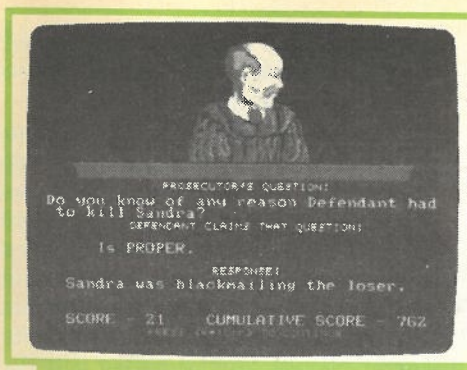

Leisure reading

Lawyer video games, off-beat names, & Mat Valley Bar

NEWS FROM THE BAR

• New rules • 1994 budget • BOG actions

MEET THE NEXT SUPREME COURT JUSTICE — BELOW

$2.00

The Alaska BAR RAG

VOLUME 17, NO. 6 — *Dignitas, semper dignitas* — NOVEMBER-DECEMBER, 1993

A judge's point of view

What's a fair fee for representing a minor?

BY KARL S. JOHNSTONE

The contingent fee agreement has been historically recognized as a method by which individuals who would be otherwise financially unable to hire an attorney are able to obtain legal services.

Typically, the attorney and client negotiate a contract where, for some percentage of the recovery (which may vary depending on the stage when a recovery is achieved), the attorney promises to pursue the client's claim and, in many cases, advance costs, subject to a promise by the client to reimburse for those costs.

Generally, the court does not want *to, and, in most cases, should not* get involved in the dealings between attorneys and their clients. That is, unless the attorney represents a minor's interest. In those cases, the court is required to review and approve the settlement including the attorney's fees.

Civil Rules 90.2 (a) (3) (4) and 90.2 (b) require the court to approve any attorney's fees that are to be paid from the settlement proceeds when the claimant is a minor. They also require a hearing to determine the fairness of the settlement and provide for the disbursement from the settlement reasonable expenses including attorney's fees.

AS 13.16.435 permits a person who prosecutes a proceeding on behalf of an *estate* benefiting a minor to receive reasonable attorney's fees. AS 13.16.440 permits the court to review the reasonableness of the compensation of an attorney employed by a personal representative.

While the scrutiny of the settlement may vary between Judges, the test remains the same: Is the settlement including distribution to client and attorney reasonable and fair?

Judges may employ different standards to determine the question as it pertains to attorney's fees. Those may include examining the complexity of the case, how long it took the case to be resolved, the risks involved, the reasonableness of the fee in relation to the recovery, and the time spent by the attorney.

An attorney recently asked me, "What can an attorney do to show that the distribution to the attorney is reasonable?" There is no easy answer to this question. Each case will have to be

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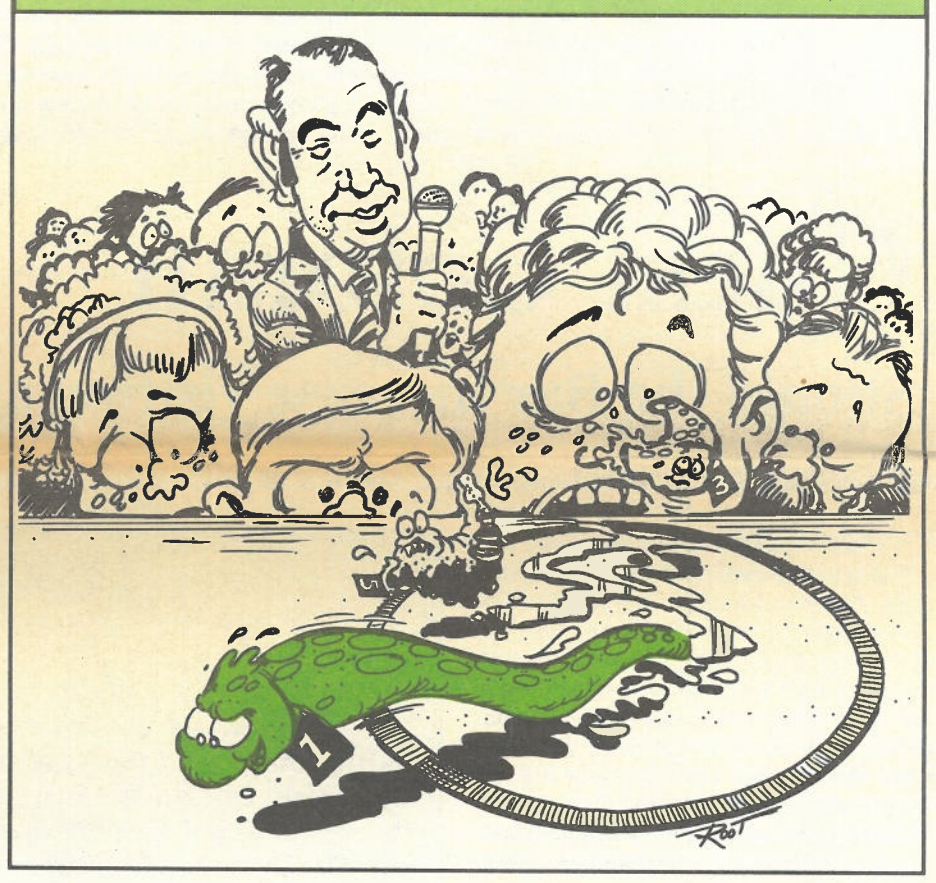
VISIONS OF COSELL IN KETCHIKAN — STORY PAGE 12



Twelve apply for Supreme Court vacancy

Nine attorneys and three judges have applied for the first vacancy on the Alaska Supreme Court in more than a decade.

Justice Edmond W. Burke, appointed to the high court in 1975 by former Gov. Jay S. Hammond, is stepping down from the Court Dec. 1 to return to private practice.

The applicants are a diverse group of Alaskans. They range in age from 37 to 59 years of age, residing from Southeastern to the Interior. Length of residence in Alaska ranges from 11-59 years, practicing law for 12-34 years.

Three women have put their names forward for the highest court, and the applicants' practice of law ranges from sole practioner to associates and partners in some of the state's largest law firms.

The Alaska Supreme Court candidates of 1994 also have a diverse range of experience: Commercial law, teaching, criminal prosecution, appellate practice, computer programming and mathmatics, municipal law, general practice, and bankruptcy litigation.

The Alaska Judicial Council will recommend two or more nominees to the governor in early 1994, using results of the bar poll; background investigations, general public comment, applicant interviews, and a public hearing in January.

The new justice will sit on a court that currently hears 500-600 cases each year, joining Chief Justice Daniel A. Moore, Jr., appointed by Gov Bill Sheffield in 1983; Jay A. Rabinowitz, appointed by Gov. Bill Egan in 1965; Warren W. Matthews, appointed by Hammond in 1977; and Allen T. Compton, appointed by Hammond in 1980.

The *Bar Rag* asked the applicants a series of questions about the Court's role during mid-November. **Thomas M. Jahnke** and **Hugh G. (Jerry) Wade** were vacationing out of the state during the interviews and could not be reached for their participation.

•

1. What's the Court's role in defining the relationship between the legislative and executive branches?

The candidates agreed with unanimity that the Court must adhere to the constitutional separation of powers: the Legislature makes the laws, the courts interpret them. **Douglas D. Lottridge**: "In the case of the executive branch, the Court determines whether regulations in fact meet the intent of the law; it determines whether laws and (regulatory) actions are constitutional." **Robert L. Eastaugh**: "There is no question that there will be times the executive will avoid enforcing legislative stat-

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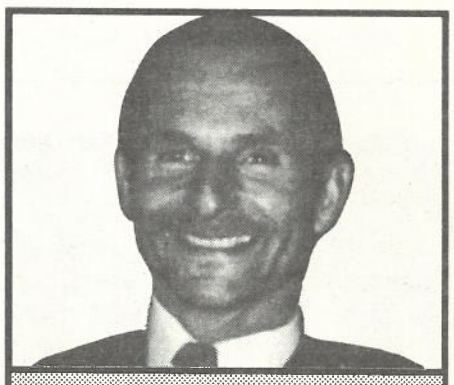
President's Column

It's time for us to start talking to you

One of our colleagues appeared at the last Board meeting and remained after his scheduled appearance. It was Saturday morning. For the rest of the day, the Board engaged in sometimes tough and divided debate over proposed rule changes, labored over budget details, and wrestled with the idea of mandatory malpractice coverage. The board also adopted, rejected, and postponed numerous agenda items ranging from the routine to controversial. A board meeting's worth of work, I thought as we finished, otherwise of little interest to most of the bar. This colleague thought otherwise. "It's interesting," he said. "Too bad the rest of us don't have the time to see what you do and hear your discussions."

I think this colleague of ours was as right as he was wrong. He's correct in sharing the view that it's unfortunate that Bar Association members don't see the amount of work, and hear the degree of debate and discussion that occurs at Board meetings. But this colleague of ours was wrong, I think, in feeling that Bar members



Philip Volland

have the responsibility for making the effort to see and hear what the Board does. That's our job as Board members. We are, after all, your representatives and it's our responsibility to keep you informed and not yours to inquire of our work.

So in this *Bar Rag* issue you'll see something new. The first think you'll notice is a new "Point/Counterpoint" series written by Board members representing opposing points of view on new rule changes and resolutions considered by the Board. This issue will cover a proposal requiring Bar members to attend a course on the new Model Rules of Professional Responsibility and a new rule change authorizing suspension of attorneys who fail to follow treatment recommendations after conviction of a substance abuse related offense. Hopefully, these articles will share a measure of the sometimes lengthy debate on these topics and promote feedback from members.

This will also be the start of a regular guest column written by a Board member on a new issue facing the Board or members. In this issue, President-Elect Dan Winfree shares his views on the Board's plan to increase the fee charged to out of state attorneys who appear *pro hac vice* under Civil Rule 81. Future columns will likely cover ideas being considered by the Board as part of its long range plan to increase member services and improve the Bar's public image.

You'll also notice a brief summary of Board meeting action. Though reading much like official minutes, this regular summary will help keep you informed of Board work.

You should also see articles about new member services, and other topics worthy of brief note. At this past meeting the Board approved an agreement with representatives of West Publishing which gives Bar Association members a discount on purchasing West's new CD-ROM Alaska Reporter Series and provides the Bar office with a CD-ROM Reporter Series that can be used and tried by Bar members. Although I don't believe that the Bar Association should be in the business of endorsing or promoting certain products, this agreement has definite benefits. Bar Association members who purchase the CD-ROM during the next year receive a small discount. Bar members can also visit the Bar Association offices to see how the technology works.

Our decision to reach out to members through the *Bar Rag* is certainly no earth shattering development. But it's one of those small changes that may make a large difference in Board policy in the future. We can't do our job well unless we hear from you. But that's not the issue. A large part of our job is to tell you what we're doing, take the heat, respond to criticism and have the courage to lead when necessary. That all begins with something so small as the "Point/Counterpoint" series you'll see starting today. Our hope is that it will lead to better policy in the future.

Guest Column

Should the Bar increase visiting attorney fees?

Published in this edition of the *Bar Rag* is a proposed bylaw change affecting the amount of the administrative fee charge to attorneys from other jurisdictions who apply for permission to appear and participate in particular state court proceedings under Alaska Civil Rule 81. At the present time, the Bar Association charges only a $100 administrative fee per proceeding. There were 165 Rule 81 applications processed through September, 1993, and the Bar expects the year-end total to be around 220. Interestingly, it appears a number of attorneys from other jurisdictions may regularly practice in Alaska through multiple Rule 81 applications, apparently finding the $100/proceeding administrative fee significantly more appealing than the Alaska bar examination.

The number of attorneys practicing in Alaska under Rule 81 has steadily increased, and the Board of Governors is concerned about potential impacts on the Bar's disciplined budget and the client protection fund. Significant disciplinary investigations and/or proceedings involving non-resident attorneys could have an extremely detrimental effect on either or both the Bar's disciplinary budget and/or the Lawyers' Fund for Client protection; yet, despite their economic gain from practicing in Alaska, attorneys admitted under Rule 81 contribute nothing to that disciplinary budget or the client protection fund.

The Board of Governors' proposal increases the Rule 81 fee to $250/proceeding, $10 of which will be designated for the client protection fund, and changes the fee from a one-time fee to an annual fee during the life of the proceeding. For example, an attorney from another jurisdiction seeking permission to appear in a particular court proceeding in 1994 would pay $250 at the time of the request and would pay an additional $250 in January of 1995 and each subsequent January as the proceeding continues on with that attorney remaining as counsel of record.

The Board of Governors believes this is an equitable administrative fee. It is more than an inactive member pays to retain membership in the Bar, but it is less than active membership dues. Most importantly, it moves us closer to a situation where all attorneys practicing in Alaska contribute to the administration of the Bar Association, especially the administration of the disciplinary system and the client protection fund. We look forward to your comments.

Proposed Civil Rule 81
to increase fees for Outside counsel

The Board of Governors is proposing an amendment to the bylaws which would increase the fee for Outside counsel to participate on a particular Alaska case under Civil Rule 81. See the article by Dan Winfree in this issue. Please address any comments to Deborah O'Regan, Executive Director at the Bar office by December 20, 1993.

Article III. **Membership Fees and Penalties.**
Section 4. **Required Fee for Other Attorneys.**

The required fee for other attorneys under Civil Rule 81 (a)(2) is [$100] *$250 annually, with $10 of that fee contributed to the Lawyers' Fund for Client Protection, until the attorney notifies the Alaska Bar Association that the case in which the attorney is participating is closed or the attorney has withdrawn from the case. Attorneys appearing under Civil Rule 81 in cases prior to the effective date of this rule will begin paying the $250 annual fee on January 1, 1995.*

BAR RAG
correction notice

Dr. Paul Craig, a speaker at the "Planning and Counseling for Elderly and Incapacitated Clients and Their Families" CLE scheduled for November 10, 1993, is a Ph.D., not and M.D. as noted in the brochure. The Alaska Bar Association regrets this error. Dr. Craig hold a Ph.D. and is a Diplomate in Clinical Neuropsychology, American Board of Professional Psychology.

The Alaska BAR RAG

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George Vogt: He helped the 'little people'

By Jerry Markham

I first met George Vogt when I was in high school. My mother invited me to accompany her to a political caucus held at Bob and Gaynal Hatcher's house. All the "prominent" folks in Kodiak were going to be there.

From several years of watching Perry Mason on TV I had already decided to be "a lawyer," so I naturally jumped at the chance to go.

George was new in town then. He looked and spoke like my adolescent ideal of a lawyer, (i.e., Perry Mason) and he took the time at this caucus to talk to me—a 16-year-old—at length. But as I circulated through the party I overheard some Kodiak "prominents" (vessel owners and businessmen) saying very negative things about George. On the way home I asked my mother to explain that to me, because everyone always spoke so highly of Roy Madsen, Kodiak's only other attorney at the time.

She replied that many "prominent" people in Kodiak didn't like George because before he came, Roy Madsen was Kodiak's only attorney.

She explained, "Roy is a former government prosecutor and he respects the City, the bank, the canneries, and many of Kodiak's businessmen, large vessel owners and other people who have property. Before George Vogt came the people Roy represented and the police pretty much had their own way here.

"George comes from Detroit — a workingman's town; he went to law school on the GI bill and worked summers on the Great Lakes ore ships. George is a trial lawyer. He's chosen to represent the little people—the working guys when they get hurt on the job or are improperly fired or get in trouble with the law. Since coming here George has rocked the boat and many people don't like it."

I still remember her keen perception.

The '60s were a turbulent time for this country and that turbulence didn't miss Kodiak. Labor rights, racial inequality, problems of the poor, personal liberties and the Vietnam war all descended on America and on Kodiak, and George was there.

The "prominent" continued to badmouth him for representing "hippies and draft dodgers," (maybe even "Commies"), but he did it nonetheless. Then we had our own turbulence — the tidal wave. Many of the "prominent" lost everything in it, and they too were suddenly "poor," and so they went to George for help in their fights that followed when big government temporarily took over our town for "urban renewal," (i.e., for our "own good"). George was there for them, too.

Also in the '60s the U.S. Supreme Court shocked the "prominent" all over this country by putting teeth behind many Constitutional rights: illegal stops, searches and coerced confessions by police. Recognition in 1963 that these abuses fell mainly on the poor resulted in the famous *Gideon* decision holding that all people charged with a crime were entitled to a lawyer free of charge from the state!

Alaska in 1963 was no more ready for this than anywhere else. There was no public defender's office nor (before oil) was there any money to fund one. Lawyers at that time (and until the late '60s) were "appointed" (i.e., told) by the court to defend the poor, usually for no or little pay.

In Kodiak because Roy Madsen was often the prosecutor, much of this often thankless job fell on Kodiak's only "other" lawyer, George Vogt.

I next really spoke to George Vogt in 1970 following my first year of law school. I asked him for a summer job as a law library research assistant. George agreed, but as the time to come up approached, he called me and said "I don't know what I was thinking of; Kodiak barely has a law library! Stay down there and I'll mail you the questions and you mail me back the answers."

I did. I still have a copy of the first legal memo I ever wrote—for George: the police searched a VW "hippie van" without a warrant and (lo and behold) found a marijuana pipe. They charged that "hippie" with felony drug possession. We invalidated the search — the "hippie" went free, but because I spent that summer in the University of Oregon Law library, I never met him.

I graduated from law school, passed the Bar, and then worked for the state's attorney's offices for four year to get a little seasoning. George gave it to me first hand—he "waxed me."

I learned while often losing to him. Win or lose, George was always a gentleman and always a man of his word. George's pleadings will never be studied in any law school, but they got the job done.

If George has one professional failing (he had many personal ones which made him very human), it was that he couldn't say no to a person in need of help, and he would allow his case load to grow until it overwhelmed him and he'd get behind in all his cases.

I'm sure this was a cause of the major heart attack George suffered in the mid-'70s. This would have stopped most men — the practice of law is not "good heart therapy," but George wouldn't stop. Like Perry Mason, he returned in full force; he practiced law literally until he could work no more.

I lost two heroes this month: Raymond Burr (Perry Mason) and George Vogt. Were it not for these men I doubt that I would be a lawyer today —surely not a trial lawyer. They looked somewhat alike, and they were a lot alike. Raymond Burr was America's ideal of what a trial lawyer should be.

George Vogt *was* one. George didn't win every case, and his office was not in some fancy tall building: (in the '60s and '70s it was over the Ship's Bar). George treated at least two fine legal secretaries like Perry Mason treated Della Street — my secretary Micky Mummert-Crawford of 15 years (who I sort of "stole" from George when I returned to Kodiak), and Joanne Hall who was with him to the last. And George was wonderful with his family.

George Vogt and attorneys like him were often the only lawyer the true working "people" of this community or any community in America had in that era or still have today. We were damn lucky to have him. He took on problems, large and small, and he tried to help "people" find "justice." His reward for succeeding was often only a handshake and the scorn of this community's "prominent." As a mutual friend of George's and mine, famous trial lawyer Gerry Spense of Casper Wyoming writes in his autobiography "Gunning for Justice."

"After a gunfight some of my opponents will admit I won, but others will say I cheated. Unfortunately both are the reputation of a *good* lawman." Judge him not by when *some* say, but by what he does."

I hope all the people of this community will reflect on that and join me in saying, "Continue to fight the good fight, George. Rock the boat for what is right—George Vogt, rock on."

—From the Kodiak Daily Mirror

Another tale of George's skill

It was sometime in the late '70's, well after (we all thought) George had recovered from his massive heart attack, when the local paper headlined the story of a cannery worker who fell into an industrial ice crusher (which proceeded to perform equally efficiently on his legs) and the heroic efforts of a local doctor extracting him alive by performing an on-scene bilateral amputation. Upon reading of the event, of course, all Kodiak private attorneys (there were I believe four at the time) immediately canceled their trips out of town, refreshed their secretaries in a short course on phone etiquette, placed a clean contingent fee contract on their desks, and waited expectantly for the possible call.

After about a week passed during which no one heard boo, the legal Tom-Toms beat the message that George had suddenly entered the hospital clutching his chest complaining of heart pain.

"Fine," I ungraciously first thought. I've just drafted a stipulation that needs George's signature immediately so we can close a small settlement before a shaky insurance company goes under. "How will I manage this now?" I wondered.

I called George's secretary Joanne and asked her if she could possibly slip my stipulation under what I assumed would be George's feeble hand before he passed into the abyss?

"Oh hell," she replied; "George is fine. They're just keeping him in the hospital one more day for observation. He has asked about the stipulation and said if it's so damn important to bring it up!"

So up to the hospital I went.

Now Kodiak Island Hospital, one must understand, isn't Mayo Clinic. There are no private rooms once one is transferred from intensive care to the male general ward which has only eight beds.

So I had no difficulty in locating George sitting up in bed, phone in one hand, dictaphone in the other, with a stack of files on his lap. After hanging up the phone and signing my stipulation with a flourish, he pooh-poohed my inquiries as to his health.

"It must have been indigestion," he said, "but a man with my condition can't be too careful you know." And then with an exaggerated wink toward me, he motioned to the man in the adjoining bed obviously missing two legs, and said, "By the way, I want you to meet my new client..."

Gerald W. Markham

An eye for an eye and a pie for a pie

In 1975 I undertook to defend a Mr. Cunningham in the District Court of Alaska at Anchorage. He was charged with assault and battery upon a Miss Jo Day for hitting her in the face with a piece of pie. The case was promptly dismissed by my unique alternative proposal.

By letter to the District Attorney and not to his Assistant to whom the case had been assigned, I offered to settle this misdemeanor case "tastefully" and bring "piece" or "pieces" to the parties. My client, Mr. Cunningham, with me as his "Second" and the victim, Miss Jo Day, with the District Attorney as her "Second" would meet at a time on a street corner in downtown Anchorage as selected by the victim with Miss Jo Day armed to the teeth with a pie of her choosing and with flavor and texture of her choice so as to be given the opportunity to repay my client in kind; "An eye for an eye and a pie for a pie" so to speak. I also added that the press be notified of the event.

In the letter I also told the District Attorney that I had secured a continuance of the arraignment until June 27, 1975 at 9 a.m. at which time the offer, if not accepted, would be withdrawn and I, as Simple Simon and the Pie Man would see him in Court. In closing, I said that I was sure no jury in the world would convict Mr. Cunningham for something that each of us probably has had a secret desire to do one time or another.

My offer of compromise was not accepted. Better yet, District Attorney Joseph D. Balfe signed and filed a Notice of Dismissal one week before the deadline

—Wayne Anthony Ross

As told to William F. White, 205 Berwick Road, Lake Oswego, Oregon 97034. From his book: "The Lighter Side of Practicing Law." Submissions welcome.

A judge's point of view

continued from page 1

decided on its own facts to determine reasonableness and fairness.

Some judges may not go beyond what is the customary and usual fee arrangement for the type of case involved. However, red flags may be raised in some cases which may heighten a judge's scrutiny level. Those flags might include a higher than usual percentage for the attorney, no apparent time spent on the case, a policy limits settlement with nothing in the file but perhaps a complaint or little else, a non-standard provision for the reimbursement of courts advanced by the attorney, or the appearance of a conflict between the attorney and guardian/parent or personal representative.

Many attorneys on a contingent fee arrangement do not keep time records. The argument is that time spent on maintaining these records could be more productively spent doing work on the client's case. This is a sound argument, but when it comes down to the approval of attorney's fees involving a minor, the inconvenience of maintaining time records might someday be far outweighed by the difficulty of showing reasonableness when there is nothing in the file which appears to justify a large attorney's fee. Attorneys who don't maintain time records of some sort, however rudimentary, when doing contingent fee work, may also take a risk of being unable to show the reasonable value of their services when a client discharges the attorney prior to the resolution of the client's case.

This is not to suggest that the test of reasonableness should be simply the number of hours spent by an attorney to justify a fee. There are many nuances in the assessment of reasonableness. For example, a highly skilled attorney in a specialized field may be able to justify the reasonableness of a contingent fee and have spent less time on the matter than some other attorney who is less skilled. And, sometimes, the court file may not reflect the magnitude of effort put into the case prior to filing of the complaint.

Prefiling preparation and investigation often results in settlements without the necessity of the expensive discovery process that may take place after a complaint is filed, which provides for not only an early resolution of the case, but the elimination of needless costs. The point is, however, that where there is little or no information to justify a fee except for the settlement amount, the percentage allocations to the client, the repayment of costs, and distribution of attorney's fees, the court has very little to go on in determining the reasonableness or the fairness of the distribution.

> ***"This is not to suggest that the test of reasonableness should be simply the number of hours spent by an attorney to justify a fee."***

Where an attorney's motion for approval of a minor's settlement may have been rubber stamped in the past, some judges may give more scrutiny to that process in the future. A wise lawyer will take steps to avoid delay in the approval process by making a thorough showing of reasonableness and fairness.

Some ways to avoid delay or adverse rulings on a request for approval of fees might be to attach the contingent fee contract as an exhibit and, if time records were maintained, set forth in some meaningful detail what time was spent on the case and what was done on behalf of the client. When asking for approval of unusually high costs, perhaps some information on why the costs were necessary would be helpful to the court. If there are some complexities about the case that warrant mention, include them. If the court file is "thin" but nevertheless the attorney has spent time in prefiling preparation, spell it out. If the attorney has specialized expertise in a particular field and some special training or experience to back it up, let the court know. This might be persuasive in a showing of reasonableness and fairness when some other indications might be lacking. If the total settlement appears to be low given the minor's injuries, but liability was thin, give an explanation to eliminate any doubt the judge may have about the fairness of the amount.

The foregoing are just suggestions and by no means should be considered as a procedure to be employed in all cases. Each judge who is presented a motion for approval of a settlement involving a minor will employ their own tests and level of scrutiny. But in each case, each is expected to determine if the settlement was fair and the attorney's fees are reasonable. Provide adequate information to the Judge, and you are less likely to be dissatisfied with the decision.

Meeting minutes

Mat Valley bar distracted by food & fiscal matters

President Estelle slanders former President Golter

Unlike his predecessor, President William Estelle promptly called the meeting to order and demanded to know what our agenda should be, whereupon Andy Robinson interrupted proceedings to ask Dana Stoker what he was eating.

President Estelle then asked for a Treasurer's report whereupon Treasurer for Life Eric Jensen told him not to worry about it and that "we don't need any money."

Estelle: "When did we last collect dues?"

Jensen: "When we needed money."

Estelle: "When was that?"

Jensen: "Probably a couple years ago."

Robinson to Stoker: "Is it good?"

Estelle, trying to regain control of the floor: "What about the scholarship fund, how do we know it was disbursed to the student who won it, for all we know Golter is out spending it." (a low blow, but even Robinson is listening now).

Magistrate Zwink, recognizing the conversation has sunk to his favored level, decides to contribute to the discussion and points out that Estelle "unlike the last President who wouldn't take a stand on anything... enter President Emeritus David Golter, albeit 30 minutes late. Zwink greets him warmly and the subject matter changes. Meanwhile, a side drama had developed at the same table.

Snodgrass eats Colberg's lunch

Our membership has in the past exhibited a disturbing inability to agree upon even the most basic concepts. For example, we have had an ongoing dispute as to the definition/location of "the Mexican Place" where we meet in Palmer. We may have stumbled onto an explanation for that confusion. Not knowing where the Mexican place is may be related to a basic non-understanding of what "Mexican food" is and how to identify it. The Secretary ordered a "Chicken Chimichunga" and Mr. Snodgrass ordered a "taco." Mr. Snodgrass was served first although he ordered last. His plate was piled high and he immediately began to chow down.

Mr. Robinson (who was remarkably focused on food throughout the meeting) then asked, "is that a Chimichunga, Jack (Mr. Snodgrass)?" At that moment the Secretary, who had ordered a Chimichunga, spoke up and said, "no this is supposed to be a Chimichunga Andy" pointing to the small taco shaped item on his plate. Only then, after having eaten much of his giant "Taco" did Mr. Snodgrass realize the beef inside his taco had a suspiciously chickenlike flavor.

Secretary: "Jack, you are eating my lunch!"

Snodgrass: "Well, do you want it back?"

The Secretary was appalled at that concept. "No thank-you."

Mr. Snodgrass then continued to labor through his plate of bean covered chickens long after everyone else had finished their smaller portions of food.

"Bush" experience in Palmer

There was a brief discussion of why it is that DAs outlast PDs in Palmer. The only PD present, Kirsten Bey, suggested that the "Bush" experience in Palmer is something PDs prefer more than DA's.

The meeting was then adjourned by President Estelle. Secretary Colberg then paid for the lunch he never had.

Lunch Epilogue

Two hours later Mr. Snodgrass called the Secretary to complain about the size of the lunch he had eaten on the Secretary's behalf. Life is tough in the Bush.

— Talis Colberg
Sept. 3, 1993

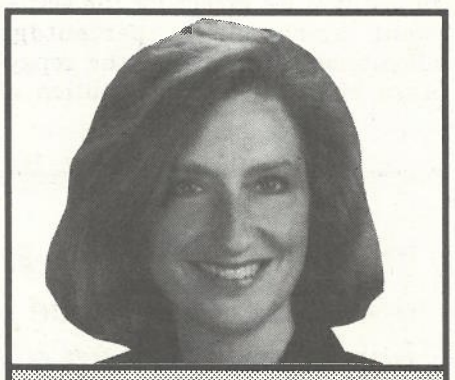
Solid Foundations

Alaskan banks support IOLTA

The financial institutions in the State of Alaska continue to provide lawyers effective service and products which result in the growth of the Alaska IOLTA program.

The IOLTA program is made possible by the cooperation of the banks serving Alaska's law firms throughout the state:

Bank of America
First National Bank of Anchorage
Denali State Bank
Key Bank of Alaska
First Bank
National Bank of Alaska



Mary Hughes

First Interstate Bank
Northrim Bank

Several banks have been innovative in their approaches to the marketing of IOLTA accounts. Account service fees usually charged are waived by most banking organization. Additionally, Bank of America, Denali State Bank and First Bank do not charge the Alaska Bar Foundation the administrative reporting fee. The fee, between $1 and $9 per reporting period (either quarterly or monthly), is usually charged by a bank on each IOLTA account, and the total administrative reporting fee charges are deducted from the interest paid to the Foundation. The commitment of Bank of America, Denali State Bank and First Bank has amounted to thousands of dollars of additional revenue over the life of the IOLTA program.

First National Bank of Anchorage is totally revamping its IOLTA account package for lawyers. The bank will offer lawyers a NOW account which allows the earning of a competitive rate of interest with the benefit of unlimited check writing. The bank intends to provide information to its lawyer clientele very shortly.

IOLTA has become of age! The Alaska banks and lawyers are working together to provide much needed legal services for the disadvantaged and to assist in the administration of justice. Thank you to all!

Name changes I have known and loved in court

By Alicemary L. Closuit

A person's name is of the utmost importance to the individual. I guess I always knew that since I often took offense that nobody ever got mine right.

This basic postulate of human nature was brought home to me more clearly during the time I was assigned to hear name-change proceedings.

Human nature being what it is, what we call ourselves partly defines us so I guess that's why it's so important to us.

Although I didn't care if a petitioner wanted, henceforth, to be known as Napoleon Bonaparte Smith or in the case of a recent name change of a famous rock star (not in my courtroom) to be known as an unpronounceable symbol, by law I did have to determine whether or not a petitioner was trying to defraud anyone or otherwise pull a fast one by taking a new name. These hearings are mostly ceremonial in function, but the Master or Judge has to determine whether or not there is any "reasonable objection" to the person assuming the name they have requested.

Prior to the hearings on name changes, my only preparation consisted of determining whether or not the petitioner had filed the appropriate proof of notice to the world (Affidavit of Publication or Posting) that they were now going to be called Joe Bfilzpsk or whatever. I never bothered to check the name that was being requested or the reason they gave for the name change. Until that fateful day of unique name changes, this was not a problem.

On that day I had three name changes scheduled. The first was for a minor, whose name I am changing slightly to protect his dignity. He had one of those androgynous first names which is usually given to a girl and a middle name no boy should have to put up with, namely Hiscock. His last name is irrelevant for the purposes of this story. Children's names like this are either a result of extreme parental ignorance or some misguided loyalty to family tradition. This poor kid's father had to have known better since he was a II and he made his kid a III.

Poor little Evelyn, all of 9 years old, appeared in court and was sworn in. He showed extreme bravery in the face of all the legal rigmarole. His character and courage had probably been strengthened by 9 years of being called "Evelyn." Both his parents were consenting to the change of name. I asked Evelyn why he wanted his name changed.

"Well," he said in a strong voice, looking up at me with big eyes, "everybody always thinks I'm a girl when they hear my first name and, if they find out about it... "he glared at me fiercely to warn me not to disclose his middle name to unauthorized friends and acquaintances, "...they make fun of my middle name. It's getting to be a real pain. The last straw was that, I'm in the Chapter One reading program, ya know, and this summer they sent me a bunch of books in the mail. I opened up the package and the book on top was "So You Want To Be A Ballerina."

I didn't ask about creditors, I just recommended that the Superior Court Judge grant the requested name change.

The next guy was considerably older than 9 years. This gentleman was wearing a black leather jacket with the arms yanked off and a Harley Davidson logo on the back. He was BIG, over 6 feet tall and the lights in the courtroom shone off of his shaved head. He had a Fu Manchu mustache, several prominent scars on his face and tattoos on both arms, none of which read "Mother." His paperwork was in order, so after he was sworn in, I asked him what name he wanted.

"Chopper," was the answer. A man of few words, obviously.

"So, do you want to keep your first or middle name?" I asked.

"Nope. Just Chopper."

"Uh huh. Ok, well, do you own a chopper?" I couldn't help asking the question. It just fell out of my mouth. I winced inwardly at my own temerity. (Rule of Thumb for all of us who wear a black robe... "Never let 'em see you sweat.")

"Yep." His face lit up. Evidently it was a prized possession. I barely refrained from asking how we were going to tell him from the motorcycle. This was plainly not the time for levity. My courtroom is on the second floor. Judicial Services is on the first floor and their fastest response time to my courtroom, if an officer is available, is about 2.5 minutes. I figured Chopper's response time to the bench to be about 2.5 seconds. I bit my tongue.

"So why do you want your name changed to no first name, no middle name, Chopper?" I asked.

"Well, my business is filming MC meets and motorcycle shows. I've been known as Chopper for years and have my business in that name."

An entrepreneur. Who would have imagined! And after a few questions about creditors, judgements, etc., it was clear he was handling his business just fine. I recommended approval. He hugged his girlfriend, a very strong looking blonde, thanked me courteously and left the courtroom. I turned to name change number 3.

Number three was already at the table, obviously anxious to get these proceedings under way.

"What do you want your name to be?" I asked.

"I want it to be da same," he answered. I was non-plussed and somewhat flustered. The question went through my mind "Then why are we here?" To cover my confusion, I looked down at his file, hoping to find an answer there. (See Rule of Thumb, hereinabove.) The file was indeed of some help. The paperwork said that he had requested no first name, no last name, just D'SAME, all caps. I regained my confidence.

"So why do you want your name changed to be D'SAME?" I queried.

"Well, I'm a born again Christian and I've been to a lot of prayer meetings. So I asked God what he wanted my name to be and God said he wanted it to be D'SAME." Obviously a strict Bible constructionist. I wanted to say "You're getting the message wrong!" However, a man's communication with his God is not my business.

After Mr. D'SAME left the courtroom, Dale, my in-court clerk, looked at me and said, "I thought he was going to say he wanted it to be D'Same as D'Other Guy's."

The moral to the story was stated by Barry Levitt, Child Custody Investigator when he heard the story. "Da more things change, the more they stay D'SAME."

WE'RE MOVING THE 1994 CONVENTION TO MAY!

The 1994 Alaska Bar Association Annual Convention will be held on Thursday, Friday, and Saturday, May 5, 6, & 7, 1994 at the Hotel Captain Cook in Anchorage.

The Alaska Judicial Conference will also be held during this week in Anchorage.

Please mark your calendars and plan to be with us. The convention brochure will be mailed in early 1994.

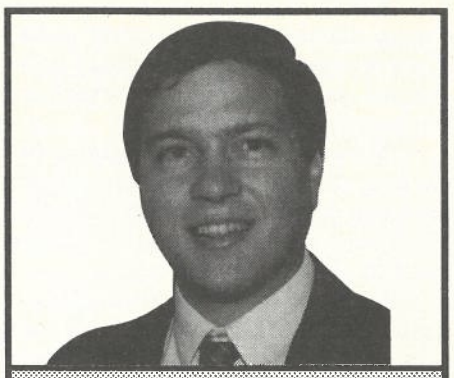
1994 REVENUE BUDGET	
Admission Fees-All	143,100
Continuing Legal Education	119,800
Lawyer Referral Fees	56,200
The Alaska Bar Rag	15,600
Annual Convention	40,000
Substantive Law Sections	7,000
Ethics Opinions	300
Pattern Jury Instructions	7,600
Management Svc Law Library	9,600
Accounting Svc Foundation	9,100
Special Projects	0
Membership Dues	1,208,400
Dues Installment Fees	10,950
Penalties on Late Dues	10,700
Disc Fee & Cost Awards	0
Labels & Copying	15,100
Investment Interest	35,000
State of Alaska	0
Miscellaneous Income	2,500
SUBTOTAL REVENUE	**1,690,950**

1994 EXPENSE BUDGET	
Admissions	183,530
Continuing Legal Education	219,884
Lawyer Referral Service	55,621
The Alaska Bar Rag	35,328
Annual Convention	40,000
Substantive Law Sections	9,100
Ethics Opinions	100
Pattern Jury Instructions	1,900
Management Svc Law Library	3,500
Accounting Svc Foundation	9,100
Special Projects	0
Board of Governors	49,174
Discipline	497,100
Fee Arbitration	39,204
Administration	360,513
Committees	5,150
Duke/Alaska Law Review	32,500
Miscellaneous Litigation	0
Remodeling/Moving Expense	0
Loan Interest/Loan Fees	0
Computer System Training	500
Other/Miscellaneous	0
SUBTOTAL EXPENSE	**1,542,204**
NET GAIN/LOSS	**148,746**

See chart, page 6

The Public Laws

Why is it . . . . . ?



Scott Brandt-Erichsen

Rather than concentrating on a particular topic, this article is intended to pose a few, mostly rhetorical, questions which have occurred to me as I think about the practice of law. These are the sort of wishy-washy questions for which people normally apply for government grants to study the issue and produce a report concluding that "we just don't know for sure, further study is warranted." Not having the benefit of a federal grant, here is a six-pack social scientist's view of some issues facing the legal profession.

1. Proposition: Advertisement by attorneys is helpful to the public as consumers of legal services. When I was first out of law school and looking for a job in 1988 I happened to look in the Yellow Pages of the Anchorage telephone book to get some idea of what sorts of practice I would do if I worked for various firms.

Last week I happened to look in the "Attorneys" section of the Yellow Pages for another purpose, and I noticed that the appearance was substantially different. From page 53-111, the Yellow Pages are filled with advertisements by attorneys. On the radio on the way to work I hear advertisements for attorneys. On late night television I see advertisements for attorneys.

Looking at the proliferation and substance of the advertisements, I cannot help but believe that these advertisements lower, rather than raise, the general public's perception of attorneys. There must be a better way to inform the consuming public of the availability of legal services. Even posting a listing of all attorneys, including names, addresses, year of admission to practice and preferred practice areas, at each state and federal courthouse would be preferable to advertisements which play upon individual greed and self interest. Rather than encouraging problem resolution and furthering social harmony, many of the advertisements appear to encourage confrontation and litigation as a preferred dispute resolution mechanism.

These ads can't be cheap, and the proliferation makes them less effective. Is it really in the best interest of the legal profession to use this type of advertisement to inform the public of the availability of legal services? If so, it is only a matter of time before we see advertisements asserting "I'll stand on my head to get you the highest recovery for your injury."

2. National Health Care and the Law: If Clinton or anyone else is successful in establishing some form of nationwide health care system, what effect will this have on personal injury cases? It doesn't take a Ph.D. in economics to figure out that medical special damages will likely be reduced to a minor issue in personal injury cases. Just what effect is this likely to have on the legal profession, both on the insurance defense side and on the plaintiff's side? Could a national health care plan be billed as tort reform?

3. Baby Bust and the Bar: Justice Moore has called for the information of "Inns of Court" to increase the interaction between more senior and more junior members of the bar and the participation of younger lawyers in bar to increase functions and committees. I support Justice Moore's goal. Concerning the low level of participation by younger lawyers, I am curious the extent to which three disparate factors contribute to this apparent apathy and further contribute to dissatisfaction of many attorneys with their chosen profession.

One dynamic is that many of the attorneys admitted to the Bar since 1983 or 1984 attended law school and began their "formative years" of the practice of law under the Reagan/Bush era. The 80's have been classified as a period ruled by greed and self interest which encouraged a focus on making money and discouraged altruistic actions. Against this background the value of expending effort where there is no tangible pecuniary gain is diminished.

A second factor may be stratification of larger law firms. As the legal profession becomes more crowded it appears that many law firms have increased the length of time which individuals must serve as associates before qualifying as partners, and have increased the stratification within firms, creating multiple levels of partnership or associateship. The perception that the desired status becomes increasingly more elusive can be frustrating and disheartening to the younger attorneys.

This frustration is further exacerbated by the "baby bust" effect. Alaska is still a land of many opportunities, but certain of those opportunities are not as readily available as they once were. As with the stratification in law firms, the opportunities for attorneys, whether they be judicial or otherwise, are clearly not as open as they were fifteen years ago. One need look no further than the Alaska Supreme Court to see this illustrated. Three of the current Justices were appointed after less than ten years practicing law in Alaska (based on bar admission dates in the Directory of Attorneys). In contrast it has been more than ten years since there has been an opening on the Court. In the time since Justice Moore was appointed in July of 1983, 1,331 attorneys have been admitted to the Bar. None of these attorneys has had even the opportunity to apply for such a position. This is a common experience for those in the "baby bust" generation, those born in 1964 or later. Coming after the "baby boomers," the "baby busters" at least perceive that they face more limited opportunities, and as a result may experience a great deal of frustration and dissatisfaction with their careers.

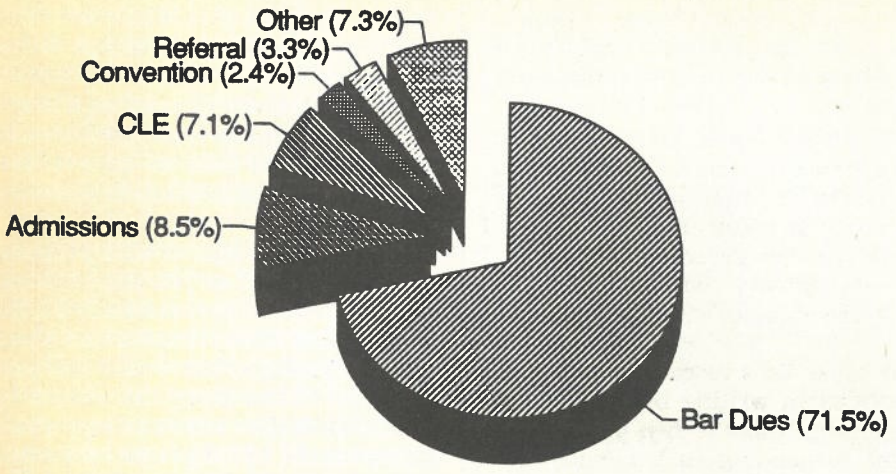
4. The Proposed New Discovery Rules: Is it rational to assume that the new system of discovery rules dependent upon enforcement by the same people enforcing the current rules will be effective in making lazy attorneys more conscientious?

The new civil discovery rules seek to streamline the discovery process to increase the efficiency with which the system deals with cases. As an aside, I support the proposed change just as I would support any change which seeks to make the processing of cases more efficient. Hidden in the new rules is a presumption which may not be borne

continued on page 16

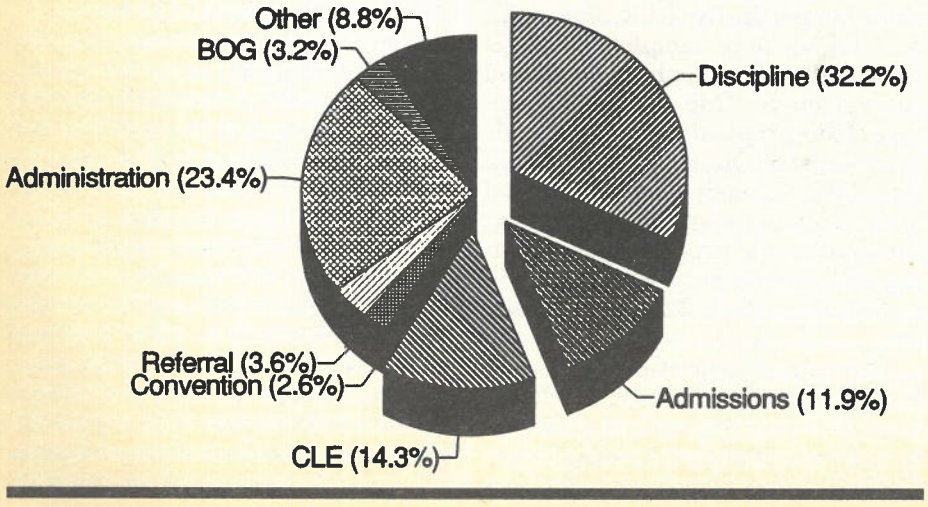
1994 REVENUE BUDGET

$1,691,000



1994 EXPENSE BUDGET

$1,542,000



NOTICE TO THE PUBLIC

By order of the Alaska Supreme Court,
ROGER W. CARLSON
Attorney at Law
is suspended from the practice of law for three years
effective September 13, 1993

Published by the Alaska Bar Association,
P.O. Box 100279, Anchorage, Alaska 99510-0279
Pursuant to the Alaska Bar Rules

NEWS FROM THE BAR

Two days of BOG meetings: Action items

At the Board of Governors' meeting on October 22 & 23, the Board took the following action:

• Reviewed the results of the July 1993 bar exam, including the character investigations, and certified the results.

• Passed a budget for 1994 with projected income of $1,691,000 and expenses of $1,542,000.

• Discussed a proposed amendment to Bar Rule 26 which would provide a way to enforce the court's referral of an attorney's alcohol/drug conviction to the Substance Abuse Committee. This is published in the current issue of the Bar Rag along with point/counterpoint views by board members.

• Approved the stipulation for a 3 year suspension of an attorney. (This suspension will be made public upon acceptance by the Supreme Court.)

• Approved the reimbursement of expenses for Laurel Peterson for acting as Trustee Counsel for Darrel Gardner.

• Approved for publication a draft amendment to the bylaws which would increase the fee for Rule 81 (Outside counsel) participation to $250 and make it an annual fee for the life of the case and/or participation.

• Adopted an ethics opinion entitled "Disclosing Information on IRS Form 8300."

• Asked the ethics committee to redraft the opinion entitled "Attorney Communication with the School Board, Regarding Pending Litigation, without Consent of Counsel Representing the School District." The Board asked that the opinion address communication with administrative bodies generally.

• Asked staff to rework and publish a pamphlet entitled "Accident Victim's Legal Information Guide and Common Questions Asked by Accident Victims."

• Discussed whether to recommend to the supreme court a proposed rule change which would require all attorneys to attend a course or view a video on the new Rules of Professional Conduct. The Board reviewed 3 proposals from the staff on implementation and considered whether the Bar should charge members a fee to cover costs. The proposed rule is published in the current issue as well as an article on the board's discussion.

• Met with Judge Johnstone regarding the court's concern about developing a list of discovery masters. The Board is willing to work with the court for developing criteria.

• Reviewed a draft of an Unauthorized Practice of Law rule and referred it to the ethics committee for review and comment for the January Board meeting.

• Met with Bill Cotton, Executive Director of the Judicial Council about a possible proposal to the constitution which would change the make-up of the Judicial Council to 5 nonattorneys and 1 attorney. He also advised that member Dan Callahan's term expires in February.

• Discussed a letter from ALPS president Bob Minto exploring the idea of mandatory malpractice insurance for all attorneys in private practice in Alaska. Philip Volland will talk to Bob Minto and advise him that the numbers seem too high and ask if there are any alternatives. The Board asked Bar Counsel to draft a proposed mandatory disclosure of no malpractice insurance rule.

• Voted to split the Family Law panel on the Lawyer Referral Service into 3 categories: divorce, dissolution & custody; adoption; and guardianships & conservatorships. Lawyers already on the Family Law panel can renew for all three categories for one $10 fee.

• Approved the request of Christopher Kennedy to transfer to active status.

• Approved the minutes of the September 10 & 11, 1993 board meeting.

• Approved sponsorship of the West Bar Membership Discount program for West CD-ROM users. (Also covered in this issue.)

For further information on any of the actions taken by the board, please contact your local Board of Governors representative or Deborah O'Regan, Executive Director.

Proposed Bar Rule 64: Mandatory CLE is on the way

Rule would affect all lawyers; consequences imposed

Alaska's first (or second) mandatory continuing legal education rule may affect you soon. Bar Rule 5, Section 1(a)(6) already requires new admittees to attend a presentation on attorney ethics as prescribed by the Board of Governors. Proposed Bar Rule 64 would expand that mandatory CLE requirement to every active member of the Alaska Bar Association. Every active member of the bar would be required to attend a mandatory continuing legal education course on the Alaska Rules of Professional Conduct, or view a videotape of the mandatory course. The Bar Association would like to receive comments on the proposed rule, and suggestions on how to implement the rule, if it is adopted.

One of the important features of the proposed rule is that members who do not fulfill the CLE requirement will be suspended. (What good is a mandatory rule without consequences?)

In a state this large, with lawyers practicing in many remote locations, it is obviously impossible for every member to attend a live CLE. The course will have to be videotaped and made available to every lawyer in Alaska, as well as to every active member of the Alaska Bar who lives outside the state. The Alaska Bar Association currently has 2,154 active in-state members and an additional 368 active members living outside the state, for a total of 2,522 active members. Some members will have attended the live presentation. However, we estimate that about 2,300 members will choose to watch a video tape of the presentation. The Bar Association will have to decide the best way to disseminate the tapes and whether or not to charge for them. We seek your input on these issues.

Three proposals have been discussed as ways of making the tapes available. The first suggestion is simply to mail a copy of the tape to each member of the bar who has not already attended a live seminar, and require the member to send back an affidavit stating that the member has viewed the tape. The second alternative is to save some of the mailing costs by not mailing a copy of the tape to each member of a law firm, but mailing a single copy to each law firm, for later dissemination within the firm. The third alternative is to make a number of the tapes available for rent through our existing rental library.

Proposal 1 - Mail copies to members

The first proposal is to mail a copy of the tape to each member who has not attended the live CLE, along with an affidavit to be completed and returned after the member has viewed the videotape. One obvious advantage of this proposal is that it is simple to administer, One obvious drawback is that it is expensive to duplicate and mail so many tapes. We project that the total cost of producing, duplicating and mailing out 2,300 tapes will be $47,231, which $20.54 per member.

There are other criticisms as well. Will the members really watch the tape? Will they pay as close attention to a video tape as they would at a live CLE? Will they benefit as much from the tape if they do not have the opportunity to ask questions of the presenters, as they would at a live CLE?

If the rule is adopted, we plan to produce as high a quality videotape production as possible. The current proposal is to produce the tape at UAA studios, using a live audience of about 70 people. Bar staff has the advantage of having given several live CLE's on this topic. They will make sure that the most commonly asked questions and the most frequently troublesome ethical areas are addressed in this production.

Proposal 2 - Mail to firms only.

One criticism of the proposal to mail copies of the tape to each lawyer is that it is wasteful. Many law firms will schedule group showings within the firm. Why not save duplication and mailing costs by sending a single copy of the tape to each law firm and leave it to the firm to ensure that each lawyer within the firm views the tape?

The cost savings of this proposal are not as great as you might think. We would save approximately $1,035 on the costs of duplication and about $532 in postage, but would increase the cost of handling the videos by about $365. The total savings would amount to $2,869. The unit cost would decrease by $1.25 from $20.54 per member to $19.29 per member.

Would it be worth an additional $1.25 per member for everyone to have a personal copy of the tape to keep and review?

Proposal 3 - Rental Library.

Can we save even more duplication and mailing costs by simply making the tapes available for rent by individuals and groups? The Bar Association already has a growing rental library, which is used by an increasingly large number of members. Should we simply stock a supply of tapes for members to rent through the rental library? The rental system is already in place and well used. A simple call to the CLE director would make the tape available to the member at a convenient time. We

continued on page 16

The Board of Governors is considering the following addition to the Bar Rules which would require members who have not already done so to attend or view an Alaska Bar Association CLE presentation on the new Alaska Rules of Professional Conduct. The Board welcomes comments or suggestions by interested persons. Final review is scheduled for the January 1994 Board meeting in Anchorage.

PROPOSED BAR RULE 64 RELATING TO MANDATORY COURSE ON ALASKA RULES OF PROFESSIONAL CONDUCT

Rule 64. Mandatory Course on Alaska Rules of Professional Conduct; Suspension for Noncompliance.

(a) Every active member of the Alaska Bar Association as of (effective date of rule) shall attend a mandatory course on the Alaska Rules of Professional Conduct by the Alaska Bar Association within 12 months of (effective date of rule). This rule shall not apply to members who attended the May 14, 1993 or June 23,1993 course on the Alaska Rules of Professional Conduct or viewed the videotape of the June 23, 1993 course prior to (effective date of rule) provided the such viewing is certified by affidavit to the Executive Director.

(b) Persons who become active members of the Alaska Bar Association after (effective date of rule) shall attend a mandatory course on the Alaska Rules of Professional Conduct by the Alaska Bar Association within 12 months of the date on which they become active members.

(c) In lieu of attendance at the mandatory course described in this rule, members may view a videotape of the mandatory courses within the required time period and file an affidavit of compliance with the Executive Directors following that viewing.

(d) Any member who without good cause fails to comply with the requirements or this rule shall be notified in writing by certified or registered mail that the Executive Director shall after 30 days petition the Supreme Court of Alaska for an order suspending such member for noncomplaince. Upon suspension of the member for noncompliance, the member shall not be reinstated until the member has complied with this rule and the Executive Director has certified to the Supreme Court that the member is in compliance.

NEWS FROM THE BAR

Interim suspension could be imposed for substance use

For

Bar must protect attorneys and the public from drugs and alcoholism

Alcoholism and drug addiction among Alaska lawyers are not merely an individual problem, but one that directly impacts both our profession and its clients. The Bar association has long recognized a dual obligation to protect clients and assist affected lawyers.

The amendments to Bar Rule 26 are not a departure from current policy, but an extension of Bar Association responsibility. The questions to be answered are: Are the amendments necessary? Do they protect the rights of the convicted attorneys? Will it work, that is, will some attorneys get help they would not otherwise receive?

Alcoholism and drug addiction are diseases characterized by denial. Studies have shown that lawyers, who are articulate experts at rationalization, are among the toughest cases, both in their refusal to recognize that they have a problem and in their unwillingness to seek or accept treatment. These amendments offer a means, if warranted by a professional analysis, to persuade some lawyers that they have a problem and force them to consider treatment.

Ultimately, I believe one's position on this matter is likely to be dictated by how seriously one views alcoholism and drug addiction as a threat to the profession. For me, it is enough that I have seen the lives, reputations, and careers of colleagues ruined by alcoholism and addiction. The wasted talent, the suffering of the colleagues and the families of such lawyers and the damage inflicted on clients and their cases, is a tragedy of incalculable proportion.

It is important to understand the historical context in which these amendments arise. The Substance Abuse Committee has, for years, actively provided assistance to lawyers and others who seek help for substance abuse problems. The Supreme Court has informally referred eight convicted lawyers to the Committee. Most have refused to meet with committee members and none have sought treatment.

The rule does protect convicted attorneys' due process rights and does not, as some would suggest, hand over powerful sanctions to a bar committee. The rule will allow, but not mandate, the Supreme Court to refer an attorney convicted of a misdemeanor drug or alcohol crime (more than 90 percent will be DWI 's) to the Substance Abuse Committee. The attorney must then meet with the Committee and follow its "recommendations for professional evaluation and professionally recommended treatment." No one believes, as my friend Marc June suggests, that a single DWI conviction means a lawyer has a substance abuse problem. Absent some other evidence that alcohol or drug use is affecting a lawyer's practice, it is unlikely that the Substance Abuse Committee would even recommend a professional evaluation in addition to that mandated by the current DWI statute. When the Committee does recommend an evaluation, it will be performed by an independent professional or agency who would not be eligible to provide any recommended treatment. Certainly the attorney would be able to present any evidence to the Committee, including another professional evaluation. Should the attorney decide to reject the Committee's ultimate recommendation, they would have a full opportunity to be heard before the Supreme Court. The matter thus remains largely in judicial hands. The Supreme Court decides whether to refer the matter to Bar Counsel, the Substance Abuse Committee, or no one; the Supreme Court retains jurisdiction of the matter and will decide whether or not to suspend the lawyer upon a refusal to comply with the recommendations.

Finally, will some lawyers be helped and some clients protected through the enactment of these amendments? It is generally accepted that alcoholics and addicts don't get clean and sober until they hit bottom. That "bottom" can be a threat of divorce, the loss of a job, a humilitating experience, or criticism by friends. It can occur, for the fortunate, before real damage is done to one's life and career. But few change their minds - and their lives - without the treat of consequences. That is the mechanism in this rule — those who are professionally determined to have a substance abuse problem that affects their ability to practice law will face a choice. Most will make the right choice and experience the many joys of recovery from a debilitating disease.

I believe we must, as a profession, do whatever is necessary to help our colleagues and to protect the public.

— Brant McGee

The Board of Governors is considering the following amendment to Bar Rule 26 relating to referral of an attorney's alcohol or drug conviction to the Substance Abuse Committee. It would permit the Court to interimly suspend an attorney for failure to meet with the Committee or to follow its recommendations for professional evaluation or professionally recommended treatment. The Board welcomes comments or suggestions by interested persons. Final review is scheduled for the January 1994 Board meeting in Anchorage.

PROPOSED ADDITION TO BAR RULE 26 RELATING TO REFERRAL OF ALCOHOL/DRUG CONVICTIONS TO THE SUBSTANCE ABUSE COMMITTEE

(Additions italicized; deletions bracketed and capitalized)

Rule 26. Criminal Conviction; Interim Suspension.

(g) **Proceeding Following Conviction of Other Than Serious Crimes.**

Upon receipt of a certificate of conviction for a crime other than those described in Section (b) of this Rule, the Court may, in its discretion, refer the matter to Bar Counsel for whatever action (s)he deems warranted, including the possible initiation of a formal proceeding.

(h) **Proceedings Following Conviction of Other Than Serious Crimes Relating to Alcohol or Drug abuse: Interim Suspension For Noncompliance.**

(1) Upon receipt of a certificate of conviction for a crime other than those described in Section (b) this Rule relating to alcohol or drug abuse, the Court may, in its discretion, refer the matter to the Substance Abuse Committee (Committee) of the Alaska Bar Association.

(2) The convicted attorney will be required to meet with the Committee and to follow its recommendations for professional evaluation and professionally recommended treatment. In the event that the attorney does not meet with the Committee or follow the Committee's recommendations, the Committee will mail to the convicted attorney's bar roster address notice of his or her failure to meet or follow its recommendations and 10 days from the date of the notice in which to cure the deficiency. If the convicted attorney fails to cure the deficiency by 10 days from the date of the notice, the Court may, based on a report by the Committee, order the attorney to show cause why the attorney should not be interimly suspended from the practice of law until the attorney demonstrates to the Court that (s) he is in compliance with Committee's recommendations.

Against

Rule 26 additions are overly broad; recourse is already in place

The Board of Governors recently voted to publish a proposed rule change to Bar Rule 26 which, in essence, requires all attorneys convicted of misdemeanor alcohol/drug offenses to meet with the Bar's Substance Abuse Committee and comply with all subsequent recommendations of the Committee. Failure to do so would result in the attorney being required to show cause before the Supreme Court as to why the attorney should not be immediately suspended from the practice of law.

I disagreed with this vote and, since comments are being sought on the proposed rule change, would like to explain why.

Is substance abuse a bad thing? Should attorneys who have a substance abuse problem seek appropriate treatment? Should attorneys who are convicted of alcohol/drug crimes consider whether they have a substance abuse problem and how this might impact their clients? The answer to all these questions is yes. However, that does not justify a mandatory rule saying that all attorneys convicted of minor drug/alcohol offenses must meet and comply with all recommendations of the Substance Abuse Committee or risk being suspended from the practice of law.

My concern is basic. The proposed rule change can only be justified on a belief that *all* attorneys convicted of a single misdemeanor drug/alcohol offense are likely to have a substance abuse problem and they have harmed clients in the past or are highly likely to harm clients in the near future. I do not buy into this premise.

Proponents of the proposed rule change would argue that I have taken an extreme view and that the Substance Abuse Committee would only require attorneys be evaluated by health care professionals and enforce the recommendation of that evaluation. It would be those professionals who would recommend further treatment. That is not how the proposed rule change reads to me. More importantly, the health care professionals would not be asked to opine as to the attorney's fitness to practice law.

While the Substance Abuse Committee's intentions may be good, I harbor healthy distrust about giving a committee the threat of the legal death penalty as a tool of coercion to enforce what is described as "the Committee's recommendations" even if those recommendations come from a third party professional selected by the Committee. I am especially distrustful if there is no specific opinion as to the attorney's fitness to practice.

The injustice of the proposed rule change will ultimately be found in the attorney convicted of a misdemeanor drug/alcohol offense who does not believe he has a substance abuse problem, has never injured a client, is not likely to do so in the near future, and does not wish to undergo the recommended treatment. It is this attorney who will be forced to persuade the Supreme Court that he should be allowed to practice law.

Generally, the burden of proof as to whether an attorney should be suspended from the practice of law is on the Alaska Bar Association. Attorneys are suspended from the practice of law only if they have committed a serious ethical violation or if there is a substantial threat of irreparable harm caused by ongoing misconduct. Certainly, attorney applicants to the Bar are not precluded from admission by a history of a single misdemeanor drug/alcohol offense. A practicing attorney's single misdemeanor drug/alcohol conviction, standing alone, does not in my mind justify a departure from this general rule by the threat of immediate interim suspension to coerce unwanted treatment.

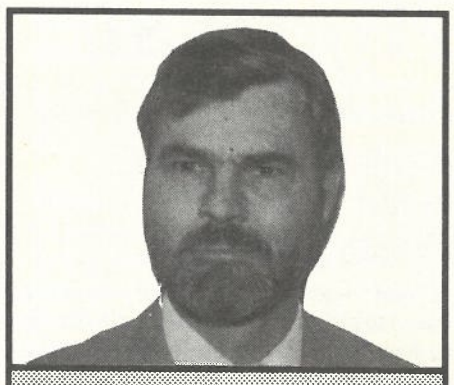
How would the absence of the proposed rule change affect our profession? Attorneys convicted of serious criminal offenses will continue to be immediately suspended. The Bar will continue to be notified when attorneys are convicted of misdemeanor criminal offenses. And under appropriate circumstances, (such as multiple drug/alcohol offenses or the filing of other grievances) Bar counsel has the right to investigate an attorney's ongoing fitness to practice law and prove that fact. This is the way I believe the Bar should operate.

Comments are being solicited on the proposed rule change. Should you agree with these thoughts, I would encourage your comments since my opinions are in the minority.

— Marc June

Bankruptcy Briefs

Demise of chapter 13 stripdowns



Thomas Yerbich

In June the United States Supreme Court dealt a double blow to chapter 13 debtors in the Ninth Circuit. On June 1, 1993 the Court overturned *In re Hougland,* 886 F.2d 1182 (9th Cir. 1989), — holding that 11 USC 1322(b)(2) precludes use of 11 USC 506(a) to "stripdown" residential mortgages in chapter 13 cases [*Nobelman v. American Savings Bank,* 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993)] A week later, the Court overturned *In re Laguna,* 944 F.2d 542 (9th Cir. 1991), holding that 506(b) and 1325(a)(5)(B)(ii) require a chapter 13 debtor pay both postpetition and postconfirmation interest to oversecured residential mortgage lenders on the cure of arrearages [*Rake v. Wade,* 113 S.Ct. 2187, 124 L.Ed.2d 424 (1993)].

Although sending ripples of shock through the chapter 13 debtor community and waves of joy through the residential mortgage lender industry, as a practical matter, *Nobelman* may not have a significant effect. The recovery in the residential real estate market in Alaska has been slowly eroding the *Hougland* impact as residential real property values increase and mortgage balances are reduced by ongoing payments. Soon, to the extent it had not already occurred, the "twain shall meet" in any event and *Hougland* would have passed into near oblivion to be brought out in rare cases.

The implications of *Rake*, on the other hand will, perhaps, be felt not so much by chapter 13 debtors as by general, unsecured chapter 13 creditors. After all, in most, if not all chapter 13 cases, "disposable income" sets the upper limit on plan contributions by a debtor and general, unsecured creditors get the "leavings" after the priority and secured creditors are paid in full, including postconfirmation interest payments on secured claims. Thus, since Rake requires higher payments to satisfy the arrearage claim, it naturally follows that the amount available out of the finite plan contributions available for distribution to general, unsecured creditors will decrease.

However, lust perhaps, until the "twain shall meet," *Rake* left a loophole that can be exploited in cases involving undersecured residential mortgagees. First, *Rake*, as *Laguna*, involved an oversecured mortgagee. Second, neither the agreements nor otherwise applicable state law in *Rake* conferred on the residential mortgagee the right to interest on the arrearage. Third, both *Nobelman* and *Rake* recognized the continued viability of the rule that, notwithstanding the 1322(b)(2) proscription on altering the rights residential mortgagees, 1322(b)(3), (5) authorize cure of any arrearage in installments.

There are essentially four situations that may arise in dealing with residential mortgage arrearages: (1) an oversecured residential mortgagee with an agreement that the arrearage bears interest; (2) an oversecured residential mortgagee without an agreement that the arrearage bears interest; (3) an undersecured residential mortgagee with an agreement that the arrearage bears interest; and (4) an undersecured residential mortgagee without an agreement that the arrearage bears interest.

The first and third situations are governed by Nobelman and the 1322(b)(2) proscription on modifying the rights of the residential mortgagee; the residential mortgagee would be entitled to interest on the arrearage. The second situation is identical to the facts in and is, therefore, controlled by *Rake*. It is the fourth situation — undersecured and no agreement — left "open" by *Rake*.

Nothing in *Nobelman* indicates that the court was holding that 506(a) had no application to residential mortgages in chapter 13 cases. In fact, the court acknowledged it was permissible for the debtors to seek a 506(a) valuation in proposing their chapter 13 plan; its holding was really quite narrow — 1322(b)(2) overrode a 506(a) "stripdown" of residential mortgages because it impaired several enumerated rights contracted for by the residential mortgagee enforceable under otherwise applicable state law.

Rake, as noted above, recognizes that the residential mortgage claim may nevertheless be bifurcated into its "reinstated" balance and the amount necessary to cure the default ("arrearage"). *Rake* held that, even in the absence of a contractual or state law provision for interest, an *oversecured* residential mortgagee is entitled to postpetition interest under 506(b) and postconfirmation interest under 1322(a)(5)(B)(ii). It did not address the rights of an undersecured residential mortgagee in a similar situation.

Section 506(b), permits an oversecured creditor to recover postpetition interest, irrespective of the absence of an agreement providing for interest [*United States v. Ron Pair Enterprises*, 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989)]. On the other hand, if the claim exceeds the value of the collateral, no postpetition interest is allowable under 506(b). [*United Savings & Loan Ass'n v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988)] Thus, 506(b) limits the recovery of interest to the value of the collateral. Accordingly, *Nobelman* and 1322(b)(2) notwithstanding, where the residential mortgagee is in fact *undersecured*, the residential mortgagee is not entitled to postpetition interest: 506(b) alone confers any right to postpetition interest on arrearages in the "nonconsensual" situation and 506(b) itself limits that right.

The effect of 1325(a)(5)(B)(ii) requires a different analysis. First, *Nobleman* recognized that, even in a chapter 13, 506(a) operates to bifurcate a claim into its secured and unsecured portions. *Nobelman* also implicitly recognized that 1322(b)(3), (5) authorizes "impairment" of a residential mortgagee's claim with respect to curing defaults; a position confirmed by *Rake*. *Nobelman* focused on the "rights" aspect, not the fact the claim was undersecured. As long as the "reinstated" claim, exclusive of any arrearage, is unimpaired, 1322(b)(2), as interpreted and applied by *Nobelman*, is satisfied.

Since the claim of a residential mortgagee may be bifurcated under 506(a), it follows that, in order to comply with the requirements of 1325(a)(5)(B)(ii) the court must determine what portion of the claim is secured and what portion is unsecured.

To the extent that the claim is secured, 1325(a)(5)(B)(ii) requires interest be paid postconfirmation; however, to the extent the claim is unsecured, neither 1325(a)(5)(B)(ii) nor any other provision of the Code requires that the residential mortgagee receive postconfirmation interest. In many cases this may require the arrearage (but not the "reinstated" claim) be bifurcated, with interest accruing on the secured portion only. [In any event, under *Nobelman*, the arrearage claim as of the confirmation date would have to be paid in full, even the undersecured portion not accruing interest.]

When faced with a residential mortgage arrearage, the question is whether, in light of 1328(a)(1), the debtor should retain a primary residence and, if so, the terms to propose for curing the arrearage. There are two provisions available to cure defaults: 1322(b)(3) and 1322(b)(5). The difference being that under 1322(b)(3) the default must be cured during the life of the plan, whereas under 1322(b)(5) a "reasonable" time is allowed, which may extend beyond the life of the plan. [*See generally* 5 King, *Collier on Bankruptcy*, 1322.07, 1322.09 (15th ed. 2/93)].

Which to use? Before hopping on 1322(b)(5) (assuming the circumstances warrant a cure period in excess of the plan life), remember 1328(a)(1) excludes from discharge claims provided for under 1322(b)(5). Thus, if a debtor avails himself/herself of 1322(b)(5) the debtor will not be discharged from personal liability on the mortgage debt. Therefore, if a postdischarge default occurs and the residence remains "under water," the debtor may find himself/herself facing a deficiency. If, on the other hand, the debtor does not available himself/herself of 1322(b)(5), *e.g.*, using 1322(b)(3) instead, 1328(a)(1) does not apply and personal liability maybe discharged. [*See Matter of Chappell*, 984 F.2d 7?5 (7th Cir. 1993); *Education Assistance Corp. v. Zellner,* 827 F.2d 1222 (8th Cir. 1987)]

Two ancillary issues remain. First, what is included in the "arrearage"? It includes not only the delinquent payments, but any fees, costs and other charges as provided in the loan agreement to which the residential mortgagee may be entitled as well. These are as much a part of the "rights bargained for" as any other. [See *Rake*, footnote 12] Second, what is the interest rate to be applied in the absence of an agreement; *Rake* left this open [*Rake*, footnote 8]. The weight of authority is that it is a "market rate." [*General Motors Acceptance Corp. v. Jones*, 999 F.2d 63 (3rd Cir. 1993); *United Carolina Bank v. Hall*, 993 F.2d 1126 (4th Cir. 1993); *Memphis Bank & Trust v. Whitman*, 692 F.2d 427 (6th Cir. 1982)] [For discussion of "Market Rate" see Yerbich, *Bankruptcy Briefs*, 17 Alaska Bar Rag, No. 2, page 9 (Mar-Apr 1993)

Software Review

Computer game teaches criminal defense skills

By Tim Terrell

Objection! Is a computer game designed to teach lawyers and law students to recognize evidentiary issues and react properly.

The program outlines a factual scenario where you are a criminal defense attorney representing an accused murderer. Witnesses parade onto the screen for questioning.

The prosecutor asks the questions, which appears on screen, and you are asked to decide whether the question is proper or objectionable. If it is proper you hit a certain key, and if it is objectionable you hit the key corresponding to the right objection (a list is provided for easy reference). You get more points the faster you answer questions correctly.

At the end of each level, if your cumulative score meets a certain points total, you are given a chance to advance to the next level. In order to do so, you have to correctly answer yes or no to two factual questions. This is designed to test your ability to remember the facts and absorb new facts while concentrating on evidentiary objections. If you answer correctly you move on to the next level. The game has seven levels, and when you finish the seventh you start over with a new trial.

Like all video games, the only thing you get when you reach the highest level is a sense of self-satisfaction - no new car or trip to Hawaii. If you lose the trial, your client goes to the gas chamber.

You do not have to keep playing to the next level; the program gives you the option to exit at the end of each level, and if you do not get enough points to advance to the next level you have a chance to play that level again with new questions.

Overall the program gets good marks, although it has its pluses and minuses. On the plus side, as far as the technical aspects go, it is easy to use — even the non computer-literate can use it with no problems. It is also convenient to use because each level can be played in less than five minutes, so you can work i a quick practice round in your spare time.

On the minus side, the graphics do not give the program a high degree of realism. When each level starts, you see the judge enter the courtroom and sit, and then the witness comes in. After that, all you see is the judge-figure raise his arm and bang his gavel if you answer the question incorrectly or if your objection is sustained.

The viewer's perspective is always the same, i.e. from the counsel table looking straight-on at the judge and witness. To really simulate the realism of a trial would require more sophisticated graphics where the viewer's vantage point would change and where there would be more variation in the action. However, such a program would require machines with large RAM capacity, and the author undoubtedly elected to compromise in this area so that more people could use the program.

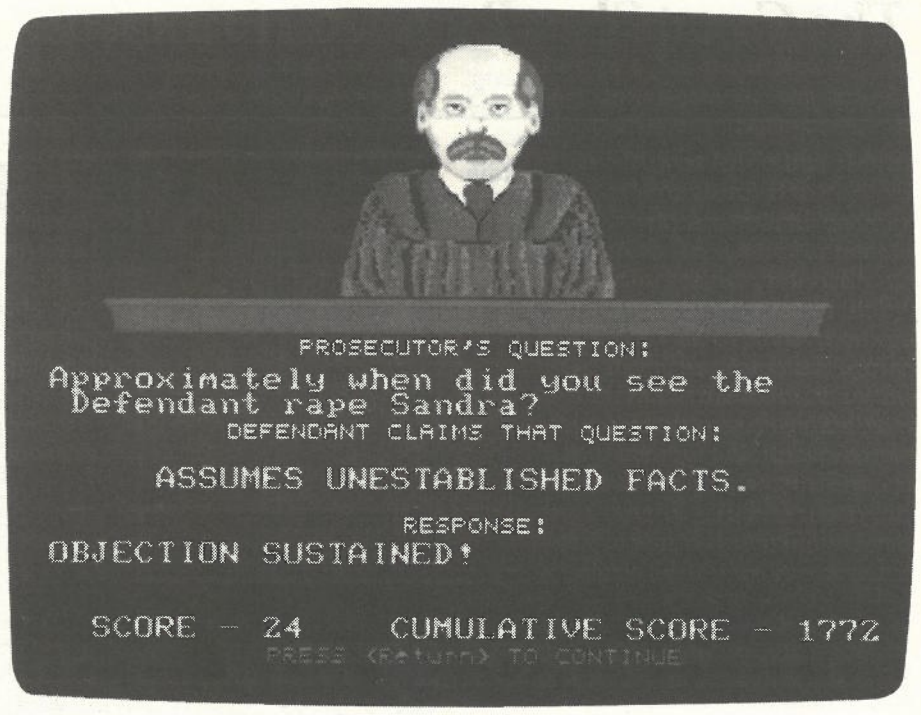
On the substantive side, the program meets most of its goals as a teaching tool. It does not truly simulate the atmosphere of live court, but then again nothing can. The program tries to do this by increasing your points the faster you answer questions correctly, and you cannot advance to the next level without answering quickly. However, unlike a real trial, nothing bad happens if you do not do well. The program also does not simulate a real trial in that it does not take into account trial strategy. For example, in a real trial you would not object to everything; sometimes it makes sense to allow in material that is technically objectionable. The program also is simplistic in that it only allows you to object on one ground - the answer to a proposed question might be objectionable because it violates the hearsay and best evidence rules, but the program will only allow you one answer, and will only give you full credit for the answer which addresses what it considers to be the primary issue. Fewer points are awarded for "correct" answers that are not the "best" objection.

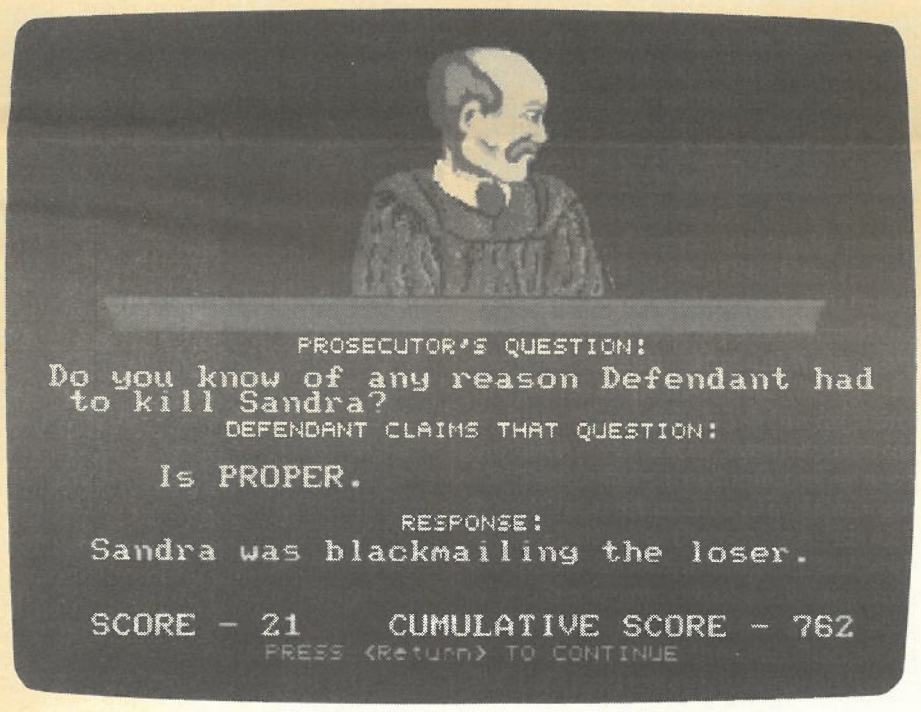
On the plus side the program does a good job of training lawyers to spot evidentiary issues and to make the correct objection, and of course if you do not see an evidentiary issue and object at trial you have (generally speaking) waived the objection.

The program is fun to use, and enjoyable no matter what your level of trial experience. I work in an office of 12 attorneys, some of whom are current or former trial attorneys with substantial trial experience, some who are appellate attorneys with little trial experience, and some who (like me) have litigation practices which rarely if ever involve trial work.

I gave the program to people from each of these groups to try, and everyone enjoyed using it. I would say, though, that the program's utility is probably limited for the experienced trial lawyer. Its best use is probably in law school skills training classes, as training for young associates in a firm, or as a brush-up tool for the practitioner who does little trial work. California allows 12 CLE credits for the game.

Objection! Is published by TransMedia productions in Toledo, Ohio. Objection! Is authored by evidence expert Ashley S. Lipson, whose two books on evidence [Documentary Evidence (1986) and Demonstrative Evidence (1988)] have been published by Matthew Bender & Co. Lipson also wrote the courtroom evidence guide that comes with the program. It is available at $99 on 3 1/2" and 5 1/4" disks for both the Macintosh and IBM compatible formats. It requires a computer with at least 720K RAM, but although it has color graphics, it can be used with a monochrome monitor. TransMedia Productions, Inc. has a toll-free number: 800-832-4980.





Discount Program for CD-ROM Reporters

At its October meeting, the Alaska Bar Association Board of Directors approved sponsorship of a one-year discount program for purchases of West Publishing's CD-ROM Alaska Reporter series with regular updates as new volumes are published.

As part of the sponsorship program, West is also giving a CD-ROM Reporter Series to the Bar Association so that interested bar members can see first hand how the CD-ROM technology works. Bar members who want to take advantage of the Bar's discount program should make sure they mention the program to their West representative. Any questions about the program can be directed to Deborah O'Regan and the Bar Association or to Reed Wiecks at (800) 347-1596, West's sales representative in Alaska.

Eclectic Blues

The Great Slug Race

I've never dreamed of being a radio sports announcer even through years of studying the play by play techniques of Red Barber, Howard Cosell, and Chick Hearn have left me with a mastery of sports cliches.

This knowledge probably would have gone to waste if Ketchikan's reigning sports king hadn't decided to spend the summer surfing the tiny waves of Western Washington. In desperation, Ketchikan's radio station turned to me.

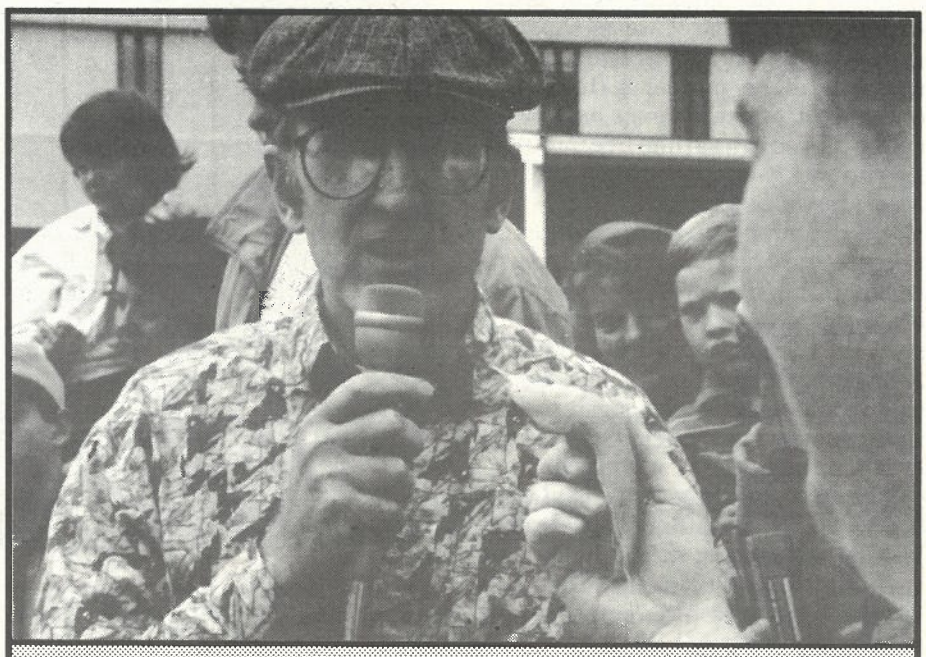
Every good play-by-play announcer needs a trusty color man by his side to fill the air with charm and useless statistics. The station said I could choose my own color guy, someone who would make a nice juxtaposition to my accent which is a rich mixture of Bakersfield twang, Montanese and Western Minnesotan. "Alabama Steve" Patton was the perfect choice.

Steve resisted the idea until I produced a sheet of slug facts he could use as a cheat sheet if the thrill of the race left him speechless. Besides a description of the race rules, the Slug Fact Sheet provided some race history and a description of the battle between slug right advocates and the race committee that threatened to end a venerable Ketchikan tradition.

Earlier in the summer, Ketchikan had been rocked by the announcement that the Society for the Prevention of Cruelty to Gastropods had threatened to interfere with the race if steps weren't taken to protect the slug racers. The race committee, hoping to sell the race TV rights to a satellite television network, took the SPGG very seriously, as well they should.

Few can forget the havoc the society caused in Paris when they investigated French snail-farming conditions. The world almost saw the end of escargot as we know it.

Bending to SPGG pressure, the race committee banned the use of salt shakers, vinegar squirt guns, or other slug motivating devices. Random slime testing was in place to discourage the use of Rapid Grow and other performance enhancing drugs. In addition, the committee agreed to have a slug veterinarian present at all time during the race.



Dan Branch

Broadcaster Branch interviews a would-be champion.

Gray clouds hung low over Ketchikan on race day. Over in the Methodist parking lot, two simply-painted plywood race tables awaited slug-bearing children. The twin gastropod coliseums had been carefully scrubbed clean of last year's slime.

By 11:00 a.m., the race crowd stretched from the Methodist church to a corn dog stand set up on the shadow of A. Fred Miller's Law Office. Tardy slug trainers squirmed through this press of humanity to plant their gastropods in the center of the race table before the starting bell.

After taking a quick look around the crowd for monitors from the Society For Prevention of Cruelty to Gastropods, Race Marshall Heidi Ekstrand mounted a frozen chicken box. There, towering above the assembled masses, she gravely set out the contest rules.

In the crowd a small boy dressed in a camouflage sweat shirt and slime-proof boots listened carefully to Ms. Ekstrand while absent-mindedly stroking his racing animal with a gloved hand. Something told me to watch this young man and the slug I would learn to call "Spot." The boy's eye glinted with the confidence of a past champion.

After instruction, Spot and his fellow racers were placed inside the starting circles occupying the middle of the racing tables. Satisfied that all antennae were inside the line, the race monitors dropped their slime rags to set the slug races on their way. Since the crush of the crowd prevented me from seeing the other racing table, I concentrated on Spot's heat.

Spot soon showed himself a true champion. The green and black brute followed a straight line toward his trainer and the fresh green pea that would be his reward for finishing the heat. A cream-colored banana slug named Slimy provided some chase but it was clearly Spot's race. His copious slime trail provided testament to his single-minded commitment to win.

Slimy the banana slug took second to Spot, while an undistinguished little racer named Eric came in a remote third. There were other slugs in the heat. Most, sadly to say never crossed the starting circle. Their owners, perhaps shattered by the humiliation of their slug's failures, ran off without removing the animals from the race table. A crisis was averted when Spot's owner used his gloved hand to move the abandoned racers to the relative safety of a nearby trash can.

After a slime break, the top three contenders from the other heat were moved over to the main table and the race for the blueberry began.

Starting strong, Spot looked to repeat his performance in the first heat. Suddenly, deadly sunlight flooded the race table. Having expended vast amounts of slime in his first effort the game racer was paralyzed by the drying rays. A chant went up in the crowd, "Spot!" "SPOT!" "SPOT!" Responding to this outpouring of love, the gallant little gastropod picked up his pride and headed for his trainer's waiting gloved hand.

On another part of the board two banana slugs, apparently unaffected by the sudden heat, battled for the win. Eric, the third-place finisher in the first heat, appeared to have the edge over Slimy, his cream colored competitor, until another cream slug set up a body block. "Foul" cried the knowledgeable fans.

Undeterred, Eric, the blocked invertebrate literally slimed over the body of the unethical racer. The race marshall, her attention temporary diverted by the sight of an illegal salt shaker on the race table, missed the violation and the contest continued.

In the end, Slimy beat out Eric by an antenna. Spot was rushed by the race doctor to hospital were he was bathed in soothing water and then allowed to feed on the neighbor's rhubarb plant. "He'll be back," Spot's brave trainer told the press. We all knew Spot's racing days were over. No slug has lived long enough to compete in more than one Blueberry race.

As the race crowds thinned out I took a minute to study the scene. Slime trails on the now-abandoned race tables glistened in the sun. Over by the reindeer sausage booth, reporters crowded around Slimy and his trainer. Eric and the other also-rans were returning to their gardens bitter with the knowledge that had come close to glory. For them I have written a little poem. I think it contains a useful message for everyone who has tried his/her/its best and failed. Even animals with backbones should find something for them in the thin lines.

Slime on, you valiant gastropods.
I take off my hat to you.
Forget defeat's bitter bile
Hardly sweet as dew.

Move on,
lay your eggs
before freezeup greets the dawn
The future of our slug race
On your soft shoulders rests upon.

Estate Planning Corner

More on stepping up tax basis

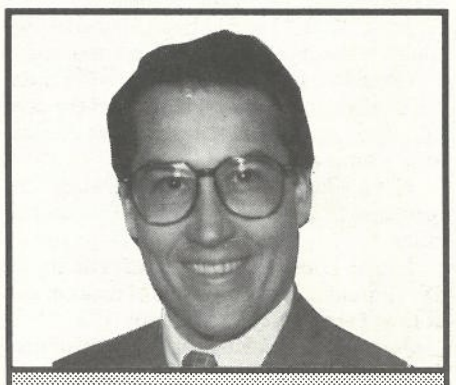
The concept of "basis" is used in determining gain or loss from the sale or other disposition of property.

If a client purchases property for $10,000, his basis in the property is $10,000 (IRC Sec. 1012). If the property is later sold for $100,000, the client's taxable gain is $90,000, which is the consideration received in excess of basis.

A so-called "stepped-up basis" to fair market value is obtained, in general, on a transfer at death (IRC Sec. 1014). In this area, community property is beneficial in that 100 percent of the property obtains a step-up in basis, whereas with joint tenancy and tenancy by the entirety property generally only 50 percent gets a step-up.

Consider a husband and wife who own land outside Alaska as joint tenants with right of survivorship. They purchased the land in 1982 for $10,000. The husband has recently died. At the time of his death, the fair market value of the land was $100,000.

Under such circumstances, the surviving spouse would obtain a basis of $55,000 in the land. This is because 50 percent of the land's value would be included in her husband's gross estate for federal estate tax purposes (IRC



Steven T. O'Hara

Sec. 2040 (b) (1) & 1014 (b) (9)). The surviving spouse's basis in the other half (which would not be included in her husband's gross estate) would remain at $5,000 — that is, half of the couple's original purchase price of $10,000.

So the surviving spouse's new basis in the land would be the original basis on "her" half (i.e., $5,000) plus the stepped-up basis in the half that is considered to have passed from her husband (i.e., $50,000), thus totaling $55,000.

If the surviving spouse then sells the land for $100,000, she would have $45,000 of gain, which could generate a 1993 federal income tax liability of $12,600 (IRC Sec. 1 (h)).

By contrast, suppose the same land was purchased by the couple with community property and that the couple maintained the character of the land as community property. Suppose further that before dying the husband executed a Will giving his half of the land to his wife, should she survive him.

Under such circumstances, because the land was held as community property, the surviving spouse would obtain a stepped-up basis over 100 percent of the land (IRC Sec. 1014 (b) (1) & (6)). So with a basis of $100,000, the surviving spouse could sell the land at absolutely no tax cost, a savings of $12,600 in income tax.

Under the recent case of *Gallenstein v. U.S.*, 975 F.2d 286 (6th Cir. 1992), it is possible to get a community-property-like result over non-community property bought by the decedent before 1977.

In *Gallenstein*, the court held that where a husband purchased land before 1977, with no contribution from his wife toward the purchase price, all of the land is included in the husband's gross estate upon his death. The court made this holding even though the land was held in joint tenancy with right of survivorship and the husband died after 1981 (i.e., the effective date of the otherwise current tax treatment of joint tenancy property).

As a result, the surviving spouse in *Gallenstein* received a stepped-up basis over 100 percent of the property, which meant for her that when she sold the property she had no gain on the sale and was entitled to an income tax refund of $115,152.

With *Gallenstein*, it is now important to ask married clients whether they have any property that was bought and placed in joint tenancy or tenancy by the entirety before 1977. If property is identified, the clients may wish to preserve or change the ownership of that property, depending on (1) what contribution each spouse has made to the purchase of the property and (2) which spouse is likely to die first.

Clients should note, in this connection, that the Internal Revenue Service will likely seek to overturn *Gallenstein* legislatively, so the treatment of joint tenants and tenants by the entirety would be the same regardless of when the interests were created.

Gallenstein further illustrates the rule that in estate planning, each of the client's assets should be analyzed from a local-law and tax standpoint. The issue is what opportunity or problem is inherent in the form of ownership of the asset.

Bar People

Brad Ambarian, formerly with the Law Offices of C.R. Baldwin, is now with Guess & Rudd.....**Pamela Babich** has married and changed her name to Pamela Anne Hartnell and is now with the A.G.'s office in Fairbanks.....**Brent Cole** is now a shareholder in the firm of Brena, McLaughlin & Cole, P.C.....**Norman Banfield** has relocated from Sun City, AZ to Irvine, CA. Mr. Banfield was admitted to the Alaska Bar in 1935.....**Woody Brooks** has temporarily relocated from Fairbanks to Vermont.....**Jeri Bidinger** has relocated to Aberdeen, Scotland.

Paul Cossman writes that he is taking a sabbatical from the practice of law for two years and will be out of the country.....**Michelle Boutin,** formerly with FDIC, is now with Bundy & Christianson.....**Gregory Fisher,** formerly with Hughes, Thorsness, is now with the D.A.'s office in Fairbanks.....**Peter Gamache** is the Section Chief of the Human Services section in the A.G.'s office.....**James Hopper** is now with the firm of Boyko & Flansburg.....The Law Offices of Luce & Hensley is now known as the **Law Offices of L. Ames Luce** as **Dan Hensley** has left the firm.....**James Jackson,** former hearing officer for APUC, is now with GCI.

Pamela Kelly is no longer with the firm (FKA Foley, Foley & Kelley) now known as Foley & Foley.....**Dennis Kelso** has relocated from Douglas to Berkeley, CA.....**Mauri Long,** formerly with the P.D.'s office, is now with Dillon & Findley in Anchorage.....**David Marquez,** formerly with Alyeska Pipeline, is now with ARCO Alaska.....**Norm Resnick,** formerly with FDIC, is now with the Statewide Office of Land Management, UAA.....**Mark Sokkappa,** formerly with ALSC in Juneau, has opened his own law office.....**David Snyder,** formerly with Torrisi & Snyder, is now with the P.D.'s office in Dillingham.

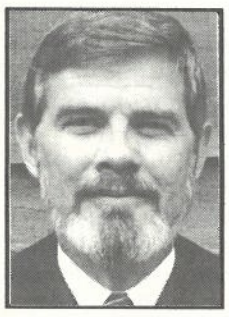
Allan Thielen has relocated from Kotzebue to Kodiak.....**Teresa Chenhall** and **Mary Treiber,** both formerly with the P.D.'s office in Ketchikan have opened the law firm of Chenhall & Treiber.....**Marcia Vandercook** has relocated to Ithaca, NY.....**Thomas Van Flein** has relocated from Fairbanks to Beverly Hills, CA.....**Jill Wittenbrader,** formerly with the Law Offices of James Gottstein, is now with Harold Green Law Offices.....**Lauri Adams,** formerly with the Sierra Legal Defense Fund in San Francisco, is now with the A.G.'s office, Anchorage.....**Harold Curran** has relocated to Anchorage, and is with the North Slope Borough in Barrow.....**Ruth (Bessie) O'Rourke** has relocated from Barrow to Anchorage.

Twelve apply for highest court's vacancy

continued from page 1

ute: it is the Supreme Court which must apply the standards of review." **Robert E. Congdon**: "I don't see it as the Court's role to 'define' this relationship; the Court can encourage the legislature to change law in the way it writes its decisions." **Cynthia M. Hora**: "The Court must maintain a balance of power so that neither branch oversteps its bounds."

2. What's your view of the developing dispute(s) between common and civil law and the trend of legislative and initiative processes to preempt this body of historic law?

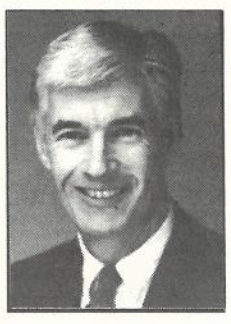


JAMES R. BLAIR, 54, Fairbanks. Alaska resident for 26 years. Practiced law for 26 years. University of Colorado. Partner, Bliss Riordon.

Most Supreme Court applicants specifically see the legislative and initiative process as appropriate means for society to participate in the democratic process and make its wishes heard in the making of the body of law. Other observations:

Karen L. Hunt: "This is a trend that is likely to continue, and increase in the future; the rapid movement of information has substantially decreased the amount of time that society is willing to wait for an answer to the issues. We are no longer in an environment that allows the deliberation of legislation and court decisions over time" to refine and resolve issues of public interest. Lottridge: "Common law is a development of uncodified law, and it's important to know the wishes of the public. (But when) initiatives are not entirely well thought-out, the courts must sort it out." **Peter A. Michalski**: "The Court as an institution can work to educate the public as well as the other branches about what actually happens in cases before the courts in Alaska." **Joseph J. Perkins Jr.** "These processes cannot be stopped by the courts; as a political matter, they're probably healthy, despite problems of construction. And the legislature should make it clear (to the public) if they're throwing the baby out with the bathwater." **Donna C. Willard:** "I disagree that initiatives preempt law in any substantive way. Common law, legislation, and initiatives are all legitimate avenues of developing law." Hora: "It's the realm of the legislative process (through legislative representation and the citizen initiative) to determine what the law is to be; this is the appropriate process of social change.

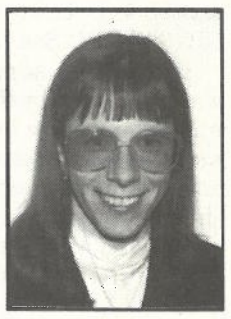
ROBERT E. CONGDON, 43, Anchorage. Alaska resident for 42 years. Practiced law for 11 years. Willamette University College of Law. Sole practitioner.



ROBERT L. EASTAUGH, 49, Anchorage. Alaska resident for 47 years. Practiced law for 25 years. University of Michigan Law School. Shareholder, Delaney, Wiles, Hayes, Reitman.

3. What's the Court's role in preserving the professionalism and level of respect within the Bar?

James R. Blair: "The buck stops there. The Supreme Court is the ultimate determining body of the canons of ethics, who stays, and who leaves the profession; its enforcement of the canons of ethics ultimately should improve the profession and respect for the Bar." **William K. Jermain**: "The Court must take a leadership role (by example) and see that courts are responsive to the public. Impracticality of the law (in its decisions) will cause a loss of respect for the profession and the judiciary." Michalski: "Responsibility lies pirmarily in the trial courts, simply because it is there in which most of the bar is regularly practicing."



CYNTHIA M. HORA, 37, Anchorage. Alaska resident for 11 years. Practiced law for 12 years. Harvard Law School. Assistant attorney general.

Chief Justice Moore's initiatives to create Inns of Court with the young lawyers section was commended by a number of the Court applicants, and Hunt said courts should be vigilent in their language choices in opinions, to avoid characterizations of lower courts and litigating attorneys in a derogatory way (such as "absurd"). "This conveys an impression to the public that our legal system is incompetent and undermines respect for and public confidence in the process."

KAREN L. HUNT, 54, Anchorage. Alaska resident for 20 years. Practiced law for 20 years. University of Southern California. Superior Court judge.

4. What's the Court's role in promoting greater access to the courts & judicial process for all classes of litigants?

Several candidates cited barriers to equal access that are likely beyond the Court's role or jurisdiction, except to the extent that justices can participate in public education dialog (Congdon, Jermain). "The cost of obtaining representation," as Michalski put it, is among these barriers. Hunt sees "ease, price and speed of delivery of justice" as critical factors in the access issue.

Eastaugh: "There are several main problems (relating to equal access), and whether the Supreme Court has direct a direct role in these is open to question: Delay (chills interest in the process), expense of litigation, competency of counsel,

THOMAS M. JAHNKE, 42, Ketchikan. Alaska resident for 20 years. Practiced law for 17 years. Boston University. Superior Court judge.

and uncertainty about substantive law, which is one of the few things the Court can do something about by writing clear and succinct decisions." Willard: "The Court must ensure that the cost of litigation be reduced. Some examples: The tremendous time & cost of discovery. Courts must set guidelines and parameters on the question of competency, so that 'competent' representation does not mean the most expensive brief in the world. We as attorneys are spending too much time and effort to ensure that we are not sued for malpractice."

Other factors cited by the applicants:

—Construction of court procedural rules, establishment of reasonable court fees: Eastaugh, Hunt, Blair, Perkins, Jermain, Hora.

—Encouraging alternative means of dispute resolution: Lottridge, Perkins.

5. What do you see as the Court's strengths in the past 5 years?

Blair: Court has not been afraid to face tough issues; intellectually competent.

Congdon: Chief Justice's Inns of Court.

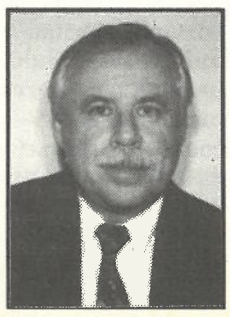
Eastaugh: Intellectually rigorous; adapting principled rule of law to Alaska as a young state.

Hora: Continuity of membership; improvement of civil, appellate, criminal rules.

Hunt: Has remained constant in its development & refinement of most areas of law; receptivity to MO&Js.

Jermain: Fostering higher level of professionalism at trial court level; extremely competent, responsive.

Lottridge: Strong effort to streamline the judicial process to move cases through the process sooner.

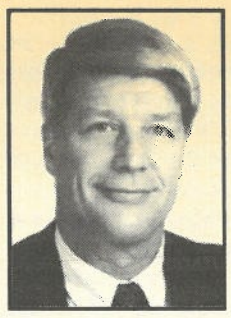


WILLIAM K. JERMAIN, 54, Anchorage. Alaska resident for 26 years. Practiced law for 24 years. University of Tennessee. Shareholder, Jermain, Dunnagan & Owens.

Michalski: Commitment to providing statewide services; modifying and improving court rules; deeply commited to providing justice to rural as well as urban areas.

Perkins: Stability; thoughtful in revisions to rules; improving profession and practice of law.

Willard: The high regard in which the Court is held; unlike other states; no taint of favoritism or impropriety has touched the Court; hard-working and timelier than most jurisdictions.



DOUGLAS D. LOTTRIDGE, 55, Anchorage. Alaska resident for 24 years. Practiced law for 21 years. University of California, Berkeley. Assistant attorney general.

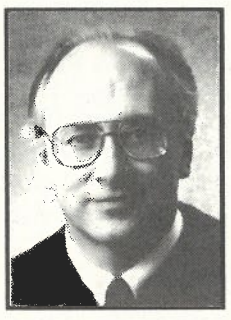
6. What do you see as its weaknesses?

None of the applicants was critical of the current Court's performance, but did perceive areas for improvement.

Willard: Its almost complete failure to accord recognition to the doctrine of *stare decisis*: Once a decision is rendered, it should be part of a continuity of law; tendency at all levels of judiciary to be removed from the realities of practice and its financial and emotional cost to the public.

Perkins: Justices/judges are removed from day-to-day practice of law.

Michalski: Difficulty (of bar) in keeping track of (effective and necessary) rules changes; slow transition to age of computers.



PETER A. MICHALSKI, 47, Anchorage. Alaska resident for 22 years. Practiced law for 22 years. University of Minnesota Law School. Superior Court judge.

Lottridge: Decisions occasionally are disassociated with practical effect of decision in society.

Jermain: Needs to be more expression of certainty in law—more than ruling something is "wrong" without direction on how to do it "right."

Hunt: Lack of certainty in family law issues (not the only court in U.S. in this position); occasional rules that have effect of "case management" of trial courts, attorneys.

Hora: The delay of cases moving through the appellate system.

JOSEPH J. PERKINS, Jr., 39, Anchorage. Alaska resident for 14 years. Practiced law for 14 years. University of Denver College of Law. Shareholder, Guess & Rudd.

Eastaugh: External observers perceive that some opinions are not always limited to a focused, irreducible holding that can clearly stand future test of time.

Congdon: Tendency in some cases to act as fact-finder & resolve factual problem, rather than give guidance to attorneys and constitutancies that must deal with issue of law thereafter.

Blair: Too long to reach decision; too many reversals; lengthy process in children's proceedings, particularly where custody is a factor.

6. Why did you apply for the position of Alaska Supreme Court Justice?

Virtually all of the candidates said they are attracted to the intellectual challenge of service in the Court. They all believe, as well, that their experience will be an asset to the judicial process at its highest level, and that they can made a contribution. The candidates described some of this experience in their profession, as well:

HUGH G. (JERRY) WADE, 59, Anchorage. Alaska resident for 59 years. Practiced law for 34 years. Catholic University of America. Wade & De Young.

Blair: 13 years in the judiciary, *pro tem* service to Court.

Congdon: Experience in representing "small" clients in all facets of practice, at the grassroots level where the effects of Court decisions are felt.

DONNA C. WILLARD, 49, Anchorage. Alaska resident for 25 years. Practiced law for 23 years. University of Oregon. Sole practitioner. Member, American Bar Association Board of Delegates.

Eastaugh: A tradition of service to the law in his family; long interest in appellate law.

Hora: Strong interest in research and writing appellate briefs; more perspective of younger generation than current court; experience in new criminal code.

Hunt: As trial court judge past 10 years, has maintained strong interest in achieving worthwhile consensus; experience in more than 60 administrative appeal decisions. Appointed to Superior Court in 1984 by Gov. Bill Sheffield.

Jahnke: Appointed to Superior Court judgeship by Gov. Bill Sheffield, 1985. Understands state government through service as assistant attorney general for government affairs (1979-85). Served as law clerk to Judges Thomas B. Stewart and Allen T. Compton. Known for respect he accords to the bar and jurors in judicial process, including solicitation of process evaluation from jurors after trials.

Jermain: Varied practice statewide:

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Roger Smith reprimanded for misleading counsel; Two lawyers disciplined for violating ethics opinions

Attorney Roger W. Smith represented Client in a divorce matter. After Mr. Smith withdrew from the representation, Client filed a grievance against Mr. Smith based on neglect. During the course of investigating the neglect charge, allegations surfaced that Mr. Smith had had a sexual relationship with Client during the course of the representation. Mr. Smith categorically denied any sexual relationship, and further stated that, with the exception of one meeting outside the office, he had "at no time ... escorted [Client] to any function as a date."

Notwithstanding the latter statement, Mr. Smith later admitted that he had accompanied Client to a club on at least two occasions, and that he had also accompanied her to lunch, to dinner, and to a movie. Further, he admitted that Client has been to his home on at least one occasion, though this might have been business, as he did occasionally have clients in his home on business matters. Mr. Smith admitted that is was possible that on one or more of the occasions when he saw Client outside the office he has kissed her on the mouth, hugged her, placed his arm around her or held her hand.

After full investigation, bar counsel found insufficient evidence to support the "sexual-relations-with-client" charge. However, bar counsel concluded that Mr. Smith, in denying that he had ever accompanied Client to a function as a "date," had knowingly made a misleading statement to bar counsel in violation of Alaska Bar Rule 15(a)(3). Mr. Smith agreed to stipulate to a violation of Bar Rule 15(a)(3) and to accept a public reprimand. Mr. Smith was also reprimanded for violating of Disciplinary Rule 6-101(A)(3) (neglect of legal matter) by ceasing work on Client's case in the face of a fee dispute without formally seeking to withdraw as counsel pursuant to Disciplinary Rule 2-110 and Alaska Civil Rule 81(d).

The Disciplinary Board approved the stipulation to public reprimand.

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Upon initial retention in a divorce matter, Attorney X explained to Client that failure to pay attorneys fees would result in Attorney X's withdrawal from the case. Attorney X obtained from Client, at the outset of the representation, a pre-executed consent to withdraw, which was to be used in the event of non-payment of fees. The consent was signed, but not dated, by client. Attorney X and Client had a "falling out" during the representation, and Client discharged Attorney X. Because of illness, however, Attorney X did not immediately file a motion to withdraw from the court proceedings pursuant to Civil Rule 81. Accordingly, Attorney X remained counsel of record for several more weeks. In the meantime, Client negotiated a settlement on her own in the divorce case.

A hearing was scheduled before Master to consider the uncontested divorce. Attorney X was notified of the hearing, as she remained counsel of record. Attorney X telephoned Client to verify her consent to withdrawal, and thereafter Attorney decided to appear at the hearing for the sole purpose of withdrawing from the representation. She brought along the pre-executed consent form. After asking Client in open court whether she had "signed the consent to withdraw last summer" (and receiving an affirmative response from Client), Attorney X entered the hearing date in the previously-blank "date" space beside Client's signature, and submitted the consent document to the court without further comment. Upon further inquiry, the Master determined that Attorney X had improperly entered the hearing date on a consent document which had actually been signed many months before. Attorney X did not explain the alteration to the client or to the court in advance, and she obtained neither's consent before submitting the document with the altered date. Concerned that Attorney X had materially misled the court by the alteration of the consent form, the Master filed this grievance.

Bar counsel concluded, first, that Attorney X had clearly violated Alaska Ethics Opinion 84-10, which prohibits the obtaining of signed consents to withdraw prior to the time of actual withdrawal. In addition, bar counsel concluded that Attorney X's alteration of the consent document had made that document misleading on its face. However, given the fact that Attorney X had solicited the *actual* date of signing from Client before the document was submitted to the court, it was clear that there was no specific intent to deceive the court as to the signing date. Further, given Client's undisputed desire to discontinue the relationship, bar counsel found no injury or potential injury as a result of the misconduct. Accordingly, bar counsel concluded that Attorney X's conduct amounted to no more than a negligent violation of DR 6-101(A)(3).

With the approval of one Area Division Member, bar counsel issued a written private admonition for violations of Ethics Opinion 84-10 and DR 6-101(A)(3). Attorney X accepted the admonition,

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Client moved Outside and failed to pay Attorney X's fees. The attorney referred the delinquent account to a collection service. He specifically authorized the service to list Client's account with a credit reporting agency. The credit report may have been a factor in delaying Client's ability to obtain financing for a new house.

Alaska Ethics Opinion 86-3 prohibits disclosure of a client's name and delinquent fee to a credit reporting service; such information is confidential under DR 4-101 and primarily serves to "sully the client's credit rating." Bar Counsel found a violation of this ethics opinion. Bar Rule 15(a) provides that violation of an ethics opinion is grounds for discipline. Attorney X was unaware of the opinion, and Bar Counsel found that the violation was merely negligent. Client suffered no permanent injury, Attorney X cooperated with the disciplinary process, and he had no prior disciplinary record. Bar Counsel requested and received approval to issue a written private admonition, which the lawyer accepted in writing.

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Attorney Y wrote a letter which Attorney X perceived as a personal attack on his integrity (it implied that Attorney X had filed "false documents" in a litigation matter). A heated telephone conversation ensued. During the conversation, "[Attorney X] used the word 'fuck' at least a dozen times. He referred to [Attorney Y] as a 'fucking shit.' He said the way [Attorney Y] practiced law is 'shit.' He said that [Attorney X had] better 'get off [his] fucking fat ass' because [Attorney Y] was 'coming at [him].'" Attorney Y grieved Attorney X based on the offensive conduct. Attorney X did not dispute making the statements in question.

Bar counsel concluded that Attorney X violated Alaska Code of Professional Responsibility, Disciplinary Rule 1-102(A)(5) (conduct prejudicial to the administration of justice), Disciplinary Rule 1-102(A)(6) (conduct adversely reflecting on fitness to practice), and Disciplinary Rule 7-102(A)(1)(lawyer shall not take action on behalf of his client "when he knows or it is obvious that such action would serve merely to harass or maliciously injure another.") Although Attorney X's conduct preceded the Supreme Court's adoption of the Rules of Professional Conduct, bar counsel noted that the conduct would also violate ARPC 4.4, which precludes a lawyer, in representing a client, from "us[ing] means that have no substantial purpose other than to embarrass, delay, or burden a third person."

Attorney X had no prior history of discipline imposed, and the statements were made without reflection in a heated telephone conversation. With the approval of one member of the Area Discipline Committee, Attorney X was issued a written private admonition, which was accepted by Attorney X.

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Attorney X represented Client in a criminal appeal in a military tribunal. Client was also represented by military counsel. Attorney X failed, repeatedly and without excuse, to return telephone calls from Client, Client's military counsel and other agents of Client during a period in which counsel faced an impending deadline for the filing of an appellate brief. The calls made to Attorney X involved legitimate requests for information and consultation directly related to protecting Client's interests in the appellate matter.

Messages by military counsel, Client and others that the calls were "urgent" and that the calls should be returned "immediately" went unheeded by Attorney X, resulting in unnecessary delay.

Bar counsel concluded that Attorney X violated Alaska Code of Professional Responsibility, Disciplinary Rule 6-101(A)(3), which prohibits an attorney from "neglect[ing] a legal matter entrusted to him." In aggravation, Attorney X had substantial experience in the practice of law. In mitigation, Attorney X's conduct did not result in significant harm to the client; his actions were not motivated by selfishness or dishonesty; he experienced other sanctions in the form of a significant reduction in attorneys fees in fee arbitration; and he was at all times candid and cooperative with bar counsel in this matter.

Attorney X received, and accepted, a written private admonition for his conduct.

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Attorney X represented Client, a criminal defendant.

During a recess in Trooper's testimony at trial, when the parties and spectators were present in court but the judge and jury were not, Trooper and Attorney X had a conversation during which the attorney called Trooper a "fucking liar." The language was overheard by spectators and the incident was reported in the local press. Bar Counsel found that this remark tended to reduce respect for the legal profession and the justice system, and also amounted to harassment. Bar Counsel requested and received approval to impose a written private admonition, which Attorney X accepted.

Twelve apply

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public, private, individual, corporate, institutional clients with state, federal appellate work.

Lottridge: Degrees in math, computer programming, teaching. Analytical skills in case ananalysis, strong communications skills.

Michalski: Former chief of the office of special prosecution & appeals, strong interest in appellate focus. Appointed as Superior Court judge in 1985 by Gov. Bill Sheffield.

Perkins: Strong natural resources focus and understanding of role resources play in Alaska's future.

Wade: In practice for 34 years. "A lawyer's lawyer," representing diverse range of cases from criminal, commercial and real estate law to landmark public law, bankruptcies and representation of attorneys. "I gave been involved in litigation about civil rights, fishing rights, mining claims, wrongful terminations, wage and hour problems, workers compensation, franchises & licenses, and the right of kids to go to school," says Wade biography.

Willard: Interest since law school in research, analysis, and writing of substantive briefs. Board of Governors, American Bar Association.

—Sally J. Suddock

The Alaska Bar Association and the Anchorage Bar Association
invite you to an Open House
for Justice Edmond W. Burke, November 30, 1993
in the Supreme Court Hearing Room,
5th floor of the Boney Momorial Courthouse,
1:00p.m. - 4:30p.m.

You are cordially invited to attend a celebration in honor of
Justice Edmond W. Burke
Alaska Supreme Court
who is retiring from the bench after twenty-three years of service
on December 1, 1993
at the Hotel Captain Cook Ballroom

No Host Bar - 6:00pm • Dinner served at 7:00pm

$35.00 per person — Steak/Halibut combination
(includes gift)

R.S.V.P. by calling 264-0625 No later than November 15, 1993

Give it a try:

Mediate before you litigate: it works

By Paul M. Lisnek

Since more than 90 percent of civil cases settle before trial, it is clear that lawyers recognize litigation to verdict as less that the best road to resolution. In days when lawyers are urged to be more civil with each other and the system, we witness an increasing use of mediation.

This process utilizes the skills of a neutral third party who intervenes in a dispute to assist the parties in finding their own resolution. Mediators do not make findings of fact or law, as does a judge and arbitrator. Rather, they facilitate an open discussion between the parties about their own needs and interests. The process relies on active participation from the parties and their lawyers.

While alternative dispute resolution tools are well-tried alternatives to arguing in court, attorneys still do not use the process of mediation readily. Perhaps lawyer training emphasizes adversarial tactics over mutual resolution, but the more likely explanation lies in attorney inexperience and unfamiliarity with the process. In addition, mediation's relative youth compared to other forms of alternative dispute resolution means that few people understand its benefits or know how the process works.

The benefits of mediation are many:

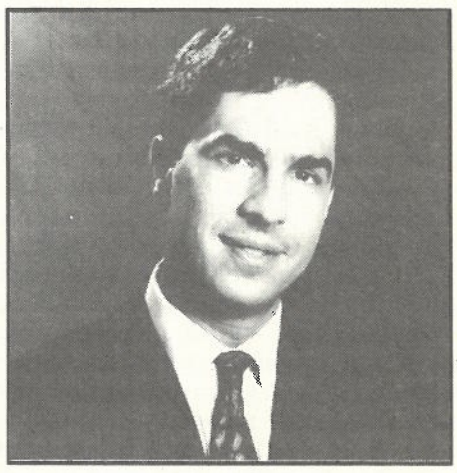
• It is less time consuming that litigation. Court backlogs suggest that even people who can afford the high cost of litigation wait years for their day in court. A mediation session can be arranged quickly and produce resolution in hours, and most often, in less than a day.

• It is much less expensive than litigation.

• It includes exploring alternatives. Unlike a "fixed pie" distribution that litigation produces, mediation focuses on flexible solutions; it "expands the pie for opportunity."

• It addresses the needs of all the parties. By definition, a consensual agreement reached through mediation will reflect the parties' needs. The same cannot be said for verdicts at trial.

• It improves communication between all the parties. Litigation fosters an adversarial environment that is



Paul M. Lisnek

not conducive to effective communication. A trained professional mediator interrupts this escalation and replaces it with assistance to communicate.

• It increase the probability of compliance. Disagreement as to the terms of an imposed settlement or judgment reduces the probability of compliance. Because a mediated solution is an agreed-upon product emerging from the parties themselves, it is more likely to be followed.

In general, mediation will move through five stages. During the first stage, the mediator establishes the guidelines and tone for the session. These rules promote fairness and equality among the parties and highlight the cooperative nature of the session. The rules might be as simple as not interrupting while other are speaking, and as structural as when breaks are scheduled and where the parties should sit.

The parties give their version of the underlying facts and the mediator listens, knowing that the truth likely lies somewhere in between the competing accounts. The mediator identifies areas of disagreement and works to develop trust between the parties and the mediator. One tool unique to mediation in information-gathering and trust-building is the caucus meeting. In a caucus, the mediator meets privately with each party to explore and encourage acceptance of the other party's perspective. In addition, candid and realistic perspectives are shared in this private confidential setting, which is provided equally to all parties.

The third stage is to develop settlement options. Parties discuss their positions and suggest alternatives seeking to have all of their needs met. They brainstorm for possible solutions that satisfy stated and unstated needs. The mediator uses information gathered in caucus, while maintaining confidentiality, as the process proceeds.

Deciding on the best option is the fourth stage of the process. The parties focus on the alternatives which best satisfy each other's interest at the least cost to all parties. Having built a foundation of trust and good faith, here the parties negotiate, compromise and trade off concessions to arrive at a tentative agreement. The mediator encourages the parties and their lawyers to formulate an agreement and ensures that everyone is heard.

Lastly, the mediator assists parties and their lawyers to formalize the agreement, memorializing the list of options to which both parties agreed. Most often, the lawyers write the agreement in language that everyone understands, avoiding legalese and language barriers inevitably found in litigated resolutions.

Although mediation is non-adversarial, attorneys play an important role as counsel. First, they advise their client as to the viability of litigation. Once most clients are made aware of the costs and delays of a litigated solution, they are more dedicated to valuable participation in the mediation. In addition, lawyers ensure that any terms agreed to are equitable to his client and are drafted so as to conform to the intent and reasonable expectations of the client.

Not every dispute is appropriate for mediation although most can be resolved through the process. There are times when litigation is needed to resolve major policy questions or to establish precedent. However, these cases are few in number. When there is flexibility in the solution, and where the participants take the process seriously, then mediation is most likely going to be successful.

If you have not yet tried mediation, you can count on a pleasant surprise. If you have participated in mediation, then help spread the word, because its well-deserved day is on its way.

Readers are encouraged to write Dr. Lisnek with specific topics, challenges or difficulties they have encountered and which they wish to have him address. They are also encouraged to include short anecdotes and stories that reflect communication concerns of lawyers for possible inclusion in future columns. Letters should be directed to Dr. Lisnek at 612 N. Michigan Ave. Suite 217; Chicago, Ill. 60611, or in care of the Chicago Daily Law Bulletin. If you are interested in joining the Alternative Dispute Resolution Section of the Alaska Bar Association, please call the Bar Office at 907-272-7469.

Proposed Bar Rule 64

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would not need as many tapes, because a single tape would be viewed by many members at various times. At first glance, this would seem the most logical of the choices.

This proposal is not without its problems, however. Lawyers are notorious procrastinators. This tendency is perhaps inherent in the way we work. We face deadlines constantly. Oftentimes the work that has the highest priority is the work that has the most current deadline. Many will not worry about the deadline to view the Model Rules video until the month or two before the deadline to comply with the rule. Then, when the lawyer gets the tape, the tendency may not be to view it immediately, but to wait until the last day before it should be returned before actually viewing it. Worse yet, some lawyers will not return the tape on time, creating an even greater bottleneck.

Have you ever tried to rent new releases at the local video store? Have you ever paid a late fee for not returning a rented video on time?

Bar Association staff already spends a significant amount of time tracking down late videos. There is no reason to believe that the situation will improve with this particular video. The increased burden on staff time and the need to keep sufficient copies of the tapes available for members who will want to rent them in the waning hours of the compliance period will reduce the cost savings of this alternative. Our projection is that the cost per member of this alternative is $18.77, which is $.52 less the cost of mailing the tapes to firms and $1.77 per member less than the cost of mailing the tapes to individuals.

Conclusion

Please take a few minutes to review Proposed Bar Rule 64. Will a mandatory refresher course in ethics help to reduce the number of bar grievances that are received? Will passage of the rule help to improve the image of lawyers in Alaska? If the rule is passed, should the Bar Association charge for the course? How much? Should we make a profit on the sale of the tapes? Please take an extra few minutes to contact the Bar Association, or your local member of the Board of Governors, to discuss your thoughts on this proposed rule.

— J. John Franich

The Public Laws

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out. That presumption is that all attorneys will be forthright and conduct the affairs of their clients in good faith and in furtherance of the interests of justice. The proposal includes additional opportunities for the court to penalize attorneys and their clients if they are not. The greatest question in my mind is whether these penalties will actually be used.

My fear is that the new rules may further penalize the conscientious practitioner without improving the practice of those who push the system to its limits of tolerance, and play upon the natural compassion of judges and the disinclination to mete out penalties where minor infractions of rules may occur. Will the penalties under the new proposals really provide a greater motivation than Rule 11 or Rule 37 sanctions for the recalcitrant practitioner? I hope so.