The Alaska BAR RAG

VOLUME 23, NO. 6 — *Dignitas, semper dignitas* — $3.00 — NOVEMBER - DECEMBER, 1999

Inside:

Watergate revisited

25 years later . . . How Nixon fell

BY JOE SONNEMAN

DISCOVERING THE TAPES

Chief Watergate investigator Sam Dash revealed to a packed room of about 100 lawyers how the Nixon tapes were discovered 25 years ago: John Dean revealed to Sam Dash that he once noticed President Nixon apparently talking to a bookcase, as Nixon tried to reform and revise a statement that he probably should not have made.

That Nixon move made Dean—and then Dash—suspect Nixon had taped that conversation. Dash said he and his staff then developed "satellite charts" showing which people—subordinates, staffers, visitors, etc.—had contacts with the Watergate principals. The investigators then interviewed all those people, asking them general questions but including also apparently innocent questions about the tape investigators then believed might exist of that one particular talk.

Dash said his team deduced that three people knew: Haldeman, Higbee, and Butterfield. The first two lied, said Dash, but investigators hit paydirt with Alexander Butterfield believed the investigators already knew about the taping system hidden in the Oval Office. Butterfield explained that there was not just *one* tape, but two years of tapes in a system Butterfield maintained.

HISTORIC WATERGATE AFFAIR

This, Dash said, was "investigator's heaven"—to have your chief suspect confessing to multiple offenses on tape.

Dash and three of his ex-staffers — Donald Burris, Michael Frisch, and Bob Muse—and John Dean (formerly counsel to President Nixon), and Dean's 1974 lawyer Charlie Schacter, were all part of a panel discussion presented to Georgetown University Law Center Reunion attendees in Washington, D.C., on October 23, 1999.

Dash and several of his staffers also referred to the "missing man" who should have been on the panel—the late Senator Sam Irvin, who chaired the Senate Committee that investigated the break-in at Democratic Headquarters (located in the Watergate Hotel complex), the burglary later tied to CREEP (the Committee to Re-Elect the President).

Knowledge of the break-in, or attempts to cover up involvement with it, led ultimately to firings and resignations of top Administration officials and, ultimately, to Richard Nixon resigning the Presidency (but avoiding trial or imprisonment when Ford became President and pardoned Nixon). The panel provided their observations of the historic Watergate affair.

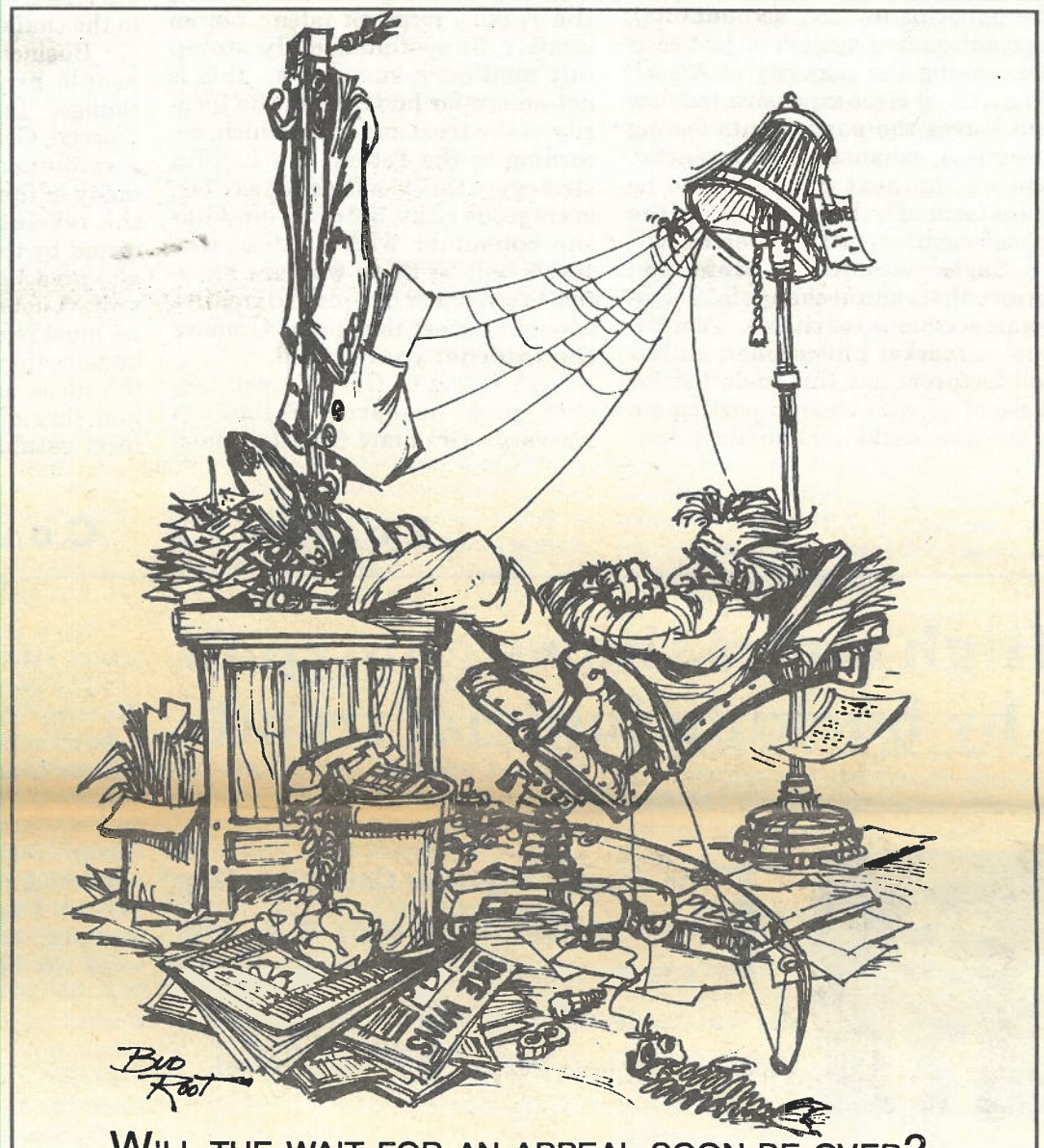
SAM DASH

Dash said people should review the Watergate experience from time to time, because this was what he termed a "turning point in American history," an end to the then-prevalent notion of an "Imperial Presidency." Dash quoted Nixon as saying then that Nixon "didn't have to worry about the 'Silent Majority'" and Dash also quoted a Nixon lawyer as telling a disbelieving Judge Sirica that the President was like Louis the XIV, four years at a time.

The American people, when properly informed, will

Continued on page 3

SUPREME COURT STEPS IN



Supreme Court tackles appellate delay

BY MARILYN MAY

The Alaska Supreme Court has begun an initiative to investigate delays at the appellate level. Appointed by Chief Justice Warren W. Matthews, a five-member committee has been meeting since February, to develop recommendations that will address all the Supreme Court members' concerns over delays in disposing of cases on appeal.

The Appellate Delay Reduction Committee members are Justice Robert L. Eastaugh, Justice Alexander O. Bryner, Court of Appeals Judge David Mannheimer, Deputy Administrative Director Stephen Bouch, and Clerk of Appellate Courts Marilyn May.

The committee has conferred with the Standing Committee on Appellate Rules and has studied the internal procedures employed by both the Supreme Court and the Court of Appeals. The committee has also studied the time standards followed by other appellate courts, and it has recommended modifications to

Continued on page 20

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President's Column

The Age of Revolution has begun

☐ Kirsten Tinglum

At the dawn of the new millennium, many would say that we are experiencing a technological and societal revolution. Whole professions have been and are being transformed, either against the will of the participants (*see,* doctors) or under the direction and guidance of the participants (*see,* accountants). Our antiquated system of justice is not serving the majority of Americans well - it is too expensive, too slow and leaves the participants feeling powerless, exhausted and resentful. Are we the next profession to be transformed? Will we drive the transformation, or be driven by it?

Sages outside our profession foresee that radical change in all economic sectors is inevitable. Tom Peters (a market philosopher, author and lecturer) has this to-do list for those of us who wish to participate in the new world: **1) reorient hiring - hire the oddball, the freak, the rebel** - focus on talent, not on comfort; **2) systematically stomp out mediocre successes** - this is not an era for huddling in the security of the tried and true (which, according to the Peters, is a LOSER strategy) - this is a time to take big, outrageous risks; **3) focus on what the consumer wants** - those who thrive will be those who are sensitive to consumer desires and creative enough to meet them; and **4) make the Internet your friend.**

According to Gary Hamel, (author and Research Fellow at Harvard's Graduate School of Business Administration), the Age of Progress has ended. The Age of Revolution has begun. Change now occurs so rapidly and constantly that it is no longer enough to react to change, we have to move into a position to drive it. **It's no longer enough to get better, we have to get different.** Incremental change is useless. The world demands radical change. And what should drive and motivate this radical change? **Consumerism.** And what tool will we need, as a profession, to create and thrive in the new world? **Talent.** More valuable than our experience, our track-records, our tradition, our reputations, or our existing client bases, will be the talent we apply to the challenge of the future.

Business gurus are not the only people predicting revolutionary change. In his bestseller *Give Me Liberty!*, Gerry Spence also speaks of a revolution, and one which bears many of the same characteristics of the revolution observed and predicted by the market guys. Spence also preaches that this era demands radical, not incremental change; that we must reject tired, old orthodoxies because they have failed us; and that the ideas and leadership that will fuel this revolution will not come from established authorities, but from "outsiders," and heretics. Spence, too, sees individual talent, what he calls the "union of one," as the center of power in the new millennium.

However, it is attorney Spence who pricks the lawyers' collective conscience. The market guys talk about remaining competitive, keeping the consumer happy and retaining market share. Spence's book goes further, to remind us that, as lawyers, we are uniquely qualified to perceive and challenge injustice (past, present and future). As lawyers, it is our role to effect legislative, judicial and institutional change that will adapt America to the revolution in a way that preserves the dignity and autonomy of her citizens.

But what, exactly, are we supposed to do? What does all of this mean? We are bright, educated people. We care about justice. We care about society. We care about our jobs and our livelihoods. How come we read this stuff and see blank?

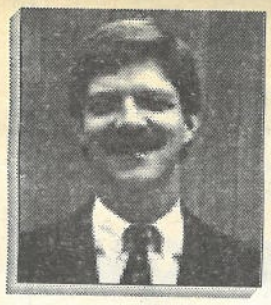
It may be that the very qualities that make us good lawyers paralyze us. We persuade, analyze and communicate by looking backward to precedent, not forward to the future. We are good at understanding and working within systems, not outside of

Continued on page 18

Editor's Column

High court shows chutzpah by bucking judicial trend

☐ Peter Maassen



The Alaska Supreme Court has long been on the cutting edge of the law, and its many fans are therefore understandably disappointed when the Court occasionally lags behind in judicial trends.

One of the Court's more obvious lapses, remarked upon in bar journals across the country, is its failure to work the term "chutzpah" into any of its reported decisions. The term's first reported judicial usage is now 27 years old; the court in *Williams v. State,* 190 S.E.2d 785 (Ga.App. 1972), could think of no better word to describe the crime of "burglary by breaking into the Jenkins County Courthouse and asportation therefrom of 8 pistols, 5 shotguns, and rifle shells which were in three locked cabinets in the sheriff's office."

As the millennium draws nigher and nigher, "Yiddish is quickly supplanting Latin as the spice in American legal argot," according to Alex Kozinski and Eugene Volokh in *Lawsuit, Shmawsuit*, 103 Yale L.J. 463, 463-64 (1993); and the term "chutzpah" appears to be doing most of the work.

As of 1993, the word had appeared in 112 published decisions, and the Great Sage Westlaw tells us that the count is now up to 169. The D.C. Circuit actually has a "chutzpah doctrine," *see Caribbean Shippers Ass'n v. Surface Transportation Board,* 145 F.3d 1362, 1365 n. 3 (1998); and the Federal Circuit issues "chutzpah awards," *see Dainippon Screen Mfg. Co. v. CFMT, Inc.*, 142 F.3d 1266, 1271 (1998). Another court has gone so far as to opine that without "legal chutzpah...our system of jurisprudence would suffer." *Chaffee v. Kraft General Foods, Inc.*, 886 F.Supp. 1164, 1167 (D.N.J. 1995).

So why does our high court hesitate? A Bar Association committee met recently to discuss this issue. While it lacked the effrontery (some might say "chutzpah") to insist that the Court step onto the bandwagon, it did at least come up with three plausible explanations why the Court is watching this particular bandwagon trundle by without it.

The first suggestion is that the practice of law in Alaska is so restrained and dignified that the word "chutzpah" never comes to mind. The classic example of the term, of course, is "a young man, convicted of murdering his parents, who argues for mercy on the ground that he is an orphan." *See Harbor Insurance Co. v. Schnabel Foundation Co.,* 946 F.2d 930, 937 n. 5 (D.C.Cir. 1991).

What do other courts consider analogous? In *Gray v. State*, 562 A.2d 1278, 1283 n. 6 (Md.App. 1989), the court labeled "chutzpah" the prosecutor's reason for striking a juror: "I have a P rule. I never accept anyone whose occupation begins with a P. He is a pipeline operator." In *Franklin v. Elmer*, 332 S.E.2d 314, 318 (Ga.App. 1985), a concurring justice thought it would take chutzpah to challenge the medical expertise of a plaintiff who had self-administered 6,000 enemas.

With our mundane appellate points, how can we compete?

The second suggestion was that the term "chutzpah" has no place in a decision that is expected to stand forever in a state's jurisprudence, because the word's definition changes with as much regularity as Gumby changes shape. Courts are constantly remarking upon the conduct of lawyers or litigants that gives "new meaning" or "new definition" to the word. *See State v. Amado*, 680 A.2d 974, 981 (Conn.App. 1996); *Britt v. Rosenberg*, 665 N.E.2d 1022 n. 1 (Mass.App. 1996); *Checkpoint Systems, Inc. v. U.S. International Trade Comm'n*, 54 F.3d 756, 763 (Fed.Cir. 1995); *Kaden v. Pucinski*, 635 N.E.2d 468, 472 (Ill.App. 1994); *Southwest Marine, Inc. v. Campbell Industries*, 796 F.2d 291, 292 (9th Cir. 1986). If the Latin phrase *res ipsa loquitur* were given "new meaning" as often, we'd trash that particular doctrine in favor of trial by combat.

Third, "chutzpah" is a term of incredible variability and subtle nuance, rivaling in complexity Alaska's "sliding scale" approach to equal protection. As developed by other courts over the past 27 years, "chutzpah" has been subdivided into so many gradations that any attempt at proper legal usage can lead to embarrassment, which our Court rightly seeks to avoid. On the high end of the scale, courts speak of "sheer chutzpah," "pure chutzpah," "real chutzpah," "true chutzpah," "utter chutzpah," "quintessential chutzpah," "breath-taking chutzpah," "unmitigated chutzpah," "impressive chutzpah," "the height of chutzpah," "the zenith of chutzpah," and "chutzpah to the nth degree." Toward the middle of the scale is "considerable chutzpah" and "no small amount of chutzpah." Moving toward the bottom of the scale one reaches "a fair measure of chutzpah," "a certain measure of chutzpah," "a modest degree of chutzpah," "a minimal degree of chutzpah," "a mild dash of chutzpah," and, finally, "just plain chutzpah-ish." The *Bar Rag* can, of course, provide supporting legal citations upon request.

In the final analysis, the committee concluded that the Court cannot be faulted for slighting "chutzpah." The ultimate responsibility rests with us, the practitioners. When we have properly set the stage by our inconsistent positions, our brazen arguments, our hard-ball tactics, the word "chutzpah" will pop out on the printed page like a crocus in springtime.

Let's get to work.

The Alaska BAR RAG

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Watergate revisited

25 years later . . . How Nixon fell

Continued from page 1

act rightly, Dash said, adding that the Watergate experience made Americans distrustful of government. Dash called that skepticism healthy, but he said distrust may now have gone to a cynical extreme.

Early on, Dash said, he invited *Washington Post* reporter Bob Woodward to lunch, asking Woodward for hints, not for names of sources. Dash said Woodward gave him good advice—to start with the secretaries. Dash said the investigators were successful, but were also lucky, not only with Butterfield, but also with CREEP. Dash said CREEP made multiple copies of documents labeled "Eyes Only" and—still more amazingly—sent copies of damaging documents off to archives without screening or destroying the negative information.

MORE ON THE REUNION PAGE 19

JOHN DEAN

John Dean, then a 30-year-old lawyer who rose rapidly to become counsel to President Nixon, and now an investment banker, said Watergate continued to be "the gift that keeps on giving."

Dean said in 1991 a "revisionist" book claimed the real reason for the break-in was to uncover an alleged Democratic Party-operated call-girl ring—a ring in which Dean's present wife supposedly was a member. Dean said that G. Gordon Liddy claimed that "if the Deans don't sue, that means the book's claims are true." So, after reviewing their options and after letting the book's initial publicity die down, the Deans did sue.

The Deans hired the lawyer Neal Papiano (who Elizabeth Taylor used when suing the *National Enquirer*). To hold down legal costs, John Dean agreed to do some work too, so Dean for years has reviewed Watergate information. Everyone settled, Dean reported, except for Liddy: the case may come up in the D.C. courts in a few months.

DEAN'S LAWYER

Dean introduced his Watergate lawyer, Charlie Schacter, who, Dean said, "gave me options and good advice." Schacter said there were "no road maps" for this case, "but I thought he needed immunity."

Schacter was a former federal prosecutor (of Jimmy Hoffa, among others), so he knew his way around Justice, but the Department refused immunity for Dean. Schacter said he then called Sam Dash, who said "I've been waiting for your call."

Security was a major factor to Schacter, who said he and Dean avoided talking to anyone except Dash himself—and even then met with Dash only in the middle of the night. When Dash asked Schacter and Dean to testify to the Committee, they were very reluctant, until Dash explained that the Committee would be in executive session, with secrecy protected by Senate Rule 24.

But news of their supposedly-secret testimony appeared in the *Washington Post* three days later, apparently leaked by a Senator. An angry Schacter demanded an audience with Irvin. Schacter told Senator Sam that he "could throw us in the Senate jail, but there would be no more executive sessions." [Schacter said neither jail nor executive sessions followed.]

THE STAFFERS

Donald Burris, who later founded Burris & Harriwell, said that in 1974 he was a "line soldier" in the Watergate legal research team. He called the event "a brief shining moment of my career." He said Dean had the integrity to tell the story, that Watergate was a story about character and integrity, a story about U.S. institutions and about the U.S. Constitution. The government seemed in peril, he said, because of cancer-like growth in the Executive Branch. But he believed Americans, because of Watergate, preserved respect for government. Burris said the staffers all felt the import of their task and the necessity to get the word out to the people.

Michael Frisch, now with the D.C. Bar Counsel, said the Watergate Committee was the first to be computerized. [Dash added that Library of Congress staffers trained Frisch and others]. Frisch said in those pre-PC days, armed guards escorted them and their data to and from the mainframe computer, heightening the sense of high drama and importance of it all. Frisch started out in this summer job with 10 to 12 other second-year law students; he learned to take information, summarize it, and categorize it for the computerized files. He was so busy with this work Frisch said, that only twice was he able to hear Watergate testimony directly: John Dean's opening statement and Butterfield's revelation about the taping system.

Bob Muse was 25 years old in 1973. He said Dash was a real investigator who insisted on concentrating on the facts. He added that Watergate changed the way people looked at public matters. For reasons Muse could not explain, subsequent investigations (Iran-Contra, Whitewater, etc.) just have not had the same unity of purpose nor effect that Watergate did. (Muse is now with the D.C. Public Defender Service.).

THE PARDON

Dash said he was against Ford's pardon of Nixon, which to Dash sent the wrong signal, violating the concept of equal justice and leaving Watergate inconclusive. Dean, then serving 120 days, said at first he wondered if other pardons might be forthcoming. Dean said that on balance he thought the pardon a fair solution, but he was surprised that Nixon resigned without a fight, because the House case was not all that strong. Staffer Burris said the pardon upset him greatly at the time, but now he sees it as good closure, especially given Nixon's reformation through foreign policy later.

THE "SUBVERSIVE" COVER STORY

Dash called "stupid" and "fiction" the story that Democratic presidential nominee George McGovern supposedly would have made peace with Cuban leader Castro, but Dash agreed that Cubans involved in the break-in honestly believed that cover story. Dash said having McCord tell this story made the Cubans believe even more, because they knew of McCord's former CIA ties. Dean agreed the cover story was false, adding that revisionists try to create reasons for the break-in when there were no reasons: it was just a "fishing expedition" for financial information about Democrats, Dean said.

CHANGES IN ATTORNEY ETHICS?

Frisch said Watergate did not lead to many prosecutions of government lawyers; echoing Woodward's earlier advice to Dash, Frisch said many such cases begin when a secretary starts talking. Dash said that for a short period Watergate did improve attorney ethics, but after a while people let down their guard again. There were "hills and valleys" in attorney ethics, Dash said. (Dash often teaches Professional Responsibility courses at Georgetown Law).

JUST LED ASTRAY?

Dean said he was then very young, about 30 when he first became counsel to President Nixon. He then had no working knowledge of criminal law—something he said is now mandatory for lawyers to U.S. Presidents (lawyers should be experienced federal prosecutors). Still, he felt "we did good staff work." But Dean said he became the 'desk officer' for the Watergate break-in cover-up. "This role took me slowly from the edges into the center," he said, realizing too late that he was in the depths, not at the top. Neither attorney ethics nor legal education prepared him for this situation, he said, but he took a big risk in telling President Nixon about the break-in.

"When I told Nixon, I thought it would change him," Dean said, "But it didn't."

That's "the disease of 'Oval-itis'," Dash said.

"But it wears off," Dean concluded.

Want to publish?

The *Alaska Law Review* is looking for articles on Alaska law for the June 2000 issue. 30-50 pages. Bluebook standards for footnotes. Deadlines are flexible, so please contact our office if you're interested.

Jason Goode, Editor-in-Chief
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Oops! Inexplicably, the July/August issue of the Bar Rag printed Art Peterson's "Uniform Laws Wrap-up" as his "ALSC Report." There was no ALSC Report for that issue. Staff and management regret the error, and assure the world that it'll never happen again.

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Names in the news

☐ Arthur H. Peterson

Some people promote equal access to justice regardless of income level. Some don't. Here's a mix.

MARIA-ELENA WALSH

If you have not yet met or heard from Maria-Elena Walsh, the odds are in your favor that you will do so. She is the new *pro bono* coordinator, employed by the Alaska Legal Services Corporation to work with the Alaska Bar Association and its members in providing free legal assistance to the indigent, for the good of the public.

Maria-Elena inspires enthusiasm; she inspires re-commitment to the cause of equal access to our judicial system. She began work with ALSC in July, following the departure of Seth Eames to be closer to family Back East.

Maria-Elena Walsh

The new *pro bono* coordinator brings to her job a paralegal certificate, 123 semester hours of study in business and law, an honorable discharge from the Air Force, and Spanish/English bilingual skills. She also brings a considerable amount of experience working in law firms in Anchorage, San Antonio, and Dayton, going back to 1984, as well as three and a half years as an administrative assistant for the Anchorage Planning Department. Her employers have provided rave reviews of her work and ability. And she is the recipient of many awards and letters of commendation for her community service.

One of her major volunteer activities is and has been work with Alaskans for Drug-Free Youth, which she has served as president. ADFY, in concert with the Alaska Federation of Natives Sobriety Movement, combats drug and alcohol abuse by Alaskan youth. Maria-Elena, with other volunteers, runs the Youth Station in downtown Anchorage in the bus transit station on 6th Avenue. The station provides a safe refuge for kids to come in off the streets.

With her concerns for the community, and her experience working with lawyers, Maria-Elena is well-suited for her role as *pro bono* coordinator. Already, in her new job, she says that she has "learned about the many private attorneys . . . actually involved in providing high quality legal services to our poor, enabling them to obtain the basic necessities of life." She "had seen the full-page newspaper ad listing the names of the attorneys on the *pro bono* panel. However, the ad just did not tell the entire story and this is something that I hope to change. I hope to share a lot of our success stories with the public so that they will realize how much time and money our attorneys donate to our poor.

"*Pro bono* attorneys accept cases despite their busy trial calendars and heavy case/client loads so that our poor can obtain effective access to the courts and administrative agencies to assert and enforce their legal rights. There are also no boundaries – Anchorage attorneys willingly represent clients from Fairbanks, Kenai, or Kodiak; attorneys from Nome represent clients from Barrow, Kotzebue, or Bethel. We even have a Juneau attorney . . . representing an elder who was originally a resident of Alaska and is now living in Florida."

Maria-Elena has also observed, that "Overall, since July 6, 1999, when I began working for ALSC, attorneys on our *pro bono* panel have expressed their sense of satisfaction in volunteering to assist our poor in their legal needs." And she believes that all citizens of a community have "a responsibility to guarantee that those who are unable to afford . . . counsel are provided with legal assistance." It's not just the job of the ALSC staff, nor just that of the legal profession.

So, please welcome Maria-Elena Walsh.

JIM MINNERY

Jim Minnery is ALSC's "development director" (fundraiser). See the January-February 1998 *Bar Rag*. He is also dedicated to the principle that the indigent are entitled to legal assistance. At the September 25 ALSC board of directors meeting, Jim reported that the 1999 Partners In Justice fundraising campaign is now underway, hoping to build upon the success of the 1998 campaign. Jim also distributed a new pamphlet that he and some estate planning attorneys developed, entitled "Planned Giving Opportunities." We thank those who helped in its preparation. The pamphlet succinctly discusses bequests, memorials and honorary gifts, gifts of employee benefits, charitable remainder trusts, gifts of life insurance, gifts of appreciated property, and the ALSC endowment fund. Everyone is encouraged to think of ALSC as a recipient of a great variety of donation approaches.

JUSTICE DANA FABE AND ILONA BESSENYEY

Under the leadership of Justice Dana Fabe, the Alaska Supreme Court's Access to Civil Justice Task Force will soon issue its report. A draft prepared by Anchorage Attorney Ilona Bessenyey was circulated this past summer. We discussed it in a teleconferenced meeting in September, and made some modifications in it. As of this writing (October 1, 1999), I believe that Ilona plans to have the final version ready to submit to the Supreme Court by early November. Both of these people demonstrate commitment to securing access to justice.

THE CONGRESSMAN FOR ALL ALASKA

Believe it or not, this summer Alaska's lone Congressman, Don Young, voted *against* the successful floor amendment in the U. S. House of Representatives that raised to $250 million the $141 million recommendation of the relevant subcommittee in the House! The vote was 242 in favor, obviously including many Republicans, and 178 opposed. President Clinton had requested $340 million, and the Senate had approved $300 million – the same amount that ended up in the Legal Services Corporation appropriation for the current fiscal year. This routine is the same as in the past four years. But, last year, Don voted in favor of the floor amendment. And he received a lot of praise for doing so. I don't know what happened this time. He knows the great importance of this funding to his Alaskan constituency.

As of this writing, the Senate-passed version ($300 million) and the House-passed version ($250 million) are in the bill currently in conference committee. By the time this article is published, we will know the result. And maybe we can explain this need to Don again.

The newly revised Local Admiralty Rules are available from Book Publishing Company, 201 Westlake Avenue North, Seattle, Washington 98109, telephone 800-537-7881. We also have the revised Local Admiralty Rules on our Web Page [www.akd.uscourts.gov] that can be downloaded and printed.

UNITED STATES DISTRICT COURT
for the District of Alaska
CLERK OF COURT

John Thomas Hansen remembered

John Thomas Hansen died August 1, 1999 after a short but arduous battle with lung cancer. Born in Evanston, Illinois on June 20, 1947, Mr. Hansen moved to Wayne, Pennsylvania as a child. He always pursued a unique vision of life's possibilities and graduated from Golden Gate University School of Law in 1974 without ever having graduated either high school or college.

Mr. Hansen began his law career in San Francisco, California then moved to Anchorage, Alaska in 1977 with his wife and infant daughter. He was appointed a magistrate with the Alaska Court System and exercised judicial discretion with a firm but fair hand, one time chasing and tackling an escaping transgressor outside the court house.

Mr. Hansen returned to the private practice of law, and practiced with his wife in the Anchorage firm of Hansen and Lederman. He became well known as a tough courtroom adversary and a brilliant strategist with the perseverance of a pit bull. Mr. Hansen primarily handled negligence and malpractice litigation, but he epitomized the general practitioner, representing clients in every type of case, from bankruptcies to borderline disputes. He filed the first complaint in the Exxon Valdez litigation on behalf of fishermen. That lawsuit resulted in a $5 billion verdict, but is now on appeal.

Mr. Hansen moved to Chapel Hill, North Carolina in 1991 with the objective of changing careers and taking on new challenges. He developed several unique and successful residential subdivisions in Chapel Hill which realized his vision of community and conservation. The first neighborhood he developed utilized the concept of clustering and became a model for preserving recreation space and woods. In 1997, the Town of Chapel Hill recognized Mr. Hansen's contributions to the environment with a beautification award. More recently, a park which was created through his work and vision was renamed the John Hansen Park.

Mr. Hansen pursued a variety of interests, including astronomy, oceanography, aviation, history and antiques. He captained several boats, both in Alaska and off the coast of North Carolina and spent some of his most fulfilled days on the water. He was also an accomplished skier. He loved children and dogs, but he had no tolerance for fools, charlatans or slackers. He was a devoted husband, an attentive son and a loving father to his two children, Lindsey and Joey. He never missed his children's music recitals or athletic events, even when he had to attend with a broken ankle.

During his last year, Mr. Hansen restored an historic house in Chapel Hill where he proudly escorted his daughter down the aisle at her wedding in May. Mr. Hansen had an energy and spirit which few who knew him will forget.

— Obituary notice from Carrboro, NC.

Supreme Court Oral Argument Broadcasts

Supreme Court Oral Argument BroadcastsSupreme Court Oral Argument BroadcastsSupreme Court oral arguments scheduled for November and December will be videotaped by KTOO, Juneau's public television station, and broadcast on local GCI cable channels. Coverage of the arguments is provided by the producers of Gavel to Gavel Alaska and funded in part by West Group. The goal of the project is to increase public understanding of the judicial process, allowing citizens throughout the state to observe the work of the state's highest court.

Arguments will be aired beginning at 9 p.m. on November 10th and 11th and December 8th and 9th on Channel 46 in Anchorage, Channel 19 in Fairbanks, and Channel 4 in Juneau. For a complete listing of cable stations and for exact broadcast schedules, visit the KTOO/Gavel to Gavel website at http://www.ktoo.org/gavel/ or call 1-800-870-5866. For a complete listing of oral argument schedules, visit the court system's website at http://www.alaska.net/~akctlib/calen.htm. For more information, contact Cynthia Fellows, State Law Librarian, 907-264-0583.

ESTATE PLANNING CORNER

Update on trustee removal and appointment powers

☐ Steven T. O'Hara

An otherwise perfectly sound trust can unravel through selection of the wrong trustee. This is true in the tax area as well as in the trust-administration area.

For example, if the creator of an irrevocable trust ("settlor") names himself as trustee, the whole exercise may be considered incomplete for tax purposes. The settlor's gifts through the trust may be considered incomplete until a distribution is made or the settlor ceases to serve as trustee. If the settlor was serving as trustee at or within three years of his death, the trust may be includable in his estate for tax purposes. To the extent the settlor is considered the owner of the trust for gift or estate tax purposes, the settlor will continue to be considered the transferor of the trust property — including any appreciation of the property — for generation-skipping tax purposes.

Suppose instead of serving as the initial trustee, the settlor reserves the unrestricted power to remove the trustee and appoint himself as trustee. Here it is reasonably clear that the settlor will be considered for tax purposes as having the powers of the trustee. Thus trustee removal and appointment powers can also render the whole exercise incomplete for tax purposes.

Suppose the settlor reserves the unrestricted power to remove and replace the trustee, except that the settlor cannot name himself as trustee. In Revenue Ruling 79-353, the IRS ruled that the settlor here would be considered to have the powers of the trustee (Rev. Rul. 79-353, 1979-2 C.B. 325; see also TAM 8922003 (June 2, 1989)).

An older woman from Wisconsin by the name of Helen Wall forced the IRS to back off from this position. In 1979 Mrs. Wall created three irrevocable trusts, naming First Wisconsin Trust Company as trustee. As settlor, Mrs. Wall reserved the power to remove the trustee and appoint a corporation or trust company as the new trustee. She could not name herself as trustee.

Mrs. Wall died on October 7, 1987, and the IRS took the position that the three trusts were included in her estate for tax purposes. The IRS' position was that by reserving the power to remove and replace the trustee, Mrs. Wall in effect reserved the powers of the trustee, even though she could not name herself as trustee.

The matter went before the United States Tax Court, which rejected the IRS' position, including its holding of Revenue Ruling 79-353. The Tax Court characterized the IRS' position as a "quantum leap" from established authority (Estate of Wall v. Commissioner, 101 T. C. No. 21 (1993)). The Tax Court explained:

> In irrevocable trusts such as those under scrutiny, the trustee is accountable only to the beneficiaries, not to the settlor, and any right of action for breach of fiduciary duty lies in the beneficiaries, not in the settlor. [Citation omitted.] It also seems incontrovertible that the trustee's duty of sole fidelity to the beneficiary remains the same regardless of whether or not distributions are discretionary [or subject to an ascertainable standard].
>
> In the absence of some compelling reason to do so ... we are not inclined to infer any kind of fraudulent side agreement between Mrs. Wall and First Wisconsin as to how the administration of these trusts would be manipulated by Mrs. Wall. Instead ... the trustee would be expected to look to the circumstances of the beneficiaries to whom sole allegiance is owed, and not to Mrs. Wall, in order to determine the timing and amount of discretionary distributions.
>
> We therefore apply the Supreme Court's definition of a . . . retained right [to affect beneficial enjoyment of property that causes inclusion in Mrs. Wall's estate for tax purposes]; namely, that it must be an ascertainable and legally enforceable power. [Citation omitted.] We hold that Mrs. Wall did not retain such an ascertainable and enforceable power to affect the beneficial enjoyment of the trust property.

The IRS chose not to appeal the case. Moreover, the IRS revoked Revenue Ruling 79-353.

But not leaving well enough alone, the IRS used its revocation of Revenue Ruling 79-353 as an opportunity to continue to deter the use of trustee removal and appointment powers. The IRS called upon an old ruling, Revenue Ruling 77-182, which held that the settlor will not be considered to have retained the trustee's powers where the settlor reserves the power to name a corporate trustee in the event the incumbent trustee resigns or is removed by judicial process. The IRS modified Revenue Ruling 77-182 to hold that the settlor will not be considered to have retained the trustee's powers if the settlor reserves the power to remove and replace the trustee, as long as the settlor cannot appoint a related or subordinate party as trustee (Rev. Rul. 95-58, 1995-2 C.B. 191).

BY USING THIS CONCEPT OF "RELATED OR SUBORDINATE PARTY" IN THE TRANSFER-TAX AREA, THE IRS MAY AGAIN BE TAKING A "QUANTUM LEAP" FROM ESTABLISHED AUTHORITY.

For these purposes, a "related or subordinate party" means the settlor's spouse if living with the settlor, the settlor's parent, sibling or descendant, an employee of the settlor, a corporation or any employee of a corporation in which the stock holdings of the settlor and the trust are significant in terms of voting control, and a subordinate employee of a corporation in which the settlor is an executive (IRC Sec. 672(c)).

This term "related or subordinate party" is an income-tax concept. It is used in defining situations where the settlor is treated as the owner of a trust for income tax purposes.

This income-tax concept is not used in the Internal Revenue Code in defining situations where the settlor is treated as the owner of a trust for gift, estate or generation-skipping tax purposes. By using this concept of "related or subordinate party" in the transfer-tax area, the IRS may again be taking a "quantum leap" from established authority.

Alaska Legal Services
mission is to:

- **Resolve** serious legal problems of low-income Alaskans.
- **Promote** economic and family stability.
- **Reduce** the consequences of poverty through effective legal advice and representation.

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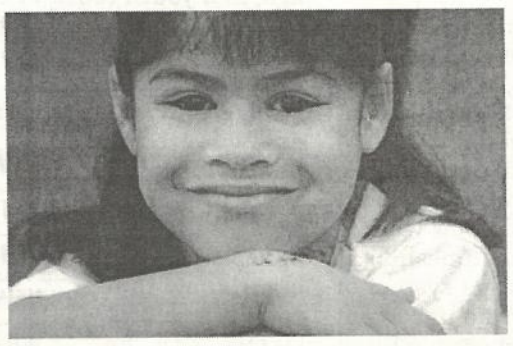

Staff attorneys offer expertise and help on critical legal concerns involving **family matters**, **medical care**, **housing**, and **consumer issues**.

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...Alaska Legal Services **impacts** and **improves** the quality of life for our children, our families, the elderly and disadvantaged, and brings **value** to our community.

Alaska Rules of Professional Conduct
Rule 6.1

" Every lawyer has an ethical obligation to render public interest legal services by providing pro bono services and by providing financial support for organizations that provide legal services to persons of limited means."

Alaska Legal Services
the nonprofit law firm for Alaska's poor
1016 West 6th Ave, Suite 200
Anchorage, AK 99501
907-276-6282

because justice ...has a price

THE CAMPAIGN FOR EQUAL JUSTICE FOR ALL ALASKANS

Just as access to basic health care is not the sole responsibility of doctors... lawyers are not the only group responsible for ensuring our system of **justice** remains accessible to all, regardless of one's ability to pay for it.

However, lawyers do have a **unique** responsibility and opportunity to make a difference.

Over the next several weeks, lawyers across the state, from diverse political and professional backgrounds... will be asking you to demonstrate your commitment to the ideals of our profession.

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...your **support** is encouraged.

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For your profession.

For your community.

Alaska Legal Services is proud to be a member of... Alaska Community Share

GETTING TOGETHER

Restorative justice? "Absolutely not!"

☐ Drew Peterson

Dear Mr. Prosecutor:

I recently contacted you about the possibility of participating in a CLE seminar on the subject of restorative justice. You were appalled. Your quick response was "Absolutely Not." Not just "No," but "Hell No." It would be irresponsible to even be associated with such an event, in your opinion, such as by sitting on a panel. I might try the defense bar, I was told. They would no doubt approve of such a nefarious thing.

My instinct was to try to reason with you about the subject. To point out that restorative justice is an idea whose time has come. That it is breaking out all around the country. Breaking out in the form of victim rights groups, and victim-offender mediation programs, and community sentencing programs, and various treatment programs. And contrary to your assumption, the impetus for restorative justice is not coming from the defense bar. Criminal defense lawyers are just as incredulous about the concepts of restorative justice as the prosecution.

The impetus for restorative justice is coming, rather, from the courts and from the criminal justice professionals in the prisons, juvenile institutions, and probation departments. And it is coming most especially from the victims of crimes, who the current system has kept almost completely out of the process.

My instinct was wrong, of course, because there is no reasoning with you on the subject. You know what is best, from your years of inmeshment in the current retributive system of justice. You told me in no uncertain terms that you are not even willing to engage in a public debate on the subject. To do so would be an abdication of your duty to protect the public.

So I won't debate the issue with you any further. Instead I will simply compare your system, the current retributive criminal justice system, with the new restorative model which I will gladly claim for my own (though I don't personally deserve any credit for it).

Let's start with the young thugs on the street: the juvenile criminals. Your system doesn't do anything with them at all, really, until they have been in trouble with the authorities for an average of 15-20 times (according to your own office). Oh, they may get their hands slapped, I suppose, or get a stern lecture from a magistrate or juvenile intake worker. But 15-20 criminal acts go by before they are actually placed into detention or face any other real accountability for their crimes.

Under "my" system they will be required to go in front of youth peers for even a first offense. And don't tell me that it does not provide real accountability to a juvenile offender to be judged by kids of his or her own age, in a youth court, or to meet face to face with the victim of their crimes and learn about the impact of their action on that individual. Recidivism studies provide evidence that offenders who have been through such programs are less likely to be repeat offenders. I know that recidivism statistics can be misleading and bad science sometimes. But I have seen the looks in the wide frightened eyes of the juvenile offenders in the youth court or in the mediation rooms. What do you have to demonstrate that your system is a better deterrent to their future criminal behavior?

I WILL SIMPLY COMPARE YOUR SYSTEM, THE CURRENT RETRIBUTIVE CRIMINAL JUSTICE SYSTEM, WITH THE NEW RESTORATIVE MODEL WHICH I WILL GLADLY CLAIM FOR MY OWN (THOUGH I DON'T PERSONALLY DESERVE ANY CREDIT FOR IT).

Under your system, my friend Janice Leinhart, whose elderly parents were brutally murdered by a juvenile, was not even allowed into the courtroom to know what was going on in the criminal proceeding against the murderers. Janice actually had to lead the campaign to amend the Alaska Constitution to give victims the right to be present under such circumstances.

Luckily for Alaska, the Constitutional amendment succeeded, and efforts are now being made to involve victims in the criminal process to at least a limited extent. Yet they are still not able to ask questions nor obtain closure in any but the rarest of serious cases.

Your system is opposed to such involvement by the victims. You hate to deal with the emotions of grief-stricken individuals. They get in the way of your efforts to protect the "public," which apparently does not include the victims of the crimes.

Under my system, in contrast, victims of criminal acts are included as full participants in the process from the onset. In the case of circle sentencing the victims can even shape the exact punishment to fit the crime committed against them.

Under your system the judges throw up their hands at recidivists. They can do no more than give such incorrigible criminals the maximum allowable sentence, and then simply watch them as they are released from prison at the end of their term to go out and drive drunk or burgle or rape and murder once again.

Under certain restorative justice alternatives, however, actual headway is made with such classic recidivists. An old college friend of mine who is now a judge in Minnesota is so excited about the possibilities that he donates hundreds of extra hours of his time yearly to work on such restorative programs. He is sick and tired of sentencing such criminals to the maximum sentence allowed by law, only to see them get out and reoffend within days of their release. He believes that restorative methods make a difference. What alternatives do you have to provide for such recidivists?

I admit that I have never been a criminal attorney, nor had much interest in the area. As a young lawyer I chose to stay out of an area of the law that seemed morally and ethically bankrupt to me. From a defense standpoint I saw my colleagues getting heinous criminals off on technicalities, without such individuals taking any responsibility for their criminal acts. My lawyer friends justified it on the grounds that some of their clients were innocent, and we would all want to be treated with procedural exactness if we were charged with a crime we did not commit. Clearly 95% of the released criminals were guilty, however, as the defense lawyers would all admit.

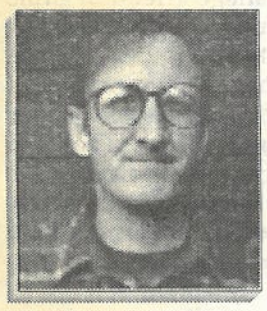
Even more disturbing and morally bankrupt to me, however, were my lawyer friends in the prosecution offices. They would try to inflict the maximum possible punishment on those few criminals who were poor enough and stupid enough to be convicted regardless of the technicalities. And then they would have no apparent concerns (not in their job description) as the criminals they put away were brutalized and homosexually raped in the prisons they were warehoused in (at tremendous expense). The convicted criminals would then get out again, often after serving far less time than originally sentenced to, as much worse, experienced, and more brutal criminals than they were before they went in.

Well I guess you have now heard my rant, Mr. Prosecutor, so I will shut up for the moment. I would offer you equal time in this column, in the next issue of the *Bar Rag*, to explain just what it is that you find so offensive about the concept of restorative justice, to the point that you believe it is irresponsible to even discuss the concept on a panel. Of course I suppose it might be irresponsible to engage in a debate in this forum also, in which case we will be waiting in vain.

ECLECTIC BLUES

It's raining money

☐ Dan Branch



It's raining again in Juneau. It's been raining for a couple of months now. Eighty soft days of wet, gray light. Eighty nights of bar lights reflecting off the puddles at Franklin and Front.

The weather made the front page of today's *Juneau Empire* with the headline, "Strange but true: NO RAIN THIS MORNING." In the story that followed, a reporter described the brisk sale of windshield wiper replacement blades in the Mendenhall Valley. He also mentioned that it has rained at the Juneau Airport every day but two, since September 1.

(I provide a description of the newspaper article because in the past, members of the Juneau Bar Association have accused me of starting every *Bar Rag* article with a negative weather report. Hey, we live in a rain forest. Precipitation is a fact of life. This fall, precipitation is our only way of life.)

All this sky-water gives the cruise ship companies and their tee shirt shop allies something more to worry about. It adds to the misery brought on by a couple of helicopter crashes, the bust of one cruise ship company for criminal, intentional water pollution, and Juneau's new $5 a head cruise ship passenger tax,. With all these problems, next year Juneau may not get the annual increase in cruise ship use that we have come to expect. Heck, we may not even break the 600,000 passenger mark.

Just when things started looking as bad as deserted South Franklin Street in January, the *Wall Street Journal* published a body slam article that rated Juneau as one of the 10 worst vacation spots in the world.

Just imagine the impact the article must have had on the cruise ship industry. On a sunny morning this fall, serious guys in gray suits boarded their morning commuter train to New York City. Like the award-winning Juneau Drill Team, they marched to their usual seat, snapped open the *Wall Street Journal* and looked for a little amusement among the stock reports. Instead they found vacation advice in a story placing Juneau in the same league as a Chernobyl and a nudist colony in war-torn Croatia. Grabbing their cell phones, the commuters call home—"Muffy, darling, lets forget Juneau next summer—just got a piece of insider information—better book that condo in Spain again—best not to look the fool." What will happen next?

Even with all this bad news, the Juneau tourist industry pushes on with its dreams. Local guiding services have asked the city to increase the number of cruise ship passengers they can charge for trips on our local trails. A couple services are asking the city for leave to take over 50,000 cruise ships riders around the one mile, Outer Point Trial next summer. The helicopter companies want to continue flying tourists up to the ice field to rubberneck or go on short dog sled rides. At least one of the air charter services is fighting the Forest Service's efforts to curtail flights to the sensitive brown bear habitat on Admiralty Island.

Rain won't kill the tourist industry. The *Wall Street Journal* won't kill it, either. No, the only thing that will kill this golden egg-laying goose is the goose, itself. In the words of the *Wall Street Journal* reporter, "every day, as many as 10,000 cruise ship passengers jam the streets here. Even worse: The buzz of touring helicopters rattle windows."

ANNOUNCEMENT: DUES MORATORIUM

The United States District Court for the District of Alaska has decided to excuse payment of the annual renewal fee for lawyers admitted to its bar for the year 2000 to 2001. The next payment will be due January 1, 2001. The payment initially due January 1, 2000, will not be collected. The annual fee as well as a part of the initial fee charged new lawyers and the pro hac vice fees paid by lawyers not members of the court's bar who appear before it are paid into the court's Court Fund. By law, payments from this fund are limited to items for which funds appropriated by Congress are not available and which promote the practice of law and the administration of justice in the District.

The court is currently considering amendments to D. Ak L.R. 83.1 governing practice before it in light of the comments received when proposed changes were published in the Bar Rag and on the court's bulletin boards. The court is assisted by a Court Fund Committee chaired by Leroy Barker, Esq. The committee, with the assistance of Clerk of Court Mike Hall, will be preparing a proposed budget to govern expenditures from the Court Fund and will be studying how other districts use their court funds to promote the practice of law in the federal courts. Consideration will be given to such topics as expenditures for lawyer discipline, the court's pro bono program, the court's share of the annual Bench-Bar Convention, Continuing Legal Education programs of special interest to lawyers who practice in federal court, and other matters of interest to the federal bar. Suggestions and comments should be forwarded to Mr. Barker and Mr. Hall. The court will review the committee's proposal and make a final determination regarding amendments to Rule 83.1 sometime next year.

Alaska Bar Association Winter/Spring CLE Calendar (Programs scheduled to date — 11/99) Watch for brochures about the following upcoming programs

Date	Topic	Live in	Time
Nov 18	Representing Military Members	Anchorage	8:30 a.m. – 12:00 noon
Nov 30	Appellate Rule 210(c)	Anchorage	8:30 – 10:00 a.m.
No CLEs in Dec 1999			
Jan 7	Appellate Rule 210 (c)	JUNEAU	TBA
Jan 11	Ethics for the Millennium	Anchorage	8:30 a.m.– 12:00 p.m.
Jan 28	Off the Record – 3rd Judicial District	Anchorage	7:30 – 9:30 a.m.
Feb 16	Update on Bonding: Court, Contract, & Fidelity – in cooperation with Brady & Co. and Reliance Surety Co.	Anchorage	8:30 – 11:00 a.m.
Feb 29	Mandatory Ethics for New Admittees	Anchorage	1:30 – 4:45 p.m.
March 1	Trust Accounts – in cooperation with ALPS	Anchorage	8:30 a.m.– 12:00 p.m.
March 1	Risk Management –in cooperation with ALPS	Anchorage	1:30 – 4:45 p.m.
March 7	Immigration/Political Asylum – in cooperation with Catholic Social Services Immigration and Refugee Services	Anchorage	8:30 a.m.– 12:30 p.m.
March 8	Daubert Meets the EEOC: Use of Experts in Employment Law Cases	Anchorage	8:30 a.m.– 12:30 p.m.
March 8	Lunch with the EEOC	Anchorage	12:30 – 1:45 p.m.
March 24	Mandatory Ethics for New Admittees	JUNEAU	1:30 – 4:45 p.m.
March 31	Mandatory Ethics for New Admittees	FAIRBANKS	9:00 a.m.– 12:15 p.m.
April 6 & 7	Administrative Law Update	Anchorage	8:30 a.m. – 12:30 p.m. each day
May 17, 18 & 19	Annual Convention	Anchorage	Full Days

NEWS FROM THE BAR

Board of Governors takes action

At the Board of Governors meeting on October 22 & 23, 1999, the Board took the following action:

• Certified the July 1999 Bar Exam results.

• Certified two reciprocity applicants for admission.

• Approved a Rule 43 (ALSC) waiver for Jennifer Beardsley.

• Voted to disapprove the stipulation in the Matter of Samuel R. Peterson and deferred the matter until they have a better record with the results of the criminal charges and any sentencing records.

• President Tinglum will write a letter to Governor Knowles, encouraging him to fill the vacancy on the Board by appointing a third public member.

• A subcommittee of the Board will meet and review the amount of fees charged for such areas as reciprocity, Rule 81's, and Sections, and make recommendations to the Board at the January meeting.

• Approved the 2000 budget as amended.

• Accepted the hearing committee report recommending the disbarment of Donald M. Johnson and added that Johnson be required to pay all Bar Association costs and attorneys fees incurred in the investigation and prosecution of the disciplinary matters and that, as a condition of readmission, Johnson make full restitution of any amounts owed to his client or her assignees or subrogees. The Board recommendation will be filed with the Supreme Court.

• Set the Voluntary CLE dues reduction for 2001 at $45.

• Adopted an Ethics Opinion entitled "May In-House Counsel for an Insurance Company Represent Insureds?"

• Referred electronic publication on the Bar's website of Pam Cravez's book to the Internet Committee.

• Agreed to fund an Immigration Law seminar in March 2000 at $4,000 + $1,500 for travel. This CLE is designed to train attorneys willing to provide pro bono legal services for immigrants seeking political asylum.

• Heard a report from Brant McGee on the Attacks on Judges group. Formed a subcommittee to discuss how to respond to attacks on judges, and to work with Steve Van Goor on what Bar can/can't do.

• Approved the formation of a Worker's Compensation Section.

• Agreed to continue the Trial Court Opinions database.

• President Tinglum will write to local Bar presidents encouraging them to keep track of local bar meetings which have substantive programs, the amount of time and attendance, for which their members might want to claim VLCE credit.

• President Tinglum will write the legislators that the Board took no action on their requests for waiver of the VCLE rule.

• Approved moving Section elections to September.

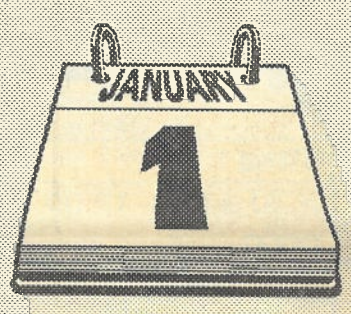
• Bar Counsel will draft a rule eliminating the prohibition against advertising the existence of the Lawyers' Fund for Client Protection.

• Voted to send Bar Rule 5 (Conditional admission & attorney's oath) to the Supreme Court.

• Voted to publish ARPC 1.5 (draft language for Comment for disclosure to client of potential responsibility for costs under Civil Rule 82) in November *Bar Rag*.

• Accepted the ARPC Committee's report on ARPC 1.8(e) (financial assistance to a client).

• Approved the August minutes with corrections.



January 1, 2000 is the deadline to transfer to inactive status for 2000.

For more information, or to receive an affidavit to transfer to inactive status, contact the

Alaska Bar Association

P.O. BOX 100279
ANCHORAGE, AK 99501
OR 510 L STREET, SUITE 602
272-7469
FAX: 272-2932
e-mail: alaskabar@alaskabar.org

Member comments invited

The Board of Governors invites member comments concerning the following proposal to add language to the Alaska Comment of Alaska Rule of Professional Conduct 1.5.

The proposed addition would provide language a lawyer may use in advising a client in a written fee agreement in a litigation matter of any costs, fees or expenses for which the client may be liable if the client is not the prevailing party.

Please send comments to: Executive Director, Alaska Bar Association, PO Box 100279, Anchorage, AK 99510 or e-mail to alaskabar@alaskabar.org by January 7, 2000.

ARPC 1.5 COMMENT

PROPOSED ADDITION TO ARPC 1.5 COMMENT
REGARDING CLIENT LIABILITY FOR
COSTS, FEES OR EXPENSES
(Additions italicized; deletions bracketed and capitalized)

Rule 1.5 Fees.

...

(b) The basis or rate of a fee exceeding $500 shall be communicated to the client in a written fee agreement before or within a reasonable time after commencing the representation. This written fee agreement shall include the disclosure required under Rule 1.4(c). In a case involving litigation, the lawyer shall notify the client in the written fee agreement of any costs, fees or expenses for which the client may be liable if the client is not the prevailing party.

...

ALASKA COMMENT

...

Lawyers may use the following language to notify the client of the client's potential liability for costs, fees or expenses if the client is not the prevailing party in litigation:

"Under the law, you may have to pay some or all of the costs, fees and expenses of your opponents in your case if you don't win your case or if you reject an offer that turns out to be better than your results at trial."

Send your comments via fax to 907-272-2932 or e-mail the Bar at alaskabar@alaskabar.org

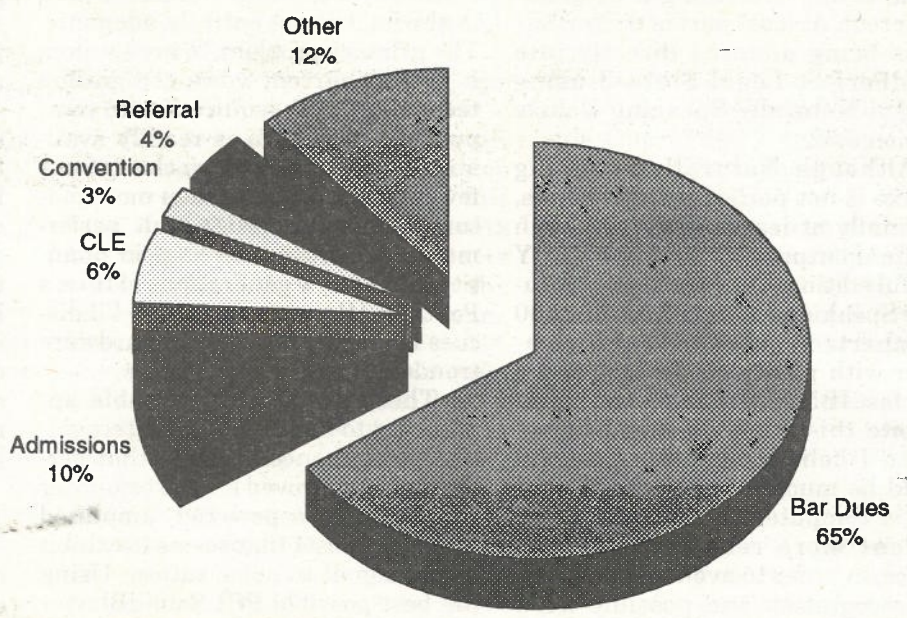
Bar Rar Articles Welcome: Guidelines

- Ideal manuscript length: No more than 5 double-spaced pages, non-justified.
- E-mail and .txt: Use variable-width text with NO carriage returns (except between paragraphs).
- E-mail attachments & disks: Use 8.3 descriptive filenames (such as author's name). May be in Word Perfect or Word. Attachments are preferable to text in the body of the e-mail message.
- Fax: 14-point type preferred, followed by hard copy or disk.
- Photos: B&W and color photos encouraged. Faxed photos are unacceptable. If on disk, save photo in .tif format.
- Editors reserve the option to edit copy for length, clarity, taste and libel.
- Deadlines: Friday closest to Feb. 20, April 20, June 20, Aug. 20, Oct. 20, Dec. 20.

2000 Budget Summary

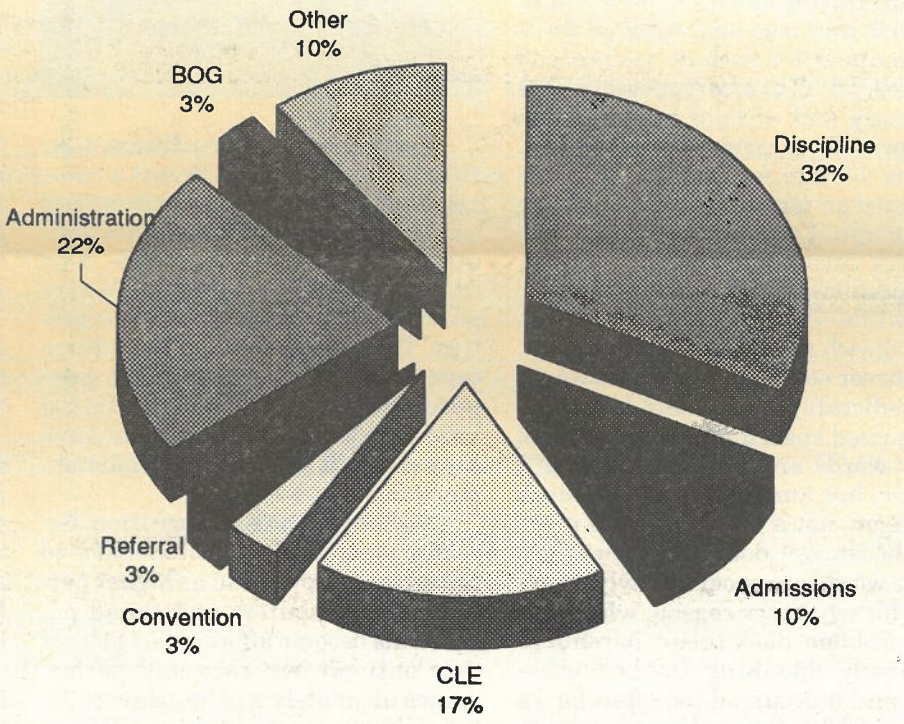
Projected Revenue	
Admissions Fees - All	196,000
CLE	111,000
Lawyer Referral Fees	81,000
The Alaska Bar Rag	35,000
Annual Convention	50,000
Substanstive Law Sections	11,000
Ethics Opinions	2,500
Pattern Jury Instructions	6,600
Mgmt. Service/Law Library	6,000
Accounting Svc./Foundation	10,000
Membership Dues	1,245,000
Dues Installment Fees	16,000
Penalties on Late Dues	16,000
Labels & Copying	6.000
Investment Interest	109,000
Misc.	2,000
Total Revenue	**1,903,000**

2000 REVENUE BUDGET



Projected Expense	
Admissions	185,000
CLE	313,000
Lawyer Referral Service	51,000
The Alaska Bar Rag	47,000
Annual Convention	65,000
Substantive Law Sections	19,476
Ethics Opinions	600
Pattern Jury Instructions	2,000
Mgmt. Services/Law Library	3,000
Accounting Svc./Foundation	10,000
Board of Governors	48,000
Discipline	598,000
Fee Arbitration	53,000
Administration	414,000
Committees	7,000
Alaska Law Review (Duke)	34,000
Internet/Web Page	6,000
Credit Card & Bank Fees	9,000
Computer Training/other	500
Total Expenses	**1,866,000**

2000 EXPENSE BUDGET



If you have questions or would like a copy of the entire budget detail, please contact the Bar office at 272-7469, or e-mail alaskabar@alaskabar.org.

CIRCLE THESE DATES!

SINCE 1896
ALASKA BAR ASSOCIATION

CONVENTION 2000
Hotel Captain Cook & Egan Convention Center
Anchorage
Wednesday, Thursday, & Friday
May 17, 18 and 19

CONVENTION 2001
Ted Ferry Convention Center
Ketchikan
Wednesday, Thursday & Friday
May 9, 10 and 11

HI-TECH IN THE LAW OFFICE

Trying out new gadgets

BY JOSEPH L. KASHI

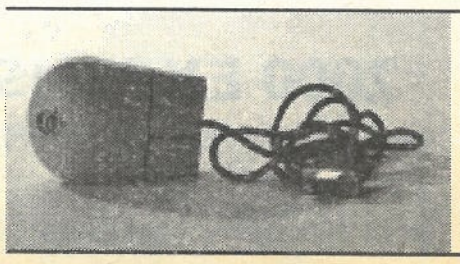
I'm trying something a little different. At least part of this article is being dictated directly into WordPerfect Legal Suite 8 using Dragon Naturally Speaking Deluxe Version 3.52.

Although Naturally Speaking Deluxe is not perfect by any means, it's finally at least usable, although the final output still requires VERY careful editing. I've been using Naturally Speaking DeLuxe 3.52 on a 500 megahertz Windows NT 4.0 computer with plenty of memory and a very fast IBM Ultra2SCSI hard disk. Despite this fairly high end horsepower, I believe that this program would be much more useful if used with a computer that has about 50 percent more real-world performance, in order to avoid lagging output recognition and possible word jumbling. I understand that Naturally Speaking Deluxe 4.0 is now shipping but I haven't had the chance to examine it.

I did experience one very disconcerting problem when dictating into Corel WordPerfect 8, with Service Pack 5. During dictation, WP8 tended to crash and lose any unsaved data. I also noticed a strange tendency of Dragon V 3.52 to insert spoken words suddenly, and without warning, into the middle of prior words or sentences. I found, for example, that this occurred on repeated occasions when I attempted to use the words "frequency recognition performance". The problem seems to occur most often when Dragon cannot keep up with speech recognition: at that point, the cursor seems to jump backwards unpredictably and insert belatedly recognized speech into the middle of other words and other sentences. I believe, but am not sure, that this is a Dragon, not a WordPerfect 8 problem, because it does not occur when single words are spoken slowly. However, for whatever reason, whenever this problem does occur, it renders Naturally Speaking Deluxe unusable, and it occurred too often for I's liking. I look forward to examining whether this problem also occurs in Dragon Deluxe 4.0. Others tell me, though, that they experience adequate performance using even slower computers, so it's possible that there's some other problem that I haven't been able to diagnose yet.

As a productivity tool, Dragon Naturally Speaking DeLuxe V 3.52 is almost, but not entirely, adequate. The primary problem, in my opinion, it is that current voice recognition technology still requires more computing power than is readily available. That equation may change in a few months, though, when more mature versions of AMD's high performance K7 processors ship in quantity and as new generations of Intel's Pentium III processors ship. I'll discuss emerging high-speed hardware trends in greater detail below.

There are several possible approaches to improving voice recognition performance. I found that performance improved on one computer when adding a powered, amplified Andrea headset that seems to exhibit better signal to noise ratios. Using the best possible PCI SoundBlaster card helps.



If you've got a very fast computer, an excellent sound card, and a very high-end headset, and if you dictate better than you type, then continuous speech recognition software is probably good enough for you at this time.

Further improving software algorithms would help, but there's a natural limit to how much performance can be squeezed out of software optimization. Another approach is to throw the maximum affordable computing performance at voice recognition. This approach has the advantage of constantly improving computer performance and declining hardware prices but this brute force approach will likely exhibit diminishing returns as well.

Although voice recognition becomes continually more effective as software improves and as higher performance computers and sound peripherals become affordable, I believe that optimal accuracy and performance ultimately will be achieved by optimizing voice recognition software to better use the specialized digital signal processing (DSP) capabilities now being integrated into high end sound cards and new computer CPUs. Using DSP minimizes the demands made upon a general-purpose CPU and works far more efficiently in the highly specialized area of voice recognition. IBM successfully used specialized DSP hardware years ago to make voice recognition workable on a slow 486 system.

If you've got a very fast computer, an excellent sound card, and a very high-end headset, and if you dictate better than you type, then continuous speech recognition software is probably good enough for you at this time. However, if you're a good typist, then you may be better off typing, at least for the time being. If you do decide to use voice recognition software, then I recommend waiting until faster K7 and Pentium III computers become generally affordable.

HOTTEST HARDWARE

When you're using voice dictation or document imaging/OCR, there's no such thing as too much computing power. While testing Dragon Deluxe 3.52, my sense was that I needed about 50% more performance than my 500 megahertz computer could provide. One of AMD's new K7 Athlon processors should do the trick, although I suggest waiting for a few months while the bugs are worked out of the system board chipsets and the faster memory that powers the K7's high end performance.

AMD's K7 Athlon is faster than anything Intel is currently marketing and it represents the first distinctive break from the de facto system board standard set by Intel. Unlike AMD's K6, which uses an enhanced Pentium Socket 7 to provide performance comparable to its Intel counterpart, AMD's K7 Athlon adopts DEC's high performance ALPHA system board bus including the capability of using memory up to 200 megahertz-twice as fast as anything now available. Initial published results for a 650 MHz K7 system indicate performance about 60% better than my 500 megahertz Intel system. That boost should be enough to provide all the power that current versions of Naturally Speaking realistically require. The Winstone 99 benchmarks used in making these comparisons, by the way, emphasize very demanding 3D and audio frequency analysis functions, making them a good predictor for how voice recognition would do on a particular computer.

You can buy K7 systems at this time at Costco among other stores but at a fairly high price, mostly from upper end vendors like IBM. Second and third tier K7 systems are not yet common, even though the CPUs are available, because AMD's K7 uses a unique system board architecture that's new to the Wintel market. K7 system boards reportedly remain scarce and "immature" and the technology remains fairly cutting edge. Further, one of the K7s major benefits, faster SDRAM memory access, will remain a merely hypothetical advantage until memory manufacturers begin shipping faster alternatives to standard PC 100 SDRAM. Production versions of somewhat faster PC 133 memory and even faster RAMBUS and Double Data Rate SDRAM Memory probably won't ship in quantity for several more months. Even then, I don't expect to see these products become mature and affordable until the second half of 2000. The allegedly fastest of these new DRAM alternatives, RAMBUS, is allegedly in a lot of technical and market trouble. In the meantime, RAMBUS memory is losing its initial luster due to very high initial cost and marginal performance improvements in the early samples. As a result, system vendors are looking toward somewhat faster PC133 memory and SDRAM variants to provide at least some interim performance improvements. As manufacturers gear up to produce newer memory types, memory shortages and tripled prices for standard PC100 SDRAM have become commonplace during the heavy pre-Christmas buying season, and those shortages and high costs are further aggravated by damage and delays caused by Taiwan's recent 7.6 earthquake. Don't expect to see memory prices drop back to summer 1999 levels until at least March or April 2000.

AMD has further improved its popular K6 series processor. New 450 MHz K6-3 processors perform essentially on part with a 500 MHz Pentium III but at a lower cost. The K6-3 performs so well because its crucial L2 cache is not only on the CPU core but also runs at full CPU speed. In contrast, both the Pentium II and the Pentium III separate the L2 cache from the CPU core but run that cache only at 1/2 CPU speed, thus creating a significant memory access bottleneck that drags down potential performance. For the best price-performance ratio around, I like 450 MHz K6-3 systems. In fact, a 450 MHz K6-3 system using 128 MB PC100 SDRAM and one of IBM's fast new 7200 rpm 13.5 GB Ultra 66 IDE hard disks turned in one of the best performances that I've ever measured in a Windows NT 4.0 system.

Rock-solid versions of Intel's 820 chipset needed to support faster memory types with Intel's newest CPUs still have not shipped to system board manufacturers, with the delay reportedly due to continuing bugs.

Intel is now shipping the consumer-oriented 810 chipset for system boards that embed video, sound and other peripheral circuitry directly into the system board. Even though 810-based systems can be very good products for the home market, used by many manufacturers, I recommend that you avoid 810-based systems for business use if possible. System boards using embedded video, sound and other peripherals tend to be somewhat less stable and

Continued on page 13

Gadgets

Continued from page 12

more difficult to upgrade and to use in business environments where networks, tape drives, SCSI adapters and other non-consumer peripherals are the norm.

Along with the crucial chipsets needed to support faster, more feature-rich processors, Intel will start shipping a broad range of faster CPUs over the next several months, all of which continue to use improved versions of the Pentium II CPU core. Among these new CPUs will be really high speed Pentium III models using .18 micron die sizes, cutting edge copper internal connections, and faster memory access. Intel's "consumer" Celeron, an under-appreciated CPU, will get full speed 100 MHz SDRAM access beginning with the 550 Mhz model. Expect to see the Celeron maintain its good price-performance ratio.

FREE OFFICE SUITES

Third party competition with Microsoft's Office suite recently took an interesting turn when Sun Microsystems bought German office suite vendor Star Division and began giving away Star's perfectly usable Star Office 5.1 suite. Star Division has been in business for years and has developed, at least overseas, a very good reputation for stable software that works well across many different hardware and operating system platforms. Sun, as you may recall, made its Java language a de facto standard by giving it away and apparently intends to take the same approach with Star Office. You can download the 65 megabyte Star Office 5.1 file from Sun at www.Sun.com/staroffice in a variety of operating systems including LINUX, Sun Solaris (Intel or SPARC), Windows 95/98/NT and OS/2. This download is available in numerous national languages and includes a word processor, spreadsheet, and presentation software. I suggest, however, that you go online and order the CD that includes ALL operating system in both English and German and also Star Office's binary code for $9.95 plus shipping. Sun is positioning Star Office as a major cross-platform product that can be adapted to the "thinclient" operating systems and Internet technology powered by Sun's expensive high end server hardware. Sun's basic motivation, of course, is to sell more of its high end, nonWintel compliant hardware.

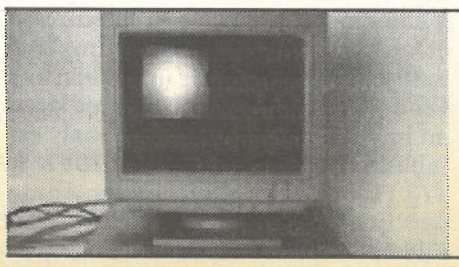
For the current standalone product, the price is obviously right and there's little risk except for your time. These products are basically lean and fast rather than featurerich, so you'll need to carefully evaluate whether they meet your needs. On the other hand, they undoubtedly have more features than the Word Perfect 5.1 for DOS that so many law offices still use. The interface is quite pleasant and installation on my Windows NT 4.0 system proceeded very smoothly.

REDHAT LINUX-NOT READY FOR PRIME TIME.

At the risk of alienating the growing body of Linux users and risking an e-mail flameout, I'll give you my own take on LINUX, based my use of Redhat's current Linux 6.0. Earlier versions, such as Red Hat 5.2 (available as a Costco closeout) were much too difficult to install.

Linux is touted as the next big wave in operating systems and as the only viable challenger to Microsoft. Microsoft, purportedly, is viewing open source, free to all, Linux as the greatest threat to its hegemony since NetScape Corporation. Although Microsoft has well-publicized shortcomings both as a company and in its Windows 9x and NT operating systems, I don't believe that Microsoft needs to worry about LINUX in the short run- LINUX remains more difficult for the average office to install and to maintain and there's little mainstream productivity software with the exception of the forthcoming Word Perfect for Linux and Sun's Star Office and the included serverbased calendaring software.

AT this point, LINUX does not natively run any Windows 9x/NT software. That glaring weakness cuts out almost the entire visible portion of the software universe, at least in terms of the sort of legally-oriented, vertical market software that makes lawyers' lives easier and more productive, such as case management, litigation support, comprehensive time and billing and document imaging.



One of the hottest buzzes that I've seen recently involves redesigning the entire gamut of legal office software to expand case management software to include case management, integrated litigation support and document imaging and management capabilities.

Placing LINUX on most end user desktops is also unrealistic at this time because the learning curve's steep and there are still too much reliance upon the command line. Still, with software heavyweights like Corel and corporate giants like IBM and Sun throwing their support behind Linux as an Internet and network server environment, the long-term prognosis is fairly positive and developments over the next two or so years may render LINUX a strong desktop contender, particularly if the forthcoming Corel version puts a friendlier face upon LINUX. WINDOWS 98 Special Edition Upgrades:

I've had mixed luck upgrading Windows 9x computers using Microsoft's newest Windows 98 Second Edition Upgrade. Windows 98 now seems to be more stable and seems to solve some of the problems that frequently cropped up over time in Windows 95 and I generally recommend it. Overall, I've found that the Windows 98 Second Edition upgrade process usually, but not always, works well. My failed 98SE upgrade seems to be a software driver and hardware recognition hangup that stopped the upgrade process in its tracks and was impossible to avoid with the system board used on my receptionist's computer - that system board integrated audio and video chips, another reason to be leery of highly integrated, do-everything system boards.

In all of these instances, unstable or incompatible software drivers seem to be the problem and seem to occur because Windows 98 tends to overwrite older software drivers and system configuration files. Sometimes, using Safe Mode will enable you to fix your system by reinstalling the older driver or to boot to Safe Mode in order to totally uninstall the 98SE upgrade. Thankfully, 98SE defaults to saving the older Windows 95 OS and configuration files before starting its upgrade, a feature which you should ALWAYS use. (If your 98SE continually upgrade hangs during hardware detection and setup, I suggest that you reboot to Safe Mode, go to Control Panel, Remove Programs, and remove the Windows 98 Second Edition upgrade.) Reverting to the earlier version of Windows worked perfectly.

If you're experiencing Windows 9x instability, you might also try CyberMedia's First Aid, which analyzes your software drivers and searches for the newest ones. Don't overlook the possibility that SDRAM or other hardware might be failing. A good diagnostic program like Checkit-98 is invaluable.

I now recommend that anyone using a recent edition of Windows 98 avoid some of the earlier shareware programs that modified the operating system. These are highly version specific and may not work with more recent shipping versions. And, it's not always easy to determine when Microsoft includes unannounced changes and improvements that might react adversely.

PSST!! Want a Really Hot, Cheap Server?

Among Novell Netware's less obvious but powerful features is Novell's very quality IDE disk driver software. These drivers, along with Netware's traditionally lean, fast performance and inherent ability to duplex hard disks, allows you to build a really high quality, redundant file server at a very low cost.

Here's how: take a dual power supply ATX system case (about $600) and install an AMD 450 MHz K6-3 CPU in a Gigabyte redundant BIOS system board (CPU and board cost about $300) and use at least 128 MB PC100 Error Correcting ECC SDRAM memory (about $350). Use the system board's built-in primary and secondary Ultra66 IDE hard disk control lers to duplex, using Netware, two of IBM's fast top quality 13.5 or 18 GB 7200 rpm hard disks ($330 for two 13.5 GB drives, about $420 for two 18 GB drives). Add a basic AGP video card, a PS/2 mouse and keyboard, an Intel Pro 100+ network card, a 3.5" floppy disk drive, and a Delta 48X IDE CD-ROM (total cost of peripheral parts about $200) and you've got one of the fastest, most redundant small office file servers around, all for about $1,780 not counting basic VGA monitor and network operating system. This package provides top end performance and redundancy at a really low price, a combination that would cost you thousands of dollars if purchased from a major system vendor, who'd probably use most of the same components anyway. I get ours built to order from Merit Distributing in Seattle, 800-856-3748, ask for Pat Rowe at x153.

SOFTWARE I'D LIKE TO SEE MARKETED

One of the hottest buzzes that I've seen recently involves redesigning the entire gamut of legal office software to expand case management software to include case management, integrated litigation support and document imaging and management capabilities. Some vendors, notably Amicus, are rumored to be moving in that direction. Over time, these products must increasingly focus upon document imaging, searching and management; it makes sense to blend those applications so that documents are scanned and entered only once. Then, I suggest that vendors evolve these apps into a Web-enabled client-server database application that performs its computational work on the high performance central LAN or Internet file server and thus provides better performance if you're connecting to your office via the Internet.

I'd also like to see a stable and usable file search utility in WordPerfect Legal Suite and in Microsoft office. Current versions of Corel's document content indexing and search utility seems to be less stable and harder to use than similar software shipped a few years ago. I suggest that Corel and Microsoft include a usable version of ISYS or a comparable text search utility. Ideally, I'd prefer that these vendors incorporate fuzzy search capabilities that look for weighted partial matches or even similar phrases, sentences and paragraphs. This is very useful, mature technology. Lotus Magellan incorporated these powerful text search capabilities ten years ago! It's time that legal and general office software suites caught up.

DOES IT MAKE SENSE TO INTEGRATE TIME AND BILLING WITH ACCOUNTING?

I've seen a lot of online debate lately about integrating time and billing programs like Timeslips 9.0 into your accounting package. I'd like to be heretical and suggest that perhaps most small law firms don't need to spend the time and money needed to properly link these financial applications.

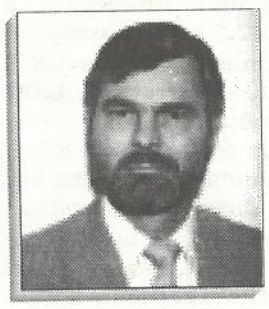
In the first instance, most small law firms report their taxes on a cash basis rather than an accrual basis. That makes a lot of sense given how often smaller firms have difficulty collecting their fees timely and also how often they work contingent fee cases where you not sure if, when and how much money you will collect. And, the IRS may make you report on a cash basis only. Given those circumstances, it makes sense to at least consider whether accrual basis integration of your time and billing system and of your accounting program even makes sense for you.

While on the matter of time and billing, I note that Timeslips version 9, often criticized earlier for stability deficiencies, now seems to work well and stably. Be sure that you download and install the latest service pack available.

BANKRUPTCY BRIEFS

Dischargeability: Willful and malicious injury

☐ Thomas Yerbich



11 USC § 523(a)(6) excepts from discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." An "'entity' includes person, estate, trust, governmental unit, and United States trustee." [11 USC § 101(15)] "[D]ebt' means liability on a claim." [11 USC § 101(12)] Thus, where the debt results from a claim arising out of a willful and malicious injury to another, or the property of another, that debt is excepted from discharge.

The question is what constitutes a willful and malicious injury? Prior to 1998, the controlling definition in the Ninth Circuit consisted of a five-part test: 1) the debtor committed a wrongful act; 2) the act was intentional; 3) the act necessarily produced harm; 4) the debtor had actual knowledge, or it was reasonably foreseeable to him, that his conduct would result in injury to the creditor; and 5) the debtor acted without just cause or excuse. [*In re Cecchini*, 780 F.2d 1440 (CA9 1986)] This test did not require a showing of biblical malice, *i.e.*, personal hatred, spite, or ill-will. Nor did it require a showing of an intent to injure, only an intentional act which causes injury. [*In re Bammer*, 131 F3d 788 (CA 9 1997) *en banc*]

In May 1998, the U.S. Supreme Court, in a medical malpractice case, rejected the argument that only an intentional act which results in injury was sufficient to trigger § 523(a)(6). [*Kawaahuhau v. Geiger*, 523 US 57, 118 SCt 974, 140 LEd2d 90 (1998)] Instead, the court, drawing by analogy from Restatement (Second) Torts, § 8A, comment a (1964), held "willful," as used in § 526(a)(6), requires an intent to cause an injury to the victim, not merely a deliberate or intentional act that leads to injury. Section 523(a)(6) is triggered by "intentional torts," as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend the consequences of an act, not simply the act itself. Thus, under *Geiger*, liability based upon negligent or reckless conduct, even a reckless disregard, is insufficient to bar discharge under § 523(a)(6). [See S Rep. 95-989 (1978), reprinted in 1978 USCCAN 5787, and HR Rep. 95-595 (1977), reprinted in 1978 USCCAN 5963. Both houses of Congress also specifically stated that it was their intention to overturn any cases that had applied "a 'reckless disregard' standard" in deciding what debts were not dischargeable.] Moreover, *Geiger* appears to indicate that the "unintentional consequences of an intentional act" doctrine, that may give rise to tort liability, might not suffice to render a debt nondischargeable under § 523(a)(6). Under the restatement approach, the debtor must desire to cause the consequences of his act, or believe that the consequences are substantially certain to result from it. [Restatement (Second) of Torts § 8A, comment b]

One must also define "malicious." The law concerning the meaning of malicious in § 523(a)(6) has long been confused. Courts have divided roughly into two camps, some requiring "special malice," which requires a showing of a motive to harm, and others requiring merely "implied malice." The difference in opinion has been whether § 523(a)(6) repudiated an implied malice test previously established in *Tinker v. Colwell*, 193 U.S. 473 (1904). [For a discussion these two lines, *see Matter of Miller*, 156 F2d 598 (CA5), *cert. denied sub nom*, *Miller v. J.D. Abrams, Inc.*, 119 SCt 1249, and *J.D. Abrams, Inc. v. Miller*, 119 SCt 1250 (1998)] The Ninth Circuit follows the implied malice line, *i.e.*, malice can be established from the nature of the conduct. [*See In re Littleton*, 942 F2d 551 (CA9 1991)]

What liabilities then come within the § 523(a)(6) exception? It seems clear that most, if not all, intentional torts, as long as the debtor intended to cause the injury would qualify. *E.g.*, intentional interference with contractual relations [*In re Rogstad*, 126 F3d 1224 (CA9 1997)]; conversion [*In re Cecchini, supra*; *In re Riso*, 978 F2d 1151 (CA9 1992)]; malicious prosecution [*In re Abbo*, 168 F3d 930 (CA6 1999)]; assault and battery [*Matter of Thirtyacre*, 36 F3d 697 (CA7 1994)]; sexual harassment [*In re Topakas*, 202 BR 850 (Bank.ED Pa 1996)]; trespass [*In re Sullivan*, 198 BR 417 (Bank. Mass 1996)]; and intentional infliction of emotional distress [*In re McNallen*, 62 F3d 619 (CA4 1995)].

Beyond intentional torts, given the clear tenor of *Geiger*, it is unlikely any other form of wrong-doing could fall within the scope of § 523(a)(6). It is well settled that breach of contract is not the type of injury addressed by § 523(a)(6). Debts that are excepted from discharge under § 523(a)(6) relate solely to tortious liabilities, not debts stemming from breach of contract. An intentional breach of contract is excepted from discharge under § 523(a)(6) only when it is accompanied by malicious and willful tortious conduct [*In re Riso, supra*; *see Texas By and Through the Board of Regents of the University of Texas System v. Walker*, 142 F3d 813 (CA5 1998)] Unless the creditor has an "interest" in the property transferred, a fraudulent conveyance is not within the scope of § 523(a)(6). [*In re Saylor*, 108 F3d 219 (CA9 1997); *but cf. In re Bammer, supra*]

In most situations, the creditor will have obtained a judgment against the debtor in a state court proceeding. The question then becomes to what extent can this state court judgment be utilized to establish nondischargeability of the obligation under § 523(a)(6). Collateral estoppel applies in bankruptcy nondischargeability actions. [*Grogan v. Garner*, 498 US 279, 111 SCt 654, 112 LEd2d 755 (1991)] But, that does not mean that the doctrine, an issue preclusion device intended to prevent relitigation of issues already tried, will carry the day when invoking § 523(a)(6).

State law is applied in determining the preclusive effect of a prior state court adjudication [*Jones v. Bates*, 127 F3d 839 (CA9 1997)] In Alaska: 1) The issue must be identical to and have been actually litigated in the former proceeding; 2) it must have been necessarily decided in the former proceeding; 3) the decision in the former proceeding must be final and on the merits; and 4) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. [*Wilson v. Municipality of Anchorage*, 977 P.2d 713 (AK 1999)] The party seeking to assert collateral estoppel has the burden of proving all the requisites for its application. To sustain this burden, a party must introduce a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action. Any reasonable doubt as to what was decided by a prior judgment should be resolved against allowing the collateral estoppel effect. [*In re Kelly*, 182 BR 255 (BAP9 1995) *aff'd* 100 F3d 110 (CA9 1996)]

The proponent of collateral estoppel must, as a minimum, introduce the pleadings and, in a jury trial, the instructions given the jury and the verdict forms (if one believes bankruptcy may result, requesting a special verdict is advisable), or, in a nonjury trial, the findings and conclusions of the court. These must clearly establish a finding that the debtor acted with the intent necessary to satisfy the *Geiger* test. Just holding up the judgment does not mean you win. Several "pitfalls" lurk in the wings. The most common is where liability could have been determined on alternative grounds, at least one of which would not meet the *Geiger* test, and the basis for finding liability is not specified. Even a specific finding that the debtor acted "willfully and maliciously," will not carry the day unless that finding is based on the standard enunciated in *Geiger*. For example, if under applicable state law, "willful and malicious" can be found based on "reckless disregard," the issue must still be litigated in the bankruptcy court. Conversely, collateral estoppel does not necessarily prevent a creditor from litigating the issue of "intent to harm" even where it was never raised in the prior action.

The upshot is that in many, if not most, proceedings brought under § 523(a)(6), collateral estoppel will only establish that the debtor did the act in question and the creditor suffered an injury. As a practical matter, the *Geiger* decision has made it a virtual certainty that the issue of "willful and malicious" will have to be tried before the bankruptcy court except where the liability of the debtor could only have been found if the debtor acted with an intent to harm the creditor. The burden is on the creditor to bring the action within the time limits of Rule 4007(c), FRBP (not later than 60 days after the first date set for the meeting of creditors). The creditor also has the burden of proof by the preponderance of evidence on all issues and it will not be tried to a jury.

FAMILY LAW

Alaska child support law changes

☐ Steve Pradell

The Alaska Supreme Court has again approved changes in the state's child support laws, which are also known as Alaska Civil Rule 90.3. This article identifies some of these changes, which became effective as of October 15, 1999, and are set forth in Supreme Court Order Number 1362. Practitioners should review the revised rule in its entirety, which is contained in the most recent "official" version of the Alaska Rules of Court, distributed in mid October and published by the Book Publishing Company.

One change will effect families where the obligor, the parent who pays support, earns over $72,000.00 in adjusted annual income per year. Previously, the court would not normally consider the amount of adjusted annual income a parent receives over $72,000.00 in calculating child support. The new rules provide that the court will cap the adjusted annual income of an obligor parent at $84,000.00. As a result, parents who receive future child support awards will normally be able to include a percentage of up to $84,000.00 of the obligor's adjusted annual income, and child support awards will increase in applicable cases.

Another important change allows parents who do not have primary custody of their children but who visit with the children for over 27 days in a row to have a larger deduction in their child support during these periods. Previously the law allowed the court to reduce a child support amount by up to 50% during these periods. Now a judge is able to give an extended visitation reduction in child support up to 75% of the normal child support amount.

A third important change allows parents who have a voluntary retirement contribution to deduct these amounts in calculating adjusted annual income to determine a child support amount. In the past, those who paid child support could only claim a deduction for retirement contributions that were mandatory. However, this may result in obligors who increase their voluntary contributions to reduce their child support obligation.

A fourth change may affect parents who have what is called "shared" custody. Shared custody for child support purposes occurs if both parents have visitation at least 30% of the time. If a parent earns adjusted annual income which is more than the $84,000 cap and has shared custody, the court will now consider the actual adjusted annual income without regard to the cap. Also, in the past the only way for a parent to have shared custody was to prove that visitation occurred at least 110 overnights per year. The new rule will allow the court to use other methods to calculate the percentages of custody if the overnight count does not accurately reflect how much each parent spends on the child during visitation.

A fifth change recognizes that the court may allocate the dependent tax deduction for each child between the parties as is just and proper and in the child's best interests. The new section, ARCP 90.3(k), states that the allocation must be consistent with the recently enacted AS 25.24.152, and with federal law. A new law was recently passed in Alaska which changes how parents can claim children as dependents for tax purposes. Under AS 25.24.152, which went into effect on July 1, 1999, a court may not grant a non-custodial parent an absolute right to claim a child as a dependent under federal income tax laws. The court may grant a non-custodial parent this right in a particular tax year provided that the parent satisfies the requirements of federal law and was not behind in child support payments at the end of the tax year in an amount more than four times the monthly child support obligation.

The revised rule recognizes the 1999 poverty income guideline for one person in Alaska as being $10,320. A new section allows the court to find by clear and convincing evidence that an obligee is precluded from collecting support arrearages which accumulate for a time period in excess of nine months if the obligee allowed the obligor to exercise primary physical custody of the children during that time.

There are other changes contained in both the rule and the commentary which need to be reviewed by family law practitioners. Additionally, court forms including the Child Custody and Support Order (DR-300), the Child Support Guidelines Affidavit (DR-305) and the Order for Modification of Child Support (DR-301) have undergone recent revisions based upon the changes to the rule, and the latest versions must be obtained and utilized in cases involving child support.

LAW FIRM FORMED

Ronald Bliss, James Wilkens and Alfred Clayton, Jr. are pleased to announce the formation of the law firm of Bliss, Wilkens & Clayton, an association of LLCs.

Al Clayton

The firm, formerly Bliss &Wilkens, LLC, will continue to focus its practice on complex civil litigation, including trial and appellate work. It takes pride in effectively assisting its clients with resolution of disputes relating to insurance coverage, business relationships and commercial matters.

Al Clayton joined the law firm of Bliss & Wilkens, LLC, as an associate on April 1, 1994 when that firm was created. Clayton was born in Seward and is a lifelong resident of Alaska. He graduated from Willamette University College of Law in 1991 with highest honors. Before entering private practice, he served as law clerk for Alaska Supreme Court Justice Allen Compton.

Bliss received his law degree with honors from Gonzaga University and has maintained a private law practice in Alaska since 1976. Wilkens began private practice in Alaska in 1984 after serving four years as a trial lawyer with the U.S. Department of Justice, Tax Division in Washington, D.C. He studied law at Drake University and graduated with honors.

All three lawyers are private pilots and members of the Aircraft Owners and Pilots Association. The firm can be contacted by phone at (907) 276-2999, by mail at 431 West 7th Avenue, Suite 202, Anchorage, AK 99501, or by e-mail at blissandwilkens@att.net.

— Press release

ZIPKIN CELEBRATES ANNIVERSARY WITH FIRM

The Alaska law firm of Guess & Rudd P.C. is pleased to announce that Gary Zipkin recently celebrated his 25th anniversary with the firm. He is senior shareholder at Guess & Rudd P.C., where he has been in private practice since 1974. Mr. Zipkin is President of Defense Counsel of Alaska and an Associate member of the American Board of Trial Advocates. His areas of practice include the defense of professional liability claims, construction contract claims, personal injury claims, product liability claims and insurance bad faith claims. He is a graduate of the University of California, Hastings College of Law, and is admitted to practice in Alaska and California.

Gary Zipkin

Guess & Rudd P.C. maintains offices in Anchorage and Fairbanks. Its 16 lawyers engage in a general civil practice emphasizing civil litigation, insurance defense (including aviation and products liability), commercial transactions and litigation, employment law, environmental law, the representation of regulated utilities, and natural resources law, transactions, and financing.

— Press release

Bar People

Edward J. Reasor, who tried his last case in 1995 preferring full time movie production, reports he has nine movies in preproduction. The projects include one of his own scripts, optioned by ABANDON ENTERTAINMENT, which recently invited him to its Los Angeles world premier of TIME SHIFTERS, starring Casper Van Dien, Catherine Bell & Martin Sheen. Reasor's film campaign is I Love Movies, Inc.

Bryan Timbers of Nome will be retiring from the practice of law at the end of the Millennium (Dec. 31, 1999). He will be doing more local and out of state traveling, and will continue as President of ALSC.

S.J. Lee, formerly with Green Law Offices, is now with the Law Offices of Kenneth Kirk..... **Kevin Feldis**, formerly with Dorsey & Whitney, is now with the U.S. Attorney's Office in Anchorage ..... **Ross Kopperud**

has retired from the State of Alaska Department of Law.. .. **Holly Roberson Hill**, formerly a sole practicioner, has become associated with the office of Sisson & Knutson.. ... **Teresa E. Williams**, formerly with the A.G.'s office in Anchorage, has relocated to Seattle.

DORSEY & WHITNEY LAW FIRM ADDS TWO NEW PARTNERS TO ITS ANCHORAGE OFFICE

Dorsey & Whitney LLP, one of the nation's largest law firms, today announced that it has named **Susan Wright Mason** and **John Treptow** as new partners in the firm's Anchorage office. Both new partners will serve in the health care practice group.

Susan Mason previously was a partner at Keesal, Young & Logan, where she advised hospitals and long-term care facilities and other health care providers on regulatory matters including Medicaid rates, confidentiality issues, tax exemption issues, certificate of need and planning issues, as well as professional and institutional licensing. She also has extensive experience in employment law, issues relating to non-profit organizations, and administrative and appellate practice. As a new partner within Dorsey's health care practice group, her areas of concentration will continue to be regulatory work related to health care providers, employment law and non-profit organizations. She obtained her law degree from the University of North Carolina School of Law and clerked for Alaska Supreme Court Justice Edmond Burke before going into private practice in Anchorage in 1979 with Atkinson, Conway & Gagnon.

John Treptow formerly served as a partner at Keesel, Young & Logan, where he advised hospitals on managed care, medical staff, provider contracting, risk management and employment issues. He was also experienced in insurance law, representing professionals in malpractice actions, employment, and mediation/arbitration. His new duties at Dorsey & Whitney include employment, professional responsibility defense, health care, insurance, general litigation and mediation/arbitration. Treptow attended Washington University School of Law, graduating in 1971. He joined Atkinson, Conway & Gagnon in Anchorage in 1976.

"I couldn't be more pleased to have Susan and John join our firm," said Doug Parker, managing partner of the Anchorage office in a press release announcing the appointments. "They are two of the best attorneys in the health care law arena, and they will be an invaluable addition to our office and our clients. In addition, consistent with Dorsey's strong growth worldwide almost doubling in size over the last three years to more than 600 lawyers - the Anchorage office itself is now at 14 lawyers and the addition of Susan and John bring much greater depth to our national health care practice of more than 15 lawyers," said Parker.

— Press release

HELLER EHRMAN ANNOUNCES INNOVATIVE ASSOCIATE RETENTION PROGRAM FEATURING 401K CONTRIBUTIONS

Heller Ehrman White & McAuliffe implemented a new program in October to reward the long-term career contributions of associates.

Effective January 1, 2000, associates will be eligible for a tax-exempt 401(k) plan investment fund contribution by the firm at the end of each calendar year. Contributions will continue for five years or a maximum of $25,000 at which time the contributions will be fully vested. Contributions will be at 3.5% of base salary at the end of the first year, and an additional .5% each year thereafter up to a maximum of 6%. Associates will make individual investment fund decisions and will receive a quarterly report on the investment earnings.

The program is effective in all the firm's offices.

"Over the past few months Heller Ehrman has implemented a number of programs designed to regard and retain associates who represent the future of the firm," said Barry S. Levin, Chair, Heller Ehrman. "The 401(k) program is the latest in a series of efforts designed to show that Heller Ehrman values its associates and recognizes their work and commitment to the firm."

Current associates will be vested in the program after their fifth calendar year with the firm but will begin earning contributions at the beginning of 2000 year and can participate in the program for five years, until they receive $25,000 in contributions, or, until they become shareholders, whichever occurs first.

As associate who recently completed her third year would best after two additional years, receiving 5% and 5.5% of her annual salary and then continue to receive contributions for three more years at 6% a year until she reaches the $25,000 maximum of become a shareholder. Associates who pas their fifth year will be fully vested on all future contributions.

The new 401(k) plan feature is a program of Heller ehrman's R2D2 (Recruiting, Retention, Development and Diversity) Committee. Other recent programs that have been developed to reward and retain associates include a Results Based Counseling Program, a one-on-one approach to accelerated career development; a new compensation and bonus program; and enhanced training and development Committee to coordinate the most effective delivery of professional training programs.

"R2D2 was created at Heller ehrman," continued Levin, "to develop new ways to address today's issues. We are continuing to work on a number of initiations that I look forward to announcing."

Heller Ehrman is a 460-attorney firm with offices in San Francisco, Silicon Valley, Los Angeles, San Diego, New York, Washington, D.C., Seattle, Portland, Anchorage, Hong Kong and Singapore. The firm has an affiliation with the European law firm of Carnelutti, with offices in Milan, Rome, Paris Naples and Padua. Heller ehrman provides legal services in a broad range of practice areas, including corporate securities, finance, tax, real estate, environmental, antitrust, commercial litigation, insurance coverage intellectual property litigation, product liability, patents, trademark and licensing, and labor and employment, as well as industry-focused groups, including financial services, life sciences, information technology and energy www..hewm.com

— Press release

Ethics overview ☐ Richard D. Monkman

This is the first of a series of Bar Rag columns by members of the Bar Ethics Committee. We hope these columns will supplement the committee's formal ethics opinions with useful information about the Rules of Professional Conduct. This first column is meant to give a general overview of the committee's activities.

1. WHAT IS THE ETHICS COMMITTEE?

The committee is a standing committee of the Alaska Bar Association, "responsible for the issuance of opinions providing guidance to Association members" in complying with the Alaska Rules of Professional Conduct. Alaska Bar Bylaws, Art. VII, § 1(a)(3). There are fifteen committee members, from all regions of the state. Bar Counsel is an ex officio member.

2. WHY IS THERE AN ETHICS COMMITTEE?

The Rules of Professional Conduct embody the ethical standards of the profession in our state. It is a safe bet that at one time or another every practicing lawyer has grappled with the Rules. They come into play in routine matters and in difficult circumstances: discovering a potential conflict of interest; withdrawing from representation; supervising a junior lawyer; dealing with a client's misrepresentation. Most of the Rules are familiar to lawyers who have been practicing for a few years; others are more obscure and rarely encountered by the average practitioner outside of a bar review course.

Violating the Rules is not just bad form. "Every lawyer is responsible for the observance of the Rules of Professional Conduct." Preamble, Alaska Rules. Breach of an ethical duty imposed by the Rules can lead to disciplinary action by Bar Counsel. A violation of the Rules may be used against you in a malpractice action.

Simply put, successfully resolving ethical problems in a manner consistent with the Rules is a necessary survival skill for today's practitioner. The Ethics Committee's mission is to provide guidance on ethical matters to Alaska lawyers as they navigate through these sometimes turbulent waters.

3. HOW DOES THE ETHICS COMMITTEE PROVIDE GUIDANCE?

The principal means is through the committee's formal Ethics Opinions. These are written responses to questions posed to the Committee on matter relating to the Rules of Professional Conduct. The Ethics Opinions are published by the Bar Association, and distributed statewide to law libraries, to members of the committee, and on request to others. The number of opinions issued each year varies, depending on the number of requests and the complexity of the questions presented.

4. HOW DO I REQUEST AN OPINION?

Any member of the Bar can request a formal Ethics Opinion by sending a letter to Bar Counsel. Most Ethics Opinions are issued in response to requests from Bar members or from Bar Counsel. The committee sometimes issues opinions on its own initiative, on matters the committee deems sufficiently important to merit an opinion in the absence of a request. On rare occasions members of the judiciary request an opinion.

5. DO ALL REQUESTS RESULT IN AN ETHICS OPINION?

The committee does not draft formal opinions in response to all requests. We respond by letter to requests that have been addressed by previous opinions, are easily answered by reference to the appropriate Rule, or do not pose a question of general application. The committee declines requests that appear to be outside the scope of the Rules of Professional Conduct – due process issues or discovery rule questions, for example, where there may be "ethical overtones" but the primary issue is procedural or involves interpretation of court rules.

6. WHAT ABOUT THAT SLIMY, UNETHICAL JERK OF AN OPPOSING COUNSEL?

The committee tries to avoid being embroiled in disputes between counsel during the heat of ongoing litigation. Opinion requests generated during litigation tend to be extremely fact specific, and the attorneys involved rarely, if ever, agree on the facts.

The committee's experience has been that the effort required for us to sort out these situations is rarely well-spent. Our goal is to provide guidance to the profession on ethical matters of general concern, not to referee disputes between counsel. If you've got a problem with opposing counsel, tell it to the judge.

7. HOW ARE ETHICS OPINIONS WRITTEN?

Opinion requests are put on the committee's meeting agenda for discussion. Each request is assigned to an individual Committee member for research and preparation of a draft opinion. The assignments are based on the members' workloads and interest in the subject matter. Draft opinions are circulated to all the members, and discussed at the first meeting after they are received.

Our principal legal resources are the text and commentary of the Alaska Rules of Professional Conduct, pertinent Alaska cases, and the cases and commentary in the American Bar Association's Annotated Model Rules. Almost all other states have ethics committees, and many have similar rules. Interpretation of parallel provisions by other jurisdictions' ethics committees is frequently helpful. When appropriate, we solicit comment from practitioners in the area, from affected governmental agencies and the judiciary, and revise the drafts in light of the points made.

Once a draft is prepared, it is brought back to the Committee for discussion. We have very lively, thorough and free-wheeling discussions about draft opinions. Some would say the review is unmerciful. Not all ethical questions have a clear cut answer, and many have more than one possible "right" answer.

We strive for consensus in reaching our conclusions and usually achieve it, although sometimes only after much discussion and multiple revisions. Opinions are adopted by majority vote, however. If a consensus cannot be reached in a reasonable time or if the opposing positions are intractable, the question will be called and the votes tallied. We do not issue minority opinions.

As may be apparent, this process takes some time. Those who request an ethics opinion should not expect anything remotely resembling an immediate response. The committee diligently tries to respond to all opinion requests, but it is not infrequent for the entire review, drafting and adoption process to take six months to a year.

8. IS THERE ANY REVIEW OF ETHICS OPINIONS?

After the committee adopts an Ethics Opinion, it is forwarded to the Board of Governors for approval. Bar Counsel, the committee chair and the committee member who drafted the opinion attend the Board meeting to present the opinion. The Board of Governors is not a rubber-stamp, as those of you who have encountered it in other contexts are aware. On more than one occasion, the Board has rejected the committee's opinions, requested more information or sent an opinion back for redrafting. In those instances, we review the opinion in light of the Board's views and, when warranted, revise the opinion accordingly.

9. WHAT IS THE PRECEDENTIAL VALUE OF AN ETHICS OPINION?

Once approved by the Board of Governors, an Ethics Opinion "is binding upon the Association," and should serve as a guide to the members' conduct. Alaska Bar Bylaws Art. VII, § 1(c). Violation of conduct proscribed by an Ethics Opinion is a specific ground for professional discipline. Our opinions have persuasive value in the Alaska courts, although of course the judiciary has the authority to interpret the Rules independently

10. DOES THE COMMITTEE OFFER INFORMAL ADVICE?

The individual members of the committee are always willing to discuss ethical problems with other members of the Bar. Our individual opinions are just that, and should not be considered as a statement of the Committee's position. Through our work on the Committee, however, we are more familiar with the Rules than the average practitioner. As individuals, we are able to provide informal advice on a much faster timetable than required for the committee as a whole to promulgate a formal Ethics Opinion.

If you have a question about an ethical issue, please feel free to call any of us for assistance. We may not be able to resolve your problem, but we should be able to point you in the right direction. The Ethics Committee members are: Robert J. Mahoney, Chair; Nelson G. Page; Lance C. Parrish; James J. Benedetto; John A. Reeder, Jr.; Daniel E. Winfree; Susan C. Orlansky; Robert C. Bundy; Thomas A. Matthews; Michael C. Geraghty; Richard D. Monkman; Brent R. Cole; Jan Hart DeYoung; Amrit K. Khalsa, and Steve Van Goor, exofficio.

Frequently Asked Questions about VCLE Reporting

Recommended: 12 hours of approved CLE including 1 hours of ethics per year.
A CLE credit is based on 60 minutes of instruction time.

1. WHO KEEPS A RECORD OF MY ATTENDANCE AT CLES?

YOU, the attorney, have the responsibility of keeping a record of your attendance.

We suggest you or someone in your office keep a file with a record or list of all CLEs you attend.

If you want confirmation of which *ALASKA BAR CLEs* you have attended, call the Bar office.

Do not send your individual certificates of CLE attendance to the Bar office.

2. HOW DO I REPORT MY ATTENDANCE TO THE ALASKA BAR FOR THE VCLE RULE?

You will report all your CLEs attended on the VLCE Reporting Form which will be sent to you by the Bar office.

You will list all CLEs attended for the first reporting period:
September 2, 1999 – December 31, 2000
(this includes the banking period of September 2 – December 31, 1999).

Having a file with a copy of registration forms/certificates of attendance for the CLEs you attended will assist you in filling out the form.

3. WHAT CONSTITUTES A CLE CREDIT?

A. Sixty minutes (60) of instructional time at an approved CLE activity equals one (1) CLE credit.

Breaks, lunch, or other social events as part of a CLE do NOT count for CLE credit.

Divide the number of instructional minutes by 60 to get the CLE credit count.

B. For every hour you teach an approved CLE seminar, *you earn 2 hours of CLE credit for preparation time.*

Example:
If you are on a CLE panel from 8:30 a.m. – 12:00 noon – with one break of 15 minutes, you earn 195 mins. divided by 60 = 3.25 hrs =3.25 credits

3.25 CLE credits for teaching plus prep time

Preparation time:
3.25 teaching hrs. x 2 = 6.50 credits in preparation time

Total earned for this CLE
for teaching and preparing: 9.25 CLE credits

4. WHAT QUALIFIES FOR CLE CREDIT?

Examples of ways to earn approved CLE credit are:

- attendance at approved CLE seminars
- attendance at approved continuing judicial education seminars
- attendance at approved video replays
- attendance at approved in-house CLE seminars
- attendance at substantive section, local bar, or Inn of Court meetings
- preparing for and teaching approved CLE courses
- participating as a faculty member in Youth Court
- studying audio or videotapes or technology-delivered approved CLE courses
- writing published legal texts or articles in law reviews or specialized professional journals – legal articles in the Bar Rag qualify

5. HOW DOES A CLE ACTIVITY GET APPROVED?

A. Any CLE activity presented by an *approved provider* is automatically approved for CLE credit.

Approved providers include, but are not limited to:

- state and local bars
- Alaska Academy of Trial Lawyers
- American Bar Association
- any American Bar Association accredited law school
- American College of Trial Lawyers
- government agencies, e.g. Federal Court System, Alaska Court System, Alaska Dept. of Law, Federal Defenders Office, Public Defenders Office
- American Inns of Court and their affiliates
- Defense Research Institute
- Federation of Insurance Corporate Counsel
- International Association of Defense Counsel
- any organization with an CLE Director or staff holding membership in the Association for Continuing Legal Education (ACLEA)

Call the Bar office for a complete list of approved providers.

Any organization, including law firms, can apply to the Alaska Bar CLE Director for approved provider status.
Go to our website at www.alaskabar.org and click on CLE.
Click on CLE Accreditation and download the application form.
There is no fee to apply.

B. Individual programs not presented by an approved provider can be reviewed for qualification for CLE credit.

The CLE Director can review the agenda, topics, and speakers and determine if and how much CLE credit can be approved for that program.

Call the Bar office for submission details.

The Age of Revolution has begun

Continued from page 2

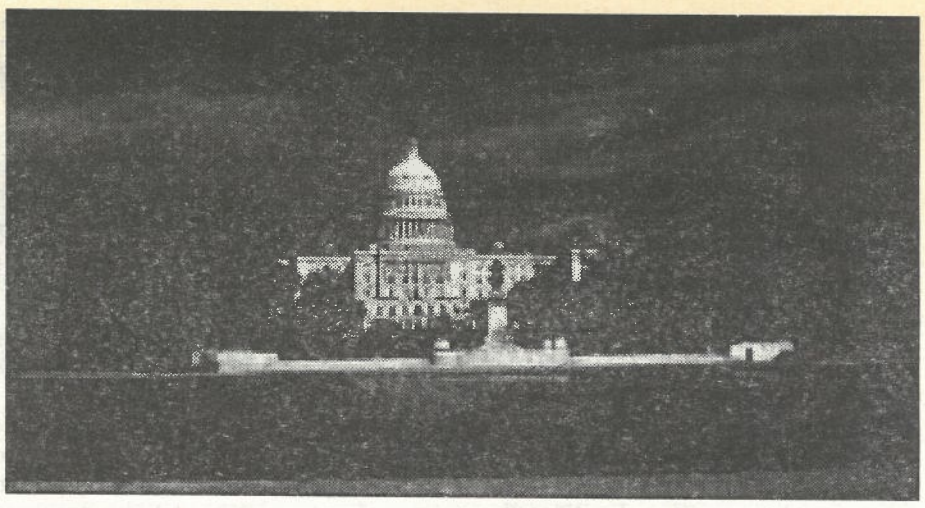
them. We focus on and orient ourselves toward persuading and appealing to an established authority, whether it be a body of law, or a judge or tribunal. We understand that change is incremental: one case, one transaction, one law at a time. We work hard, and demand that our work be *productive* - our hours must be billable to count.

Paradoxically, it may be that our work ethic is the biggest roadblock to the kind of progress we need to make. We have no radical, workable solutions because we are terrified to pause, to look up from our work. We believe, based on our experience in law school and in practice, that we can accomplish anything just by working harder and longer. The more anxious we are, the harder we work. And the more we work, the more we grind away at the rut that we have created for ourselves and our justice system.

Perhaps the first step toward assuring ourselves a meaningful and useful role in society ten years from now is to deliberately work less today. We need to surf (not work) on the Net for an hour each day. We need to chat with (not work with) the vast universe of outsiders and oddballs and freaks that is now available to us on the Web. We need to read stuff just for the heck of it. We need to doodle. We need to brainstorm - not just with each other, but with our paralegals, clients and secretaries; our yoga teachers, ministers, car mechanics and brewmeisters. We need to detach from our own lives and practices long enough to gain perspective on our profession, our lives and on justice in America.

The bad news is, we aren't going to do this. The strain of losing "productive hours" would be too much for most of us. The good news is, there's no rush. If we don't do it now, we can do it with all the free time we're going to have when the revolution renders us obsolete.

A law school reunion



By Dr. Joe Sonneman

OVERVIEW

The miracle of frequent flier tickets let me return to Georgetown University Law Center [GULC] in late October for a reunion, some highlights of which I report to you here and some of which hopefully appear in a separate article. I try especially to emphasize those aspects likely to apply to most reunions and also include a panel discussion previewing U.S. Supreme Court cases.

EXPANDED PHYSICAL PLANT

In 1986, Georgetown Law was a single block-square building five stories tall and three stories below ground. Since then, they've finished a $50 million law library (1989), a 12-story dorm for 275 student (1993), and an addition to the main building (1997). In 1998, they bought an adjacent city block which is temporarily parking; planning is in process for yet more buildings. All of this is transforming the law school from a commuter school to a campus school—and campus schools are better, because of the extra-curricular education students get from one another on a campus.

INCREASED TUITION

The motto here is, "If you think the cost of education is high, consider the cost of ignorance." Still, tuition relentlessly rises about 9-10% annually. In 1986, tuition was $10,800; for the entering class of 1989, tuition was $13,900. In 1999, the tuition-only cost is over $25,000 ... and this is only the sixth-most-expensive law school! Living at the so-convenient dorm runs another $15,000, so a three-year law degree will cost over one-eighth of a million dollars, not counting books, modest living expenses, and the opportunity cost of income the student could have earned during that time.

COSTS OUTRUN TUITION

The Dean explained to all Reunionists (*i.e.*, from all the 5-year interval classes, meeting together in the large Moot Court room) that no law school makes enough money from tuition to cover all its costs. "We can't make it up in volume," she said, explaining that endowment earnings and alumni contributions pay the difference. New buildings, more property, world-class professors, more books in new libraries, student scholarships and loan forgiveness programs—all these take money, she said, "so we have a partnership with the alumni." [But a school staffer privately said staff benefits—such as free tuition—have been cut back]

REPUTATIONS CHANGE SLOWLY

A former Dean used to say the school was "one of the 15 law schools in the Top Ten," and some ranking systems still say the same, despite all the changes. Dean Areen says law school reputations change slowly, in part because many people still use impressions formed 15 or 20 years ago. Yet the school is considered first in clinical programs and among the top five in international and in tax; surveys of student satisfaction [*i.e.*, surveys that ask present students] also rank the school high and law firms hire the school's graduates more than any other's [not only because it has the most students, the Dean insisted].

TECHNOLOGICAL AND HUMAN IMPROVEMENTS

In 1986, only six IBM XTs existed to serve the nearly 1700 law students, few of whom then used laptops. But a count of students in an upper-level Secured Transactions class showed 30% now use laptops. A first-year student said that in her cohort about 50% use laptops, all plugged in to outlets at the hard-wired desks. One "electronic classroom" even interconnects content from student computers to the teacher's master computer. A room in the library offers about 20 computers—in fact, librarians now offer instruction in computer use, if anyone still needs that. Lexis and Westlaw legal database terminals abound in the library ... and two more terminals exist even in the student dorm.

THE MOTTO HERE IS "IF YOU THINK THE COST OF EDUCATION IS HIGH, CONSIDER THE COST OF IGNORANCE."

Exercise rooms and child care rooms now offer services not present in the 1980s, but even a new cafeteria and after-hours pub did not completely end student complaints about food. The street between the main building and library has, with city consent, been blocked off and turned into a mini-campus park, adding a welcome bit of green to all the urban concrete and stone.

CURRICULUM CHANGE

This law school now offers first-years a choice: either the standard courses (Property, Contracts, Constitutional, Civil Procedure, Criminal Procedure, Torts) or a more historical/intellectual review of past and present legal theories. This "B" curriculum is so popular that students must apply in a lottery to take it, but so far only four professors are teaching the "B" version, though they believe law school curricula must change, so they willingly lead the way.

TEACHING METHODS PERSIST

Several Reunionists sat in on a Secured Transactions class. The professors lectured on different state and federal bankruptcy rules for the entire first hour of this two-hour class, only calling on the initially-silent students during the second hour. Though many students used laptops instead of paper and pen, the professor still had to prod them to get them going, but the discussion livened up after a bit. The professor still used standard techniques of book, handout, lecture, and eventually the blackboard to illustrate changes in debt and collateral at time of bankruptcy and also 90 days previously. There were no other visual aids. Law school is still very much an abstract enterprise.

CAMPUS AND OTHER TOURS

Two first-years and a staffer led groups of alumni on campus tours of the old and new buildings. Alumni could also sign up for tours of local points of interest: in Washington, D.C., that meant the White House, the Holocaust Museum, the Corcoran and other art galleries, the Air & Space Museum, etc. But the Washington Monument is covered with shrouded scaffolding for repairs—and law students, like Reunionists, have too little free time to wait in the long lines there anyway.

ALUMNI EVENTS OF FOOD & DRINK

A Dean's reception for all the 5-year-interval attendees (5, 10, 15, 20, etc. years) followed the Dean's Powerpoint presentation of facts and figures: this included an open bar, a variety of hors d'oeuvres and mini-desserts—all this on Friday evening in the new addition to the main building.

Saturday began with a breakfast for the evening students, panel discussions in the morning and tours in the afternoon. After 90 minutes to freshen up, the individual Reunion years met in separate hotels all over town for their separate $95 dinners, also with preceding open bars.

Many Reunionists returned home after the dinner, but Georgetown is after all a Jesuit school. Sunday morning there was a non-denominational service in the main building chapel, after which a much smaller group of Reunionists from all classes met for brunch in a room with a view atop the new student dorm.

FUND RAISING

Aside from the Dean's remarks on the "partnership" of the school with alumni, the Reunion included not even any implied fund-raising. The school instead appoints members of each class to ask other members to contribute to a Class Gift or Fund in advance of the Reunion and runs special Campaigns for particular projects. This approach did make the Reunion more enjoyable, but some more experienced fund-raisers among the alumni thought the school missed a bet in not asking for money during and after the open bar at the Dean's reception.

ALUMNI EDUCATION

Reunions are often held in conjunction with a CLE, sometimes offering an extra incentive for alumni to attend. Five years ago, the school scheduled its popular Civil Rights CLE for Reunion time, but this year the CLE was more esoteric: advanced estate planning. Several professors offered talks for the Reunionists and alumni could also attend an upper-division class (more to see how modern classes work than for subject matter). The school organized several panel discussions: I report separately on "Watergate Revisited" and summarize below a Supreme Court preview.

SUPREME COURT PREVIEW

Professors Susan Bloch, Father Robert Drinan, and Viet Dinh gave a preview of the U.S. Supreme Court term.

Bloch: Bloch predicted that O'Connor and Kennedy would be the swing votes in several cases (federal limits on state release of driver information, Violence Against Women Act, and state liability for age discrimination) involving federal versus states' rights; she added that for a change there would be no "Clinton case."

Dinh: Professor Dinh predicted a review of Federal pre-emption law in cases involving big money (corporate product liability) and small money (state limits on campaign donations); this former O'Connor clerk said the Court misunderstood the source of pre-emption, which he said came from the Commerce Clause and the "necessary and proper" clause rather than from the Supremacy Clause. He predicted that, as to campaign finance, the Court would find narrow grounds on which to rule, thus leaving *Buckley v. Valeo* intact.

Drinan: Fr. Drinan looked forward to the Alaska case involving a religious landlord's right (or not) to refuse rentals to an unmarried couple. Drinan reviewed recent "religious" law, from *Smith v. Oregon* through the Religious Freedom Restoration Act (RFRA) to the Court's negation of RFRA, to a possible reenactment of RFRA II ... or not, as Congress begins to have second thoughts on the matter.

Overall, the panel thought Justice Stevens likely to retire soon, no matter who next becomes President, and the panel also thought Rehnquist might retire, particularly if a Republican wins. The group felt that even one new Justice can change the Court's whole dynamic, just as Souter influenced Kennedy and O'Connor.

THE CHANGING CITY

D.C. remains a relatively stylish if low-paid city, with tan slacks and blue blazer still the male staffers' unofficial uniform. The proportion of coffee houses to bars and Sunday brunch places has increased, suggesting a faster or at least a more caffeinated way of life. The Metro (subway) expanded its new but still incomplete Green Line, but escalators at Metro stations are often out of service, though trains and stations remain clean and modern-looking. Gentrification is changing some boarded-up apartment buildings and/or crack houses into cleaner if more expensive housing, but the process, as always, takes time. The Washington Monument now, and the Capitol as is frequently true, are being repaired. People in Greater Washington the city still have—or think they have—little to do with people in Political Washington. A new Thurgood Marshall Federal Judiciary Building adjoins Union Station near the Capitol; at the other side of Union Station a brew-pub took over part of the old ornate Post Office, some of the rest became a Postal Museum.

CLASSMATES

Well, that's the real reason for going to Reunions, to see again the people you suffered and bonded with. That's great! Some now are parents of 1-4 children; others are sole practitioners or are in large law firms. Still others are out of law altogether or are working in or near—or have worked in or near—the White House, perhaps in a Federal agency. Many came from—and many returned t – New York. The good news: 30% of the '89ers showed up; the bad news: 70% (and most of the professors) did not. Still, all in all, a good Reunion.

Just say no! . . . Defending the rights of the elderly

By Hal Fliegelman

Your client resides in a nursing home. She is physically healthy, but she is frail and suffers from dementia (e.g., Alzheimers Disease). She is highly mobile and frequently leaves the nursing home on her own, which means she must later be found and brought back because she cannot remember where she lives.

You receive a letter from the nursing home giving notice that the home intends to transfer your client to another facility where your client cannot wander away. However, your client's daughter tells you she does not want her mother moved because such a transfer would leave her mother frightened, more confused, disoriented and isolated, causing irreparable psychological and even physical harm. The daughter tells you the nursing home has no right to transfer her mother without consent.

There are only six permissible situations in which a nursing home may involuntarily transfer or discharge a resident.

Who is right?

There is Federal law covering involuntary transfers and discharges. (42 U.S.C. §§1395i-3(a)-(h); 42 U.S.C. §§1396r(a)-(h); 42 C.F.R. §§431.200 et seq.; and 42 C.F.R. §§483.1 et seq.) These laws cover facilities that participate in either the Medicare or Medicaid program. (42 C.F.R. §§483.5, 431.202, 431.206.) Every proposed transfer or discharge from a covered facility is subject to the substantive and procedural aspects of these laws. (42 C.F.R. §483.5.)

There are only six permissible situations in which a nursing home may involuntarily transfer or discharge a resident. See 42 U.S.C. 1396r(c)(2)(A), which provides in relevant part:

A nursing facility must permit each resident to remain in the facility and must not transfer or discharge the resident from the facility unless —

1. the transfer or discharge is necessary to meet the resident's welfare and the resident's welfare cannot be met in the facility;
2. the transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;
3. the safety of individuals in the facility is endangered;
4. the health of individuals in the facility would otherwise be endangered;
5. the resident has failed, after reasonable and appropriate notice, to pay ... for a stay at the facility; or
6. the facility ceases to operate.

In each of the cases described in clauses (i) through (iv), the basis for the transfer or discharge must be documented in the resident's clinical record. In the cases described in clauses (i) and (ii), the documentation must be made by the resident's physician, and in the case described in clause (iv), the documentation must be made by a physician.

In your client's case, it seems that none of the conditions applies. It seems the nursing home wants to get rid of your client because she causes too much trouble or requires extra staff, neither of which is an acceptable basis for transfer.

But suppose the nursing home claims it cannot meet your client's needs in the facility? What then?

There are two courses of action you can take. The first challenges the statement that your client's needs cannot be met and the second attacks the nursing home's failure to provide a comprehensive care plan to ameliorate problems with your client's conduct.

A nursing home's written eviction notice (required per 42 U.S.C. §§1395i-3(a) - (h); 42 U.S.C. §§1396r(a) - (h); 42 C.F.R. §§431.200 *et seq.;* and 42 C.F.R. §§483.1 *et seq*) must include "the location to which the resident is [to be] transferred or discharged." *See* 42 C.F.R. § 483.12(a)(6)(iii). If the proposed transfer is to another nursing home, it is evident the resident's needs *can* be satisfied in a nursing home. It follows, therefore, if the resident's needs can be satisfied by *another* nursing home, then they can be - and should be - satisfied by your client's nursing home as well.

In addition, the statutes cited above require that the basis for the transfer or discharge must be documented in the resident's clinical record and the documentation must be made by the resident's physician. Where, as in the present scenario, there is no medical reason for the proposed transfer and the doctor, in good conscience, has no grounds for indicating the resident's needs cannot be met, the proposed transfer must be rescinded.

The nursing home is required to create and implement a comprehensive care plan to attempt to solve your client's problem before eviction may be considered. *In the Matter of the Involuntary Discharge or Transfer of J.S. by Ebenezer Hall*, 512 N.W. 2d 604 (Minn. 1994). The Care Plan and the extent to which the Care Plan has been implemented must be documented in your client's clinical record. *Id.* To the extent such a Care Plan does not exist or has not been properly implemented, the proposed transfer must be rescinded.

NOTE: The nursing home must give 30 days written notice of intent to transfer or discharge. 42 U.S.C. §§1395i-3(a) - (h); 42 U.S.C. §§1396r(a) - (h); 42 C.F.R. §§431.200 *et seq.;* and 42 C.F.R. §§483.1 *et seq*). If the nursing home fails to do so, you can prevent transfer or discharge until the notice has been delivered, at which time the 30 day period begins. While this tactic may only delay the inevitable, it does give you some time in which to persuade the nursing home to change its mind.

In short, a nursing home may not transfer or discharge your client just because she is "difficult" or even "very difficult." Nursing homes have a duty to deal with such difficulties and to attempt to find ways to resolve them. Since 1987, that has been the mandate of nursing homes: to care for people with mental and physical difficulties. 42 U.S.C. §§ 1395i-3 and 1396r.

In short, a nursing home may not transfer or discharge your client just because she is "difficult" or even "very difficult." Nursing homes have a duty to deal with such difficulties and to attempt to find ways to resolve them.

The author is the principal of Fliegelman Elderlaw, a law firm specializing in the legal affairs of older and disabled people, with emphasis on Medicaid and nursing home issues. This article was provided courtesy of the American Bar Association General Practice, Solo and Small Firm Section and the GP Link.

Supreme Court tackles appellate delay

Continued from page 1

the appellate courts' computerized case management database to improve case tracking and to identify cases that need attention.

The committee has identified three areas where substantial time savings might be achieved: in the clerical functions of the Clerk's Office; in the procedures governing motion and briefing practices; and in the appellate courts' decision-making processes. At present, the committee is focusing on clerical functions and the courts' internal functions. It will later review the procedures governing motion practice and briefing.

The committee's review of the clerical function has already been beneficial. The clerk's office has evaluated its case-processing procedures, and its performance standards are being reviewed and updated. Several changes have already been implemented. For example, cases are now assigned a file number as soon as opening pleadings are filed, even if those pleadings are incomplete; we expect this change to facilitate case-tracking and to prevent cases from "falling through the cracks." Additionally, the clerk's office has shifted its work assignments in an effort to alleviate bottlenecks.

Although the committee has not yet issued recommendations regarding the internal procedures employed by the appellate courts, the supreme court has independently reviewed its own procedures and is now considering changes that it hopes will significantly reduce disposition times. Those changes include automatic reconferencing of cases whose progress is delayed.

The committee and the court recognize that not all appellate cases can be resolved on the same schedule. Some cases can be resolved very quickly, often in an unpublished opinion. Other cases involve issues of significant public importance which require lengthy and thoughtful consideration. Even routine cases can sometimes give rise to substantial disagreements among reasonable judges — disagreements that lead to the writing of separate opinions or, at times, reassignment of the case when the initial draft fails to win the adherence of a majority of the court.

One promising approach is to adopt criteria that will allow the court to identify, early on, those cases that presumably can be decided more speedily. At the same time, the court wants to be careful not to adopt procedures that may speed disposition of a case but that impede the court's ability to give the case its full and careful attention. For most litigants, an appeal to the supreme court presents the last opportunity to have their case reviewed. The supreme court's goal is to accelerate the disposition of cases without adversely affecting the quality of their decisions. Further, any changes to the court's internal procedures must not interfere with the court's ability to discharge its administrative duties. Most parties and practitioners do not realize that ten to twenty percent of a Supreme Court jurist's time is spent on administrative matters.

From the committee's review of the available statistics, it appears that motion practice, delays in briefing, and oral argument continuances all significantly lengthen the time needed to decide a case.

As explained above, the committee has not yet examined or proposed any changes to address the delays that may be attributable to the parties and their attorneys. From the committee's review of the available statistics, it appears that motion practice, delays in briefing, and oral argument continuances all significantly lengthen the time needed to decide a case.

Persons with questions about the Appellate Delay Reduction Committee are welcome to call me at 264-0608. The appellate courts and the committee welcome any suggestions on how to speed the disposition of appellate cases.

An overview of appellate court procedures will be drafted for a future edition of the Bar Rag. In the meantime, persons having specific questions on appellate court procedures should feel free to contact me.

Information about the appellate courts, including statistics on the number of cases filed and resolved, as well as disposition times, can be found at the Alaska Court System's website — http://www.alaska.net/~akctlib/homepage.htm — as well as in the most recent Alaska Court System Annual Report (covering Fiscal Year 1998). The annual report for fiscal year 1999 will be issued in a few months.

Please visit our website. It includes a public-access version of the appellate courts' case management system, as well as the text of slip opinions, court rules and forms, and other information such as a pamphlet on oral argument in the Supreme Court. You will also find the complete text of Chief Justice Matthews' State of the Judiciary Address from last January.