The Alaska BAR RAG

VOLUME 24, NO. 6 | *Dignitas, semper dignitas* | $3.00 | NOVEMBER - DECEMBER, 2000

Inside:

Tea with the Chief

Alaskan & British meet with Justice William Rehnquist

BY PETER ASCHENBRENNER

Shortly before ten a.m. on the appointed morning, our group of three passed through security and, freshly scanned, was admitted to the Maryland Avenue entrance of the United States Supreme Court. It was a Friday in September and time for our interview with the Chief Justice. I was there with my two British colleagues and my allotment of two questions, much practiced on the flight from Fairbanks to Washington. Andrew LeSeuer and Richard Cornes had flown in from London; that made me the all-purpose baggage handler and cab hailer.

The Friday interview with Chief Justice William Rehnquist was to cap the week's interviews. Cornes and LeSueur had taken pains to get their questions framed and emailed to the interviewees in advance. A day with functionaries in the Administrative Office was followed by a meeting with Solicitor General Seth Waxman and Bennett Bosky. Mr. Bosky had clerked for *Justice Reed (Charles Evans Hughes was Chief Justice)* and then for Harlan F. Stone after he succeeded Hughes as Chief Justice.

Thursday, a complete tour of the Supreme Court: The monumental courtroom, the Library, with all support staff at our disposal for our questions. Thursday afternoon an interview with Justice Ruth Ginsburg. Friday morning our interview with the Chief Justice. The British were here to find out what made a top court run and what to do and to not do in designing a British Supreme Court.

Framing a Supreme Court for the United Kingdom would be a monumental task in institution building; a once-in-a-half millennium undertaking. The questions were dignified and pointed; the British professors had identified shortcomings in their current "constitutional settlement" of the United Kingdom. The British know the double and triple meanings of this phrase and it seems (unfortunately) to have no ring at all for us. So how do we connect with an institution that we don't shape? Is there some multigenerational promise that we are obliged to honor, leaving the court to its own devices and doctrines? And what is today's feelgood that goes with this restraint, if that's what it is?

That's why neighbors building an addition on their house attracts our attention. We can imagine them making choices and imagine what it would be like for us to make choices in designing and building or remodeling -- a verb that encompasses at once the process of sorting out how to do things differently and then doing it.

It seems hardly British that our cousins have to upgrade institutions simply because they chose, in the 1970s, to join a continental political arrangement. What would Americans do if we had to remodel our top court? Just what is it that the men and women do there?

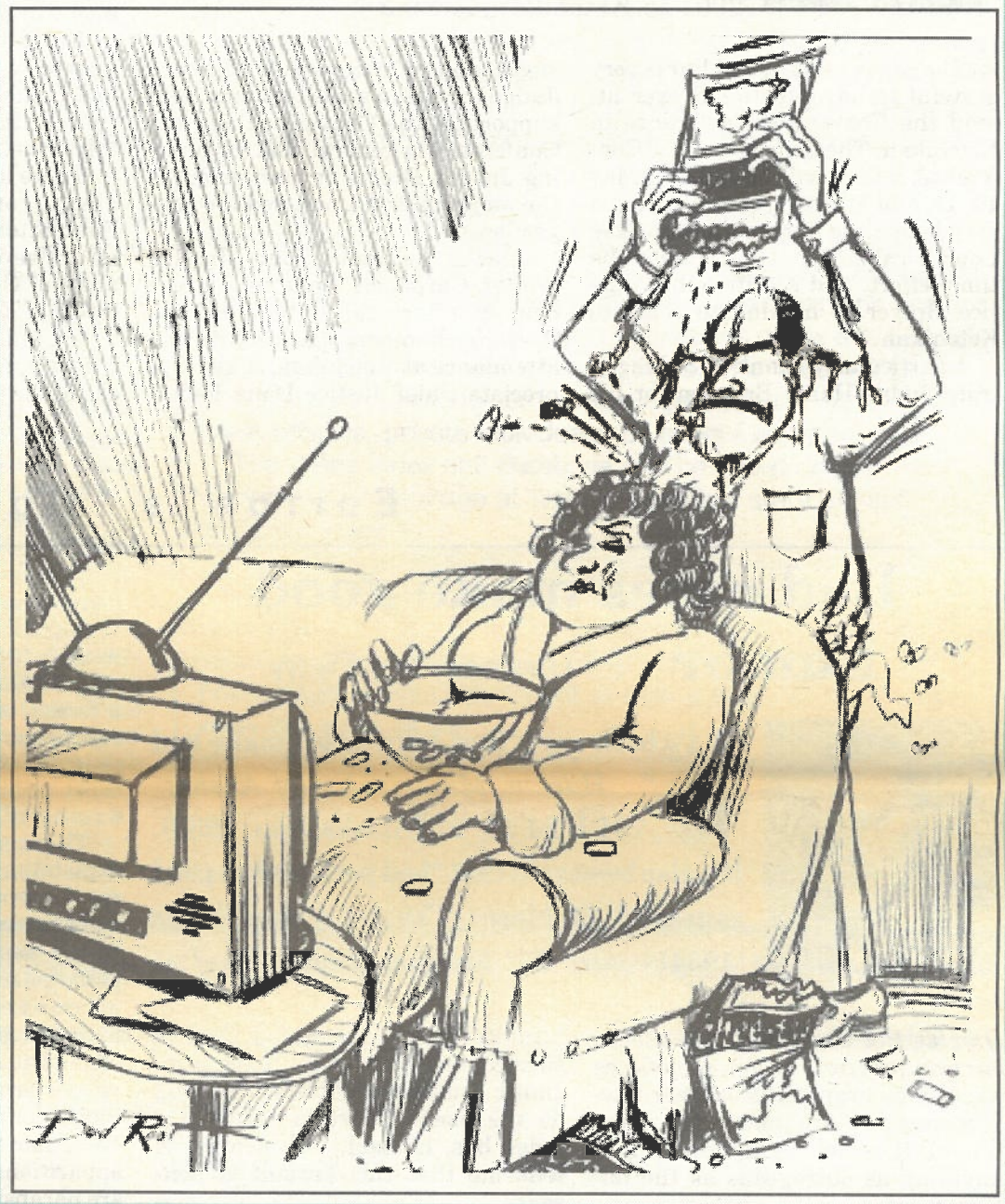
However it has been built, our Supreme Court costs the country a mere $30 million in annual budget. The entire judiciary, one third of the federal government, consumes only $4 billion of (barely, as Senator Dirksen would remind us) "real money." And the Supreme Court runs on a budget separate from even that $4 billion.

The office into which the three of us were admitted for tea at thirty seconds past ten is vaguely Italianate, evoking the eponymous scene from the film, Tea with Mussolini; black marble, gold trim here and there with a merely decent fireplace and a magnificent view of a

Continued on page 24

UNWORTHY COURTROOM SNITS

—PAGES 22-23



Alaska insurance law changes

Ed Note: On January 1, 2001, the Alaska Insurance Consumers Protection Act takes effect. The sponsor of this legislation, Sen. Dave Donley, discusses the intended impact this legislation should have on insurers.

BY DAVE DONLEY

In the past many attorneys have told me they do not bother sug-gesting to clients that they file complaints with the Alaska Division of Insurance for violations of the Unfair Claims Settlements Practice statute (AS 21.36.125) because the division typically took no action on individual complaints. That should change with the passage of Senate Bill 177 "The Alaska Insurance Consumers Protection Act" this year that gives the Division of Insurance the new authority to protect injured Alaskans and insurance consumers.

I authored SB 177 to provide better consumer protection for Alaskans by giving the Division of Insurance the authority to take corrective action on *individual acts* of unfair or deceptive trade practices. Amazingly, before passage of SB 177, *the division was powerless to take action under AS 21.36.125* to protect an insurance consumer until a pattern of de-

Continued on page 17

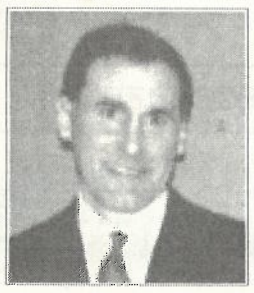
Alaska Bar Association
P.O. Box 100279
Anchorage, Alaska 99510

Non-Profit Organization
U.S. Postage Paid
Permit No. 401
Anchorage, Alaska

President's Column

Ketchikan to host Bar Convention

☐Bruce B. Weyhrauch



United States Supreme Court Justice Stephen Breyer has confirmed that he will attend the joint meeting of the Alaska Bar Association Convention and Alaska Judicial Conference in May 2001 in Ketchikan, Alaska.

The Alaska Bench and Bar is very grateful to have Justice Breyer attend the Convention/Conference in Ketchikan. The Convention and Conference, which will be held on May 10, 11, and 12, 2001, comes during a very busy time during the Supreme Court's calendar. I appreciate the time, effort, and sacrifice that Justice Breyer is making to come to Ketchikan.

I particularly thank U.S. Magistrate Judge Harry Branson for his suggestion to invite Justice Breyer. Judge Branson's enthusiasm and support for the Convention and the Conference in general, and for inviting Justice Breyer in particular, is the major reason I pursued his suggestion.

Alaska Supreme Court Justice Walter Carpeneti went to a great deal of effort to contact Justice Breyer's chambers and confirm his attendance at Ketchikan. I also appreciate Chief Justice Dana Fabe's support of these efforts to invite Justice Breyer to the Convention.

I am especially grateful to Barbara Armstrong, the Bar's CLE Director for working with me, the judiciary and the Ketchikan facilities to arrange all of this. She has received much appreciated effort from Stephanie Hall and her staff with the Alaska Court System, and Mike Hall with the Federal Court System.

Finally, the Ketchikan Bar Association is working overtime to make this Convention memorable and enjoyable. They are going to great lengths to make sure that those who want to fish, shop, hike, and tour Ketchikan and its beautiful surroundings will be able to do so.

I urge you to make your reservations now to attend this Convention and Conference. We highlight Convention information on page 12 of this issue.

There are many reasons for planning to come to this exciting event. First, attorneys will be able to obtain all twelve of their recommended minimum of CLE credits, including one credit of Ethics.

Second, these CLEs will be in substantive, interesting, and timely areas of the law such as U.S. Supreme Court opinions, trial advocacy skills, and more. The faculties will be experienced judges and practitioners with relevant and extensive experience in their respective topics.

Third, Ketchikan offers a rich cultural and natural diversity. Nestled in the largest national forest in the United States, Ketchikan is surrounded by natural wonders from misty fjords, beautiful hiking trails through rich forests, to superb fishing for king salmon, steelhead, trout, and halibut.

Ketchikan has many fine restaurants, hotels, and bed and breakfasts, and is renowned for its hospitality. Enjoy walking around town, touring museums, and visiting the newly constructed visitor center. You can enjoy flight-seeing tours or short cruises to locations around Ketchikan, such as Misty Fjords, or a fishing trip.

We look forward to seeing you in Ketchikan, Gateway to Alaska, the Heart of the Tongass National Forest, and the location of the 2001 Alaska Bar Association's Annual Convention and the Alaska Judicial Conference from May 10 - 12, 2001 for what promises to be one of the best Alaska Bar Association Conventions and Judicial Conferences ever.

Editor's Column

Bad cases make good humor

☐ Thomas Van Flein

It's been said "that hard cases make bad law." *Hiler v. Municipality of Anchorage*, 781 P.2d 24, 27 (Alaska App. 1989). It's also been said that "bad pork makes good sausage." O. Meyer, *The Art of the Wiener* (1934); *contra* B.P. Franks, *The History of the Humble Hot Dog* (1966). While, in our own practice, we are sometimes amused by arguments of other lawyers (our own arguments are never funny), it is not often we run into anything as outrageous as the following cases.

One of the leaders in this category is *McDonald v. John Scripps Newspaper*, 257 Cal.Rptr. 473 (Cal.App. 1989). I have to quote liberally from the opinion, since it is clear the court was guarding its words. No doubt the losing appellant was told to sit down before reading the opinion, since any decision that starts out proclaiming that "two things are missing here—causation and common sense," cannot end well.

The case involved the parents of a young boy suing the sponsor of a spelling bee competition. The parents claimed that a violation of the rules allowed another boy to win instead of their son. The appellate court presented the issue in the familiar question and answer format: "Question—When should an attorney say 'no' to a client? Answer—When asked to file a lawsuit like this one." The court continued, explaining that "Gavin came in second in the county spelling bee. Being adjudged the second best orthographer in Ventura County is an impressive accomplishment, but pique overcame self-esteem. The spelling contest became a legal contest. We search in vain through the complaint to find a legal theory to support this metamorphosis."

The appellate court noted that the "erudite trial judge stated Gavin's shortcoming incisively. 'I see a gigantic causation problem.' Relying on the most important resource a judge has, he said, 'common sense tells me that this lawsuit is nonsense.'"

Placing most of the blame on the attorneys who took this case, the appellate court pointed out that the complaint alleged that the young boy "suffered humiliation, indignity, mortification, worry, grief, anxiety, fright, mental anguish, and emotional distress, not to mention loss of respect and standing in the community. These terms more appropriately express how attorneys who draft complaints like this should feel."

The appellate court concluded that the "courts cannot erase the world's imperfections," and further stated that "one should not trifle with the Court of Appeal." Although the court was affirming the dismissal of the case, it offered some "advice" to the young spelling contestant: "Gavin has much to be proud of. He participated in a spelling bee that challenged the powers of memory and concentration. He met the challenge well but lost out to another contestant. Gavin took first in his school and can be justifiably proud of his performance. It is this lawsuit that is trivial, not his achievement. As for the judgment of the trial court, we'll spell it out. A-F-I-R-M-E-D." (You have to appreciate the court's intentional misspelling). One almost thinks the Court would have spanked the lawyer involved, if corporal punishment were allowed.

Another case, *Stambovsky v. Ackley*, 572 N.Y.Supp.2d 672 (N.Y. App. 1991), involved the purchase of a house, and a subsequent suit for rescission when the buyer learned that the house was haunted. The court ultimately concluded that, "as a matter of law, the house is haunted."

The appellate court started off by explaining that "Plaintiff, to his horror, discovered that the house he had recently contracted to purchase was widely reputed to be possessed by poltergeists." The decision turned not on whether the house was in fact haunted, but on the seller's knowledge that it could be (based on the seller's prior public statements) and the seller's failure to disclose this: "Whether the source of the spectral apparitions seen by defendant seller are parapsychic or psychogenic, having reported their presence in both a national publication ("Readers' Digest") and the local press . . . defendant is estopped to deny their existence and, as a matter of law, the house is haunted."

Although the court was "moved by the spirit of equity to allow the buyer to seek rescission of the contract of sale and recovery of his downpayment" the plaintiff's claim for misrepresentation was found not to have "a ghost of a chance." The equitable remedy of rescission was determined to be the appropriate response to "a very practical problem with respect to the discovery of a paranormal phenomenon: "Who you gonna' call?" as the title song to the movie "Ghostbusters" asks." If you can't call on the court of equity, presumably you are left with Bill Murray as your only remedy.

The court rejected the doctrine of caveat emptor since to apply it in this context "conjures up visions of a psychic or medium routinely accompanying the structural engineer and Terminix man on an inspection of every home subject to a contract of sale. It portends that the prudent attorney will establish an escrow account lest the subject of the transaction come back to haunt him and his client—or pray that his malpractice insurance coverage extends to supernatural disasters." The court's ruling intended to dispel "the notion that a haunting is a condition which can and should be ascertained upon reasonable inspection of the premises" as a "hobgoblin which should be exorcised from the body of legal

Continued on page 3

The Alaska Bar Rag

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

Bar Letters

Thorsness will be missed

I was shocked, then saddened when I opened your September issue to find that we had lost David Thorsness.

Although my professional contact with David Thorsness was short, it came at a critical time for me. My very first job as an attorney was under his tutelage in 1978. I remember long, early morning conversations with "Mr. Thorsness." Mostly, he talked and I listened. In the dark morning hours he left his office lights off and worked with just a desk lamp. He told me stories about the law, old time lawyers, flying, dogs, hunting, and a myriad of other things. He gave me sound advice not only about the practice of law, but also about life.

Although it pained me to lose contact with Dave, I eventually left Hughes Thorsness and Alaska to return to my home in Washington State. But I carried with me some of the wisdom from a man of great integrity. I corresponded a little with Dave over the years and always expected to see him again at some future time in my life. I'm very sorry that I never got the opportunity to do so.

—Rodney K. Nelson

Clinton ATLA article disturbing

I have received the Alaska Bar Rag for September-October, 2000 which contains on the first page an article by President Clinton to ATLA at their recent convention. Why this article was given such prominence in the Alaska Bar Rag is disturbing to me.

Mr. Clinton is presently a lawyer who not only has been found in contempt of court by a United States District Court for being untruthful, but is also being considered for disbarment before his own state Supreme Court.

What does this image portray to the Alaska lawyers? Are we to embrace such a person simply because he promotes tort reform to benefit the lawyers of ATLA? This a shameful disregard of the duties and obligations owed by lawyers to the public. No wonder the profession is constantly being ridiculed and debased. If you had a lawyer from the Alaska Bar Association who was up for disbarment and you give him/her the prominence that you have given Mr. Clinton, what an example it would promote. He tells the profession that you can lie and cheat even before a federal District Court and you are still treated as a great tort reformer.

I understand why ATLA wished to have him at their convention to promote their cause, but I am terribly disappointed that you allowed all of the space that you did for the article regarding Mr. Clinton in the *Bar Rag*. You have thereby promoted him as a great and outstanding person, which he is not.

—Albert Maffei

Clinton author responds

Journalism reviews write about writing, but I don't believe in modern slanted-conclusion journalism, being only a reporter, reporting the five Ws and an H so that readers can make up their own minds, almost as if they had been there in the Hyatt Regency, Chicago, July 30 [not June]. I reported both the lone hostile comment, the lone favorable comment, the content, the tone, and the setting.

Mr. Maffei made up his mind about the speaker, with no special reference to that speaker's words or to reporting quality. It's his right to take an ethical stand about what he wants to read, though logic professors might call that the *ad hominem* fallacy. But his personal evaluation should not deprive *Bar Rag* readers of the right to make up their own minds.

What's nice about *Bar Rag* editors is their consistently light touch. I wrote at some length—the speech lasted 40 minutes—to give readers a real understanding of content and setting; this was the first time a sitting U.S. President addressed a full ATLA convention. Abbreviated TV reports missed most content and all the tone—both of which *Bar Rag* readers could evaluate personally, thanks to the light editing here (as usual).

Isn't that how good newspaper reports are supposed to work?

—Joe Sonneman

Gift giving program benefits foster children

The Mall at Sears and Alyeska Resort, in cooperation with The Division of Family and Youth Services, in hosting the 2nd annual Trim the Tree for the Children program. We are hoping that this gift-giving program will benefit the more than 2,400 foster children throughout Alaska.

This program is designed to provide gifts for children that are often left out at Christmas time. For a variety of reasons they are wards of the State and without parents capable of providing for them. The State makes sure their needs are met, but this doesn't cover many extras, like Christmas presents. The lives of these children can be very hard. Won't you help us to let them know that someone cares? With help from organizations such as yours, we hope to spread the warmth and love of Christmas by providing at least one gift to every foster child in the State.

If your organization would like to be involved in this event, we are offering the opportunity to sponsor a child for $20. You can either sponsor the children as an organization, or through the collaborative effort of your employees. For each child you sponsor, your name (and the name of the sponsoring employee) will go up on our tree on a special ornament, along with the name of the child you sponsored.

You may either request a list of the children you are sponsoring, with their name, age, and wish list and do the shopping yourself, or you may simply provide the funds and the shopping will be done for you from recommendations provided to us by DFYS. One-hundred percent of your contribution will go toward the purchase of the gift.

If you do not wish to participate as a sponsor, you can still make a contribution and be part of this wonderful program. Simply donate what you can afford, in your name, or on behalf of someone else; perhaps as a Christmas gift to them. If you donate in the name of someone else, we will provide a certificate in their name, which you can present to them. Either way, the foster children of Alaska benefit from your generosity and their Christmas this year will be much brighter than it would have otherwise been.

Christmas will be here faster than we expect (children are already anticipating), so please don't delay. Establish your business as a supporter of Alaska's children and become part of this magical event.

If you wish to sign up or need further information, contact Sarah Thomas at 907-694-0418.

Bad cases make good humor

Continued from page 2

precedent and laid quietly to rest." As long as the court is laying to rest old doctrines, how about the Rule in McMaster's Case, a rule that still scares law students.

Along the lines of the supernatural is *U.S. ex rel May v. Satan and his Staff*, 54 F.R.D. 282 (W.D. Pa. 1971). In *Satan and his Staff*, the plaintiff filed suit in federal court claiming "that Satan has on numerous occasions caused plaintiff misery and unwarranted threats, against the will of plaintiff, that Satan has placed deliberate obstacles in his path and has caused plaintiff's downfall. Plaintiff alleges that by reason of these acts Satan has deprived him of his constitutional rights." Substitute the word "jury" or "judge" or "opposing counsel" with "Satan" and there could be a growth industry against anyone who deliberately "places obstacles in our course."

As the federal courts often do, the court first evaluated whether it had jurisdiction over Satan, or members of his staff (I suspect the staff would have to be in the "control group" or else they may need separate counsel). "We question whether plaintiff may obtain personal jurisdiction over the defendant in this judicial district. The complaint contains no allegation of residence in this district." One wonders, however, that even if there was no general jurisdiction based on residence, whether Satan had sufficient minimum contacts with the forum state such that the assertion of jurisdiction would not offend traditional notions of fair play and substantial justice.

The court also pondered whether such an action could be "maintained as a class action. It appears to meet the requirements of Fed.R. of Civ.P. 23 that the class is so numerous that joinder of all members is impracticable, there are questions of law and fact common to the class, and the claims of the representative party is typical of the claims of the class." Assuming such a class action proceeded, what about a possible settlement? Would that require making a deal with the devil? Ultimately, the court found that "the plaintiff has failed to include with his complaint the required form of instructions for the United States Marshal for directions as to service of process." I think this could have been remedied with the following directions: take the exit near Hell's Canyon, find the Gates of Hell, ring the bell (but don't ask for whom it tolls), and then serve the Devil when he answers the door, or leave with it with any responsible adult there present.

What can we learn from this final case? If you represent Satan (talk about being the Devil's advocate), service and jurisdiction may be difficult and a motion to dismiss may meet with success. I suggest, however, you get a retainer up front. I have heard that the Devil is a "slow pay" and audits his bills rather closely (which gives new meaning to the phrase "there will be hell to pay.") Perhaps I am confusing the Devil with a certain insurer, in which case I owe an apology to the Horned One. Conversely, if you are suing the Evil One, you probably don't stand a snowball's chance in Hell.

Classified Advertising

ESTATE PLANNING CORNER

Tax-Free Transfers

☐ Steven T. O'Hara

This article summarizes various exclusions and credits that shelter gifts from transfer taxes. For purposes of this discussion, consider a client 65 years of age. He is single and a multimillionaire. He resides in Alaska. All his assets are located in Alaska. He has never made a taxable gift.

The client has four children and 10 grandchildren. One of the client's children is in college and has annual tuition of $20,000. Another is in medical school and has annual tuition of $30,000. Five of the client's grandchildren are in private elementary school. The annual tuition for each grandchild at the school is $5,000.

One of the client's children, and two of his grandchildren, do not have medical insurance. The annual cost of a good medical insurance plan for this family of three is $11,000. One of his uninsured grandchildren needs an operation that will cost $13,000.

The client would like to undertake an annual gifting program in order to reduce the size of his estate that will be subject to estate taxes. He wants to make the maximum amount of cash gifts that he can make for the benefit of his descendants without incurring any gift or generation-skipping tax. The client wants to keep things simple. He does not want to *fund a family limited partnership* and then gift interests in the partnership. He wants to make cash gifts only.

First, the client may use currently, and on an ongoing basis, his unified credit amount (known more recently as his applicable exclusion amount). This amount currently is $675,000. It is scheduled to increase in 2002 to $700,000, in 2004 to $850,000, in 2005 to $950,000, and in 2006 to $1,000,000 (IRC Sec. 2010(c) and 2505).

This year the client could, for example, create a one-pot trust for the benefit of his descendants and immediately transfer $675,000 to the trust without incurring any gift tax. Then, if the law does not change, he could transfer to the trust an additional $25,000 in 2002, an additional $150,000 in 2004, an additional $100,000 in 2005, and an additional $50,000 in 2006.

The next transfer-tax shelter to discuss with the client is the $10,000 gift-tax annual exclusion. This exclusion would allow our client to make annual gifts of up to $10,000 to each of his 14 descendants without incurring any gift tax.

The gift-tax annual exclusion is available only for gifts of "present interest." The exclusion does not shelter gifts of "future interest" (IRC Sec. 2503(b)(1)). Suppose in our example that the client does not want to give the $10,000 directly to each descendant. Rather, the client wants to transfer an additional $140,000 each year to the one-pot trust he has already funded this year with $675,000.

When creating the one-pot trust, the client could provide that the initial $675,000 is not subject to withdrawal by the beneficiaries. But he could provide that the $140,000 additional transfer to the trust in 2000 would be subject to each descendant having a $10,000 Crummey power. Recall that a Crummey power is a demand right with a limited life. Here each descendant is given the right to withdraw $10,000 by written demand made to the trustee within 30 days after the $140,000 transfer. If the descendant does not make the demand by that deadline, the Crummey power lapses and the cash relating to that power stays in the trust.

On a technical note, many Crummey trusts limit the beneficiary's Crummey power to $5,000 per year, for example, even though the gift-tax annual exclusion is currently $10,000. This restriction is often made in order to stay within the $5,000 *or five-percent* safe harbor that exists under the wealth-transfer tax system (O'Hara, *Estate Planning Corner*, Alaska Bar Rag p.18 (Sept.-Oct. 1999)). Here the $5,000 per year limit is not necessary because the trust has assets in excess of $200,000 (five percent times $200,000 equals $10,000).

Suppose under our example that we are now in November 2000 and the client has been able to transfer, on a gift-tax free basis, $815,000 in cash to a one-pot trust for the benefit of his descendants. Suppose the client wants to gift more, and he is not concerned about making equal gifts to each descendant.

The next transfer-tax shelter to discuss with the client is the exclusion for certain payments of medical expenses or tuition. Under this exclusion, *direct* payments of tuition or for *uninsured* medical care are not transfers for gift or generation-skipping tax purposes, regardless of the amount of the payments (IRC Sec. 2503(e) and 2611(b)(1)). Amounts paid for medical insurance on behalf of another are considered medical expenses for purposes of the exclusion (Treas. Reg. Sec. 25.2503-6(b)(3)).

Two words in the preceding paragraph bear repeating. The first word is "direct." Direct payment to the educational organization or medical-care provider is required in order for the exclusion to apply (Treas. Reg. Sec. 25.2503-6(c)(Examples (2) and (4)). The second word is "uninsured." The exclusion does not apply to amounts paid for medical care that are reimbursed by medical insurance (Treas. Reg. Sec. 25.2503-6(b)(3)).

The educational organization must be qualified in order for the exclusion to apply. For these purposes, a qualifying educational organization is one that maintains a regular faculty and curriculum and has a regularly enrolled student body (Treas. Reg. Sec. 25.2503-6(2)). The exclusion is not available for amounts paid for books, supplies, dormitory fees, board, or other similar expenses (*Id.*).

CLIENTS HAVE A NUMBER OF OPTIONS IN UNDERTAKING ANNUAL GIFTING IN ORDER TO REDUCE THE SIZE OF THEIR ESTATES FOR TAX PURPOSES.

Therefore, under our facts, the client could directly pay each year — without incurring any gift or generation-skipping tax — the $75,000 in tuition that his family incurs each year. In addition, the client could directly pay each year the $11,000 needed for a good medical insurance plan for his three otherwise uninsured descendants. He could also directly pay for his grandchild's $13,000 operation without incurring any gift or generation-skipping tax.

Clients may wonder where qualified state tuition programs fit within the various transfer-tax shelters. Qualified state tuition programs are sponsored by various states, including Alaska. These programs allow clients to shelter transfers into managed funds, for the benefit of designated beneficiaries, through use of the $10,000 gift-tax annual exclusion (IRC Sec. 529(c)(2)(A)(i)). Indeed, it is possible for a client to transfer to a qualified state tuition program — in a single year — $50,000 per beneficiary, without incurring any gift or generation-skipping tax (Prop. Treas. Reg. Sec. 1.529-5(b)). In other words, a client may elect to treat transfers made in one year to a qualified state tuition program as made ratably over five years (IRC Sec. 529(c)(2)(B)). If a client makes this election and then dies within the five-year period, part of the transfers made to the program will be included in the client's estate for tax purposes (IRC Sec. 529(c)(4)(C)).

Thus the foundation of qualified state tuition programs is the $10,000 gift-tax annual exclusion. Unfortunately, transfers into qualified state tuition programs do *not* qualify for the tuition exclusion under the gift and generation-skipping tax (IRC Sec. 529(c)(2)(A)(ii)).

In our example, the client has decided not to use a qualified state tuition program. He has determined it is more efficient from a tax standpoint for him to pay tuition directly to all schools. Then the payments will *qualify under the tuition exclusion*, which is in addition to the $10,000 gift-tax annual exclusion.

The client intends to use his $10,000 gift-tax exclusion by making annual gifts of $140,000 to the one-pot trust he has created for his 14 descendants. The client has determined that if he is not alive someday when tuition payments are needed, those tuition payments can be made either out of the one-pot trust or another trust funded at his death. If the trust would otherwise be subject to generation-skipping tax, the trustee could avoid this tax by using the tuition exclusion and paying the tuition directly to the schools. The tuition exclusion is not only available to individuals; it is also available to trusts subject to generation-skipping tax (IRC Sec. 2611(b)(1)).

In other words, if the client participates in a qualified state tuition program, then the client is using part of all of his $10,000 gift-tax annual exclusion for each designated beneficiary. To that extent, the client will have less shelter to make annual gifts to his one-pot trust. Moreover, for each designated beneficiary in the qualified state tuition program, the client may be giving up the opportunity for him or a trust to make direct tuition payments and thus qualify transfers under the tuition exclusion.

Clients have a number of options in undertaking annual gifting in order to reduce the size of their estates for tax purposes. The sooner they start gifting the more effective their gifting plans will be, since generally all the accumulated income and appreciation from the gifted property (as well as the gifted property) will be out of their estates.

January 1, 2001 is the deadline to transfer to inactive status for 2001.

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

ALSC President's Report

ALSC . . . and justice for all;
Money matters ☐ Loni Levy

There is much encouraging news to report on the fund raising front. ALSC was recommended to receive a five year grant from the Mental Health Trust Authority for a special project to address legal barriers to independent living for those afflicted with mental illnesses. This long overdue effort is set to begin in July of 2001, provided that the Governor and the legislature give final approval to this proposed Mental Health Trust Authority expenditure. ALSC looks forward eagerly to serving this historically disenfranchised population.

The NAPIL Housing Assistance Project, mentioned in earlier columns, will get underway in a few weeks, thanks to local support from Chugach Alaska Corporation, the law firms of Heller Ehrman White & McAullife, United Way of Alaska and the Mental Health Trust Authority. Many thanks to each of these for their commitment to ensure that low income Alaskans will be able to have safe, affordable housing.

Equally exciting is the December 1 re-opening of the ALSC Kotzebue office, devoid of any legal services presence since 1996, with a grant provided by the Maniilaq Association. However, other parts of rural Alaska continue to be at risk.

OUR STATEWIDE GOAL OF $250,000 CAN ONLY BE REACHED WITH YOUR BACKING, SO GET READY TO WRITE A SUBSTANTIAL CHECK TO MAKE EQUAL JUSTICE FOR ALL A REALITY IN ALASKA.

Local funding reductions imperil ALSC's continued existence in Nome, Dillingham and Barrow. While some funds have been promised by Kawerak Inc., the Bristol Bay Native Association, and the Arctic Slope Regional Corporation, these commitments are inadequate to keep those offices open and the ALSC Board will face the difficult task at its next quarterly meeting of having to consider closing its doors in these communities.

This is why we appreciated the participation in and generous donations to the third annual **Partners in Justice Fundraising Campaign** at a luncheon on November 15 with a keynote address by Chief Justice Dana Fabe. She was joined by Jim Torgerson of Heller Ehrman who will chair the Third Judicial District campaign. Tom Findley of Dillon & Findley in Juneau and former Attorney General Charlie Cole of Fairbanks are chairing the respective efforts in southeast and northern Alaska. Our statewide goal of $250,000 can only be reached with your backing, so get ready to write a substantial check to make equal justice for all a reality in Alaska.

ALSC Board and staff also look forward to working with the newly elected legislature in an effort to add a surcharge to civil filing fees as a way to obtain ongoing support of legal services for Alaska's poorest citizens. We solicit the assistance of Bar members in this challenging endeavor which is one of the many promising recommendations of the Access to Civil Justice Task Force Report. Check it out on the Court System's web site.

IT'S A BIRD; IT'S A PLANE; IT'S WHAT?

That's right; it's a flying pro bono panel, orchestrated by Pro Bono Executive Director Maria-Elena Walsh, and underwritten by the Alaska Bar Association to send pro bono volunteer attorneys and paralegals to selected sites around the state to assess pro bono needs, to conduct legal clinics and to interview prospective and assist current pro bono clients. Here's how it will work: Maria-Elena will set up meetings for pro bono volunteers with local judges, clerks of court and service agencies to assess the pro bono needs of a particular community. Based on those interviews, other volunteers will follow up with workshops, clinics and conferences with particular clients in those communities.

As an example, the Barrow Senior Service Center recently requested a wills/probate clinic, and a local community volunteer agreed to spread the word that such a clinic would be held. Maria-Elena sent a pro bono attorney from Anchorage who was amazed and delighted to find 70 people–and a volunteer interpreter– attending the clinic. It was a big success.

AND DON'T FORGET ABOUT THE BARRISTERS'S BALL TO BE HELD IN FEBRUARY OR MARCH 2001.

Maria-Elena is looking for attorneys from Juneau, Anchorage and Fairbanks and elsewhere who are willing to travel to remote locations, all expenses paid, on a year round basis. Contact her at the Alaska Pro Bono Program in Anchorage at 565-4300 ; fax (907) 565-4317 or toll free at 1-888-831-1531. Volunteer! It's good for your frequent-flier account.

STAKEHOLDER'S COMMITTEE CONVENED

The first Pro Bono stakeholder's committee met in Anchorage and by teleconference from other locations on November 3 to talk about pro bono needs, priorities, and proposed client eligibility requirements. Seventeen representatives from more than a dozen organizations attended the first of many roundtable discussions which will shape the role of the pro bono program in years to come. A second meeting is set for January 12, 2000. More information is available from MariaElena.

And don't forget about the **Barristers's Ball** to be held in February or March 2001.

Volunteer, volunteer, volunteer!

Alaska Network on Domestic Violence & Sexual Assault Pro Bono Program

With the decline in funding for Alaska Legal Services at the state and federal level, access to pro bono legal representation for victims of domestic violence and sexual assault in child custody and divorce actions has decreased dramatically.

The STOP Violence Against Women Legal Advocacy Project with the Alaska Network on Domestic Violence & Sexual Assault (ANDVSA) is currently in its fifth year of funding through the Violence Against Women Act.

In 1998, the Department of Justice awarded a Civil Legal Assistance Grant to the Legal Advocacy Project to provide funding for legal representation for victims of domestic violence/sexual assault. This important grant funds the ANDVSA Pro Bono Program. The ANDVSA Pro Bono Program uses volunteer attorneys from around the state to assist victims of domestic violence and sexual assault with civil legal problems.

The Pro Bono Program currently runs two projects: the Mentoring Project and the Information and Referral Hotline. The Mentoring Project is the program whereby volunteer attorneys take cases. Referrals are made through the legal advocates at ANDVSA's 21 member programs to the Pro Bono Mentoring Attorney. The Pro Bono Mentoring Attorney screens the cases and refers appropriate applicants to volunteer attorneys. Inexperienced attorneys needing assistance are given a mentor, a Family Law Handbook (including sample pleadings) and back-up legal assistance from the Pro Bono Mentoring Attorney.

The Information and Referral (I&R) hotline is a hotline that victims of domestic violence and sexual assault can call with questions about legal issues. The I&R line is a toll-free number that can be call-forwarded anywhere in Alaska, allowing attorneys throughout the state to volunteer to staff the line. The volunteer attorney may choose to answer calls from the domestic violence and sexual assault program in the town where they are located or from the privacy of their own home or office.

The ANDVSA Pro Bono Program is currently planning our third annual continuing legal education entitled "The Impact of Domestic Violence on Your Legal Practice." The CLE is scheduled for March 15 & 16, 2001 in Anchorage and is presented in cooperation with the Alaska Bar Association. Volunteer attorneys with the ANDVSA Pro Bono Program may attend the training free of charge. In addition, the ANDVSA Pro Bono Program will pay for travel, per diem and lodging for pro bono attorneys to attend this CLE if they volunteer with the program.

Last year the CLE was approved for 12 CLE credits through the Alaska Bar Association. In addition to other local speakers who have agreed to volunteer their time, we are excited to have secured Sarah Buel, nationally recognized domestic violence attorney, as our highlighted speaker. Topics at the CLE will include: basics of domestic violence; safety planning; working with legal advocates from domestic violence/sexual assault programs; the effects of domestic violence on children; basic nuts and bolts of custody and divorce litigation involving domestic violence; and evidentiary issues in domestic violence cases.

Other topics include working with the child custody investigator; working with tribal courts; and issues effecting immigrant victims of domestic violence.

All CLE registrants will be given a copy of the Pro Bono Program's Volunteer Attorney Manual for Family Law, the American Bar Association publication "The Impact of Domestic Violence on Your Legal Practice," and a resource manual that will be put together specifically for the CLE.

Attorney Discipline

LAWYER ADMONISHED FOR NOT ADVISING CLIENT OF FEE AWARD

Attorney X represented Client, a plaintiff in civil litigation. The court entered summary judgment in favor of Defendant. Client authorized Attorney X to negotiate with Defendant over attorney fees. When talks stalled Defendant moved for fees. Attorney X opposed the motion but the court awarded the fees. Attorney X failed to timely advise Client about the stalled negotiations or the fee award. Client first learned about it when Defendant executed on her bank account.

Bar Counsel found a negligent violation of ARPC 1.4, the rule requiring reasonable communication with a client. Advising Client about the stalled negotiations and the attorney fee award could have allowed her to make informed decisions about how to protect her interests. Attorney X had no history of discipline. Bar Counsel requested permission from an Area Division Member to impose a written private admonition. The Area Member reviewed the file and approved the admonition, and Attorney X accepted it.

Meet Beth Kerttula

Active ANDVSA pro bono program volunteer Beth Kerttula is an Alaska state legislator. This interview was originally published in *"The Legal Advocate,"* Vol.4, Issue1, July/Aug 2000 (a newsletter for domestic violence / sexual assault program Legal Advocates)

Tell us about your current position as a member of the Alaska House of Representatives.

I love my job, or I couldn't do it. It is demanding in every way. But that is balanced with how rewarding it is. It's a wonderful experience to make a positive difference in people's lives, and to help direct the course of the state. It is also an enormous responsibility. I have to sit back and take it one step at a time to not get overwhelmed.

I've learned a lot about myself, about who I am doing this job. When you actually have to sit down and vote on something you learn who you really are. I am very fortunate to get to do this.

Describe your past legal practice, and your experience with family law.

After law school, I was a law clerk for Judge Alex Bryner, who was the Chief Judge of the Court of Appeals then. I worked as a Public Defender in Anchorage for five years as a trial attorney. I was the counsel to the Senate Judiciary Committee, worked at a private firm for a year, and then spent nine years as an assistant attorney general in natural resources, and oil and gas.

Have you worked with victims of domestic violence and sexual assault before? In what capacity?

I have. In the Public Defender Agency I worked with victims, both as clients and witnesses. I've always done volunteer work with the Alaska Legal Services Pro Bono Program and my cases with that program have all included domestic violence issues.

In the legislature, I talk to many women who have domestic violence issues.

I'm also aware of domestic violence through friends and professional acquaintances. Last year I helped a friend who was terrified of what the domestic violence in her life might do to her professional reputation. I try to step back and realize that anyone can be a victim. It's a disservice against all women to think that this only happens to some women. It's not about income level or race; domestic violence cuts across all boundaries.

A great thing that's happening now at Bartlett Regional Hospital (in Juneau) is that they're screening all women who come in, asking if they've experienced domestic violence or sexual assault. You know, I've only been asked that question once in my life in a medical setting? It's great that Bartlett is asking all women and not making assumptions that some women, because of income, race, or social status, couldn't be victims of domestic violence.

What motivated you to volunteer for ANDVSA's Pro Bono Program?

Kari Robinson mentioned it to me. It sounded like something I could do because of my background in criminal law. It's been really important for me as a legislator to get first hand experience with what's happening across the state. The experience helps me articulate the needs and issues in a way that is more meaningful to other legislators. I want to be able to speak with knowledge, especially on this issue.

How was your experience answering the hotline?

It was non-stop. In a four-hour time period the phone was busy constantly and I had messages lining up.

When I worked for the Public Defender Agency we used to take turns being on call after hours. The after-hour calls were always the most emotional, difficult cases, and answering the ANDVSA Information and Referral line brought that memory back.

What types of calls did you get?

They were complex, tricky. There were many questions about property, divorce and custody. You don't know everything about the situation in a short phone call, but I made a point of discussing safety with every caller. The hardest part was the recognition that many women might not get the legal help they need, especially callers from rural areas.

Did you feel like you were able to adequately assist people?

Good question. I can answer that either way. I can say that "no," because the issues can't be easily resolved for many callers, but on the other hand, having a voice offering some safety options can be of the utmost importance. So overall, I think the answer is "yes," because I was able to steer some callers in the right direction. In the cases where I didn't have the information someone needed, I was able to follow up the next day.

I want to mention that Christine Pate was a great resource. I called her the next day and she was able to answer my questions so I could follow up.

Was the resource book helpful?

It was excellent material, very helpful.

Is this a volunteer experience you would repeat/encourage other attorneys to volunteer for?

Yes, I will answer the line again, and I'm already encouraging others, particularly legislators who are attorneys. Because we're so busy during session, I can only do pro bono work during the summer. Because answering the phone takes a short amount of time it is a great way to volunteer for anyone involved in the legislature.

Is there a way the LAP could make this a better experience for attorneys taking calls? Or for the people who call in?

I know you offer an annual Continuing Legal Education (CLE) training for attorneys that covers basic property and divorce law, and I think that is important. I think it might be good to have a component of that training geared toward learning how to answer the phone line. The resource book was terrific, but it might help to require people answering the phone to do a one-hour practicum so they look at all the materials before they answer the phone. You could also put the information on your website.

Who is the woman who inspires you most? Either a historical or a contemporary figure.

My mother, without a doubt is the woman who inspires me most. The second person, though, who's been inspiring to me over the past few years (maybe because my mom is always sending me quotes from her) is Eleanor Roosevelt. A recent quote my mom sent me by Eleanor Roosevelt is "Any woman who is in the public life has to have a hide as thick as a rhinoceros."

Is there anything else you would like to add to this interview?

If our legal system is to truly be "fair," then it is imperative that all people have equal access to justice. And in terms of cultural bias, our system is still definitely biased in a "Western" way. The court system has made efforts to address this issue, but there is still a lot of work to do.

I think that everyone involved in working with the Network and the Legal Advocacy Project is incredibly professional and tremendously supportive. I'm impressed with the project and very happy to be working with you. I'm still sort of in shock by the realization that there's still such a huge need. The hotline really brought that home, and it increased my desire to help stop domestic violence. a

If you are interested in volunteering with the ANDVSA Pro Bono Program contact Christine McLeod Pate, Pro Bono Mentoring Attorney at 1-888-520-BONO (2666).

CLE Calendar

Don't Miss These December Seminars!

Working Smarter
Not Harder
In Your Law Practice

With Tom Clark, Legal Management Consultant, Arizona
Friday, December 1, 2000
8:30 a.m. - 4:00 p.m.
Hotel Captain Cook Anchorage
5.5 General CLE Credits

Ethics for the Millennium (A Reprise):
The Short Course
Thursday, December 7, 2000
8:00 - 10:00 a.m.
Hotel Captain Cook, Anchorage
2.0 Ethics CLE Credits

Bar People

After 27 years at Guess & Rudd, **Terry Fleischer** obtained his LLM in Bioethics at McGill University in Montreal, then spent two years as a senior fellow in clinical medical ethics at the University of Chicago. He is now a member of the Bioethics Centre at the University of Cape Town, South Africa.

The law firm of Wade & De Young announces that effective October 31, 2000, the firm's name changed to **De Young, Freeman & Watts.** The firm will continue to emphasize its practice areas of construction litigation and claims, labor and employment law (management), business and commercial law, personal injury, real estate, and military law. The firm's name change reflects the departure of Hugh G. Wade, who is continuing his practice in the new firm of Wade, Kelly & Sullivan.

In September **Rick Johannsen** married Agnes Borgeaud of Nice, France and after completing a two-year assignment as a political officer in the U.S. Embassy in Paris he and his wife are relocating from France to Burkina Faso (West Africa) where he will be the public affairs officer at the U.S. Embassy in Ouagadougou.

The law firm of **Jensen, Garretson, Verrett & Morford** has changed its name to Verrett & Morford.

Sheri Hazeltine has been selected as the new Indian Child Welfare Act (ICWA) attorney for the Central Council of Tlingit and Haida Indian Tribes of Alaska. She will be representing the Central Council in child protection cases involving Southeast Alaska Native children. The Central Council is a federally-recognized tribal government representing over 22,000 Tlingit and Haida Indians worldwide. It provides a wide range of services to tribal members including job training, business and economic development services, emergency financial assistance to tribal elders, Head Start programs, childcare assistance, housing, services to Native landholders, Indian child protection, emergency medical assistance, and tribal enrollment. To find out more, see its web site at www.tlingit-haida.org.

After travelling abroad and in the U.S. **Tom** and **Joan Woodward** (nee Katz) are resettled in Colorado. Their new address is 2181 Quail Ct.; Grand Junction, CO 81503. Phone is 970-254-1656.

After four years as the Assistant Director of the Alaska Public Offices Commission, **Jenifer Kohout** has moved on to become the Legislative Liaison for the U.S. Fish & Wildlife Service here in Anchorage, AK.....**Lisa Crum** formerly with the attorney general's office in Bethel has relocated to Minnesota and is now with the Minnesota Attorney General's office. She had a baby girl, Kathryn, born Sept. 14.

Jacqueline Bressers is pleased to announce the opening of her family mediation practice. For the past 10 years Bressers has been a family law practitioner, guardian ad litem and child custody investigator. She has been specifically trained in divorce mediation and conflict resolution through The Northern California Mediation Center. Bressers will offer comprehensive family mediation services with a focus on children's needs.

Preston Gates & Ellis adds staff partner


Douglas Parker

Preston Gates & Ellis LLP has announced that a new partner and two associates have joined the firm in its Anchorage office.

Douglas Parker, partner, employment and labor. Parker's practice focuses on management labor relations, where he represents private and public employers before state and federal courts as well as various local, state and federal labor boards, the Equal Employment Opportunity Commission (EEOC) and other administrative agencies. He assists clients in defense of a broad range of employment claims including wrongful discharge and associated torts. The Family Medical Leave Act (FMLA), sexual harassment, disabilities, wage and hour disputes, equal opportunity and the Employee Retirement Income Security Act (ERISA). Additionally, Parker handles complex litigation involving construction, insurance and environmental claims and has served as lead defense counsel for several class action lawsuits. Former chairman of the Alaska Bar Association's Employment Law Section, Parker is a frequent lecturer and author on Alaska personnel law issues. Prior to joining Preston Gates, Parker headed the Anchorage office of Bogle & Gates and subsequently Dorsey & Whitney. He holds a J.D. from Willamette University.


Kristen Richmond

Kristen Richmond, associate, employment. Prior to coming to Preston Gates, Richmond clerked for the Alaska Court of Appeals and worked in U. S. Senator Ted Stevens' office. She currently serves on the board of the Anchorage Young Lawyer's Association. Richmond holds a J.D. from University of Oregon School of Law.

Christine (Cricket) Lee French, associate, litigation, municipal and business. French, a certified public accountant, has experience with maritime actions, taxation and insurance issues. She has worked on a variety of issues facing municipalities in Alaska, including ordinance drafting, port activities and sovereignty issues. She holds a J.D. from the University of Washington.


Christine French

For more information, please visit www.prestongates.com/news

Hi-Tech in the Law Office

Software goes the way of the web

By: Chris Santella

This past year, it seems that a new legal Internet application has appeared on the scene every week. Many of these solutions approximate applications that once lived happily on the desktop or network—litigation support and time & billing, for example. Internet-based apps held forth several promises: lower hardware and software costs, because the application and data reside with the provider, and is accessed via a browser and Internet connection. And 24/7 access, wherever users happen to be (providing they have an Internet connection and passwords handy).

Have the promises been kept? We look at three attorneys' positive experiences - and offer one cautionary note. Darin Snyder, a partner with O'Melveny & Myers in San Francisco, has made use of a litigation support solution from casecentral.com. "I was casecentral's first client seven years ago," Snyder said. "The solution works much the same way now as it did then, with the addition of an Internet front end."

Casecentral.com is a browser-based case management service promising anytime access to case-critical information. Users can perform a variety of searches on databases of documents, view a scanned document image on screen, and make notes on key evidence. The user can permit other users to view his notes, or make them private. Small sets of search results can be saved to your computer, or printed on your office printer. Large results can be output and shipped.

"When you have a number of participants working on a case, it's critical to have the data synchronized," Snyder said. "I recently worked on a case with a number of outside counsel with varying levels of computer literacy. With the database constantly being updated — and some counsel being reluctant to work with electronic data — keeping the data standardized was becoming impossible. Casecentral made it manageable. The familiarity of the browser-based interface encouraged even the less computer-inclined counsel to access documents electronically."

Was security a concern? "CaseCentral.com uses a variety of security measures to prevent unauthorized access. Because those measures are actually more extensive than those that we use internally, we felt confident"

Charles C. Jordan, a partner with Dallas, Texas-based Carrington, Coleman, Sloman & Blumenthal, faced a challenge a year ago. The firm's real estate group was asked to organize a client's work group that was engaged in the development and marketing of a master planned community outside the client's headquarters. "There were onsite personnel, headquarters personnel, and several of Carrington's paralegals and lawyers who needed simultaneous access to the current status of contract negotiations, development initiatives, municipal relations, and closing processes," said Jordan. "Status changed every few days; it became a challenge not only to hunt down the client, but also to make sure they received a facsimile of the most current iteration of documents."

Carrington Coleman deployed an intranet/extranet system from Niku (www.niku.com). An extranet is a private computer network that provides a means for communicating with people inside and outside the firm — clients, co-counsel, opposing counsel, etc. Extranets are used for exchanging and managing documents, and as a private 'virtual conference' area for conducting threaded discussions.

Jordan and his colleagues used the Niku extranet to post status reports as a substitute for repetitive phone reports or teleconferences. They also posted survey files, as various people involved in both development and marketing processes need to know, in real time, where we stand in finalizing those things. "We are working toward a model of disciplined communication where the extranet will automate arduous hunting expeditions for members of scattered work groups," Jordan said.

Sam Norber is a tax attorney who left a large Los Angeles firm in March to go solo. Deploying a time and billing system was a high priority. "I was concerned about cash flow challenges, as most solos are," Norber said. "I was also concerned about incurring software expenses, as I already had a new office to get up and running."

Norber selected TimeSolv, from Elite.com, the Internet arm of the established Elite Information Group (www.elite.com). TimeSolv supports multiple timekeepers and users each with their own security levels and rate structures. Users can assign separate rates for individual timekeepers, clients, or matters. As TimeSolv operates as an ASP (Application Service Provider), users can "subscribe" on a monthly basis for as little as $9.95.

"What really sold me on Timesolv was how easy it was to learn," Norber added. "I was up and running in about one hour after only a couple of phone calls to technical support. Once I recognized patterns in the way it was designed, I could intuitively figure out how to use each feature."

How about security? "I was initially skeptical about Internet security. [But] the servers where my data is stored are in a both physically secure and logically secure environment. Passwords are stored in an encrypted format and only valid users can access data for each firm. Compare this to how secure the typical small office environment is."

I recently spoke to an old college friend who's a litigation manager at a large Midwestern insurance company, and asked him if they were using any Internet-based applications to process claims. "The notion of an extranet is an attractive one," he said. "But technology is a hard sell around here. We still rely in some part on carbon-copy forms, though we did recently get e-mail."

The author is a marketing consultant in Portland, Oregon.

Music in cyberspace—the copyright wars continue

By Ronald P. Oines, & Paul V. McLaughlin

I. INTRODUCTION

Most people have heard of MP3.com, Napster.com, or both. These companies have had more than their share of press lately, first for their cutting edge technology and second, for the lawsuits aimed at preventing the use of such technology. This article discusses recent Federal Court decisions involving claims of copyright infringement against these companies and certain developments since those holdings. But first, some background.

II. WHAT IS MP3?

An increasing number of consumers and audio professionals are using their computers to create, edit, transmit, and/or store audio files. Prior to MP3 (short for Motion Picture Experts Group, Layer 3), this was difficult because uncompressed audio files are very large. An uncompressed audio file of an average song may be approximately 50 megabytes. MP3 allows an audio file to be shrunk down to between one-tenth and one-twelfth of its original size with little decrease in sound quality. As computer hard drive memory capacity has increased (and become more affordable), and as compression technology, such as MP3, has improved, it has become feasible to store a library of songs in the MP3 format on home computers. Additionally, there are many portable MP3 players on the market which allow a person to listen to MP3 files anywhere.

A concurrent improvement in modem technology and increased use of high-speed DSL or cable lines for internet access has enabled computer users to share MP3 files relatively easily. Computer users can download MP3 files from the internet in minutes, or even seconds. Of course, computer users are also able to upload MP3 files to the internet. The ease with which computer users can access and share MP3 files has made the format extremely popular for downloading music from the internet. According to one survey, 180 million MP3 files are exchanged every week.

III. WHAT IS MP3.COM?

MP3 is not a proprietary format and is not owned by MP3.com. MP3.com, however, owns and operates one of the most popular MP3 music sites on the internet. MP3.com launched a service called "My.MP3.com," which enables a subscriber to store, customize, and listen to his or her CD collection from any internet connection. A user must first prove that he or she owns the CD version of the music either by inserting the CD in the user's computer for a few seconds, or by buying the CD online from one of MP3.com's cooperating online retailers. Once the subscriber proves that he or she owns the CD in question, MP3.com allows the subscriber to access MP3.com's copy of the recording via the internet and play it on any computer anywhere in the world. In order to offer this service, MP3.com purchased tens of thousands of CDs and copied them onto its computer servers.

IV. WHAT IS NAPSTER?

Napster owns and operates a web site that allows users to share MP3 files with other users who are logged onto the Napster system. Napster charges no fee for this service, or to download the necessary software. Napster provides a searchable index of song titles and artists that makes it convenient to find the desired selection to download from other users. Napster also allows users to play downloaded music using the Napster software.

V. WHY DO RECORD COMPANIES (AND SOME INDIV IDUAL ARTISTS) DISLIKE MP3.COM AND NAPSTER.COM?

Record companies and artists are understandably disturbed at the ease with which programs such as Napster and MP3.com facilitate the transfer of copyrighted materials. One record industry group estimates that there are one million illegal MP3 files available for download on the internet. All it takes is one purchased CD to generate infinitely many illegal copies on the internet. Troubled by this prospect, the record industry and several prominent artists have initiated lawsuits against both Napster and MP3.com. These suits have met with some initial success.

VI. THE RECENT HOLDING IN THE LAWSUIT AGAINST MP3.COM

In UMG Recordings, Inc. et al v. MP3. com, Inc., a group of record companies challenged the My.MP3.com service described above. On February 28, 2000, Judge Jed S. Rakoff of the U.S. District Court for the Southern District of New York granted the record companies' motion for partial summary judgment, finding that MP3.com's unauthorized copying of the tens of thousands of CDs constitutes copyright infringement. MP3.com argued that its service was the "functional equivalent" of storing its subscribers' CDs. The court rejected this argument, noting that MP3.com was actually replaying converted versions of recordings that it had copied (without permission) from CDs. This, the court held, made out a presumptive case of infringement tinder the Copyright Act of 1976. Judge Rakoff similarly rejected MP3.com's argument that its copying was protected by the doctrine of "fair use." Generally speaking, the fair use doctrine recognizes that, in certain circumstances, people other than the owner of a copyright may use copyrighted material in a reasonable manner without the copyright owner's consent. Judge Rakoff examined each of the statutorily enumerated factors and found that MP3.com did not meet any of them. Finally, MP3.com argued that it provided a useful service to consumers that in its absence would be served by pirates. Judge Rakoff was not persuaded. He noted that the copyright laws were not enacted for consumer protection or convenience; rather, they were enacted to protect the property interests of the copyright holders. On the basis of these findings, the court granted partial summary judgment holding that MP3.com infringed the record companies' copyrights. MP3.com recently announced that it has reached a settlement with Warner Music Group and BMG Entertainment, which includes a licensing agreement that will allow MP3.com to store music owned by those companies.

VII. THE RECENT HOLDING IN THE LAWSUIT AGAINST NAPSTER

Unlike MP3.com, Napster took the offensive in *A & M Records, Inc., et al. v. Napster, Inc.* The record companies brought suit alleging that Napster was liable for contributory and vicarious federal copyright infringement and related state law violations. In response, Napster moved for summary adjudication. Napster argued that a safe harbor provision of the newly enacted Digital Millennium Copyright Act ("DMCA") applied to the Napster system. The safe harbor provision in question, 17 U.S.C. section 512(a), limits liability "for infringement of copyright by reason of the [service] provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider," if five conditions are met. Napster essentially argued that it was nothing more than a "passive conduit." Chief Judge Marilyn Hall Patel of the U.S. District Court for the Northern District of California denied Napster's motion, holding that Napster does not meet the requirements of the safe harbor provision because it does not transmit, route, or provide connections for allegedly infringing material through its system. In a way, the very attribute of the Napster system that makes it attractive to users compelled the court's decision that the safe harbor provision did not apply. The court focused on the fact that Napster enables and facilitates connections between users' computers. The individual users then share information with each other using the internet -- not the Napster system. Thus, the court concluded that Napster does not transmit, route, or provide connections for infringing material. Judge Patel also held that Napster was not entitled to summary adjudication because there were genuine issues of material fact as to whether Napster had met another safe harbor requirement; namely, whether Napster had adopted and reasonably implemented a policy that terminates repeat copyright infringers. Napster's policy was to change the password of repeat infringers so that the user could not log onto the system using that password. Of course, nothing prevented the user from reapplying with a different password and continuing their infringing activity. In addition, the record companies raised a question as to whether Napster's policy had even been in place before they filed their lawsuit. On June 12, the record companies in the Napster litigation moved for a preliminary injunction that would effectively shut Napster down pending a final decision.

VIII. OTHER PENDING LAWSUITS

Napster now finds itself battling on several, very public, fronts. Not only is its suit with the record companies still ongoing after the denial of its motion for summary adjudication, but high-profile artists such as Metallica and Dr. Dre have publicly criticized Napster for promoting the unauthorized sharing of their music. Metallica filed a lawsuit against Napster.com and also named several universities Metallica claimed facilitated infringement by allowing students to access Napster's site. Some of the universities responded to the suit by blocking access to Napster from university computers and were subsequently dropped from the suit. Metallica also delivered to Napster documents identifying over 300,000 Napster users who had allegedly illegally swapped Metallica songs through Napster. (Dr. Dre has recently taken similar action.) On May 10, 2000, Napster responded to Metallica's action by blocking access to Napster by those users identified by Metallica. In a sign of the difficulty copyright holders will face curbing the spread of files through programs such as Napster, however, Metallica songs remain readily available on Napster.

IX. THE FUTURE

Given the proliferation of freely available copyrighted music on the internet, it was inevitable that the record companies would take action. Moreover, the decisions of the courts in the cases against MP3.com and Napster are not surprising. If services like My.MP3.com and Napster are to co-exist with record companies, they will have to do so by mutual agreement, such as through licensing. However, although MP3.com is reportedly in the process of negotiating licenses with the record companies, and Napster will likely have to do the same, we have not likely seen the last of the legal wangling over music on the internet.

New programs such as Freenet and Gnutella claim to represent the cutting edge in information sharing technology and demonstrate the difficulty the recording industry may face in its attempts to protect copyrighted music. Freenet, for example, claims that its program enables a user to acquire or exchange information anonymously while simultaneously frustrating any attempt to either remove the information from the internet, or to determine its source. Freenet's genius is in its ability to find and acquire files without reference to a single database. This is a potential nightmare for copyright holders attempting to track down infringers. Freenet also uses encryption technology to cover the tracks of its users. A test version or Freenet was posted on the internet in March of this year, and has been downloaded more than 15,000 times. Thus, there may he thousands of network servers already running Freenet. Moreover, Freenet allows users to exchange any file format; it is not limited to MP3 files.

Record companies and artists will soon learn whether their aggressive legal stances might negatively affect sales. Consumers are not likely to stop buying their favorite artists' music based on something the artists' record company does. However, consumer backlash against the artists themselves, such as the reported negative reaction of Metallica fans to Metallica's action against Napster, could potentially hurt sales. A person who feels strongly about Napster may be more likely to support bands like The Offspring or Limp Bizkit (both of whom publicly support Napster) rather than Metallica.

One thing is certain. Record companies (like any other well-run company) will do whatever they believe will, in the long run, be most beneficial to the bottom line. The biggest challenge will be to figure out what that is.

The authors are attorneys with Morris & Foerster in California.

Structuring and managing a virtual law firm

A technologically inspired multi-disciplinary approach

BY JOSEPH L. KASHI, M.S., J.D.

Despite recent efforts of the American Bar Association's House of Delegates to push the toothpaste back into the tube, some forms of multi-disciplinary and virtual law practices will probably emerge during the next five to ten years. As with eCommerce, it's an idea made not only possible but probably imperative by our nation's Internet Economy and we'll need to adapt to this new market environment. Previously, I discussed generally what constitutes a virtual law firm and the technology that makes a virtual law firm feasible. In this second article, I'll discuss some aspects of building and managing a virtual law firm that also includes some subsidiary elements of a multi-disciplinary practice.

This month's article is based upon some anecdotal evidence and is mostly conjecture. There's really have very little systematic experience and research at this point. Robert Summers, Ph.D. and Joseph Kashi (2000) are conducting statistically based research to identify and understand how legal technology is affecting the manner in which American attorneys practice law. Law Office Computing anticipates publishing some results of that research.

The probable emergence of multi-disciplinary law practice (MDP) is not only a challenge but a boon, spurring law firms to more fully comprehend what modern clients need and to adapt their firms to new technological and market realities. Whether a firm profits and thrives, or declines into irrelevance, depends upon its ability to direct its energies into embracing and adapting to a very competitive and technologically sophisticated future.

Most discussions of MDPs implicitly assume that the parent entity is a non-lawyer firm such as the Big 5 accounting and consulting firms, that employees lawyers in a subsidiary role and that therefore have implicit but inherent ethical conflicts. That's only one possible model. Equally likely and feasible, if our stare decisis worshiping profession awakens, is a virtual law firm that thrives by offering a passel of subsidiary services that are needed by our clients but perhaps somewhat outside the boundaries of traditional law practice, such as general consulting, project management, accounting and technology, preparation of non-litigation exhibits and similar services as part of our overall client services.

The services that we might offer are limited only by our imaginations. Here are just a few examples and possibilities that readily come to mind. CaseShare, a spinoff of Holland and Hart, Denver, now provides virtual private network services, intranet and database programming, computer graphics, and other technology services not only to litigators but also to non-litigation technology clients. I can easily see specialized law firms, or their subsidiaries, providing services such as project management. Construction claim law firms are already advising their clients how to structure transactions, are writing the contracts for all of the involved parties, and are helping their clients ride herd upon lagging contractors and vendors. It's only a small step, a step with manageable ethical concerns, for that law firm to hire professional engineers and the other specialized personnel necessary to fully flesh out the ability to help a client inspect and oversee a project from inception through the final claims process. As it is, most of our clients contact us whenever they hit a snag in their business dealings.

I believe that how well we utilize technology and cope with increasingly complex client problems whose solution requires input from several disciplines may be some of the most decisive factors determining how well we'll thrive in the 21st Century. How we structure our law firms may be key.

As attorneys become comfortable working in a multidisciplinary virtual environment, my sense is that we will see several trends arising from the desirability of attorneys becoming more expert in the substantive businesses whom they serve. In addition, the successful attorney must become even more computer literate because this is the only way that he or she can successfully coordinate the virtual team and effectively bring to bear all of the cooperating disciplines upon the client's problems.

LEGAL PRACTICE WILL BECOME MORE SPECIALIZED

We'll likely see even further specialization of legal practice, with law firms focusing upon those areas of practice where they have real substantive knowledge. Thus, we may see more boutique practices emerging and successfully competing despite a more competitive context. In fact, I believe that MDPs and large law firms will be competitive in more specialized areas of law only to the extent that they likewise develop specialized practice groups. Generalist attorneys will have an increasingly difficult time competing for high quality business when an already highly competitive environment becomes even more so and a more difficult time finding quality work if they are unspecialized solo or small firm practitioners.

HIRING AND TRAINING EMPLOYEES

We may see a premium placed upon hiring attorneys with substantive specialized backgrounds in technical disciplines, engineering, accounting and finance, and possibly some social sciences. Such attorneys will: a.) be able to better understand the overall scope of the client's objectives and problems; b.) avoid the need to first become educated in depth about the client's line of business; c.) better able to communicate with the client; and, d.) better able to effectively coordinate and combine the efforts of the different disciplines needed to solve the client's problem. For example, a law firm with a construction claims practice may seek out attorneys with a construction or civil engineering background because such attorneys already know what to look for, speak the specialized language used by the client's project managers, engineers and workmen, and have a much greater ability to understand the nuances of a substantively complicated area of practice.

Quality control and the training of associates will become even more important, but also more difficult, in the virtual law firm. We'll lose some of our ability to informally and efficiently review intermediate work and discuss it with staff, attorneys and experts who are not physically located in our offices. I believe that quality control issues are an underappreciated problem arising in connection with virtual law firms.

The traditional law firm did place great emphasis upon grooming promising attorneys and staff for the long haul, training less experienced staff, gradually giving them more authority as they gained experience and ability. Generally, the more experienced senior attorneys understood, and could do, everything assigned to new staff and thus could effectively mentor and supervise less experienced staff. Senior partners met with the client and set strategy, often being the only persons who really understood the Big Picture. Small portions of a matter, along with explicit directions, were given piecemeal to less senior staff. Later, as information slowly worked its way to senior attorneys, the efforts of many junior people were gradually combined and sharpened by more experienced senior associates and junior partners. Ultimately, the finished product arrived back on the desk of the partner in charge of the case, who theoretically checked the work for quality and judgment.

The days of the generic junior attorney and staffer are gone along with the pencil and paper era. We need to hire and retain better trained, technically adept staff, many of whom must have skills that most lawyers currently comprehend only with difficulty. Such employees are in high demand and very mobile. Rather than directing such employees in detail, we need to motivate and lead them. We'll need to adapt our management style to a more collegial, democratic approach that better suits an increasingly professional staff.

We now require employees who are comfortable working with advanced computer systems and who can learn readily new techniques and approaches. Because advanced technology requires advanced skills, we'll have to invest a substantial amount of time money in training employees to a mix of constantly evolving skills through specialized outside trainers. And, rather than training new staff, the senior partners will need to take the same training themselves. Employees with specialized knowledge are no longer interchangeable and, unless we maintain a professionally rewarding place of employment, employee mobility will increase as law firms compete for better educated, more productive paraprofessional staff .

THE INTERNET WILL FORCE LAW FIRMS TO RESTRUCTURE

Internet based legal applications will not be able to fully compete with the features, stability and maturity of tried and true desktop applications until everyone in the virtual law firm has very high bandwidth Internet access: until then, performance issues will limit the range of useful features. However, when that day arrives in the near future, and as legal ASP offerings mature, they'll clearly influence not only how we practice law but also how we organize our law firms, or should I say our practice associations. One thing is sure, though: traditional law firm structure will change greatly.

Internet technology will force law firms to change into radically different, flexible practice associations that respond more quickly to market and technological changes. Future law firms will likely adopt a more flexible and democratic horizontal structure that facilitates the quick and efficient flow of critical information, something that's critical to the quick parry and thrust of almost any law practice. Further, almost ever other industry has found that flexible business structures also lend themselves to better profit margins. I've identified below several possible models of how the forward-looking law firm might consider structuring itself. Thus, like their clients, law firms are also being forced to "re-engineer" their operations.

Why is a law firm's structure becoming so important? In the paper and pencil era, we used the brute force of many associates and paralegals to manually collect and process the vast amount of information required by any significant litigation or transaction. Because the raw data could not be readily analyzed by a single person in the pencil and paper era, we resorted to extensively summarizing the data. We added intermediate layers to supervise employees and to control the quality of the paperwork as it gradually flowed to the ultimate users. Nasty surprises resulted in court or negotiations when our summaries did not match our

Continued on page 11

Structuring and managing a virtual law firm

Continued from page 10

evidence. Potentially important raw data and research, and a coherent overview of the entire matter, is often blurred or lost in the process. Information may get to the decision makers too late. Staffing costs became prohibitively expensive and clients have become less willing to pay such costs. Continuing to insert several potentially superfluous layers of associates and junior partners between the senior litigator and those gathering the raw data simply causes critical information to move too slowly. Too many intermediate layers not only reduce the firm's productivity and responsiveness but badly hurts its overhead, increasing costs to the point where either profits or competitiveness are stifled..

To some decreasing extent, traditional law firms continue to employ these vertical "channels" as the primary conduits for information flow within a firm. But, those sorts of law firms are expensive, counter-productive anachronisms in an era where a fast Internet connection makes a paralegal on the other side of the continent almost as accessible as one down the hall. As a result, an Internet-based virtual law firm can leverage the effectiveness of a few highly competent staff, regardless of where they live. As we enter the era of document-imaging based files distributed on a CD-disk, we don't even need to be overly concerned about where the paper files are located.

There are several possible solutions, most of which use networking technology to flatten a law firm's overall structure, allowing freer electronic communication between all personnel, regardless of rank, seniority or geographical location.

One approach may be to form within the firm small ad hoc action teams. Such teams would form and dissolve in response to individual projects or to specific aspects of a very large case, with their results quickly available to the ultimate decision-makers. These teams should include professionals already knowledgeable in specialized areas, to ensure a competent immediate response. Action teams should have their own budgets and their choice of the firm's personnel. The team's members would cooperatively process and share information through remote networking technologies. This approach might be particularly useful in medium to large litigation firms. ASP applications are particularly useful to this sort of action team.

Another solution might be to form a separate, highly specialized boutique firm that already has the specialized knowledge, research and forms to work upon quick-breaking projects. Our economy's increasing demand for fast action leaves little time to become acquainted with a new practice area after taking on the project. Here, the premium upon specialization probably places this option beyond the immediate reach of most general practitioners unless they are already well-known in a particular area of practice and getting referrals from less-specialized counsel. Small specialized firms would joint venture as needed with other similar firms possessing complementary expertise, again an option made feasible primarily by Internet technology.

Most commonly, the law firm of the future will likely tend toward the virtual law firm, combining a small permanent core group similar to military cadres or large construction contractors, drawing upon contract professionals and paraprofessional staff as necessary for particular projects. This firm's ability to maintain a broad network of cooperating joint venture partners with expertise in different areas of the law will be crucial to future growth into new areas of practice when existing practice areas stagnate. I believe that this model will prove the most feasible for the average small to medium law firm of the future. This approach will only work efficiently if and when the data, documents, and case management and collaborative technology are immediately available across the Internet in a responsive, high bandwidth technological envirnonment.. Although practicing with people we've never physically met may seem unnerving, upon reflection we see that we do it all of the time. The only difference is that Internet technology makes the process smoother and more efficient. One possible advantage to this structure compared to the preceding two models is that the core group will already be familiar about working with each other, reducing possible personal clashes, startup times and initial confusion.

Another possible intermediate solution might be to generally retain the same vertical law firm structure but flatten it by reducing the number of intermediate law yers and paraprofessional who actually research, process and summarize data. Instead, we'll involve senior lawyers directly with processing and using the raw data through advanced technology. We can minimize the burden upon senior lawyers through the use of a few associates and paraprofessionals who develop raw information and then input it into advanced document assembly, case management and litigation support programs. These programs help key lawyers find evidentiary items quickly and spot critical information and important patterns. And, easily accessed on-line and CD-ROM legal research materials allow the senior litigator to quickly research questions at his or her desk rather than relying upon library searches by associates. The quality of litigation may even improve as information flows more smoothly to the end user and as intermediate overhead costs decrease.

I expect that most law firms will move in this direction initially. It's more familiar and comfortable, and easier to implement. The brand name is already there. Most likely, this slimmed down traditional law firm model will hybridize with the pure Internet-based virtual law firm to produce an intermediate law firm model that has both solidity and flexibility, a model which I believe will retain long term viability.

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

Law.Com acquires ASP

Law.com, an internet legal portal site, has aquired application service provider PMT Inc. (www.pmti.com) a provider of Web-based and client-server practice management software.

Complementing its information and service offerings, law.com's new practice management suite will offer a variety of Web-hosted management applications that will include calendaring, collaboration and groupware, case management, document management and assembly, and time and billing.

"With a truly comprehensive suite of applications and business-critical information offerings, law.com has emerged as the Web's first virtual law office, revolutionizing the way legal professionals do business," said the company

The acquisition is part of the company's strategy to become a cornerstone component of everyday legal practice, said law.com. With the acquisition, more than 100 major firms and corporations nationwide including (such as Skadden, Arps, Slate, Meagher & Flom, Jones, Day, Reavis & Pogue, White & Case, Kemper Insurance Companies and Occidental Chemical) are currently using law.com applications to manage their practices and caseloads. Acquiring PMTI is law.com's latest step in bringing a total solution to a professional's desktop," said CEO Bill Feid. "With this piece of the puzzle in place, legal professionals will for the first time be able to access their virtual law office from anywhere, anytime, through law.com."

PMTI is based in Watkinsville, Georgia, with an office in Lithuania, and employs 40. The company's flagship product, Practice Manager,

PUBLIC NOTICE

REAPPOINTMENT OF INCUMBENT MAGISTRATE JUDGES IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

The current terms of the office of United States magistrate judges at Anchorage, Alaska are due to expire. The term of office of Magistrate Judge A. Harry Branson expires on May 2, 2001, and the term of office of Magistrate Judge John D. Roberts expires on July 12, 2001. The Unites States district court is required by law to establish a panel of citizens to consider the reappointment of a magistrate judge to a new eight-year term. A survey questionnaire is being mailed to all active bar members in the State of Alaska.

The Merit Selection Panel invites comments from the public and attorneys as to whether the incumbent magistrate judges should be recommended for reappointment by the Federal District Court.

Written comments should be directed to:

Merit Selection Committee
c/o Michael D. Hall, Clerk of Court
222 West 7th Avenue, Box 4
Anchorage, Alaska 99513

2001 Bar Convention & Judicial Conference

SINCE 1896
ALASKA BAR ASSOCIATION

Ketchikan, Alaska
Thursday, Friday, and Saturday
May, 10, 11 and 12, 2001

Don't Miss this Convention in Beautiful Southeast Alaska!

Agenda Highlights

Thursday, May 10

CLEs

- Trial Advocacy Skills, Part 5: Jury Innovations
- Section Updates
- Ethics for Government Attorneys
- Estate Litigation
- Ethics Update (fulfills VCLE requirement)

Lunch: Alaska Bar Business Meeting and Awards

Evening: Dinner Cruise

Friday, May 11

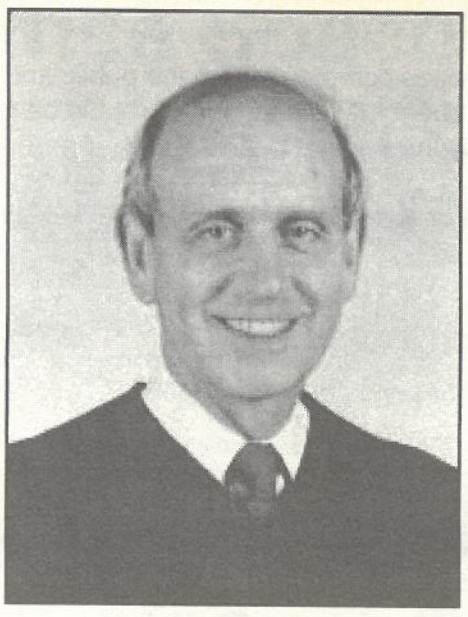
CLEs

- U.S. Supreme Court Opinions Update -- Professors Arenella and Chemerinsky
- Alaska Appellate Update: 1) Insurance and 2) Employment
- History of the Alaska Court -- Justice Jay Rabinowitz, Chair
- State-Tribal Relations

Lunch: State of the Judiciaries

Chief Judge James Singleton and Chief Justice Dana Fabe

Evening: Bench/Bar Reception and Banquet with Keynote by U.S. Supreme Court Justice Stephen Breyer


Justice Stephen Breyer


Professor Erwin Chemerinsky


Professor Peter Arenella

Saturday, May 12

CLEs

- Appellate Off the Record with Justice Stephen Breyer, Senior Judge Robert Boochever, Judge Andrew Kleinfeld, Justice Alex Bryner, Justice Jay Rabinowitz -- Moderator, Bruce Weyhrauch
- Ethics Update (fulfills VCLE requirement) Repeat of May 10 program

12 noon Adjourn

Watch for your full brochure in early February!

Convention Information

Registration and Exhibitors
Registration and exhibitors will be at the Ted Ferry Civic Center.

Program Locations
Convention events will be held at the Ted Ferry Civic Center and at the State Courthouse.

Transportation from Hotel to Program Locations
The Bar is arranging for shuttle buses that will run on a published schedule to take attendees to and from hotels and the program locations. Taxis are also available.

Sleeping Room Accommodations
The Alaska Bar has a block of rooms at the **The Landing/Best Western**, 3434 Tongass Avenue, Ketchikan 99901. **Call 1-800-428-8304 or 907-225-5166 for reservations.** *Be sure to state you are with the Alaska Bar Association group.* Rates are $112 single and $122 double plus 11.5% tax. Suites are available at a higher rate. **Make your reservations by MARCH 20, 2001.**

Air Reservations
Alaska Airlines is offering a special rate to the Alaska Bar and the Alaska Court System for this event. **Call the official convention travel agent, Jay Moffet, of World Express travel at 907-786-3274. Or call the Alaska Airlines Group Department at 1-800-445-4435. The group ID number is CMA0-261.**

Car Rental
Call Jay Moffet, the official convention travel agent, at 907-786-3274 or contact the following Ketchikan car rental agencies directly: Alaska Car Rental at 1-800-662-0007 or Payless Car Rental at 1-800-729-5377.

Ketchikan Convention & Visitors Bureau
For additional information on lodging and sightseeing, call 1-800-770-3300.

Hospitality Suite
The *Ketchikan Bar Association* will be hosting a hospitality suite during the convention.

Registration Fees
CLEs
Early Bird Registration Before April 10
All 3 days: $175
Any one full day of CLE: $90
Any half day CLE (morning OR afternoon): $50

Registration After April 10
All 3 days: $195
Any one full day of CLE: $110
Any half day CLE (morning OR afternoon): $70

Special Events
Lunches: $20
Dinner Cruise: Cost TBA
Awards Reception and Banquet: $40

Call the Alaska Bar office 907-272-7469/fax907-272-2932 or e-mail alaskabar@alaskabar.org for more information.

In the Supreme Court of the State of Alaska

In the Disciplinary Matter Involving,)
)
)
)
Marcus B. Paine,)
)
Respondent.)
)
ABA Membership No. 8811209)

Supreme Court No. S-09452
Order

Date of Order: **9/15/00**

Before: Fabe, Chief Justice, Matthews, Eastaugh, Bryner, and Carpeneti. Justices.

On consideration of the renewed motion for interim suspension (Alaska Bar Rule 26(e)), filed **8/23/00,**

IT IS ORDERED: The motion is **GRANTED.** Marcus Paine is suspended until a permanent sanction is imposed at the end of the disciplinary proceedings. This suspension is effective immediately.

Entered by direction of the court.
Clerk of the Appellate Courts
/s/Marilyn May

In the Supreme Court of the State of Alaska

In the Reinstatement Matter Involving,)
)
)
)
Joe Micheal Cox,)
)
Petitioner.)
_____)

Supreme Court No. S-09486
Order

Date of Order: **2/25/00**

ABA Member No. 9011089
ABA File No. 1999R002

Before: Matthews, Chief Justice, Eastaugh, Fabe, Bryner, Justices
(Carpeneti, Justice, not participating).

On consideration of the petition for reinstatement pursuant to Alaska Bar Rules 29 and 30, filed on 12/20/99, the second petition, filed on 1/3/00, and the Alaska Bar Association's non-opposition, filed on 1/11/00,

IT IS ORDERED:

The petition is **GRANTED. Joe Micheal Cox is reinstated to active practice effective 3/13/2000.**

Entered at the direction of the court.
Clerk of the Appellate Courts
/s/Marilyn May

VCLE RULE

Remember to Keep Track of Your CLE Credits!

The minimum recommended guidelines are at least 12 credit hours of approved CLE, including 1 credit hour of ethics, each year.

VCLE Reporting Year

The first VCLE Reporting Period is
September 2, 1999 - December 31, 2000.

You will be receiving a VCLE Reporting Form with your Bar Dues Statement in November.
Watch for it in the mail.

Return the VCLE Reporting Form with your Bar Dues Statement and Dues Payment to qualify for the Bar Dues Discount of $45 and to be included on a list of attorneys who have voluntarily complied with the VCLE Rule minimum recommended hours of approved CLE as set forth by the Alaska Supreme Court. Only attorneys who voluntarily comply with the VCLE Rule may register for the Lawyer Referral Service.

Contact

Barbara Armstrong, CLE Director or
Rachel Batres, CLE Coordinator
for more information:
907-272-7469/fax907-272-2932

SINCE 1896
ALASKA BAR ASSOCIATION

2001 Budget Summary

Projected Revenue

Admissions Fees - All	197,875
CLE	168,915
Lawyer Referral Fees	81,500
The Alaska Bar Rag	15,500
Annual Convention	45,000
Substantive Law Sections	10,000
Ethics Opinions	2,000
Pattern Jury Instructions	6,000
Mgmt. Service/Law Library	6,000
Accounting Svc./Foundation	9,485
Membership Dues	1,211,575
Dues Installment Fees	15,500
Penalties on Late Dues	16,695
Labels & Copying	10,000
Investment Interest	115,000
Misc.	1,800
Total Revenue	**1,911,844**

Projected Expense

Admissions	176,002
CLE	404,302
Lawyer Referral Service	47,573
The Alaska Bar Rag	46,185
Annual Convention	80,000
Substantive Law Sections	20,000
Ethics Opinions	600
Pattern Jury Instructions	1,000
Mgmt. Services/Law Library	3,722
Accounting Svc./Foundation	9,485
Board of Governors	64,627
Discipline	603,628
Fee Arbitration	52,794
Administration	409,912
Committees	10,000
Alaska Law Review (Duke)	34,000
Internet/Web Page	10,000
Credit Card & Bank Fees	10,500
Public Interest Grants	10,000
Computer Training/other	500
Total Expenses	1,994,830

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.

Ethics opinion

ETHICS COMMITTEE OPINION NO. 2000-2
The Effect of Confidential Settlement Agreements on Precluding Further Representation for Subsequent Clients

The Ethics Committee has been asked to determine whether a lawyer who has represented a creditor, settled the claim, and whose creditor-client has signed a confidentiality agreement with the debtor agreeing not to disclose information from the settlement, may subsequently represent another creditor against the same debtor. It is the opinion of the Ethics Committee that a lawyer is not precluded from representing a subsequent client against the debtor in the circumstances outlined below so long as the attorney abides by the confidentiality requirements of Alaska Rule of Professional Conduct 1.6. Additionally, it is the opinion of the Ethics Committee that an attempt to use a settlement agreement to preclude an attorney from representing subsequent creditors might violate Alaska Rule of Professional Conduct 5.6.

RELEVANT FACTS

The specific fact scenario presented to the Ethics Committee involves an attorney who has represented a creditor against a particular debtor in the past. As a part of the original settlement agreement between the parties, the creditor and debtor "agree not to divulge any information contained in or concerning the terms of this agreement to third parties, except as may be necessary for the execution of this agreement or as required by law." Thereafter, the terms of the settlement are complied with between the parties.

Later, the creditor's attorney is retained by another creditor in proceedings against the same debtor. The creditor attorney's demand letter is met with a response that the attorney must withdraw based upon the confidentiality clause of the original settlement agreement. The letter from the debtor's attorney in essence states that this new representation by the creditor's attorney would necessarily require the disclosure, at least implicitly, of the settlement negotiations with the debtor. This disclosure, the letter continues, breaches the confidentiality provisions of the settlement agreement, subjecting the first creditor to legal action. The debtor's attorney also alleges that this representation would violate Rules of Professional Conduct 1.7 and/or 1.9.

ANALYSIS

1. Rule of Professional Conduct 1.6 Precludes the Creditor's Attorney From Revealing the Discussions and Terms of the Prior Settlement to the Second Creditor.

Although the debtor's attorney's letter assumes that the creditor's attorney will necessarily be compelled, in the course of his representation of the second creditor, to disclose settlement results from prior negotiations with the first creditor, it is not clear that this assumption is correct or proper. Under Alaska Rule of Professional Conduct 1.6, the principle of confidentiality is set forth. This rule states:

(a) A lawyer shall not reveal a confidence or secret relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b) or Rule 3.33(a)(2). For purposes of this rule, "confidence" means information protected by the attorney-client privilege under applicable law, and *"secret" means other information gained in the professional relationship* if the client has requested it be held confidential or *if it is reasonably foreseeable that disclosures of the information would be embarrassing or detrimental to the client.* In determining whether information relating to representation of a client is protected from disclosure under this rule, the lawyer shall resolve any uncertainty about whether such information can be revealed against revealing the information. (Emphasis added.)

This rule prohibits the disclosure of client "secrets" including information gained through a professional relationship with a client when it is reasonably foreseeable that disclosures would be "detrimental to the client." In this case, the information covered by the confidential settlement agreement would constitute a client "secret" which could not later be disclosed to another client or anyone else for that matter without violating this rule, since its disclosure could result in breach of the original settlement agreement and possibly legal action against the first creditor.

Any further limitations on the attorney's representation are thereafter governed by Alaska Rule of Professional Conduct 1.7 and 1.9 as set forth in the analysis below.

2. Rule of Professional Conduct 1.7 Does Not Preclude the Attorney From Representing the Second Creditor.

The debtor's attorney claims that representation of the second creditor by the attorney violates Rule of Professional Conduct 1.7. The Ethics Committee disagrees. This rule states in pertinent part:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation...

The facts of this scenario are not clear regarding the terms of the original settlement and whether there are ongoing obligations owed by the debtor to the first creditor at the time the attorney begins his representation of the second client. For purposes of this opinion, it is assumed that no such continuing obligations exist. Under these circumstances, the second creditor will not be "directly adverse" to the first creditor because there are no ongoing obligations owed by the debtor to the first creditor which might be impacted by the second creditor's claim. Additionally, since the lawyer is no longer working for the first creditor, the lawyer's representation of the second creditor should not be "materially limited" by the lawyer's responsibilities to the first creditor. This is a decision that must of course be analyzed by the attorney with regard the facts and circumstances of each individual case.

If these circumstances are then met, the Ethics Committee does not believe that representation of the second creditor by the attorney violates Rule of Professional Responsibility 1.7.

3. Rule of Professional Conduct 1.9 Does not Preclude the Attorney From Representing the Second Creditor.

Again, the debtor's attorney claims that representation of the second creditor by the attorney will violate Rule of Professional Conduct 1.9. The only relevant provision of this rule states as follows:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

This rule is designed to ensure that a lawyer's duties of loyalty and confidentiality as to the matter in which the lawyer represented a client continue after the termination of the attorney-client relationship. Under the facts of this case, however, the attorney's representation of the second creditor does not violate the Rule of Professional Conduct 1.9 because the second creditor's interests are not materially adverse to the first creditor's interest. Again it is assumed for the purposes of this opinion that there are no ongoing obligations owed by the debtor to the first creditor at the time the attorney begins his representation of the second client.

4. Rule of Professional Conduct 5.6 Precludes an Attempt by a Party From Restricting an Attorney's Right to Practice.

The Ethics Committee believes it is important to note that an attempt by the debtor's attorney to preclude an attorney from representing subsequent creditors under these circumstances might be construed as a violation of Rule of Professional Conduct 5.6. This rule states in part that a lawyer shall not participate in offering or making "an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties." If the debtor's attorney construes the confidential settlement as precluding further representation by the creditor's counsel, then the debtor's attorney may have violated this rule by drafting or negotiating this contractual arrangement.

CONCLUSION

In summary, it is the opinion of the Ethics Committee that the terms of the confidential settlement agreement do not preclude the attorney from representing the second creditor. The attorney is precluded under Rule of Professional Conduct 1.6 from disclosing the discussions or the

Ethics opinion

Continued from page 14

terms of the settlement agreement between the first creditor and the debtor with the second creditor.

Approved by the Alaska Bar Association Ethics Committee on February 3, 2000.

Adopted by the Board of Governors on March 10, 2000.

ALASKA BAR ASSOCIATION ETHICS OPINION 2000-3
Reaffirmation of Ethics Opinion 86-3,
Referral of Client Identity to Credit Bureau

The Alaska Bar Association Ethics Committee ("Committee") received a request to reconsider Ethics Opinion No. 86-3. Relying on former DR 4-101(C)(1), that opinion held that "the referral of any client information to a credit bureau should not be permitted in Alaska, except with the knowing consent of the client." The Committee concludes that the underlying rule of this opinion remains valid. Attorneys in Alaska may not refer information about present or former clients to a credit bureau without the knowing consent of the client.

In opinion number 86-3 the Committee was concerned that the dissemination of client information to third parties might constitute a breach of an attorney's duty to keep information about a client confidential. Although DR 4-101(C)(4) permitted an attorney to reveal "confidences or secrets necessary to collect his fee," the Committee concluded that reporting a client to a credit bureau did not fall under this exception "(s)ince the credit bureau will not be collecting the fee for the attorney."

Since then, Alaska has adopted the Model Rules of Professional Conduct, which are silent as to the method an attorney or law firm may employ to collect legal fees. ARPC 1.6(b)(2), which addresses confidentiality of information, provides: "A lawyer may reveal such information to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client." Similarly, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 117 (Proposed Final Draft No. 1, March 29, 1996), which concerns "Using or Disclosing Information in Compensation Dispute," states:

> A lawyer may use or disclose confidential client information when and to the extent that the lawyer reasonably believes necessary in order to permit the lawyer to resolve a dispute with the client concerning compensation or reimbursements that the lawyer reasonably claims to be due.

Section 53 of the Restatement, which concerns "Fee Collection Methods," states:

> In seeking compensation claimed from a client or former client , a lawyer may not employ collection methods forbidden by law, use confidential information (as defined by Chapter 5) when not permitted under § 117, or harass the client.

Neither Section 53 nor Section 117 explicitly addresses whether a lawyer may disclose confidential information to a credit bureau. But comment d to § 53 states, "In collecting a fee a lawyer may use *collection agencies* or retain counsel." (emphasis added). The majority of states that have addressed the issue allow a lawyer to use a collection agency to collect delinquent accounts provided that strict guidelines are followed:[1]

Failure to adhere to these guidelines places a lawyer in jeopardy of violating Rules of Professional Conduct 1.5, 1.6, 1.7, 1.8(b), 5.5(b), and/or 8.4(a-d).[2]

It is important to note the difference between employing a collection agent and reporting a delinquent client to a credit bureau. A collection agency seeks the unpaid fees directly from the delinquent client. The client is assured of procedural safeguards because legal proceedings must be commenced in order to collect the unpaid sum. By comparison, listing a delinquent client with a credit bureau is at best an indirect method of collecting an unpaid fee whereby notice is provided to other businesses that the client is a potential credit risk. In theory, listing an unpaid fee with a credit bureau will prompt a delinquent client to pay his or her bill. However, the pressure to pay an unpaid fee results more from the *in terrorem* affect of a bad credit rating than from any merit to the claim.

The referral of a client's debt to a credit bureau is fraught with questions of procedural fairness. When a collection agency files an action to collect fees, the requirements of the legal process must be followed. Similarly, the Alaska Bar Rules provide for a procedure, including reasonable safeguards, to resolve attorney fee disputes. If an attorney concludes that the matter should be referred to a credit bureau however, it automatically becomes a stain on the client's credit record. A delinquent client may respond to a listing by filing an exception to his or her credit report, which must be included in a credit bureau's file.[3] Even so, the potential to damage a client's credit rating remains high because potential lenders have reason to be suspicious.

Further, while the statute of limitations for commencing a collection action is likely to be only three years under present Alaska law, the credit bureau report may include negative information for as long as seven years. The Committee can see no rationale under the rules of professional conduct that justifies a continuing penalty in the form of a bad credit rating long after the attorney's ability to collect the fee has been barred by the applicable statute of limitations.

New York and South Carolina prohibit the referral of a delinquent client to a credit agency. The New York State Bar Association concluded that "a [l]awyer may not report [an] unpaid client account since status of [an] account is a client secret that may not be disclosed except as necessary to collect [a] fee."[4] The NYSBA premised its holding on three maxims: (1) a lawyer has a duty to avoid public dispute over an unpaid fee whenever possible[5]; (2) a lawyer's right to compensation should be balanced against his or her duty to avoid injury to the client[6]; and (3) a lawyer is obligated to keep client secrets confidential even if a fee is past due, except to the extent necessary to utilize the services of a collection agency. The NYSBA also favored the use of alternative dispute resolution methods such as negotiation, arbitration, and mediation to resolve fee disputes.

Similarly, the South Carolina Bar Association ruled that a lawyer should not refer a delinquent client to a credit bureau because: "(a) it is not necessary for establishing the lawyer's claim for compensation, (b) it risks disclosure of confidential information, and (c) it smacks of punishment in trying to lower the client's credit rating."[7]

Other jurisdictions reach the opposite conclusion. The Florida Bar determined that referral of a delinquent client to a credit bureau to collect an unpaid fee is permissible under the following circumstances: "(1) only former clients, rather than current clients, may be reported to the credit bureau; (2) confidential information unrelated to the collection of the debt must not be disclosed; and (3) the debt must not be in dispute."[8] The Kansas Bar Association reasoned that "modern debt collection law makes few distinctions between collection agencies, collection attorneys or credit bureaus."[9] Accordingly, it adopted the Florida requirements and added several more:

> (4) the lawyer should first advise the former client that unless the fee is resolved the firm intends to refer the matter to a credit bureau;
>
> (5) the lawyer should set forth accurately what may happen to client's credit rating if such a referral is made;
>
> (6) the credit bureau should have had nothing to do with the fee being earned;
>
> (7) the lawyer must reasonably believe the client would be able to afford the fees when the fee agreement was made; and
>
> (8) the lawyer must be satisfied that the credit bureau will not use illegal means to collect the amount owed.[10]

Despite the contrary authority, the Committee believes that the rationale and reasoning of Opinion 86-3 remains valid. As the Committee concluded in its earlier Opinion:

> (R)eferral of the client's delinquent status to a credit bureau is at best an indirect method of collecting the unpaid fee. The only direct effect is to sully the client's credit rating. The Committee concludes that the probability of collection by such indirect methods as referral to a credit bureau is too small to justify its use. Referral to the credit bureau may intimidate a client without ever resulting in payment of the fee or even direct efforts to collect the fee.

Although the law has advanced since the earlier opinion, and provides for some protection against wrongful listings with credit bureaus, the underlying fact remains that an attorney who lists a client with a credit agency has revealed confidential information about the client for a purpose not permitted by ARPC 1.6(b)(2) since such a referral is at most an indirect attempt to pressure the client to pay the fee. For these reasons the Committee reaffirms the conclusions of Opinion 86-3.[11]

Approved by the Alaska Bar Association Ethics Committee on May 4, 2000.

Adopted by the Board of Governors on August 18, 2000.

[1] W. Virginia State Bar, Comm. on Legal Ethics, Op. 94-01, at 2-3, & fn. 2 (citing other states allowing attorney to employ collection agents); *see* NYSBA Op. # 608 ("The conditions involving the use of collection agents have changed substantially since [1975]. The collection process has been subjected to increasing public scrutiny and government regulations over the years (e.g. the Fair Debt Collection Act, 15 U.S.C. § 1692 *et seq.*) and the use of collection agents no longer appears to us to be inconsistent with the dignity and honor of legal professionals, provided that all other reasonable efforts short of litigation have first been exhausted and provided also that appropriate measures to assure the collection agents' strict adherence to law and regulations and to the highest ethical standards in the process of collection are taken by the attorneys retaining them."); Ohio Sup. Ct. Bd. of Comm'rs on Grievances and Discipline, Op. 91-16 (6/14/91); Vt. Bar. Ass'n, Op. # 97-4; Tex. Comm. on Prof. Ethics, Op. 495 (3/94) (Confidential information is broadly construed and includes both privileged and unprivileged client information such as: "(1) Name, address, telephone number of the client; (2) The amount the law firm contends the client owes; (3) Copies of actual billings that are outstanding; (4) Copies of the fee agreement and previous correspondence with the client concerning billings; and (5) A copy of the entire file to which the account receivable relates."); Pa. Bar Ass'n, Op. # 96-09 (3/14/96).

[2] *Id.*

[3] Kansas Bar. Ass'n Ethics Op. # 94-5, at 4 (8/15/94).

[4] NYSBA Op. # 684 (11/27/96), construing DR 2-110(C), 4-101(A)(B), (C)(4), EC 2-23, and EC 2-32.

[5] The NYSBA cited EC-23, which provides: "a lawyer should be zealous in efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject."

[6] "[A] lawyer should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client." EC-23.

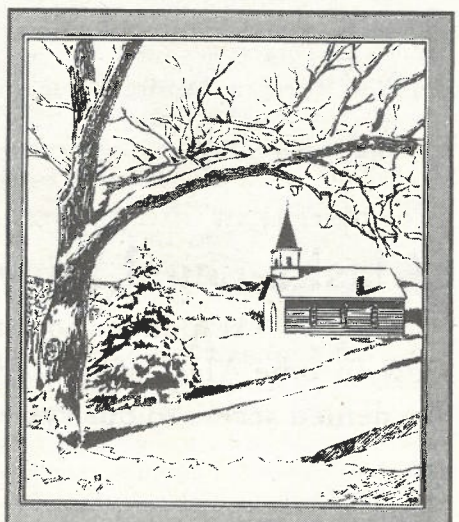
[7] South Carolina Bar Ethics Op. # 94-11 construing RPC 1.6.

[8] Florida Bar Ass'n Ethics Op. # 90-2 construing RPC 1.6.

[9] Kansas Bar Ass'n Ethics Op. # 94-5, fn. 8 ("The Fair Debt Collection Practices Act defines all three entities as "debt collectors" under the Act. Consumer remedies regarding any of these three entities are the same.").

[10] Kansas Op. # 94-5 construing RPC 1.6, 1.8.

[11] Counsel has the responsibility under this opinion for insuring that there is no confusion when a matter is referred to someone else for collection. If there is any possibility that a collection agency might also act to refer a matter to a credit bureau, counsel must take steps to ensure that the collection agency has been instructed not to do so.



Mid year educational forum to be held in Orlando

National Lawyers Association president-elect and forum chairman, William W. Maywhort, of Denver's Holland and Hart announced that the Mid Year Forum will be held in Orlando Florida on Feb. 17, 2001, and will focus on critical day to day issues for lawyers and their families. "We at the National Lawyers Association are extremely concerned about the high level of dissatisfaction expressed by many young and veteran lawyers over the stresses and family related issues of the practice of law in today's high tech and fast paced legal profession, said Mr. Maywhort, the NLA understands and wants to help all attorneys with these problems."

The program topics are: Live in the Law: Is it an Oxymoron" presented by James Jenkins of Denver, Colorado and Maureen E. Witt of Greenwood Village Colorado and "Estate Planning for Legal Professionals and Their Families" presented by James A. Fehringer of Columbus, Nebraska and John Buckley, Colorado Springs, Colorado. Available to all lawyers, members and non members, both CLE Presentations will offer credit for the attendee's home state CLE requirements.

He also announced the selection of the Double Tree Castle Hotel in the heart of the Orlando's family friendly fun zone as the site of the NLA's 2001 Mid Year Educational Forum.

The "Castle" is centrally located within two miles of Sea World of Florida, Universal Studios Escape, the Islands of Adventure theme park and the new Pointe Orlando shopping center. Other major family attractions are within 5 to 8 miles. The Kennedy Space Center and Busch Gardens of Tampa Bay are within an easy one hour drive. With room rates at $139 per night for single or double occupancy, the room rate is very competitive and will easily sleep 4 on the two queen size beds.

For further Forum information, contact Kathleen Cunningham at the National Lawyers Association headquarters, 800-471-2994; Fax: 816-471-2995.

Watch for the Alaska Bar "30-Second Technology Survey" in the mail and fax it in!

Alaska insurance law changes

Continued from page 1

ceptive or unfair trade practices had developed. The burden of proof remained high and liability was often difficult to prove. It also required staffing the division simply didn't have. This lack of authority allowed illegal claims practices to go uncorrected and unchecked. Insurers proceeded with impunity, knowing there was little chance of any enforcement to protect injured victims and consumers.

Fortunately after passage of SB 177, that will not be the case anymore. The Division of Insurance will now be able to protect consumers from *both patterns and individual acts* of deception and unfair trade practices.

Under the provisions of SB 177, the Director of the Division of Insurance can now require an insurer to make full and whole restitution to an injured Alaskan in the event the insurer committed an unfair claims practice that resulted in loss or harm. Additionally, the Director can issue a cease and desist order upon an insurer who violates a provision of the Unfair Claims Settlement Act. *These provisions are very powerful remedial and enforcement tools* that can help curb unfair insurance claims practices in Alaska.

SB 177 provides immunity from liability for defamation for those persons who provide the Division of Insurance with information regarding an unfair act or practice. This provision will help alleviate this "chilling effect." In some reported instances, consumers and even insurance agents were sometimes intimidated from pursuing a fair settlement due to the fear of retaliation from a powerful insurance company. This discouraged claimants from pursuing an equitable settlement and hindered the consumer protection ability of the Division of Insurance, as they were unable to gain access to information they needed to effectively protect these consumers.

SB 177 also specifically overturns the recent *State Farm Fire & Cas. Co. v. Bongen*, 925 P.2d 1042 (Alaska 1996) decision to ensure homeowners and other insureds get the protection they pay for. SB 177 adopts the majority rule of law in the United States and prohibits insurers from denying a claim in which multiple actors caused the loss to occur and there is a secondary cause that is not covered by the policy. This very important change is intended to ensure that a claim is covered when a loss has more than one cause and one cause is covered by the policy. SB 177 also provides pro-consumer protections for injured third party insurance claimants. Under 21.36.125, third party claimants were not entitled to all the same protections as first party claimants. SB 177 added a new section to AS 21.36.125 making it illegal for an insurer to:

compel an insured or third-party claimant in a case in which liability is clear to litigate for recovery of an amount due under an insurance policy by offering an amount that does not have an objectively reasonable basis in law and fact that has not been documented in the insurer's file.

Additionally, SB 177 prohibits an insurer from using the threat of the cost of arbitration to force an injured third party to accept less than their claim was worth.

AS 21.36.125(11) read:

make known to insureds or claimants a policy of appealing from arbitration awards in favor of an insured or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;

The section now reads:

make known to insured or third-party claimant a policy of appealing, from an arbitration award in favor of an insured or third-party claimant for the purpose of compelling the insured or third-party claimant to accept a settlement or less than the amount awarded in arbitration;

The intent of these changes was to prevent insurers from using the cost of litigation or arbitration as leverage in coercing legitimate third party claimants to accept settlements that do not adequately compensate them for their injuries. Under prior law both these practices are prohibited as to first party claims but not as to third party claims. *SB 177 expands the prohibition against such bad faith actions to protect third party claimants and gives the Division of Insurance the power to take corrective action for single violations.* SB 177 went through many revisions in the legislative process and I would have preferred even stronger protections for claimants but SB 177 is a major step forward to ensuring fairer claims settlement practices and protecting insurance consumers. The provisions of SB 177 take effect January 1, 2001.

— Senator from Anchorage

All judges retain seats in general election

The 30 Alaska judges who stood for retention in the general election statewide Nov. 7 all retained their seats on the bench. According to the unofficial Division of Election results in mid-November, Alaskans cast a total of 3,425,025 votes on the retention of judges on all the regional ballots across the state. The following are unofficial results as of Nov. 20, as reported by the Alaska Judicial Council (www.ajc.state.ak.us).

Supreme Court	YES	NO
Alexander Bryner	128000	81825
Dana Fabe	120340	91738
Warren Matthews	124130	81248

Court of Appeals		
Robert Coats	130828	74438
David Stewart	132532	70332

Superior Court, First Judcial District		
Larry Weeks	19788	8167
Larry Zervos	17978	8891

Superior Court, Second Judicial District		
Richard Erlich	5672	2940
Ben Esch	5148	3288

Superior Court, Third Judicial District		
Elaine Andrews	89185	39894
Harold Brown	82931	43283
Rene Gonzalez	83446	43992
Dan Hensley	84292	41853
Donald Hopwood	81981	44025
Jonathan Link	82860	43128
Peter Michalski	72862	55477

Superior Court, Third Judicial District *(continued)*	YES	NO
Eric Sanders	82983	42010
Eric Smith	81755	43463
Sen Tan	70207	58881
Fred Torrisi	80284	44498
Michael Wolverton	84391	41194

District Court, Third Judicial District		
Peter Ashman	85768	40164
Joel Bolget	84213	41348
Natalie Finn	86041	40203
Suzanne Lombardi	86709	39723
James Wanamaker	83050	42206

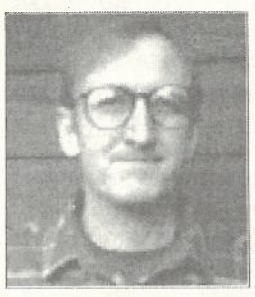
Superior Court, Fourth Judicial District		
Dale Curda	23759	17971
Mary Greene	22962	20336

District Court, Fourth Judicial District		
Raymond Funk	26982	14970
Mark Wood	28826	13636

Alaska has 56 judges on the bench statewide, sitting on the Alaska Supreme Court, the Alaska Court of Appeals, the Superior Court, or District Court. Courts are located in Ketchikan, Juneau, Sitka (First Judicial District), Nome, Kotzebue, Barrow(Second Judicial District), Anchorage, Dillingham, Kenai, Kodiak, Palmer, Homer, Valdez, (Third Judicial District), Fairbanks, and Bethel (Fourth Judicial District).

Admiralty Island in November

☐ Dan Branch



Admiralty Island is best in November when wet flakes of snow drift through the tree canopy. Most of the migrants are gone. You follow the deer up hills, through the old growth and grab some shelter under a sizable spruce. Protected, you watch the snow fall, tracking one flake and then another to the ground. The snow, white against brown and green, brings light to the forest. It bends down last summer's surviving leaves and mutes to pink the glow of high bush cranberries. Below you, a musk keg meadow covers the flat spaces between this hill and one to the North. The snow is at work there too, decorating beaver dams, and bull pines. A Brown bear digs through snow and muck to reach skunk cabbage roots. You will find fresh evidence of his work, when crossing the meadow at dusk on the way back to camp. This November, bear sign is easy to find. You climb higher up the hill, reaching a tree covered ridge that offers easy walking. It's lighter here. Silver glimpses of Stephens Passage show through the tops of spruce and hemlock. You stop to catch a breath and listen to snow melt drip. A raven calls and you wonder if he's spotted a deer for you. Open ground on the ridge offers a chance to move quietly, maybe to within range of a deer. Its been hours since you've heard human noise so every step seems like a shout. You move slowly, with as much care as you have. Something snorts and crashes away. You come no closer to a kill that day. At 2 pm its time to turn back down the hill to the musk keg. You look for bear or deer and see none. The darkness thickens when you start up the smaller hill between you and camp. In the gloom, you should be scared but are not. Instead you feel peace until gravity and the gray of the bay guide you to the beach. Sea ducks have gathered in some sheltered water near camp. Only their shapes identify them as merganzers and scoters. Even the Harlequin's clown colors fade in the storm light. It's easy to believe in God then, when the loudest sound is made by your breathing mixing with the surf. Beauty becomes a thing you can touch. There are easier times to visit Admiralty Island. In June, after the bear hunters leave, there's lots of sunlight and warm weather. Goose quills and feathers of other molting birds float on the surface tension of water shared with kayaks and small cruise ships. Bird songs mix with float plane noise. Summer light makes the color of rock weed thicken and sets off the green of alder and spruce. When low tide yields too rich a feast of sight and sound you break through the barrier of devil's club and alder to a park of old growth. The tree canopy blocks much of the sun and sounds and you easily find game trails to follow. On some parts of Admiralty Island, the old growth smells like a barn yard, with deer dung thick as mud on the trails. Half eaten leaves hang from the devil's club. In other places, there is no animal smell. In these places you find the disorganized scat of a brown bear, or his crisp paw print left minutes before in soft ground. Either sign reminds you that this is not your home and you are soon back on the beach thankful that God gave the bear fear of you. In any season Admiralty is a good place to wait out your storms. If you stay long enough, the storms stop mattering and you only catalog hours of daylight and the height of the tide. The warm light of Summer invites kayakers to sit motionless on the beach. Deer fawns and hummingbirds show no fear if you are quiet. It's a rich time for visitor. By late Fall, the migrant birds are gone. Animals that remain show the caution of the hunted. The forests are quiet and empty. Still, my storms blow over quicker there in November.

In Memorium

Norman Banfield

Norman Banfield died on February 6th, 2000, at the age of 93. While his career spanned nearly a half century of Alaska history, there are not many active members of the Alaska Bar Association who knew or even remember him. That is not surprising. Norman's last years of active practice were nearly twenty years ago; he was never a well known trial lawyer, and except for a stint on the Juneau School Board, I almost never saw his name in the paper. For those who did know him though, his loss is enormous and personal.

Norman Banfield graduated college at the University of Wisconsin in 1931 and moved to Juneau to work as a meteorologist. In 1934, he began the study of law in the office of Bert Faulkner who was then one of Juneau's prominent attorneys. Norman was admitted to practice in 1935. Faulkner and Banfield, together with Bob Boochever, who joined them in 1946, formed the nucleus of a firm that has been prominent in both Juneau and the entire state of Alaska for years. Norman was married for many years to Mildred Banfield, a force in her own right who rose to be Majority Leader in the State House and served in the State Senate as well. They had two daughters, Nancy and Julie who presently live out of state.

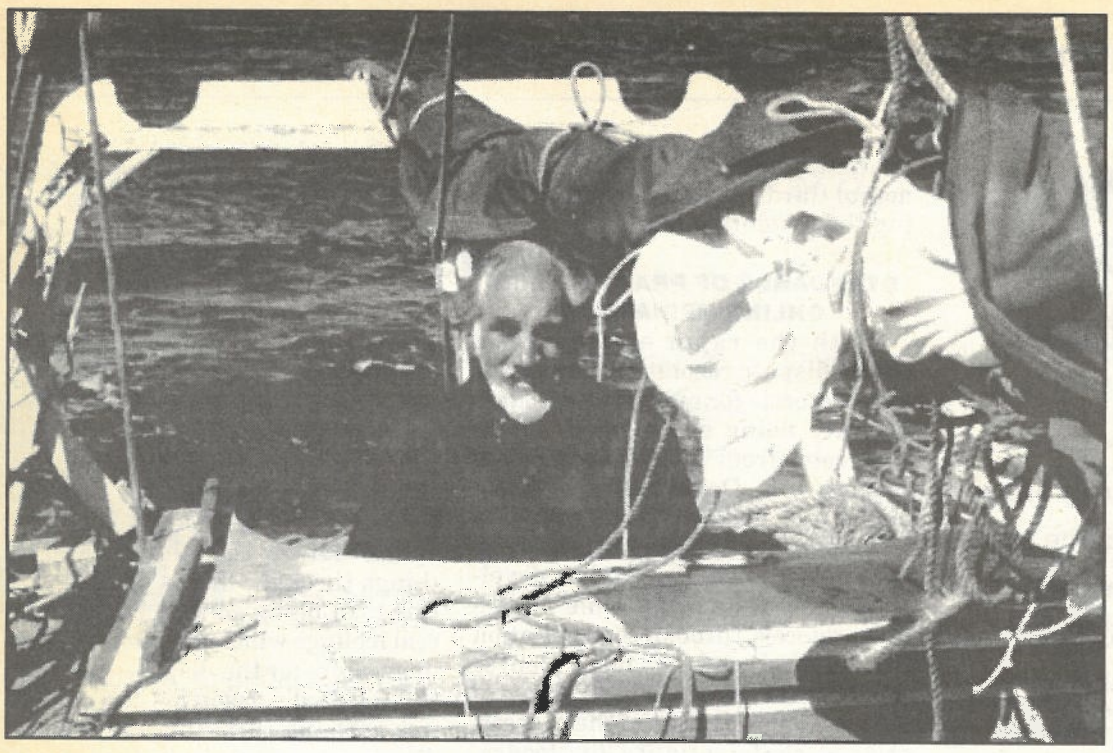
Norman Banfield was a leader of the early statewide bar in Alaska. He served on the first Board of Governors of the Alaska Bar Association. He set standards for his own practice which most of us seek to emulate, though not always successfully. No one ever asked Norman Banfield for a letter to confirm an understanding; his word was unshakable and his integrity unquestioned. He worked hard everyday. If he charged a client for an hour of work, you could be sure that he had spent at least that time and probably more. For the most part, he represented both local and out of state corporations that did business in Southeast Alaska and handled an extensive probate practice, not very glamorous work but work that he performed with exactitude and great skill. His writing was succinct and simple; there was seldom any confusion as to his meaning.

I learned how to practice law from Norman Banfield, as did nearly every other associate in what was known for a long time, as Faulkner, Banfield, Boochever and Doogan. Norman did not teach litigation or negotiation techniques; he taught standards of excellence, organizational skills, hard work, fair dealing and integrity. He did it by living them himself and by making it clear that in his firm (and it was his firm), those qualities were required for participation. He could be withering in language and attitude if he felt that attorneys were not living up to his standards; he suffered fools poorly. As Mike Holmes, one of his partners said at the Memorial Service in Juneau, "If I made a mistake he was kind enough to point it out to me in a way that made me not want to do it again."

It may sound, from what I've written that Norman was a cold person. That is not true. What made Norman so unusual was that while he had a no nonsense approach to everything he did, he was at the same time a kind man with enormous warmth and charm. He was a great storyteller; you could spend hours listening to him tell the history of Juneau or talk of territorial politics, or of the early practice of law in Alaska. He had a great sense of humor. Most important of all, he could be enormously caring and supportive to those who needed his help. Norman's friends were longstanding; everyone had some story about what Norman had done – acts of kindness that continually surprised others that had never seen that kind of thing from him.

Norman Banfield is one of the last of a generation of lawyers who practiced here prior to statehood, before the eras of Xerox and faxes, where motions and interrogatories were limited by the fact that secretaries had to type carbons and erase on all six copies if a mistake was made. It was an era when practice was much more local; one did not go lightly to Anchorage or Seattle to argue a motion or meet with a client – it was most of a day's trip to get there when I began practice in 1960 and it took much longer during most of Norman's career. Alaskan firms were small; there were very few lawyers compared to today. When the Juneau or even the Anchorage Bar association met weekly, nearly all of the practicing attorneys were there. There was much more personal interchange between the attorneys; you saw the same attorneys over and over again in different kinds of legal disputes. Respect and integrity were keys to success in that kind of practice. Norman had the respect of everyone who practiced here and knew him. He also had the real affection of his colleagues and of his neighbors. We will miss him.

— Avrum Gross



In memory of Warren Charles "Chris" Christianson

The Alaska Bar lost one of its more colorful and longstanding members last month. Warren Charles "Chris" Christianson, of Sitka, died October 19, 2000 in Burien, Washington. He had been overnighting in Seattle on his way to Turkey for a conference on social work when he was stricken with a heart attack on October 7.

Christianson was president of the Alaska Bar Association in 1969-1970. He left perhaps his most indelible mark on the collective memory of Alaska attorneys when, at the associations's annual convention in Fairbanks in1963 he drove up to the site of the annual picnic on the banks of the Tanana River showing off his new bride and new car. He drove off the road pavement, onto the lawn leading down to the river, and, to the horrified gasps of the picnickers, drove his new car into the Tanana River itself. The gasps turned to cheers once Christianson drove back out of the river and proudly showed that his new vehicle was a German-made Amphicar, an amphibious vehicle capable of achieving 50 mph on land and 10 knots in the water.

Christianson was born in 1920 and grew up in Hinkley, Minnesota. He received his undergraduate degree from the University of Minnesota in 1942, and then joined the U.S. Army Air Corps.

In World War II, Christianson served as bomber pilot with the 99th bomber group of the 15th Air Force flying B-17 bombers and flew 51 missions. On one mission, two of his four engines were shot out and a third engine badly damaged. The plane was unable to maintain altitude, and the crew evacuated. Christianson nevertheless managed to fly the plane back to base, and received the Distinguished Flying Cross and Distinguished Service Cross for his heroism.

After World War II, he and his wife Faith built the Tantalus, a 46-foot gaff-rigged schooner, while attending law school at the University of Minnesota. In the spring of 1949, when the boat hull and deck was complete but the masts had not yet been installed, he and Faith floated the boat hull on the spring floods over several dams, and under several rigid concrete bridges, sufficiently far down the river that the bridges were high enough to permit a ship with masts to pass underneath. A local farmer let the young couple cut down two trees which became the ship's mast. The Christiansons then sailed down the Mississippi, through the Caribbean, through the Panama Canal, and up the west coast, arriving in Sitka in 1951.

The Christiansons thereupon homesteaded a 26 acre island in Jamestown Bay, Sitka. Christianson was the only attorney in Sitka for several years, in the 1950's and 1960's, and served as the city attorney for a time. He practiced both as a sole practioner and with various other attorneys: Roger DuBrock, Victor Krumm, Theron Cole, William Royce, and Ed Stahla all remember him fondly.

Christianson was active in both local and state politics. He was chairman of the Alaska Democratic Party, and supported many charities with his money, time and expertise; and was active in the Rotary Club and the Chamber of Commerce. He also was an active member of the Sitka Unitarian Universalist Fellowship.

A man with a zest for life, Christianson was known for wearing colorful, if mismatched, clothing. He often wore bright red socks to trial. He liked to dance, enjoyed music of all kinds, and hosted a radio talk show ("Classics with Chris") for many years in Sitka. He loved to travel, getting to know the people and cultures of the countries he visited.

In 1978 he launched the Tantalus for a two-year sail down the west coast of the Americas, to the South Seas. By this time, the original masts had rotted, so before he left he cut new masts from Sitka spruce trees growing on his island. And, in a reluctant concession to 20th century technology, he installed two winches on board. He refused, however, to change the belaying pins.

As an attorney, Christianson was perfectly willing to take on a quixotic case for a worthy, if impecunious, client. At Christianson's funeral service held in Sitka on October 28, 2000, Sitka Superior Judge Larry Zervos told of the last time Christianson had appeared in his court. Christianson's client was in a custody battle against the child's biological parents. During motion practice, Judge Zervos told Christianson, in so many words, "Mr. Christianson, your case is hopeless. You can't possibly win." To which Christianson reportedly replied, "I know, sir, but I'd like to try." After a bench trial, Zervos ruled in Christianson's favor. Christianson never charged the client a fee.

Christianson and his sons went goat hunting every year in the Mt. Bassey area near Sitka. His friends are currently attempting to have an unnamed lake, which served as his base camp, to be named after him.

Donations may be made in his memory to Sheldon Jackson College, Sitka, Alaska 99835.

In Memorium

Warren Charles "Chris" Christianson, a long time Sitka attorney and community leader, died October 19 at Highline Community Hospital in Burien, Washington. He had been in Seattle on his way to Turkey for a conference on social work when he was stricken with a heart attack on October 7.

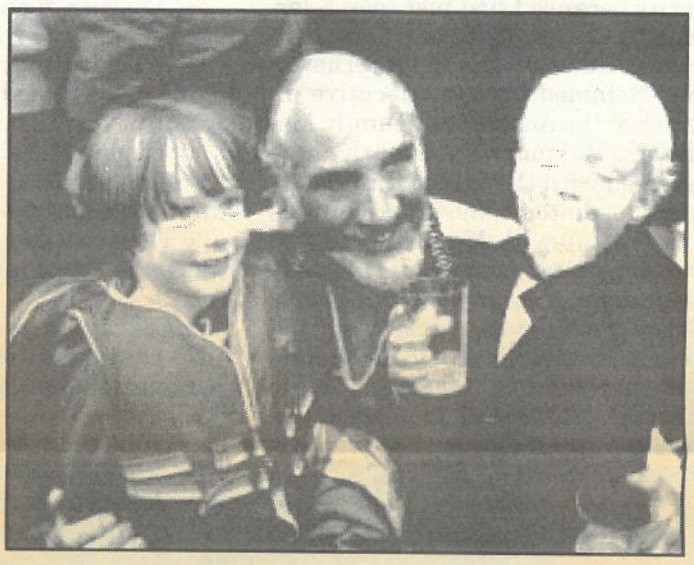
He was born October 24, 1920 in Minneapolis, Minnesota, and grew up in Hinkley, MN.

He graduated from the University of Minnesota in 1942, and joined the U.S. Army Air Corps. He served with the 99th bomber group of the 15th Air Force flying B-17 bombers, and received the Distinguished Flying Cross and Distinguished Service Cross.

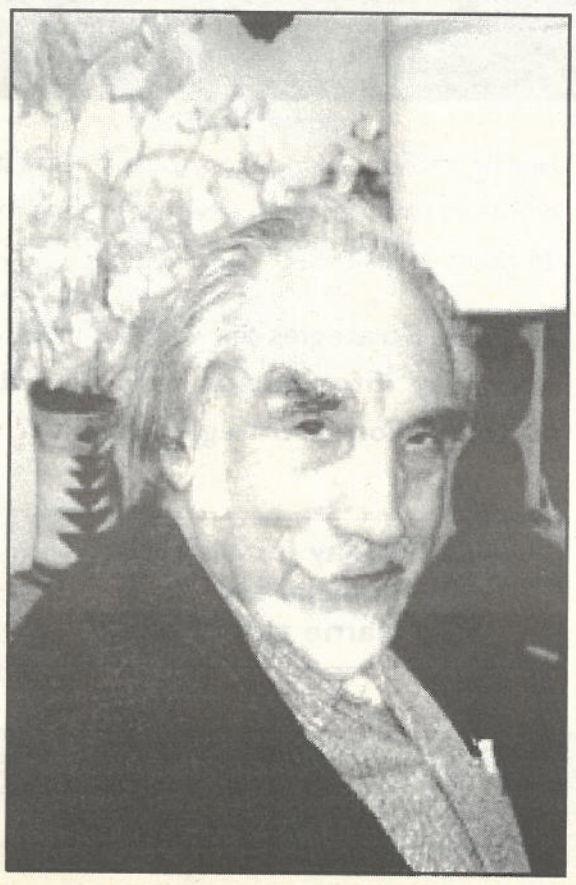
He also was an active member of the Sitka Unitarian Universalist Fellowship.

A man with a zest for life, he liked to dance, enjoyed music of all kinds, wore colorful clothes and loved to travel, getting to know the people and cultures of the countries he visited. He made a number of friends during his trips, and kept up correspondence with them over the years.

"He loved Sitka, and being a Sitkan," a family member said.



Survivors include his sons, Cabot Christianson of Anchorage, Kord Christianson of Guam, and Thor Christianson, Sitka, and a daughter, Tanya Dray of San Diego, CA. He also is survived by a brother, Ronald Christianson, of Hinkley, three Anchorage grandchildren, Nicholas, Charles and Kieffer Christianson, and two Seattle grandchildren, Sierra and Justin Christianson.



Mediating on the Internet — asynchronous paradigms for the future

☐ Drew Peterson

An attorney colleague recently showed me a short popular magazine article concerning online mediating.

My friend found the article interesting, yet disturbing, and implied that things were moving in a technologically disturbing direction. The article itself described a mock commercial dispute using two separate online mediation services, with mixed results. Its conclusions were unclear, except that online mediations would seem to be the trend in the future.

The article caught my attention partly because I had just seen reference to another article on the subject of mediation and the Internet by Jim Melamed, former executive director of the Academy of Family Mediators. Melamed is currently more involved with the Internet than any other mediator I know, through his relationship with Mediate.Com, the primary online resource tool for mediators. Reading my friend's article also caused me to download and read Melamed's lengthier and more comprehensive article, "Mediating on the Internet: Today and Tomorrow", located at http://www.mediate.com/articles/melamed5.cfm?plain=t.

CURRENT USES OF THE INTERNET

Melamed's article provides a good current overview of mediation and the Internet. It includes an analysis of mediation benefits from technology in general, as our world has rapidly moved from typewriters to word processors to desktop computer to laptops over the past quarter-century or so.

According to Melamed, practical uses of the Internet by mediators at the current time include:

1. The use of Email for everyday communications.
2. Posting and managing descriptive websites
3. Posting forms, articles, and handouts.
4. Using Email for meeting notices, homework, and caucus discussions,
5. Distributing draft agreements
6. Using aliases, mailboxes and filters for client matters.
7. The expanding use of voicemail, Efax and instant messaging over the web.
8. Collecting key Email addresses, such as referral sources, satisfied customers, key constituents, and the like.

ONLINE MEDIATION SERVICES

Melamed's article provides online addresses for 14 separate online mediation services which are currently in operation, and notes that many others also exist or will soon be started. The various sites provide different types of online assistance. These primarily include set system processing, i.e. various kinds of blind bidding processes handled by structured software, and open system content processing, which involve actual third party neutrals facilitating the resolution of a conflict.

STANDARDS OF PRACTICE FOR ONLINE MEDIATORS

With the rapid emergence of online dispute resolution, standards and protocols for effective participation are being established. These have come from various sources, including U.S. Department of Commerce and Federal Trade Commission-sponsored public workshops on the subject. Mediate.com has developed a set of its own online mediation protocols, through the Mediation Information and Resource Center (MIRC), covering the basic areas of the initial description of the process, privacy, confidentiality, disclosure, and suggested ground rules.

MOVING BEYOND REAL TIME AND CRISIS MEDIATION TO ASYNCHRONY

For me, the most interesting aspect of Melamed's article was his discussion of the value of asynchrony. In comparison with "real time" discussions that we normally have in mediation, participants on the Intenet do not need to immediately respond to ideas and communications as they are required to do in face to face discussions. Melamed asserts that one's immediate response to an issue is often not one's best response, by either the mediator or by the participant. Indeed, the immediate response is often the worst possible response. Melamed assets that participants will more thoroughly consider the issues and develop options, if allowed a bit of time to fashion their response outside the "gaze of the other side."

WHETHER WE LIKE IT OR NOT, MELAMED ASSERTS WE ARE ENTERING INTO A NEW WORLD WHERE A GOOD MEASURE OF MEDIATION WILL BE ON THE INTERNET.

From a mediation perspective, Melamed asserts that we have falsely worshipped real time discussion - we often automatically assume that real time communications are preferable. Yet there are many problems with real time discussions, particularly in the world of conflict. Because of its affordability, capability, safety, and ease, Melamed asserts, the Internet will force us to reexamine everything that we now do and how we do it.

Whether we like it or not, Melamed asserts we are entering into a new world where a good measure of mediation will be on the Internet. Face to face meetings will no longer be used exclusively, nor even primarily, to make progress. Instead they will be used strategically, when they provide a specific advantage. The cost savings and quality of consideration intrinsic to asynchronous discussion will become the leading factors driving mediation discussions on the Internet. As the Internet becomes more and more real it will make less and less sense to travel and meet at enormous cost.

I AGREE WITH HIM THAT BECAUSE OF THE INTERNET, ASYNCHRONOUS COMMUNICATIONS HAVE BECOME, AND WILL INCREASINGLY IN THE FUTURE BE RECOGNIZED AS ANOTHER IMPORTANT TOOL WHICH CAN BE USED BY MEDIATORS UNDER PROPER CIRCUMSTANCES TO HELP RESOLVEDISPUTES.

BUT WHAT ABOUT THE FEELING CONTENT OF DISPUTES?

I have discussed Melamed's theories about the advantages of asynchronous communications with a number of mediator friends. Like my friend who showed me the original article on mediating on the Internet, my collegues remain uncomfortable or skeptical, for a variety of reasons. To me the most convincing of those reasons is that asynchronous communications would seem to eliminate some of the most effective recognition and use of human feelings in the process of dispute resolution. While it may be true that individuals negotiating face to face may speak before they have thought things through, this is often a good thing. In doing so they reveal their real feelings which are often primary motivators for the dispute. Contrary to Melamed's assertion that speaking without thinking exacerbates disputes, my experience is that it often is key to understanding and resolving disputes in a win-win manner, especially in mediation.

Consideration of feelings in mediation leads into much broader issues of mediation styles, and which are preferable. There are certainly some mediation styles where, like in the courtroom, feelings are considered a bother and held to a minimum. In other mediation styles, however, feelings are considered essential to the process of resolving disputes in a manner which will provide mutual gains to all sides.

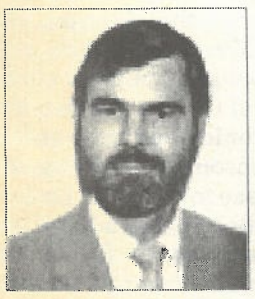
I am sure that it will be argued that the feeling content of disputes will still come through in asynchronous communications. To me it is obvious, however, that feelings will often be the first thing edited out of such comminutions, and that substantial amount, if not all of the feeling content of disputes will be lost by attempting to resolve them through asynchronous methods.

BROTHER CAN YOU SPARE A PARADIGM?

Much as I like to use them, I always get nervous when I hear words like "asynchronous" and "paradigm" strewn around. But I think that much of Melamed's point is a good one. Like it or not, we are entering a new world where a substantial amount of mediation will take place on the Internet. This will give us an opportunity to move past old models (paradigms) of dispute resolution based on face to face meetings, and to explore new models of asynchronous communications which could prove to be even more effective in resolving disputes. Melamed does not argue that all communication in dispute resolution should be asynchronous, but merely points out that we are headed towards a technological world where such communication will become much more prevalent than is currently the case. I agree with him that because of the Internet, asynchronous communications have become, and will increasingly in the future be recognized as another important tool which can be used by mediators under proper circumstances to help resolvedisputes.

Denial of discharge: 727(a)(3), (4)

☐ Thomas Yerbich



Concealing, destroying, falsifying, or failing to keep or preserve financial books and records is grounds for denial of a discharge under § 727(a)(3). Section 727(a)(4) enumerates four acts that a debtor can do in connection with the case that are grounds for denial of discharge. (1) Make a false oath or account; (2) present or use a false claim; (3) offer, give, or receive money, property, or advantage, or a promise of money, property or advantage in exchange for an act or forbearance; or (4) withhold from the trustee books, records, documents, and papers relating to the debtor's property or financial affairs.

In addition to committing the act specified in § 727(a)(4), the debtor must do so "knowingly and fraudulently"; mere negligence, inadvertence, carelessness, or forgetfulness is not a basis for denial of discharge. [*In re Senese*, 245 BR 565 (Bank.N.D. Ill 2000)] If reasonable, reliance upon the advice of counsel will generally negate a finding of "knowingly and fraudulent" conduct on the part of a debtor. [*In re Adeeb*, 787 F2d 1339 (CA9 1986)] However, fraudulent intent, of kind required to deny debtor's discharge, may be established by debtor's reckless disregard or indifference for the truth. [*See In re Cohn*, 54 F3d 1108 (CA3 1995)] As with other situations where establishing intent is required, fraudulent intent in these cases is determined from circumstantial evidence, *i.e.*, from all the facts and circumstances. [*In re Mereshian*, 200 BR 342 (BAP9 1996)]

FALSE STATEMENT

In order to deny a discharge based on false oaths, it must be established, by a preponderance of evidence, that: (1) debtor knowingly and fraudulent made a statement under oath; and (2) the statement related materially to bankruptcy case. Whether a debtor made "false oath," of kind sufficient to permit denial of debtor's discharge, is a question of fact. A false statement or omission may be material even if it does not cause direct financial prejudice to creditors. False oath is "material," for denial of discharge purposes, if it bears a relationship to debtor's business transactions or estate, or concerns the discovery of assets, business dealings, or existence and disposition of debtor's property. In addition to false testimony at the creditors' meeting, schedules of assets and liabilities and statement of financial affairs, signed under penalty of perjury, have the force and effect of "oaths," for purposes of denial of discharge based on false oath. [*See In re Wills*, 234 BR 58 (9th Cir. BAP 1999)]

The fundamental purpose of § 727(a)(4)(A) is to insure that the trustee and creditors have accurate information without having to conduct costly investigations. The entire thrust of an objection to discharge because of a false oath or account is to prevent knowing fraud or perjury in the bankruptcy case. As a result, the objection should not apply to minor errors or deviations in testimony under oath. A false statement or omission that has no impact on a bankruptcy case is not grounds for denial of a discharge. As a result, omissions or misstatements relating to assets having little or no value may be immaterial. Likewise, omissions or misstatements concerning property that would not be property of the estate may not meet the materiality requirement. However, an omission or misstatement relating to an asset that is of little value or that would not be property of the estate is material if the omission or misstatement detrimentally affects administration of the estate. [*Id.*]

In determining whether or not an omission is material, the issue is not merely the value of the omitted assets or whether the omission was detrimental to creditors. Even if the debtor can show that the assets were of little value or that a full and truthful answer would not have directly increased the estate assets, a discharge may be denied if the omission adversely affects the trustee's or creditors' ability to discover other assets or to fully investigate the debtor's pre-bankruptcy dealing and financial condition. Similarly, if the omission interferes with the possibility of a preference or fraudulent conveyance action the omission may be material. [*Id.*]

FALSE CLAIMS

For denial of debtor's discharge for presenting false claim under § 727(a)(4)(B), the debtor must have presented or used inflated or fictitious claim in bankruptcy case, with intent to defraud. [*In re Gollomp,* 198 BR 433 (S.D.N.Y. 1996)] There is sparse case law applying § 727(a)(4)(B) [*See In re Overmyer*, 121 BR 272 (Bankr.S.D.N.Y.1990) (the debtor allegedly falsely listed at least 25 related corporations among his unsecured creditors whose corporate veils had been successfully pierced); *In re Cline*, 48 BR 581 (Bankr.E.D.Tenn.1985) (the debtor filed a falsely inflated proof of claim on behalf of his father-in-law without the claimant's authorization); *In re Pope*, 18 BR 125 (Bank.S.D.Fla.1982) (the debtor allegedly falsely listed a debt for alimony owed to a former spouse)].

However, asserting a claim of exemption cannot be a "false claim," within meaning of § 727(a)(4)(B), regardless of whether debtor is entitled to exemption or of debtor's intent in asserting exemption. "Claim," as used in exception to discharge, does not equate with an assertion of right to exemption. [*In re Garcia*, 168 BR 403 (D.Az 1994); *In re Parnes*, 200 BR 710 (Bank.N.D. Ga 1996)]

GIVING, OFFERING OR RECEIVING MONEY

Case law construing § 727(a)(4)(C) is practically nonexistent. This may very well stem from the fact that most acts that would fall within this provision probably occur after the time within which an objection to discharge can be brought under Rule 4004, FRBP. This is of small solace to the debtor who may offer a bribe or attempt extortion; 18 USC § 152 makes any such an act a crime. The little case law directly construing § 727(a)(4)(C) holds that the act must be in or in connection with the bankruptcy case, thus prepetition acts are not within its scope. [*E.g., In re Ledvinka*, 144 BR 188 (Bank.M.D.Ga 1992); *In re Aiken*, 80 BR 971 (Bank.E.D.Mo 1988)]

MAINTAINING AND PROVIDING FINANCIAL RECORDS

Section 727(a)(3) requires that a debtor maintain adequate financial records, while § 727(a)(4)(D) requires the debtor to turn those records over to the trustee. In order to state a *prima facie* case under section 727(a)(3), the party objecting to discharge must show (1) that the debtor failed to maintain and preserve adequate records, and (2) that such failure makes it impossible to ascertain the debtor's financial condition and material business transactions. Once the objecting party shows the debtor's records are absent or are inadequate, the burden of proof then shifts to the debtor to justify the inadequacy or nonexistence of the records. [*In re Cox*, 41 F3d 1294 (CA9 1994)]

Intent to conceal one's financial conditions is not a necessary element for denial of discharge for failure to keep adequate records. If extent and nature of debtor's transactions were such that others in like circumstances would ordinarily keep financial records, debtor must show more than that she did not comprehend the need for records, in order to escape denial of discharge, and justification must indicate that, because of unusual circumstances, debtor was absolved from duty to maintain records herself. [*Id.*]

Factors to consider in determining whether debtor's failure to keep adequate business records was justified by debtor's reliance on another to do so include: intelligence and educational background; experience in financial matters; extent of debtor's involvement in finances for which discharge is sought; what, if anything, debtor saw or was told that indicated that the other person was or was not keeping records; nature of relationship; and any record keeping or inquiry duties imposed upon debtor by state law. Generally, a person is not required to inquire into the extent of record keeping by another in the absence of some warning or other indication that the person to whom responsibility for keeping records is properly delegated is not keeping adequate records. [*Id.*]

Focus of statutory exception to discharge for debtors who withhold recorded information from trustee or other officer of court is on debtor's duty to maintain and turn over recorded information which bears upon his/her financial condition and business affairs. Debtor's cooperation is prerequisite to grant of discharge. To satisfy the statutory obligation to maintain and turn over recorded information bearing on his financial condition and business affairs, debtor must take action to obtain any relevant documents that are not in his possession and to turn them over to trustee, and may not simply send trustee in search of them. [*In re Guttman,* 237 BR 643 (Bank. ED Mich 1999)]

Sections 727(a)(3) and (4) exemplify a basic underlying premise of the bankruptcy system: only honest debtors are entitled to a discharge. Debtors who are less than forthright, play "hide the ball," or "beat the system," are, as they should be, denied the ultimate relief afforded by bankruptcy - discharge from liability for one's debts.

NOTICE OF PROPOSED RULES U.S. BANKRUPTCY COURT, DISTRICT OF ALASKA

The Advisory Committee on Bankruptcy Rules has proposed amendments to the local Bankruptcy Rules [1001-1, 1001-2, 2002-1, 2015-2, 3015-1, 3016-1, 3016-2, 3017-1, 3018-2, and 9070-1].

Written comments on the proposed rules are due no later than January 15, 2001

Address all communications on rules to:

Clerk, U.S. Bankruptcy Court
Attention: Local Bankruptcy Rules Advisory Committee
Historic Courthouse, Room 138
605 West Fourth Avenue
Anchorage, Alaska 99501-2296

The proposed amendments to the rules may be reviewed at: State Court Libraries in Anchorage, Juneau, Fairbanks and Ketchikan; U.S. Courts Library in Anchorage; U.S. District Court Clerk's Office in Anchorage, Fairbanks, Juneau, Ketchikan, and Nome; U.S. Bankruptcy Court Clerk's office in Anchorage; or on the web at the Touch 'N Go U.S. District Court Home Page http://www.touchngo/lglcntr/usdc/usdcak.htm.

The great Cheetos caper

☐ William Satterberg

"Of course! Everybody argues when they're married. It's normal," he helpfully responded. I had just asked the veteran Alaska State Trooper Sergeant whether or not, in his experience, family arguments occurred. He voluntarily continued, however. "The problem is, sir, when one of the two members of the family decides it is time to call in the police, it has gone too far." Once again, a good answer had turned into an ambush. I thought about ringing the bell even louder, and making an objection to this unsolicited comment, but wisely changed my mind.

It was another in a long line of Fairbanks domestic assault trials. It was a hot day in early June, before the Honorable Judge Mark Wood. The State was being capably represented by attorney Steven Elliott. I was doing my best job trying to turn an otherwise meritorious defense case into a shambles. At issue was an allegation that my client, an extremely nice gentleman of approximately 42 years old, had engaged in a heinous assault upon his wife, also an extremely nice person of 39 years old. There was no prior history of problems between the couple.

The evidence was straightforward. Although the stories sometimes conflicted from the various witnesses called upon by the State, all of whom testified seemed to be wanting to help the case, even though I did not want the assistance.

Several months previously, an argument had developed in the family over issues involving teenage children. My client had wisely left the scene and had decided that he would stay elsewhere. He fully intended to engage in an advisory cooling down. The plan was well conceived, but poorly executed.

Unbeknownst to my client, his wife had accessed the ATM machine earlier that week, leaving but a pittance of financial worth in the family's account. This act had also inadvertently seriously jeopardized later legal representation by private counsel. Frustrated and economically destitute, my client had returned to the home, only to find his wife languishing on the couch, watching a videotape and eating puffy Cheetos.

He lost it.

No, he did not strike his wife. He did not even threaten to strike her. Instead, he impulsively grabbed a handful of Cheetos out of the nearest Cheetos bowl and proceeded to crush them into his wife's hairdo. In retrospect, this was not a good move, or one conducive to continued marital harmony.

There was some dispute during the trial as to whether my client "smashed", "crushed", "crumbled", or "crunched", the Cheetos into his wife's hair. What was not in dispute, however, was that her head was covered with crumbled Cheetos.

The wife's reaction was predictably unpleasant. No, she did not strike back or engage in any physical violence, either. Neither did she reach for her personal gun, as many Interior residents are often tempted to do. What she did do was to protest very loudly the unsolicited crass and primitive attempt to turn her from a blonde (allegedly) into a redhead. In seconds, the Friday night fights were on.

About then, a next door neighbor's teenager came to return a videotape. In so doing, the teenager walked into this rapidly developing family squabble. Shocked over what she had observed, the teenager rushed home to wake up her foster mother, and to report the incident. The foster mother immediately went to the residence. She planned to calm things down, or so she thought.

The problem, unfortunately, was that this newest player to the family argument had been drinking heavily earlier during the evening. By her own admission, she had been mixing Mexican beer with some drink purchased from a local convenience store known as a "Slow Ball Fizz." To say she was drunk would be an understatement. She was soused. Without doubt, she was irrational. But, to her credit, she was certainly determined. This drunken determination was packed into one of the most petite frames ever to take on an extremely irate married couple hell bent upon resolving the righteous indignation of a dastardly Cheetos attack.

When the foster mother arrived at the residence, the argument immediately escalated into a three-way battle. Intense screaming and yelling took place between all parties. But there was still more to come. The trio was soon to be joined by another individual, who was the foster mother's significant other. There were now four incensed adults packed into a small mobile home, all arguing, screaming and yelling loudly at each other while crushing Cheetos into the carpet. At some point, a chair was tripped over, pushed, or shoved, which resulted in the little toe on my client's wife being broken.

That was also the straw that broke the camel's back. The foster mother, by then the self-ordained aggressor and clearly the take charge person, drug my client's wife into the back bedroom. The foster mother next dialed the police, reported a domestic assault, insisting that the local gendarme take action. Besides, it seemed like a good way of getting the husband out of the house once and for all. A Cheetos crisis was rapidly developing, which needed decisive action.

Three troopers arrived, best known as the recruit, the rookie, and the old-time sergeant. An investigation was conducted by the recruit, under the watchful eyes of the rookie. The sergeant, meanwhile, wisely stayed out on the porch visiting pleasantly with my client and explaining to him words to the effect of, while it is normal to argue, it is not normal to call the police.

Eventually, my client was arrested and taken downtown, where he was given a quieter place to stay for the evening.

The well-meaning, but drunken neighbor returned home, along with her significant other, and my client's wife re-did her hair.

Several months later, the case went to trial. In all reality, it was a case which probably should have never gone to trial. It was a family spat, a squabble, a childish argument, which obviously would not have been reported to the police but for the involvement of the next-door neighbor, who failed miserably at her self-imposed civic duty to referee the fight. By the time trial took place, all members who had been involved in the encounter session had fully reconciled their differences and were once again very good friends. Predictably, they were also quite embarrassed over the entire ordeal.

There is a rumor outstanding that somebody important in Juneau has announced that all domestic assault cases will be prosecuted at whatever cost. Maybe the rumor is true. Maybe it is not. Maybe somebody should check it out. Maybe it is an agenda which has both political and personal overtones, to keep the defense bar wealthy, and diligent State prosecutors over-worked. For whatever reason, if this rumor is true, it certainly causes occasional complications. This case was just such an example.

Most cases are won during jury selection. As such, I went through many of my standard routines, interacting with the jury, playing games, asking opinions on various issues, and waxing eloquently.

I initially was comfortable with my jury, until such time as Steve Elliott, the assistant district attorney, exercised some extremely well placed peremptory challenges. In point of fact, Steve literally gutted my entire jury. "What gall!", I thought.

Now, rather than having a jury of older people, to whom I could argue my theory of "Hey, folks, let's let the kids grow up, okay?" I was stuck with a jury that looked like it had come straight from Romper Room. Young idealists. The worst type. The type that hated to see anyone argue.

In addition, this jury looked a little bit on the tired side. Although I often am used to seeing jurors nod off during my own presentations, it surprised me to see them drifting during Steve's opening statement. Ordinarily, the nodding doesn't bother me too much. It's the snoring that I hate.

My client's wife remarked during one break that the jury looked like, "a senior high school class the day after junior prom night." Keeping them awake, let alone interested, clearly would be difficult. Moreover, this was the first jury I had ever had that declined to have notepads. Whether it was because they had photographic memories, or were illiterate, I couldn't say. The fact that they were not interested in taking notes, or even doodling like some judges do, however, still concerned me. It was going to be a rough trial. Drastic measures were needed.

The first witness to be called was my client's wife. She responded during the Assistant District Attorney's direct examination that she did not want the case prosecuted. She dearly loved her husband. She claimed that things would have been worked out well if they had simply been left alone. She made it quite clear to all concerned that she was capable of taking care of herself. The argument was a silly argument over a bunch of Cheetos which, if left to her own devices, she probably would have won in the end. Ammunition certainly was not in short supply. There was still other food in the house.

It became my turn to cross-examine this obviously friendly witness. Reaching into my bag of tricks, I pulled out a large, family-sized, bag of Cheetos. My client's wife had thoughtfully bought the bag which had the "X's and O's" on the outside. We figured it would be a rather subtle method of humorously conveying the nature of the case to the jury. I asked to have the Cheetos introduced for illustrative purposes, as *Exhibit A*. Judge Wood frowned until I pointed out that I had enough to go around for all of the jurors. To prove the point, I pulled out another bag. This brought laughter from everyone in the courtroom. Both bags of Cheetos ultimately ended up being marked as *Exhibit A*, possibly out of a desire by the clerk to make sure that they did not leave the courtroom intact.

I next questioned my client's wife about the Cheetos assault. I asked her how she felt about crushed Cheetos in her hair. She responded that she was, "very mad." For a moment, I thought seriously about allowing my client's wife to demonstrate on my client using the better part of *Exhibit A* to graphically show exactly how the Cheetos had been crushed into her hair. She would have gained retribution right then and there. Judge Wood, as well, apparently sensed that I might have been thinking something along those lines. Another stern look from the bench made it quite clear to me that such a courtroom demonstration would go over no better than O.J.'s shrunken leather glove.

After I concluded my examination, Steve briefly redirected my client's wife, concentrating primarily upon issues of whether the Cheetos were, "smashed", "crushed", "crunched", or otherwise pressed into either her hair, face, or other locations. She was not cooperative, and I had no recross. After the wife had testified, the trial day concluded.

On the second day, the first witness to testify was the nosey neighbor. She claimed that her memory was foggy. She readily volunteered that she was clearly intoxicated on the night in question. She argued that she did not have a good recollection, if any, regarding the incident. What was most startling was that she was probably quite accurate on that last point regarding faulty recollection. Her facts did not match anybody's to a large degree.

The final two witnesses were the young recruit trooper and the senior sergeant. Their testimony was straightforward. Both Troopers clearly outlined the scope of the investigation, the nature of the crushing injuries, and the required actions taken.

It soon became apparent that nobody's heart was really into this case. In fact, I think the jury became more and more interested in the bag of Cheetos as the case wore on. They even asked for notepads on Day Two — probably to draw pictures on.

After the Troopers testified, the State rested. The only defense witness was my client, who testified regarding the nature of the incident. He openly confessed embarrassment over the entire situation, in a very persuasive, emotional testimony regarding his family life. The defense

Continued on page 23

The great Cheetos caper

Continued from page 22

then rested. There was no rebuttal testimony.

There were only a few remaining things to be done. Classically, these tasks were to argue the case to the jury, read the standard jury instructions, and await the verdict.

It was during the break to prepare jury instructions things went sideways.

During the course of the case, Steve was able to evaluate matters more closely. It became apparent during that evaluation that this incident was not an ordinary domestic assault case. It was, instead, a case which most likely would have never been reported to the police, had it not been for the nosey neighbor. The broken toe was clearly the result of an accident. The crushed Cheetos were, quite more likely than not, not a serious assault, if any assault whatsoever. Wasting food, of course, was a different issue, but still not of a criminal nature, unless my mother were the judge.

Impromptu discussions quickly took place. Various offers were exchanged. Ultimately, an agreement to dismiss a portion of the case was reached just before Judge Wood returned to the courtroom. All parties thought the court would be happy. Surprisingly, however, this caused the court all sorts of concern. The jury instructions would now have to be redrafted. The court's secretary was on lunch break. Because the courthouse is a union shop, this was a most serious complication.

Judge Wood hurriedly left the room to redraft the jury instructions, rather than keeping six jurors starving.

It was during that second break that additional frantic negotiations took place. The second round of discussions resulted in a change of plea to a lesser charge, with certain conditions which resolved the entire case. This time, everybody was happy. The change of plea was accordingly entered. To fatten the deal, the defense voluntarily forfeited the Cheetos to the court to be destroyed. From a practical perspective, there was no harm, regardless. My client's wife had made it quite clear after the incident that Cheetos were forbidden in the house. Besides, the Cheetos now clearly were a weapon, legally subject to forfeiture.

Following the change of plea, the court suggested to all attorneys that they leave the courtroom and allow the court to break the news quietly to the jury.

Later that day, I spoke with Steve about the case. I learned that, when told the trial was over, the jury was actually happy. Both versions of *Exhibit A*, consisting of the two large, family-sized bags of Cheetos, were delivered to the jury as a consolation prize. An empty Cheetos bag, bearing an *Exhibit A* sticker, is now taped to the door of Judge Wood's chambers — a silent reminder of the trial that should never have been.

Finally, rumor has it that there may be a bill submitted to the Alaska legislature next session to provide for a five-day waiting period before a married adult may purchase Cheetos. Given the quality of Alaska's past legislation, I suspect that the bill will pass unanimously, another chapter in a legacy of revisions to Alaska's criminal laws.

ATTORNEY GENERAL OPINION INDEX AND TEXT AVAILABLE ONLINE

The Alaska Department of Law recently announced a new service to Alaskans, the Internet Attorney General Opinions (IAGO) database and index. "This is another example of our state's efforts to make government more accessible to the public," said Attorney General Bruce Botelho.

IAGO includes an index to abstracts of published opinions of Alaska's Attorneys General since Statehood as well as the full text of opinions published by the department since 1996. The index is searchable by specific terms, such as date, subject, author, and statutory references. Full-text documents can be searched by using specific terms or a full-text search engine. Opinions available through the web site are in Adobe Acrobat format.

The opinion database will be expanded to include the full text of opinions issued from 1991 through 1995. Printed copies of indexed opinions for which the text is not available online are available from the Alaska State Library, the libraries of the Alaska Court System, or the Office of the Attorney General. They are also available through commercial online legal information databases.

Attorney General opinions are written under the authority of AS 44.23.020. Attorney General opinions may be issued in response to requests by state agency officials and state legislators to help them perform their duties. These opinions are not law, but advice to state officials on questions of law and how the law applies to particular fact situations. The Attorney General may not issue opinions nor provide legal advice for local government officials, private individuals, or private entities.

The online index and database can be found on the department's webpage at http://www.law.state.ak.us/opinions/index.html.

In addition to IAGO, the Department of Law webpage includes, among other things, a Consumer Protection webpage, the department's monthly reports, updates on natural resource cases, and links to other legal sites. The home page of the Department of Law is http://www.law.state.ak.us.

The Alaska Network on Domestic Violence and Sexual Assault Pro Bono Program would like to thank the following attorneys and law firms who have volunteered their services in our first year and a half of operation.

Thank you Allen Bailey
Kristin Bomengen
Robin Bronen
Gayle Brown
Jessica Carey
Keri Clark
Donald Cortis
Thomas Daniel
Scott Dattan
Leonard Devaney
David Edgren
Deidre Ganopole
Ray Gardner
Michael Gershel
Sharon Gleason
Ken Goldman
Charles Gunther
Helena Hall
Manuella Hancock
Andy Harrington
Nacole Heslip
Theodore Hoppner
Karla Huntington
Elizabeth Kerttula
Stacey Kraley
Cecilia LaCara
Keith Levy
C. Russel Lewis
Lynda Limon
Joe Loescher
Anthony Lombardo
Dennis McCarty
Jim McGowan
C. Levi Martin
Joan Nockels
Shannon O'Fallon
Jude Pate
Richard Payne
Audrey Renschen
Jan Rutherdale
Vance Sanders
Laurie Sayan
Michael Schaffer-
Pamela Scott
Marja Selmann
Anthony Sholty
Aleen Smith
Colby Smith
Loren Stanton
Krista Stearns
Trevor Stephens
Robert K. Stewart
Tony Strong
Jody Sutherland
R. Scott Taylor
Brian Timbers
John Vacek
Jim Valcarce
David Weber
Jennifer Wagner
Tom Wagner
Teena Williams
David Winston
and Will Woodell,
Davis Wright Tremaine, LLP
Edgren & Associates, PC
Faulkner Banfield, PC
Hedland, Brennan, Heideman & Cooke, PC
Hicks, Boyd, Chandler & Falconer
Hughes Thorsness Huddleston & Bauman, LLC
Lessmeier & Winters, LLC
Oles Morrison Rinker & Baker, LLP
Perkins Coie, LLP
Rice Vollan & Taylor, PC
and Smith & McCarty.

Thank you for helping victims of domestic violence and sexual assault!

Tea with the Chief

Continued from page 1

garden to the rear of the Court's block. Wing chairs with bold colors in yellows and blues and reds and a beige sofa. A coffee table between the four of us with a tea service.

The British academics pose their first questions to the organization of federal judges called the Judicial Conference. The Judicial Conference speaks on administrative issues of importance to federal judges. Supreme Court Justices are not members of the Judicial Conference. They are apart, the Chief Justice explains. There is no value to insights from lower court judges into the operations of the United States Supreme Court. And so the Justices don't participate in the Judicial Conference. Thus, two cadres, ranks, of judges: A top court with a membership of nine, and a club of appellate, trial court and specialty court judges with about a thousand members. "The" federal judiciary is two: With the top court segregating itself from discussion, scrutiny, insight from fellow federal judges.

The budget is prepared at the Supreme Court and goes to the White House and then arrives at the appropriation subcommittees of the House and Senate. "I send the two most junior justices to the Hill to defend our budget but they don't cut anything," Rehnquist explained. "The committee members like to have someone come up from the Court and explain it to them." The Chief Justice would know exactly what to do, what levers to leverage, if the Court's budget were savaged on the Hill. "It's all on a personal basis, who you know."

A paltry thirty millions of dollars are put into the Supreme Court's bank account and then drawn out by the Marshal with the credits and debits posted on his computer. Procurement done by the Clerk and his efficient functionaries, a police staff hired and run by a chief of police inside the building, with its own press room, law clerks, and functionaries. And the papers come in and out. Like the Grand Duchy of Fenwick in Peter Seller's 1959 classic The Mouse that Roared, the Supreme Court has some, but not all, the attributes of sovereignty. It lacks its own landfill, draws water from the public mains, and has no international airport. It coins no money and has no seat in the United Nations. But it makes its own rules of practice, and its own rules of jobsite justice. It frames and obeys its own dress code. The Court is committed to run itself, but no one asks how the judges' efforts were designed to produce results.

And then there is the bookstore. Filled with the currency of Justices' speeches, histories, memoirs, and biographies. The bookstore is on its own a singular enclave. It is run by the Supreme Court Historical Society whose website, supremecourthistory.org, gives its address as: 1 First Street, N.E. The website and the handouts at the Gift Shop don't advertise the charming connection between a public institution and a private nonprofit corporation dedicated to the collection and preservation of the history of the Court. Hence the Society uses history to cheer for the Court. But the development of constituencies of support for the institution is not only in the knick-knacks or the child's introduction to the Justices, in large print and glossy photos. Lawyers are invited to pay $100 for certificates to practice law before the Supreme Court and the Clerk's budget solemnly records this financial support, which at once defrays Congress's foreign aid for this little Fenwick and brands each attorney as a certified supporter of the Court. I had never joined their ranks. Back in Alaska I hustled off my $100 as soon as I received my Permanent Fund Dividend. There are more than 4,000 new barrister members per year.

So it is a truly independent institution. No other body of trustees for the American way of law is more of itself, for itself and by itself. And the beggar's ransom of thirty million dollars secures this separateness. Separate and higher, segregated into the highest stratosphere of government. The duchy imports and exports papers, trafficking in mountains of paper, from the invited and eagerly perused briefs of the Solicitor General to the prisoner's petition to this last court in the land. We were personally introduced to a vanload of last year's cert petitions.

Fenwick projects itself as a club of mature men and women eager to get on with one another. Perhaps it was the time of year. With so many opinions to write, cases to decide in May and June, the Justices and staff rather enjoy their recess. This isn't how you would run a corporation, Rehnquist told us. But then we're all in the mood to get along with one another. Cordiality is enforced by tradition. We all refer to each other by first name, Justice Ginsburg explained. A note will be clipped to a draft opinion: "Dear Ruth, please read this and let me know your thoughts, David." No email. And no jackets for the male staffers who do the errands in the halls.

But why should people – whether they are consumers of legal rules or involved in litigation as parties and so users of the civil adjudication systems – care about whether the Justices care about the job they do? Dialogue happens, in the broadest sense, when both sides are committed to ask and answer and both sides care about the outcome. Perhaps whatever makes the consumer care more about judicial product is a positive good because it enhances dialogue. If today the vital connection between nine Justices and consumers is nurtured by the schedule of opinions to be completed on time, the public Oyez, the robes (and chevrons), the Gift Shop, these posture an anthropology of comfort between the Court and its consumers. Perhaps one could tease all of this into what it means for an entire nation of consumers to get more vitally connected with designing, producing and managing error in Supreme Court effort. A theory may be required but that can hardly be un-American since we could steer clear of the empty logic of syllogism and rely on our own experience.

"Where do you teach, Professor Aschenbrenner?" the Chief Justice graciously asked me on the way out. "There is no law school in Alaska," I answered. In the end I was outed as a gatecrasher, upended on my own questions. Outside it was all bright sunshine and Vermont marble and the guards chased us off the steps after a couple of casual snaps.

It was rather pleasant to take tea with the Chief Justice and not at all what I had expected, which is rather the charm of being from a place too far away.