justice Moore said that these judges bring to the administration a wide range of experience and excellent skills which will meet the challenge of the complex job of managing the Trial Courts in the Third Judicial District.

CALL FOR INTEREST RE CREATING AN OIL & GAS SUBSTANTIVE LAW SECTION

Are you interested in forming and participating in an Alaska Bar Association Oil & Gas Substantive Law Section? If so, please contact Robin Brena, c/o Barbara Armstrong, Alaska Bar Association, 510 L St., Ste 602, Anchorage, AK 99501, phone 272-7469, fax 272-2932.

DIAL 800-478-7878 FOR CLE & BAR INFO

The Alaska Bar Association now has an 800 information number thanks to the Alaska Bar Foundation. The outgoing tape message on this number gives you the Bar office hours, address, phone, fax, upcoming CLEs, and other program information -- such as the Bar Exam and MPRE dates and locations.

If there is other information that you think would be helpful to have on this tape, please call Barbara Armstrong, CLE Director, at the Bar office at 272-7469.

• From the spoken word to paper: 5 seconds

Continued from page 1

only court reporters in the lower 48 who can spell Chuathbaluk, Kwethluk, Tuntatooliak and Deg Hi'tan for you today.

Taku was wonderful. They were professional, accurate and pleasant to work with.

What real-time transcription means for a judge is a computer screen on the bench that provides you a transcript of what everyone in the courtroom says five seconds after they say it. The transcript then goes directly to a hard disk and you have immediate access to the trial transcript.

For nearly two years I have used a computer to take notes at the bench to make a record for me to review at my leisure. As a matter of practice, however, I've not used the computer to record my conclusions or thought processes. The luxury of having an actual transcript instantly available allowed me to use my computer to write down logical connections, the relevance of particular bits of evidence, observations about witnesses, questions I wanted to ask, or points I wanted to raise with counsel at a convenient time. At the end of each day I had a summary of what I thought was important from that day.

The reapportionment case was a 16-day trial with 10 lawyers in the courtroom, more than 10,000 pages of exhibits and over 60 large maps. We had trial Monday through Saturday from 9 a.m. to 5-6 p.m. each day. With a long trial, this kind of summary is very helpful.

The lawyers were outstanding. I am a great believer in NITA but these lawyers renewed my belief that you don't *have* to be a specialized trial lawyer to do a great job at trial. Ten good lawyers coming at you with a record this size makes you look for help. The real time transcript gave me that.

The complete, corrected transcript was available within 48 hours of the end of the trial. This made it possible to do electronic searches for references, for testimony I thought I'd heard and to correct misimpressions.

The ability to watch the transcript go by as it is spoken gives the judge the power to see that the transcript is accurate at the time it is being made. It makes it possible to correct things that were (or people wish were) "mis-spoken." Although seldom necessary in this trial, real time transcription gives the judge the ability to interpret a question for a witness when the lawyer has gotten so convoluted in asking a question that the lawyer doesn't know where he or she may be.

I wouldn't admit that it happened in this trial, but if a judge were ever to have his or her attention diverted from the question when an objection is made, it is possible to review what was asked and rule on the objection.

If there is anyone with a hearing problem, real time transcription can be set up to insure they understand.

The ability to instantly locate, block and copy extended portions of a trial transcript makes opinion-writing easier. Sometimes nothing makes the point better than it was made by a witness.

Real time transcription also makes it easier for lawyers. While in private practice I used Discovery-ZX in some big cases that proved beneficial and the real-time process is not dissimilar. Discovery-ZX was helpful to me when I represented an architect charged with malpractice. There had been numerous depositions and I was able to mark, block and copy enough portions of that into a summary judgment motion to convince a judge that there was no real issue of fact, whether or not there were "genuine issues."

Real time transcription can be an important tool for lawyers in a long trial. It gives lawyers a hard copy transcript at the end of the day for all testimony. It also gives them the power to see whether the script they thought they were following was actually followed. Sometimes it is easier to read what a witness said than it is to listen to the witness. This is especially true if you have lawyers who need to think about what they are going to ask next. Expert and difficult witnesses can sometimes gloss responses that don't appear in text the way the lawyer wishes they were. The ability to see a transcript at the end of the day and review with a witness the next day things that need to be covered again or to explore nuances that may have been ignored at the time is a significant advantage at trial.

While real-time transcription may be available only for cases with lots of resources involved, it is a real boon to both the court and counsel during trial. To the extent that a high percentage of cases in Alaska are appealed, real time transcription would also significantly reduce the time now taken for appeals.

• Voice recognition

Continued from page 1

changeably with the keyboard or with verbal statements of keyboard commands. It may be used in combination with other computer accessories such as scanners and integrated fax modems.

According to Cook and Readman, the firm of Duncan and Craig, through utilization of the software, was able to reduce their secretarial staff from 8 to 4 people in the section using the technology. The software replaced such functions as free text dictation in the form of memos and correspondence; creation of documents by voice by utilizing boilerplate precedents and forms; the use of "voice macros" as a means of integrating certain boilerplate phrases, sentences and paragraphs into free text dictation; the use of control sheets and Smart Merge Macros to create documents; and command and control of the computer resources, including faxing directly from the word processing application by a voice command.

Cook and Readman said that the software program runs about $5,000. Setting up a complete system with a printer/photo copier such as the Kodak Ectaplus, a computer, software, printer, and photo copier combination may run up to $15,000 or-so. However, even at this cost, if the technology operates as demonstrated it still presents a significant savings over labor costs. It also frees up support staff for tasks which are more interesting than simple data entry or document creation.

• Dial-a-deposition

Continued from page 1

carefully screened according to strict standards required for membership. The thorough screening process includes securing referrals from lawyers in each of the markets for firms that are most respected for their proficiency and ability to handle business. DepoNet then verifies that these firms can provide a full range of services, including litigation support, videotape, conference rooms, speakerphones and use of certified shorthand reporters.

In addition to being fast, free and easy, quality assurance is another trademark of DepoNet. At the conclusion of each deposition, the attorneys are provided a Satisfaction Survey with an attached $2 check for their time in filling it out. That way any problems with member firms can be straightened out immediately. The cost of the service is paid by the member reporting firms, which benefit from the increased national exposure and business generated by the service.

So while there may not be any more free lunches, getting in touch with court reporting firms across the nation is just a free phone call away. Just dial 1-800-866-9090.

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Oil case brings technology to Alaska

BY LYNDA BATCHELOR

The headline in the Juneau paper read, "Oil settlement worth $128 million," on April 14, 1992. That was the day when the 14-year-old *ANS Royalty Litigation* (formerly known as Amerada Hess) case went to trial and settled in the space of about 15 minutes. What the article only hinted at was the extraordinary array of technology brought in by both the State and Exxon to help present this case to the jury.

Judge Walter Carpeneti's courtroom had been remodeled to accommodate extra counsel tables with computer and phone cabling to each, two 39-inch color monitors suspended in front of the enlarged jury box, a nine-foot screen on the far wall and equipment to project bar-coded laser disk video depositions and exhibits.

Less obtrusive but perhaps the most intriguing system installed for the trial was the Computer Integrated Courtroom (CIC) system which provided an instant transcript of the court proceedings. "It's an amazing system that makes everything else look primitive in comparison. It's definitely the wave of the future," reports Maureen McGuire of the Court Reporters News Bureau in Edison, N.J.

Although CIC's have been in use around the country and are increasing in number rapidly, this was Alaska's first glimpse at how computerized shorthand reporters have revolutionized the trial transcript. Testimony is written on a computerized shorthand machine cabled directly to a high-speed computer. The computer instantly translates the shorthand symbols into English and flashes the testimony onto screens placed around the courtroom.

CIC's allow court reporters to provide instant transcripts and give attorneys and judges immediate access to all information involved in a case. In addition to viewing the ongoing proceedings, attorneys and judges can access previous days' testimony, depositions or other documents loaded into their computers for research and comparison purposes. Or they can call up WestLaw or LEXIS for on-line research on particular points.

Another feature of the CIC is the ability to make notes or mark key points in the testimony as it appears on the screen. The lawyer or judge can then jump back to these marks and notes as well as key words or phrases for reference or cross-examination purposes. For example, Judge Frank Andrews, who presides over a CIC in Dallas says, "I often simply type in the letter 'D' each time the testimony is about damages. If a question later arises about evidence on damages, I then review all the 'D' entries, avoiding testimony not related to damages. Likewise, I can make a quick search to determine whether or not an exhibit has already been offered or admitted in evidence."

CIC's also help court systems comply with the Americans with Disabilities Act by allowing hearing-impaired witnesses, jurors or litigants to read what is being spoken in the courtroom. This is particularly helpful since it can be difficult to convey complex legal principles using sign language.

Those without hearing difficulties benefit, as well. It is common to miss or misunderstand what is being said when distracted by background noises or whispered communications. Reference to the computer screen eliminates the need to have testimony repeated.

In cases that involve witnesses who speak little or no English, examinations through interpreters can be difficult, lengthy and imprecise. However, use of a CIC gives the interpreter the opportunity to view the precise question before translating it for the witness and gives greater accuracy to the proceedings.

Judge Carpeneti said his experience with CIC was worthwhile. "Although I did not have a great opportunity to work with the computer-assisted transcription system, I was very impressed by what this system offers. The immediate availability of a complete and accurate transcript freed me from the responsibility of trying to record as completely and accurately as possible what was being said. With this freedom, I could listen more critically and I could look more frequently at the witness or at exhibits which were the subject of testimony," said Carpeneti.

"Additionally, the software system being used allowed me to annotate the transcript through the use of a laptop. (Those notes were available only to me). Finally, the system allowed me to search easily and quickly through the transcript (either for a specific word or words, or for notes which I had added), which would have aided immeasurably in reviewing what was scheduled to be a multi-month trial.

"Especially in longer cases involving multiple and complicated issues, the availability of computer-assisted transcription promises to offer substantial advantages for the attorneys and their clients, the court, and ultimately the judicial system as a whole. I hope that its use continues to grow in this state," Carpeneti said.

Although the CIC was only used briefly in the *ANS* trial, it was immediately pressed into service in the reapportionment trial, *Southeast Conference, et al., v. Hickel,* which began the following day in Judge Larry Weeks' courtroom. Judge Weeks, known for his fondness for computers at the bench, had TWO of them in front of him: One connected to his office computer for note-taking in Word Perfect and the other displaying the trial proceedings as they were spoken.

At one point during the trial, a question was objected to at length and then asked to be repeated. Instead of the clerk having to find and replay the question on the court's tape system, Judge Weeks read it back from his computer screen.

Judge Weeks commented to us that having the trial transcript available to him daily on his computer was of tremendous value to him in keeping up with the evidence in the case and making rulings. And having all 4,000 pages of the trial transcript loaded in his computer at the close of trial certainly hastened the issuance of his opinion. He reported that he would be writing his decision in one window in WordPerfect while calling up relevant parts of the transcript for reference in another.

The technology of today and tomorrow revolves around the computer. Computers have been finding their way into law offices over the past few years, familiarizing attorneys and their staff with their time- and cost-saving capabilities. Now that they have made their debut in Alaskan courts, I predict we will see use of computer-assisted transcription increase to the point of being at the heart of every significant trial in Alaska's future.

Lynda Batchelor is a principal in the firm of Taku Stenographic Reporters in Juneau, a registered professional reporter, and past president of the Alaska Shorthand Reporters Association.

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STOCKING STUFFERS

Two cheap Christmas gift ideas crossed the *Bar Rag's* desk, for those obligatory offerings to colleagues and others on your list.

No car tape player would be complete over the holiday season without "U-Can Sue for Xmas," a compendium of blasphemous carols concocted by some legal secretaries in Los Angeles.

A sampling of the lyrics (to the tune of "Angels We Have Heard on High"):

Lawyers we've heard down the hall,
Buzzing 'bout their last phone call.
Client had a slip and fall,
Into court she'll have to crawl.

The Claus[e] Company produced the tapes. You can find their order blank ad in this issue of the *Bar Rag*.

* * *

A perennial favorite of the *Rag's* now-departed Editor is the Cheese Weasel, the author of which has given the former Editor a life-time free subscription for shamelessly plugging the comic book in the *Bar Rag*.

You can order a subscription, too, for a mere $6.95. Help a struggling lawyer in "The Comics Capital of Kankakee County" by sending a check to Jim Ridings, Side Show Comics, PO Box 464, Herscher, Illinois, 60941. Ridings does a whole series of other comics, as well. Maybe he has a catalog.

Report from the Mudflats

When in Anchorage, choose a good bar

BY BARBARA KISSNER

Now that summer is just a memory and winter is well underway, it is time to start working full days again.

It seems that many attorneys work a lot harder during the winter than in the summer. (Of course, some attorneys work hard all year long, but they are too busy to read this article, anyway.) This could be a reflection of our clients, who also enjoyed the summer and are now out creating work for us. Or it may be that many of us chose to ease through the summer by putting in minimal hours at work so we could enjoy the maximum amount of outdoor time: biking, fishing, hiking, fishing, camping, fishing, hunting, and naturally, fishing.

Now we need to make up for lost (billable) time. It seems that everyone is busy these days, so I began to wonder how everyone relieves their stress at the end of the day. (Of course, some attorneys are not under any stress, but they are too busy to read this article, anyway.).

I found that some attorneys work out to relieve stress. others go skiing. Some go home and play with their kids or watch CMT. As an alternative to these methods, or on days when you just don't feel like working out or skiing, some attorneys have found that a good stress reliever is simple socializing. Whether you want to complain about being overworked and underpaid or just want to relax and have some laughs, it's nice to socialize after work.

So where do Anchorage lawyers get together? Bars, of course. In fact, downtown lawyers are blessed with a variety of watering holes to choose from. In case you are not familiar with all of them, I'll share my research with you in this handy "Bar Review." So, when you want to socialize with your colleagues, consider the following places for your destination.

Simon & Seaforts. Simons lounge has plenty of room for lots of attorneys, and, in fact, usually has lots of attorneys - especially on Friday afternoons. Simons offers a variety of domestic and imported beer, a full bar, and enough tasty nonalcoholic drinks to please everyone from the firm or office. Simons also offers plenty of appetizers and has a super view (if you arrive before the sunset). There is generally a representative from every law office and firm within walking distance. Fridays are a must if you want to catch up on the gossip of who's seeing who, who's hiring and firing, who's getting sued and who's doing the suing.

F Street Station. Most of the lawyers who don't head to Simons, generally socialize at F Street. F Street gets a little livelier than Simons, either because it draws from different offices or because it's slightly more casual. F Street, like Simons, has enough variety of food and drink to please everyone. Unfortunately, F Street doesn't have the room for everyone. There is not as much gossiping at F Street, because the F Street crowd focuses on relaxing and having some laughs.

Elevation 9. Elevation's lounge has almost as much to offer as Simons — plenty of drinks, appetizers, and a view. What you won't find at Elevation is the crowd. Elevation is not the place to bring the entire office, but if you want to have a quiet conversation with someone, it's the place. Elevation has a small lounge and seems to cater to a more subdued crowd. For some reason, there is usually a judge or two at Elevation. It could be that Elevation is across the street from the courthouse, but my guess is that they can peacefully sit at Elevation and gossip about all those attorneys living it up at Simons and F Street.

La Mex. La Mex is a great group gathering place. Again, there is plenty of variety to satisfy everyone, and plenty of room for everyone, too. La Mex offers free chips and salsa on each table. Rumor has it that the chips and salsa are coated with something to make them addicting. Whatever the reason, no one can eat just one. Since La Mex has plenty of its own customers, it doesn't get overrun by lawyers, like Simons and F Street sometimes can. This means that you can have plenty of margaritas without too many folks hearing about it.

Fletcher's. Fletcher's, in the Captain Cook, may remind you of a New England pub where the decor is classy, and the atmosphere comfortable. Fletcher's is the place where decisions are made, deals are done, and the future of Alaska is often a topic of conversation. The after-work crowd is usually lawyers, although there are often businessmen, politicians, and other folks who can effect the future of this state and its people. It's also the only place you can go and be served by an Iditarod musher.

The Keyboard Lounge. Keyboard attracts the greatest variety of lawyers among the downtown bars. The Keyboard has a relaxed atmosphere, including jazz music, which is pleasing to almost everyone regardless of whether they are wearing a suit or jeans and birkenstocks. It's located across the street from the courthouse so it's convenient to most offices. the Keyboard, like the other bars, has plenty to drink and eat. If you stay long enough, the Keyboard offers some talented jazz performers.

Darwin's Theory. Unlike the others, Darwin's does not have an adjoining restaurant, but it does serve free popcorn. In fact, it's even more addicting than the chips and salsa at La Mex. Darwin's is small and homey, with a great jukebox. After a few visits, everyone will know you by name (or so I've heard). For the most part lawyers can and do go unnoticed at Darwin's. This bar draws from neighboring businesses like First National Bank and Arco or From F Street's overflow. Don't forget to try house drink, the "red-hot," which goes down smooth, but sneaks up on you later.

The Pioneer Bar. The Pioneer isn't what I'd call a typical lawyer hangout, but if you want to shoot a game of pool, throw darts, listen to Patsy Cline on the jukebox, and not run into anyone you know, then the Pioneer could be for you. Pioneer is a no nonsense kind of place: If you want an appetizer, the barkeep will sell you a bag of potato chips. You can do your own thing and not be bothered, or bend the ear of the folks at the bar, who will tell you just what they think — including what they think about lawyers.

All of the bars will call you a cab if you socialize too much. Yes, there are some bars I did not mention, but I haven't completed my research. the winter is young.

SOLICITATION OF VOLUNTEER ATTORNEYS

The court system maintains lists of attorneys who volunteer to accept court appointments. The types of appointments are listed in Administrative Rule 12(d)(2)(B). Compensation for these services is made pursuant to the guidelines in Administrative Rule 12(d)(2)(E)-(T).

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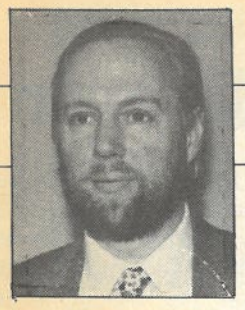


Getting Together

By Drew Peterson

"I learned the true practice of law," said a famous attorney, Mahatma Ghandi. "I learned to find the better side of human nature and to enter men's hearts. I realized that the true function of a lawyer was to unite parties riven asunder."

How many of us in the legal profession share Ghandi's vision of the function of a lawyer? I suspect that the answer is that a great many of us do.

Reality often seems very different from such a vision of lawyers as peacemakers, however. Lawsuits can and often do take on a malevolent life of their own. Uniting parties "riven asunder" is not one of the things they do best. The Chinese even have a curse on the subject: "May you have a lawsuit in which you have confidence."

I am coming to realize that a major reason that I have fallen in love with the field of collaborative negotiation, and the mediation structure, is because of their application to this concept of the lawyer as peacemaker. Collaborative methods can allow us to serve in such a peacemaker role, without in any way harming our corollary duty to be the best possible advocates for our clients.

I am currently reading a fascinating book by Kenneth Cloke entitled *Mediation: Revenge and the Magic of Forgiveness* (Center for Dispute Resolution, Santa Monica, California, 1990). Cloke's book includes a thought-provoking essay entitled "What's Better Than The *Rule Of Law*?"

For centuries the rule of law has stood for progress and against tyranny, Cloke asserts. Principal concepts of such a view have been "equal justice under the law" and "a government of laws, not of men." Under such a view of the rule of law the subjective has been viewed as biased, while the objective is seen as neutral and thus preferable. The law is seen to be more rational, even-handed, and lasting than more personal methods of resolving normal human concerns. The law distinguishes civilization from anarchy.

Cloke argues that such rule by law, however, is limited in its scope. Its methods are predetermined (by codification or precedent), coercive, and hierarchical. The law provides only limited options for resolving conflicts. The limited methods which the legal system has created, moreover, almost inevitably manufacture a loser as well as a winner to every legal dispute.

Yet even in victory one may emerge defeated, as we all recognize on some level. If one loses compassion, integrity, generosity, honesty, or humility in the process of winning, has he really won? While it can be satisfying at some level to revenge oneself on one's enemies, it is much more satisfying to turn an enemy into a friend. There is a great difference between mere containment of conflict, and its transcendence.

"The rule of law is masculine, not feminine," asserts Cloke. It is "white, not black; rich not poor . . . it is a sterile, uncultured unfeeling brute, with no music in its soul or art in its eye. It is not childlike or playful or affectionate or funny. It can't dance." worst of all, the rule of law pretends that all of this is not true: "It argues but it doesn't really listen. It pontificates but it doesn't really care. It judges but it lacks wisdom. It reasons, but it lacks heart."

But what then is better than the rule of law? Cloke argues that it is a system in which results are obtained voluntarily and by consensus. Under such a system the parties can define both the form and the content of their negotiations. Feelings can be expressed, acknowledged and respected. The focus can be on the future, not the past. Third parties can be used to facilitate but not determine outcomes. Under such a system, neutrality is established through empathy rather than through distance; positive communication and collaboration skills are modeled; and reconciliation is encouraged. Such a system is called mediation.

Cloke acknowledges that mediation will never wholly replace the rule of law. In most cases which are currently litigated, however, he asserts that mediation produces better results faster and less expensively than litigation. Its results are "owned" by the participants, with fewer enforcement problems and a dramatic reduction in the costs of appeal.

The rule of law is an effective answer to dictatorship and tyranny, Cloke acknowledges. But it is not the last answer, nor the best one for a democratic society. Mediation when it is possible (and it usually is) can return us to the deeper principles of wisdom and compassion, honesty, self-revelation, healing, and forgiveness.

I agree with Cloke, except that I think he somewhat overemphasizes the need for third party mediators. All of us in the field of dispute resolution are capable of serving in just the kind of role that Cloke and Mahatma Ghandi describe, namely of helping to unite parties riven asunder. We can help to transcend conflict and reconcile disputing parties, rather than just resolving and containing the dispute.

The task is not an easy one. It is much more difficult to work as a peacemaker rather than a fighter, although the price is well worth it. Those who think that mediation or collaborative negotiation methods are soft or weak are dead wrong. In the words of Mary Parker Follett:

> We have thought of peace as passive and war as the active way of living. The opposite is true. War is not the most strenuous life. It is a kind of rest cure compared to the task or reconciling differences. From War to Peace is not from the strenuous to the easy existence. It is from the futile to the effective, from the stagnant to the active, from the destructive to the creative way of life . . . The world will be regenerated by the people who rise above these passive ways and heroically seek whatever hardship, by whatever toil, the methods by which people can agree.

Tanana Valley Bar

Excerpts from our friends at Fairbanks' Tanana Valley Bar weekly luncheon....

Bob Noreen gave a food committee report and said that per a second faxed solicitation from the Westmark, we could get less hot food for less money than we're paying now. Dave Call will be contacting Regency management to see if we can't get better food for the same or less money here.

I reported on the fact that the Alaska Bar Association Ethics Committee is preparing a "Disaster Response Plan." Roger Brunner asked if they expected us all to become unethical at one time. We had no answer for this.

Oct. 2, 1992

* * *

A law library report was given. It was announced that the policy of locking the back library door has been changed to allow access to the bathrooms after hours in an effort to save the potted plants in the library and coincidentally avoid gender bias.

Oct. 9, 1992

* * *

A report was given on the 5 Most Popular Ways to Determine Who Our New Superior Court Judge is:

5. When asked how his interview went, Ralph said "fine" and Chuck said "not so good."

4. All junior partners at Huge Thoughtless have been seen with tape measures in Ralph's office, paging through catalogs of drapes and wallpaper.

3. All tickets to Bethel bought by the court system for the next 4 years have the initials Ralph Beistline on them.

2. The other four Superior Court judges are preparing lists of their very finest and best cases to give to Ralph, most of which have plaintiffs and defendants who (at least temporarily) share the same last name. (Since this isn't Juneau, this does not include State v. State cases).

1. Prior to his selection, the Governor met both candidates to be interviewed at the door and said, "Come on in, judge...Not so fast, Pengilly."

It was also reported that Beistline has resigned from damn near everything.

Oct. 23, 1992

* * *

Dan Winfree went to Juneau and indicated that Art Robson had saved the TVBA's honor (we have honor?) by registering our name. Seems that some underhanded, dirty, lowdown MFBAers tried to steal the TVBA's name so they could charge us for using it, but Art Robson foiled the attempt by accidently having already registered it.

Nov. 6, 1992

--Aly Closuit,
Secretary & Dog Lady

Season's Greetings!
(Where did 1992 go?)

"My wife shot a moose"

Wherein Peggy brings home the steak dinner

BY RALPH R. BEISTLINE

For years my family has been unwillingly feeding moose from our garden, but this year the tables were turned. Here is the story.

Some time ago, when middle-age unexpectedly arrived in our household, one area of concern became diet. We had been growing a large vegetable garden for a number of years and this now became more important. Meat almost completely disappeared from our menu and, much to the chagrin of our children, fish and fowl took center stage at the dinner table.

About this time, we were given what turned out to be some really tasty moose meat. The kids enjoyed it, and the amateur dieticians we spoke to sung its praise. That's when Peggy started thinking about filling the freezer herself. These thoughts became more prominent when Peggy's brother gave her a 270 Winchester for her birthday (actually for all her birthdays and the next 40 Christmases).

A .270, we were told, was small enough that even a petite lady such as Peggy could shoot it, but large enough to stop a moose. We discovered last year that the rifle did work, that there was little kick, and that Peggy was a good shot. We didn't see any moose, though, and were therefore unable to determine first-hand the rifle's impact upon a moose.

The rifle spent last winter in the closet and I gave no further thought to it. However, with the arrival of fall this year and the opening of hunting season, Peggy resumed her moose hunt. By this time our garden was in full bloom and nearly ready to be harvested. Peggy envisioned a purely Alaskan banquet with fresh vegetables and Alaskan moose. While this all sounded fine to me in theory, I didn't really expect that it would ever materialize. (You have to understand that my vision of a moose hunt is to put the rifle in the car, drive to our cabin on the Steese Highway, take the rifle from car to cabin, look out the window of the cabin, put the rifle back in the car, and then enjoy the weekend. It's exhilarating and little time is wasted cleaning game).

Peggy, however, was more determined this year.

On September 5, 1992, we arrived at our Steese Highway cabin. It was a beautiful evening so my son and I went fishing. It was great. The grayling were moving downstream and I caught four 12-to -14 inchers within a few minutes. (I used a silver doctor fly for you fishing enthusiasts.)

Peggy wasn't interested in fishing. She was hunting. With rifle shouldered, I saw her head off into the sunset. About an hour later she was back and excited because she had seen "lots of moose sign." I wasn't excited because there's always lots of moose sign. There just

are never any moose during hunting season. But it did make for some good discussion as we headed back to the cabin.

By now it was dark and I was able to get the generator going so that we could watch videos on the TV. This is a rustic way to end an invigorating day in the wild.

That night the weather turned cold, the barrel stove burned out, and the cabin was chilly when the alarm clock burst into action at 6:00 a.m. I couldn't believe it. Peggy had actually set the alarm clock. This was a Saturday! I was even more surprised to see her get up, grab the rifle, throw on her winter gear, and head out the door. The screeching of the screen door woke the kids, but only momentarily,

I had just fallen back to sleep when the shot went off. Peggy doesn't joke like that and she doesn't miss, usually. I knew in an instant that my day of leisure was gone.

Peggy burst back into the cabin. "I need another shell!" she yelled.

"What?" I responded. "You only had one shell? You mean you were out hunting last night with one shell ... that's crazy!"

The cabin was a flurry of activity as I searched for some shoes and my glasses.

"This is not the time to argue," Peggy pleaded as she grabbed another bullet and headed for the door.

Blam! another shot. I couldn't find my shoes or shirt but joined Peggy outside on the frozen ground. It was just starting to snow very slightly. I could see the moose moving across the small pond in front of our cabin. I grabbed some slugs for the 12-gauge and headed after it. I traveled 100 yards or so when I really began to miss my shoes. Nevertheless, I headed into the brush after the moose. I ran right into it. In fact, when I saw it, it was about 6 feet from me. I raised the shotgun and pulled the trigger. This was followed by an ominous click. The shell was a dud. The moose then moved back into the pond, still probably wondering what all the excitement was about as I tried to open the jammed weapon.

Peggy arrived on the scene about the same time the moose reached the island. We now had a canoe and were able to move in the direction of the moose. The thick brush on the island made visibility difficult; however, as we rounded a corner, we reached a point where the moose was visible. Peggy stood and pulled the trigger. The moose fell immediately but was obscured by the heavy brush around the island.

It was clear that someone had to go ashore and take on this moose, a big one, at close range. It was a dangerous situation and Peggy, who is months younger than me, was the logical choice. We quietly beached the canoe and Peggy headed into the brush. The excitement, though, was over, for there, laying in the middle of the island, was the moose.

My wife had actually bagged a moose!

Peggy is taking a Native culture class at the University of Alaska this year, and she explained to me that traditionally the men kill the game and the women clean it. She noted that inasmuch as she had killed the moose this year, it was my duty and cultural obligation to clean it. I disagreed. We compromised and together, with the help of Peggy's brother who arrived soon afterwards, cleaned the moose, quartered it, put it in the canoe, and took it back to the cabin. There on the shore of the pond, Peggy skinned the moose while I napped in the cabin. It was then that my 8-year old explained how he had dropped the rifle the night before and tried to get the scope back on as best he could. That explained a lot.

By noon the moose was in town ready for the butcher. A week later it was cut and in our freezer. It has proven to be a real delicacy. We don't eat it, though, with garden fresh vegetables, for while we were at the cabin harvesting moose, the urban moose were in town harvesting our garden...again!

Directory to come

Tribal courts seen as logical village option

The Alaska Judicial Council is praising three rural, volunteer organizations that dole out justice to residents involved in legal disputes. In a recently released report, the council found that rural tribal courts are an effective means of dealing with local problems and encouraged other villages to form similar organizations as alternatives to state courts.

The Minto Tribal Court, Sitka Tribal Court and PACT — a nonprofit conciliation organization in Barrow — demonstrate that low-cost, volunteer organizations can resolve local disputes involving family cases, civil claims and local ordinances, according to the evaluation, which was funded by the State Justice Institute.

The evaluation was conducted to get a neutral view of tribal courts, and the organizations voluntarily participated in the review, the report said. The three organizations are among the most active of dozens of community groups that help resolve disputes throughout rural Alaska.

The council found that all three organizations function with scant funding. Most participants receive little or no pay, and the courts are driven by individuals who are strongly committed to the idea and who work long hours. The organizations have accomplished so much with so little, but heavy reliance on volunteers has left all three organizations susceptible to burnout and turnover among decision makers and support staff, the report said.

The council's report does not take a position on the controversial issue of sovereignty for Alaska Natives. Because people from the communities voluntarily appear in tribal court, the report suggests that tribal courts can provide important dispute resolution services without resolution of the sovereignty question.

Non-Natives voluntarily use or cooperate with tribal courts in family matters and civil cases, the report said, which "indicates that the tribal courts can serve citizens of all races in the state in their capacity as local dispute resolution organizations." Cultural or ethnic cohesiveness of the community may be helpful but not necessary.

The organizations appear, in some instances, to save the state money. The Fairbanks District Attorney's office reports no misdemeanor prosecutions from Minto in several years and only a few felony prosecutions. In contrast, the office prosecutes an average of 50 to 75 misdemeanors and 10 felonies in other Yukon-Koyukuk villages annually, the report said.

The council recommended that interested communities develop similar organizations. It also encouraged continued cooperation among state agencies and tribal courts to further local justice in civil and criminal manners, the report said.

During the next eight months, the council will be preparing a directory of all organizations offering dispute resolution in Alaska's rural communities. To have a tribal court or other dispute resolution organization included in the directory, contact the Alaska Judicial Council in Anchorage.

Attorneys disciplined, sanctioned in four cases

Summaries of discipline imposed

Attorney X was retained by Client in a litigation matter. Attorney X required that Client, at the outset of the representation, sign a written fee agreement stating in part: "If you [Client] fail to comply with the terms of our attorney/client contract, as set forth above, your signature on this agreement constitutes your consent to my withdrawal as your counsel." A subsequent fee dispute arose between Attorney X and Client, and Attorney X moved to withdraw, relying in part on the language of the fee agreement.

Alaska Ethics Opinion 84-10 provides that an attorney "may not obtain a consent to withdraw in advance of an actual intent to withdraw." The opinion further provides that "a lawyer may not tender to the court such a previously executed document even following motion and notice of hearing to his client and opposing counsel." Bar counsel concluded that Attorney X violated both of the foregoing provisions of Ethics Opinion 84-10, thereby violating Alaska Bar Rule 15(a), which makes violation of a Formal Ethics Opinion a separate basis for discipline. Bar counsel further concluded that the offense was committed as a result of ignorance of the prohibition, rather than intentional overreaching. Accordingly, Attorney X was issued, and accepted, a written private admonition for the misconduct.

* * *

Attorney X represented Client in a lawsuit over a business computer system and accompanying computer program. Attorney X's husband, Y, served as her office manager and paralegal and worked directly on Client's case. Client's computers had secured a loan to Lender. When Client defaulted on the loan, Lender sought to execute on the computers and sell them at public sale. As it was apparent Client could not cure default, Attorney X recommended the computers be surrendered to Lender. It was understood that the computer hardware (or similar rented computer hardware) would be needed for trial preparation, and Y offered to purchase the computers at the sale with his own money and in his own name, with the understanding that if Client wanted to buy them back from him in the future for the price he had paid, he would be willing to sell them to her. Client agreed to surrender the computers.

Attorney X did not fully disclose to Client the conflict that might be presented by the fact she was providing advice to surrender for execution sale computers which she knew her husband/office manager/paralegal intended to buy in his own name and with his own funds at the very same sale. She did not discuss with client the fact that it would be in Client's best interest to see to it that the sale was commercially reasonable and that the highest possible selling price was received, whereas Y, as a bidder, might have the *opposite* interest. She did not suggest consultation with independent counsel might be appropriate.

Y purchased the computers in his own name at the sale. He subsequently used the computers solely for purposes of client's case and, after it settled, sold the computers for what he had paid for them. There was no evidence that either Y or Attorney X personally profited from the purchase of Client's property at the execution sale. Bar Counsel concluded that this was an isolated, negligent violation of DR 5-101(A), which ultimately resulted in no actual injury to the client. Attorney X received a written private admonition.

* * *

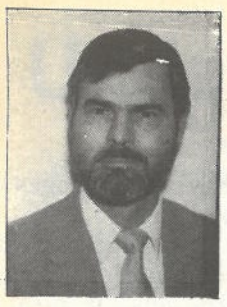
Attorney X and his son entered into a business relationship with Client. A contract dispute later developed between Client and Attorney X in the business matter. While serving as a counsel of record for Client in another matter, Attorney X, representing himself and his son, entered into extended adverse negotiations with Client in connection with the business dispute. Attorney X did not withdraw from representation of Client in the other matter during the period in which he was representing himself and his son *against* Client in the contract negotiations. Attorney X did not obtain Client's informed consent to the concurrent representation after full disclosure, nor did Attorney X at any time recommend that Client obtain independent legal representation in either matter.

In aggravation, Attorney X had substantial experience in the practice of law. In mitigation, Attorney X's conduct was negligent rather than intentional, he had no prior record of discipline, his conduct did not involve dishonesty or deceit, he admitted wrongdoing, and he was cooperative and candid with the Bar Association throughout the investigation. Attorney X stipulated, and the Disciplinary Board approved, a reprimand by the Board, privately imposed.

* * *

Attorney X received a written private admonition for violation of DR 6-101(A)(2) (handling a legal matter without adequate preparation in the circumstances) and DR 6-101(A)(3) (neglect of a legal matter). Attorney X was retained to probate a small, uncontested, single-heir estate. The matter took over four years to complete, there were substantial errors in the final accounting prepared in the matter, and Attorney X had negligently included in the estate an asset which should have passed to the client outside probate. Bar counsel concluded that, although some delays were justified by unforeseen complications in the handling of the estate, the overall four-year delay was excessive. Further, bar counsel concluded that the accounting errors and the mistakenly probated asset could have easily been avoided by closer supervision of staff, greater attention to detail, and clearer communication with the client."

In mitigation, Attorney X had no prior record of discipline imposed, his actions were not motivated by dishonesty or selfishness, he was relatively inexperienced in the practice of law at the time the misconduct occurred, he made a good faith effort to address Client's concerns when raised, he acknowledged wrongdoing, and he was at all times cooperative with the Bar Association during its investigation. Attorney X accepted the admonition, and the file was closed.



BANKRUPTCY BRIEFS

By Thomas Yerbich

Under 11 USC § 506(b) an *oversecured* creditor is entitled to recover, as part of the allowed claim, "interest on such claim, and any reasonable fees, costs and charges provided under the agreement under which the claim arose." Although simple in concept, application of § 506(b) to the facts present in a particular case can get somewhat complicated, particularly with respect to fees, costs and charges.

The principal limiting factor for awarding interest and/or fees, costs and expenses is the value of the collateral securing the obligation. That is, the value of the collateral must be sufficient to satisfy, in order, the principal balance, any charges against the collateral permitted under § 506(c), the interest, fees, costs and expenses. In making this determination it is, of course, necessary to first deduct any principal, interest, fees, costs and expenses allowed under § 506(b) to a creditor having a senior interest in the collateral. To the extent the value of the collateral is insufficient to satisfy any part of the interest, fees, costs or expenses, allowance under § 506(b) is denied. *[United Savings Assn of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988); 3 King, *Collier on Bankruptcy*, ¶ 506.05 (15th ed. 9/89)]

In addition, some cases have indicated that the Proof of Claim should specify on its face that the claim also includes *post-petition* interest, fees, costs and expenses. *[See In re Fawcett*, 758 F.2d 588 (11th Cir, 1985); *In re Haynes*, 107 B.R. 83 (Bkrtcy.E.D.Va. 1989); *Matter of Bradley*, 94 B.R. 563 (Bkrtcy.N.D.Ia. 1988)] Given the existing practice in this district to liberally allow amendments to claims and application of the "informal proof of claim" doctrine [*In re Pizza of Hawaii, Inc.*, 761 F.2d 1374 (9th Cir. 1986); [*In re Sambo's Restaurants, Inc.*, 754 F.2d 811 (9th Cir. 1985)], omission should not be fatal to a creditor's claim for post-petition interest, costs, and expenses.

INTEREST

While allowance of fees, costs and expenses as part of the claim under § 506(b) is dependent upon an underlying contractual provision providing for payment by the debtor, no contract is necessary for allowance of post-petition interest. Thus, notwithstanding the general proscription of § 502(b)(2) against allowance of post-petition interest, a non-consensual lien claimant is entitled to post-petition interest under § 506(b) to the extent there is value in the collateral. [*United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989)]

The prevailing view is that post-petition interest is computed at the rate provided in the agreement or the law under which the claim arose, the so-called "contract rate." *[In re Anderson,* 833 F.2d 834 (9th Cir. 1987); *3 King, Collier on Bankruptcy, supra]* There are, however, exceptions to this rule. For example, the Ninth Circuit has held that where the contract provides for a higher interest rate in the event of a default, equitable principles may preclude application of the post-default interest rate under § 506(b). *[In re Southeast Co.,* 868 F.2d 335 (9th Cir. 1989); In re Entz-White Lumber & Supply, Inc., 850 F.2d 1338 (9th Cir. 1988)]

Ron Pair, by using the comma separating the "under the agreement" language from the interest provision to disjoin interest from the requirement for an agreement raises an interesting argument whether the pre-*Ron Pair* rule applying the contract interest rate survives. At least one bankruptcy judge thinks it did not and applied the federal judgment rate to both consensual [*In re Laymon*, 117 B.R. 856 (Bkrtcy.W.D.Tex 1990)] and nonconsensual [*In re Kelton,* 137 B.R. 18 (Bkrtcy.W.D.Tex. 1992)] liens. Unfortunately for debtors in the western District of Texas, although on appeal the District Court agreed with the bankruptcy Judge, the Fifth Circuit disagreed and reversed *Laymon* [958 F.2d 72 *rehrg denied* 964 F.2d 72 (5th Cir. 19920], remanding the case with directions to apply the contract rate. [Note: The Fifth Circuit joined the Ninth Circuit "equitable principles" camp for determining whether the "contract rate" for interest could be adjusted post-petition and pre-confirmation.] As this article is written, the fate of *Kelton,* decided two months before the *Laymon* reversal, has not been decided; however, some key points upon which the Fifth Circuit based its reversal of *Laymon* are not applicable to *Kelton* and it is possible (though, I suspect, unlikely) a nonconsensual lienholder in the Fifth Circuit could be on a different footing than a consensual lienholder. Moreover, except as applied to § 726(a)(5), Judge Clark has received no support for his federal judgment rate theory from other Bankruptcy Judges.

FEES, COSTS AND EXPENSES

Notwithstanding *Ron Pair*, entitlement of an oversecured creditor to fees, costs, and expenses under § 506(b) remains tied to the existence of an agreement from which the claim arises providing for allowance. Thus, to the extent, and only to the extent, that there is both value in the collateral *and* a contractual provision for fees, costs and expenses will they be allowed as part of the claim under s 506(b). This does not mean, however, that all such fees, costs and expenses must be allowed.

First, such fees costs and expenses must be "reasonable." The question of "reasonableness" is one of federal law to be independently determined by the bankruptcy court without regard to any otherwise applicable state law provisions. [*Matter of 268 Ltd.*, 789 F.2d 674 (9th Cir. 1986)] An issue may arise where the underlying agreement provides for a specified percentage of the obligation as a set amount to be assessed for fees and costs. While the bankruptcy court must independently determine "reasonableness" under § 506(b), the creditor may nevertheless be entitled to recover the difference between the specified percentage and the "reasonable" amount as an unsecured claim to the extent the percentage fee is enforceable under otherwise applicable state law. [*In re 268 Ltd*, 877 F.2d 804 (9th Cir. 1989)] Thus, an oversecured creditor may have a bifurcated fees, costs and expenses claim: allowed as partially secured under §506(b) to the extent "reasonable"; and the balance of the "enforceable" claim allowed as a general unsecured claim.

Second, at least in the Ninth Circuit, the fees, costs, and expenses must be directly related to enforcement or collection of the contractually based claim, not to enforcement of rights under federal bankruptcy law. "Absent bad faith or harassment, attorneys' fees are not available for the litigation of federal bankruptcy issues under a contract that provides for attorneys' fees for the enforcement of a contract." [*In re Coast Trading Co., Inc.*, 744 F.2d 686, 693 (9th Cir. 1984); *see also In re Fobian*, 951 F.2d 1149 (9th Cir. 1991) (attorneys' fees incurred in opposing plan confirmation denied); *cf. In re Johnson*, 756 F.2d 738 (9th Cir. 1985) (attorneys' fees for stay litigation based on a federal law claim and were denied to a debtor)]. Given the strong bias of the Ninth Circuit against awarding fees, costs and expenses incurred in bankruptcy proceedings, allowance of post-petition fees, costs and expenses as part of the secured claim should rarely occur where incurred in connection with litigating provisions of the Bankruptcy Code such as relief from stay, adequate protection payments, or plan confirmation. "[I]t appears the holdings of the Ninth Circuit have been fairly consistent from *Fulwiler, Coast Trading* and *Johnson* in the 1980's to *Fobian* in 1991: No creditor or debtor will be allowed attorney fees for litigating issue related to a contract if those issues are 'peculiar to bankruptcy.'" [*In re Rubottom*, 142 B.R. 407, 409 (Bkrtcy.D.Ore. 1992); *but see In re Marquis Associates*, 81 B.R. 576 (9th Cir. BAP 1987) and *In re Dalessio*, 74 B.R. 721 (9th Cir. BAP 1987) in which the BAP refused to adopt a *per se* rule denying attorneys' fees for automatic stay litigation.] On the other hand, a controversy over the amount of the claim or the enforceability of the underlying obligation (*i.e.*, the debtor objects to allowance of the claim) is an action to enforce or collect the obligation, and fees, costs and expenses incurred in resisting the objection to the claim should be awarded as part of the allowed claim.

COURT NOTES

Executing on the Permanent Fund Dividend

One of the new laws passed by the legislature this year (chapter 52 SLA 1992) makes significant changes in the procedure for executing on Permanent Fund Dividends. The two most important changes are:

a. Writs of execution on the PFD can now be served on the commissioner of revenue by certified mail.

b. When a PFD is seized with a writ of execution, it will no longer be necessary for the creditor to serve the Notice to Debtor packet on the debtor. Instead, a new notice will be sent to the debtor by the PFD Division along with what is left of the debtor's PFD check. The debtor will have 30 days to contact the court if a mistake was made (for example, if the wrong person's dividend was seized or if the judgment has already been paid). Note: this *only* applies to executions on the PFD, not to other executions.

The court system's Forms Committee was created the following new form and instructions to implement the new law:

CIV-502, Writ of Execution and Notice of Levy on Permanent Fund Dividend By Certified Mail

CIV-503, Creditor Instructions for Executing on the Permanent Fund Dividend

Note: The new CIV-502 writ can only be used if the creditor wants to execute on the PFD *by certified mail.* Some creditors may prefer to use a process server (for example, in order to get priority for their seizure by being first in line at the PFD office on April 1). If a process server is used, then the CIV-500 writ must be used, not the new CIV-502 writ.

The new form and instructions are available at all courts.

Child Support Orders

Effective July 15, 1992, the Supreme Court amended Civil Rule 67(b) to require that all orders for payment or modification of child support be entered on forms developed by the administrative director of the court system. (SCO #1093) Two of the court system's child support orders, DR-300 and DR-301, were revised in September because of the new law about child support for 18 year olds which went into effect September 20 (Chapter 117 SLA 1992). Copies of the revised forms and a memo about the changes were sent to members of the family law section. Anyone else who wants to receive a copy should contact Susan Miller, Special Projects, Administrative Office, 303 K Street, Anchorage, AK 99501.

Legislative branch enjoys immunity

BY PAUL H. CRAGAN

The General Rule

The doctrine of legislative immunity is deeply rooted in Anglo-American law. It is contained in the speech and debate clauses of the federal and state constitutions, and is based on the principle that legislators, who are inevitably required to make difficult policy decisions which negatively impact many people, must be free to act for the common good without fear of personal liability. This well-established doctrine applies at all levels of government under both § 1983 and Alaska law.

An individual acting in a legislative capacity is absolutely immune for liability arising from his legislative acts. Intent is irrelevant. For instance, a legislator who votes to delete an employee's position from the annual budget is immune, even if the legislator subjectively wanted to punish the employee for personal reasons.

This doctrine grants sweeping immunity from both tort and criminal liability, from having to defend litigation, and from being deposed or otherwise required to testify concerning legislative activity. Statutory abrogation of this immunity will not be implied. Generally, however, legislative immunity protects only the legislator in his personal capacity, and not the governmental entity which he serves.

The Alaska cases which establish this rule include *Breck v. Ulmer*, 745 P.2d 66 (Alaska 1987)(legislative immunity applies to municipal legislators); *Kerttula v. Abood,* 686 P.2d 1197 (Alaska 1984) (legislator cannot be deposed about his legislative conduct); *State v. Haley*, 687 P.2d 305 (Alaska 1984) (legislative immunity doctrine discussed in the context of an employment termination case); *State v. Dankworth,* 672 P.2d 148 (AK. App. 1983) (state senator was immune from criminal prosecution for allegedly using his official position to obtain a personal financial benefit).

Representative federal cases include *Tenney v. Brandhove*, 341 U.S. 367, 71 S. Ct. 783, 95 L. Ed. 1019 (1951) (a state legislator is absolutely immune from liability for a constitutional violation committed in his legislative capacity); *Shultz v. Sundberg*, 759 F.2d 714 (9th Cir. 1985) (state senate president absolutely immune for alleged constitutional violation in forcibly compelling the attendance of other legislators at a joint legislative session); *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S. Ct. 1171, 59 L. Ed. 2d 401 (1979) (regional legislators are absolutely immune); *Cinevision Corp. v. City of Burbank,* 745 F.2d 560 (9th Cir. 1984) (every federal circuit which has considered the issue since *Lake Country* has granted legislative immunity to municipal legislators). *Rateree v. Rockett*, 852 F.2d 946, 951 (7th Cir. 1988). In Breck, the Alaska Supreme Court cited with approval *Lake Country, Cinevision,* and the other federal circuit cases cited in *Cinevision*.

The Scope of Legislative Immunity

Legislative immunity protects even the most egregious conduct. It has immunized legislators whose conduct was alleged to be unconstitutional. *Tenney, supra; Eastland v. United States Serviceman's Fund,* 421 U.S. 491, 95 S. Ct. 1813, 44 L. Ed. 2d 324 (1975); *Shultz. supra.* The doctrine protected a legislator who released classified national security documents to the public during time of war. *Gravel v. United States*, 408 U.S. 606, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972). It has shielded a legislator from criminal prosecution for accepting a $25,000 bribe to influence the performance of his legislative duties, cash exchanged in a suitcase at the Atlanta airport *United States v. Dowdy,* 479 F.2d 213 (4th Cir. 1973). A legislator was immunized from criminal liability for using his legislative position to arrange for the State of Alaska to purchase property which he owned. *Dankworth, supra.*

The doctrine is not limited to acts taking place on the floor of the legislature. Rather, it covers any activity which would be within the sphere of legitimate legislative activity. An act is legitimately legislative if it would be performed by a legislator during the course of his legislative duties, regardless of the legitimacy of the legislator's actual purpose in performing the act.

The Ninth Circuit stated the test as follows.

> We utilize a two part test to determine whether an activity is within the 'legitimate legislative sphere.' The activity must (1) be 'an integral part of the deliberative and communicative process by which members participate in committee and house proceedings,' and (2) 'address proposed legislation or some other subject within [the legislature's] constitutional jurisdiction.'

Schultz, supra, at 717; *Accord, Eastland, supra; Kerttula, supra: Dowdy, supra* (contacting and conversing with officials within the executive branch to gather information for a committee investigative hearing was conduct entitled to immunity despite blatant bribery which motivated the contacts); *Ashelman v. Pope*, 793 F.2d 1072 (9th Cir. 1986) (ninth circuit overruled its prior immunity decisions which failed to focus objectively on the nature of the ultimate acts in question); *Miller v. Transamerican Press, Inc.*, 709 F.2d 524 (9th Cir. 1983).

Further, the doctrine applies to other persons, such as staff members, who assist a legislator by performing acts which would be legislative if done personally by the legislator. *Gravel, supra* (contacts and conversations by senator's aide in preparation for a subcommittee hearing were entitled to immunity).

However, there are limits on the extent of legislative immunity. Some cases hold that a legislative body which attempts to act outside its jurisdiction is not acting legislatively. Therefore, its members are not immune. *Thompson v. Ramiriz,* 597 F. Supp. 730 (D. Puerto Rico 1984)(special legislative committee established for three months was not acting legislatively when it issued a subpoena after expiration of three-month sunset provision); *Donivan v. Dallastown Borough*, 835 F.2d 486 (3rd Cir. 1987) (borough council voted to abolish police force by simple motion, *held*, this act was not legislative because state statute required legislative acts to be accomplished by ordinance).

There are contrary cases, however, which hold that action is not rendered non-legislative because of a procedural defect. *Draughon v. City of Oldsmar*, 767 F. Supp. 1144 (M.D. Fla. 1991) (city council action eliminating position from the budget was legislative notwithstanding that council used resolution rather than ordinance to accomplish budget reduction); *Traweek v. City and County of San Francisco*, 659 F. Supp. 1012 (N.D. Cal. 1984) (procedural defects in enactment of ordinance do not render action non-legislative); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialea*, 688 F. Supp. 1522 (S.D. Fla. 1988).

> Generally, however, legislative immunity protects only the legislator in his personal capacity, and not the governmental entity which he serves.

Legislative v. Administrative Activity

Employee positions frequently are deleted from state or municipal budgets. This is a common scenario in which legislative immunity issues arise in the employment law context. From the standpoint of the employee, there may be no difference between a legislative budget reduction on the one hand, and an administrative disciplinary termination on the other. In both situations the employee loses his or her job.

However, from the standpoint of the governmental decisionmaker, these situations are vastly different. A city councilmember who votes for a legislative budget reduction has absolute immunity from civil rights liability. A city manager who fires an employee for cause has only qualified immunity.

An employee whose position is eliminated from the budget will frequently allege that the budget action is a sham transaction designed to cover a disguised disciplinary termination. Thus it is necessary to distinguish between legislative and administrative actions. Such cases arise most frequently at the municipal level.

The Alaska Supreme Court has never addressed the question of whether the municipal budgeting and appropriation process is a legislative function, although the Court of Appeals has held that the state's budget process is legislative. *Dankworth, supra.* However, the supreme court has made general statements about the nature of legislative conduct.

Not all governmental acts by a local legislature are necessarily legislative. The casting of a vote is not determinative. Rather, the inquiry must be whether the actions, in law and in fact, "contain matter which is regarded as legislative in its character and effect." The actions of local legislators are legislative only if their acts have general applicability or involve policy making, as opposed to being a specific application of a particular policy to an individual. *Breck, supra; Haley, supra* (in an employment termination case, application of a state statute to a particular employee's acts of alleged misconduct was an administrative action); *Ballard v. Stich,* 628 P.2d 918 (Alaska 1981) (school board sitting as personnel review board to determine whether employee should be terminated for selling drugs was acting administratively); *Winegardner v. Greater Anchorage Area Borough*, 534 P.2d 541 (Alaska 1975) (borough assembly sitting as board of equalization applying property tax statute and ordinance to a particular parcel of real property was acting administratively).

Numerous courts in other jurisdictions have discussed the application of this principle in the municipal budget context. These decisions treat budgeting as a "quintessential legislative function." They draw a clear distinction between the legislative act of eliminating (or creating) an employment position, and the administrative act of deciding which individual will occupy an existing position. Legislative immunity will attach to the former, but not to the latter.

However, this rule is not always hard and fast. Budget reductions can occur under many different circumstances, some of which are sham transactions. In questionable cases, the facts surrounding the action will determine whether it was legislative or administrative. Indicia of legitimate legislative action include the following.

1. The action occurred during regular action on the annual budget.
2. The position was actually eliminated, either by combining it with another position into a single new position, or by spreading its duties among several existing positions.
3. The elimination saved money, transferred money to a more important priority, or otherwise increased economy or efficiency.
4. The budget action affected more than one person.

Indicia of sham budgetary action designed to conceal improper discipline include

1. The action occurred out of the normal budget cycle, at a meeting which was hastily called or procedurally defective.
2. All of the duties of the eliminated position were reassigned to a substantially identical position with a different title.
3. The elimination did not increase economy or efficiency.
4. The action appeared to target a particular person, ie. at the time of the elimination there was an ongoing controversy involving the terminated employee, who was the only person affected by the budget action.

Rateree, supra; *Ditch v. Board of County Commissioners of the County of Shawnee*, 650 F. Supp. 1245 (D. Kan. 1986); *Herbst v. Daukas,* 701 F. Supp. 964 (D. Conn. 1988); *Finch v. City of Vernon,* 877 F.2d 1497 (11th Cir. 1989); *Healy v. Town of Pembroke Park*, 831 F.2d 989 (11th Cir. 1987); *Aitchison v. Raffiani*, 708 F.2d 96 (3d Cir. 1983); *Baker v. Mayor and City Council of Baltimore,* 894 F.2d 679 (4th Cir. 1990); *Draughon v. City of Oldsmar*, 767 F. Supp. 1144 (M.D. Fla. 1991); *Drayton v. Mayor and*

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Ethics Opinions

Bar adopts opinion on intimate relations

ALASKA BAR ASSOCIATION ETHICS OPINION NO. 92-6
Propriety of an Intimate Relationship Between an Attorney and a Client of the Attorney's Law Firm

The Committee has been asked previously whether it is in violation of the Code of Professional Responsibility for an attorney to commence a sexual relationship with a client during the time the attorney is representing that client. In Ethics Opinion 88-1, the Committee responded by setting forth criteria that would render such a relationship unethical. More recently, we have been asked to assess whether Ethics Opinion 88-1 applies to a sexual relationship commenced between an attorney and a client of the attorney's law firm. Specifically, we have been asked to determine whether it was unethical for a lawyer to become intimately involved with a client of the firm during the course of the firm's representation in a termination of parental rights proceeding.

The Committee has concluded that this conduct is unethical if:[1]

(1) The sexual relationship has an adverse affect on the lawyer's ability to protect the client's interests, or is otherwise prejudicial or damaging to the client's case;

(2) The sexual relationship creates the potential that the attorney will be called as a witness on behalf of the client or to testify on issues prejudicial to the client;

(3) The client is involved in a legal matter of the type that is generally recognized to be emotionally charged; or

(4) The sexual conduct is exchanged for legal services, nonconsensual, coercive, or illegal.

These factors recognize that there are some circumstances and types of representation under which a sexual relationship is inconsistent with a professional relationship between an attorney and client. The Committee's basic concern is that the attorney-client relationship, once established, should not be exploited by the attorney. The attorneys' foremost duty must be loyalty to the client, not personal gratification.

It is the opinion of the Committee that a sexual relationship between an attorney and a client of the attorney's firm is improper to the same extent as a relationship between an attorney and the attorney's own client, with certain limited exceptions. First, an attorney not directly involved in representing the client must know or have reason to know of the attorney/client relationship existing between the client and the attorney's firm. Second, such attorney may rebut with objective evidence the presumption established in criterion (3), which assumes that an attorney who is sexually involved with a client during cases that are by nature emotionally charged is unethically exploiting the attorney-client relationship.

In the case presented, the Committee has not been provided with sufficient facts to determine whether the attorney's sexual relationship with the firm's client was proper. However, the fact that the client was involved in a proceeding to terminate parental rights would trigger the presumption in criterion (3), which is not satisfactorily rebutted by the client's subjective statements that he or she was not harmed by the short-lived affair. The attorney must carefully consider this and the remaining criteria to determine the propriety of his or her conduct. If any of the criteria are met, the attorney's conduct is unethical, and no member of the attorney's firm may continue to represent the client under principles of imputed disqualification embodied in DR 5-105(d). Accordingly, the firm must withdraw.

For further guidance, the above criteria are discussed separately below.

(1) Adverse Impact on Client's Case

In some situations, a sexual relationship with a client during the course of representation may adversely affect the client's case or otherwise prejudice or damage the client's position. The Oregon State Bar has evaluated the propriety of an attorney's sexual relationship with an unemployed woman he was representing in a divorce proceeding. Oregon State Bar Ethics Opinion 429 (May 1979). The opinion stressed that the particular facts are extremely important in each case. It concluded that there were several facts militating in favor of a finding that the lawyer's conduct was improper under DR 5-101, which prohibits a lawyer from accepting employment if the exercise of his professional judgment on behalf of the client will be affected by personal interests. First, the lawyer's conduct could significantly aggravate the other spouse and threaten a reasonable settlement. Second, in the event of a trial, the potential for an embarrassing disclosure of the lawyer's affair might cause him to curb effective and aggressive representation.

Similarly, Maryland Ethics Opinion 84-9 (September 7, 1983), advises that a lawyer must withdraw from employment when he is sexually involved with a client who is seeking advice regarding the sale of property owned by the client and her husband, the transfer of property from the husband and wife, and a possible divorce. In these circumstances, an intimate personal relationship between the lawyer and the client may have an adverse effect on the lawyer's ability to protect his client's interests.

Although not directly discussed by the Oregon or Maryland opinions, a sexual relationship may also prove damaging to the merits of a client's case in particular circumstances. For example, in matters involving child custody, a parent's conduct is closely scrutinized, and the details of an intimate relationship may conceivably become part of this scrutiny, particularly to the extent it may affect the children in question. Not only could the parent's conduct be negatively viewed by the court, but the lawyer would face a serious risk of becoming a material witness and being required to withdraw. Additionally, the lawyer's professional judgment and ability to render competent representation may be compromised. *Bourdon's Case*, 565 A.2d 1052 (N.H. 1989); *Kentucky Bar Assn. v. Meredith*, 752 S.W.2d 786 (Ky. 1988).

Clearly, sexual relationships should be avoided because they pose a number of potential violations of DR 7-101(A)(3), which prohibits a lawyer from intentionally prejudicing or damaging his client during the course of the professional relationship. The fact that a lawyer's associate, not the lawyer, is sexually involved with the lawyer's client has little bearing on this analysis. Like the lawyer, the associate is ethically bound to refrain from conduct that prejudices or damages a client of the firm.

(2) Potential For Becoming a Witness

If an attorney or attorney's associate should be called as a witness on the client's behalf, the continued representation of the client by the attorney or the attorney's firm is jeopardized pursuant to DR 5-102. The risk of becoming a witness is particularly great where the client's ongoing conduct is at issue, such as in a divorce, custody or adoption dispute; a matter involving the client's physical, mental or emotional limitations or injuries, including a personal injury and wrongful death case; and a criminal matter where a client's compliance with court orders may be at issue. In such cases, attorneys or associates who place themselves in a position to know first-hand intimate details of a client's life create a likelihood that they will learn information that either (1) ought to be divulged in the client's behalf at trial, which would require disqualification pursuant to DR 5-102(a), or (2) might prejudice the client, if the attorney or associate is called as a witness other than on the client's behalf. Such a risk is unacceptable because the potential of harm to the client is too great. Again, whether the lawyer or lawyer's associate is sexually involved with the client is irrelevant -- if *either* is in a position to be called as a witness, continued representation by the firm is jeopardized.

(3) Presumed Emotional Vulnerability

The Committee is of the view that sexual relationships with clients must be presumed to be harmful to clients in cases that can be viewed objectively as emotionally traumatic. Examples of such cases include, but are not limited to, divorce, child custody or adoption disputes, or criminal matters involving the client, client's spouse or other family member. These cases involve the loss or potential loss or incarceration of persons of significance to the client, such as spouses or children. Because such cases by nature involve emotional issues, clients' judgments on emotional matters can be expected to be impaired, making them more vulnerable to the advances of a lawyer or more likely to initiate advances of their own. A lawyer has a duty to be cognizant of this vulnerability and to refrain from sexual relationships for the duration of representation. *See Drucker's Case*, 577 A.2d 1198 (N.H. 1990); Levy, *Attorneys, Clients and Sex: Conflicting Interests in the California Rule*, 5 GEO. J. LEGAL ETHICS 649 (1992). This duty extends to the lawyer's associates, who are also in a position to exploit a client's emotional vulnerability through their affiliation with the firm and potential familiarity with the case.

(4) Sex that is Non-consensual, Coercive, Illegal, or Accepted in Exchange for Legal Services

A sexual relationship with a client that is initiated by an attorney under circumstances reflecting that the client may have been deprived of free choice with regard to the relationship is unethical. As an example, in *People v. Gibbons,* 685 P.2d 168 (Co. 1984), an attorney undertook representation of seven co-defendants charged with burglary. The lawyer, who was sixty-six years of age, initiated a sexual relationship with a twenty-three year old female defendant as a condition for his representation of her and her husband. Following the conclusion of the criminal case, his clients filed a complaint alleging blackmail because the sexual relationship was made a condition of representation. In disbarring the attorney based upon the sexual relationship and other matters relating to the attorney's responses to the grievance proceeding, the court noted that the client was in a stressful situation and she was placed "in a position in which she was unduly dependent on the respondent and in which she may not have been able to exercise free choice." *Id.* at 175. If the sexual relationship with the client, or sexual conduct toward the client, is illegal, the attorney is violating DR 1-102(A)(3), which prohibits a lawyer from engaging in illegal conduct involving moral turpitude. An attorney who had been retained to represent a female client on a drunk driving charge was found to violate DR 1-102(A)(3) when he made sexual advances to the client in the jail library and later in his car. *In Re Littleton*, 719 S.2d 772, 776 (Mo. en banc 1986). The *Littleton* court noted that DR 1-102(A)(3) does not require a conviction of a crime, but only illegal conduct. The court further noted that moral turpitude includes everything contrary to justice, honesty, modesty and good morals. In holding that the attorney had violated his professional obligations, the court stated:

> Respondent and [client] entered into a professional relationship. [Client] had a right to expect that Respondent would conduct himself in that relationship in a manner consistent with the honorable position of the legal profession -- a tradition founded on service, integrity, vigorous commitment to the client's best interest, and that leads us to the rule of law. Instead of remaining true to that tradition, however, Respondent chose to exploit it, seeking to turn the professional relationship into a personal one. *Id.* The court also emphasized that the non-consensual nature of the sexual relationship was an important factor in the finding of impropriety. An attorney who grabbed his female client, kissing her and raising her blouse, was also found to engage in illegal conduct involving moral turpitude. *In the Matter of Adams*, 428 N.E.2d 786 (Indiana 1981).

Finally, an arrangement between an attorney and client under which the client would provide sexual fa-

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[1] The Committee has taken this opportunity to expand and clarify the standards for determining when an intimate relationship is unethical and warrants withdrawal or disqualification. Most notable changes are those now set forth in criteria (2) and (3).

Edthics Opinions

Limiting the scope of representation

vors in exchange for legal representation would also violate DR 1-102(A)(3). *Iowa State Bar Assn. v. Hill*, 436 N.W. 2d 57 (Iowa 1989); *Carter v. Kritz*, 560 A.2d 360 (R.I. 1989). Similarly, the withholding of services or provision of damaging legal advice because of a client's refusal to engage in sex is improper. *McDaniel v. Gile*, 281 Cal. Rptr. 242, 245-46 (Cal. 1991).

Again, no separate standard is warranted for a lawyer's associate. If the sexual conduct is non-consensual, coercive, illegal, or induced in exchange for legal services, it is improper regardless of whether the attorney involved represents the client directly or is simply an associate of the client's attorney.

(5) Conclusion

The Committee concludes that sexual relationships with clients commenced during the course of representation by either an attorney or the attorney's law firm are unethical under any of the four circumstances described above. This opinion is not intended to prohibit representation of a client in a case where the attorney and client have been engaged in a mutually consensual and on-going sexual relationship prior to the commencement of the representation. In this regard, the Committee emphasizes that its chief concern is to diminish the potential for legal or personal harm to a client, for exploitation of a client's vulnerability, or for illegal coercion or force that are posed by the commencement of sexual relationships during or as a condition of representation by either a client's attorney or the attorney's associate. While the Committee would recommend that a lawyer not represent *any* client with whom he or she is sexually involved when the above circumstances exist, it is the *commencement* of a sexual relationship during the course of representation that is of greatest concern.

Approved by the Alaska Bar Association Ethics Committee on November 5, 1992.

Adopted by the Board of Governors on October 30, 1992.

ALASKA BAR ASSOCIATION ETHICS OPINION NO. 92-7
Preparation of a Client's Legal Pleadings in a Civil Action Without Filing An Entry of Appearance

The Ethics Committee has been asked whether the preparation of legal pleadings in civil litigation for *pro se* litigants constitutes the unethical practice of law. In the committee's opinion, a lawyer may ethically limit the scope of his representation of a client, but the lawyer should notify the client clearly of the limitation of representation and the potential risks the client is taking by not having full representation. When an attorney limits the scope of his representation, an attorney-client relationship is still created between the attorney and the client. Disclosure of the attorney's assistance must be made to the court and to opposing counsel unless the attorney is merely assisting the client in filling out forms designed for *pro se* litigants.

The attorney requesting the ethics opinion states that he is helping many *pro se* litigants prepare their own child support modification motions. Many of these litigants, he states, are unable to obtain legal counsel due to their poor financial condition. Assistance with their self-help efforts presents one of their few options for access to the courts. EC 2-33 stresses the legal profession's commitment to making high quality legal services available to all. Attorneys are encouraged to cooperate with qualified legal assistance organizations to provide pro bono legal services on behalf of the poor. Canon 6 of the Code of Professional Responsibility further provides that a lawyer should represent a client competently and zealously. When an attorney undertakes the representation of any client, that client should receive a high quality of legal service. The Committee is essentially asked to address the interplay between these ethical and professional considerations when a lawyer provides legal services to a *pro se* litigant without entering an appearance in the litigation in question. The Committee concludes that such assistance is not unethical when conducted under the guidelines set forth below.

According to the facts before the committee, the attorney assists in the preparation of pleadings only after fully describing this limited scope of his assistance to the client. With this understanding, the client then proceeds without legal representation into the courtroom for the hearing. The client may then be confronted by more complex matters, such as evidentiary arguments concerning the validity of the child support modification, or new issues such as child custody or visitation to which he may be ill-prepared to respond. The client essentially elects to purchase only limited services from the attorney, and to pay less in fees. In exchange, he assumes the inevitable risks entailed in not being fully represented in court. In the Committee's view, it is not inappropriate to permit such limitations on the scope of an attorney's assistance.

A non-profit legal assistance organization may limit the scope of representation to its clients. For example, non-profit legal assistance organizations that provide free legal services to low income clients may offer, in lieu of representation in court, a class on *pro se* divorce to individuals seeking simple uncontested divorces and may also offer such classes to individuals with more complicated divorce matters provided that all clients are fully advised of risks involved in *pro se* representation. ABA Opinion 90-18 (July 31, 1990).

Also, the Virginia Bar Association has recognized that a lawyer may assist *pro se* litigants in the preparation of discovery requests, pleadings or briefs without entering an appearance. Opinion 1129 (Virginia 1988). Such assistance creates an attorney-client relationship, however, and the attorney must therefore comply with the Code of Professional Responsibility. The attorney is responsible to the client for the attorney's conduct during the course of the professional relationship, however limited. Within the agreed scope of the representation, the attorney must provide the client with all counseling necessary to make informed decisions.

The New York Bar Association has ruled that *pro se* assistance is appropriate provided that the lawyer who prepares pleadings or documents for a *pro se* litigant discloses his or her assistance to opposing counsel and the court in the documents themselves. Opinion 1987-2 (New York 1987). Nondisclosure of such active and substantial assistance would be misleading because *pro se* litigants may receive special consideration and preferential treatment from the court.[1] Disclosure must be made no later than the time in which the pleading or document is filed or when the litigant otherwise uses the lawyer's assistance. It would be appropriate to endorse pleadings as "prepared by counsel," without disclosing the lawyer's name. If the litigant chooses to disclose the lawyer's name, however, the lawyer cannot prevent such disclosure.

Approved by the Alaska Bar Association Ethics Committee on November 5, 1992.

Adopted by the Board of Governors on October 30, 1992.

[1] Disclosure is not required, however, if the lawyer is merely assisting the pro se litigant in filling out standard forms devised for use only by such litigants. Id. But the Committee notes that similar steps may be warranted when an attorney prepares and provides *pro per* forms and instructions to persons who intend to fill out and file the forms on their own. A full discussion of the ethical considerations in such circumstances is beyond the scope of this opinion.

Court Notes

Debtor Exemptions

On October 1 the exemption amounts which debtors can claim increased by about 15 percent. As required by AS 09.38.115, the Department of Labor amended its regulations to increase the exemption amounts because of the increase in the Consumer Price Index. See 8 AAC 95.020 and .030.

The following court system forms have been amended to reflect the new exemption amounts:

CIV-511, Judgment Debtor Booklet

CIV-525, Writ of Execution for Garnishment of Earnings

CIV-526, Employer's Response

CIV-530, Notice of Garnishment

CIV-532, Order of Increased Exemption Amount on Garnishment

CIV-535, Creditor's Affidavit and Request

CIV-536, Order to Debtor and Notice of Exemption Rights

Lesson #1: Beware of raging hormones

BY DAN BRANCH

Life's Lessons

My friend Mike is the only guy I know to discover a box of unstable dynamite the first time he opened the trunk of his recently purchased used car. He finds adventure in the everyday events that most of us cruise through on auto-pilot.

When I stopped by for a visit the other day I found him a tad deaf. Apparently one of his ear drums had ruptured while commercial diving for abalone on a recent trip to the west coast of Prince of Wales Island.

I sensed a story and asked him to describe the trip. "Oh, it was a great trip," he began. "My son flew up from Texas to dive with me and we made a nifty profit."

"Of course," he went on, "there were problems." He suffered the ruptured ear drum and the failure of a "new to him" dry suit.

Before the trip he had purchased the Viking dry suit from a local diver. Mike had been assured by the seller that the suit was a low-use, high quality item that retailed for nearly $1,000. (Why, only the day before, it had been used successfully to protect the seller while he was being keel hauled around the hull of a leaky timber ship). Mike snapped it up for a low, low $500 price.

The dry suit did not live up to its name. On the first dive, water seeped through a zipper hole and collected around Mike's left foot. Busy prying valuable abalone from their rocky home, my friend didn't notice the problem until his left leg was encased in cold sea water and he was entering the second stage of hypothermia.

Fortunately, Mike had brought along his old and much patched wet suit so he could keep on diving. While this change of gear ended Mike's misadventures, his son's were just beginning. The boy, an athletic 18-year-old, was doing so well that they decided to split up so he could work on his own.

The divers had entered an area of southern Southeast haunted by gangs of juvenile male sea lions. These teenagers had been denied a chance to mate with their own kind by mature bulls who battled any youngster foolish enough to flirt with a member of their harem.

Like human teenagers, the young lions thought a lot about procreation. They were also bored. A few years ago, one of these frustrated sea mammals fell in love with Mike. He was diving for abalone off of Prince of Wales at the time. His sea lion would follow the diver around the Abalone beds like a puppy. When Mike stopped to pry, the unwanted suitor would lean its 1,500 pound bulk on his shoulder. When that didn't win the diver's affection, the sea lion would lay at the diver's feet and look up at Mike with big brown eyes.

Mike and his sea lion parted as "just good friends." When he spotted sea lions in the area of this year's expedition, he warned his son about the amorous beasts. Now a grizzled veteran of two days on the beds, the boy wrote off the warning as the groundless fears of a protective father. He should have listened to his dad.

While thinning out a particularly thick concentration of abalone, the boy spotted a male sea lion hurtling at him through the water. Before he could take cover, the animal swam within a foot of the boy, pulled himself into an upright position, and opened his fins wide to give the young diver a full opportunity to appreciate his plumbing. Having never before been flashed by a sea mammal, Mike's son made for the surface and pulled himself out on the rocks. Fortunately, his admirer didn't follow the boy out of water.

From then on, the boy dived with his father. The sea lion made one more flirtatious overture to the son before giving up but Mike was too busy pulling abalone to notice it.

Father and son talked long into the night about their sea lion experiences.

The boy vowed never again to take for granted life or the dangers of the sea. He also made plans to donate some of his abalone money to the local woman's shelter.

• IMMUNITY

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Council of Rockville, 699 F. Supp. 1155 (D. Md. 1988); *Taylor v. Cochran*, 644 F. Supp. 753 (E.D. Ark. 1986).

It is clear from these authorities that a plaintiff has an uphill battle to prove that a position elimination was not legislative. Further, a plaintiff who sues an individual city councilmember for voting on the annual budget does so at his peril. However, a plaintiff has a better chance of succeeding against the corporate municipal entity because, except in the 4th Circuit, legislative immunity does not apply *to* the municipality itself. The municipality's liability will be discussed below.

Judicial and Prosecutorial Immunity

The same analysis applies in litigation against judges and prosecutors. These officials have absolute immunity when performing their official functions. Problems can arise, however, when a judge or prosecutor acts outside his or her official role.

For instance, a judge who fires his or her secretary is acting administratively, not judicially. The character of the act, not the identity of the actor, controls. In that situation the judge would have only qualified immunity for a civil rights violation. *Ashelman v. Pope*, 793 F.2d 1072 (9th Cir. 1986).

January: Municipal Liability