Have a wonderful holiday

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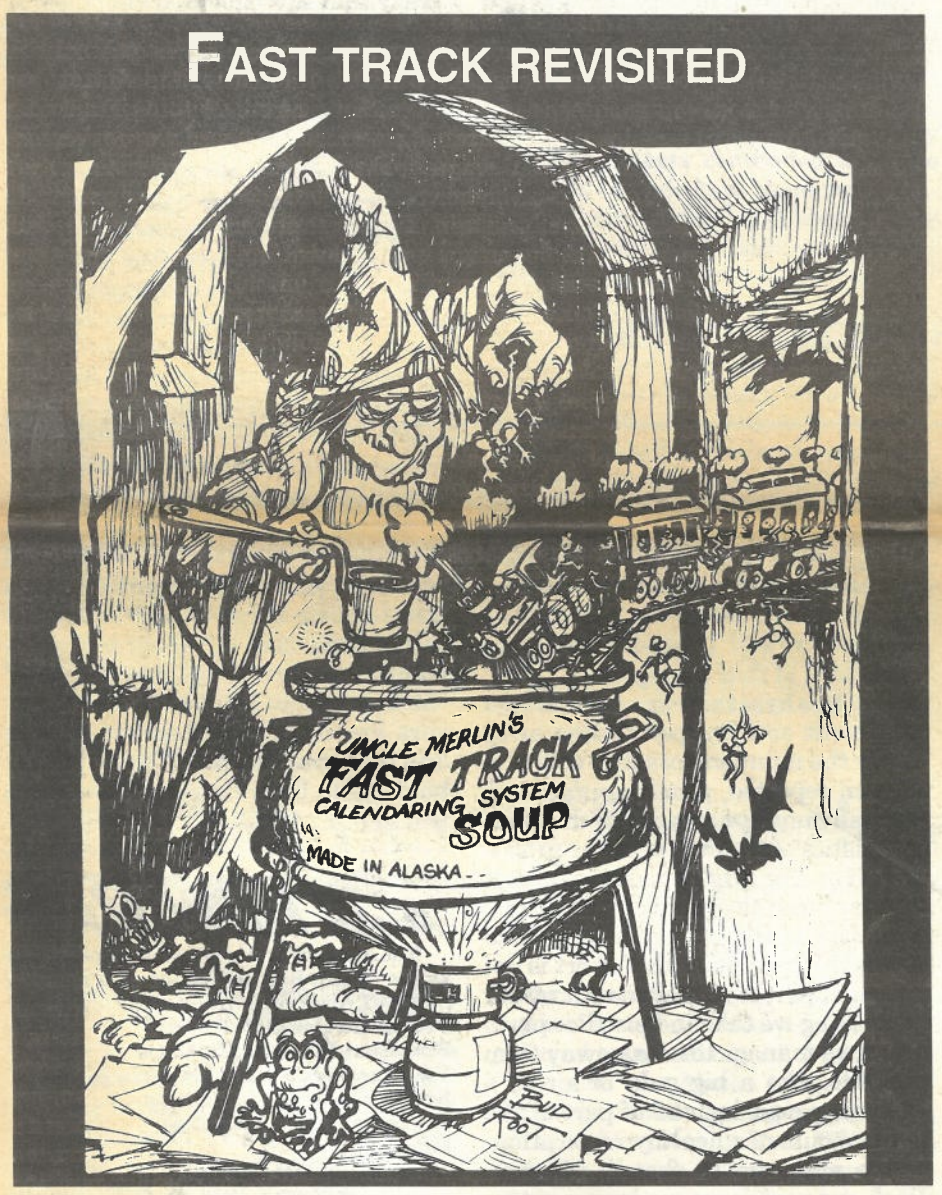
The Alaska BAR RAG

VOLUME 18, NO. 6 — *Dignitas, semper dignitas* — NOVEMBER-DECEMBER, 1994

Winds of change come to courts



By Karl S. Johnstone

Many members of the Bar Association will recall when Chief Justice Daniel A. Moore, Jr. appointed a special committee to investigate the Alaska Rules of Civil Procedure. The committee was to make recommendations to the Civil Rules Committee and the Supreme Court to amend existing rules or propose new rules for the purpose of eliminating unnecessary and costly discovery, speeding up the litigation process, and making the courts more accessible.

As a result of the efforts of the special committee and the Civil Rules Committee, the Alaska Supreme Court has adopted significant changes to the Alaska Rules of Civil Procedure which, among other things, provide for mandatory disclosure, formal discovery restrictions, and mandatory scheduling conferences of civil cases. These changes are scheduled to go in to effect in July, 1995.

Now the Anchorage Trial Courts, under the direction of the Presiding Judge, are considering expanding ARCP 16.1 (fast track) application to cases which have previously been exempted.

It is understood that there are some types of cases, because of their complexity or the length of time needed for trial, that will have to be exempted from strict Rule 16.1 application. The burden, however, would be on the party seeking relief to show good cause for the exemption and, if successful in these efforts, parties should expect to be placed on a tracking schedule of some sort providing for deadlines and ultimately a trial date.

In the past, the pace of non-fast track litigation has been dictated by the parties while the pace of fast track cases has been dictated by the rule. Current thinking in the vast majority of courts within the country is to provide for court management of cases once filed, which provides for a speedier and more economical resolution.

In addition to expanding fast track case characterizations in Superior Court, under consideration is a requirement that all civil cases filed in District court (excepting small claims and FEDs) comply with Rule 16.1

A review of District Court civil cases reflects that a higher percentage of them have older filing dates than civil cases filed in Superior Court. Presently, the pace of District Court civil litigation is dictated by the parties and that pace is slow. As a result there are very large numbers of stale cases with no tracking mechanism to identify them. Rule 16.1 would provide such a mechanism for new cases and would prevent them from becoming stale.

See related orders, page 16.

Yet another change in the wind will likely be found in the family court area. By the time this column is published, we may have a procedure in place requiring parties with children who wish to file for a dissolution to view a very professionally done video entitled "Listen to the Children." The purpose of this will be to give the parties information about the process they are about to embark upon and provide insight on the effect which the process may have on their children. This video will be shown by court system employees or other qualified individuals and will be required prior to filing a dissolution petition. This decision has been made by a committee consisting of the Presiding Judge of the Third Judicial District, a member and a staff employee of the Judicial Council, together with representatives from the family court, and others including a mediation consultant and attorneys utilizing family court on a regular basis. The initial project will

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Legal services must focus on family law, domestic violence

By Joyce Weaver Johnson

Faced with radical funding cuts, Alaska Legal Services Corp. will be letting go staff and closing three of 10 offices.

The changes, effective at the close of 1994, also mean a narrowing of ALSC's focus. More of its caseload than ever will have to be in family law, said executive director Robert Hickerson. Of those cases, a greater proportion than ever will involve domestic violence.

ALSC, which has never had enough resources to serve all eligible clients, routinely evaluates prospective work based partly on how urgent it is; thus the focus on family law and especially family cases involving violence, Hickerson said. The agency's current caseload is about 40 percent family law.

Another 20 percent involves housing, and the remaining 20 percent public entitlements, wills and probate, limited entry fishing permits, Native allotments, etc. This breakdown varies depending on the locale, Hickerson said.

Hickerson spoke after his board had met in late September to decide how to cope with an expected budget shortfall of $700,000. The most visible decisions will lead to the closing of ALSC's Dillingham, Kodiak and Nome offices, and elimination of three of 23 attorneys and six of 21 staff members statewide. Less visible will be the three percent salary reductions and reduced insurance benefits for all employees.

These were sad decisions for the

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President's Column

Mentors — past and future

I just attended the swearing-in of the Fairbanks contingent of newly admitted attorneys, which included the two newest additions to my own firm. The first thing I noticed was the youthful enthusiasm of these new attorneys, and I tried to recall back through the dozen years since my own swearing-in ceremony. Frankly, the only thing I could remember about it was standing up and repeating the attorney's oath. I wonder if any of the unremembered speakers gave me any good advice.

Ralph Beistline has a good technique for creating a swearing-in ceremony that people will remember. (I'm pretty sure his brilliance is genetic from his mother's side of the family.) He sets up a VCR with a clip from Bambi, and, at the conclusion of his remarks, plays the scene where Thumper answers his mother's question about what his father told him — "if you can't say something nice. . .

Daniel Winfree

don't say anything at all." If new attorneys remember that line alone — which, given the context, they should — it will serve them well.

I then thought about the (relatively) long and winding road I've travelled since I was admitted to the Bar. I hope all the new attorneys are as lucky as I was to have initially worked with good, competent attorneys who cared about the quality of their service to clients and about their participation in our judicial system. When I was learning the ropes, people took time to teach, to counsel, to scold on those very few occasions when it was warranted, and to help me be the best attorney I could be, given what I had to work with. Now it's my turn to be the teacher, counselor, scolder and helper.

What a change of priority this will be. Sure, it's all part and parcel of running a business and ensuring that clients are served as well as possible. But there's more to it than that it's kind of like having children and making the commitment to be the best parent you can be, in spite of being too busy at the office. (On the other hand, I certainly hope dealing with two newly admitted attorneys will be easier than dealing with my nine year old daughter and three year old son.) If I don't take the time to teach, counsel, scald and help, who will?

I have always been available to talk to newer attorneys about their cases or answer questions about the practice of law. That was a commitment easy to fulfill, and the occasional beer(s) that went with it wasn't so bad, either. But now I'm going the full route — I hereby pledge to be the best mentor to our two new attorneys that I possibly can, given, of course, what I have to work with. 1: want them to be able to look back on their firs~ decade as an attorney as favorably as I did. (Check in with us in 2004 and see how it went.)

By the way, how many younger attorneys have you taught, counseled, scolded, and helped? Stop and think. Did you do all you could to help a younger attorney along the way? If so, kudos to you — that's what it takes to keep the Bar alive and well. If not, isn't it time you started, too? If you need help being mentor, we will be putting on a mentoring program at the May, 1995, Convention in Fairbanks — please attend. If you can't attend the convention but would like to participate in a mentoring CLE, call Barbara Armstrong at the par office and let your wishes be known. A big response will surely be accommodated.

I have to go now. It's snowing like crazy and my snowmachines are all serviced and ready to roll. I need some play time to prepare for my new mentoring responsibilities.

Editor's Column

Allow me to introduce lawyers in sports briefs

Like most of you, I went to law school because it seemed the most natural extension available of the mindless bonhomie of college athletics.

The law school had the best intramural sports teams, regularly rolling over the budding doctors, engineers, and architects with a mixture of physical skill and verbal artillery that left the audience swooning and the lawyers drunk with sadistic power.

In track, the med students were too tired to listen to the starter's commands and would respond to the gun by feeling around slowly in the cinders for their glasses, muttering "Rounds again?" while the law students ran victory laps and chanted "Torts, torts, we're bad sports!"

The dental school hockey team had the most realistic upper plates in the league but a defense that was permeable as fresh snow, and they had a succession of wings who were hooked on nitrous oxide and did nothing but skate in circles and giggle at each other while the action flashed by them.

The engineers had the thickest playbook of any touch-football team that ever took to the gridiron, but you could always fend off an impending touch by shouting "Square root of 37?" and letting nature take its course.

To a 22 -year-old layman, the law sounded like a robustly physical career, full of races to the court house, uses that sprang and vaulted, covenants that ran, and motions to strike and to quash. I wanted a piece of that action.

My impression of law school as a sportsman's paradise was confirmed in my first-year legal writing course. Our maiden assignment was to evaluate the causes of action available to the holder of a season basketball ticket whose own personal demigod had been feloniously assaulted by an opposing player and put out of action for the season. At the same time, in an ex-

Peter Maassen

ample of life poorly imitating academia, I was learning to play squash, having been railroaded into it by a student whose former opponent's ankle I had broken by clumsily (but nonfeloniously) landing on it in a basketball scrum.

In my second year of law school I learned water polo (a wimpy kind with innertubes) and perfected my ping-pong game. These were in addition to my usual sports activities, which mostly involved running. Like most law schools, mine had its Race Ipsa Loquitur or Race Judicata or Race Gestae to separate the sheep from the even slower sheep. I believe I took some classes, too, though none come immediately to mind.

So it was with a sense of profoundly inevitable confirmation that I moved to Alaska and found the lawyers here to be among the most sports-minded people on earth, and I don't mean what they watch on television.

The Alaskan legal community is awash with skiers, mountain-climbers, dog-mushers, weight-lifters, swimmers, and bicyclists. Law firms regularly field teams in softball, basketball, and volleyball. There are truly respectable hockey and rugby teams made up predominantly of members of the bar, many of whom are otherwise really nice people. Our bench boasts a former discus champion and arguably two of the fastest appellate-court judges in the nation. The only sports which are poorly represented by our membership are jai-alai and aquabatics, and I stand ready to be disabused of that perception.

But this hyperkinetic undercurrent of athletic activity, percolating away below the mundane practice of law, is seldom reported, poorly appreciated, virtually untouted as one of the characteristics of our own peculiar profession. The *Bar Rag's* occasional article on bear hunting or canoeing the Class V waters of the Upper Ganges reinforces the perception that sport is not a regular part of what we do but rather something we take in episodic spurts when we manage to break away from real life, like a big gulp of air to a drowning man instead of part of the ins and outs of a healthy respiration.

We now aim to change all that. With our next issue we inaugurate a regular section entitled "Lawyers in Sports Briefs" (with a nod to Scott Brandt-Erichsen for the tasteless imagery of the title) , in which we will report, in brief, the athletic achievements of members of the Alaska Bar. Anticipating that few of you are self-aggrandizing enough to report on yourselves, we invite all readers to snitch on each other. Submissions from the historically underreported First, Second, and Fourth Judicial Districts are particularly encouraged, although submissions from the Fifth and Sixth will be scrutinized with some skepticism. Scores and times will be included if submitted but are not important. "Bill Baines ran up the stairs faster than he ever thought he could" is sufficient to convey the drama of the moment. Laureled remnants of glories past are as acceptable as last week's 10-K performance, *e.g.*, "Thirty years ago this week Spyder McVeigh laid out four boxing opponents in as many rounds, to the wonder of radio listeners across the land."

We will continue to strive to make this your newspaper by invading all aspects of your hitherto personal lives and turning them into grist for our journalistic mill. Upcoming departments include "Lawyers in the Arts," "Lawyers in the Kitchen," "What Lawyers are Reading," "Lawyer Arrests and Indictments," and "Useful Household Hints from Lawyers." So watch this space.

The Alaska BAR RAG

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Letters from the Bar

Beware of security

The need for the court access system is in the eye of the beholder, but few attorneys will get upset enough to accost the judges and other court personnel with a weapon.

The security system puts another barrier between practicing attorneys and the judiciary. While the security personnel appear competent and have been courteous to me, I get a cringe in my gut every time I take a belt buckle off and take the keys out of my pocket. It seems as if there is a little less respect for the attorneys as Officers of the Court.

—Leonard T. Kelley

Not so

In the Fall edition, you reported that the Juneau Bar Assn. [JBA] had been taken over by monarchists and you reprinted their false report that I was "the Royal Doctor."

Not so.

Though I earned a Ph.D. in Government—as well as the J.D. many of us hold—I remain too much a small 'd' democrat to accept royal titles.

In fact, I led the democratic counter-revolution at JBA that permanently [?] tabled the royalists' revisionism.

Thank you for printing this correction.

—Joe Sonneman

More on bar exams

Will Aitchison's article in the September-October, 1994, *Alaska Bar Rag* brought back memories of my Alaska Bar examination. I was already admitted in Virginia, Oregon and Washington. Part of the 1980 exam was the "Alaska law" section. To my utter amazement, one of the questions involved issues which I has just argued (on a *pro hac vice* admission) before the Alaska Supreme Court.

I started my answer to this "Alaska law" question: "There is no Alaska law on this subject. See my brief on appeal in..." I don't recall the case citation but the issue was comparative indemnity and arose out of the Wien Air Alaska crash at Gambell in which I represented the State of Alaska.

I tend to share Mr. Aitchison's views about the dis-utility of the bar examination — particularly the multi-state portion. Fortunately, I am old enough that I never had to take the multi-state although I have reviewed the questions. The more you learn in law school, the harder the multi-state becomes. All of the answers are wrong under some exception to the general law. The result is that the exam only demonstrates test taking expertise, in selecting the "least wrong" answer.

I, too, enjoy the *Bar Rag* (and the title).

—Lloyd B. Ericsson
Portland, Ore.

You could be next

I assume you have seen the article in the September-October issue of the *Bar Rag* concerning what quite possibly will happen when the new security systems are installed at the courthouse. While the article is humorous on one hand the subject is very serious to me and may be to many of my fellow Officers of the Court.

Being Officers of the Court I feel we should be treated as such. The use of our bar card to gain access to the courthouse could be an acceptable alternative.

This suggestion is not made for the purpose of obtaining special treatment. It is made to expedite court business and to permit Officers of the Court to use their time efficiently.

—Julian C. Rice

No Flashing

I too loathe metal detectors. Please count me among those who would prefer to "flash" our bar card for immediate and unfettered access to the judicial system we were sworn to uphold.

Remember: "Attorneys don't shoot judges — Divorce participants shoot judges" ... or something like that.

—Ward M. Merdes

Now comes his wife

I thought you might enjoy "the rest of the story" on my article "Name Changes I Have Known and Loved in Court." (*Alaska Bar Rag*, Nov.-Dec., 1993).

You remember "Chopper" from that story? Well, it turns out that "strong looking blonde" was his wife, not his girlfriend. And since he changed his name...., well just look!

—Aly Closuit

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

AT _____

FILED in the Trial Courts
State of Alaska, Fourth District

JUN - 7 1994

Clerk, Trial Courts
By _____ Deputy

IN THE MATTER OF
A CHANGE OF NAME FOR:

Suzanne Marie Peffer
Petitioner (current name)

CASE NO. 94-1582 CI

PETITION FOR CHANGE OF NAME

Petitioner requests the Court to enter judgment changing petitioner's name as follows:

1) Petitioner's current legal name is Suzanne Marie Peffer

2) Petitioner wants to take and be legally known by a new name, which is Sue Choppers-Wife.

3) The reasons for this request for a change of name are:
Husband changed name to Chopper. Now I have a lastname that belongs to neither of us.

4) Petitioner seeks this name change for personal reasons and not to avoid judgments, debts, obligations, or to defraud any person. The reasons stated are consistent with the public interest.

6-3-94
Date

Suzanne M. Peffer
Petitioner's Signature

Mailing Address City State ZIP

Daytime Phone

VERIFICATION

Petitioner says on oath or affirms that petitioner has read the foregoing document and believes all statements made in the document are true.

Subscribed and sworn to or affirmed before me at Fairbanks, Alaska on June 7 94 (date).

(SEAL)

Clerk of Court, Notary Public or other person authorized to administer oaths.
My commission expires 1/28/96

CIV-700 (3/87)(st.2)
PETITION FOR CHANGE OF NAME

Civil Rule 84
AS 09.55.010

10 Trends in high-tech law practice

How technology and economics are changing how you practice law

BY JOSEPH L. KASHI

Technology is changing how we practice law and our future success as lawyers will depend in large part upon how we cope with rapid technical innovation. Because computer and telecommunications technology are rapidly merging, we'll consider them together under the term "Information Technology."

1. Constant change is forced upon us by technology itself.

Technology is like an arms race. Because it makes early adopters more efficient and competitive, their opposite numbers must do so as well in order to avoid losing too many clients or too many cases. Emerging non-lawyer competitors will use technology to more easily penetrate the legal market and compete with established firms for routine transactional and documentation services. Business clients are automating rapidly and expect the same level of sophistication from their attorneys as they do from their own companies.

2. Technology is reducing the number of lawyers needed for an existing high quality business.

A 1993 survey by *The American Lawyer* magazine estimated that efficiencies gained through technology had resulted in a 33 percent overcapacity among lawyers. Here in Alaska, with our very high ratio of lawyers to the population base and a poor mid-term economic forecast, the outlook may be even worse. A recent article in *Forbes Magazine ASAP* documented how the Dupont Corporation used advanced technology to shed most of its several hundred outside defense firms and to reduce the cost per case litigated. If existing outside counsel didn't get with the program, they were outside looking in. Attorneys dealing with a few major, sophisticated clients like insurance carriers and oil companies should anticipate similar pressures in the next few years.

3. Pre-packaged legal form programs will encourage the rise of do-it-yourself user and paraprofessional legal documentation clinics for the middle class.

Routine wills, transactional and other legal documentation pay the monthly bills for many solo and small firm practitioners. This business will diminish. Some lay businesses, such as title companies, are already providing legal documentation for customers without any assistance from lawyers. And we will likely see basic legal documentation being prepared by paralegal documentation services. I have already seen examples of paraprofessional foreclosures in Kenai. Consumer programs already on the market will tempt individuals to prepare legal documentation (such as wills, powers of attorney, and real estate transactions) on their own, just as they now do with IRS returns.

4. Neural net legal advice programs will be mass-marketed.

In the not too distant future, neural analysis programs that actually guide a person's analysis of the factual "symptoms" and recommend generally correct approaches to a potential legal problem are undoubtedly on the way. In this regard, they are no different than the generalized "desk books" that many lawyers use. Neural network programs already operate our national telephone system and internal medicine specialists also use comparable programs for medical diagnosis. Intel and Nestor are now producing neural net CPU chips with more transistors and computing power than the fastest Pentium processor.

5. Technology quickens the pace of law practice. Businesses and consumers are becoming used to faster results and are demanding it from their lawyers

Clients have become accustomed to quick transactions, faxes, electronic mail, overnight delivery and getting something done now. They are demanding this same speed from their lawyers.

New information technology is the principal factor causing our working pace to continually accelerate. In fact, even times that should be restful have become less so as technology allows us to work at home in the evenings, work at the beach, and get out E-mail from every airline seat, automobile and phone booth.

6. Technology will increase our personal stress and malpractice risk.

Our now-constant companion, the fax machine, has, by itself, sharply increased the speed of legal practice. Instead of opposing counsel mailing you a letter, with an average delivery and response cycle of a week or more, a letter is often faxed, received, and answered within an hour or less. Large clients send you an E-mail zinger. There are obvious advantages to fast communication when closing a deal or clarifying a position, but this fast response cycle also increases the pace of law practice. There's less time for thoughtful decision-making, bouncing ideas off your colleagues, and reflective insight.

As the pace of practice increases, we tend to make snap judgments with little time available for reflection. Once that nasty rejoinder is faxed, there's no room for second thoughts or pulling the letter from the next day's mail for a rewrite. We have less time to reflect upon our next move and how we might best approach a particular problem before committing ourselves. As a result, the quality of our decisions suffers. When there's less time to cool down and respond calmly to an irritating opposing counsel, overall civility declines as our stress level rises. Except in larger litigation matters, we must be on guard against an increasingly fast-paced, higher volume practice that puts us at higher risk of burnout, stress, incivility and malpractice.

Potential errors and hidden assumptions in document assembly and similar practice system computer programs can increase the number of hidden bombs waiting in your files unless your office actually does its own program setup and implementation. Few attorneys will understand the concepts and assumptions used in pre-programmed technology like document assembly systems, docketing programs, neural net analysis programs and "workflow" routing of incoming information to only specific users. We will be dependent upon hidden assumptions made by the programmers and persons setting up the system. These may not be attorneys. If you succumb to taking on too many cases, you may not be careful about always checking what the computer produces.

7. Coping with technology's challenges. Technology is forcing law firms to change into radically different, flexible entities that respond quickly to market and technological changes.

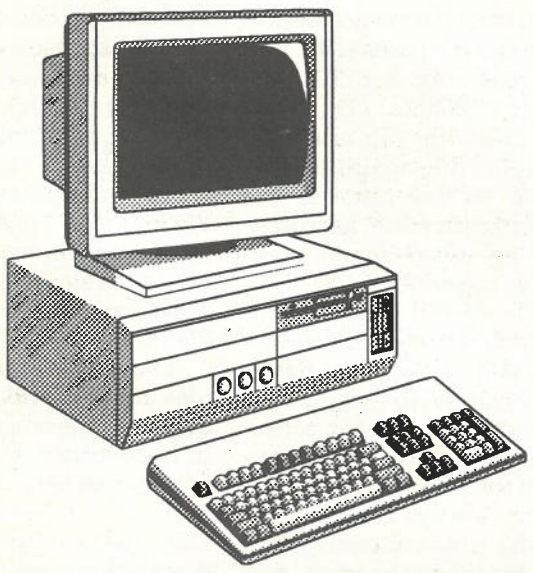
Continued on page 5

How technology and economics are changing how you practice law

Continued from page 4

Although information technology will greatly challenge and ultimately change how we practice law, there are some basic insights that can blunt its impact. Although there will be technology casualties, you can be a survivor.

A law firm's organizational structure is probably the most important single determinant of whether it will prosper in the turbulent years to come. Future law firms must adopt a more flexible and democratic horizontal structure that facilitates sharing critical information. I've identified below several possible models of how the forward-looking law firm might be structured.



Basically, firms must learn how to use information technology to make necessary information quickly available to whomever needs it. The traditional "vertical" information channel in law firms hinders efficient information flow and thus must be changed if the firm is to prosper in a business climate that rewards the fast flow of important data. I'm sure that we all remember cases that we might have won if we had just had a particular piece of data a little sooner. Local and wide area networking, groupware like Lotus Notes, and communications technologies themselves enable us to restructure our law firms in ways not previously feasible and help us cope with the need to find critical data fast.

One approach may be to form within the firm ad hoc small action teams with a more horizontal pattern of information flow and supervision and to link them through electronic mail to other groups and firms working on the same problems. Such teams would form and dissolve in response to individual projects or to specific aspects of a very large case. These teams should include professionals already knowledgeable in specialized areas, to ensure an immediate response. This approach might be particularly useful in litigation firms.

Another solution might be to form a separate, highly focused boutique firm that already has the specialized knowledge, research and forms to work on quick-breaking projects.

Alternatively, the law firm of the future might tend toward a small permanent planning and administrative core group (similar to military cadre staff or to large construction contractors), drawing upon contract professionals and paraprofessional staff as necessary for particular projects. This firm's ability to maintain a broad network of cooperating joint venture partners with expertise in different areas of practice when existing practice areas stagnate. I believe that this model will prove the most feasible for the average small law firm of the future. Here, too, quick electronics communication between an hoc "partners" will be necessary to the efficient cooperation and concerted action needed to enter new practice areas.

Another possible solution might be to generally retain the same vertical law firm structure but flatten it by reducing the number of intermediate partners and associates who actually process and summarize data. In the leaner firms of the future, we'll involve senior lawyers directly with the raw data and case research through advanced technology. We can minimize the burden upon senior lawyers through the use of a few associates and paraprofessionals who develop raw information and then input it into advanced data analysis programs.

Regardless of which approach is taken, we'll see law firms adopting a more horizontal structure that emphasizes electronic communication. Expect to see reduced litigation staffing, lower overhead and reductions in the number of associates and mid-level partners whose basic function is to collect and synthesize information, passing it up the chain.

The number of contract lawyers with good knowledge of a particular practice area (but without permanent employment) will increase and develop commercial referral networks. Law firms that choose to maintain surplus capacity may find themselves contracting it out to other firms on a regular basis.

8. By linking operations between several offices and clients, electronic mail and document exchange processes will help us compete more effectively for quality clients.

Electronic mail is often more convenient than a phone call and clients should get the fast response they demand. There are fewer complaints about poor client communication from the delayed returning of phone calls. Major clients are beginning to demand sophisticated electronic mail as a means of sharing common data. Note the Dupont experience above. Maturing, sophisticated "groupware" "E" mail database programs such as Lotus Notes are particularly useful here although still rather too complex.

9. The days of the generic clerk-typist are gone along with the pencil and paper era. We'll need to hire and retain better trained, technically adept staff.

As a result, we must adapt our management style to a more collegial, democratic approach that better suits an increasingly professional staff.

We now require employees who are comfortable working with advanced computer systems and who can readily learn new techniques and approaches. Because advanced technology requires advanced skills, we'll have to invest a substantial amount of time and money to train employees for a mix of constantly evolving skills. Employees with specialized knowledge are no longer interchangeable and, unless we maintain a professionally rewarding place of employment, employee mobility will increase as law firms complete for better educated, more productive paraprofessional staff.

10. Emerging technologies like voice dictation and document imaging will reduce many of the traditional lower-skilled jobs.

Why should you employ five file clerks at $20,000 a year to file and find documents for you when you can retrieve documents from an imaging system at will and employ one or two more skilled persons?

For you and your employees, here are several other strategies to compete:

• *We'll see a great increase in "virtual employees" who interact with us through a wholly electronic environment composed of electronic mail, fax, telephone and Federal Express.* These may either be telecommuters or persons with particular skills living far from the physical office location. Chances are that many "virtual employees" will never meet each other face to face. This works particularly well for valued employees who are forced to move from the area but whose expertise you wish to retain.

• *Tightly focused legal software can help you enter new practice areas and become more versatile.* Consider, for example, certified bankruptcy and estate planning software that does both document assembly and economic calculations and tax analysis. Except for your local rules, much of the routine knowledge needed to practice in these areas is already contained in these programs.

• *Learn how to manage your time.* Time management will become more important for lawyers and staff as technology increases the number of tasks and people simultaneously vying for our attention. We will founder about unless we learn how to identify significant priorities and set aside calls and electronic communications that can wait for another day.

• *Avoid highly proprietary technology.* Don't get caught in one "correct" approach and stubbornly hold on to it long after its relative usefulness has declined or the vendor has ceased innovating. You don't want to be trying to make it with a "Wang and a prayer" when all those around you have moved beyond 1982 technology.

Correction, Sort Of

In the last issue of the *Bar Rag,* we neglected to bestow a photo credit upon Tony Rowlett for his photograph that accompanied the article on Judge James von der Heydt. The *Bar Rag* regrets the oversight.

Estate Planning Corner

Tax considerations in trustee selection

Trustee selection — it is what we help clients do everyday. So we need to be aware of the tax pitfalls.

Suppose we have a client who is signing an irrevocable trust, naming his spouse and his descendants as beneficiaries. The client ("grantor") is using unified credit in funding the trust (IRC Sec. 2505), and only he will be making contributions. He has expressly provided that no distribution may be made that would discharge his personal legal obligation (Treas. Reg. Sec. 20.2036-1(b) (2)).

The grantor does not wish to name a bank or trust company as trustee. In fact, he has narrowed the group of potential trustees down to only four people: first, himself; second, his spouse; third, his oldest child; and fourth, his sibling.

If the grantor names himself as trustee, the whole exercise may be considered incomplete for tax purposes. First, for income tax purposes, the grantor may be considered the owner of the trust (IRC Sec. 674). Ordinarily this is not a problem. Indeed, it is popular at present to create a trust that is so-called defective for income tax purposes, but which is effective for transfer tax purposes (*Estate Planning & Taxation Coordinator* (RIA) at ¶ 33,301, *et. seq.*). Note also that if the grantor's spouse is a

Steven T. O'Hara

beneficiary of the trust, the trust income will generally be taxed to the grantor (IRC Sec. 677(a)).

Second, if the grantor serves as trustee, his transfers to the trust may be considered incomplete gifts, for tax purposes, until a distribution is made or he ceases to serve as trustee. This could be the case if the grantor, in his capacity as trustee, retains power to change the interests of the beneficiaries (Treas. Reg. Sec. 25.2511-2(f); *but cf.* Treas. Reg. Sec. 25.2511-2(d) ("A gift is not considered incomplete, however, merely because the donor reserves the power to change the manner or time of enjoyment").

But if the trustee's distribution power is limited by an ascertainable standard, the grantor will be considered to have placed his contributions irrevocably beyond his control, even if he serves as trustee (Treas. Reg. Sec. 25.2511-2(g)).

Third, if the grantor was serving as trustee at or within three years of his death, the trust may be includable in his estate for tax purposes (IRC Sec. 2036(a)(2), Treas. Reg. Sec. 20.2036-1(b)(3), IRC Sec. 2038(a) (1), Treas. Reg. Sec. 20.2038-1(a) (3), and IRC. Sec. 2035(d) (2)). But again, in general, there is an exception if the grantor's distribution power as trustee is limited by an ascertainable standard (*Jennings v. Smith*, 161 F.2d 74, 78-79 (2nd Cir. 1947); Pennell, "Retained Enjoyment Through Discharge of Legal Obligation of Support," 6 *Probate Practice Reporter* 16 (Jan. 1994)).

While adverse transfer-tax consequences are generally avoidable through use of the ascertainable standard, this is not always the case. For example, if the grantor transferred insurance on his life to the trust, and the grantor was serving as trustee at or within three years of his death, the insurance would be includable in the grantor's estate for tax purposes regardless of whether his distribution power was subject to an ascertainable standard (Treas. Reg. Sec. 20.2042-1(c)(1) and (4), IRC Sec. 2035(d) (2), and Rev. Rul. 84-179, 1984-2 C. B. 195).

Finally, to the extent the grantor is considered the owner of the trust for gift or estate tax purposes, the grantor will continue to be considered the transferor of the trust property -including any appreciation of the property — for generation-skipping tax purposes (IRC Sec. 2652(a) (1)).

In sum, by serving as trustee, the grantor may lose all the transfer-tax benefits of gifting, including any leveraging of his unified credit and GST exemption (IRC Sec. 2505 and 2631).

If the grantor names his spouse as trustee, the grantor will probably continue to be considered the owner of the trust for income tax purposes (IRC Sec. 674 and 672(e)).

After the grantor's death, if his surviving spouse as trustee may make distributions to herself, she may be considered the owner of the trust for income tax purposes (IRC Sec. 678(a)). There is legislative history, however, that suggests the spouse should not be considered the owner of the trust for income tax purposes if her distribution power, as trustee, is limited by an ascertainable standard (Adams and Abendroth, "The Unexpected Consequences of Powers of Withdrawal," 129 *Trusts & Estates* 41, 44 (August 1990)).

Although the trust may be defective for income tax purposes where the grantor names his spouse as trustee, the trust can be effective for transfer tax purposes if the grantor limits the trustee's distribution power by an ascertainable standard and prohibits distributions that discharge a personal legal obligation.

If the spouse's distribution power as trustee is not limited by an ascertainable standard, and as trustee she may make distributions to herself, then distributions to others may be considered gifts by her (IRC Sec. 2514(b) and (c)). In addition, the spouse may be considered to have released a general power of appointment by her resignation or removal as trustee (Treas. Reg. Sec. 25.2514-3(c) (4)).

If the spouse as trustee may use the trust to discharge her personal legal obligation, such as to support her children, distributions may be considered gifts by her to the extent of her personal legal obligation (Treas. Reg. Sec. 25.2514-1(c)(1)). Also, her resignation or removal as trustee may be considered the release of a general power of appointment (Treas. Reg. Sec. 25.2514-3(c)(4)).

The spouse's serving as trustee may also have adverse estate tax consequences. The trust could be includable in her estate for tax purposes, unless her distribution power as trustee is limited by an ascertainable standard and she is prohibited from making distributions that discharge her personal legal obligation (Treas. Reg. Sec. 20.2041-1(c) (1) and 20.2041-1(c) (2)).

To the extent the grantor's spouse is considered the owner of the trust for gift or estate tax purposes, she will be considered the transferor of the trust property for generation-skipping tax purposes (IRC Sec. 2652(a) (1)).

If the grantor appoints his child as trustee, the transfer tax issues are pretty much the same as those relating to the spouse's serving as trustee. Also, if the grantor wants to avoid a defective trust for income tax purposes, the trust will generally be treated as a separate taxpayer if the child's distribution power as trustee is limited by an ascertainable standard. This assumes we do not have a problem under Section 678 of the Internal Revenue Code (Adams and Abendroth, *supra*).

If the grantor appoints his sibling as trustee, we may be tempted not to worry about any tax considerations. After all, the sibling may only be a remote beneficiary under the trust, entitled to take a fraction of the trust on the death of the grantor, his spouse and their descendants.

Even here where the sibling's beneficial interest is remote, consider limiting the trustee's distribution power by an ascertainable standard (Treas. Reg. Sec. 25.2511-1(g) (2); Adams and Abendroth, *supra*, at 42-43)). Otherwise, the IRS may argue that the sibling, as trustee, is making a gift when he makes a distribution to a current beneficiary — though, admittedly, the gift may have negligible value.

NOTICE OF PUBLIC MEETING

NEW PROPOSED FEDERAL LOCAL RULES: THE IMPACT ON ALASKA PRACTICE

Tuesday, December 20, 1994
2:00 p.m. - 5:00 p.m.
Courtroom 1, New Federal Building

Panel:
Chief Judge H. Russel Holland
U.S. District Court

Chief Justice Daniel A. Moore, Jr.
Alaska Supreme Court

Judge James K. Singleton, Jr.
U.S. District Court

Presiding Judge Karl S. Johnstone
Judge Dana Fabe
Alaska Superior Court, Third Judicial District

Harold M. Brown
Christine E. Johnson, Court Rules Attorney
R. Collin Middleton, Chair, Local Rules Committee
Gary A. Zipkin

Overview of the Rules
Public Comment Invited
Panel Discussion:
"How state and federal practice will differ and/or remain similar under the new proposed rules."

This program has been approved for 2.5 CLE credits by the Alaska Bar Association. This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California.

There is no registration fee for this program. Please register IN ADVANCE by calling or faxing the Alaska Bar office by TUESDAY, DECEMBER 13, at 907-272-7469/fax 907-272-2932.

Solid Foundations

Providing equal justice under the law

The American system of justice is based upon the provisioning of justice on an equal basis. However, as has been demonstrated countless times during our history, both in the civil and criminal arenas, "justice" is both elusive and unaffordable to many Americans.

Looking simply at the providing of civil legal services to the disadvantaged, legal services for the poor are underfunded. The Legal Services Corporation's current budget of $400 million is less than half the estimated need of 1980 (Interest on Lawyer Trust Account (IOLTA) program monies total approximately $232 million in 1994). While the legal profession continues to emphasize pro bono services and lawyers individually financially support the Legal Services Corporation, legal services to the poor are not a high funding priority.

Americans whose income falls between approximately $12,000 (the individual yearly income ceiling for Legal Services Corporation purposes) and $30,000 must also be included in the

Mary Hughes

group of ever-growing Americans who cannot afford much justice. Although employed, these individuals may receive housing assistance and food stamps and have little or no expendable income.

In addition to supporting the Alaska IOLTA program, what steps can Alaska lawyers (both private and public) initiate to assist in providing equal justice to all Americans:

—View our profession as a service industry, always striving for greater public access to the justice system.

—Reform the justice system to provide adjudicatory vehicles in addition to the traditional trial court concept.

—Provide public education and promote public understanding of the justice system.

—Accept greater public involvement, in addressing justice system related issues.[1]

The American Bar Association has been very active in introducing the topic of justice system reform. The Just Solutions Conference attracted over 530 participants and highlighted the need for discussion between the legal profession and the public in addressing the needs of the justice system.

In addition to involvement with local bar committees which may be created as a result of the emphasis placed on the legal needs of Americans by the American Bar Association, members of the Alaska Bar Association have the opportunity to donate their services through the Alaska Pro Bono Program, contribute to Alaska Legal Services (the annual fund-raising drive is in full swing), and help groups or individuals who may have limited access to the legal system, cannot qualify for Alaska Legal Services assistance, but manage to seek out an attorney. A helpful hand may be the first step in curing a damaging perception of the justice system and the legal profession.

[1]Recommendations of participants in the ABA Just Solutions Conference held in the Spring of 1994.

Winds of change

Continued from page 1

be examined on a test basis to see if it is helpful and to determine whether it should be expanded to all cases involving custody issues.

A committee also has been formed to evaluate the pretrial order and trial setting notice in domestic cases. The committee is considering a page limitation on affidavits, memoranda and replies in support of or in opposition to any application to the court. No supplemental briefing would be permitted nor will page limitations be exceeded except upon leave of court after good cause shown. The new orders will provide integrity to the trials that are set and limit the parties to the time allotted by making ar equitable division of that time between them. ARCP 95 sanctions including costs and attorney's fees may be the order of the day for those who offend the requirements of the pretrial order or trial setting notice. The judges and masters are behind this approach and the days where attorneys can show up unprepared after advising that they are ready for trial are numbered.

When Daniel A. Moore, Jr. became Chief Justice of the Alaska Supreme Court he embarked on an ambitious project to get rid of "deadwood" files in the Trial Courts in Anchorage. This project has resulted in over 16,000 inactive files being eliminated from the system. Chief Justice Moore and the Presiding Judge have been working on case management plans for all departments within the Trial Courts. The purpose of these plans is to make the Court more efficient and to eliminate inactive and stale files where no recent activity has taken place and none is expected.

Parties and attorneys will likely receive more orders from the Presiding Judge administratively dismissing and closing cases which appear to be inactive or stale. The decisions to close files will be on the basis of a sampling procedure which examines a random selection of files from given years rather than looking at each individual file. The numbers of files are voluminous and the Trial Courts are without resources to individually examine each file to determine inactivity. As a result, the decision to dismiss and close cases will be on a statistical basis and will be without prejudice. If your files are dismissed and closed and you desire them to remain open, all you will likely need to do is contact the Clerk of Court in writing with a request within a specified time, and as a matter of right the file will be reopened.

It is not the intent of the Presiding Judge or the Chief Justice to deny a person from actively pursuing or defending a just claim. The operative word here is, of course, "actively." We have discovered that the vast majority of files that have been administratively dismissed and closed have never been resurrected because all persons involved, for one reason or another, have lost interest in the process.

Notice of administrative dismissals and closures will be published in the newspapers and, if possible, a general mailing will occur. It would be helpful to the Trial Courts if attorneys, staff and parties would review their files to determine the impact of this administrative order and advise whether individual files are still active and should remain open. If the Clerk's Office is asked to put the file back into open status, the requesting parties should expect that it will be placed on a tracking system and be given some deadlines including a trial date.

Thus, it is fair to say that change is upon us. Hopefully these changes will not be too intimidating or cause inconvenience. The goal is to get over the hump of change and on to the level ground of an efficient administration of justice. Hopefully I will have addressed different groups of the Bar and the Bar will have input on these changes. Should any lawyer wish to comment on these new concepts, please write to me or the Chief Justice as soon as you can after receiving your issue of the *Bar Rag*. I promise we will review all reasonable and constructive comment with open minds.

Alaska Legal Services

Continued from page 1

board, Hickerson noted. "We have been historically proud of the fact that we had people everywhere in the state," he said.

Even before the cuts take effect, ALSC is at about half its peak staffing of 1980-81, Hickerson noted. Where once they could close some 10,000 cases per year, they now close about 4,600. "We turn away hundreds of (financially eligible) people (with good cases) every week. The demand is overwhelming."

Eligibility is based on income and assets. The income ceiling for an individual is $11,000; for a family of six, $30,000. Hickerson called it "too low for Alaska standards, but it's what we've got." The asset rules vary with the would-be client's age. Some assets, such as a family home, may not count.

And how do eligible Alaskans cope if ALSC turns them down? "They go to court without a lawyer," Hickerson said.

ALSC will be looking to the private bar and, increasingly, law firms for cash contributions. As for pro bone professional time from the private bar, Hickerson said the official "protocol" has not changed: no lawyer is expected to handle more than one case per year.

However, Hickerson expects lawyers, especially in Alaska's three largest cities, to start getting calls to give more help. Most likely they will be asked to work with rural clients, primarily by telephone.

"We count on our *pro bono* program. It's the most successful in the country. We have the highest percent of per capita (participation) of any state," said Hickerson. (The Pro Bone program's Seth Eames put the figure at 57.4 percent of the "available" bar. Judges, for example, are not "available".)

The court system's help is needed, too. Hickerson asks that judges try not to "over-assign" ALSC attorneys in Child in Need of Aid and domestic relations cases because such cases are especially "lawyer-intensive," and "there are fewer of us to play those roles."

The new reductions in funding involve federal, state and local government sources. And whereas in the past, community and private sources sometimes helped fill the gap - as when Dillingham came up with money from fish taxes in 1985 and 1991 to keep their local ALSC office from closing -- Hickerson said rural Alaska is unlikely to pull this off in the current economic climate. In the case of Dillingham, for example, fish prices and, consequently, fish tax revenues are lower, and the city is having trouble even funding police protection.

ALSC offices will remain open in Anchorage, Barrow, Bethel, Fairbanks, Juneau, Ketchikan and Kotzebue.

One bright spot in the otherwise gloomy funding picture is that money from the federal Bureau of Indian Affairs, under a contract to assist with Native allotment cases, may increase for 1995. Hickerson credited Rep. Don Young and Sen. Ted Stevens for their efforts with regard to those services.

Prominent attorney leaves public service

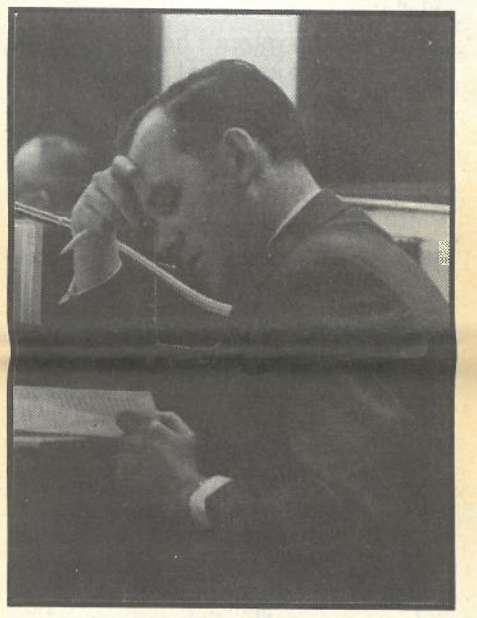
By Scott Brandt-Erichsen

On October 14,1994 another chapter in the long and distinguished legal career of Richard "Spyder" McVeigh, which has to date spanned four decades, came to a close. Dick McVeigh resigned his position as the Municipal Attorney for Anchorage and will also be leaving his post as state coordinator for the National Institute of Municipal Legal Officers.

McVeigh's legal career in Alaska includes both public and private practice. His years as a public attorney have seen him as the U.S. attorney for the District of Alaska from 1965 through 1968 and as the municipal attorney for the largest city in Alaska. In addition, he served six years in the State House. While he has not completed the sweep with a stint as attorney general for the State, he worked as an assistant attorney general for the State of Alaska from 1962 until 1964.

Dick McVeigh's commitment to Alaska started very early. He moved to Alaska in 1939 and grew up in Anchorage and Fairbanks. He attended high school in Fairbanks before finishing up with his junior and senior years at Army-Navy Academy in Carlsbad, California. He received a B.A. degree from the University of Notre Dame in 1955, spending his Junior year at the University of Alaska-Fairbanks. From 1955 through 1959 he was a pilot in the United States Air Force. Following his discharge from the Air Force, he attended Georgetown University Law School graduating in 1962. While in Washington, he was a legislative assistant for Sen. E. L. "Bob" Bartlett, then Senator for Alaska.

Richard L. McVeigh stands in formal dress uniform at the Army-Navy Academy.



Rep. McVeigh ponders a bill in Juneau in 1968.

"McVeigh instituted a number of new procedures and programs throughout the municipal attorney's office."

Dick recalls that he considered boxing as a career while in college but had to give it up because of trouble with his hands... "the referee kept stepping on them." During this period he gained the nickname "Spyder" because of his gangly limbs and boxing style.

McVeigh's first legal job was with the Alaska attorney general's office in Juneau. He worked on civil matters for a year before moving to Anchorage as a prosecutor in the district attorney's office. In 1964 Dick took a job with the firm of Ely, Guess, Rudd and Havelock. In 1965, at the age of 31, McVeigh was appointed by President Lyndon Johnson and became the youngest U.S. attorney in the country. As United States Attorney for the District of Alaska, he created an international stir when he ordered the seizure of Russian vessels for fishing within the prohibited zones off the coast of Alaska.

McVeigh was elected to the State House in 1968 with the slogan "Up Up and Away with Dick McVeigh".. During his tenure he served as chairman of the House Rules and State Affairs Committees. He also chaired the legislative Free Conference Committee on the Pipeline Commission during the special session on that issue. His legacy in the House includes the legislation creating and funding the public television network.

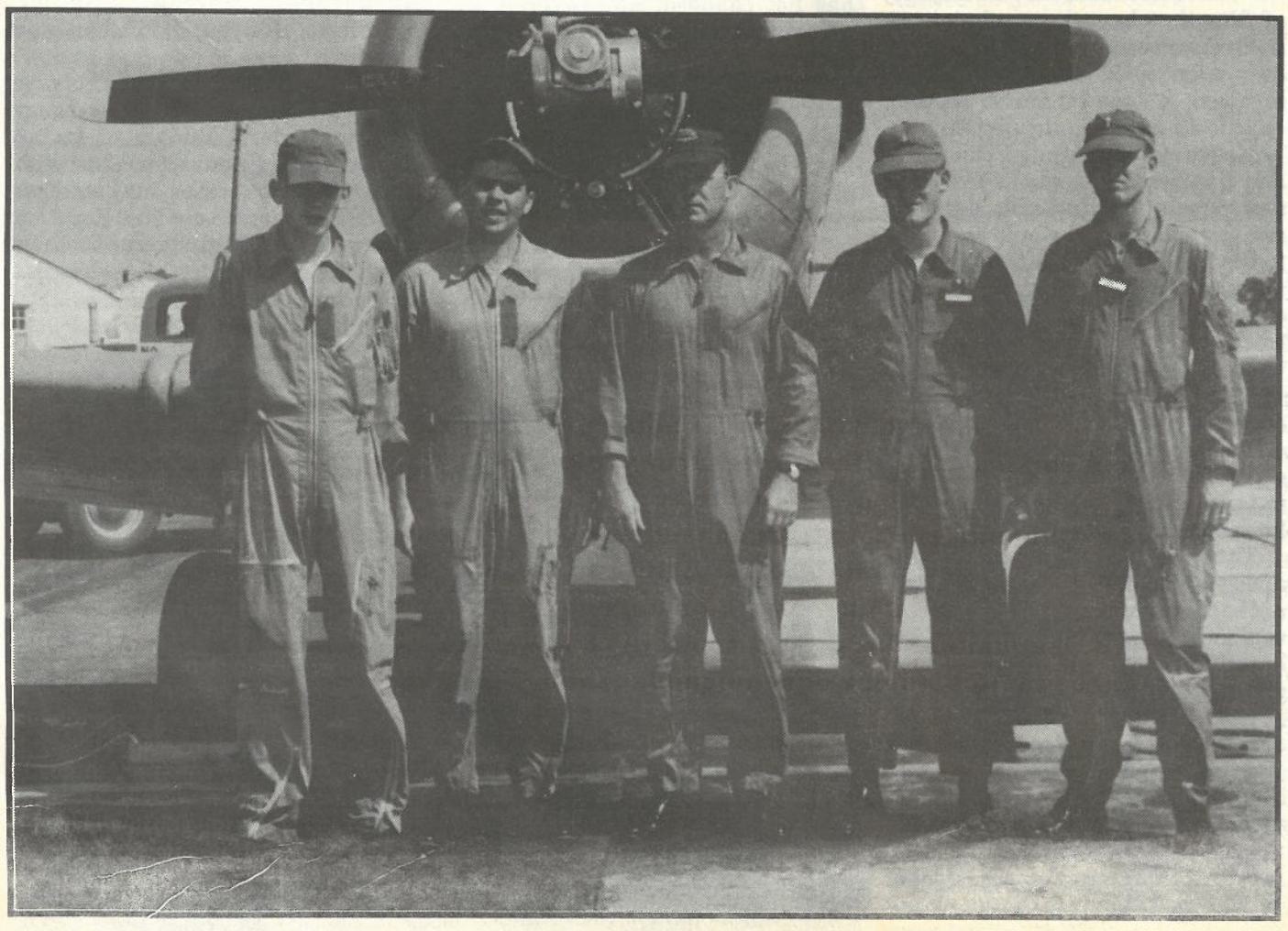
After leaving the House, McVeigh went into private practice in the firm McVeigh, Peterson and Melaney where he spent the next 14 years practicing both civil and criminal law. McVeigh maintained a steady practice representing varied clients until 1988, when newly elected Anchorage Mayor Tom Fink asked McVeigh to join his staff. Following his re-election in 1990, Mayor Fink appointed McVeigh municipal attorney.

Upon taking charge, McVeigh instituted a number of new procedures and programs throughout the municipal attorney's office. Some of these include bringing municipal prosecutors into the computer age for recordkeeping, overseeing the organization of an administrative hearing program, and a "cutting edge" DWI vehicle forfeiture program.

Due to his long tenure with the municipality, McVeigh had the opportunity to develop specializations among the municipal attorney's office staff, hiring attorneys with particular expertise as vacancies occurred. (Eighteen of the current assistant municipal attorneys were hired by McVeigh.) This specialization improved the efficiency of the office. As a result, McVeigh helped reduce costs paid to outside counsel by more than one third.

"Nearly all would agree that he has been a top flight public legal administrator who is skilled both in politics and the law."

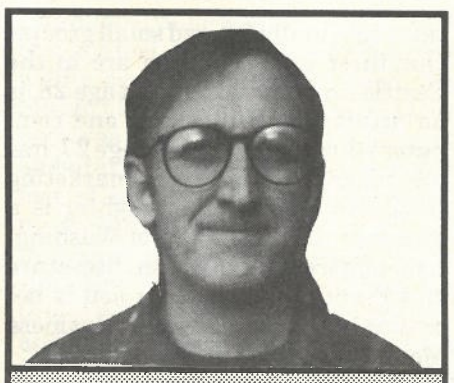
Many who have come in contact with McVeigh over the years have their own thoughts, opinions, or favorite stories. Nearly all would agree that he has been a top flight public legal administrator who is skilled both in politics and the law. If he does not return to the active practice of law, whether public or private, it will be a loss to the legal profession, not Mr. McVeigh.



Dick McVeigh (far left) reports for flight school in the U.S Air Force.

Eclectic Blues

Conversation topics



Dan Branch

Dogs and honey buckets formed the core of most conversation when we lived in Bethel. This left little time to discuss the weather and the other staples of lower 48 conversations.

Often typical Bethel interchanges ran down these lines:

Me: Do you think we'll have an early breakup this year?

Anyone else in town: Maybe.

Me: Do you think it will flood?

Anyone: Maybe.

Me: How are things over in Lousetown, Tundra Ridge, Housing, Subdivision, Alligator Acres or Mission Road?

Anyone: OK, except...

Invariably a honey bucket and/or dog story would follow. Either the honey bucket man hadn't shown up that day, or the speaker just stumbled into a new non-sanctioned honey bucket dump site.

Folks often complained about the neighbors' dog who barked all night or raided the dry fish cache.

Bethel, in those days, was always a month or two on either side of a police department dog shoot and everyone had an opinion about them. It was enough to drive a guy to drink, which was the third most popular conversational topic.

It is pretty hard to find honey buckets or sled dogs in Ketchikan. Liquor pours freely in the Tongass Avenue drinking establishments, which provide one leg of the southern southeast conversational triad.

Tourism and rain provide the other two.

At the end of September, the last cruise ship of the '94 season headed down the Tongass Narrows as ship stewards gathered in cheap rain ponchos. The passengers grouped around chocolate fondue pots dipping slices of crisp fruit into hot Giradelli semi-sweet. Between bites, these new Ketchikan veterans shared stories about the tour bus adversities they overcame. Some, no doubt, bragged about leaving the safety of their Gray Line bus and braving 50 feet of storm to take a picture of their spouse putting his arm on the shoulder of Oyster Man at the Saxman Totem Pole Park. Others held the floor describing passage across the unsettled waters of Lake Harriet Hunt in giant canoes styled after New England birch barks.

Most talked about wearing themselves out by wandering the warren of downtown curio shops in a search for take home tee shirts. Some complained about how the side panels of their cruise ship-issue ponchos turned them into rudderless sidewalk sailors. Truly these end-of-season travelers will be honored when they return to Sun Spot, New Mexico or whatever solar - punished place the call home.

To honor the end of the cruise ship season, our Ketchikan public radio station broadcast interviews with some of the brave pioneers who booked passage on the last boat. "The cruise ship people warned us, so we were prepared -- long underwear, hand warmers, VHF radio," one adventurous tourist reported. "It was fun and even challenging, operating our camcorder while holding a Gucci umbrella," another shared.

Well, now they are gone. We have the town back until May. After local government re-opened the downtown docks for parking, I conducted a conversational topic survey among the locals. The average interchange with these folks went about like this:

Me: Do you think the monsoons will come early this year?

Anyone in town: Maybe.

Me: Do you think it will flood?

Anyone: Maybe.

Me: How are things over in Newtown, Saxman, Herring Bay, Pennock Island, North Tongass, North Point Higgins, South Point Higgins, Pond Reef, Gravina Island, Mountain Point, or Bear Valley?

Anyone: OK except...

Over 90 percent of those surveyed went on to complain about tourists, sharing stories of tour bus traffic jams, unseemly fondling of the Whale Park Totem Pole, and long lines of tourists at the bank seeking to exchange U.S. greenbacks for Alaskan money. "They're cattle," one driver complained, "wandering across Tongass Avenue like it was Disneyland's Main Street." Another more positive guy referred to them as a low impact renewable resource that can be harvested, like salmon, but without having to deal with the viscera.

After complaining about tourism, several of those surveyed expressed concern over the high costs of fancy coffee drinks. Three could only talk about their infected sinuses. One of those not suffering from that malady registered complaint about the smell of humpy carcasses lining the sides of Ketchikan Creek. Don't worry, I told my friend with a sensitive nose, October's rains will wash away the dead fish.

As it happened on the day of my survey, we were enjoying a modest September storm which soaked my survey target population. A bracing breeze tattooed a steady beat of horizontal rain against The Mall. After they had exhausted the subject of tourism, most locals surveyed had plenty to say about the rain.

Eighty-Sixed: Rudely rejected by the bars

By William Satterberg

During my college years, and even during a portion of law school, I had the honor of being thrown out of more than one fine establishment. And even some not-so-fine establishments. In point of fact, I was rather familiar with what is commonly referred to as "Two Street" in Fairbanks. Many of my buddies and present clients hail from that vicinity. And I once received an optical contusion at the Orange Bar in Syracuse, New York.

The common term for such a rather rude rejection, is called "eighty-sixed." In fact, you naive types, when people are "bounced," they will often proudly refer to the fact that they were "eighty-sixed" from a particular establishment. The establishment, as well, often becomes the recipient of a descriptive, colorful adjective used by George Carlin in many of his early comedy routines.

Following the tumultuous years of college and law school, I eventually began to mature emotionally and found that, with time, the number of bumps, bruises, and skid marks upon my face lessened. This, coupled with the fact that Judge Wood's father was instrumental in having the bar block in downtown Fairbanks bulldozed into a parking lot, eventually resulted in a transformation of character in me so that I no longer was subject to the "eighty-sixed" syndrome. In point of fact, so much time had passed that I began to forget what it even felt like.

Hence, you can well imagine my surprise when I recently was once again subjected to being "eighty-sixed," by a bar (or more accurately, a member thereof).

I was representing a client who was called upon to testify as a witness in a serious criminal defense case. Due to possible self-incrimination issues, I was allowed to be present in the courtroom to observe and, if necessary, actively intervene in his testimony. As the judge had remarked, "Mr. Satterberg, I'm sure that you're capable of speaking up if something is objectionable."

The direct examination conducted by the defense attorney, as predicted, went well enough, as it should have, given that my client was a witness for the defense.

I knew better, however, than to relax, realizing that the case could welch on me at virtually any moment.

During cross-examination, the prosecutor, understandably hell-bent upon conviction, asked certain questions obviously calculated to result in an incriminating response from my client.

Continued on page 14

Faith & the law

Noted attorney has ministries

In October I had the privilege of interviewing one of the premier attorneys in Alaska, Steve DeLisio. The focus of my interview was not Steve's legal practice, but his spiritual practice (the letter of the law killeth, but the spirit giveth life, II Cor. 3:6).

Steve DeLisio has been an attorney since 1962, practicing in Alaska since August, 1963. His primary area of practice was complex civil litigation and defense work in the areas of torts, product liability, insurance, various kinds of malpractice, aviation, maritime, commercial and construction (in the last area there was litigation and nonlitigation practice). Most of Steve's cases in the last 10 years have been multi-million dollar actions.

Steve has had hundreds of clients, mostly large clients, covering thousands of cases. At his peak he has handled 30 to 40 matters simultaneously for mostly large clients, and in later years he maintained to 20 simultaneously cases.

Q. *Have you semi-retired from the practice of law? What are your other involvements in your life right now?*

A. Yes (semi-retired). I engage in consulting and occasionally am an expert witness. In the spiritual arena, I am primarily the Alaska administrator of the Christian Business Men's Committee of USA (CBMC). Also, I am a pastor and elder of my church.

Q. *Please explain what you do in these ministries.*

Walt Arden

A. As Anchorage metro director of CBMC I spend a great deal of time discipling men. By discipling I mean encouraging them, helping them grow personally, assisting them to understand their salvation, equipping them for evangelism and counseling them in their problems. At church I do much of the same, bathed in a lot of prayer for them. I pray for healing for them in my pastoral role, and although I have not seen a dramatic healing in front of my face, I have been aware of a number of people who have been healed after prayer, much to the amazement of their doctors.

Q. *Does your wife Margaret assist in these functions? What are your kids doing?*

A. Margaret teaches Sunday school, provides home hospitality and facilitates spiritually focused small groups. Our three adult children are in the Seattle area. Our oldest son age 28, is an accomplished musician and computer whiz. Our other son, age 27, has just married and is in the marketing field. Our 24-year old daughter is a senior at the University of Washington, majoring in English literature and French. Our younger son is becoming active in a Christian Business Men's Committee in Washington.

Q. *Please explain the need for these ministries in the Anchorage community.*

A. The question just about answers itself. Humanity is in a downward spiral. The Anchorage community is a broken landscape of unhappiness, violence and carnal pleasures and needs all of God's provided help that it can get. We try to get out and do something, not just lament about the problem. It is better to turn on the light than curse the darkness. Spiritual ministries, if Christ-centered, are selfless, loving and nourishing. People in brokenness and bitterness are wise to accept the love and assistance that only Jesus Christ can provide, through his people. All manner of diseases, afflictions and problems can be healed, and marriages restored, by a higher power of which we are stewards but which is beyond us.

Q. *Have you ever helped former clients in spiritual ways? Please elaborate.*

A. Yes, there have been a substantial number in the last few years. An architect client comes to mind, whose wife was dying of cancer. We helped him work through her death, over time building in him an infrastructure of inner joy. He has experienced salvation and is growing spiritually. Litigation is so traumatic. When I saw litigants, the case was only part of the problem. Other aspects of their lives were very difficult by the time they come to me, and these can be addressed competently only in the spiritual and total-person realm.

Q. *So people sometimes go to the church altar instead of a doctor to be healed?*

A. I wouldn't make it quite so mutually exclusive. The power of God can be manifest at the altar and in the hospital when there is a prayer of faith. As lawyers we come to realize the breadth of people's problems. A good lawyer treats the client as a whole person. I have been privileged to be of much greater service to my clients now than before I awoke to the spiritual aspect.

Q. *You've indicated that the emotional climate of Anchorage would be a lot healthier if there was more participation in ministries like yours. Would courts also get a welcome reprieve?*

A. Certainly so. Rather than always go to court, people would be more motivated than ever to deal with their real problems themselves, among each other. The court system itself creates problems and compounds people's pain and loss. It is wisest to escape court at all costs and not to pursue one's "rights." (Matt. 5:25-26 and I Cor. 6:7 say the same thing.) One should be able to say of the legal system that, if a litigant is right, he will receive peace and exoneration, and if not, he should not be there. However, it can only be said that if one enters the legal system as it currently operates he or she will get chewed up. I left my legal career a). to pursue a more effective and satisfying spiritual career, and b). because I've lost confidence in the courts' ability to deliver justice. The system generally supports only its functionaries, not the public. Alaska appellant courts have been reactive to individuals and have not built a consistent body of law. Such ad hoc jurisprudence has adversely affected the practice of law, but also it has removed stability from commercial, social and personal realms of life.

Q. *What are some of the other Christian ministries in the Anchorage area which give people much-needed help and soundness in the direction of their lives?*

A. Christ-centered churches are the most important. Others are Promise Keepers (a ministry to men to help them commit to lead Godly lives), Crown Ministries (small-group studies for sound finances), the Jesus video project currently happening, the Christian Women's Club (counterpart to CBMC for men), and Christian radio and television. Also, Christian day schools, the Crisis Pregnancy Center and Common Care Counseling Center, to which the courts refer, located in Muldoon.

Q. *What are your plans for the future?*

A. To continue to serve the Lord in whatever way I can to bring honor and glory to Him. To assist people in a total capacity, addressing their legal and translegal problems.

Get a master's degree in Russian law

The Institute of State and Law of the Russian Academy of Sciences offers a one year Master's program in Russian law in Moscow to qualified U.S. students. The Masters in Russian law, comprising 1,100 hours of instruction during two academic semesters, is designed to be an intense and practical program to provide students with the ability to work effectively in the Russian legal and administrative system. Admission is limited to 25 students who have received a degree from an ABA accredited law school.

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Learning the ropes in French Polynesia

By Paul Cossman

"We grounded!"

Actually Julia didn't even have to say that. I knew we'd hit ground when she pulled back on the throttle in the middle of the pass. There wasn't much I could do about it from my lookout perch 20 feet up the mast. But I knew it would only be a few seconds until the three or four knot current we were fighting turned us around and slammed us into one of the coral reefs on either side of the narrow pass.

I yelled down to Julia to give it full throttle. Unfortunately, from my lookout the 30 foot deep pass seemed to drop instantaneously to about 4 feet Our draft is 5 feet. It looked the same to my brother Eric, who was acting as bow lookout. We had no choice but to head for the standing waves and rushing current which obscured the bottom, and do it at full throttle. In the absence of any pass markers we just had to assume that was deep enough. Fortunately we didn't ground again, and we made it through the current in the pass (which looked just like lower Eagle River rapids to me). As we came out the end of the pass into the Manihi lagoon, we discovered a new set of dangers: large coral heads up to thirty feet in diameter which lay just one or two feet under the surface of the lagoon. But from 20 feet up the mast I could make them out at enough of a distance to go around them.

That was our introduction to navigating passes through coral into atolls. (An atoll is a large sunken volcano that has a navigable lagoon in the middle and is surrounded by coral, usually with one to three "passes" into the lagoon).

Then we learned the finer points of anchoring in coral atolls.

We were in Rangiroa atoll, which measures about 30 miles in diameter. We decided to anchor near Blue Lagoon, which is a miniature atoll inside the larger Rangiroa atoll. It was quite beautiful, and we anchored in about 30 feet. The area was peppered with coral heads which protruded from the lagoon floor like stalagmites, and were each about five to 10 feet in diameter. As the boat pivoted around its anchor during the night the anchor chain successfully wrapped itself around several of these coral heads.

At about 1 a.m. I was awakened by the pitching of our boat. The winds, previously calm, were now up to a steady 25 knots. The lagoon now had three-foot steep, choppy swells battering the boat. Since the anchor chain had wrapped around the coral heads, there was now such a short length of chain between the closest coral head and the boat, the boat was pitching furiously up and down with the swells. It was too much for the gear, and the line that took the tension between the anchor chain and the boat snapped apart. I quickly made another "snub line," which also parted under the strain. By this time the boat was bucking wildly on the short length of chain. Our depth gauge was jumping from 20 feet to 8 feet, because we were veering wildly over this one coral head. We couldn't let out more chain because the reef was right behind us. A little elementary arithmetic told me that 8 feet of water (over the coral head), minus three feet (the swell height), left us with five feet of water depth. That's right, the same as our boat draft. By this time a couple hours had gone by and I was exhausted, so I did the only reasonable thing. I went below to wait for daylight.

The next morning we found that the main shaft of the power winch we use to pull up the 60 pound anchor and chain was bent beyond use. So we rigged up a couple of lines with chain hooks on them to hold the chain as I pulled it up by hand. I went down with a scuba tank to try to map out the best way to maneuver around the coral heads to retrieve our anchor and chain. It took us about two hours of maneuvering and pulling to retrieve the 150 feet of chain and the anchor.

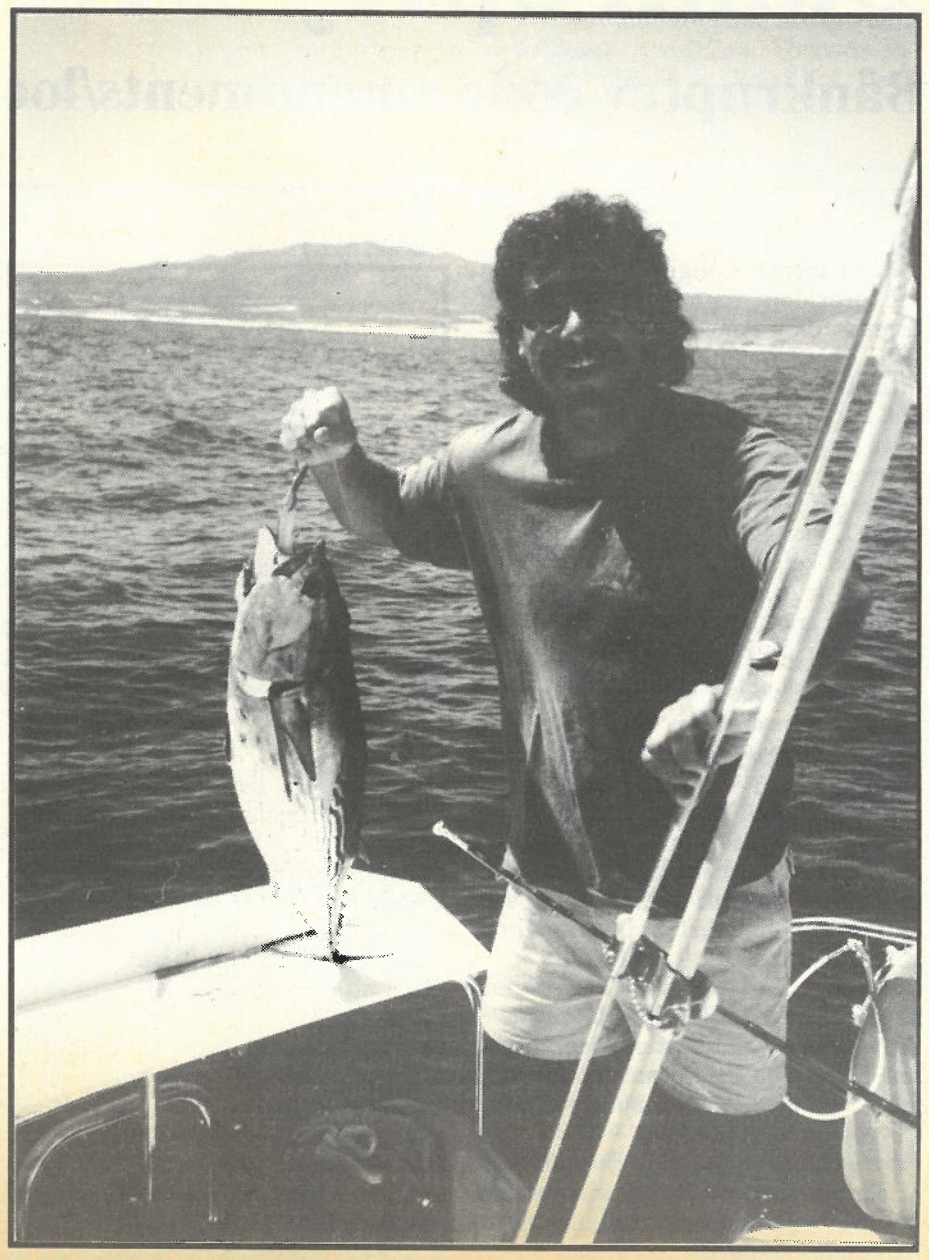
After we got the anchor up, we then had to navigate across the atoll to get out of the pass. When it's calm you can see the coral heads just hiding one foot under the surface. But when the wind is blowing 25 knots it kicks up whitecaps that obscure everything below the surface. So we navigated out of the atoll by memory, hoping to miss the coral heads. We were lucky.

These two experiences don't stand alone. I have many other fond memories of the last 8,000 miles, like when the genoa jib sail tipped out in a gale at the equator and it took me three days to sew it back together. Or when the wind blows 30 to 35 knots at a new anchorage and we stay up all night to make sure the boat doesn't drag anchor. Or when the boat does drag anchor and we stay up all night to make sure it doesn't happen again. Or when the reef sharks come over to investigate us while we're walking in knee-deep water. Or the last two weeks, when there have been strong wind and gale warnings issued every four hours of every day throughout all of French Polynesia.

Really, though, the voyaging has been a lot of fun as well. Sitting on deck with a margarita in a calm sea just doesn't make much of a story.

I often think back to a conversation I had in a hotel bar in Kodiak last year with a couple other lawyers. One told me that I would never be able to adapt to a cruising life because I am too hyper a person, and that I would be too bored.

I remember wondering, back then, what it would be like to be bored. I'm still hoping I get the chance to find out.

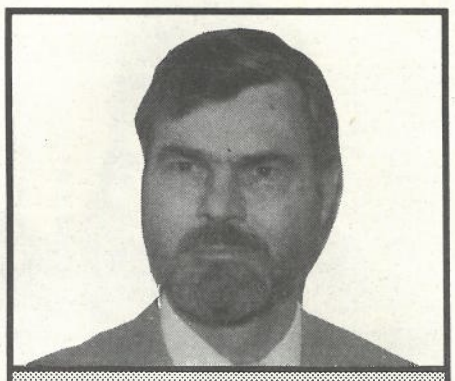


The author proudly displays a tuna dinner in the South Pacific. He sent this photo and report to his brother, Eric, who practices law in Anchorage.

Bankruptcy Briefs

Bankruptcy code amendments/local rule changes

Last month Congress passed and the president signed into law the "Bankruptcy Amendments of 1994" [H.R. 5116]. In addition, amendments to the Local Bankruptcy Rules ["LBR"] and Local Bankruptcy Forms ["LBF"] have been proposed. Highlights, with reference to the sections affected, of the major changes of general interest to the Code and LBRs/LBFs are summarized below. [The summary is intended to alert the reader to the changes and is not intended as a definitive or authoritative dissertation on the effect of the changes.]



Thomas Yerbich

Bankruptcy Code

Automatic Stay [§ 362(e)]: Hearings on relief from stay have been expedited. The final hearing must now be concluded not later than 30 days after the preliminary hearing; time may be extended only with the consent of the parties or if the court finds compelling circumstances.

Exemptions [§ 522(d)]: The dollar amounts of federal exemptions have been doubled; in addition, exemption amounts will be automatically adjusted every 3 years for increases in the cost of living index.

Priority Claims [§ 507(a)]: The amounts of claims entitled to priority where determined by a specific dollar amount have been doubled.

Independent Sales Representatives [§ 507(a)]: Adds a provision extending the wage priority to certain single-employee corporations acting as a independent contractor in the sale of goods or services.

Nondischarseable "Luxury" Debts [§ 523(a) (2) (C)]: Definitional amount increased to $1,500 for charges or advances made within 60 days of the order for relief.

Support, Alimony & Property Settlements [§§ 362(b); 507(a); 522(f); 523(a), (c); 547(c)]: Excepts from the automatic stay various family law matters and adds a new seventh-tier priority for alimony and child support payments. Debtor may not avoid as impairing exemptions judicial liens for support or alimony; nor may the trustee avoid as a preferential transfer a support or alimony payment or other transfer. Also, certain property settlements are excepted from discharge (if complaint objecting to dischargeability is timely filed) unless the debtor lacks the ability to pay or the benefit of a discharge to the debtor outweighs the detriment to the other party.

Involuntary Petitions [§ 303(b)]: Increases to $10,000 the amount necessary to file an involuntary petition.

Chapter 13 Eligibility [§ 109(e)]: Raises the limit on eligibility for chapter 13 relief to $1,000,000; $250,000 unsecured debt and $750,000 secured debt.

Principal Residence in Chapter 13 [§ 1322(c)]: Provides that a default regarding a lien on a principal residence may be cured in a chapter 13 plan until such time as the residence is sold at a foreclosure sale.

Principal Residence in Chapter 11 [§ 1123(b)]: Extends *Nobelman* proscription on stripping mortgages on principal residences to chapter 11 cases.

Post-Petition Rents [§ 552(b)]: Deletes the reference to "applicable bankruptcy law," leaving the right to collect postpetition proceeds/rents to the security agreement alone.

Chapter 11 Trustees [§ 1104]: Adds a new provision permitting creditors to elect a chapter 11 trustee.

Chapter 11 Status Conference [§ 105(d)]: Authorizes the court to hold status conferences to set dates for certain key events (e.g., filing of plan, assumption/rejection of contracts, combining the hearing on the disclosure statement and confirmation) in a chapter 11 proceedings. [Note: The reader is referred to amended LBR 60(e) for the procedures governing status conferences in this district.]

Late-Filed Claims [§ 502(b)]: A provision has been added for disallowance of late-filed claims. [Overrules *Pacific Atlantic Trading Co.*].

Preferential Transfers [§ 550]: During the 90-day to 1-year period, the trustee may not recover a transfer made for the benefit of an insider from a non-insider transferee. [Overrules *Deprizio-Suffola.*]

Trustee Compensation [§§ 326(a); 330(b)]: Increases trustee compensation to 25 percent on first $5,000, 10 percent on $5,000--$50,000, 5 percent on $50,000 -- $1,000,000, and 3 percent over $1,000,000; also increases trustee compensation in "no-asset" cases to $60.

Reclamation [§ 546(c) (1)]: Extends time for reclamation demand from 10 to 20 days.

Attorney Compensation [§ 330(a)]: Authorizes promulgation of procedural guidelines by U.S. Trustee

Property Tax Liens [§ 362(b)]: Adds property tax liens for postpetition property taxes to those acts unaffected by automatic stay. [Overrules *Glasply Marine Products.*]

Single Asset Real Estate [§§ 101; 362(d)]: Creates a new definition of a "single asset real estate" as a single property or project, other than a residential unit with fewer than 4 units, which generates substantially all the debtor's income and with secured debts totalling, in the aggregate, less than $4,000,000. Stay will be lifted after 90 days unless debtor has filed a plan or commenced payments to the secured creditor equal to market rate interest on the amount of the secured claim.

Interest on Interest [§ 1123]: Requires amount required to cure a default be determined in accordance with the underlying agreement and applicable non-bankruptcy law. [Overrules *Rake v. Wade.*]

Small Business [§§ 101(51)(C); 1121(e); 1125(f)]: Creates a fast-track procedure for small businesses (under $2,000,000 in aggregate debt) at debtor's election.

Local Bankruptcy Rules

Attorneys [LBR 5]: Debtor partnership must be represented by counsel; "small matter" exception for partnership/corporations representation by counsel tracking small claims jurisdiction of the Alaska courts.

Petitions /Accompanying Documents [LBR 9] : When governmental entities are scheduled claimants, the appropriate legal office must be included on the mailing matrix.

Joint Petitions [LBR 11]: Provides for automatic joint administration and "semi-automatic" consolidation.

Joint Administration / Consolidation [LBR 11]: New rule setting procedures for obtaining joint administration or consolidation of cases other than joint petitions.

Relief from Automatic Stay [LBR 41]: Requires objecting parties to more completely state grounds for objection; also implements Rule 26(a), FRCP.

Assumption / Rejection of Executory Contracts / Leases [LBR 43]: Implements Rule 26(a), FRCP.

Sale of Estate Property [LBR 45]: Implements Rule 26(a), FRCP.

Discovery [LBR 52]: Clarifies which subsections of Rule 26(a), FRCP apply generally to contested matters and adversary actions; also includes provisions on discovery motions previously covered in Rule 70.

Chapter 11 [LBR 60]: Procedures for status conferences and closing of case after a plan has been confirmed have been added; old "fast-track" rule deleted.

Chapter 11 Plans [LBR 61]: New rule incorporating much of the material previously included in LBR 60, with several modifications, regarding the content of disclosure statements.

Contested Matters [LBR 70]: Provides more complete guidance on filing motions or applications; provides for service and filing of affidavits, declarations, and exhibits prior to hearing; provides for sanctions for frivolous motions or objections; and adopts appropriate District Court General Rules for contested matters.

Local Bankruptcy Forms

Motion for Relief From Stay [LBF 1]: Requires moving party to itemize the balance due, set forth the basis for its valuation, and identify all known liens on the property.

Certificate of No Objections [LBF 4]: Eliminates the need to attach a copy of previously filed certificate of service to the form.

Chapter 13 Plan [LBF 5]: Revised to provide clearer instructions on how plan payments are to be applied, particularly with respect to cure of arrearages.

Objections to Claims [LBF 13]: Revised to provide additional information regarding the claim and how objecting party proposes the claim should be treated.

Joint Administration / Consolidation [LBFs 28 & 29]: New forms for giving notice of motions for joint administration and substantive consolidation under new LBR 13.

Post-Confirmation Report [LBF 30]: New form, to be used in chapter 11 cases in connection with amendment to LBR 60(f).

Motion for Final Decree [LBF 31]: New form, to be used in chapter 11 cases in connection with amendment to LBR 60(f).

Notice of Motion for Final Decree [LBF 32]: New form, to be used in chapter 11 cases in connection with amendment to LBR 60(f).

Changes in Time for Filing Objections [LBFs 2, 3, 10, 11, 14, 15, 16, 17, 18, 19, 23 and 26]: Revised to reflect additional 3 days for notice via mail.

In addition, LBFs 21 and 22 were abrogated. Rule 9009, FRBP and LBR 61 require use of Official Forms 12 and 13.

Getting Together

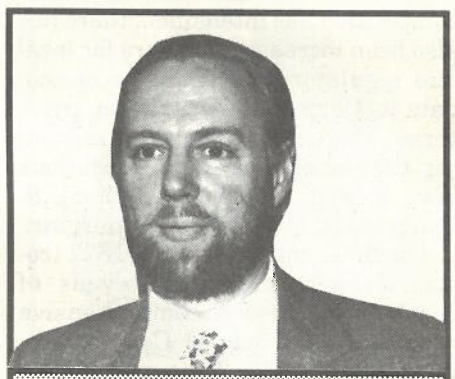
The practice of law as a healing art

In the Spring of 1993, at the National Conference on Peacemaking and Conflict Resolution, in Portland Oregon, I attended a workshop entitled "The Practice of Law as a Healing Art." When I mention the workshop to people, including my lawyer friends, the general reaction is to snicker. The concept seems ludicrous, I suppose. Yet there is much truth to the concept, I believe. The practice of law can and should be a healing art.

A similar phrase has caught the public's attention over the past couple years. Commit "random acts of kindness", the advice goes. The random kindness concept has caught the public fancy and spread rapidly. Within a couple years it has spread from a California college campus (purportedly) to be the source of numerous books and articles, as well as best-selling bumper sticker.

Like random acts of kindness, the concept of the practice of law as a healing art is striking because it is unexpected. We do not correlate the law with healing, just as we do not correlate randomness with kindness. Yet both concepts make perfect sense on a deeper level.

Indeed, I believe that it was this sense of the law as healing that attracted many of us to the legal profession in the first place. As youngsters, we talked about a quest for justice as attracting us to the legal profession. But is not that very quest for justice a quest for healing the torn fabrics of society? Looking beyond justice, are we not in fact seeking transcendence



Drew Peterson

of the particular dispute, and reconciliation of the underlying relationships?

I like the sewing metaphor for the practice of law. Mahatma Gandhi, once the most successful practicing Indian lawyer in South Africa, said that the true function of a lawyer is "to unite parties riven asunder." I have an image of attorneys toiling as gentle seamstresses, patiently mending the fabric of society that has been torn and shredded by the ravages of greed, anger, and violence.

As we mature in the profession we take increased pleasure in our role as "counselors". It is not just an anachronism that we are addressed as counselor. That is exactly the job that we perform. We counsel our clients on effective ways of dealing with conflicts that present themselves in their lives. We are often the first professionals consulted for counseling and advice when clients suffer major crises in their lives. We help to guide them through the minefield of rules and regulations that society has imposed to regulate their conduct as they cope with the crises.

The key to the practice of law as a healing art is the relationship that we have with our clients. There is a saying in negotiation training that the hardest negotiations are those with our own side. Never is this more true than in the relationship between lawyers and clients. It is easy to get pulled into the client's fire - their anger. We must negotiate with our clients to help them see beyond their pain. To help them look toward a long term resolution of the conflict, and not just a short term advantage. We need to help them to look past the satisfaction of a short term victory and towards forgiveness, reconciliation and transcendence of the entire dispute. To help them to fight for peace - not war.

The starting point in this practice of law as a healing art is to listen to what our clients are telling us. To listen carefully and respectfully to learn their true concerns. Respectful listening is much more important to the practice of law than is being a skilled mouthpiece.

One of the first things taught in mediation training is the art of "active listening." Upon first hearing about active listening I was struck by the fact that it is something we all learn from the practice of law, although I do not remember even receiving any formal legal training in active listening. But even if not taught in law school, we soon learn that listening effectively and empathetically to our clients is essential to the practice of law. We learn to gently encourage our clients to give us sufficient information that will enable us to help them resolve their disputes in the most effective way.

We may sometimes become confused by the relationship between counselors and advocates. We have the ethical duty effectively and vigorously advocate for our clients. But again the critical issue lies in our negotiation with clients in the role as counselor. Clients often do not know what they want. They are stressed and angry, which is what got them into an attorney's office in the first place. They have deliberately sought the advice and counsel of a cooler head, to seek the most effective possible solution to their current problem. Our objectivity and dispassion are what they want and need, although they may not be aware of this. They may think they want a weapon, but we convince them that they need a solution, instead.

The Portland workshop was a revelation for me. Fifty some lawyers sat in a circle, some in Levis, long hair and sandals, and others in $1,000 suits. They shared their thoughts and feelings about how to help clients transcend their anger and frustration and focus on finding effective solutions. And they shared their perspectives on how the legal profession can and should be a healing institution.

By committing not random but conscious and consistent acts of kindness with our clients, and on their behalf, we can be proud to make the profession of law a healing art.

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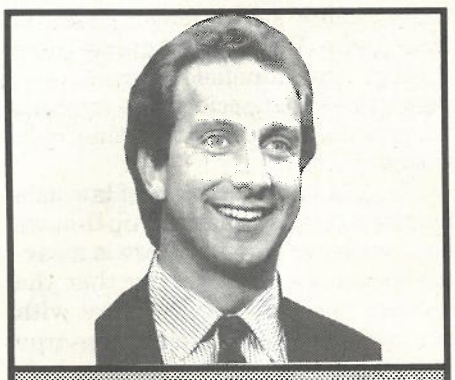
EDUCATION BY THE BAR FOR THE BAR

Juris Prudence

Telecommunications in Alaska 2001

By Daniel Patrick O'Tierney

In 1991, Alaskans witnessed the opening salvo of in-state competition in telecommunications when GCI was licensed to enter the intrastate, long distance telephone market. A competitive market structure had earlier been authorized by the Alaska Legislature. (AS 42.05.800) The telecommunications business in Alaska hasn't been the same since and more dramatic changes are on the horizon.



Daniel Patrick O'Tierney

"Advances in technology and anticipated changes in federal law are driving the provision of telecommunications services in a competitive direction.

At this point, discount calling plans abound and competition for business accounts is robust. Even AT&T is preparing to enter our market as a direct service provider. Wireless fax machines, fiber optic networks, cellular telephones and interconnected computer data banks have already permeated the Alaska market. More innovations, like interactive video, are coming soon.

Advances in technology and anticipated changes in federal law are driving the provision of telecommunications services in a competitive direction. The result not only will be new and innovative service offerings but also significant changes in the way traditional services are provided.

Nationally, the companies that now provide telephone service, cable television and data processing are preparing to branch out into each other's traditional lines of business. Technology is blurring the boundaries between historically distinct services. This convergence is the basis for expected competition on multiple speed lanes of the so-called 'information superhighway'. Locally, for example, Anchorage Telephone Utility announced last February that it was considering provision of pay-per-view television to its local customers and expected to conduct a video trial this year.

As the technological potential for competition has intensified, there has also been increased pressure for legal and regulatory change to accommodate it. During this year's Congress, three different bills aimed at reforming the nation's telecommunications laws passed one house of the U.S. Congress by overwhelming margins.

One of them, Senate bill 1822 (cosponsored by Senator Stevens of Alaska), involved a comprehensive rewrite of the federal Communications Act of 1934. Time ran out for passage of that bill in this year's Congress but you can expect the dance of telecommunications legislation to be renewed next year. Meanwhile, certain sectors of the industry will enjoy a temporary reprieve from the prospect of increased competition.

Much of the proposed legislation in Congress this year would have reduced or eliminated existing regulatory barriers that prevent competition at the local level. Also, contrary to existent judicial restrictions, regional Bell operating companies (RBOCS) would have been authorized to compete outside of their traditional service areas and enter the long distance telephone, manufacturing, and information service markets.

Meanwhile, the Federal Communications Commission is already actively promoting competition. It is currently adopting rules for the auctioning of licenses for wireless personal communication systems (PCS). This technology is apparently capable of providing a variety of new services such as linking computer work stations in wireless LANs and greatly expanding the number of companies offering cellular-type service in the marketplace.

Amidst this period of rapid market change, many states are not waiting for federal legislation. California, New York, Washington and Wisconsin, among others, have begun initiatives to reevaluate their telecommunication goals and develop an action plan for the transition to the future.

Along the same lines, the Alaska Public Utilities Commission recently initiated a formal Notice of Inquiry, called Alaska 2001, in which it proposes to assemble task forces to explore specific areas critical to Alaska's telecommunications future in the brave new competitive world. Undoubtedly, various changes in state law will be necessary to accommodate the evolving marketplace.

New technologies and competitive services will significantly affect the way information is delivered in Alaska - and the price that consumers pay for these services. Enhanced telecommunication services have the potential to dramatically change education, rural health care, government service and the way we do business in Alaska. Information technology and telecommunications are also explosive areas of entrepreneurial activity which offer the potential to create jobs.

On a somewhat more prosaic level, litigators will be amused to know that bulletin board defamation suits have arrived. An American journalist is being sued for comments he posted on the Internet. In the United Kingdom, a nuclear physicist is suing an academic based in Geneva for statements allegedly made over the Usenet. So it goes-on the information highway.

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"Eighty-Sixed"

Continued from page 9

In full presence of the jurors, counsel, the court, and reporters, I rocketed to my feet, proclaiming loudly to my client that a Fifth Amendment privilege existed — just like in the movies, even though my client was not Italian, lacking the looks, accent and hair.

The judge promptly announced that a recess was in order, whereupon certain of the more intelligent jurors began to look for playground toys.

The court, counsel, defendant, and witness remained in the courtroom to hash out the liturgy to follow. The jury was excused. Eventually, questions and answers were worked out and objections choreographed. Almost a legal Bruce Lee movie. But not quite.

During the choreographing process, I was allowed the dubious honor of sitting at the defense counsel's table. I even had a microphone shoved in front of me in response to the clerk's predictable glares.

After the question and answer session, it came times for the defense counsel to put certain objections on record. He did a reasonably good job, but forgot that he was sitting next to a "legal co-dependent."

It quickly became obvious to me, in true Groberesque fashion, that I could do the job better. So I whispered a couple zinger objections at him to give to the court.

Considering the fact that no one could hear me before, thus causing me to virtually have to eat the obnoxious court microphone, I was amazed, startled, and astounded when both the court and the district attorney, as if on cue, told me to be quiet!

I looked around the desk, thinking that I had finally located a bug, thus explaining how I had lost so many caseS the past. Yet, none was present, although I did see remains of a few mosquitoes from last summer squashed against the formica.

"Perhaps," I thought "this courtroom was built by the same contractor who did the new United States Russian Embassy."

But I didn't have time to verify this idea.

Try as I might to keep my thoughts to myself, my lips wouldn't obey. Another objection compulsively slipped out.

The D.A. promptly, in a fashion reminiscent of little red-headed kids, tattled on me, to the court.

I was reminded again to be quiet.

"But, what about his constitutional safeguards?!" My subconscious bellowed. Fortunately, my lips remained immobilized.

"Don't fail me now, lips," I thought in inimitable Bill Cosby fashion.

Sensing a leak, I promptly placed my hand over my mouth, causing eyebrows to raise by both the D.A. and judge, who could not miss my futile attempt to quell vocal exhaust. The strain upon me was quite taxing, and I leaned closer to the defense counsel, seeking moral support! Then it happened.

Soft sputtering emanated from behind my clasped mouth. True, it may have sounded like a whisper or maybe even somewhat similar to phrases uttered in the courtroom, but I can assure you that it was unintelligible to the defense attorney, since he obviously missed the opportunity for a great objection.

I frantically began to search for paper and pen — just so I could draw some pictures and write down some favorite poetry. Consider this jewel, which often sets me at ease:

My client has taken the chair.
The D.A.'s questions aren't fair.
It's clear on this day
We've unexcused hearsay.
Dammit, object, I'm losing my hair!

About then, the matters for "the record" concluded and I was unable to jot down my missives. The jury returned to the courtroom after having coffee and tea while I remained expectantly at the defense counsel's table, poised to give my orchestrated objections at the proper moment.

About then, the D.A. asked to approach the bench. The court granted the request and the D.A. and the defense counsel shuffled forward. A discussion occurred at the bench, during which it appeared that both the D.A. and defense counsel had finally reached agreement on something in this hotly contested case.

Meanwhile, I was proud, having been entrusted to "man..." (pardon me. . .) "person" the defense counsel table by myself. It was at that time the court actually recognized my presence, even though I had earlier been told that I hadn't even made an appearance in the courtroom. Hallelujah! My identity crisis was over. I also was asked to approach the bench.

I eagerly went to the front of the courtroom, ready to participate actively in the proceedings which had frustrated me earlier.

"Mr. Satterberg," the court quietly advised, "both the D.A. and the defense, as well as this court, have agreed that you no longer need to sit at the defense counsel's table during examination of your client. You can make objections known from the back of the courtroom well enough, we're sure."

[illegible] the cold wet pavement of college actually did feel better than the commercial grade carpeting of the chambers.

Bar People

Pradell and Associates is a law firm which began in Anchorage in 1993. **Steven Pradell,** a magician, owner of Abracadabra Entertainment and an attorney, left the firm of Birch, Horton, Bittner and Cherot to begin his own practice. As if by magic, the firm began to grow, quickly expanding from a one room office where Steve practiced by himself, to a firm with two Anchorage offices, numerous attorneys, paralegals and other support staff.

Most recently, **Walter Arden** has joined the firm as an associate attorney. Walt became a licensed attorney in California in 1973, after graduating third in his class from San Francisco Law School. In 1993 he was admitted to the Alaska bar, where he has practiced in the areas of civil and probate law.

The firm is pleased that Mr. Arden's experience will benefit new and existing clients. Mr. Arden will expand the firm's practice in the areas of Domestic, Personal Injury, and Probate Law. Mr. Arden will also practice Criminal law. Additionally, the firm is pleased to announce that Debra Bushey, formerly a secretary/receptionist and office manager at the firm, has been promoted to the position of paralegal. Cynthia Wicher has recently joined the firm as a secretary and receptionist.

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Signe Anderson, formerly with Bogle & Gates is now with the Commercial Section of the A.G.'s office....**Myles Conway,** formerly with Davis Wright Tremaine, is now with the A.G.'s office....**Francine Harbour,** formerly with 1st National Bank, is now with McNall & Associates....**Mark Choate, Steven Hempel, Jack Poulson** and **Louis Menendez** have formed the firm of Choate, Hempel, Poulson & Menendez.

Edward Hein has relocated from California to Juneau....**Michael Hough** and **Mark Kennedy** have formed the firm of Hough & Kennedy in Homer....**Chad Holt,** formerly with Edgar Paul Boyko & Associates, has opened his own law office....**Kathy Keek** has relocated from Fairbanks to Anchorage....**Keith Levy,** formerly with Clough & Associates, has opened his own law office in Juneau....**Weyman Lundquist,** formerly with Heller Ehrman in San Francisco, is now with Brooks, McNally, et.al. in Vermont.

Susan Orlansky, formerly with Delaney, Wiles, et.al., is now with Young, Sanders & Feldman....**Philip Pallenberg,** formerly with Batchelor, Brinkman & Pearson, is now with the P.D.'s office in Juneau....**John Robertson** has departed the firm of DeLisio Moran Geraghty & Zobel to form a solo practice....**Leslie David Romo** writes that he has opened his law office in Austin, Texas, for the general practice of law with an emphasis on environmental law and litigation....**Sarah Tugman** announces that the firm of Tugman & Clark has dissolved and she has started a solo practice....The firm of Rice, Volland & Gleason has changed its name to Rice, Volland, Gleason & Taylor.

Lee Holen Law Office announces the association of **Barbara A Jones,** formerly of Colorado. Jones is a member of the National Employment Lawyer's Assn. The firm's practice is limited to Employment Law.

Nathan Callhan, former Kenai and Kodiak D.A., along with two other questionable, yet talented and entertaining attorneys, has formed the law firm of Dunakey, Klatt & Callhan, in Waterloo, Iowa.

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Karen Bendler, formerly with Stoel, Rives, Boley, Jones & Grey of Portland, Oregon, is now with Jamin, Ebell, Bolger & Gentry. Ms. Bendler, who is a member of the Alaska, Washington and Oregon bars, practices in the firm's Kodiak and Seattle offices and focuses on corporate and employee benefits law.

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The American Bar Association has named **Robert A. Stein,** dean of the University of Minnesota Law School, Minneapolis, its Executive Director. Stein will have overall management responsibility for staff operations at the Association's headquarters in Chicago and its Washington, D.C., office, overseeing a staff of more than 700 persons and a budget of more than $100 million. **Donna Willard** served on the 14-member ABA search committee.

Alaska attorney Michael D. White of the Anchorage firm of Hartig, Rhodes, Norman, Mahoney & Edwards assumed the chairmanship of the National High School Mock Trial Championship, Inc. in October. White has served as a member-at-large for the past three years and will preside over the 12th annual national tournament scheduled for May 11-13, 1995 in Denver.

White is pictured next to a balloon baseball player figure during the May 1994 national championships in Chicago. (The national case had to do with the 1919 Black Sox scandal involving "Shoeless" Joe Jackson, which explains the baseball motif.)

NEWS FROM THE BAR

Board of Governors meeting summary

At the Board of Governors meeting on October 27-29, 1994, the Board of Governors took the following action:

· Listened to presentations by members of the Ethics Committee, Mike Geraghty, Nelson Page and Bob Mahoney, about whether it is ethical for attorneys to tape record conversations without the knowledge of the other party being recorded; after hearing both sides of the issue, the Board set this item on the January meeting agenda;

· Adopted the ethics opinion entitled, "Representation of Client under Disability;"

· Declined to approve a stipulation for a public censure, pending more analysis on why this would be the appropriate sanction;

· Heard reports on section activities from the following Section chairs: John Hofer (Tax), Tom Daniel and Lee Holen (Employment Law), Kevin McCoy (Criminal Defense) and Susan Reeves (Environmental/Natural Resources);

· Heard a report from Sandra Saville from the Pro Bono Service Committee and approved a committee request to bring the 4 non-Anchorage members to Anchorage for a day long meeting of the committee;

· Heard the CLE report and the recommendations of the CLE Committee; approved appropriating up to $1500 for a CLE survey of the membership;

· Approved housekeeping amendments to the Standing Policies of the Board of Governors regarding sections;

· Heard public comment from Theresa Obermeyer;

· Reviewed correspondence from Judge Holland regarding the selection of the 9th Circuit Lawyer Representatives;

· Approved sending to the U.S. District Court the proposed amendment to the local federal rules which would impose a fee on Outside Counsel participating in the U.S. District Court in Alaska;

· Certified the results of the July 1994 exam, with 67 of the 92 applicants passing, for a passing rate of 73 percent (for first time takers, the passing rate was 77 percent);

· Approved 4 reciprocity applicants for admission; conditionally approved 2 other applicants for admission pending receipt of their fingerprint card reports;

· Adopted the Hearing Master's report and denied an applicant's admission appeal;

· Approved a stipulation for public censure and probation for one year, as modified;

· Approved a stipulation for a private reprimand by the Board;

· Held a hearing on a reinstatement request; the Board declined to recommend that the supreme court approve the reinstatement at this time; they believed that reinstatement would be premature because all of the conditions of the stipulation have not been met; this is not a negative reflection on the applicant and he is encouraged to reapply when the conditions have been met;

· Approved the proposed 1995 budget, with projected revenue of $1,776,000 and projected expense of $1,603,000;

· Approved the computer system replacement phase-in to begin now with estimated completion in 1996; the board asked that with a new computer system, the staff explore options for communications with members;

· Reviewed the issue of lawyer advertising and asked the director to explore options for approaches with the member who wrote the letter;

· Referred a request for an amendment to RPC 7.4 to the Model Rules Committee;

· Directed staff to draft a proposed bylaw which would make the Model Rules Committee a standing committee with staggered terms

· Heard a report on the Minority Applicant Tutoring program and that no applicants requested participation in this program for the July 1994 exam; the Board approved continuing the program for one more exam;

· Approved sending to the supreme court an amendment to the bylaws which sets the exam reapplicant deadlines at July 1 and

· Reviewed a letter from a member which asked the board to establish a policy on the sale of membership mailing labels; there was no sentiment on the board for such a policy;

· Discussed the Substance Abuse Committee with its chair, John Abbott, and decided to include this committee on the annual committee solicitation form and have staggered terms;

· Reviewed a proposed letter for the president's signature promoting the West CD-ROM membership program and it was decided that the president would edit the letter;

· Asked the director to follow up on an ABACUS Data System membership benefit program;

· Amended the Standing Policies to reflect the board's policy that financial contributions may be given for the swearing-in or retirement of statewide or federal judges and that local bars are encouraged to contribute for local trial court judges;

· Denied a member's request to resign due to pending discipline; approved the resignation request of Randall Weiner and the requests to transfer from inactive to active of Calvin (Kelly) Vance, John Holmes, Jeanne Riley and John Cooper;

· Approved the August board minutes as corrected;

· Reviewed the status of the priorities set at the August meeting planning session and suggested action on some items;

· Deliberated in the Disciplinary Matters involving Fred Triem and recommended to the supreme court that he be suspended for 90 days.

First orders issued as the winds change

In the trial courts for the State of Alaska
Third Judicial District at Anchorage

ORDER

This order constitutes notice that all forcible entry and detainer cases filed in District court, Third Judicial District ~ Anchorage, prior to March 31, 1994 will be administratively dismissed and closed as to remaining issues without further notice on January 1, 1995.

Upon dismissal, all exhibits, depositions and other items in the custody of the court will be disposed of after June 1, 1995 unless claimed by parties prior to that date.

Any dismissals under this order will be without prejudice Parties who wish to re-open their case may do so as a matter of right by making a request in writing to the Clerk of Court not later than June 1, 1995.

DATED at Anchorage, Alaska this 3rd day of November, 1994.

/s/ Karl S. Johnstone
Presiding Judge

In the Superior Court for the State of Alaska
Third Judicial District at Anchorage

In the Matter of:	
The Filing of Dissolutions Where Custody of Children is Involved.	3AN-AO-94-09

STANDING ORDER

A committee of persons including the Presiding Judge of the Third Judicial District, a member of the Judicial Council, a staff employee of the Judicial Council, attorneys practicing in the area of family law, a mediation consultant, Master of the Superior Court handling family law, the chief custody investigator, and administrative staff have determined that parents contemplating a dissolution where custody of children is involved can better understand and deal with their children's needs if the parents attend a showing of a video film of approximately 50 minutes in length. The film, entitled "Listen to the Children," is intended to address questions that parents with children may have concerning the process and the effects of the dissolution on their children. It is contemplated that this film will be shown at a designated location approximately two or more times per week and shall be conducted by court employees or other qualified individuals. If time permits, there may be a group discussion period for questions and answers and further explanation of issues raised by the film. This film and any questions and answers that may take place after the showing is not intended to substitute for legal advice from a lawyer, but is meant to help parents in planning for their own and their children's futures. Now therefore,

IT IS ORDERED as a condition to filing a Petition for Dissolution of Marriage in the Third Judicial District of the State of Alaska at Anchorage by parties with minor children, that the parties shall attend the showing of the showing of the film "Listen to the Children" or its equivalent at a designated location within the court building in Anchorage, Alaska. Upon the completion of the viewing of the film, parties to the dissolution action shall be provided a certificate of completion which, upon presentation to the Clerk's Office, will entitle them to file a Petition for Dissolution.

IT IS FURTHER ORDERED that a party to a dissolution action must attend the showing of the film unless the assigned judge or master excuses their attendance. Attendance will be excused only upon a showing of good cause by the party.

The provisions of this order become effective as of January 1, 1995.

DATED at Anchorage, Alaska this 2 day of November, 1994.

/s/ Karl S. Johnstone
Presiding Judge

Public Service Announcement

U.S. Bankruptcy Court - District of Alaska

In September the U.S. Bankruptcy Court for the District of Alaska submitted proposed local rule amendments with amended local forms out to the public for comment. The amendments would have become effective November 1, 1994. Due to recent passage of the Bankruptcy Reform Act of 1994, and due to the U.S. District Court of Alaska's proposed amendments to its local rules, proposed rules have been abrogated by this court.

After review of the Bankruptcy Reform Act of 1994, and review and approval of the amended U.S. District Court rules, this court will schedule another public comment period and submit a revised set of prosed rules for public inspection. It is anticipated that this will not be accomplished until after January 1, 1995.

The U.S. Bankruptcy Court for the District of Alaska local bankruptcy rules published March 1, 1992, will remain in full force and effect until further notice.

NEWS FROM THE BAR

Committee reviews lawyer discipline process

Background. The system for imposing discipline on Alaska lawyers who engage in professional misconduct involves shared responsibilities by the Alaska Bar Association and the Alaska Supreme Court. The Alaska Constitution explicitly recognizes the existence of the organized bar and implicitly recognizes the bar's self-governance and self-regulatory functions. At the same time, the state constitution delegates ultimate power and responsibility for the regulation of the practice of law to the Alaska Supreme Court. Sharing the responsibility for imposition of lawyer discipline involves a system by which rules regulating the practice of law are proposed by the bar association and then considered for adoption by the Supreme Court. At the same time, the court has delegated to the bar association fact finding and administrative responsibilities associated with enforcing the bar rules and administering the discipline system.

How the system functions. Discipline complaints are filed with the bar association and are investigated by the bar association's disciplinary staff headed by bar counsel, an attorney who is hired by the bar association's board of governors. Bar counsel acts as a prosecutor and pursues those cases deemed worthy of formal discipline proceedings. Disciplinary hearings are held before area hearing committees, which are comprised of two lawyer members and one non-lawyer member. The area hearing committees hear the evidence and render findings, conclusions, and recommendations, which are subject to review by the bar association's board of governors sitting as the discipline board of the Alaska Bar Association. Further review is provided by the Alaska Supreme Court. Only the Supreme Court has the power to publicly censure impose probation, suspend, or disbar attorneys for professional misconduct, The bar association can impose lower forms of discipline without court approval, including private admonitions and reprimands.

Recent changes. The system of attorney discipline has worked reasonably well since statehood. Still, at times, the case load has taxed the resources of the bar association and the adoption of standards for lawyer discipline on a case-by-case basis sometimes triggered results that at best were difficult to reconcile, and at worst inconsistent, Several steps have been taken in recent years to improve the system of lawyer discipline and the bar association is about the engage another important step, which is the purpose of this column. Of the steps already taken in recent years, one was enacted by the Alaska Supreme Court and the other by the Alaska Bar Association itself.

The court adopted the American Bar Association's Standards for imposing Lawyer Sanctions in 1986. The AEA standards provided guidelines that set forth recommended levels of discipline for various types of misconduct. Like all codifications, the ABA Standards offered some advantages and some disadvantages, Among the advantages was the move towards a system of discipline that was perceived as being fairer, more predictable, and less subject to case-by-case inconsistency. Among the disadvantages was the imposition of a discipline system that is more rigid and less capable of responding to individual nuances and characteristics presented in discipline cases.

The Alaska Bar Association's efforts attempted to streamline the discipline system and shorten the time required to bring attorney discipline cases to resolution. Towards that end, the bar association hired additional staff and adopted a number of policies aimed at speeding up the discipline process. This effort and commitment of resources was met with considerable success and the bar's backlog of cases has been substantially reduced.

Current review of discipline system. In 1992, the American Bar Association produced a report by the Commission on Evaluation of Disciplinary Enforcement entitled "Lawyer Regulation for a New Century." This publication is available through the Alaska Bar Association and identifies some twenty different problems and recommendations for modifying the attorney discipline system to meet the current needs of the legal community and the public. The ABA'S report discusses a variety of important issues including the role of public members in the discipline process, the issue of public access to disciplinary information, the role of the judiciary in the regulation of the practice of law, and a host of other issues including mandatory malpractice insurance and alternative discipline for minor misconduct.

In the face of the ABA's report and new model rules for disciplinary enforcement published in 1993, Alaska Bar Association president Daniel E. Winfree recently appointed a committee to make a "top to bottom" review of the system of attorney discipline currently in place in Alaska. The committee is comprised of past presidents and board members of the Alaska Bar Association, representatives of the Alaska Supreme Court, and the public. President Winfree's charge to the committee was broad. He directed a full review of the system. Should Alaska move to a pure court-supervised process? Should the state relieve the Alaska Bar Association from any judicial aspects of the process, leaving the bar association in the sole role as "prosecutor" of discipline cases? Should appeals proceed directly from area hearing committees to the Alaska Supreme Court? Should there be a fixed, appointed discipline panel to replace the area hearing committees hearing functions or the board of governors appellate review function? Should we change the existing system or is it presently responsive and meeting the needs of our community?

The committee will be meeting regularly during the next several months and hopes to have a report completed by June, 1995. In the interim, the committee will be soliciting comments, thoughts, suggestions, and complaints from all interested sources and parties. Towards that end, those who may have an interest in this area are urged to contact the Alaska Bar Association at 510 L Street, Suite 602, Anchorage, AK 99501, telephone 272-7969, for further information about the committee's work. The committee is committed to soliciting the participation and thoughts of all interested parties and, particularly, members of the public who, as a product of past experience with the discipline system, have comments, suggestions, or concerns that merit review and consideration by the committee.

Attorney Bill Bryson censured for income tax violation

The Alaska Supreme Court has publicly censured Anchorage attorney Bill Bryson following his conviction for failure to file a federal income tax return in 1987. Bryson pleaded guilty to the federal charge in 1993. Bar Counsel and Bryson stipulated that his conduct adversely reflected on his fitness to practice law, and that he should be censured. The Supreme Court approved the stipulation imposing the discipline on September 16, 1994. The public record is available for inspection at the Bar Association offices in Anchorage.

In the reinstatement matter involving Kenneth J. Cusack, petitioner

Supreme Court No. S-6235
ABA File No. 1994R002

By Order of the Alaska Supreme Court entered September 15, 1994, Kenneth J. Cusack is reinstated to the practice of law effective September 3, 1994.

Supreme Court Case #: 56235

***** ORDER *****

It is ordered: Mr. Cusack's petition for reinstatement filed on July 5, 1994, is granted. The reinstatement is effective September 2, 1994. Entered at the direction of the Supreme Court on September 15, 1994.

Clerk of The Appellate Courts

Disability Status

By order of the Alaska Supreme Court, George E. Weiss is placed on interim disability status with the Alaska Bar Association effective September 16, 1994. Under Alaska Bar Rule 30, Mr. Weiss may not resume practice until reinstated by order of the Alaska Supreme Court.

Supreme Court No. S-6595
ABA File No. 1994B002

— Reminder —

The deadline for transfer to inactive status is Jan. 1.

Circle these dates for the 1995 Alaska Bar Association Annual Convention

Thursday, Friday and Saturday
May 11, 12 and 13

in FAIRBANKS,
The Golden Heart of Alaska

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

Another view of domestic violence issue

By Marvin Clark

This letter is politically "incorrect." And I'm sure it will be criticized by socially snobbish elitists who erroneously claim to have a monopoly on political "correctness."

I am agitated by the fact that our legal system has been politicized in certain areas where social debates boil over into courtrooms.

When I was a small boy, I stood in awe before the Statue of Liberty and observed early on that our courts claimed to keep justice in a blindfold. There weren't supposed to be different standards for justice depending on who you might be. That was 1964. John Kennedy had been assassinated and the country finally demanded that blacks be treated equally.

But as a 41 year old lawyer, I have now observed that sometimes there are different standards imposed and that justice frequently peeks from beneath her blindfold, because she wants to maintain political "correctness." There isn't any overt impropriety involved. But the effect is the same, because social injustice results, significant numbers of our hardest-working taxpayers are effectively disenfranchised, and out on the streets the law is put to ill repute.

I suppose one of my biggest beefs is that a specific class of citizen has been singled out and targeted for prosecution in certain criminal proceedings. I am the first lawyer to rush to court for the benefit of any battered woman. I agree, women should *never* be battered. But a recent television documentary on one of our network stations pointed out that about as many men are seriously assaulted by women, as are women by men. And this is where I become concerned.

Granted, a lot of men don't report the assaults because they are embarrassed; but those who do are rarely served. Their women assailants are rarely prosecuted. Police don't take men's complaints seriously, possibly because district attorneys don't either. Sometimes men report police scoffing at reported assaults by women. "You're a big man, you should take it."

One day a court clerk looked over his counter at me and I could see by his appearance that he was seething with anger. Then he declared his total frustration by the fact that domestic violence writs were being routinely granted to women like jelly beans from the candy bowl — yet men who came to court with identical complaints were almost never granted relief.

Since the O.J. Simpson case broke news, the court clerk tells me that domestic violence petitions against men "are in vogue." Domestic violence petitions against men have increased nearly 400 percent.

A while back, I heard about a man whose wife stabbed him in the back with a wood file while he slept peacefully in bed. He apparently made it to the hospital, but his assailant was never prosecuted to my knowledge. Had their roles been reversed, *he* certainly would have been prosecuted even if his wife would have refused to lodge a complaint. The hospital would have reported the attack and the police would have stepped in. Who cared that it was a man stuck in the back with a wood file? Perhaps only the man who got stuck in the back. Men are second class. "Billy Bob." "Deadbeat Dad." Does anyone care?

In my own cases as an attorney, I have observed situations where women could be prosecuted for assaulting husbands, children, and even torturing an infant. In not even one of those cases did the court, prosecutor, or police take an interest in bringing the woman to justice. Why not?

In a sensational case, like the Bobbitt case, there may be prosecution. But that is a rare case. In the Bobbitt case, the defendant actually emerged from the courtroom in a circus atmosphere and was proclaimed a "heroine" by political feminists for having butchered her husband's penis and throwing it away in a vacant field. If Mr. Bobbitt didn't have an anger problem before, he probably should have one now. I'm sure there are prosecutions of assaultive women somewhere, but in my 12 years of practicing law I haven't heard of very many.

And what about Abraham Lincoln? Was he some "Billy Bob" dipstick, "deadbeat dad?" History records that even Honest Abe was a physically abused man. His wife, Mary Todd Lincoln, was known to chase our former president with a butcher knife, throw eggs at him, attack him with a stick of firewood, and even hit him hard with a piece of bloody meat. She obviously never was prosecuted for any of those assaults, but then neither were many men in those days, either. So at least there was equality before the law.

Divorce attorneys typically observe that domestic violence complaints are routinely used as the weapon of choice by women for springboarding to "instant" custody of children and possession of family residence. Very often husbands complain that they were hit first. And some will say that they first attempted to get relief through a domestic violence complaint and were denied by the court. But then when

continued on page 19

Some Notes About Alaska Bar Association Continuing Legal Education (CLE) Programs

1. The Alaska Bar Association presents live CLE programs in Anchorage, Juneau and Fairbanks each year. The majority of live CLE programs are presented in Anchorage and videotaped for regularly scheduled group video replay in Juneau, Fairbanks, Kodiak and Dillingham.

2. In addition to the live CLE programs and group video replays, videotapes of Alaska Bar CLE programs are available for individual purchase or rental. Course materials are also available for purchase.

3. The Bar office only keeps a record of your attendance at Alaska Bar Association live and video replay CLE programs, and can provide you with a copy of your CLE credits. No CLE credits record is kept of individual rental or purchase of CLE programs, or of attendance at CLE programs sponsored by other organizations.

4. Alaska is not a mandatory CLE jurisdiction and does not currently have any minimum continuing legal education requirements. However, if you are a member of another jurisdiction that has minimum CLE credits, and require a copy of your Alaska CLE credits for another bar, please call us.

5. Alaska is an approved provider for California Minimum Continuing Legal Education credit.

6. There is a 50% registration fee credit offered to Bar members who travel to a live CLE program via a commercial air carrier.

7. There is a 10% discount in fees if 2 people from the same organization register for a live CLE, and a 20% discount if 3 or more people from the same organization register.

8. The CLE Program Cancellation Policy is as follows:
   Registration fees minus a $10 processing fee will be refunded to registrants who cancel 72 hours prior to the program date.
   Registration fees minus a $25 processing fee will be refunded to registrants who cancel 24 hours prior to a program. No refunds can be given for cancellations the day of or after the program.

9. The CLE Library is open to all Bar members. Materials are available for reference, rental and purchase. A listing of library materials is noted below.

HERE'S WHAT YOU CAN FIND AT YOUR CLE LIBRARY!

Open 8:00 a.m. - 5:00 p.m. Mon - Fri at the Bar Office, 510 L St. Ste. 602, Anchorage.
Phone: 907-272-7469/fax 907-272-2932

- Videotapes of CLE programs
- Audiocassettes of CLE programs (on request)
- CLE Course Materials
- Reference materials on substantive law areas
- Convention CLE materials
- Annual Section Updates
- "Alaska Attorney Desk Manual" Series - individual publications on selected practice areas

Tapes and materials are available for rental and/or purchase. Facilities in the Bar office are also available to review tapes and materials. We are happy to mail tapes and materials to members outside of Anchorage.

The Bar also publishes a Library Catalog which is distributed to Bar members.

FOR CLE QUESTIONS: Please call Barbara Armstrong, CLE Director; Rachel Tobin, CLE Assistant; or Ingrid Varenbrink, CLE Library; at 907-272-7469. Call 800-478-7878 for recorded information on upcoming programs.

EDUCATION BY THE BAR FOR THE BAR

Torts

Supreme court slaps "loss" of evidence

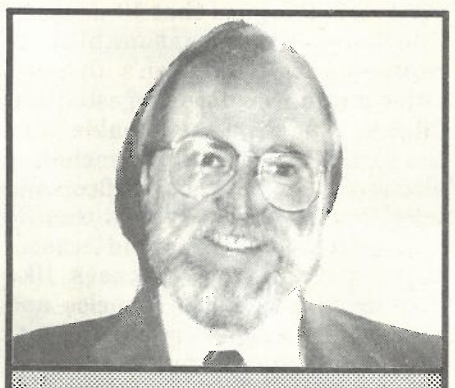
On September 30, 1994, the Alaska Supreme Court issued its Opinion No. 4127 in a case titled *Gary and Beverly Sweet, Individually and as Parents and Next Friend of their Minor Son, Jacob Sweet v. Sisters of Providence in Washington, a Washington non-profit corporation, d/b/a Providence Hospital. et al.*

This tragic story begins with the birth of young Jacob on January 16, 1986 at Providence Hospital. Jacob was circumcised on January 17 and he and his mother were discharged from the hospital on the 18th of January.

On the 25th of January, the Sweets called one of the defendant physicians because Jacob was fussy and vomiting. He was later admitted for observation and an attempt to treat this localized infection and thus curb the risk that he would become septic. Jacob began having seizures on Sunday, January 26. He had a severe seizure early in the morning on Monday the 27th, and ultimately developed brain damage.

Jacob's experts testified that the brain damage was secondary to hypoxic ischemia (reduced blood flow coupled with reduced oxygen in the blood supply) suffered during his prolonged seizure at the hospital. They testified that the seizure was in turn caused by the systemic bacterial infection that originated at the circumcision site. Jacob's experts further testified that these adverse consequences could have been avoided had his earlier seizures been better monitored and more promptly responded to.

Defense experts testified that Jacob's seizures, if any, did not cause his brain damage. They suggested that a viral infection may have been the cause of the child's ultimate neurologic dysfunction.



Michael Schneider

A defense verdict was returned on all issues.

Of great frustration to plaintiffs was the fact that a number of medical records were "missing". These included narrative nursing notes, a medication sheet, a graphic record, and a nursing care flow sheet for Sunday, January 26. The Sweets contended that the missing records kept them from winning their medical negligence case and that they were entitled to a conclusive presumption of negligence because the records were missing. The trial court shifted the burden of proof to Providence on the issues of duty and breach. The Supreme Court found however, that the plaintiffs were entitled to a shift in the burden to Providence of proving that Jacob's injuries were not caused by the hospital's negligence. *Id.* at 14:

> Just as the missing records may have impaired the Sweets' ability to prove medical negligence, they, would in the same way impair the Sweets ability to prove a causal connection between any negligence and Jacob's injuries. It is for this very reason that a number of courts in other jurisdictions have created a rebuttable presumption shifting the burden of persuasion to a health care provider who negligently alters or loses medical records relevant to a malpractice claim. *Id.* at pages 14-15 (citations omitted).

If plaintiff can show that the lack of a record hinders plaintiff's ability to prosecute plaintiff's claims, then the rebuttable presumption will apply. The opinion further seems to require that "the essential medical records [be] missing through the negligence or fault of the adverse party" *Id.* at 16.

In determining this question of "fault" in the loss of important records, the court referred to state statutes, state and federal regulations, and hospital accreditation standards specifically intended to protect the legal interests of the patient (among other things) as establishing a duty on the part of the health care provider to maintain various classifications of records. A breach of this duty is negligence per se. The party losing the evidence has the burden of affirmatively proving any defense to the negligence per se claim (e.g. *Restatement (2nd) of Torts* § 288(A)(2)(c); Inability to Comply). *Id.* at 17 and 18.

The presumption of negligence and causation, once shifted, does not vanish with the introduction of contrary evidence. Instead, the burden of proof is irrevocably shifted to the defendant to prove by a preponderance that the defendant was nonnegligent and/or that its acts were not a legal cause of the damages complained of. *Id.* at 19 and 20.

The implications of the court's holding were summarized as follows:

> As a practical matter, then, the jury must first assess Providence's excuse for the lost records. If Providence does not establish that its loss of the records was excused, the jury instructions must reflect that the burden remains on Providence to affirmatively disprove medical negligence and causation. If, on the other hand, the jury is satisfied that Providence's failure to maintain the proving that the defendants committed medical negligence, and that such negligence legally caused Jacob's injuries. *Id.* at 20, 21.
>
> The court went on to hold that the record in the case was inadequate to establish a cause of action for *intentional* spoliation. *Id.* at 21.

Without answering the question of whether or not a cause of action would be recognized in Alaska for the tort of *negligent* destruction of evidence under other circumstances, the court found that the burden shifting sanction described earlier in the decision was adequate. It declined to acknowledge a cause of action under the facts before it for negligent spoliation of evidence.

The Sweets also contended that defendants' failure to obtain signed informed consent documents made them negligent per se. The trial court concluded that the regulations relied upon by the Sweets did not set the standard of care for tort liability purposes. The Supreme Court reversed because of a lack of findings by the trial court adequate to determine whether or not negligence per se concepts properly applied to the administrative regulation in question:

> Because the trial court did not adequately investigate this issue in an evidentiary hearing, there was an insufficient factual basis from which to conclude that the regulation either was or was not obscure and whether it could be fairly interpreted to set the standard of care. *Id.* at 25.

This important decision goes on to address issues regarding the number of expert witnesses that should be allowed to testify and the extent to which and circumstances under which defense experts can be cross-examined using the sworn testimony of experts *not* expected to testify at trial.

This opinion is well worth reading, There is no reason to believe its holding is confined to medical negligence cases. It will be a great assistance to plaintiffs who are thwarted by "lost" or "missing" evidence and gives defendants an added incentive to play by the rules.

Another view of domestic violence

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they finally defend themselves, they find that the tables are turned — their wives run to court and the court throws *them* out on the street before entertaining criminal prosecution on 4th degree assault. This pattern is classic and routine. It doesn't take a lawyer to spot it. And it's a shame that some of our most competent judges are stuck driving taxicabs.

Husbands frequently complain that their wives manufacture facts to support accusations. Surprisingly, district attorneys are sometimes aware that this monkey business occurs. One prosecuting district attorney from the lower 48 states told an attorney friend of mine, "Down here we refer to the domestic violence docket as 'the perjury calendar'."

The bottom line is true, *no one* deserves to be hit, *not even men*. And it grieves me to see the system deliberately ignoring assaults committed by women against men. Men may not bruise easily, but does that make it okay for a woman to hit a man? Courtrooms are packed with male defendants. Where are their female counterparts? Don't believe me? Then go to court yourself and look for some. You won't find them,

A feminist lawyer once looked at me and declared, "Marvin, everyone knows that the courts discriminate against men, but *as lawyers we aren't allowed* to talk about it!" I asked her "why not?" An Alaska judge who addressed a crowd of young lawyers even entitled his presentation, "Billy Bob wants a divorce." And another judge once indicated from the bench that I am a Neanderthal after I insinuated in his courtroom that women should be held to the same standard of conduct as that imposed upon men. The judge was correct, politically speaking. So where is the justice in a system like this? There isn't any.

By not imposing the same standards of behavior on women, the courts have intentionally interjected themselves as an arbiter of family disputes, always resolving conflicts favoring the protected class. Women are allowed to physically assault men, treat men cruelly and to act without any regard for men's feelings. Men aren't believed to have feelings, so the defense of provocation is totally ineffective — even when the woman strikes first and gets hit in return. Hence, justice peeks from beneath her blindfold to maintain political "correctness," while totally ignoring a very sizeable, potentially *politically potent,* and increasingly *hostile, unprotected* class of men.

Our *men* cleared most of the fields upon which "amber" grain now waves. Our men have willingly shed 99.99 percent of all blood sacrificed for America since its inception. And *men* also pay 80 percent of the taxes which keep socially leftist programs afloat for the benefit of all other classes more politically "correct." So, as a man, I feel cheated and demeaned every time I observe the inequality of men in some of our legal proceedings.

I do not think it is in men's best interest for any of us to remain silent any longer. We are being disenfranchised, turned into *courtroom monkeys,* and stripped of our self esteem as men. This land is our land, too. We aren't the mongrel "Billy-Bobs" we are portrayed to be by the socialist revolutionary communications media that presently dominates America. And it is time we men all put our pants back on and stand up as men fox the equality we *all* deserve.

The Bar Rag welcomes articles from its readers

Bar Exam Facts

The most recent bar exam was given in July, with the results reported in October.

Ninety-two applicants took the 2.5-day exam. The pass rate of 78% was the highest since 1987. An equal number of men and women, 46 each, too the exam, another first. The 92 applicants graduated from 45 different law schools around the country.

The second day of the bar exam consists of the Multi-State Bar Exam (MBE), which is given in 46 states. The Alaska applicants on the July exam had an average score on the MBE which was more than 2 points higher than the national average on the 200-question multiple choice test.

Theft of identity: Call it data rape

By David A. Szwak

Computerized information superhighway pirates are stealing credit reports of unknowing victims and using the stolen data to commit application fraud. Creditors make it easy, since they take little care in investigating applications and often issue credit to the defrauders in the identity of an unsuspecting victim. The defrauder lives in luxury on the victim's credit, which is rapidly being destroyed. When the creditors report unpaid charges in the victim's identity to credit bureaus, those victims are often harassed and sued by the duped creditors.

Victims describe it as "data rape" and it could happen to you or your clients. You will need to know what to do if that happens and this article can help.

The Shaw Fiasco

In May, 1991, Steven M. Shaw, a used car salesman in Orlando Florida, used his employer's credit bureau terminal to access the credit reports[1] of Stephen J. Shaw, of Washington, D.C., and other Shaws with the name "Steve," from national consumer reporting superbureaus. He obtained the reports and began making applications for credit with banks, retailers and credit card companies in the identities of the various victims named "Shaw." Using the same terminal, he re-accessed the reports to monitor and enlarge the fraud.

After ringing up over $100,000 in credit in Stephen J. Shaw's identity alone, a fraud analyst noticed discrepancies in the victim's report when the defrauder made application and a report inquiry was made. Imagine the shock of learning that your credit reports reflect that you live in another state, with many thousands of dollars of debt and countless credit inquiries due to the volume of fraudulent applications.

Further, it becomes your job to get the duped creditors and credit bureaus to delete and suppress the false data from your reports and to warn future creditors. Lawsuits may be filed against you by the duped creditors in an attempt to collect from you, not to mention harassing letters, calls and visits from duped creditors, collectors and credit bureau employees.

Stephen J. Shaw and many other fraud victims feel they have been raped by the defrauders, while being pinned down by the credit industry. The number of cases of theft of identity is growing exponentially.[2] Victims like Shaw have begun to fight back by bringing suits against the defrauders and the credit industry.[3] The Fair Credit Reporting Act [FCRA] has not provided sufficient protection to consumers and the likelihood that Congress will pass any law to restrict the industry appears grim.

Stevenson v. TRW: Breaking Ground

In early 1989, John Stevenson began receiving harassing calls from bill collectors regarding accounts opened by a defrauder using Stevenson's identity. After receiving his credit reports from the various superbureaus, he discovered about 16 fraudulent accounts. He sent a dispute letter to TRW. TRW, almost one month later, sent Consumer Dispute Verifications (CDV's) to the disputed account creditors. CDV's are computer-generated forms sent to the subscriber, by mail, asking the subscriber to "check whether the information they have about a consumer matches the information appearing on the consumer's TRW credit report."[4]

After its initial investigation, TRW removed some of the fraudulent accounts. TRW claimed that other subscribers "insisted that the account(s) was (were) Stevenson's."[5] A fraud warning statement was finally added to Stevenson's report in December, 1989 advising future inquiring creditors-subscribers that Stevenson's identifiers had been used fraudulently to obtain credit. In February, 1990, TRW "completed" its reinvestigation and claimed all fraud-related items were deleted. Nonetheless, false data continued to appear and reappear, either because it had never been deleted by TRW or because TRW failed to suppress the item(s) in the event incoming data transmissions from its subscribers continued to maintain the false, fraud-related information.

Stevenson's problems continued and he eventually sued TRW which resulted in a bench trial in a Dallas federal court. The Judge awarded Stevenson actual damages of $30,000, attorneys' fees of $20,700, and punitive damages of $100,000. On appeal, the Fifth Circuit affirmed the compensatory awards but reversed the punitive award, finding "willfulness" had not been proven.

TRW was found to have violated the FCRA in several respects.

First, TRW failed to employ "reasonable procedures" to promptly reinvestigate existing, disputed data on Stevenson's report. Important and separable is the fact that TRW failed to promptly delete false data and use data suppression measures to prevent recapture of false data should its subscribers fail to clear their internal records and/or magnetic tape data transmissions.

The Court also found that TRW failed to post an adequate notice on its reports to advise Stevenson that he had a right to have his corrected reports sent to inquiring subscribers who received prior reports containing errors .

Finally, the Judge found that TRW libeled Stevenson by recklessly publishing false reports without regard to the truth or falsity of their contents, particularly in light of Stevenson's complaints.

Of interest is the Court's finding that TRW did not violate its duty to use reasonable procedures[6] to assure the maximum possible accuracy of each new item of data placed on Stevenson's report.[7] TRW maintains regionally subdivided databank(s) and its subscribers forward magnetic tape and other data transmissions which are fed directly into the input device. The incoming data bears consumer personal identification coding which is supposed to route each item of data, through the matching algorithm, to the proper credit report.

The name, address and social security number seem to be the three key identifiers used in matching incoming data to files.

Thus, when the defrauder used the name "John Stevenson," with plaintiff's social security number, regardless of the mail drop address listed or used, the resulting fraudulent account data ended up on Plaintiff's credit reports. TRW's matching algorithm appears to place incoming data in files which bear any two of the three key identifiers discussed above. This can result in the creation of new files and/or placement of erroneous data into other files or into multiple, existing files.

The Court refused to uphold the District Court's finding that TRW willfully violated the FRCA, particularly 15 U.S.C. 1681i(a). This provision requires a consumer reporting agency to investigate and delete inaccurate or unverifiable information disputed by a consumer within a "reasonable time" from receipt of a dispute or notice of error.[8] TRW argued that 10 weeks or 70 days, was "reasonable" to reinvestigate Stevenson's dispute. Other authorities have suggested that 30 days is fair and " reasonable ".[9] In the high-tech world today, including electronic transmissions, telefaxes and telephones, it seems evident that 30 days is far more than fair and "reasonable," particularly in cases like *Stevenson,* where the agencies and their agents, the subscribers, through their own laxity and recklessness, allowed the fraud and then attempted to place the onus on the fraud victim to correct the matter.[10]

Fraud disputes should not require excessive time to resolve. Application fraud cases, as in *Stevenson,* generally bear obvious signs that the victim had no association with the disputed account. For that reason, alone, the account should be deleted from the victim's reports.

Another problem occurs where the consumer reporting agency deletes data, yet the data continues to "reappear." This can be caused by the agency's failure to delete the item in the first place, by the agency's failure to engage the data suppression function when the data is initially deleted, or by internal deficiencies within the agency's computer hardware or software which allows data recapture when the subscriber fails to clear its records and magnetic tapes. The *Stevenson* court held that TRW was merely negligent in allowing inaccurate, deleted data to be placed back on the report.[11]

Still more disturbing is the fact that consumer reporting agencies rely, almost exclusively, on magnetic tape data transmissions from their subscribers in order to update their files. This laxity has been exacerbated in their reinvestigation procedures.[12] While the agencies are not "strictly liable" for inaccurate data in their files, they bear "some responsibility" in evaluating, assessing and investigating the accuracy of information obtained from their subscribers.[13] The *Stevenson* court went one step further in placing the burden of reinvestigation "squarely" on the agencies.[14] An agency must act impartially and in good faith in carefully evaluating all information and making a thorough and complete investigation before disseminating information to its subscribers.[15] Thus, agencies may not simply mimic their subscribers.[16] The agencies regularly fail to comply with the FCRA mandates concerning reinvestigation and security of data.

Conclusion

Technology is not out of control, but the people making unlawful and reckless use of it are and that is the danger we all face. As attorneys we must be aware of how our laws can be improved to protect the general public while assisting industry. The consumer reporting industry has long operated behind a veil of secrecy and, while their profits soared, our privacy and security have undergone a steady degeneration. We are in the information age yet our outdated laws fit the "horse and buggy" era.

Endnotes

1. The standard credit report contains a vast amount of personal information, trade line (account) information, and public record data. The report also contains a listing of credit inquiries and "credit scoring," which is the credit bureau's numerical assessment of the consumer as a credit risk.

2. One of America's largest retailers maintains that "[N]ew application fraud continues to be the fastest growing area for fraud losses. The number of new application fraud incidents during 1991 was approximately 34% above 1990 figures and 20% of all fraud losses. New application fraud losses average $1,264 (per fraud account) compared to $856 for all other types of fraud loss. Fraud losses exceeded over $3.5 million dollars in 1991 (for this retailer alone). This figure does not take into consideration the expense associated with the follow up and investigation. (parenthetical explanations added)."

3. See, e.g., *Stephen J. Shaw, et al v. Steven Shaw, et al,* suit no. 93-874-Civ-Orl-19, United States District Court, Middle District of Florida (1993); *Edward F. Brock, et al v. Edward Brock,* et al suit no. H-93-0317, United States District Court, Southern District of Texas (1992); *John Stevenson v. TRW Inc.,* 987 F.2d 288 (5th Cir. 1993) [Tex].

4. *Stevenson v. TRW,* supra, at 291.

5. Id.

6. The standard is an objective one based on what a reasonable, prudent person would do under similar circumstances. *Thompson v. San Antonio Retail Merchants Association,* 682 F.2d 509, 513 (5th Cir. 1982); *Bryant v. TRW, Inc.,* 689 F.2d 72 (6th Cir. 1982); *Cahlin v. GMAC,* 936 F.2d 1151 (11th Cir. 1991).

7. **15 U.S.C. 1681e(b).** Preparation of a credit report is a continuing process and the agency's obligation to insure the maximum possible accuracy of incoming data arises and begins with every addition of data. Cf., *Lowry v. Credit Bureau, Inc. of Georgia,* 444 F.Supp. 541 (U.S.D.C. Ga. 1978).

8. *Stevenson v. TRW,* supra, at 292.

9. Id. at 292; *Boothe v. TRW Credit Data,* 768 F.Supp. 434, 438 (U.S.D.C. S.D. N.Y. 1991); *MIB, Inc.,* 101 F.T.C. 415, 423 (1983).

10. "TRW urged at trial, however, that where fraud has occurred, the consumer must resolve the problem with the creditor." *Stevenson v. TRW,* supra, at 293. Needless to say, the Court was not impressed.

11. *Stevenson v. TRW,* supra, at 293. Also, see *Morris v. Credit Bureau of Cincinnati, Inc.,* 563 F.Supp. 962, 968 (U.S.D.C. S.D. Ohio 1983).

12. See *Stevenson v. TRW,* supra, at 293.

13. *Stevenson v. TRW,* supra, at 293; *Swoager v. Credit Bureau of Greater St. Petersburg, Fla.,* 608 F.Supp. 972, 976 (U.S.D.C.M.D.Fla.1985); *Bryant v. TRW,* 689 F.2d 72 (6th Cir. 1982) [Mich.]; *Thompson v. San Antonio Retail Merchants Association,* supra; *Hussain v. Carteret Say. Bank, F.A.,* 704 F.Supp. 567 (U.S.D.C. N.J. 1989).

14. *Stevenson v. TRW,* supra, at 293.

15. *Bartels v. Retail Credit Co.,* 175 N.W.2d 292 (Neb. 1970).

16. Supra.

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