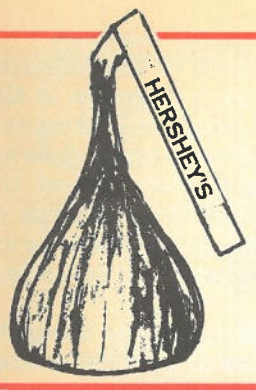


HUMOR

Trouble with kisses; Southeast wants rain; Sharing Space; & the TVBA

SERIOUS STUFF

Rule 100 approves mediation; Hillman revisited; there's tourism opportunity; lawyer jokes aren't; letters and more.

$2.00

The Alaska BAR RAG

VOLUME 17, NO. 5 — *Dignitas, semper dignitas* — SEPTEMBER-OCTOBER, 1993

Tort reform revisited: A long way from perfect

By Ken Gutsch

Apportionment of fault refers to the percentage of fault allocated by a court to the parties involved in a lawsuit. Apportionment can be a very complicated subject where one or more persons or entities are arguably at fault. The law on apportionment has changed twice since 1986. Prior to 1986, a defendant could be held liable for all of another tortfeasor's fault. In 1986, the legislature modified a defendant's liability to the extent that he may only be held liable for twice his percentage of fault if the defendant were less than 50 percent at fault.

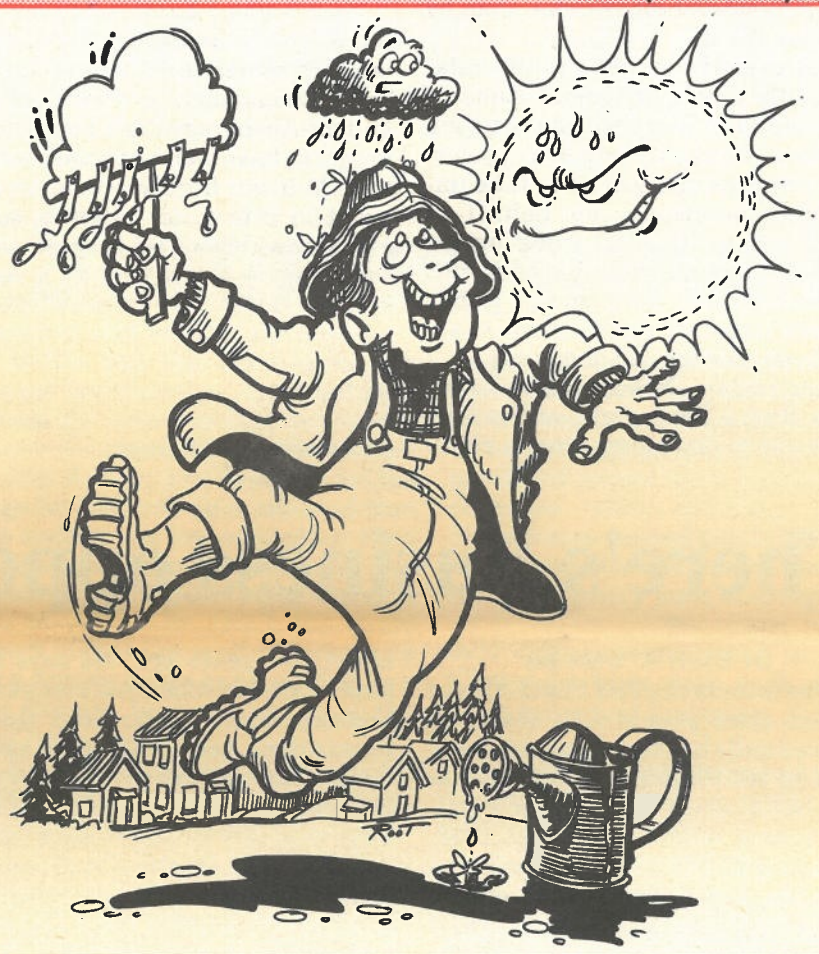
In November of 1989, ballot initiative changed the law on apportionment of fault again, and provided that the court "shall enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault."

However, there is strong disagreement as to how the initiative should be interpreted: Namely, is the jury's allocation of fault limited to the parties named to the lawsuit or to all actors to the transaction? The initiative also raised the related issues of whether a named defendant could be held liable for the fault of persons or entities not named in the lawsuit, and whether a jury may allocate fault to such persons or entities.

Although the Alaska Supreme Court has never construed the initiative, several Superior and Federal District Court judges have. In *Owens v. Robbins*, Judge Larry Zervos held that fault may be allocated among non-parties. (September 27, 1991) Judge Dana Fabe later held in *Dunaway v. The Alaskan Village, Inc.*, that the initiative by its terms, does *not allow the allocation of fault to non-parties*, although defendants are free to implead third-party defendants

continued on page 8

Ketchikan Rain Dance (see page 14)



Rule 100 allows use of alternate dispute resolution

By Drew Peterson

On the brink of the 1990s, in the November-December, 1989, issue of the *Bar Rag*, in this column, I predicted that alternate dispute resolution (ADR) would be the growth legal industry of the 90s. I am increasingly seeing my prediction becoming reality. Now even the Alaska Court System is getting into the ADR business, with the adoption of Rule 100 to the Alaska Rules of Civil Procedure.

Rule 100 is Alaska's first statewide mediation rule. Mediation is an ADR technique whereby parties enter into structured negotiations, with the assistance of a third party neutral "mediator." Mediators attempt to help disputing parties to change their focus. Mediators try to get parties away from specific positions about a dispute. They try to help disputing parties to look at their long term relationship with each other and at the realities of their alternatives to negotiation. Such alternatives are often worse than parties think, in the heat of the moment and their desire to prove the "truth" of their side. Mediators try to get parties to look at the forest and not just the trees. Especially in cases where fighting over the trees could do substantial damage to the entire forest.

Under Rule 100, any party to a lawsuit, or the court itself, can request mediation of the underlying dispute. Such a procedure can be ordered by the court any time that it determines that mediation may lead to an equitable settlement. A court order for mediation must include 1. the name of the mediator to be used, or a procedure for selecting a mediator; 2. instructions to who shall pay for the mediation (usually divided equally by the parties; and 3. a deadline by which the initial mediation conference shall be held. Mediators named can be peremptorily challenged in the same manner as judges or masters.

Mediation conferences under Rule 100 are to be conducted at mutually agreed locations or else at sites designated by the mediator. Parties or their attorneys may file confidential briefs of not over five pages, although such briefs are not required. All parties ordered into mediation are required to attend an initial session and to meet with the mediator both in a joint meeting and separately, if the mediator so requests. Attorneys may be present at all mediation sessions, but are not required. After the first introductory session, any party can withdraw from the mediation at any time.

The mediation procedure under Rule 100 is private, confidential, and voluntary beyond the obligation to attend the first orientation session. The mediator is not allowed to testify as to any aspect of the mediation proceeding. Nothing in Rule 100 serves to otherwise delay any of the other deadlines imposed by the Alaska Rules of Court. If successful, the parties themselves will prepare court documents dismissing the underlying action, or such parts are resolved through mediation.

Not all cases are appropriate for mediation. In determining which cases to refer to mediation, Rule 100 admonishes courts to consider whether there is any history of domestic violence between the parties which could affect the fairness of the mediation process or any party's physical safety. Mediation may not be ordered in any statutory domestic violence proceeding, and conduct which constitutes domestic violence under state law may not be the subject of mediation under the rule.

Alaska Civil Rule 100 has already

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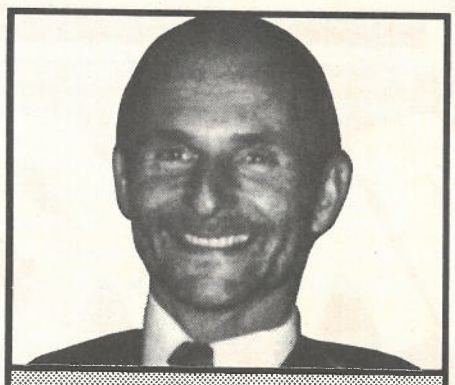
President's Column

We must improve our service

It's not that the lawyer jokes aren't funny any more; it's just that I'm getting tired of hearing them. More than that, I'm getting tired of hearing how the profession has sunk to new depths in the public's eye. It's time to do something — for the organized Bar to do something. It's time to change.

I don't think the American Bar Association is going about it the right way. I don't think it will do us much good to have a public relations expert try and convince others that lawyer jokes aren't funny. Some of them are. Anyway, we're not the only good profession that gets ridiculed, or cast as the villain. We're likely to do more by laughing lawyer jokes away, than by fighting them.

But even if you are in public relations it's tough to defend some of what we do as lawyers if you're trying to win a popularity poll. Our profession requires many of us to take unpopular positions, on behalf of unappealing litigants, using imaginative arguments usually at odds with societal norms. Few in the public believe these efforts do them much good, no matter what we say. It's human nature. Nobody wants to believe that a basic right enjoyed by them every day stems from a claim



Philip Volland

asserted by some lawyer on behalf of a pornographer, or a rapist.

And I don't know why, but the public good already done by so many lawyers seems to be falling on deaf ears. Bar members' pro-bono services and the Anchorage Bar's Youth Court program have won national recognition. You can hardly attend an arts event in this state, listen to public radio, or watch a PBS program without noticing a law firm as a major sponsor. But this doesn't seem to make a difference. Maybe this is because these services are and will be expected of us as individual lawyers. And maybe that means it's time we do something different.

The "we" I'm speaking of is the organized Bar — the Bar Association. Individual attorneys have made substantial contributions to public service and it's time that the Bar began doing the same. If we expect to have the public image of lawyers change, then the public entity which represents lawyers must itself have a public presence and by its own actions change the image of lawyers in the public's eye.

It won't be enough if these efforts are just the Bar defending lawyers and explaining the good lawyers do. Though the Bar needs to do this, and do a better job at it, it must do more. The Bar also needs to be seen providing a public service, directly to the public, with no strings attached. For instance, the Bar can sponsor an open forum every year at its annual meeting directed at a public health or safety issue important to the community. Why will this help? Because maybe the best thing the Bar can do to increase public esteem for lawyers is not to do something for lawyers, but for the public instead.

But these efforts at improving public esteem for the profession cannot come at the expense of direct services to members. To the contrary, the Bar needs to begin increasing its services to members. Many of the problems diverting the Bar's attention in the past — a huge discipline backlog and fiscal restraints requiring a dues increase — are now under control. It's time to begin thinking of ways to improve services to members by offering new programs and expanding existing ones.

These words and these thoughts aren't just my own. At its September meeting, the Board of Governors spent nearly a full day for the first time in 10 years identifying the areas where the organized Bar needs to improve, and fashioning a long-term plan to address these needs.

What emerged were two priorities; the need to improve public esteem for the profession, and the need to improve services to members. The first requires bold and innovative thinking, and the second requires a varied menu responsive to a diverse bar. But both will happen. Some this year, some the next, some the year after that. The commitment of the staff and the Board shown at the Board's planning session speak well for the results that will follow.

To do this job effectively and well, though, the Bar needs to hear from you. The staff and the Board need feedback on new services bar members would like to see, and existing services that can be improved or eliminated. We need ideas on public service programs and ways the Bar can address the community's perception of the profession. With these ideas, and by taking a leadership role in public service, the Bar Association itself may be providing its best service for members.

There's business opportunity in tourism

BY SCOTT A. STERLING

One interesting fact about Alaska is that more people visit the state than actually live here. Statistics compiled by the Alaska Visitors Association (AVA) show that almost a million people visited Alaska in 1992, including 535,000 vacation-oriented travelers. A landmark million or more visitors will come to Alaska in 1993 if current projections and record-breaking monthly totals through July, 1993, hold fast.

That growth is due in great part to successful ad campaigns by the Alaska Tourism Marketing Council (ATMC), which is a quasi-public body jointly operated by the AVA and the State of Alaska Dept. of Commerce and Economic Development, to market and sell Alaska as a premiere tourist attraction. Through extensive marketing research, testing and ad campaigns, the ATMC has amplified the call of the wild throughout the Lower 48 and abroad.

With growth comes financial success. Visitor industry revenue, employment and investment is an island of promise in that otherwise treacherous sea known as the Alaska economy. According to the AVA, between 1989 and 1990 visitor businesses generated $1.5 billion in revenues, with approximately $822 million going for business spending and $260 million going for taxes, payment to capital, and profits. The total investment in Alaska's visitor industry is estimated by the AVA at $448 million, without including an estimated $2 billion or more in cruiseship investments.

Representing visitor industry clients is really a matter of practicing sound business and commercial law, according to Anchorage lawyer Bob Flint of Hartig, Rhodes, Norman, Mahoney & Edwards. Flint began representing visitor industry clients about five years ago. He says that today's market consists of many small business owners who need timely, economical help with real estate transactions, contracts, sale-and-purchase of assets, and employment law. Flint sees most small Alaska visitor operators utilizing legal services only on an "as needed" basis, although the legal environment is becoming more rather than less complicated.

Liability issues are a major visitor industry concern according to Flint and industry consultant Dale Fox. Flint is conducting a seminar on small tour operator liability under Alaska agency law at this year's AVA convention, and Fox notes that for small tour operators and travel agents, legal issues surrounding their liability for harm coming to customers booked on or through package tours are significant. Industry concern over that issue has been translated into proposed legislation in the Alaska Legislature.

"Liability issues are a major visitor industry concern."

House Bill 300, which is awaiting action in the Alaska House of Representatives, would establish by statute "the responsibilities of persons who operate commercial recreational activities and persons who participate in those recreational activities and to decrease uncertainty regarding the legal responsibility for injuries that result from participation in recreational activities." The bill is endorsed by the Alaska wilderness Tourism and Recreation Association (AWRTA).

The controversial centerpiece of the bill provides that "A person who accepts an inherent risk of a recreational activity as described in AS 05.45.010 is contributorily negligent to the extent that the inherent risk causes injury, death or property damage." The bill is sponsored by the House Labor & Commerce Committee chaired by Representative Bill Hudson (R-Juneau).

On an industry-wide basis politics and legislation are addressed by the AVA Government Relations committee led by Governmental relations Vice-president Bob Englbrecht of TEMSCO Helicopters, a "Travel PAC" political action committee, and AVA lobbyists Clark Gruening and Sam Kito. Final decision-making power lies with the AVA board of directors. Past AVA actions include an aggressive campaign to counter media portrayal of the Exxon Valdez oil spill as a statewide disaster. AVA also appeared before the Alaska Board of Game and opposed basing the states wolf control policy on tourism considerations.

AVA plans to increase its participation in important public policy debates on a statewide basis in years to come. The group will voice visitor industry views on such matters as the Tongass National Forest Land Management Plan, development of new means and modes of access to Denali National Park, road access to Whittier and much-needed maintenance and improvement of Alaska's state parks.

Overall the Alaska visitor industry is enjoying a period of regular annual growth, financial health and public support. Members of the private bar interested in serving visitor industry clients should sharpen their business law skills, stay abreast of events and, as always, keep a close eye on costs.

The Alaska BAR RAG

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Letters from the Bar

Rejection

In my letter to Lawyers Against Discrimination (LAD?), which was recently printed in the Alaska Bar Rag, I gave my opinions regarding homosexual behavior.

Now the Bar Rag has printed a letter from Attorney Allison Mendel accusing me of calling her immoral, degenerate, and a pervert.

I reject Ms. Mendel's accusations. If my letter is reread, your readers will see that I expressed opinion on conduct, and not on persons or personalities. I never called Allison Mendel anything in my letter. In fact, I don't even mention her in my letter.

Therefore, any appellations of Ms. Mendel that she attributes to me are not mine, but instead, are strictly self imposed.

Wayne Anthony Ross

Way-to-go-Waco

Atty Phillip P. Weidner:

I saw your poem of the Waco incident in the Alaska Bar Rag which my son Tucker Thompson receives.

I took the liberty of sending copies of it to Don Young, Ted Stevens and Frank Murkowski.

I don't know when I have appreciated a poem so much. I only thank god there are folks like you still around.

Congratulations and keep up the good work. It was beautiful.

Donnis Thompson

Objection

I have read the "Torts" column in the July-August issue in the *Alaska Bar Rag*, written by my good friend Michael Schneider, columnist, and interestingly, editor-in-chief of The Bar Rag. I believe that it is unseemly and improper for Mr. Schneider, in his capacity as editor-in-chief of The Bar Rag, columnist, and losing counsel in the *Hillman* case, to fulminate about the injustice of the *Hillman* opinion, and particularly, his losing the case. He should not be using his position as a bully pulpit to advocate his own personal agenda or his own cases. If he wishes to espouse his own personal philosophy or to advocate his own cases, let him issue his own news letter at his own expense.

The only saving feature of the article Mr. Schneider has written is that he admits that his is not objective about the subject matter. His lack of objectivity renders the entire exercise useless. Had he engaged in a balanced but dispassionate and objective analysis of the *Hillman* opinion together with prior case law, then the resulting work product would likely have been thoughtful and given Mr. Schneider's scholarly abilities, insightful. Given the circumstances, however, he is doing nothing more than crying foul. The Bar Rag should not be a forum for that activity. It is funded by the Bar Association, and I for one strenuously object to the Bar Association funding Mr. Schneider's personal agenda.

Clay A. Young

Comment: Mr. Schneider has been an Alaska Bar Rag columnist, fulminating on torts and hunting, since 1987. He was appointed editor in 1993. Mr. Schneider in July was published in his traditional column space.

— S.J.S.

Show advertising restraint

For the last several years I have been spending as much time travelling throughout the United States as I have in Alaska. One of the first things I do in a new town is to look at the yellow pages to see the latest in lawyer advertising. I also see considerable lawyer advertising on local television. Most of this advertising does not portray lawyers in a very attractive light. In many cases they appear to be brokering what used to be described on *LA Law* as a drive-by sleaze pit. Some are amusing, few are professional.

The *National Law Journal* recently published the results of a poll indicating that the public's perception of lawyers has dramatically deteriorated in recent years. This is a disturbing trend. Our profession cannot endure with bad reputations.

Part of this lowered lawyer esteem has come about because of a concentrated and well financed campaign by the insurance industry against lawyers. Lawyer jokes, claims of destruction of American businesses, lack of international competitiveness, malpractice premiums, and distorted publicity of excessive verdicts have all contributed to this public perception.

Lawyer advertising has only served to compliment and reinforce this anti-lawyer campaign. Most of this advertising is telling the public that everything the insurance industry is saying is true.

Lawyers and the organized bar must campaign actively against the insurance industry's publicists. Lawyers themselves must exercise professional restraint in advertising. In fact, some of the advertising I have seen is so harmful to the profession generally that it could justify the creation of standards for advertising by the bar association itself. This, from someone who is sworn to defend the first amendment to the death.

Robert H. Wagstaff

Gender bais

Your "President's Column" summary of the gender bias program concluded with the following disturbing report:

> But then came the panel of our own, and the denial. Gender bias, it seems, didn't or couldn't exist in Juneau or Fairbanks because "we're not like that."

Given that I was the only Fairbanks panelist, your remarks are obviously directed at me.

You have inexplicably attributed views to me which are precisely the opposite of those I expressed at the Bar Convention. As I said, I believe it to be an empirical fact that the overt manifestation of gender bias in Fairbanks courtrooms has diminished substantially since the time I first started practicing here. I also believe that development be somewhat insidious, in that it tends to mask the subtler forms of gender bias that continue to plague the legal profession as a whole. Those are the two fairly innocuous points I made during the panel discussion. They certainly were not intended to suggest that "[g]ender bias... didn't or couldn't exist in . . . Fairbanks," and I am astonished that you have chosen to interpret them in that light. I am equally astonished that you have made the same mistake with regard to the Juneau panelists, neither of whom said any such thing.

As I indicated at the Bar convention, I share your recognition of the need to "change how we feel and act in our own firms and our own courtrooms"; I hope you are able to recognize that this need extends well beyond the blatant issues you have discussed in your column. I also agree that "equality" and "fairness" must be the guiding principles in our effort to make those changes, and wish you success in that endeavor.

Charles R. Pengilly

Send anecdotes

Early this summer for the fun of it I sent to you a "Letter to the Editor" which I also sent to other state bar journals asking that your readers send to me anecdotes of unusual or humorous courtroom encounters that they have experienced or heard about for use in a proposed book to be entitled: "Tricks of the Trade in the Practice of Law" or "The Lighter Side of Practicing Law" authored by "We, the Lawyers," I being designated as Ghost Editor. So far I have received 26 anecdotes from lawyers in 12 States including: California, Delaware, Florida, Idaho, Minnesota, New Jersey, New Mexico, New York, Oklahoma, Oregon, Vermont, Wisconsin.

My problem is that I started gathering anecdotes several years ago and have too many from Oregon and not enough from other states. I need at least 100 anecdotes from all 50 States.

So, to jump-start my "teeny weeny" business enterprise and attract more contributors, I am undertaking to publish in binder form by the end of this year a book of 50 good anecdotes to Circulate the best I can in as many states that I can.

I ask that those of you who can recall actual humorous courtroom experiences or have heard about them through reliable sources, to write them in anecdote form and send to William F. White, 205 Berwick Road, Lake Oswego, Oregon, 97034. I will acknowledge receipt and before publication have each author approve the edited anecdote as being told by each author.,

William F. White
205 Berwick Road,
Lake Oswego, Oregon 97034

Food for thought

Lawyers and accountants are being eyed by the IRS as tax cheats, says the *Kiplinger Letter*. IRS pilot tests have generated lists of dozens of lawyers and accountants in NYC and Chicago who haven't filed their own returns in recent years.

So while the IRS pursues criminal and civil actions against them, its computers are checking filing records of attorneys and CPAs elsewhere for similar patterns of non-compliance. The program will go nationwide.

Defense lawyers representing some of those being investigated say many paid the tax via quarterly estimates but never got around to filing. Where true, IRS will likely go lightly once returns are filed. But others can expect an unforgiving attitude from IRS agents and gov't prosecutors.

The Kiplinger Letter

You are cordially invited by the Supreme Court of the State of Alaska
to the installation of
Larry D. Card
as Judge of the Superior Court of Alaska
and
James N. Wanamaker
as Judge of the District Court of Alaska
on the first day of October nineteen hundred and ninety-three
at three-thirty o'clock p.m. in the Supreme Courtroom
Boney Memorial Court Building, Anchorage, Alaska

WE'RE MOVING THE 1994 CONVENTION TO MAY!

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

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

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

Solid Foundations

IOLTA withstands tests

The case of *Washington Legal Foundation Massachusetts Bar Foundation,* in which the plaintiffs, two lawyers and two consumers of legal services claimed that the Massachusetts IOLTA program violates their First, Fifth, and Fourteenth Amendment rights under the United States Constitution was discussed in the November/December *Bar Rag*. The 12 defendants named included the Massachusetts and Boston Bar Foundations and the justices of the Supreme Judicial Court. Judge Joseph Tauro dismissed the complaint in district court on May 28, 1992.

On May 20, 1993, in a 39-page opinion from the United States First Circuit Court of Appeals, Senior Circuit Judge Bownes affirmed the district court's dismissal.

The plaintiffs claimed that by appropriating the interest from a lawyer's trust account, the IOLTA

Mary Hughes

program was taking the beneficial use of client funds in violation of the Fifth and Fourteenth Amendments. They also claimed that the IOLTA program forced them to associate with political and ideological causes which they found offensive, in violation of the First Amendment.

The Court stated, in discussing the taking cause of action, that "the plaintiffs must first show that they possess a recognized property interest which may be protected by the Fifth Amendment." After discussing the beneficial use of deposited funds, the Court was "not convinced that the deposit of clients' funds into IOLTA accounts transforms a lawyer's fiduciary obligation to clients into a formal trust with the reserved right by the client to control the beneficial use of funds as claimed by the plaintiffs." The Court stated that "(t)he property rights claimed by the plaintiffs are intangible," and that there existed "no logical or legal support for the plaintiffs' claim that the IOLTA program has caused a physical invasion and occupation of their intangible property rights." In short, "the IOLTA Rule has not caused a taking of plaintiff's property."

In dismissing the First Amendment claim, the Court stated that "(t)he IOLTA Rule does not compel the plaintiffs to display, affirm or distribute ideologies or expression allegedly advocated by the IOLTA program or its recipient organizations. Direct compelled speech, therefore, is not an issue in this case." The Court explains that "the IOLTA program recipient organizations benefit from an anomaly created by the practicalities of accounting, banking practices, and the ethical obligations of lawyers. The interest earned on IOLTA accounts belongs to no one, but has been assigned, by the Massachusetts Supreme Judicial Court, to be used by the IOLTA program."

It appears likely that the plaintiffs will seek a Writ of Certiorari by petitioning the United States Supreme Court.

Ironically, while the courts continue to reject constitutional challenges to the program, low interest rates have dramatically decreased the revenue accrued from IOLTA programs nationwide. Without increased participation, many of the programs supported by IOLTA funding are in jeopardy.

Are 18% of lawyers alcoholics? Magazine urges action

Alcohol is the number one drug of addiction in the United States, and lawyers are as susceptible to this addiction as those in other walks of life. Eighteen percent of the legal profession in some areas of the country are alcoholics, according to *Experience* magazine in the article "Spare the Bottle, Save the Lawyer" by Ray DeLong, editor of the periodical.

The question of who becomes an alcoholic cannot be easily answered. One controversial explanation is genetics. But while there may be a genetic predisposition toward alcoholism, other factors such as choice can also be of influence, DeLong notes.

A representative from The Other Bar, a group dedicated to self-help for California alcoholic lawyers, says, "If you come from a dysfunctional family, if the genes are right and if you are exposed to alcohol or drugs, the chances are 50-50 that you are going to have problems with them sometime between the ages a 19 and 40 for a man."

The American Medical Association started calling alcoholism a disease in 1957 and most alcoholics characterize the problem that way. The problem with calling it a disease, DeLong observes, is that people may expect to be excused for their conduct when drunk.

The author points out that the Supreme Court called alcoholism "willful misconduct" rather than a disease in a case a few years ago involving two men wanting back medical benefits from the Veterans Administration because of their disease of alcoholism.

Stress, along with other factors, such as lack of supervision may contribute to lawyers' problem drinking. Also, denial is more of a problem for lawyers because they are well educated and well paid, according to Don Muccigrosso. Muccigrosso established the first fully funded lawyer self-help group in 1982.

Drinking is not a problem only for young lawyers. Studies have shown that lawyers who have practiced longer seem to be more susceptible to problem drinking, the article points out. This happens partly because tolerance for alcohol decreases with age. Older people also have more cognitive problems as a result of drinking. Older lawyers need longer treatment, the recovery rate is much less and they tend to return to drinking quicker than younger alcoholics do, the article explains.

John Keegan, chair of the ABA Commission on Impaired Attorneys, says in the article that many people suffer when a lawyer hits bottom, including unsuspecting clients. Being an alcoholic does not necessarily put the lawyer or their career in jeopardy but the problems occur when the drinking affects a matter relating to a client.

One lawyer misappropriated client funds and the Washington D.C. Court of Appeals ruled in January 1987 that the alcoholism caused the misconduct and did not suspend his license even though he had been cited for 24 disciplinary rule violations. Different states have different views on alcohol as a mitigating factor. Some courts will automatically disbar any lawyer who misappropriates clients funds, others impose suspensions.

The article contends that lawyers should not be excused for violating rules because they were drunk, but if they are in a recovery program, that should be taken into consideration.

The next issue of *Experience* will feature "Part II: The Response," dealing with how alcoholic lawyers can get and are getting help.

Experience is a publication of the Senior Lawyers Division of the American Bar Association.

Rule 100

continued from page 1

gone into effect, effective July 15, 1993. The court system administration has recently published a deskbook for judges about the rule, including a Directory of Alaska Mediators. The directory includes the names of 96 mediators available throughout the State of Alaska, including in many rural areas. It is available in all of the Alaska Court System law libraries. The Directory of Mediators also includes comparison information about fees, training, experience, professional affiliations, educational background, and much more.

The United States District Court for the District of Alaska is currently considering adopting a rule similar to Alaska Civil Rule 100. Thus it is likely that court ordered mediation will soon be an option available in all courts in the State of Alaska.

With the adoption of Alaska Civil Rule 100, Alaska has joined a number of other courts around the United States in beginning to institutionalize the new field of alternate dispute resolution. More and more alternatives are being developed to the sometimes costly and inefficient methods of resolving cases through the litigation process. More than ever, I believe that ADR is the legal field of the future. It will have more and more impact on the administration of justice in Alaska and the United States as time goes by. Civil Rule 100 is only the beginning of such a trend in Alaska.

SOLICITATION OF VOLUNTEER ATTORNEYS

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

Attorneys may add their names to the volunteer lists by contacting the area court administrator(s) for the appropriate judicial district(s):

First District:
Kristen Carlisle
415 Main St. Rm 318
Ketchikan, AK 99901-6399
(907) 225-9875

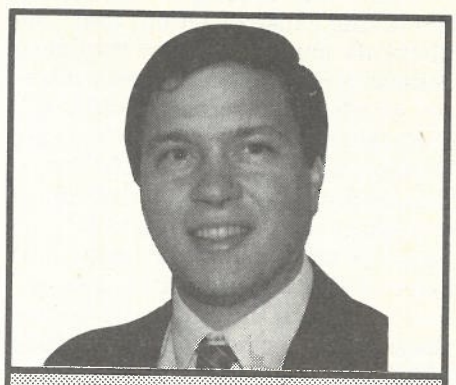
Second District:
Mike Hall
303 K Street
Anchorage, AK 99501-2099
(907) 264-8250

Third District:
Al Szal
303 K Street
Anchorage, AK 99501-2083
(907) 264-0415

Fourth District:
Ron Woods
604 Barnette St. Rm 202
Fairbanks, AK 99701
(907) 452-9201

The Public Laws

The property claimant and the 400 pound gorilla



Scott Brandt-Erichsen

I have been planning an article on this topic for some time. I had hoped to write a victorious "Why I Became an Attorney" tome chronicling my father's frustrating experience with the Bureau of Land Management's rejection of his homestead entry and how that experience motivated me to become a lawyer and to right the wrong.

Sure, I proceeded, after graduation from law school, to file a quiet title action on behalf of my father seeking to gain title to the land he had sought under the Homestead Laws. But, by the Ninth Circuit's split decision in *Viggo Thor Brandt-Erichsen v. U.S. Department of Interior, BLM, et al.,* decided July 15, 1993, that effort appears to have been unsuccessful. Although, like the Energizer Bunny, we keep going (a rehearing *en banc* has been requested).

My father's argument was based on a little-used statute, 43 U.S.C. § 1165, which Congress passed in 1891. That section, or at least my father's interpretation of this section, provided in essence, that an entryman under the Homestead Laws would be entitled to a patent, regardless of the validity of his entry, if the Department of Interior did not contest the land claim within two years of completion of the final entry and application to purchase.

The statute had been enacted in response to a Land Department practice at the time of sitting on entries and not processing them to patent. As the backlog of unpatented claims increased and individual entrymen were forced to wait longer and longer time periods before receiving a patent, Congress addressed the situation by passing Section 1165 to require the Land Department to "fish or cut bait" on the entries, and to either contest them or process them to patent within two years.

Some may question the relevance of this story to current practitioners. But the parallels in the practices of the Department of Interior in 1993 and the Land Department in 1891 should be readily apparent to anyone who is trying to get the patent for land transferred from the Department of Interior to an individual claimant, whether it be via Native land claims or through some other conveyance program.

In discussing the protracted processing of my father's entry under the Homestead Laws with other practitioners, I am led to believe that there are numerous individuals throughout the state who are waiting for either Department of Interior action patenting land to an individual or Native Corporation action in completing the transfer of land from the federal government through the Native Corporation to individual claimants.

If in fact these transfers are proceeding at a snail's pace, and if the problem is as widespread as I am led to believe, perhaps it is time for Congress to look at an updated version of 43 U.S.C. § 1165 to expedite these transfers before all of the original claimants are deceased.

Most of the individuals involved do not have the resources to pressure the Department of Interior. Like the 400 pound gorilla, the Department of Interior can sit where it wants, and can delay the issuance of patents until it is good and ready. If the current leadership is any guide, the Department of Interior may not be good and ready until at least 1997.

All in all, I would have much preferred this to be an article filled with victorious boasting rather than the relation of what turned out to be a largely quixotic family effort. However, if the concept of a modern version of 43 U.S.C § 1165 could be of benefit to other land claimants throughout Alaska, then the Phoenix which rises from the ashes of failure in my father's case, could lead to ultimate victory over bureaucratic foot-dragging.

The other side of 'Hillman' insurance case

By Peter J. Maassen

In the last issue of the *Bar Rag*, Editor and torts columnist Mike Schneider presented his own perspective of a recent Supreme Court decision, *Hillman v. Nationwide Mutual Fire Ins. Co.,* Op. No. 3971 (July 9, 1993), in which he represented the Hillmans. Since I represented Nationwide on that appeal, I believe that the following remarks should bring some balance to the discussion.

Mr. Schneider's column included a catalogue of supposed instances of insurer misconduct. Even dissenting Justice Compton (at p. 25, n. 2) concluded that "the Hillmans have not at this point presented convincing evidence of their assertions," although he did believe there to be "a genuine issue of fact."

While Nationwide is of course pleased to have won Hillman on a legal issue—the necessity that an insurer act unreasonably toward its insured before it can be held liable for bad faith—it is unfortunate, in a way, that the Court did not have to address the catalogue of "facts" head-on instead of simply assuming them to be true for purposes of discussion. Nationwide *did* address the allegations one by one in its brief, and it showed them all to be baseless. No reasonable jury could have seen the facts in the way the Hillmans presented them. Had the majority found it necessary to reach the facts, it undoubtedly would have agreed.

It is an ironic by-product of winning on a legal point that posterity will read the facts of this case in the light most favorable to the plaintiffs and is unlikely to know how unreasonable that light really is.

The *Hillman* litigation dealt with many issues, and I refer the serious student of bad-faith law to both the recent *Hillman* opinion and *Hillman I*, 758 P.2d 1248. (Alaska 1988). One of the pivotal issues in the case was whether Nationwide's adjuster acted unreasonably in advising the Hillmans that their automobile policy did not cover their daughter's ATV accident. In *Hillman I*, the Court found that the adjuster's reading of the policy was "the only reasonable interpretation" of it and rejected the Hillmans' contrary reading as objectively unreasonable. 758 P.2d at 1250. Viewed in that light, there was nothing sinister about the adjuster's failure to make an extensive investigation of the liability issues, which the apparent lack of coverage had mooted. The eventual grant of coverage was based not on the language of the parties' contract but on public policy, which itself had changed since the Hillman accident; Nationwide's position was subsequently, and is now, expressly sanctioned by statute.

Mr. Schneider's allegation that Nationwide asked for an outside legal opinion merely to "paper the file" is belied by the facts. When Nationwide received an outside opinion that the issue of coverage was "a roughly 50/50 proposition" based on the law as it had existed at the time of the accident, its adjuster immediately informed Mrs. Hillman that the company was taking a fresh look at coverage, and he asked that she send him her daughter's medical bills to aid in the evaluation of the liability issues. This was apparently too much for the Hillmans, who seemed to have been hoping not for payment of the claim, as demanded, but for a final denial of coverage to fuel a bad-faith lawsuit. Instead of cooperating with the adjuster in the imminent resolution of their claim, they filed suit just a few days later.

The contention that Nationwide "stonewalled" the Hillmans' claim is also incorrect, as it stands the case on its head. A month after the Hillmans filed suit, Nationwide offered to settle the case for policy limits. At that time, however, the Hillmans had the bad-faith bit firmly in their teeth and wanted to run with it. Their settlement demands escalated throughout the litigation, while Nationwide's position that it was liable for no more than policy limits was eventually vindicated. In fact, following arbitration of liability, the Hillmans' allowable damages were found to be $55,000, close to Nationwide's valuation of the case at its onset and light-years away from the Hillmans' demands. The case lasted as long as it did solely because of the intractability of the plaintiffs, not the "stonewalling" of the insurer.

As an insurance consumer myself (and as a lawyer who has alleged bad-faith claims on behalf of plaintiffs in other contexts), I want to add a comment about the law as it was developed in *Hillman II*. Both Mr. Schneider and (with due respect) the dissent appear to have missed the point. In his dissent, Justice Compton construed the majority opinion to mean that *any* colorable defense to payment that is allowed by contract is objectively reasonable as a matter of law. But the majority did not say that. The majority held that there can be no liability for bad faith absent some evidence that the insurer's position—whether contractually allowed or not—is objectively unreasonable. That the insurer's position is consistent with the plain language of the policy is certainly one logical part of the calculus, but there is nothing in *Hillman II* that makes it determinative. The Hillmans' problem in pursuing Nationwide for bad faith

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View from the periphery

One former way to become a lawyer

By Walt Arden

The Alaska Bar Rag needs an occasional voice from someone who is *not* so distinguished, *not* so accomplished, who would rather cause the reader to relax and think that this piece can be skipped entirely. Being so encouraged within myself, I therefore wrote.

My dad wanted me to become a lawyer, since his goal to do so was frustrated by the war. A neighborhood friend also early encouraged me to be one, since I played with words and rejoined kids with meaningless sentences such as, "Inimical to your initial subsumption inherent to the correlative ideology is the admonition that contrast to the superlative is nugatory." I remember that one from the informal debates at the Precarious Vision in San Francisco, so the year was 1963 and I was 16. Being so encouraged, I became a lawyer.

It was fairly typical beginning; Abraham Lincoln High School and San Francisco State College. I graduated during a time so militant that the world renowned semanticist, S.I. Hayakawa, was driven from the college, resigning his presidency.

I had gone to Newport, Rhode Island during my sophomore and junior year summers for accelerated naval reserve officer training, and so three days after I graduated the Navy had me. It was good duty, a food ship. We replenished oilers and carriers along the Vietnam line run and, after visiting ports for recreation, went home playing chess and bingo for 15 days on the Pacific Ocean.

I was off of active duty on September 2, 1969 and went into San Francisco to enroll in law school. My grades qualified me for Hastings, one of the big name law schools there, but the waiting list was two years. So I applied at a night school, San Francisco Law School. The academic dean told me to come on in, tonight was the first night of classes.

"But," I said, "I don't even have my transcripts."

"That is all right," she said, "get them later."

So that morning I was on active duty and that evening I was in law school.

"So that morning I was on active duty and that evening I was in law school."

It was a strict, old-time, patriarchal school, begun in 1909 and serious about its California accreditation. There were no frivolities such as take home exams, pass-fail exams or electives, and the first year was a hatchet.

SFLS was easy to get into, but difficult to stay in; 120 Students entered with me the first year, and 25 went into the second of four years,[1]

Twenty five students graduated with me in June, 1973, but not the same 25 who went with me into the second year. To the school's chagrin, only 13 of the 25 passed the bar the first time that summer. This was the same as the general pass rate, 56 percent.

I wanted to practice law in the financial hub of San Francisco, the pulse of the California legal community, namely the Mills Building at 220 Montgomery Street (where I has been assistant law librarian on the 9th floor for four years.)

However, San Francisco is a tight legal community. If not from a name school, one has to have a rock-bottom two years of in-court experience to qualify for an associateship, and it was nearly impossible to start as a sole practitioner. I examined the potential of being an assistant public defender in sleepy outlying Stockton, but this did not appeal to me. Also, I did not want to practice in Los Angeles.

A friend from the law library told me about a real need for "court attorneys" in Anchorage, Alaska just before December 19, 1973, when I was sworn into the California bar. This would give me my in-court experience to return to the Montgomery District.

I was astonished at the prospect, since I had never been to Alaska, knew no one there, and it was the middle of the winter. However, I had been fascinated with Alaska and had tried unsuccessfully to be stationed there as a naval reserve officer. On December 21, I expressed by potential interest on the phone to the chief court attorney, in a three-minute call. I was still transfixed at the new prospect of going to Alaska, and in another three minute call I told the chief court attorney that I didn't know how I was going to get there, but that I would see her on January 2.

I broke the news to my folks on Christmas Eve, and I believe they were more astonished that I was. As there was no point in waiting, I left the morning of December 28.

Toward the end of law school I had lived in the quaint town of Sausalito north of San Francisco, which I somehow could afford with my hourly wages from the law library. I shared with Pete Tsepeleff in a wooded apartment dramatically high above San Francisco Bay, looking straight down through the sliding glass panels to the bay through the trees.

Anyway, it was in Sausalito that I found my transportation to Seattle, an ex-Yellow cab with the side bashed in, the words streaked out and with 150,000 miles on it. I wanted someone to go with me, and the only person I found who would go was Ralph, a friend who had grown up with me in the neighborhood but who was an aficionado of acid trips. He was suitable company, as he was lucid most of time. I would fly out of Seattle, give him the car, and he would live there.

I landed in Anchorage the evening of December 29. I was overdressed because I had known Alaska only from rumor. It snowed lightly, and my first priority was to find an apartment. I discovered the Cove Apartments at 6th & N, and called to ascertain the monthly rate. I couldn't find anyone to let me in that evening, but I later took it sight unseen since the price was right and it was within walking distance of the courthouse. Between then and January 2 I walked the town, being fascinated by the eerie glow of the sun on the sky at high noon. I was on the very edge of the world.[2]

The court attorney's secretary was a Christian. I had lived in San Francisco for 21 years and had never met a Christian. I shortly thereafter set foot for the first time in a church, at the ripe age of 27.

Things went well, and in June I met my lovely wife Linda and we married on January 3, 1975.[3] It was 25° below zero in Anchorage that day; my dad had come up to the wedding and has never been back since.

We honeymooned at Alyeska Resort, were it was 49 degrees below zero. In August of 1974 I had suddenly become, for a brief period, the only court attorney, after the law clerks learned they would have to also be bailiffs. I trained my successors; my term expired in May 1975 and we went to Colorado.

(Shortly after landing in Anchorage I had abandoned plans to return to the Montgomery District and I wanted to practice law in Alaska. The statutes and court rules then in place said that to qualify to take the bar I had to be from an ABA-accredited school. San Francisco Law School was fully California-accredited, but it was not ABA-accredited only because it was a night school and did not meet the full-time professor requirement. Shortly before the July, 1974 bar exam I was told I could not take it. Thereupon I filed an original application to the Alaska Supreme Court, averring that since the State of Alaska thought I was good enough to be a court attorney, I was good enough to take the Bar; and that there was so little difference between my school and the ABA school that it violated equal protection. I also stated that the first chief justice of the Supreme Court of Alaska was from my school; but this apparently gained me no points. The single justice sitting in review of my application said that there was no violation of equal protection. I petitioned for review before the full court.

"...the first chief justice of the Supreme Court of Alaska was from my school, but this apparently gained me no points."

The full court found 3 to 2 in my favor. They were going to appoint a master to hear claims about my school. By this time, the February, 1975 bar exam has gone by. I dismissed my case with prejudice, wanting to be sent out as the administrator of the newly-formed outreach from the Anchorage church, to be in Colorado Springs. Shortly before I left, the appointed master caught me in the hall and said he would have found in my favor.)

Colorado also required ABA accreditation, and I worked for the entire five years at Shepard's Inc. as a law editor.

By May, 1980, the young upstarts at the outreach church had differences with the wiser generation, of which I was a part. Also, I missed Anchorage. As a consequence, Linda and I resigned from our respective positions in the community, sold our house and returned to Anchorage.

The state of the law in Alaska when I returned was that to qualify to take the bar examination, one still needed to be from an ABA-accredited school. However, in the fall of 1981, the legislature interfered with the prerogatives of the Alaska Supreme Court and the Alaska Bar Association, and enacted a law saying that to take the bar exam, one needed to have been licensed to practice law for five years.

I went down to the executive director of the bar association, and said, "Sign me up."

He said, "no, we don't read it that way, it means five years of active practice."

I said, "it doesn't say that."

So, instead of studying for the July, 1982 Alaska bar examination, I wrote a 15-page memorandum to the Board of Governors citing similar bar rules and statutes to say that the language meant what it said in numerous jurisdictions. Ten days before the bar exam I prevailed at the Board of Governors level. But it would have been asinine to try to take the bar. After the exam had passed, I went to the executive director and said, "Sign me up" (for the February, 1983 exam). He did, and I felt a real urgency that I had to pass it the first time. This proved to be realistic; soon after, the statue under which I was able to take the bar was rescinded. To my knowledge I am the only person who was admitted to the Alaska Bar under this provision.

"the term, 'Christian Attorney' is an oxymoron, anyway..."

I was sworn in June 23, 1983 and was hired at my church as Administrator/Attorney on June 28. This would last for six years, and my position gradually devolved more to the side of representing congregation members who had a justified legal need and who could not afford an attorney. The church itself had no legal needs, other than outreach incorporation, insurance matters, government interface and the enjoining of one "Fred," who years ago had been hit in the head in a construction accident and now was living in the adjoining woods, annoying the school children and breaking some church windows.

I had a few practical problems; the term Christian Attorney is an oxymoron, anyway, and despite the fact that I wouldn't thus promote myself, I became known as the "attorney from the church."

I mean, I was not some strange breed. I would say, "I object, your Honor," and not, "This is that about the likes of which it was written by them aforetime of old, My soul hath no pleasure in it."

In January, 1989 the church and I amicably agreed that the staff association may be hurting my practice, and it generously helped me get stated on my own. From there, a law firm gave me a room and common office space for 16 months and helped be break into the larger legal community, for which I am very grateful.

On the one hand, I mostly liked my clients and they were not very demanding, but now I was finding that they had few legal problems and I did mostly adoptions and legal documents. What strife did occur within the church seemed to be resolved in the church and it would have been inappropriate to represent either side under the admonition of 1 Corinthians 6.

Along about April, 1991 my friend at an RV dealership needed me to do accounting for him right away, since his accountant suddenly had to return to Arkansas. I learned the RV

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Tort reform revisited

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based on "equitable indemnity." (July 25, 1991). In *Robinson v. U-Haul*, 785 F.Supp. 1378, 1380, n.4 (D.Ct. Alaska 1992) Judge James Singleton construed the initiative and following Judge Fabe's ruling, also limited the jury's allocation of fault to named parties, but allowed impleader of joint tortfeasors based on "equitable allocation" of fault.

Most recently, the Honorable H. Russell Holland, Chief Judge of the Federal District for the State of Alaska, thoroughly examined the initiative's history in *Carriere v. Cominco Alaska, Inc.*, Case No. A91-373 Civil. (March 24, 1993). *Carriere* illustrates well the thorny apportionment issues which lurk in multi-party litigation. In *Carriere*, the plaintiff was insured when he was struck by a beam that fell from a crane. The engine that powered the crane failed when it ingested some contaminated fuel which caused the beam to fall and strike the plaintiff. The plaintiff alleged negligence and strict products liability against Cominco, an Alaskan corporation which supplied the allegedly contaminated fuel.

Cominco asserted that it was not alone in the fuel distribution process and that other participants were at fault. (e.g. the quality control monitor and the owner of the construction project). Cominco asked for a ruling that the jury allocate fault to all concurrent tortfeasors, without regard to whether such tortfeasors were named by the plaintiff as parties to the lawsuit.

The ambiguity of the initiative

In construing the ballot initiative, Judge Holland acknowledged that the term "party" usually refers to one of two sides in a proceeding, but found that the initiative was ambiguous in its use of the word "party," when read in the context of the entire section of AS 09.17.080. Judge Holland found that AS 09.17.080(a)(2) "tantalizes" by referring to "persons who have been released under AS 09.16.040," but that AS 09.17.080 makes no mention of other joint tortfeasors who are not parties to the action. According to Judge Holland, such an omission of unreleased non-parties constitutes a "statutory gap of substantial import," because plaintiffs might choose to omit certain impecunious tortfeasors in the hope of litigating against only "deep pockets." *Id.* at 10.11. Thus, Judge Holland reasoned that AS 09.17.080(a) is seriously flawed "because of the omission of any provision with respect to unreleased non-parties." *Id.* at 11.

The legislative history

To resolve the ambiguity, Judge Holland examined the ballot initiative's legislative history and referred to the official election pamphlet which published statements supporting and opposing the initiative. Judge Holland noted that the statement in support of the initiative did not employ the term "party" and gave no indication that the fault of non-parties should be ignored in the fact finder's critical allocation of fault:

> The supporting statement contains nary a hint of the notion that fault should be apportioned among only those who the injured party decides to sue or who may be drawn into the litigation by the defendants. Again, the thrust of the supporting statement is that fault be allocated to anybody having responsibility and that each should pay only his personal share of that fault.

Id. at 18.

Judge Holland found that the statement filed in opposition to the initiative similarly employed the term "person" rather than "party." *Id.* The statement in opposition assumed that, under the initiative, plaintiffs would not be able to recover in full against impecunious defendants. The opposition makes no suggestion that fault would be allocated only among those named as defendants or otherwise brought into litigation by another party. *Id.* at 18, 19. Based on the Election Pamphlet, Judge Holland concluded that the initiative was not intended to restrict the allocation of fault to those brought into the litigation. *Id.* at 19.

The repeal of contribution

Judge Holland also construed the initiative to give effect to the express repeal of statutory contribution among joint tortfeasors. Judge Holland criticized the theories of "implied indemnity" and "equitable allocation" in *Dunaway* and *Robinson* because they contradicted the initiative's express repeal of statutory contribution. Implied indemnity and equitable allocation would result in a joint tortfeasor being sued when, as a matter of law, he or she owes the defendant nothing. *Id.* at 19. "These third-party defendant joint tortfeasors will presumably be required to defend the original defendant's contention that they were partially at fault for the plaintiff's injuries. Quite apart from a related procedural problem with that approach, it is plainly inconsistent with the repeal of contribution." *Id.* at 20.

Implied indemnity

Judge Holland felt that the Alaska Supreme Court would not accept the theory of "implied indemnity" because the supreme court in *Vertecs v. Reichold Chemical*, 661 P.2d 619 (Alaska 1982) expressly rejected implied indemnity. Although such rejection was based in part on the existence of statutory contribution, Judge Holland noted that the *Vertecs* court also rejected implied indemnity because of the vagueness of standards for determining its application, because it would discourage settlements among negligent tortfeasors, and contravene the modern tort goal that each tortfeasor should pay for damages attributable to its own tortious acts. Holland at 20,21, n. 10; *citing Vertecs*, 661 P.2d at 624-25.

Judge Holland further reasoned that the implied indemnity and equitable allocation theories falsely assumed that the Alaska Supreme Court would create an implied cause of action which the voters had expressly repealed:

> Prior to the . . . initiative there was contribution with no right to implied indemnity. . . . the voters repealed contribution, leaving one tortfeasor unable to sue a concurrent tortfeasor. That is what the electorate intended. Creating a cause of action for implied indemnity runs counter to the electorate's intent. **This court respectfully suggests that the Alaska Supreme Court could not and would not imply a cause of action which the voters have expressly repealed.**

Holland order at 21 (emphasis added).

Equitable allocation

Judge Holland also disagreed with Judge Singleton's legal construct of "equitable allocation" in *Robinson* because unsued joint tortfeasors would be drawn into the fray and forced to pay defense costs. Insurers would have to defend insureds against equitable allocation claims, potentially spawning derivative insurance coverage disputes. These consequences would defeat the initiative's purpose of reducing litigation. *Id.* at 22. Further, if a third-party defendant had no incentive to defend and did not show up at trial, the result would be the same as if the jury were allowed

Civil Rule 14(a)

Judge Holland also noted that the theories of "equitable indemnity" and "equitable allocation" were not consistent with the civil rules for joinder of non-parties. By their terms, State and Federal Civil Rules 14(a) only allow a defendant's impleader of non-parties that "may be liable to him for all or part of the plaintiff's claim against him." Judge Holland ruled that the "equitable indemnity" and "equitable allocation" theories could not be employed to implead a non-party under Civil Rule 14(a) of the federal and state rules because those theories would not make the impleaded third party subject to any liability. *Id.* at 29.

Judge Holland's ruling in a nutshell

In general, Judge Holland found that "equitable indemnity" and "equitable allocation" created a procedural pandora's box, which could be avoided if the initiative were construed so as to effect the legislative intent, and the word "party" were construed as the voters would have understood it in reading the Election Pamphlet. *Id.* at 24.

Judge Holland construed the initiative to allow the jury's allocation of fault of non-parties because:

1. AS 09.17.080 is inherently ambiguous as it does not address the fault of unreleased non-parties;

2. The legislative intent, as evidenced by the Election Pamphlet, was that named defendants not be held liable for the fault of non-parties;

3. The initiative's express repeal of AS 09.16 contribution indicated the legislative intent that the initiative moot contribution, and render a party liable only for their share of the fault;

4. The theories of "equitable indemnity" and "equitable allocation" were inconsistent with Civil Rule 14(a) and the repeal of contribution; and spawned derivative litigation and procedural problems which defeated the Initiative's purpose of reducing litigation costs.

5. Such a construction of the initiative would avoid the allocation of fault based on the plaintiff's fortuitous choice of whom to sue.

Judge Holland recognized that his construction of the initiative might create "empty chair" opportunities for the defense. *Id.* at 27. However, Judge Holland noted that the same problem is inherent any time a joint tortfeasor is released. Finally, Judge Holland made clear that his interpretation of "party" did not include employers immunized under the Workers Compensation Act, since *Lake v. CMI,* 787 P.2d 1027 (Alaska 1990) harmonized the Worker's Compensation Act with the allocation of fault in AS 09.17.080. *Id.* at 32.

Judge Holland's 33-page opinion stands as the most thorough, public analysis of the ballot initiative by any judge in Alaska. Judge Holland construes the ballot initiative in light of the history of apportionment in Alaska, AS 09.17.080's statutory scheme, the recent decisions by other judges, and the ballot initiative's legislative history.

Judge Holland's order has been certified to the Alaska Supreme Court. Although one may differ with Judge Holland's conclusion, Judge Holland grapples with the various issues raised by the initiative and offers a solid point of departure for the Alaska Supreme Court's analysis of the initiative.

Notice from the Alaska Court System
Extension of Time to Comment on Proposed Changes to the Appellate Rules

In July, members of the Alaska Bar Association were asked to comment on two proposed changes to the Appellate Rules. These changes would require that notices of appeal be filed in the appellate court rather than the trial court, and that parties to appeals file excerpts of record with their briefs. The comment period on these proposed changes has been extended to October 22. Comments should be sent to the Court Rules Attorney, 303 K Street, Anchorage, Alaska 99501. To obtain another copy of the proposed changes, call 264-8225.

Juris Prudence

Another view of Rule 100

The Alaska Supreme Court recently adopted a new rule of court authorizing mediation in all civil cases. Effective July 15, 1993, Civil Rule 100 permits a judge to appoint a mediator at the request of one of the parties or on the court's own initiative if the judge determines that mediation may result in an equitable settlement of any issues in the case.

The Supreme Court's action is the end product of an inquiry that began in 1989 in response to legislative directive that the court system evaluate the potential benefits of mediation. Thereafter, the court's Task Force on Mediation and the Civil Rules Standing Committee did just that and, consequently, proposed the new rule authorizing mediation.

Daniel Patrick O'Tierney

Mediation, like arbitration, is one of the forms of dispute resolution that jurisdictions across the country are actively reviewing as an alternative to litigation. Mediation involves the use of a neutral third party (mediator) to assist or guide the disputants toward a solution that they can both live with. Unlike an arbitrator (or a judge), however, a mediator does not impose a binding decision on the parties. Instead, the parties must commit to reaching a voluntary resolution of their dispute and they retain control of the outcome.

Mediation is an informal and confidential process that offers considerable advantages over courtroom adjudication. It is generally considered to be faster than judicial decisionmaking given current caseloads - and less expensive. Further, the process is less adversarial and, therefore, better able to preserve working relationships between the parties for future purposes.

Alaska's new mediation rule provides for mediation at any time after a complaint is filed if the court determines that an equitable settlement may result. In making this determination in any domestic relations case, the court may consider, for example, whether there is a history of domestic violence between the parties which could impact the fairness of the mediation process or the physical safety of the domestic violence victim. Mediation expressly may not be ordered in cases involving conduct which constitutes domestic violence or petitions for domestic violence protection, or in any criminal proceeding.

If mediation is ordered by the court, the parties must attend an initial session. Thereafter, a party may withdraw from mediation or the mediator may terminate the process if the mediator determines it is likely to be unsuccessful. If the parties cannot agree on the selection of a mediator, the judge will select one for them. The parties are still entitled to have their attorney present at all mediation conferences.

All mediation proceedings are held in private and are confidential; the mediator cannot testify as to any aspect of the proceedings. The new rule further specifies that the costs of mediation are to be borne equally by the parties unless the Judge decides to apportion them differently between the parties. If mediation is successful in resolving the dispute, the parties file a stipulation for dismissal of the case (or any part of the case) for court approval.

The court system has prepared a brochure which explains mediation and how the new civil rule works. Also, the court system has published a directory of mediators to provide parties and judges with assistance in locating a mediator. The directory is available in each of the state law libraries.

Each of the mediators listed in the directory will simply have completed an information form which includes an indication of the mediator's training, experience, fees and areas of expertise. Mediators will not be screened or otherwise sanctioned or certified by the court. At present, there are no universally accepted qualifications or standards in that regard and mediators have diverse educational backgrounds. Any mediator who wishes to submit an information form for inclusion in the directory should contact a clerk of court or the court rules attorney.

The Alaska Bar Association has scheduled a morning program on October 22, 1993 which will focus on how judges and practitioners are implementing the new mediation rule. The lectures and panel discussions will feature mediators and judges who will also field questions.

In the near future, the court system will probably consider changes necessary to make mediation available in small claims cases. Stay tuned.

The preceding article is reprinted with permission of Alaska Business Monthly for which the author has written a regular column on legal matters of interest to the business community since 1986.

The other side of 'Hillman'

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after *Hillman I* was that the insurer's position was not only contractually justified, it had also been found to be objectively reasonable as a matter of law in *Hillman I*, in which the two dissenters went further to argue that Nationwide was not just reasonable but absolutely correct as well. To counter this, as Justice Matthews noted for the majority, "the Hillmans have directed us to no evidence suggesting unreasonableness." Op. at p. 11.

It appears to me that a bad faith action may still be brought when a defendant relies on a contractual defense under circumstances demonstrating that its reliance is objectively unreasonable, *e.g., Mitford v. de Lasala,* 666 P.2d 1000, 1007 (Alaska 1983) (terminating employee at will for ostensible purpose of cutting off retirement benefits). *Hillman* just wasn't that case.

Mr. Schneider's contention that *Hillman II* sounds the death knell for the bad faith tort is therefore wrong. It may sound the death knell for some bad faith suits, in which the plaintiff, unable to prove that the insurer acted unreasonably, tries to prove instead that the insurer thought impure thoughts while acting reasonably. In *Hillman*, Nationwide acted reasonably and was justly vindicated by the courts. For cases in which an insurer acts unreasonably, the bad faith tort is alive and well.

TRAINING

The Federal Defender has invited Larry Nathans, from the Federal Defender Office in Baltimore, the District Court, and U.S. Probation to discuss departures from guideline sentences in Anchorage and Fairbanks. Larry Nathans lectures for the Federal Judicial Center and has literally written the book on departures. We'll also discuss guideline amendments effective November 1.

WHAT TO PUT ON YOUR CALENDAR:

Anchorage: October 21, 1993
9:00 a.m. to 12:00 p.m.
Location: Anchorage Federal Building
Room 137

Fairbanks: October 22, 1993
9:00 a.m. to 12:00 p.m.
Location: Fairbanks Federal Building
Room B67

Call Peggy Beck at 271-2277 if you wish to attend.
There is no charge.

Bar People

Jeff Sauer has joined the Juneau firm of Baxter, Bruce & Brand as an associate attorney.....**Barbara Brink** has transferred from the Kodiak P.D.'s office to the Anchorage P.D.'s office.....**Nelleene Boothby,** former clerk to Judge Johnstone, is now with Guess & Rudd.....**Keith Brown** and **Sandy Gibbs** have relocated to Stone, Waller & Jenicek.

Deborah Burlinski is now a magistrate with the Alaska Court System in Dillingham.....**Martin Barrack,** formerly with Heller, Ehrman, is now with Condon, Partnow & Sharrock.....**Dan Cooper** has transferred from the D.A.'s office in Fairbanks to the D.A.'s office in Kenai.....**William Christian** has transferred from the ARCO office in Anchorage to their L.A. office.....**Teresa Chenhall** has left the Ketchikan P.D.'s office and joined with **Mary Treiber** to form the firm of Chenhall & Treiber.....**Robert Crowther** has left the firm of Giannini & Associates and opened his own law office in Anchorage.

Matthew Claman has joined the firm of Preston, Thorgrimson, et.al. in Anchorage.....**Jay Durych,** formerly of Kemppel, Huffman & Ginder, is now with the law office of Gordon F. Schadt.....**Paul Seyferth,** formerly with Dattan & Seyferth, has relocated to Kansas.....**Scott Dattan** is now practicing as a sole practitioner.....**Susan Daniels,** formerly with Russell & Teshe, is now with the A.G.'s office in Anchorage.....**Michael Dieni** has transferred from the Palmer P.D.'s office to the Anchorage P.D.'s office.....**Ken Diemer,** formerly with Hickey & Stewart, is now working for U.S. Magistrate Harry Branson.

Jon Ealy, formerly with Heller, Ehrman, is now with Borisovich International, Inc. in Anchorage.....**Ken Ford,** formerly a partner with Jermain, Dunnagan & Owens, has opened his own law office in Anchorage.....**Cliff Groh II,** formerly with Hicks, Boyd, Chandler & Falconer, is now with the D.A.'s office in Anchorage.....**Liza Gay,** formerly with the A.G.'s office, is now corporate counsel for Alaska Safari, Inc.....**Charles Hagans, Liam Moran, Meredith Ahearn & Linda Anna Webb** have formed the firm of Hagans, Moran, Ahearn & Webb.....**Vern Halter** has relocated to Trapper Creek.....**Gayle Horetski,** former Deputy Commissioner for the Dept. of Public Safety, is now with the Commercial Section of the Juneau A.G.'s office.....**Francine Harbour** is V.P. & Investor Lending Attorney for lst National Bank of Anchorage.

Robert Jurasek is now with the law office of William G. Azar in Anchorage.....**Rachel King** has transferred from the Kodiak P.D.'s office to their office in Kotzebue.....**Byron Kollenborn,** formerly with McNall & Associates, has opened his own law office in Anchorage.....**Keith Levy** is now employed as an associate with the firm of Clough & Associates,....**Joseph Levesque** is now an Assistant Borough Attorney with the North Slope Borough.....**Steve Morrissett** is now with Condon, Partnow & Sharrock.....**John Raforth,** formerly with Heller, Ehrman, is now Special Counsel with Condon, Partnow & Sharrock.....**Janalee Standberg** is now residing in Vancouver, WA.....**Tracy Tillion,** formerly with the law office of Gordon Schadt, has now opened her own law office in Halibut Cove.

Ron West has relocated to Spokane, WA.....**Sandra Wicks** is now with the firm of McNall & Associates.....**Susan West,** formerly with Robertson, Monagle & Eastaugh, is now with Guess & Rudd.....**Mary Ellen Zalewski** is now with Haas & Spigelmeyer in Homer.....**Herbert Soll,** formerly with the Peace Corps in Libreville, is now in Saipan, Mariana Islands.....**John Dittman** and **Barry Kell** have formed the firm of Dittman & Kell.....**Nancy Honhorst** is relocating to Olympia, WA.

Michael Nave and **Jay Seymour** have joined the Anchorage office of Lane Powell Spears Lubersky. Nave practices in the areas of aviation law and insurance subrogator. Seymour is experienced in the areas of employment law, environmental law and civil litigation.

Jeffrey M. Feldman of Anchorage, was appointed to an attorney seat on the Alaska Commission on Judicial Conduct, replacing Vincent Vitale of Anchorage. This appointment was made by Gov. Hickel from a nomination made by the Alaska Bar Association.

Pro Bono Responsibility Reviewed by Bar — Comment Sought —

The Bar's Statute, Bylaws & Rules Committee is studying a resolution discussed at the annual business meeting in Juneau last June which would encourage lawyers to aspire to do 50 hours annually of pro bono work. The committee will be making a report and recommendation to the Board of Governors as to whether this resolution should be adopted.

The committee is seeking input and collecting data from various sources and would like to solicit comments from the membership. If you have any comments on the following resolution, please send them in care of Deborah O'Regan, Alaska Bar Association, P.O. Box 100279, Anchorage, 99510.

RESOLVED, that the Alaska Bar Association propose an amendment to the Alaska Supreme Court that it amend the Alaska Code of Professional Responsibility by adopting Model Rule 6.1 Voluntary Pro Bono Publico Service in the following form:

Rule 6.1 Voluntary Pro Bono Publico Service

A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Shaftel elected to College of Trust and Estate Counsel

Thomas P. Sweeney of Wilmington, Delaware, president of the American College of Trust and Estate Counsel, has announced that David G. Shaftel, with the Law Offices of David G. Shaftel, of Anchorage, has been elected a Fellow of the College. His election took place during a recent meeting of the Board of Regents of the College in Lake Buena Vista, Florida.

The American College of Trust and Estate Counsel is an international association of lawyers who have been recognized as outstanding practitioners in the laws of wills, trusts, estate planning and estate administration. The college actively pursues improvements in the administration of our tax and judicial systems in these areas of law, in addition to providing scholarly publications and programs of continuing legal education for its fellows.

Membership in the college, which is a post of honor conferred by the peers of the newly elected fellow, is by invitation of the Board of Regents.

ALSA elects new officers

The Anchorage Legal Secretaries Association recently elected their 1993-1994 Board of Directors: Nanci L. Biggerstaff, CPS, PLS, Law offices of Kenneth Norsworthy, President; Yolanda (Lani) Marrero, Law Office of Kenneth Wallack, Vice President; Lindsey Galin, PLS, Faulkner Banfield Doogan & Holmes, Secretary; and Jerri Shackelford, Dittman & Kell, Treasurer.

Lindley elected to national board

Marianne Lindley, RPR-CM, of Anchorage, was elected to a two-year term on the National Court Reporters Association Board of Directors at the NCRA 92nd annual Convention in San Francisco, California.

The NCRA Board is the policy-making body over 32,000 members throughout the U.S., Canada, England and Australia. Charged with managing, supervising, controlling and directing the affairs of the association, it is comprised of five officers and nine directors.

The founder of Midnight Sun Court Reporters, with branches in Anchorage and Fairbanks, Lindley has reported in Alaska since 1979. She is a past recipient of the NCRA Pro Bono Award, the Alaska Pro Bono Court Reporter Award; and has served on numerous committees at both the state and national level, including the NCRA Committee on Professional Ethics. She attended and graduated from two court reporting schools in the Lower 48.

Marianne Lindley

MANURE TAX?

Do you want to take action against the new septic system tax or the requirement of biennial septic pumping, regardless of need?

I am an attorney considering a group effort to challenge these ordinances.

If interested, please call **John Robertson** at **279-9574.**

WEEKEND LAW TEACHING

Northern Virginia Law School, the nation's only weekend law school, is considering extending its program to Anchorage. Two attorneys would be needed, for elementary law subjects, such as contracts, torts, civil procedure, criminal law, etc. One course will be taught on Friday nights or Saturday for 3 hrs. Compensation is negotiable, and may be law book sets. Send resume to: Dean Alfred Avins, No. Va. Law School, 4105 Duke St., Alexandria, VA 22304

Estate Planning Corner

Who may make a will?

Any individual of sound mind and 18 or more years of age may make a Will (A.S. 13.11.150).

If the individual is not of sound mind when he signs the instrument purporting to be a Will, the instrument is void and of no effect. Any Will previously signed by the individual when he was of sound mind would continue in effect.

For example, consider a client of sound mind who signs a Will, giving all his property to X. The Will is preserved in a safe deposit box. Years later, with the assistance of a friend, the client signs an instrument purporting to be a Will, revoking his prior Will, and giving all his property to Y. The client then dies and the latter instrument is denied probate on the grounds that the decedent was of unsound mind when he signed the instrument.

Under such circumstances, the decedent's first instrument would not be considered revoked, since the second instrument would be considered a nullity, and all the decendent's property would go to X.

Steven T. O'Hara

An adult of sound mind is said to have testamentary capacity, meaning the mental ability to make a Will. In order to have testamentary capacity, an individual must, at the time the Will is made, be able to understand and interrelate three factors: (1) the kind and extent of his property, (2) those who would be entitled to his property in the absence of a will and (3) that the instrument he is signing will, upon his death, dispose of his property to those named therein.

An individual does not need to be in good health or even free from mental confusion in order to have testamentary capacity. Nor does he need to be able to understand legal terms or the details of complicated provisions in his Will (J. Ritchie, N. Alford, R. Effland, *Decedents' Estates and Trusts* 363 n. 83 (6th ed. 1982)).

As the Alaska Supreme Court has explained (in *In Re Kraft's Estate,* 374 P.2d 413 at 415-16 (Alaska 1962)):

> Disease, great weakness, the use of alcohol and drugs, and approaching death do not alone render a testator incompetent to make a will. The question is always whether, in spite of these things, he had sufficient mental capacity to understand the nature and extent of his property, the natural or proper objects of his bounty, and the nature of his testamentary act.

Consider a widow 93 years of age. She resides in one of Alaska's Pioneers' Homes and has an estate consisting of $11,000 in savings and her personal effects, including her wedding ring and Bible. She has no descendants and no surviving siblings. She has two nephews, who she has not seen for 20 years.

She is given small doses of morphine occasionally to alleviate pain. The morphine affects her mental alertness. Sometimes she imagines that the people on television can see her and that they are threatening her privacy. Recently she has failed to recognize friends when they come to call on her.

Although her eyesight is weak, she still reads every day. Along with her Bible, she cherishes her wedding ring and the memories it evokes about her late husband. She is generally familiar with her other property.

She remembers her siblings, and she has named her nephews as her only relatives. She has indicated very positively that she does not want to leave her property to her nephews. Instead, she would like to give her wedding ring and Bible to a friend, who had been a neighbor years ago, and her remaining property to the Pioneers' Home where she resides.

Under such circumstances, this writer would consider her to have testamentary capacity.

Two Anchorage attorneys who neglected clients receive public discipline, pay restitution

Attorney Kathryn M. Coleman has received a six-month suspension, stayed subject to several conditions, including one-year supervised probation, full restitution, acquisition of malpractice insurance, and passage of the Multistate Professional Responsibility Examination. The sanction was the result of Ms. Coleman's conduct in two matters. In the first matter, Ms. Coleman failed on behalf of her client to produce required discovery; to respond to requests for same; to respond to plaintiff's motion to compel; to comply with an order to compel; to respond to the court's order to show cause re contempt for failure to comply with order to compel; to oppose subsequent motion for summary judgment; to timely inform her client of any of the foregoing events. As a result of Ms. Coleman's conduct, a judgment in excess of $30,000 was entered against her client. The client was able, through subsequent counsel, to have the judgment vacated, but only at considerable personal expense.

In the second matter, Ms. Coleman agreed to handle the probate of an estate. However, Ms. Coleman failed, for a period in excess of one year, to file any documents in court commencing probate of the estate or to take any other significant steps to advance the matter. Further, Ms. Coleman was late in filing a routine liquor license renewal for the estate, thereby placing a valuable estate asset at risk of loss.

Ms. Coleman stipulated to knowing violations of Disciplinary Rule 6-101(A)(3) in both matters. In aggravation, the case involved multiple offenses, serious injury resulted to one of Ms. Coleman's clients, and Ms. Coleman failed to respond in a timely fashion to the initial grievance. In mitigation, Ms. Coleman was fully cooperative with bar counsel after her initial untimely response; she at all times admitted wrongdoing and expressed remorse for her misconduct; she confessed error to her client and promised full restitution even before the grievance was filed; her actions were not motivated by dishonesty or self-interest; she has no prior record of discipline; she appears to enjoy good character and reputation in the community; and she has taken affirmative steps to improve her practice so as to avoid similar problems in the future.

* * *

Former Anchorage attorney Glen D. Mark received a public reprimand with other conditions of discipline for neglecting clients after he closed his immigration practice and moved to Portland, Oregon.

In one case, Mr. Mark entered his appearance as attorney of record in an appeal from a deportation order. He then left Alaska; whether he informed his client of the departure was a matter of dispute. He was served with notice of a briefing deadline but filed nothing. After the government moved to dismiss, the client retained substitute counsel.

In a second case, Mr. Mark entered his appearance then left Alaska without telling the client. When the government sent notices but did not receive any response from the client or Mr. Mark, the client was arrested. This client, too, retained substitute counsel and avoided deportation.

In a third case, Mr. Mark successfully represented the client at trial, then appeared as attorney of record on an appeal filed by the government. However, Mr. Mark left Alaska without telling the client, and failed to file any appeal brief though notified of the deadline. Ultimately the government won on appeal and the client was deported.

The conditions of Mr. Mark's reprimand approved by the Disciplinary Board of the Bar require him to make restitution to the second client for lost wages incurred in connection with his arrest ($400), and to the third client for airfare expenses to transport the client's family overseas ($2,000). Mr. Mark will also be required to transfer to inactive status, with the potential for additional review of these matters should he apply for reinstatement to active practice.

Election and advisory poll results

The Bar Polls and Elections Committee counted and certified the election and advisory poll results on April 27, 1993 for the following position:

Board of Governors
3rd Judicial District
Philip Volland
2nd and 4th Judicial Districts
Dan Winfree

Alask Legal Services Corporation
First Judicial District
Arthur Peterson
Janine Reep*
Kenai/Kodiak District
Gregory Razo
Duncan Fields
4th Judicial District
Mason Damrau
Cameron Leonard

Alaska Commission on Judicial Conduct
Jeffrey Feldman

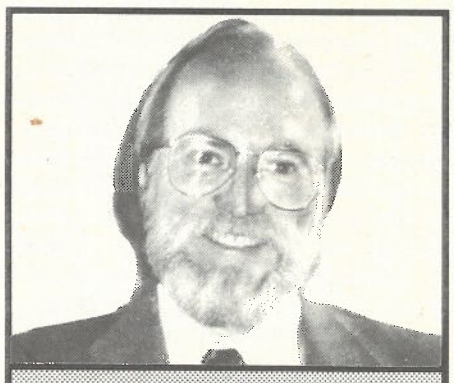
Lawyer Representative to the 9th Circuit Judicial Conference
Grant Callow**
Douglas Serdahely**

*Appointed to alternate position
**Names submitted to U.S. District Court

Torts

Health-care costs and tort deform

Most of you know by now that HB#292, an omnibus bill designed to dismantle the civil justice system, was introduced last session and is expected to see committee work during the interim. It is little surprise that much of the debate regarding the tort system is fueled by the health-care industry and its anecdotal arguments that health-care spending is linked to imperfections in the civil justice system. The American Bar Association Special Committee on Medical Liability and the ABA Governmental Affairs Office have produced a study of this issue. Their



Michael Schneider

study relied upon a general accounting office report entitled "Health Care Spending—Nonpolicy Factors Account for Most State Differences," published in February, 1992, by the GAO, data from 1982 compiled by the Health Care Financing Administration, and 1990 estimates from Lewin/ICF. The conclusions of the reports: "Health-care costs approximately doubled from 1982 to 1990. Regardless of whether a state had enacted tort 'reforms' and regardless of the type of 'reforms' enacted, . . . "

Some examples from the report follow:

1. Arkansas, Kentucky, and Mississippi, with lower than-average increases in health-care costs, had no caps on damages in medical malpractice cases.

2. Alabama, with higher-than-average estimated healthcare cost increases had a cap on damages in medical malpractice cases.

3. Massachusetts and California had severe caps on damages in medical malpractice cases while experiencing the highest estimated personal health-care costs per capita of any of the states in the Union.

This study is just one more bit of evidence that inquiring minds should view cynically the efforts of the insurance industry, the health-care industry, and manufacturing concerns to disenfranchise the victims of their misconduct on either economic or public policy grounds. For more information on this study, contact Lillian B. Gaskin, Staff Liaison to the Special Committee (202/331-2604).

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One former way to become a lawyer

continued from page 7

Soft and Quicken accounting programs, what with trade-ins, rebates, warranty credits and finance participation. My accounting grew less creative and more according to accepted accounting principles until October, when the accountant returned. I then became office manager, doing things like sales projections and RV delivery processing, as well as scaring potential adversaries by signing as "Staff Attorney." Company and private legal work kept me busy, including the sale of the dealership three days after I went to work there. (Since then my friend has owned the dealership.)

Economic restructuring caused my duties to be assumed by the general manager, so I was private law practitioner again.

I am now practicing out of my home. Surely I do feel some pressure to get a job, but there is nothing really wrong with a low income/low overhead[4] arrangement. After all, we paid $11,500 in taxes last year. And the continuing de facto pro bonos are a ministry.

•

[1] No one got an "A" grade in the first year. To say in school, one had to get a "C+" average and no "F"s

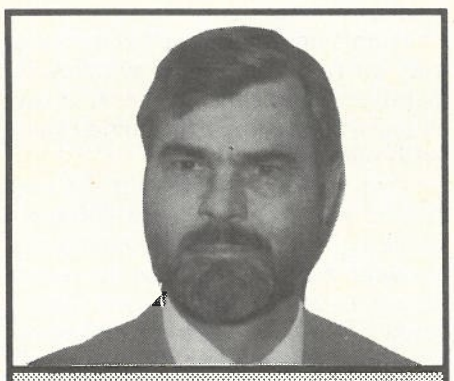
[2] In the meantime, Ralph had not stayed in Seattle, After three attempts to cross into Canada, he drove back to San Francisco, where the car blew up.

[3] 132 guest came, including Judge Buckalew.

[4] We auspiciously found ourselves in a new 2200 square foot debt-free house in South Anchorage.

Bankruptcy Briefs

Sovereign immunity



Thomas Yerbich

Sovereign immunity springs from the English common law concepts that (1) the "King can do no wrong" (from the days it was believed that kings ruled by divine right and that all rights flowed from the sovereign) and (2) that there can be no legal right as against the authority that makes the law on which the right depends. Despite widespread criticism by legal scholars the doctrine retains a substantial degree of viability in American law based on the second "prong."

Sovereign immunity at the federal level is particularly indefensible since "We the People," who ordained and established these United States and created the federal "sovereign," did not gee fit to cloak "our sovereign" with immunity for its actions. However the doctrine has been judicially recognized these past 200 years, planted in dictum by Chief Justice Jay in *Chisolm v. Georgia* [2 Dall. (2 US) 419 (1793)], fertilized in dictum by Chief Justice Marshall in *Cohens v. Virginia* [6 Wheat. (19 US) 264 (1821)], and germinating in *Clarke v. United States* [8 Pet. (19 US) 436 (1834)]. There is no constitutional basis for sovereign immunity, it is purely and simply a judge-made legal anachronism.

Despite its pernicious nature and logically indefensible character, the purpose of this article is not to argue for abolition of the doctrine but, rather, to discuss it operation, scope and effect in the bankruptcy forum. Recent cases in the U.S. Supreme Court have driven home the fact that the doctrine continues to thrive in the bankruptcy context, particularly with respect to damages for violations of the automatic stay.

In dealing with the immunity of government and government officials, it must be recognized that we deal with three levels of government: federal, state and local. Each has separate rules and varying degrees of "protection."

Federal

As noted above, it is well settled in the law that, absent "consent," the federal government, its departments and agencies are immune from suit. Sovereign immunity extend to Indian nations *United States v. United States Fidelity Co.*, 309 US 506 (1940)], government official acting in their official capacity *United States v. Lee*, 106 US 196 (1882)] and, to the extent that Congress has cloaked them with immunity, federal corporations *Keifer G Keifer v. RFC*, 306 US 381 (1939)].

The critical issue is "consent." "Consent to be sued" can be in a general sense, as with the Federal Torts claim Act. Unfortunately, where violations of the automatic stay are concerned, the FTCA is of no help as the actions do not fit within even the broad scope of that statute. However, when a governmental unit formally invokes the jurisdiction of the bankruptcy court by filing a proof of claim, government exposure to counterclaim liability exists under 11 USC s 106 (a) [*In re Pinkstaff*, 974 F2d 113 (CA9 1992); *see United States v. Nordic Village* , 503 US — [112 SCt 1011) (1992)]. Under *Pinkstaff*, the court applies a so-called "logical relationship" test. For purpose of S 106 (a), logical relationship exists when the counterclaim arises from the same set of operative facts as the initial claim in that the same operative facts serve as the basis for both claim or the aggregate core of facts upon which the claim rests activates additional legal rights otherwise dormant in the defendant. In the context of s 362, when the activities of the governmental unit in question relate to collection of the claim and the collection activity violates the automatic stay, the necessary nexus exists for a waiver of governmental immunity.

Even where the governmental unit has not filed a formal claim, use of a self-help remedy to collect on the claim by the governmental unit may constitute an "informal proof of claim" sufficient to trigger the waiver provisions of S 106 (a) [*In re Town & Country Home Nursing Service, Inc.*, 963 F2d 1146 (CA9 1992)].

States

While a sovereign may reign supreme within its borders, sovereignty does not extend beyond its borders [*Nevada v. Hall*, 440 U.S. 411 (19780]. Moreover, there being no constitutional basis for sovereign immunity, recognition of sovereign immunity is based upon principles of comity [*Id.*] Accordingly, sovereign immunity does not *per se* bar actions against states in federal courts except to the extent Federal law provides.

However, the Eleventh Amendment bars suit against states, state agencies and instrumentalities in Federal courts. Although the Eleventh Amendment specifically bars only suits against states by citizens of another state, the U.S. Supreme Court has interpreted it as barring suits by citizens of the same state. [*Hans v. Louisiana*, 134 US 1 (1890)]. Eleventh Amendment protection extends to State officials as well [*Tindall v. Weslev*, 167 US 204 (1897)], subject to an "excess of capacity" test [*e.g.., Pennoyer v. McConnaughv*, 140 US 1 (1891); *Truax v. Raich*, 239 US 33 (1915)]. However, immunity of state executive personnel is a qualified immunity limited by a "facts and circumstances" test of reasonableness and good faith [*Scheuer v. Rhodes*, 416 US 232 (1974)].

As with sovereign immunity, Eleventh Amendment protection may be waived by consent of the State to be sued, such as by voluntary submission to suit [*Clark v. Barnard*, 108 US 436 (1883)] or by a general law specifically consenting to be sued in Federal courts [*Gunter v. Atlantic Coast Line*, 200 US 273 (1906)]. However, such consent must be clear and specific, and consent to be sued in its own courts does not imply a waiver of immunity in federal courts [*Murrav v. Wilson Distilling Co.*, 213 US 151 (1909)].

Prior to 1992 it was clear that Alaska had not consented to suit in federal courts under the *Murrav* holding because AS s 09.50.250 expressly limited suits against the State on contract, quasi-contract or tort to the Superior Court. However, AS S 09.50.250 was amended by S 1, ch. 119 SLA 1992, deleting the words "in the Superior Court." If the 1992 amendment is construed as authorizing actions against the State in any court of competent jurisdiction, then it may be held that Alaska has waived its Eleventh Amendment protection [*c f. Hopkins v. Clemson College*, 221 US 636 (1911) (dicta); *but cf. Kennecott Copper Corp. v. State Tax Comm.*, 327 US 573 (1946)].

Absent a general waiver, there may be a specific waiver. To the extent that the actions of the State constitute a waiver of sovereign immunity [under *Nordic Village - Pinkstaff - Town & Country*], that same set of operative facts also constitutes a waiver of Eleventh Amendment protection [*In re 995 Fifth Avenue Associates, LP*, 963 F2d 503 (CA2 1992); *see Hoffman v. Connecticut Dept. of Income Maintenance*, 492 US 96 (1989)].

Political Subdivisions

Political subdivisions are creatures of the state, created by state law. As such, they are not truly "sovereigns." Thus, the generally accepted rule is that political subdivisions of a state do not enjoy sovereign immunity and are only cloaked with immunity to the extent that the state sees fit. Alaska follows this rule: political subdivisions in Alaska do not possess "blanket" immunity from suit [*Citv of Fairbanks v. Schaible*, 375 P2d 201 (Alaska 1962)].

Partial immunity from suit at the local government level is provided in AS s 09.65.070 (d). The main protection is the "discretionary function" provision of AS S 09.65.070 (d) (2). In this connection, a sharp distinction is drawn between "planning" and "operational" decisions in evaluating the exercise of discretion under AS s 09.65.070 (d) (2). [*see. e.g. Gates v. Citv of Tenakee Springs*, 822 P2d 455 (Alaska 1991); *Urethane Specialties v. Citv of Valdez*, 620 P2d 683 (Alaska 1980)]. "discretionary acts are those which require 'personal deliberation, decisions and judgment. . . .'" [*Integrated Resources Equity Corp. v. Fairbanks North Star Borough*, 799 P2d 295 (Alaska 1987)]. In addition, Alaska does not insulate even discretionary acts where the act itself violates established law. Thus, it must be concluded that political subdivisions of the State are not immune to damage claims under s 362.

Moreover, immunity from suit in federal courts under the Eleventh Amendment does not extend to Municipalities, counties and other political subdivisions of a state [*Lincoln County v. Luning*, 133 US 529 (1890); *Chicot Countv Drainage Dist. v. Baxter State Bank*, 308 US 371 (1940)].

Accordingly, municipalities, boroughs, and other political subdivisions that are not the functional equivalent of a state agency are subject to liability for transgressions of the automatic stay in the same manner and to the same extent as a private party.

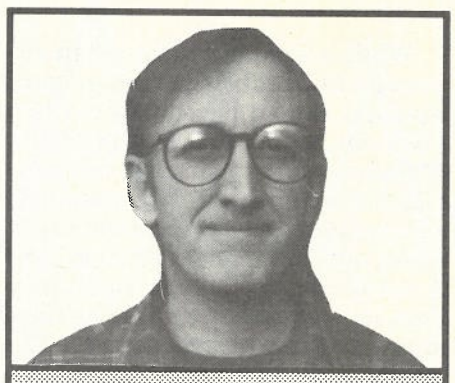
Eclectic Blues

Too much sun

When this column shows up in the Bar Rag, the angry dog storms of autumn should be hammering Southern Southeast Alaska while Ketchikanites happily stroll along Water Street, glad to be rid cruise ships and the sun. Oh happy day.

Unfortunately, as I sit down to write, it's July. Ketchikan is experiencing a Mediterranean summer, the kind that brings smiles to anyone in the curio business: and threatens to ruin purveyors of the artificial suntan.

I'd be lying to say that the average Ketchikanite doesn't enjoy a bit of warm weather. Gardeners on city water are quite pleased. Fireweed stalks have grown tall and fast. Their magenta flowers will soon be going to seed. My 110-day cabbage plants have already headed up. I am thinking about sowing a second crop of sugar snap peas. The raspberry canes are doubled over with large sweet ber-



Dan Branch

ries and I've already run out of jam jars. Downtown, the Gateway Borough flowers are providing spectacular displays of color.

Not everyone is happy about the tropical weather, however. Without summer storms our rain forest dries out. This forces tree thinners and loggers to hoot owl, a practice prohibiting the use of chain saws during the heat of the day.

People not hooked up to city water rely on rain catchment systems for potable water. In most years, nature is more than happy to provide them with plenty of soft H^20.

This year many folks out the road had to pony up for truck-delivered drinking water. In these households, drought restrictions, like 60-second showers, are in effect. One lady I know has a sign over her toilet advising that, "If it's brown, flush it down. If it's yellow, let it mellow." She claims that the doggerel will save her enough for a September trip to Mt. Layton Hot Springs and Water Slide Park in Terrace, B.C.

Low water levels in their rain-fed spawning streams are forcing sexually frustrated sockeye salmon to mill around salt water like teenagers in the Chilkoot Charlie's parking lot. It's good for the dipnetters but bad for future commercial fisherman hoping to make future boat payments.

There is one local industry which will benefit greatly from the long, hot summer—the visitor business. The folks that have figured a way to harvest the hordes of polyester-clad tourists pouring off the Princess and Dam boats are tickled pink. They know that their cutomers will return to their boats clinging to model totem poles, t-shirts and the belief that we locals promulgate the rain forest myth to keep Ketchikan's sunbaked streets to ourselves. These enlightened visitors will share the secret with friends back in Iowa or wherever they call home. They'll have video tape to prove it, too.

Can someone from New Jersey resist the temptation to take the love boat to Alaska after spending an evening watching film of their sweat-stained neighbors posing in front of totem poles? I think not.

As sure as it will storm on Thanksgiving Day there will be more cruise ship passengers next year. I wonder if they will need sun block or rain gear to deal with the elements. For the sake of our salmon, I am hoping for rain.

If I were the buyer for Tongass Trading Company, I'd lay in a supply of cheap foul weather gear.

In Sitka, writer gets in trouble with kisses

By William Satterberg

Tok is not the only city in which I have done trials. In fact, approximately two years ago, I had the rare opportunity to do battle in Sitka, before a former Fairbanks judge, Larry Zervos.

The case was a Superior Court case, involving a collection action being brought against one of my clients. The exchanges between opposing counsel and myself, over the life of the case, had been quite zealous, and were becoming almost legendary. Whereas my opponent represented a corporation of rather significant economic wealth, my client was a Swedish gentlemen of strong principle and will, but lesser comparative means.

Because the parties were not able to reach anything resembling a settlement short of trial, a trial did, in fact, ensue in the summer of 1990.

In contrast to Tok, Sitka is a slightly larger town, located in rainy southeast Alaska, with its own share of tourists. In other respects, however, the town is a delightful place to visit and to try a case in, and I must admit that the court system in Sitka, similar to that in Tok, went out of its way to make the stay most enjoyable. Each morning, there would be coffee, cake, and cookies available in the judge's chambers, along with a dish of candy. Both my opposing counsel and myself were given separate offices, complete with a telephone. Information had it that it was the first civil trial of any note to take place in Sitka in some time, and the entire community was somewhat excited (or at least the entire legal community), to see the courthouse in use for something other than misdemeanors and marriages. Undoubtedly, there had been other cases, but this must have been somewhat of a celebrated event, involving two litigants from Seattle fighting over a load of frozen sheetrock mud which was delivered to Sitka in the winter. Anchorage attorney versus Fairbanks attorney. The battle of the century.

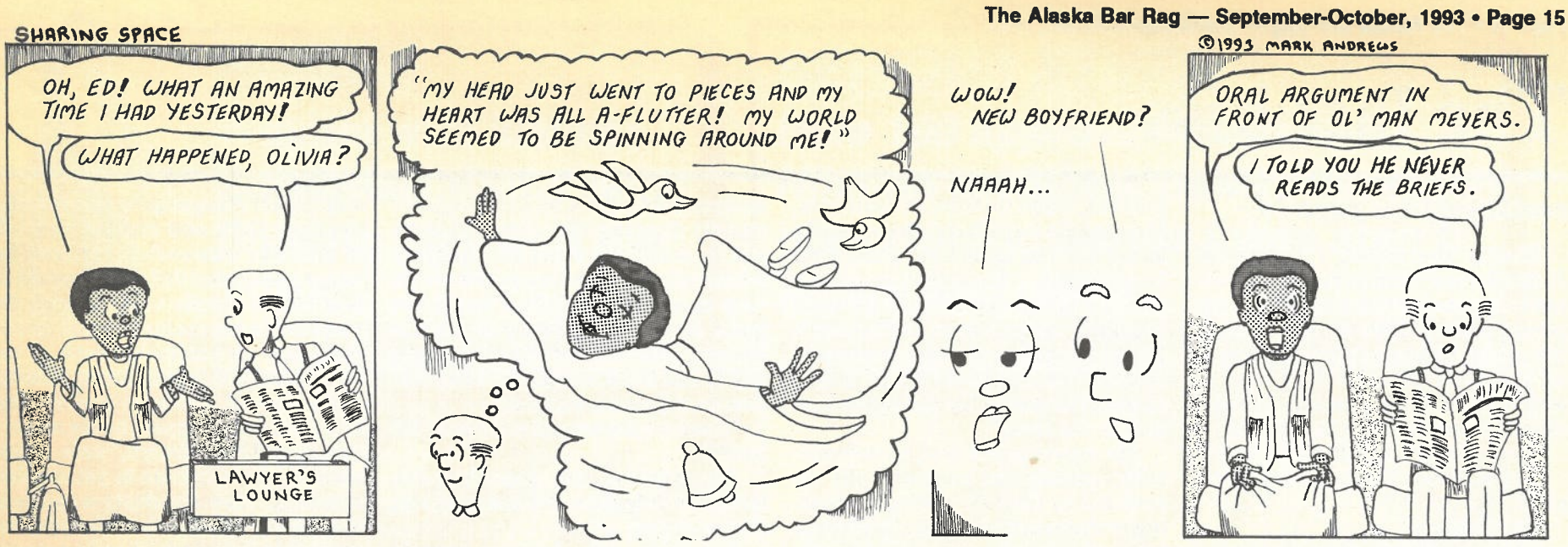
True to form, the trial was a knock down, drag out affair, and my opposing counsel was truly a worthy advocate. In fact, he was so worthy that he actually beat me at trial. (At least, that is what the jury indicated, although I find it hard to admit).

At one particular point during the trial, problems began to develop. The court found that one of the witnesses was being most difficult with respect to answering questions, and recognizing that this witness was my client, the court called a break in order to give a rather stern in-chambers lecture regarding courtroom decorum.

Ordinarily, I had welcomed the courtroom breaks and the ante room conferences, since Judge Zervos, similar to the rest of his staff, had gone out of his way also to make the trial a memorable and tasty experience. In fact, on his desk, just that morning, had been placed a large bowl of Hershey's Kisses candy, consisting of both the solid milk chocolate kind, and the crunchy, nutty kind, both of which give pimples, the big juicy kind. Every time that a break had been taken that day during the trial, both myself and opposing counsel would find ourselves voraciously unwrapping candy at the judge's desk, littering the area with enough tinfoil to fool a backscatter radar system, and ingesting thousands of calories at a sitting. My opposing counsel, clearly a successful athlete, could undoubtedly handle the caloric intake. An athlete in my own right, but known primarily for my feats of culinary ingestion, I found the caloric intake to be somewhat devastating in the future weeks.

Be that as it may, on this particular objection, we retired to Judge Zervos' chambers to discuss the future of my client's testimony and, presumably, whether or not we would be able to release one of the two hotel rooms which we had rented for the trial, recognizing that my client was close to being invited to occupy State housing for the evening. At the court's suggestion, my client and I departed Judge Zervos' office, to go to Judge Zervos' secretary's office to have what is commonly termed a colloquy between client and counsel of a most confidential nature. Judge Zervos and my opposing counsel, in the meanwhile, were left in chambers, to await our return, and to greedily gobble away.

continued on page 16



IN THE TRIAL COURTS FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

In the Matter of:	)
	)
Reassignment of Anchorage	)
Superior Court Judge and	) 3AN-AO-93-02
Caseload.	)

ORDER

The Superior Court has adopted the following plan for judicial assignment of cases:

1. *Judge / Caseload Assignment* (Civil)

Superior Court Judge John Reese is reassigned to the Civil Division, Fast Track cases.

All civil cases currently assigned to Judge J. Justin Ripley are reassigned to Judge John Reese.

2. *Judge / Caseload Assignment* (Family)

Superior Court Judge Larry Card is assigned to the Family Division.

All domestic relations cases currently assigned to Judge John Reese, except for those cases noted below, are reassigned to Judge Larry Card.

3. *Cases to be Retained by Judge John Reese*

3AN-87-02263CI	Long vs Turinsky
3AN-87-11173CI	Hodgen vs Parker
3AN-89-10342CI	Pinneo vs Pinneo
3AN-91-03289CI	Butler vs Harris
3AN192-00355CI	Hart vs Friemering
3AN-89-601CP	In the Matter of D.
3AN-81-054CP	In the Matter of R.V. and E.V.
3AN-92-508CP	In the Matter of R.V. and E.V.
3AN-89-920P/E	Estate of Chester Lampert
3AN-92-775P/G	Guardianship of S.
3AN-93-451P/A	Adoption of Y.

The following cases have matters submitted for decision. These will also be retained by Judge Reese to complete resolution of those issues only, with all other matters being the responsibility of Judge Card.

3AN-84-10814CI	Whitehurst vs Whitehurst
3AN-91-00373CI	Newbrough vs Newbrough
3AN-91-08533CI	Chisolm vs Chisolm
3AN-91-09819CI	Walatka vs Walatka
3AN-92-01177CI	Young vs Young
3AN-92-05765CI	Newby vs Newby
3AN-92-07416CI	Albee vs Albee
3AN-93-00373CI	Moroney vs Moroney
3AN-93-00732CI	Jamrose vs Jamrose
3AN-93-00010CP	In the Matter of J.B.

4. *Effective Date of Reassignments*

The effective date of the reassignment of all cases referred to in paragraphs 1 and 2 shall be October 1, 1993.

5. *Peremptory Challenges*

All parties will be allowed to exercise peremptory challenges on cases referred to in paragraphs 1, 2, and 3 by not later than October 8, 1993.

DATED at Anchorage, Alaska this 7 day of September, 1993.

/s/Karl Johnstone
Presiding Judge
Third Judicial District

TANANA VALLEY BAR

Summer travels

Ralph Beistline had been to a Judge's college in Reno and was happy to report that it is located directly across the street from Circus Circus.

Bob Noreen, who had been in Chicago for Mother's Day, reported that his mother was indeed tougher than Madson's mother. The reason he had to visit her on Mother's Day was that she told him if he didn't, she would knock his knee caps off. She shot a 78 on a driving range and used Bob as a tee because he made her carry the golf bags.

Ed Niewohner, who had recently been in Iowa, gave an Iowa report. He indicated his father, on his 99th birthday, told Ed that he was not looking forward to the next presidential election between Bill Clinton and whoever the Republicans might run for office and that he hoped he died before the next election.

Andrew J. Kleinfeld indicated that he had been in New Orleans and obtained some voodoo door prizes for the next TVBA event. He had purchased a litigation voodoo kit. Evidently, when used appropriately and with the proper chant of "other attorney be stupid," the results can be marvelous. It was remarked that perhaps somebody in town already had this kit and had put it to prolific use.

•

Library report. Alicia Thompson says she doesn't mind people stealing books from the library as long as they return them. She has re-initiated one of her official amnesty periods. A number of counsel inquired as to what volumes were missing. Chris Zimmerman related that Ms. Thompson indicated to him that all the books from the library were missing.

•

Jeff O'Bryant engaged in some Clinton-bashing with such memorable quips and quotes as:

I'm glad I'm an American
I'm glad I'm free
I wish I was a dog
and Clinton was a tree

--KEN COVELL

The Bar Rag welcomes articles from its readers

The last kiss

continued from page 14

Shortly thereafter, I re-entered Judge Zervos' chambers with my client to assure both the court and opposing counsel that all was well in the world. Bygones being bygones, we prepared to leave chambers, at which time my opposing counsel asked the court, quite innocently:

"Your Honor, may I have a kiss?"

Judge Zervos magnanimously replied:

"No problem."

Being speechless, I simply made a smooching sound into the microphone, apparently unnoticed by both Judge Zervos and my opposing counsel, and we all returned to the courtroom to complete that day's trial proceedings.

Clearly, however, something must have been bothering Judge Zervos' clerk, for, at on at least two occasions, I saw her looking rather incredulously at her boss, Judge Zervos, a/k/a the Greek. But then again, judges and court clerks have a strange relationship which is a bond which can only develop between a person who is forbidden from ever associating again with friends, having taken the oath of the judiciary, and the only other person with whom the judge may share their confidences, the ubiquitous court clerk.

Following the conclusion of the day's proceedings, and as we arose to leave, the clerk whispered something and Judge Zervos immediately demanded that both counsel remain in the courtroom to clarify a matter on the record. After the jury departed, Judge Zervos announced:

"Counsel, my court clerk advised me that, when we were in chambers, Mr. (name withheld) apparently asked me if he could have a kiss, and I responded that that would be fine. I wish to clarify that we were speaking about a bowl of Hershey's Kisses located on my desk, in order to remove any confusion which might exist in the record. Do you agree that that is the case?"

My opposing counsel, quite naturally, quickly and unequivocally responded in the affirmative, indicating to the court, of course, that there was nothing untoward regarding the conversation.

Realizing that there was really nothing for me to state, since everything had been tape recorded, regardless, I politely replied:

"Your Honor, the record will speak for itself."

Apparently, that answer did not fly very far with Judge Zervos, since he repeated his demand for clarification, much more forcefully and pointedly. Quite innocently, I can assure you, I once again responded to the court with all due respect that the record undoubtedly would speak for itself. For whatever reason, this answer still was not acceptable to the good jurist, and through various facial gestures which did not appear on the record, but were nevertheless quite communicative, he made it very clear to me that I had better assist him in the clarification of the record with respect to what apparently was an incident which was troubling the court or I might also have a place to stay that evening.

An Alaskan since 1959, and an attorney since 1976, it did not take long for me to realize that my career, and possibly my life, as well, might be rapidly drawing to a close if I were not to assist the court in clarifying what seemed to be to me an otherwise very clear record. Still, I could not quite fathom why this was such a concern, since I had often heard judges say to me when asking for clarification as a defense attorney:

"Counsel, the record will speak for itself."

Apparently, the goose/gander theory of litigation did not apply in this instance.

But then again, because records are somewhat of an inanimate object, and cannot recognize facial gestures, clenched fists, and similar methods of effective non-verbal communication, I wisely decided that it would be best for me simply to agree with the court and my opposing counsel, rather than risk an untimely death in the cold, damp jail cells of Sitka, Alaska.

In the end, the case was settled. The threatened appeal never materialized, and the "Record," once again, stood in silent tribute to yet another case to go down the dusty wayside of litigation, buried in the miles of quarter inch celluloid which only a strong magnet could ever decipher.

CAN YOU HELP?

The award-winning Anchorage Youth Court needs your help.

Due to the low interest rates we're all enjoying, the IOLTA trust account interest that funds a major portion of the operations of this organization have declined significantly. At the same time, the office space the Youth Court has been sharing is needed for the expansion of a business.

If you're a property owner, landlord or business that can spare 900 square feet of office space near the State Courthouse, the Youth Court would like to hear from you.

Youth Court staff and volunteers will maintain and caretake your property in top condition, and can afford to pay for insurance and utilities.

Earlier this year, this non-profit organization received the distinguished service award from the American Bar Association, for the nationally-recongized work it has done to put first-time teen offenders back on the track to responsible citizenship. The peer group court is staffed by volunteer teens citywide, who serve as attorneys for the prosecution and defense, and as judges in the Youth Court. Volunteer members of the Alaska Bar Association advise the teen peer program, which is managed by one paid staff person. Few of the young people who come before the court become second offenders.

Help keep this program active in the community!

If you know of space that can house the Youth Court, call Sharon Leon, Anchorage Youth Court, 274-5986.

—UPCOMING CLE—
MARK YOUR CALENDARS!!!

ATTORNEYSAND
MENTAL HEALTH PROFESSIONALS:
Toward Improving Communications
Between Two Professions

Saturday, October 2
8:00 a.m. - 5:00 p.m.

University of Alaska, Anchorage.
Arts Building, Room #116

8.0 CLE Credits
$95.00 - Advance Registration

A one-day workshop designed to provide mental health professionals and attorneys with the information and skills necessary to work together productively and cooperatively.

Faculty:
Jerry Nims, PhD., J.D.
Dr. Laura Jones
Dr. James Harper
Judge Elaine Andrews
Daniel Callahan, Esq.
Mona Lisa Earle, Child Custody Investigator

Sponsored by:
Alaska Psychological Association
UAA Department of Psychology
in cooperation with the
Family Law Section of the
Alaska Bar Association

A brochure will soon be mailed to you.
For further information, please contact Dr. Mark Johnson, UAA Department of Psychology, at 786-1642.

We hope to see you there!

IOLTA Overview

Alaska's IOLTA program was established by the State Supreme Court on November 20, 1986, through the adoption of amendments to DR 9-102. The program became operational in March 1987. On July 15, 1989, it became "opt out," requiring each attorney to file a Notice of Election.

Funds from the Alaska Bar Foundation's IOLTA program have been designated solely for the following purposes:

1. The Provisioning Of Legal services To The Economically Disadvantaged.

The Alaska Bar Foundation is committed to improving access to legal services. IOLTA support is given to projects and organizations which provide legal services to persons or groups who find it difficult to obtain such services. Particular consideration is given to projects and organizations which assist the legal needs of the economically and socially disadvantaged.

2. Improving The Administration Of Justice.

The Alaska Bar Foundation supports projects and organizations which seek to improve the legal system and the administration of justice. Special emphasis is given to projects that contribute to the substantive understanding of the legal system and to organizations which advocate improvement.

Participating Banks

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

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

IOLTA Grant Recipients

Alaska Pro Bono Program

Alaska Pro Bono Program (APBP) is jointly sponsored by the Alaska Legal Services Corporation and the Alaska Bar Association. The program involves private and public sector attorneys in the delivery of free legal services to Alaskans.

In 1992, a $165,000 grant was provided from IOLTA funds for several purposes. In addition to providing the economically disadvantaged with free legal representation, the APBP provides the following services to the community statewide: free monthly *pro se* classes which provide information and assistance concerning uncontested divorces, uncontested custody, and support orders for unmarried parents; Chapter 7 bankruptcy classes; advice-only question and answer clinics called Tuesday Night Bar; a special landlord/tenant law *pro se* and advice-only educational clinic; assistance in the area of wills, estate planning, housing, and consumer matters through the Elderlaw project for low-income clients over sixty years of age; and appointments for low-income *pro se* plaintiffs filing U.S. District Court civil cases.

Anchorage Youth Court

Anchorage Youth Court (AYC) is a non-profit organization which supports an alternative preadjudicatory system for Anchorage youth. Through this program, juveniles accused of breaking the law are allowed to submit their case to the AYC and to be represented and judged by their peers. Those convicted within this system are required to perform community service instead of receiving a criminal record. This allows the youth to atone for the wrongdoing without damaging his/her future and lessens the traffic of juvenile cases in our courts.

This program also benefits the students in junior and senior high schools who are trained in many facets of the legal system and receive hands-on trial experience as attorneys, judges, bailiffs, clerks, and jurors.

In 1992, $40,000 in IOLTA funds were donated to AYC to maintain its operation and expand its services to more students.

Catholic Social Services

Many immigrants to Alaska, in addition to the other problems they face in attempting to enter the United States, speak little or no English. They require special assistance with the often confusing immigration laws. Catholic Social Services (CSS), through its Immigration/Refugee program, provides the only legalization assistance available in Anchorage to aid immigrants with the immigration laws.

$27,090 in IOLTA funds were contributed to CSS. In addition to maintaining the previously existing legalization services, requests for which increased 23.6%, funding was used for a part-time Legal Affairs Coordinator to deal with other numerous requests.

IOLTA Law Firms

Joyce M. Abraham-Simmerman, P.C.
Law Offices of Louis E. Agi
Alaska Legal Services Corporation
Law Office of Daniel W. Allan
Helene M. Antel
Artus & Choquette
Ashburn & Mason
Ashton & Dewey
Atkinson, Conway & Gagnon, Inc.
Law Offices of C.R. Baldwin
Joyce E. Bamberger
Bankston & McCollum, P.C.
Barokas & Martin
Law Offices of Christian N. Bataille
Batchelor, Brinkman & Pearson, P.C.
Baxter, Bruce, Brand & Rodriquez
Birch, Horton, Bittner & Cherot
Bledsoe & Knutson, P.C.
Law Offices of William Bixby
Law Office of Arona S. Blachman
Bliss Riordan
Bogle & Gates
Law Offices of William J. Bonner
Boyko & Flansburg
Gregg B. Brelsford
Law Office of Carol A. Brenckle
Law Office of Teresa Foster Brimner
Law Offices of Robert C. Brink
Frederic E. Brown, Atty. at Law
Law Office of Patrick T. Brown
Law Office of Roger Brunner
Burr, Pease & Kurtz, P.C.
Law Offices of Rex Lamont Butler
Call, Barrett & Burbank
William B. Carey
Law Offices of Linda M. Cerro
Swan T. Ching
Law Offices of Mark Clayton Choate
Nils Christiansen, Atty.
Matthew W. Claman
Clark, Walther & Flanigan
Law Offices of Charles W. Coe
Law Office of Dan K. Coffey
Bonnie J. Coghlan
Law Offices of Kathryn Coleman
Craig A. Cook
Law Office of Gregory F. Cook
Brennan & Cooke, P.C.
Copeland, Landye, Bennett & Wolf
Coryell & Associates
Kenneth L. Covell
Law Office of Charles C. Coy
Law Offices of Glenn E. Cravez
Law Office of Dennis P. Cummings
Law Offices of Ronald E. Cummings P.C.
Law Offices of Ralph B. Cushman, P.C.
Davis & Goerig, P.C.
Davis Wright Tremaine
Delaney, Wiles, Hayes, Reitman & Brubaker, P.C.
Law Offices of Dan E. Dennis
Dillon & Findley, P.C.
Law Office of Vincent DiNapoli
Loren Domke, P.C.
Law Offices of Robert B. Downes, P.C.
Law Office of Richard D. Ellmers
Ely & Havelock
Law Offices of Deitra L. Ennis
Virginia M. Espenshade
Farleigh & Shamburek
Faulkner, Banfield, Doogan & Holmes, P.C.
Thomas E. Fenton
Findley & Pallenberg
Law Office of James E. Fisher
Franklin D. Fleeks
Foley, Foley & Kelley
Law Office of Maryann E. Foley
Alexis G. Foote
Law Office of William T. Ford
Law Office of Carl C. Frasure, II, Esq.
Friedman & Bros.
Law Office of Stephen Frost
Gaitan & Cusak
Peter A. Galbraith
Walter H. Garretson, P.C.
Law Offices of David E. George
Giannini & Associates, P.C.
Gilmore & Doherty
Gissberg Law Office
Law Offices of James B. Gottstein
David E. Grashin & Associates
Gray, Gevedon, Cole & Razo, P.C.
Brian Mark Gray, P.C.
Law Office of Stephen Greer
Law Office of Marc Grober
Groh, Eggers & Price
Gruenberg & Clover
Patrick J. Gullufsen
Law Office of Donna Habermann
Stan Hafferman
Hagans, Brown, Gibbs & Moran
Law Office of J. Glen Harper
Law Offices of Richard L. Harren
Law Office of Kathleen Harrington
Hedland, Fleischer, Friedman, Richard C. Helgeson
Heller Ehrman White & McAuliffe
Law Offices of Andrew Hemenway
Hintze, Herrig, & Wright
Law Offices of John L. Hoffer, Jr.
Hofstad & Lewis
Hoge & Lekisch
Law Offices of Lee Holen
Holman Law Office
Law Offices of Alan J. Hooper
Houston & Henderson
Hughes Thorsness Gantz Powell & Brundin
Kenneth P. Jacobus, P.C.
Jamin, Ebell, Bolger & Gentry
Thom F. Janidlo
Jermain, Dunnagan & Owens, P.C.
Michael Jungreis
Kalamarides & Associates
William W. Kantola
Joseph L. Kashi
Kemppel, Huffman and Ginder, P.C.
Law Office of Elizabeth Page Kennedy
Law Office of Amrit Kaur Khalsa
G. Rodney Kleedehn
Law Offices of David E. Kohfield
Koval & Featherly, P.C.
Law Office of Robert W. Landau
Lane Powell Spears & Lubersky
Larson, Timbers & Van Winkle, Inc.
LeDoux & LeDoux
Karl Fulton Lehr
Law Office of Erik LeRoy
Law Office of Kenneth Leyba
Libbey & Suddock
Law Offices of Charlene Lichtmann
Law Firm of Donald F. Logan
Law Offices of Dick L. Madson
James S. Magoffin, Jr., Atty. at Law
David D. Mallet
Maloney & Haggart
Martin, Bischoff, Templeton, Langslet & Hoffman
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McNall & Associates, P.C.
Mendel & Huntington
Law Offices of Dennis M. Mestas, P.C.
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Law Office of F.P. Pettyjohn
Law Offices of Janet D. Platt
Stanley B. Pleninger
Preston Thorgrimson Shidler Gates & Ellis
Chris Provost
Law Office of Colleen A. Ray
Rice, Volland & Gleason, P.C.
Julian C. Rice
Robertson, Monagle, & Eastaugh, P.C.
Rose & Figura
Law Office of Patrick G. Ross
Royce & Brain
Ruddy, Bradley & Kolkhorst
Law Offices of Daniel T. Saluri
Law Office of Patti J. Saunders
Law Offices of Sandra K. Saville
Law Offices of Gordon F. Schadt
Schendel & Callahan
Law Office of Ernest M. Schlereth
Schleuss & McComas
Law Office of Carol Jane Seidlitz
Richard W. Shaffer
Law Office of R. Brock Shamberg
Smith, Coe & Patterson
Michael R. Smith
Sonosky, Chambers, Sachse, Miller & Munson
Staley, DeLisio, Cook & Sherry, Inc.
James T. Stanley Corp., P.C.
Paul D. Stockler
Law Offices of Dana Robert Stoker
Law Office of Robert E. Stoller
Stump & Stump
Law Office of R.N. Sutliff
Taylor & Hanlon, P.C.
Law Office of Robin A. Taylor
Law Office of Janet K. Tempel
Valerie M. Therrien, Atty. at Law
Linda S. Thomas
Colette G. Thompson
Law Office of G. Nanette Thompson
Law Offices of Tucker S. Thompson
Michael A. Thomson, Atty. at Law
Richard S. Thwaites, Jr.
Torrisi & Snyder
Fred W. Triem, Atty. at Law
Warren A. Tucker
Charles E. Tulin & Associates
Law Office of Vincent L. Usera
Law Office of Cesar O. Velasquez
Law Offices of Vincent Vitale, P.C.
Law Office of Frank J. Vondersaar
Wade & DeYoung
Wadsworth & Associates
Wagstaff, Pope & Clocksin
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Law Offices of David T. Walker
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Daniel C. Wayne
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Kevin A. Wehrung
Daniel W. Westerburg
Kirk Wickersham
Law Office of Thomas R. Wickwire
Law Offices of Donna C. Willard
Law Offices of Richard J. Willoughby
Law Offices of Charles Winegarden
Winfree & Hompesch, P.C.
Law Offices of Tonja Woelber
Wohlforth, Argetsinger, Johnson & Brecht, P.C.
Brett M. Wood
Law Offices of Thomas J. Yerbich
Law Offices of Steve K. Yoshida, P.C.
Law Office of Clark Logan Young
Michael J. Zelensky
Ziegler, Cloudy, King & Peterson
Elizabeth A. Ziegler

Alaska Bar Foundation

1992 Annual Report

PRESIDENT'S REPORT

In 1992, the Board of Trustees of the Alaska Bar Foundation concentrated its efforts on improving the IOLTA (Interest on Lawyers' Trust Accounts) program. Participating banks were encouraged to market IOLTA accounts to their law firm clientele, and law firms were encouraged to join the Alaska IOLTA program. By December of 1992, 755 attorneys and 82 law firms in Alaska were participating in the program.

The Trustees also increased efforts to educate the public about the Alaska IOLTA program through a wider distribution of the 1991 Bar Foundation Annual Report; advertisements in the Bar Rag and Anchorage Daily News featuring IOLTA participants and the organizations that received grants; and the provisioning of grant application information to a greater number of potential recipients. A luncheon featuring 1992 recipients also was planned, but had to be cancelled due to the coinciding eruption of Mount Spurr!

Grants totaling $232,000 were distributed in 1992 which made possible the continuation of the very successful Alaska Pro Bono Program, further development of the immigration/refugee program sponsored by Catholic Social Services, and the maintenance of the highly acclaimed Anchorage Youth Court program.

We consider 1992 a successful year for the Alaska Bar Foundation and the IOLTA program, but it was also a year that continued to demonstrate the need for IOLTA monies to meet and support important Alaskan community needs.

Mary K. Hughes

IOLTA GRANT PROCEDURES

The Trustees defer to the following guidelines and procedures for reviewing applications and awarding IOLTA grants:

1. An applicant shall submit its request for an IOLTA grant by supplying the information and documents requested in the IOLTA application supplied by the Alaska Bar Foundation.
2. All applications for IOLTA grants shall be submitted to the Alaska Bar Foundation by April 15 of each year.
3. The Trustees of the Alaska Bar Foundation shall review each IOLTA grant application to determine the application's appropriateness for IOLTA funding.
4. If the application can be funded, the Trustees of the Alaska Bar Foundation shall meet as a committee of the whole for consideration and approval of IOLTA grant applications. The Trustees meeting shall be prior to June 30.
5. Funding shall be available to successful IOLTA applicants on a fiscal year basis (July 1 through June 30).
6. The President of the Alaska Bar Foundation shall communicate to each applicant the action taken by the Trustees.
7. An approved IOLTA applicant shall submit such evaluation reports as requested by the Alaska Bar Foundation.
8. Grant applications are the property of the Alaska Bar Foundation.
9. Applications for emergency IOLTA funds shall be made to the Alaska Bar Foundation through its President. The request will be forwarded to the Trustees who may call a special meeting to consider the same.

ALASKA BAR FOUNDATION TRUSTEES

WINSTON S. BURBANK

JOHN M. CONWAY

MARY K. HUGHES

WILLIAM B. ROZELL

SANDRA K. SAVILLE

FINANCIAL STATEMENTS

ALASKA BAR FOUNDATION
Financial Position as of December 31, 1992

ASSETS:			
Cash and Investments:			
Operating Account	3,701		
Ready Assets	46,345		
Total		50,046	
Accounts Receivable:			
Alaska Bar Association	2,874		
Interest	100		
Total		2,974	
Donated Property (Art)		4,500	
TOTAL ASSETS:			**$57,520**
LIABILITIES AND FUND BALANCE:			
Liabilities	00		
TOTAL LIABILITIES:		00	
Fund Balance:			
George F. Boney Endowment	5,000		
Justice Dimond Endowment	3,600		
Wendel P. Kay Endowment	490		
Designated Scholarship Fund			
Balance at 12-31-92	(6,000)		
Increase (Decrease)	00		
Undesignated Capital	39,493		
YTD Gain (Loss)	6,309		
Consolidated Retained Earnings	8,628		
TOTAL FUND BALANCE:		57,520	
TOTAL LIABILITIES AND FUND BALANCE:			**$57,520**

ALASKA BAR FOUNDATION
Income Summary for the Twelve-Month Period Ending December 31, 1992

INCOME:			
Donations	9,247		
Interest	1,460		
TOTAL INCOME:		10,707	
EXPENSES:			
General Projects	00		
Grants	00		
Board Meetings	00		
Alaska Legal Net	530		
Accounting Services	1,674		
Supplies and Miscellaneous	1,869		
990 Information Return	325		
TOTAL EXPENSES:		4,398	
NET GAIN (LOSS):			**$6,309**

FINANCIAL STATEMENTS

ALASKA BAR FOUNDATION IOLTA PROGRAM
Financial Position as of December 31, 1992

ASSETS:			
Cash and Investments	218,273		
Account Receivable Interest	480		
TOTAL ASSETS:			**$218,753**
LIABILITIES AND CAPITAL:			
Current Liabilities:			
Payroll Taxes Payable	8		
TOTAL LIABILITIES:		8	
Capital:			
Funded Capital	300		
YTD Gain (Loss)	34,676		
Fund Balance	183,769		
TOTAL CAPITAL:		218,745	
TOTAL LIABILITIES AND CAPITAL:			**$218,753**

ALASKA BAR FOUNDATION IOLTA PROGRAM
Income Summary for the Twelve-Month Period Ending December 31, 1992

INCOME:			
IOLTA Interest	182,424		
Interest on IOLTA Account	8,353		
TOTAL INCOME:			190,777
EXPENSES:			
IOLTA Grants:			
Alaska Pro Bono Program	82,500		
Anchorage Youth Court	20,000		
Catholic Social Services	13,545		
Total Grants		116,045	
Administration:			
Staff Expense	6,464		
Bank Fees	16,773		
Accounting Services	6,697		
Annual Report	4,367		
Program Advertising	3,961		
Miscellaneous Expense	1,795		
Total Administration Expense		40,057	
TOTAL EXPENSES:			156,102
INCREASE (DECREASE):			**$34,675**