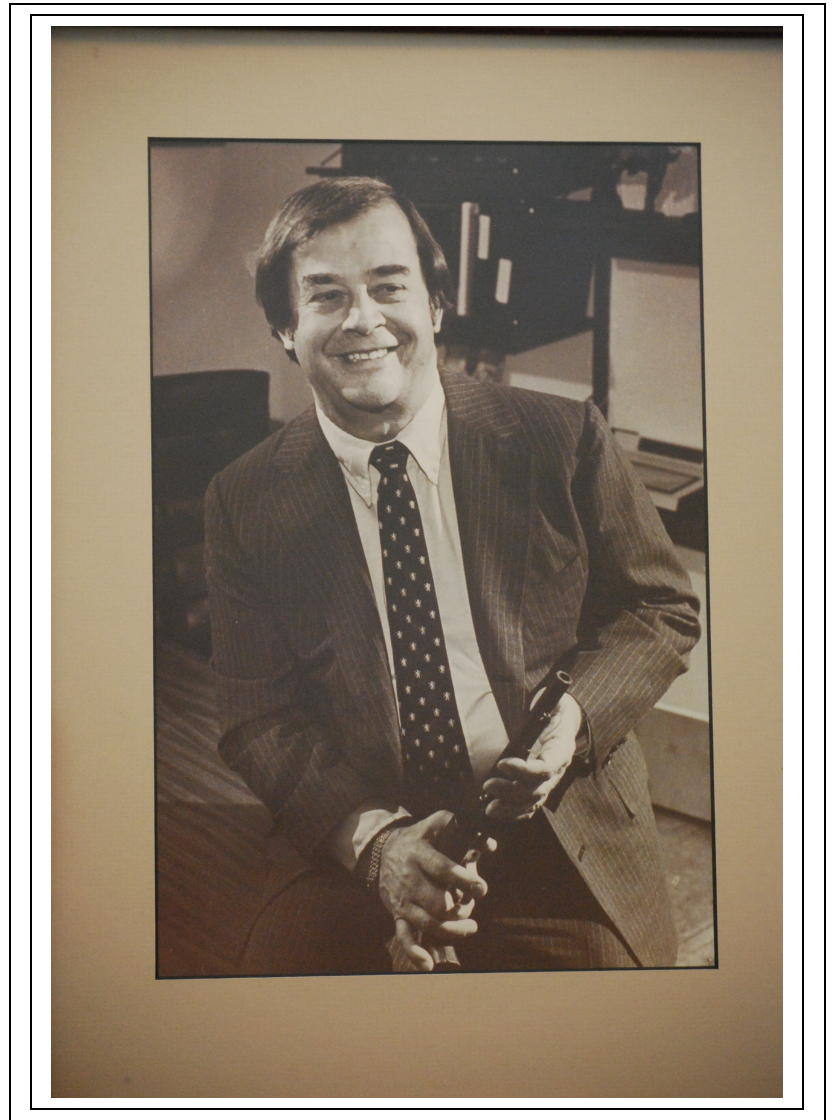


# ***ALL MY TRIALS***

***Tales of a  
Hired Gun***



***by***

***JUDGE GAIL ROY FRATIES***

*Publishing Notes:*

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*Livingstone, Montana, 2009*

**Forward**

**Alaska** Superior Court Judge Gail Roy Fraties (1928 – 1989) was a fine judge, a consummate professional - but always he remained a criminal trial attorney at heart. I think it was there, as a criminal trial attorney, when he was at his best. His often irreverent, sometimes outrageous but always colorful, intelligent and insightful writings about his dealings at law, and especially about his times at trial, are among the funniest and most-right-on writings about the law I've ever read. Here, twenty years after his death, he discusses things about the law in ways few have ever matched, and, given the solemnity of the times, probably fewer still ever will.

I envy you, as you are about to enjoy a real treat.

And I hope this is true for all of you. However, if something in the material offends you, remember that Gail was writing at a time when it was permissible to say things that now he would never say. Additionally, criminal trial attorneys, by their nature, are dealing with the seamy side of our world, with difficult issues, with genuinely terrible crimes, with people who are those with whom we'd choose to go to dinner. Bad Actors, he'd call them, and that's using his gift for understatement. So please keep the timing and context of Gail's writings in mind as you read them.

Additionally, I'm sure Gail never intended to displease anybody who he mentioned by name (and there are many mentions by name in this book). He never intended to hurt anyone, quite the reverse...and yet he always said his friends were as outrageous as he (and I agree with him wholeheartedly about those I've met...YOU know who you are...). I think they were always delighted to see their names in his column...even, I've heard, vying for the privilege....as I would have, had I had that singular honor. So if you are one of, or family of one of, the folks whom Gail mentions, and if you see something here that is difficult to read, well, Gail would be sorry to hurt any one, and please keep in mind that Gail saw a different reality at work than he did at home. At home with his family he was a kind, loving, gentle man, although (in my opinion) he always had a bit of the pirate going for him, even there.

Anyway, if you do want to comment on this work, we'd welcome your comments on the site where you downloaded it... [Peeweesinadventureland.com](http://Peeweesinadventureland.com). And thanks for purchasing Gail's book.

A. J. Fraties

**Sample Chapter, ALL MY TRIALS**

**Spring** has come to Alaska, and with it various annual migrations – including lawyers to our Bar convention. Typically, these gatherings take on some of the atmosphere of the sponsoring city – and it can be anticipated that the convention at Juneau will be a success, well organized and interesting, with plenty of educational opportunities for all. This is not to invidiously compare the efforts of the freer spirits in Ketchikan, for example, or Fairbanks – who present equally interesting, if crazier agendas. However, nobody goes to Nome anymore – and some of my readers have asked me to comment.

I think that most of the applicable statutes of limitations have run out, and as a participant in the 1969 Bar convention at Nome, I do remember vividly what went on there, as does everybody else who attended. However, no one has chosen to talk about it until this moment – presumably because of the general “twilight zone” atmosphere that pervaded the whole strange affair.

The Bar was much smaller then, and Fred Crane – District Attorney for Nome and the Second Judicial District – had prevailed upon the rest of us to honor the city with a convention. He promised a totally organized program, with many delights available only in the Far North. Unfortunately, he died during the winter – and according to Nome custom at that time – was stored in a warehouse awaiting, with the other residents who passed away during the cold months, the softening of the ground in the summer for burial. That didn't prevent him from attending the convention, however, as I will explain.

As I recall, Alaska Airlines had chartered a special flight that picked up many of the participants – originating in Southeast and proceeding north. It was a long trip, and most of the membership had seen the bottom of the glass long before we arrived. After we settled in, Tom Wardell (then Deputy Attorney General, and presently a District Attorney himself, at Kenai) invited me to accompany him to the Board of Trade, a bar on Main Street which was, and is, Nome's major attraction. Tom is a gregarious soul, who generally manages to conceal beneath an engaging exterior the fact that he – together with such other immortals as Bill Garrison and Stan Didus – is one of the true bad actors of our legal community and times.

Most of the other lawyers had already preceded us to the “Trade,” and it was a headstrong and spirited group that responded to the then probate judge J. Gerald William's stentorian cry (his normal speaking voice), “Let's bring out old Fred.” A delegation was dispatched, and soon returned with the guest of honor – who although he did not leave his box, certainly contributed to the gaiety and spontaneity of the gathering. Many toasts were made to him, and it was decided that he be given an eternal (as opposed to “lifetime”) position on the Board of Bar Governors, but I seem to remember that Didus offered to become the blood brother of one or more Eskimo gentlemen who were also in the bar, and inasmuch as they spoke no English, his picking up knife for that purpose was misinterpreted and resulted in a certain amount of breakage.

It was a subdued group that met (in a Quonset hut at the edge of town) for the business meeting the following morning. Anchorage trial lawyer Bob Erwin, seconded by his brother

(later Justice) Bill Erwin, proposed as a first order of business that the Bar convention be shortened from four to three days, which was given unanimous consent. The following seventy-two hours passed as in a dream, mostly in the Board of Trade, and I don't really recall going to any classes. I do remember seeing the King Island dancers, who performed "The Salmon Dance," "The Reindeer Dance," "The Sheefish Dance," and "The Walrus Dance" (in which they were accompanied by J. Gerald Williams, a comfortably fleshed gentleman who not only danced with vigor but turned an interesting shade of magenta in the process). I asked Attorney General G. Kent Edwards, who had accompanied me, if he could see any difference in the dances – and he replied that he couldn't.

"They just do the same one over and over again, and give them different names for the tourists," he said.

During all of our activities and breakfast and lunch gatherings, I had noticed the presence of a friendly but rather quiet stranger, who was identified to me as a presiding judge of the Ninth Circuit Court. He was to be the keynote speaker at our banquet, and all of the lawyers were courteous to him – soliciting his opinion of various legal decisions of the day. He was nice, but noncommittal – and seemed to prefer to listen to everyone else rather than expressing an opinion himself. This was put down to judicial reserve, and we respected his professional reticence to give an opinion on matters which might well be before his court at some future time.

The evening of the banquet, the president of the Bar, Warren Christianson, presented the speaker by name. He rose, and with a shy smile, stated the following: "I had always heard that lawyers were clannish, but I want to say that I have never been treated with such gracious and courteous attention as I have received from the members of this group. Two days ago, when I arrived at the airport, I was greeted by a delegation of your members who – although they were drunk – were as hospitable a group of fellows as I've ever met. You've paid for my room, fed me three meals a day, and invited me to all of your lectures and discussions. I've been asked my opinion about the *Miranda* decision, whatever that may be, and I've answered as well as I could – and now you've invited me to be your keynote speaker. Why you should pay such a tribute to a dried milk salesman, I am at a loss to say."

By this time, various members of the Bar, particularly the welcoming delegation, were looking at one another with wild surmise ("silent upon a peak in Darien," as it were) and most of us are still wondering what became of the Ninth Circuit Judge that our colleagues passed over in favor of our new keynote speaker. However, our fears were quickly forgotten, because this gentleman proceeded to talk about the only thing that he really knew well – selling dried milk in rural Alaska, and he gave the best speech that most of us have heard in a lifetime of going to Bar conventions. He got a standing ovation, as well. We determined on the spot to bring him back for next year's convention – where, I suppose, he was passed over at the airport under similar circumstances. Anyway, I never saw him again.

*With that high point, any really clear recollection of the Nome Bar convention is at an end. I do remember everybody running out to cheer when the water truck came by, but I don't know why.*

*Recollections of the midnight visit with Mr. Crane bring to mind a problem described to me recently by my friend, Anchorage investigator Bob Mitchell. As I've tried to point out in this column before, we lawyers – although our lives are frequently lived on the razor's edge of disaster – are not the only professionals who have their little problems. Bob, a licensed commercial pilot, is still concerned about an incident that occurred to him and his friend Dan Ludahl in the spring of 1969.*

*According to Bob, Mr. Ludahl was operating a small charter service called Glacier View Skyways, out of Flathead County Airport near Kalispell, Montana. Bob occasionally flew as co-pilot. One day a grieving widow appeared – prevailing upon both of them to scatter her husband's ashes over Glacier National Park. They agreed to do so, and accepted \$350 for the service. Over several drinks, Bob described the subsequent events as follows:*

*“Jesus, Gail – I've always felt bad about it, but this is what happened. We took this Cessna 172, and while Dan was flying I sat in the back seat with this little urn and fed the ashes through the window vent. We really did try to find all the prettiest spots – and Dan flew over all these lakes and rivers while I continued to shove the gentleman's ashes through this little hole.*

*“However, when we got back down on the ground – I noticed that a back window had been partly opened on the same side of the plane, and for some reason all of the ashes had blown right back in and were half an inch thick in the back seat. We were going to go back up, but the weather closed in – and Dan was leaving that night for a three week vacation. To make matters worse, we had to get the plane cleaned up in order that he could lease it to another company.”*

*“What did you do, Bob?” I asked.*

*“Ah, shit – it was really tacky. I just took a whisk broom and swept the dude out on the ramp. It had oil all over it and everything,” he continued, staring moodily into his glass.*

*I tried to comfort him. “Probably some of him got on the park anyway – and besides the wheels of the other planes must have spread him around some.”*

*“I know, Gail – but he wanted to be part of Glacier National Park, not half the runways in the Rocky Mountain states.”*

*I persisted. “Never mind, Bob, no one will care about it in a thousand years anyway.”*

*“I will,” he said.*

### Chapter Three

I would like to publicly thank Bruce Monroe of Juneau, Mike Schneider of Anchorage and my mother of Watsonville, California, all of whom commented favorably on my last article. I know what the rest of you are thinking – “Yes, but can he tell war stories?”

The most effective final argument I ever heard was in the Municipal Court at Salinas, California. I had gone in to watch one of my fellow prosecutors try a local citizen or “peace disturbance,” which (at that archaic time in California history) had as its gravamen the fact that swear words had been uttered in the presence of women and/or children. The State produced a number of witnesses who had heard the foul language screamed by the defendant during a fight in a local bar.

The accused, who defended himself, did not choose to deny any of this, and apologized profusely to the jury. His statement, as I recall, was, “If Officer Bill says that I did all these things, I’m sure that it is true. However, I had just been kicked in the nuts. You know how that feels,” he added, locking onto the horrified gaze of a 72-year-old lady in the first row of the jury. His acquittal from the box followed routinely.

It’s obvious that if you don’t have any facts, your final argument is crucial. My friend among the prosecution like to dwell on this, and are fond of saying, “Mr. Fraties is going to quote from the Bible, Lassie Come Home and Uncle Tom’s Cabin – but please remember that we have presented you with ten world famous pathologists, and all he has is a hypnotist and a voice stress analyst. What does he have to say about that?” What I have to say to that of course, is, “He that does it to the least of these does it also unto me.” If the jury wants to take its chances with Divine Retribution, so be it. I’ve put them on notice.

Court watchers have awaited with interest the Supreme Court’s Opinion 2180 – August 25, 1980 in *Swivel vs. Fulano DeTal Inc.*, in which popular Anchorage trial attorney Ben Walters had attempted an innovative approach to jury argument. In the words of Mr. Chief Justice Rabinowitz: “In this case, Plaintiff’s attorney – in closing argument – stated to the jury, ‘Some of you no doubt have wondered why I questioned you extensively in my voir dire of the jury panel concerning whether or not you believed in the tooth fairy, the Easter bunny, and Santa Claus. You will have noted that those of you who replied in the negative were assiduously challenged by defense counsel, whereas I kept as many of you as I could. I think that it is appropriate to say that I sought a jury in which was in the proper frame of mind to evaluate his Honor’s forthcoming instruction that an insurance company is not a party to the case.’ Trial Judge Victor Carlson thereupon did a brief but spirited in-court imitation of a brown bear with its foot in a trap, and granted a mistrial and a dismissal of the Plaintiff’s case, with prejudice. From that decision, Plaintiff appeals:

*"It has been a time-honored custom in the courts of Alaska, as throughout the civilized world, to honor certain legal fictions [State vs. Raven, et al.] to avoid the decision which faces it now. The fictions of which I speak, number among them, but are not limited to, the suppositions that:*

- 1. The Defendant in a criminal case is presumed innocent.*
- 2. Any witness is presumed to tell the truth.*
- 3. The jury will not discuss the case among themselves (much less with their families and neighbors) before the evidence is in.*
- 4. They will pay no attention to what the judge or counsel have done in their presence, merely because they are instructed not to do so.*
- 5. They will forget testimony, once heard, because the Judge later rules that is inadmissible (see, "Unringing the Bell – Does Anyone Still Believe This Bullshit?", U.C.L.A. Alaska Law Review, Issue No. 12, Dunnagan).*
- 6. There is not an insurance company lurking somewhere behind every effective defense of a civil case.*

*"The Alaskan People, however pragmatic and simplistic, are highly intelligent individually or in a group. It is inconceivable that such persons can sit through a two-month trial, involving – as they usually do – witnesses flown in from the Persian Gulf and eating their heads off in the lap of luxury while awaiting the vagaries of a 'trailing calendar' – and remain convinced that all of this is being financed by the Defendant/motorist.*

*"It is obvious, even to the untutored eye, that either the federal government or some insurance company is on the job, and has deep pockets - it appears that they have about equal rank.*

*"As a practical matter, it is almost impossible to avoid the subject of insurance, once counsel have determined to raise the subject. It does not seem to us that Plaintiff's counsel should be forced to demean themselves by the usual ruses, some of which are as follows:*

- 1. Question: 'Do you own controlling interest in any insurance company:' (directed to average middle class jurors).*
- 2. Instructions to one's own witnesses: 'Now, don't mention any word beginning with 'I' – but did you report this accident to anyone other than the police?'*
- 3. The time-honored 'blurt-out' by the Plaintiff: 'He said his insurance would pay for it.' All of us, as former trial practitioners, are aware of many similar examples.*

*"I'm sure the Alaska Bar is well aware I could go on for fifty more pages but I like to be unpredictable. Suffice it to say this court finds Plaintiff's argument not only harmless, but refreshing – and remands the case to the trial court for action in accordance with this opinion (if it can figure out what that may be).*

*"Mr. Justice Burke (dissenting): 'I must disassociate myself from any attempt of this court to make sense. Mystery is what the public demands, and mystery is what we have consistently given it. I would affirm.'"*

*This writer has been made aware that some of the practical advice contained in his last column did not seem germane to the practice of the government attorneys in the Bar. In answer to the inquiry of Kenai District Attorney Tom Wardell – no, a time slip is not what happens when the Starship Enterprise exceeds warp factor 9. Further, a bring-up system is not some sort of gruesome fad diet. I will explain further when you leave public employment.*

*In closing, all of us are indebted to Bar historian, Judge Robin Taylor, for his words of encouragement to the trial Bar: "All great empires, however despotic, eventually fall by their own weight." See, Gibbons, *Decline and Fall of the Roman Empire*, as quoted in "The Snowden Syndrome – Light at the End of the Tunnel" (Taylor, *American Trial Judges' Quarterly*).*

## Chapter Four

**My** readers have prevailed upon me to comment on client relations. I am delighted to do so, despite the fact that the only rule that consistently works with my own is to stay away from them when the moon is full.

In this context, I have examined with interest the ATLA's proposed Code of Conduct (presumed by that organization as the "Alternative to the ABA Disaster"), Part II, Fidelity to the Client's Interest, Sec. 21, which provides: "In a matter entrusted to a lawyer by a client, the lawyer shall give undivided fidelity to the client's interest as perceived by the client, unaffected by any interest of the lawyer or of any other person, or by the lawyer's perception of the public interest (emphasis mine)." I mean, why look further – here it was all the time, right in front of us.

With the above as a preamble, I am reminded of the first client conference I ever attended (as an observer). California trial lawyer, William F. Bryan, in his urbane and gracious way, and asked his prospective client for brief statement. This request, as was Bryan's custom, was prefaced by an admonition that it was in the client's best interest to tell the lawyer the whole truth, however embarrassing, and that he was protected by the attorney-client privilege in doing so.

### A TERRIBLE MISUNDERSTANDING

Our caller was a large and imposing man, obviously accustomed to deference and respect. He identified himself as a minister of the Gospel, and stated: "Mr. Bryan, I have been the victim of an incredible accident. I was walking alone in the city park, late in the afternoon, when I felt a 'call of nature.' There was no public bathroom in sight, and I –thinking myself alone – stepped off the trail, and behind a tree, to relieve myself. You can imagine my chagrin and dismay to discover that I had been observed by a troop of Brownie scouts, and that their leader had been so misguided as to report the incident to the police. Obviously, I had no knowledge of the presence of these children – and now, the mere fact of my arrest has blighted my career. I'm sure that this terrible misunderstanding can be cleared up, so that I may be allowed to return to my congregation and my life work of spreading the good news of the Lord, free of the awful suspicion that has been created about me. I'm not accustomed to dealing with criminal lawyers, but given my excellent reputation and standing in the community,

*this case should present very little difficulty for you. Inasmuch as it is important to me, will you please make a couple of phone calls and straighten it out?"*

#### *BREAD UP FRONT*

*Attorney Bryan, who had been listening with a deeply attentive and sympathetic expression, replied with equal candor. "Padre," he stated with a disarming smile, "for weenie-wavers it's \$2,500 up front, American. That's a minimum retainer. If you've got the bread, give my bookkeeper a check on the way out – and tell my secretary the date and time of your arraignment." There was little further conversation, and the shattered cleric, after complying with his attorney's instructions, was soon released to the bosom of his flock. I'm not sure how Bryan stands on the ATLA or ABA guidelines – but I do know he gets results.*

#### *ANIMAL HOUSE, REVISITED*

*It's this sort of anomaly, I suppose, that leads lawyers – particularly trial lawyers – into a variety of self-destructive and outrageous activities. The Ketchikan Bar Association's yearly "Continuing Education of the Bar" at Yes Bay is a case in point. Students of the Ketchikan scene will recall that this function used to take place at Bell Island, but for reasons not made clear to the writer (who attended this year) it has been moved to a new location.*

*As a mere observer, I do not pretend to the insights of those who have made a thoughtful and informed evaluation of this annual rite, and the reader is directed to "The Migration of the Lemmings, the Running of the Bulls at Pamplona, and the Ketchikan Continuing Education of the Bar – Inquiries Into Animal Behavior, as Influenced by Mass Hysteria," The American Sociologist, Winter ED. 1979. As a friend of the participants, I can say that while it is true that the Ketchikan Bar Association is the only private organization in Alaska that is required to make an environmental impact statement before giving a party, I did not observe anything that I considered to be unusual – given the personalities involved. This year's problem, as ever, included a searching inquiry into the nature of the First Amendment privilege as well as some experimental investigation into numbers and games theory, involving the use of various props.*

#### *PROGRAM NOTES*

Special thanks were voted to Ketchikan attorney, Hal Brown, for his imaginative defense before the panel of the redeeming social value of an underground classic, "Big Molly and Proud Mary," as well as to co-panelists, Cliff Smith and Ted King, for their demonstration to other interested members of the group that gambling is a pernicious evil. As Fairbanks attorney, Dick Savell observed, "Next year I'll just mail those two bastards a check, and I won't have to come here at all." Other group pursuits included an ongoing inquiry into the evils of drink, culmination with a delegation attempting to enter the room of Mary Guss (the sole female participant) with an announcement that she had "won the raffle" which – possibly due to the lateness of the hour – fell on deaf ears.

### THE GLASER SAFETY SLUG

With due deference to our gun editor, Anchorage attorney Wayne Anthony Ross, trial attorney Joe Palmier of Anchorage has brought to the paper's attention the fact that the heavy subscription by Alaska attorneys to such magazines as "The American Handgunner" and "Big Bore Beauties" (which, coincidentally, was also a subtitle of the classic defended by Mr. Brown, above) is possibly due – in large part – to the therapeutic effect of such article as "The Glaser Safety Slug – Police Only Manstopper" as quoted in a recent edition on one of these popular magazines. According to the author, "An armed criminal advancing on an officer was shot center with the Glaser Safety Slug. He collapsed, didn't even kick, and was DOA. The coroner – after he had recovered from a brief indisposition induced by the appearance of the body – gave as his opinion the fact that the wound had been induced by an air to ground Sidewinder missile, fired at close range." The author of the article, after stating that "the effectiveness of this new ammunition is largely unknown to the public, the many times hostile press, and those individuals and organizations that are anti-police and dedicated to disarming them, goes on to say that, "This baby, with its muzzle velocity of 7200 f.p.s., weight of slightly more than half a pound, and fragmentation equal to that of a German field issue 'Potato Masher' hand grenade, is guaranteed to stop a sex-maddened stegosaur in its tracks. No policeman should be without these loads – which so far have not been denounced by either the Geneva Convention or the U.N. Security Council, and are highly endorsed by SMERSH, the NRA, and the National Chiefs of Police Association."

Mr. Palmier reports that after motion hearings before Presiding Judge Ralph Moody, he usually returns to the office and reads this article with deep satisfaction – followed if necessary, by selected portions of JAWS, Andersonville, and The Executioner, Number 43, Assassination in Anchorage.

### MORE FICTION

*In closing, I am indebted to the following correspondents for their reporting of legal fictions propounded by the Alaska trial judiciary (prompted by our reporting of Swivel v. Fulano De Tal in the last column).*

*1. Dean of the Alaska Trial Bar, Wendell Kay of Anchorage, (Instruction) "You are to consider the defendant's multiple convictions (for buggery on minors) only as they reflect on his credibility."*

*2. Juneau defense attorney Peter Page, (Hearsay Ruling) "I will allow a letter from the victim's deceased grandmother for the limited purpose of identifying the defendant, weapon, motive, and an eyewitness account of the shooting – but will caution the jury that they are to accept the evidence only for what they think it is worth."*

*3. Leavenworth inmate Jack Jeffrey McCracken, (commenting on McCracken v. State, Alaska Supreme Court, 1974), "If the error was so God-damn harmless, why am I doing 45 years?"*

## Chapter Five

**My** readers have asked me to comment on recent efforts by the Alaska Bar to ingratiate our profession with the public. The feeling seems to be that we are not understood – and I am reminded of a comment attributed to Dorothy Parker that, “Women complain that men don’t understand them – but women understand women and don’t like them.” However, I suppose it is worth a try.

One of the plans that has been advanced is that of putting laymen on the Board of Bar Governors, on the premise that if they sit in on and contribute to that body’s deliberations, they can help explain our attitudes to the laity. A further question arises, however, as to the composition of such a civilian delegation.

Some guidance can be derived from police review boards, now a popular national phenomenon. A careful study has indicated that such boards are usually comprised of three blacks, three Chicanos, one women’s libber and a gay. Certain variations occur depending upon regional differences, but this is the standard, or “Weidner ratio” (see *Burying the System for Fun and Profit*, Weidner, at page 493).

If we are to have laymen on the Board, a strong argument could be made that at least half of them should be criminals (to recognize their proportionate involvement with the activities of the Bar, and court system in general). It should be apparent that a rapist is more intimately connected (if that is the expression I want) with the administration of justice than, say a housewife or a clergyman. Given the degree of their involvement, convicted felons, in the process of serving maximum sentences for a variety of bizarre and inexcusable crimes – would be best qualified. Many of my own clients fit into this category, and would be happy to serve.

Of course, civil litigants should have equal representation, and Anchorage attorney Bob Bake has proposed the following meld: three convicted felons, one quadriplegic victim of a heavily insured vehicle, one insurance adjuster, and one divorced party whose wife ran away with her lawyer. Possibly it would be appropriate to have a few lawyers on the Board of Bar Governors as well, if only to serve as a counterbalance.

I perceived that the basic problem of our trying to explain ourselves to the public is that lawyers don’t talk like other people either. Whatever law school does to the human brain and personality is subtle enough to be unnoticeable until one is dealing with a legal problem – at which point we start acting like lawyers, to the complete mystification of the untutored.

*A sentencing hearing is a case in point, and usually goes something like this:*

*Court: It is my understanding that the Defendant wishes to change his plea.*

*Defense counsel: That is true, your Honor.*

*Court (addressing Defendant): Have any threats or promises been made to you, in order to induce you to plead guilty?*

*Defendant: No, your Honor.*

*Court: You understand, of course, that I am not bound by the recommendations of either counsel – and if I wish, I may sentence you to the maximum which – in this case – is 3,000 years at hard labor, or life, whichever ends first?*

*Defendant (in strangled voice, after another prolonged consultation with defense counsel): Yes, your Honor.*

*Court: You are charged with sexual abuse of a minor under Section 11.41.440 of the Criminal Code in that you're alleged to have had sexual penetration with a person under sixteen years of age but thirteen years of age or older. The law requires that I question you as to the facts of this case. Did you do such a thing?*

*Defendant: Did I do what?*

*Court: What I'm asking you is whether your penis entered the vagina of a female person under 16 years of age.*

*Defendant (shocked): I don't think so, your Honor.*

*Defense counsel: Your honor, my client may be a bit confused – may I interpose a question of my own?*

*Court: Of course, Mr. Keenan.*

*Defense counsel: Isn't it true that you fucked your little sister?*

*Defendant: Oh, that. Well...sure.*

*Further to the subject of police efforts to popularize themselves with the community (see above) I would say that television has been an effective vehicle for that purpose. No one can watch "Starsky & Hutch," "Baretta" or "The Streets of San Francisco" and come away unmoved, and even the grim world of forensic pathology has been humanized by the engaging Dr. Quincy. Some years ago, there was a sporadic attempt to popularize criminal lawyers – but it quickly faded out. There is a paucity of believable fact situations where a criminal lawyer*

can be depicted as defending an innocent man, and of course the public rejects any other concept. They don't want to know what we really do – but if they did, I'm sure it would make for some interesting viewing.

*Suggested pilot: The defense of a kiddy pornographer. The defense counsel by legal legerdemain, excludes 200 pictures of various children under the age of seven years engaging in unnatural acts with each other, the defendant, and his pets. In a dramatic courtroom confrontation, he suppresses the Defendant's boastful admissions concerning his conquests of various members of the fairer sex (ages six to nine) on some variation of the Miranda warning problem (Anchorage-based policeman failed to give warning when he phoned Defendant at his summer home in Kailua).*

*The Defendant is not allowed to take the stand because he has told his counsel all about his transgressions in chilling detail, the child witness for the prosecution is impeached (and reduced to tears) by the revelation that she was caught "playing doctor" with several neighborhood boys two years before the purported crime, and the jury is unable to make a positive identification of the Defendant in the pictures that did escape exclusion, because his face is obscured by various portions of the children's anatomy.*

*The Defendant's twelve previous convictions are kept out on relevancy objections, and a passionate plea to the jury for fairness by defense counsel wins an acquittal, after which a fee of \$30,000 changes hands and the victorious lawyer is roundly congratulated by other members of his firm for winning a tough case. The scene closes with the young attorney, now a popular hero, receiving phone calls from other wealthy child molesters. Fade out to strains of "The Impossible Dream."*

*That's the Defense side, of course. The prosecution phenomenon - if truthfully presented - offers similar possibilities. Anyone who has ever been a prosecutor is familiar with "The Sporting Theory of Litigation." This, roughly translated, means, "Let's run it by a jury and see if they'll convict." It works a lot better if you're dealing with bad guys in the first place.*

*I remember one time in my former incarnation as a felony prosecutor in Salinas, California, being ordered by Mr. Ed Barnes – the Assistant District Attorney – to prosecute the members of a motorcycle gang who were accused of raping the gang mama. Students of California subculture will be aware that such an individual obtains her status by being readily available to all members of the motorcycle organization, their designees, assigns, and heirs, for sexual enjoyment. In this particular case, the young lady in question had formed an attachment with someone outside the gang, and had decided to be faithful to him. After about twenty-four hours of this, the gang members came around, took her out of the house, and enjoyed her favors anyway. She was mildly indignant, but didn't complain. However, her new boyfriend did, and the gang members were arrested.*

*I asked Mr. Barnes why we were pursuing the case, and he replied candidly that it was because the Chief of Police had bet the District Attorney \$100 that I couldn't convict them. A two-week trial ensued, half a dozen members of the gang went to state prison, and money*

*changed hands all over the courthouse. By this time, of course, the girl had left her new boyfriend and was safely back in the arms of a rival motorcycle gang.*

*My point is, that although the above examples are familiar enough to members of our profession – we may face a certain resistance from a public that has been schooled to take a more simplistic view of justice and morality. We know the rules – or should – and we also know why they exist. How we're going to get the public to accept it, without making lawyers out of them also, I am at a loss to say.*

*So far as having civilians direct our destinies, and understand our problems, consider what happened to a detective friend of mine who was asked to explain his work, and law enforcement in general, to a group of second graders – sort of an “Office Bill” program. He did so, in great detail, talking about the various roles of the police in the community, the justice system in general, and the function of the police, prosecution and courts in protecting society. There was even a good word for defense counsel. He then called for questions, and one little girl asked him, “Where do babies come from?”*

*I'm not denigrating in any way the intelligence or good will of non-lawyers, it's just that they haven't been trained to be as crazy as we are. This is bound to be productive of misunderstanding.*

*Of course, no amount of public relations is a substitute for those simple human gestures which can do so much to improve the public image of policemen and lawyers alike. At this most joyful of seasons, one is reminded of the incomparable Col. James “Pat” Wellington, former Commissioner of Public Safety – a man widely admired for his humanistic approach to police problems. Some years ago, as Chief of Police in Juneau, Pat reportedly introduced a homosexual into the drunk tank on Christmas Eve on the grounds that, “Everybody should get something for Christmas.” Fade out to the strains of “Hark, the Herald Angels Sing” (or, if you prefer, “Oh, Come, All Ye Faithful”).*

## Chapter Six

**A** number of legal secretaries among my faithful readers have inquired concerning the care and feeding of litigators, particularly while they are in trial. It is a matter of some concern to these ladies that we tend to become a bit testy at such times, and I feel that a few simple rules, scrupulously observed, will go far to alleviate matters:

Don't argue with them – they're getting enough of that in court. Don't expect them to answer telephone calls, either. Most of them only live as long as they do because the Angel of Death got tired of waiting on hold.

A quiet, submissive "Yes, Bwana" is a proper response to any reasonable request.

All requests are to be treated as reasonable unless deemed otherwise by a joint meeting of the Ethics Committee and Board of Bar Governors.

If you must strike a trial lawyer, never do it with your open hand. A folded newspaper is better, as the noise frightens them.

They're all schizoid anyway. Sociologists have pointed out that the thought processes of the normal human being are deeply affected by the native language spoken, and trial lawyers are taught to say "special appearance" when they really mean that their prospective client is peddling his lungs to come up with a maximum retainer. "Interests of justice" means the fix is in, and, "Does your Honor feel that this is an appropriate place to break testimony" means that the proponent of the question can feel his back teeth floating, and wants desperately to make a pit-stop. The examples are endless, but none of them are consistent with coherent thought.

In the embattled arena of the courtroom, as well, the lawyers, judges and court personnel tend to become somewhat blasé. Jurors and clients (at least those who are not recidivists) approach their duties with a certain freshness of outlook, but the lawyers have seen it all. Consider the case of *State v. Lloyd Leon Davis, a/k/a "Baha Mohammed"*, in which I participated some years ago.

I was a prosecutor in Monterey County in those days, and Baha had been a thorn in everybody's side. He quite rightly suspected that the District Attorney's office was out to get him, and when he was convicted by an all white jury of armed robbery, he took the occasion to address them on their shortcomings. This resulted in an altercation between the Defendant and several large sheriffs' deputies, and his removal from the courtroom in a less than ambulatory condition. He had shouted his observations directly into the faces of the panel, leaning over the jury rail to do so, and when he was forcibly removed they sat there stunned and noticeably whiter than usual.

Defense counsel George McInnis, who had been knocked down several times while trying to reason with his client and intervene in the fracas, was now quietly talking to the court reporter. This young lady was new in the service, and seemed a bit overwhelmed by Mr. Mohammed's impromptu address – including, as it inevitably did, a routine expletive dealing with Oedipal relationships. George's quiet voice could be heard in the rapt silence, "Yes, I know – but that's what he said. Capitalize the M and the F – and I think it's hyphenated." Superior Court Judge Stanley Lawson, ever the pedant, intervened. "It's all one word when it's used as a predicate nominative," he added.

It's this sort of daily experience that probably results in the litigators acting a little bit different than the other lawyers in the office, ladies. You have to make allowances for them, even if they seem a trifle self-centered. These people aren't estate planners, they're combat types – and, basically, your trial lawyer is not an intellectual, but a pragmatist. He's out to get results.

Show me the prosecutor who hasn't hung a snitch jacket on a street type that's crossed him, and I'll show a man who doesn't understand the uses of power. I remember a case years ago where we had failed to convict a particularly bad actor of any of his various brutal rapes, but finally managed to get him on an aggravated assault. The word was put out in the prison population that although he masqueraded as a macho, he was really a blatant homosexual. "He'll fight and kick," the message went, "but once you really get cooking he just goes crazy." His subsequent therapy at the hands of his ardent fellow prisoners was swift, dramatic and effective. If that doesn't meet the Alaska Constitution's twin objectives of rehabilitation of the individual and protection of the public, what does?

Fairbanks trial lawyer Bill Brattain has observed that whereas our more learned brethren are priests of an occult rite, the trial practitioners are more akin to professional athletes. Probably the court system in general would be improved if we recognized that fact, and treated trials accordingly.

The opposing team (comprises of lawyers, clients and witnesses) would function more cohesively if supplied with uniforms and restricted to rigid time schedules. Nobody ever heard of a Super Bowl on a trailing calendar, and if such were the case it is doubtful that one could attract spectators. That's probably why most of our trials are played to empty courtrooms. Other innovations, such as sudden death overtime, should also be imported directly into the trial process – thus eliminating the wasteful phenomenon of the hung jury.

Finally, even in this age of television replay, we do not change the final score once the game has been played, just because the public feels well served by this, and it has the additional advantage of finality. Those who risk wagers on the outcome of sporting events don't have to wait for two years to find out whether or not the score will stand, and the legal system could profit by the example. No slight is intended to the appellate system, but who wants to wager on Oakland or Philadelphia if we're not going to collect our bet for an average of between eighteen and thirty-six months?

*Visualize your average P.I. case tried under pro rules. Plaintiff, a popular quadriplegic, scores an early lead with a moving accounts of his incapacity. His wife (who as a large claim for loss of consortium) converts, with a description of his total inability to function as a husband unless assisted by bizarre stimuli (she gets an extra point for her description of the cockatoo and the barbed wire). Good field position is obtained by the Plaintiff's team with horrifying medical testimony, followed by another score as the specials come in.*

*In the interim, Defendant cross-examination special unit has been building up points, and the game is all tied up by a moving picture, surreptitiously taken by the Defendant's investigators, showing the Plaintiff winning a disco contest with a modernized version of the tarantella. In overtime, Plaintiff scores the first point with a dramatic impeachment (winner of dance contest is shown to be a member of the Screen Actors Guild, rather than Plaintiff) and wins the game. As is the case in any professional sport, there is no second place – and the winner takes all. The bet, having been established by the litigants before the game started, is paid immediately, and there is no appeal.*

*The same rules would apply to criminal cases, and needless to say there would be no jury intervention – any more than the crowd at a football game is invited to vote on the result. Justice would be swift and sure, the drama of the event would be enhanced to the point where trial law would again be the spectator sport it deserves to be – and we would get some color and excitement back into our courtrooms. Half-time activities, marching bands, and cheerleaders are certainly a possibility – as is “Monday Night Murder Trials.” Some purists may object that these modifications will result in trials becoming a spectacle, with uncertain results depending almost entirely on the skill of the professional participants, as well as the breaks – but there is nothing new in that.*

*In response to some of the sterner comments directed to the Editor concerning my recent columns, it is unfair and unkind to suggest that I, as a simple observer of our system of justice, should be required to consider the extreme alternatives of banishment or ceremonial seppuku. However, to those correspondents who have wondered whether I find any drawbacks in dealing with a huge clientele composed mostly of wealthy murderers, rape fiends, drug addicts and assorted deviates, I must reply in the affirmative.*

*In all humility, it's not easy being a star. As Anchorage trial attorney, Mike Flanigan has repeatedly complained, it's lonely at the top.*

## Chapter Seven

*“Gail, do you remember that Martinez kid we saw last year at the county hospital?”*

*I was chatting with Bob Ames, an old friend and school mate who had dropped in to see me at the District Attorney’s office in Salinas. A distinguished California trial lawyer, he is a partner in the same firm as the sardonic William F. Bryan (first introduced to readers of this column in the October, 1980 issue). Bob had been retained by a Mexican family, all of whom had been badly injured in a head-on collision with a reckless but heavily insured driver, and I had gone along as an interpreter.*

*“Sure, how is he?”*

*“Oh, he’s fine, for Christ’s sake. Can you believe that after we spent over \$1,500 for neurological examinations, the son-of-a-bitch doesn’t even have brain damage?”*

*I could understand his chagrin. The impact had been awful, and all of the occupants of the Martinez car had been brutally injured - the individual in question having gone through the windshield, head first. I tried to suggest that the family must be grateful for the reassuring news, but he was too preoccupied by the fact that Bryan – as a result of the firm’s fruitless expenditure – had taken to referring to him as “Mother Cabrini.” However it seemed to me that there had to be some redeeming features to the situation.*

*“The mother and father were both hurt pretty badly, weren’t they, Bob?” I recalled severe spinal damage to Mr. Martinez, Sr., and that his wife had a shattered pelvis as well as other complications. Both of them, when I first saw them, looked like they had just gone fifteen rounds with Vlad, the Impaler.*

*“I don’t think we’re going to be able to show any serious permanent injuries. She just got pregnant again,” he said. “they’re never too sick for that,” he added, darkly.*

*I continued trying to cheer him up. “Didn’t you guys get that young doctor and his wife that were burned to death when their parked car was hit by a Greyhound bus? That ought to make you well.”*

*Bob refused to be consoled. “With my luck, they’ll probably rise from the dead,” he replied.*

*The trial bar will have recognized that Mr. Ames, a plaintiff’s attorney, was discussing potential damages in a case where liability was clear, and insurance adequate. Although I have known him personally, for many years, to be one of the kindest men in Monterey County – he was simply expressing the bias of a master craftsman at his trade. All of us have been*

thwarted, at times, by the mysterious operation of Baxter's law, which, succinctly stated, holds that permanent and disfiguring injuries have a tendency to occur in inverse ratio to the certainty of liability and amount of insurance (see also Gucker's maxim, current summer issue).

The converse is, of course, true of members of the defense bar – who, as Jon Link once observed, have a resistance to empathy with the pain felt by others second only to orthopedic surgeons and claims adjusters. All of us have had occasion to congratulate one of them on some rousing victory or another, as follows:

You: "I hear you really dumped them in that drunken school bus driver case. How many infant quadriplegics were plaintiffs?"

Him (with quiet pride): "Twelve of them – and I zeroed everyone of the little bastards out."

You: "It's unbelievable – how in the hell did you manage that with all those baby crips sitting around the courtroom?"

Him: "Over three million dollars – but it was worth it."

The above examples are, of course, only reflective of the fact that lawyers generally identify with the aims and views of their clients. The same phenomenon occurs when you get a couple of them, representing opposite sides, discussing the potential for liability. Whereas the plaintiff's attorney can make a compelling argument for proximate causation if the defendant's negligence and the plaintiff's injuries occurred within weeks and/or miles of each other, his defense counterpart is equally adept at theorizing. The fact that his client has dropped a safe on yours doesn't necessarily imply responsibility – there are plenty of intervening forces to consider, as well as your man's assumption of the risk for being on the same planet.

None of this diminishes the general trepidation with which lawyers are regarded by members of the lay public. While browsing through my copy of *Alaska Fishing Guide* (Alaska N.W. Publishing Co. of Anchorage), I recently came across a description of the fresh water ling (*Lota lota*) "also called the lawyer, fresh water cusk, eelpout, lush, or burbot," which, that author went on to explain, is found in most Alaskan drainages from the Copper River in South-central north and west to the Bering Sea and the Arctic Ocean (page 79). Subsequently, I discussed his information with Claude St. Amand – former supervisor of Fish & Game for Southeast Alaska, and cherished fishing companion.

"Why do they call it a lawyer?" I asked him.

"Well," he replied, "I guess it's because they're ugly as sin – eat up all the other fish in the lake, have big sharp teeth, and aren't worth a damn."

I was somewhat taken aback by his candor, but inquired further. "Then why do they call it a lush?" Claude just smiled, and I dropped the subject.

*This attitude towards members of the Bar is reflected in the Spanish language as well, when the curse, "May you fall among lawyers," is easily as popular as the more traditional, "I this and that myself in the milk of your father."*

*Of course, people in other professions startle attorneys occasionally, too – at least they upset me. I was visiting my army buddy (Medical Corps, Korea vintage) Ford Van Hagen recently in Springfield, Illinois, where he is now an eminent surgeon. I had given him the benefit of my views on the general callousness of the medical profession – and he replied – with some spirit – that I didn't know what I was talking about, representing himself and his colleagues as being not only maligned, but sensitive and concerned as well. He then invited me to accompany him on his rounds, which I was proud to do – and he took the opportunity to demonstrate the magnificent facilities of the hospital in which he works and teaches.*

*In the intensive care unit, Dr. Van Hagen showed me how every individual patient was monitored in such a way that their vital signs – including heartbeat – reflected on a series of screens set in a large panel, which was constantly observed. As we gazed at it, one of the monitors showed a sudden and violent disruption – following which the heart indicator flattened out completely and proceeded in a straight line, rather than making a series of crests and indentations, as before.*

*"Look at that one, Ford," I exclaimed – "Does it mean what I think it does?"*

*He glanced at the offending screen calmly. "I really don't know, Gail," he replied "It's not one of my patients." And we continued on.*

*I didn't dare ask him anything else, but I've thought about it a lot since then.*

*In fairness, all professions which deal heavily in human misery – and there are many, if one considers the broad spectrum of services demanded by an increasingly complex and hazardous society – have a propensity for installing in their members a certain ennui regarding the problems of others.*

*Nevertheless, it frequently happens that the dignity of the human spirit rises above the general atmosphere of crushing indifference, and communicates itself even to the members of the compressor class.*

*Revisiting Salinas for the moment, I was waiting to speak to the Chief of Detectives one afternoon, and was enjoying the late autumn sunshine – standing near the doorway of the police station in order to do so. I was interested to observe that the "drunk wagon," which had pulled up nearby to transport its cargo to the holding cells, was – by its defective design – causing considerable difficulty for its befuddled passengers. It was a large, van-like affair, with a sliding door opening approximately three feet above the sidewalk. As each occupant emerged, he automatically fell from the doorway to the concrete, staggered to his feet, stumbled over the parking rail, and arose again only to plunge over the steps into the police*

*station. I was fascinated by this unique choreography, and watched for several minutes – accompanied by several bored policeman.*

*The last “347-F” (California Penal Code – drunk in public), however, riveted my attention even as the Ancient Mariner who stoppeth one of three. Grasping the sides of the doorway desperately with both hands, he stared down as if into an abyss. Then he looked up and spoke directly to my conscience and my heart.*

*“What do they think I am,” he inquired in a quavering voice, “a gaw-damned paratrooper?”*

*Exactly the feeling I always get in my dentist’s office.*

## Chapter Eight

*“I know how to win the war in Vietnam.”*

*The speaker was Joe Perry, Judge William Stewart’s bailiff, and we were standing in the Municipal Court in Salinas, California, watching the drunks file into the room for Monday morning arraignments. As usual, after a restless weekend, there were about a hundred of them.*

*“How would you do it, Joe?”*

*“I’d tell all these guys that there is a million gallons of free wine in Hanoi, and set them loose at the border. It would all be over in two days.”*

*“How are you going to get them to sober up enough to shoot straight?” I wondered.*

*“Hell, Gail, they’d fight their way up there with their bare hands.”*

*The 347-F’s (drunk in public) were perennial customers of ours in the Municipal Court. Probably that statute has been outlawed as unconstitutional, or something, by this time – and if it has, I don’t know who’s going to take care of these people. We were the only ones who ever paid any attention to them.*

*My cousin, Judge Elmer Machado, also of the Municipal Court (he went up to the Superior Court a few years later), once had his bailiff, Karl Prell, calling the jails and hospitals for two days when Frank Fijakowski failed to show up for a whole week. He was good for about every other day if he happened to be out of jail, and the judge was justifiably worried about him. He knew whether or not Frank was at liberty, too because he used to tailor the sentences to meet Mr. Fijakowski’s needs, more than anything else. If the old gentleman looked peaked, as well as drunk, he’d usually get about ten days on the farm (a minimum security prison) gardens and get plenty of fresh air – or, like Mr. Fijakowski, just wander around following the little animals. I happened to be present, however, one day in the fall when a nip was just coming into the air. On this occasion, Mr. Fijakowski was sentenced to 120 days. “It’s time to put him away for the winter,” Judge Machado remarked quietly to his in-court deputy.*

*Watching the arraignments of the two judges was really a study in their contrasting personalities. Both were exceptionally kind and decent men, and cared deeply about the needs and problems of everyone who appeared before them, as well as the protection of the public. However, Judge Stewart – to put it mildly – was touch more patient than Judge Machado, who had inherited in full strength the restless nature of our mutual great-grandfather, Chris Machado – finally at peace in the graveyard of the old mission at Carmel.*

The difference can best be exemplified by the fact that Judge Machado managed to arraign between 50 and 75 drunks in approximately an hour and a half, whereas Judge Stewart took the whole morning and into the noon hour. Both of them accomplished exactly the same objectives, and handed out the same sentences. The sentence usually took the form of three days suspended for the first offense, the three days imposed on the second offense, then more days imposed on the third offense, and start all over again with three days suspended on the fourth offense. This cycle was repeated endlessly unless somebody needed attention to their health, as explained above.

Judge Stewart was a gentle, friendly man with silver hair and a bemused expression. He peered at the courtroom through his brightly polished rimless glasses rather like someone who was walked into a strange place and is letting his eyes become accustomed to the light before asking for directions. With Judge Stewart, each individual prisoner – no matter how intoxicated – was the subject of individual attention. They all pled guilty, of course, since it was commonly known that any 347-F who did otherwise was set for jury trial in 30 days, and remanded to custody. Of course, anyone who changed his mind was brought back immediately for sentencing – so everything worked out as soon as the recalcitrant individual sobered up enough to figure things out.

After the plea, Judge Stewart invariably asked each prisoner, “What are your plans?” and then listened, apparently with intense interest, to all sorts of wild schemes – which had as a common denominator the fact that they could only take place on condition of immediate release. Then he sentenced them just the way Judge Machado did, but he always listened to them first.

He didn't seem to differentiate the 347-F's from the more normal offenders we dealt with in the misdemeanor court, either – and on one occasion I remember him putting on a charge of “dog at large” (leash law) before the drunks, in order that a nice lady would not have to sit through three or four hours of sentences. She was elegantly groomed and coifed, a dignified club woman in her middle years, obviously very much at ease with the Judge – whom she knew socially. After assessing a small, suspended fine, he politely inquired about the health of the offending animal, a miniature French poodle. She stated that it was well, in spite of the fact that it suffered from some exotic malady (the nature of which I have forgotten) peculiar to the breed.

Judge Stewart, as ever, was fascinated by this detail, and impulsively turned to a row of drunks who had spilled over from the courtroom into the jury box saying, “Why, that's very interesting. Did any of you ever –?” Something about their expressions deterred him, however, probably the fact that they obviously didn't know what the hell planet they were on, much less what anybody was talking about.

Judge Machado, on the other hand, was a model of efficiency, and judicial activism. He usually tried to read the 347-F statute – but invariably stopped about half-way through with the comment, “You're all charged with being drunk. You all know what your sentences are going to be, depending on how many times you've been in here, so don't tell me you have a ticket to

Castroville for a job that starts this morning. Anybody that say's he's innocent gets a jury trial in 30 days."

As each man stepped forward, he got the prescribed jolt – and it was all over in a mercifully short time. Salinas being an agricultural center, we had a large transient population of Mexican stoop labor – some of whom occasionally got swept up with the rest of the drunks. Most of them didn't speak English, and on these occasions one of our perennials, Don Rojas – could be heard quietly explaining to them in rapid Spanish, "When the patron speaks to you, wait until he is finished and them say 'geelty.' Since you haven't been here before, he'll let you go."

For many of them, I am sure, this is the only word in the English language that they ever learned – with the sole exception of "welfare" or "el welfare" as it was commonly called. Don Rojas, incidentally, had been with us so many times – for so long- that Chief Clerk Lydia Kerns once had the girls in the Clerk's Office add up all the three and ten day sentences he had served, which turned out to total 17 ½ years.

When Mr. Rojas was not in jail, he generally had a B.A. in excess of 0.20 per cent (milligrams of alcohol per 100 cubic centimeters in blood) – and functioned perfectly at that level. Anchorage investigator Bob Bacolas, then a detective sergeant with the Salinas Police Department, once won a bet from the Chief of Detectives, Captain Duncan, based on this bit of inside information. He made the idle comment that "balancing tests don't prove anything," and Capt. Duncan fell neatly into his trap. As a result, Mr. Rojas was brought from the drunk tank and performed a whole series of tests perfectly (it's still on videotape in the Department). Thereafter, he took his breathalyzer test and – being fresh off the street – scored a credible 0.27% (under California – and Alaska – statute, intoxication is presumed at 0.10%). At 0.30% the ordinary person is close to coma. I saw Don Rojas the following morning at arraignments, and – having sobered up – he could barely stand.

The Police Department regarded the drunks more as a disposal problem than as individual human beings – and did not share the judiciary's concern with their welfare. On the two-block from the drunk tanks to the courthouse, they were usually required to whistle "Colonel Bogey's March," and I was present on many occasions when the night detectives amused themselves by waking up all the drunks in the tank and making them sing. "Bringing in the Sheaves" was a popular request, I recall.

My old friend, Dale W. Cheek, presently Director of the Wages and Hours Division of the Department of Labor at Juneau, was – in his early years – a member of the Salinas Police Department, and later the D.A.'s office. This was long before he worked with Attorneys Pioda, Leach, Stave, Bryan, and Ames (the latter two gentlemen already known to my readers) and later became the Chief Investigator for the Public Defender's Office in Solano County, California, subsequently serving Alaska in the same capacity for the Department of Law.

Himself a bottomless well of war stories, Dale once told me that there was a period, one summer, when the drunk arraignments fell off sharply – and investigations revealed that the town patrol, having tired of hauling the same offenders in on a nightly basis, had taken several

wagon loads to the railroad yards and locked them in a freight car headed for Shreveport, Louisiana. As reconstructed from the garbled stories of the survivors who straggled back to Salinas, people kept getting out of the boxcar as they sobered up, and the train stopped, all across the country.

*I often wonder whether any of them missed Judges Machado and Stewart, and their other old friends, in all those foreign courtrooms.*

## Chapter Nine

### **MADERA** V. MIRANDA

*Students of constitutional law will be interested in an entirely new variation of the Miranda waiver, recently utilized by the Prosecutor's Office in Madera County, California. Madera (as everyone knows) is a small community in the San Joaquin Valley. As is true of that area generally, it maintains a steady temperature of about 110 during the summer and is, in the words of its Public Defender, F. Earl Bande, "where the elephants go to die." He and I were having a beer together a month or so ago – both having been engaged in felony trials during the day.*

*As Mr. Bande described it, he had been appointed to defend a young Mexican gentleman who had just been arrested on two charges of armed robbery, and waived his right to silence and a lawyer, and had given a videotaped confession.*

*"You should have seen it," Earl said. "On the videotape they had this kid, half the cops in the County, Paul [Assistant District Attorney Paul Avent, and amiable gentleman who was my opponent in the felony matter which brought me to that community], the police chief, the chief of detectives, and a couple of guys from the Highway Patrol. It looked like the signing of the peace treaty on the deck of the Battleship Missouri.*

*"Anyway, the Chief gives this kid his Miranda, explains to him that Paul is from the District Attorney's office, gets a waiver – and asks him if he wants to discuss the matter, which he does. He gives a detailed confession – and at some point, after about an hour, they decided to do it all over again because he hadn't waived each of his rights individually.*

*"They start another tape, introduce Paul again as the District Attorney's representative, ask the defendant if he wants to waive each and every one of his rights (which he does) and he gives his confession all over again. Then at the very end of the tape (after about two hours of this) the Police Chief reminds the kid once more that Mr. Avent is from the prosecutor's office.*

*The dialog continued.*

*"What do you mean, the prosecutor's office?" asked the young suspect.*

*“Well, you know, he’s the attorney for the State – the people who are going to try to put you in jail,” replied the Chief.*

*“Hey, man,” blurted the defendant with alarm, “I thought he was my attorney, man?”*

*At that point, the videotape mercifully came to an end, but not without a final comment from the prosecution.*

*“I think,” mused Mr. Avent, “we’ve got a problem.”*

*Of course, this took me right back to my own early days as a prosecutor, in Salinas, California, where such misunderstandings were routine. I don’t know who to blame, really, exotic behavior seemed to be about equally distributed between the D.A.’s office, the cop shop, and the criminal element. In retrospect, some of the things that we took casually are hard to believe – but they all seemed normal then. I suppose it was the temper of the times.*

## LAVARATO STRIKES

*I and my old friend Sam Lavarato (an Al Pacino type) considered ourselves the backbone of the office. Between us we handled a lot of the felony work. Time weighed heavily on Sam’s hands between trials, however, and he could usually be counted upon for some innovative conduct to keep up the general morale.*

*I remember the time when he appropriated a bunch of photographs that had been confiscated by the Salinas police department in the search of a local gay bar. These started to appear around the office, without causing much comment. We were all used to it. One day, however, he pasted one of them in the inside cover of my California Penal Code (each prosecutor had an individual copy) and after perusing it, I forgot it was there. It showed a rather languid young man standing in a pool of water with his back to the camera and his bathing trunks pulled down, while he peeked coyly over his shoulder at the photographer. A pin-up, I suppose, in certain circles.*

*I was at my desk early one morning when Assistant District Attorney Ed Barnes (a formidable gentleman known to my readers from the November/December 1980 column) came in looking for his own penal code. He picked mine up, flipped open the cover – glanced at the photograph – and without any visible surprise, so far as I could tell, muttered, “No, that’s not mine,” and resumed his search. Sam, who was watching, was delighted – and I couldn’t get him to explain.*

*Maybe it’s me – but my life really hasn’t changed all that much over the years. Nevertheless, as sedate as I am, something is always happening. I came into my office the other morning, to*

find a message, "Phone General Mancado" – and after returning the call to District Attorney Tom Wardell of Kenai, I reflected on the story that goes with it.

#### GENERAL MANCADO d.b.a. EQUI FRILLI BRIUM

When I first joined the Department of Law, I was given the "nut file" on the obvious grounds that I didn't have anything to do. As the present incumbents of our Attorney General's office undoubtedly know, there are a variety of people who get off on all kinds of exotic crusades, write letters, and copy in every attorney general in the United States. Those items were passed to me for my attention, and I always replied – copying in Tom (then the Deputy Attorney General) for his amusement and comment.

One of our favorite correspondents was General Mancado, a gentleman who styled himself the leader of the Filipino Liberation Army. They seemed to be a religious group of some sort, and their newsletter often had long and unintelligible free verse offerings by the General himself, which caught on with the Department of Law and became part of our in-group communication.

When we received letters from other nuts, I would often reply posing as the General. We had Xeroxed a supply of "stationery" bearing his legend "Equi Frilli Brium," at the top, with a small inset of his revolutionary army and other exotic symbols. My secretary, Judy Jones (presently co-owner of a thriving secretary service in Juneau, J&R Associates, "Your Place or Ours") took it all in a stride, and became familiar with the General's literary style – which I, of course, copied. So did the rest of the people in the office, including Joe Balfe – then my assistant, and subsequently the District Attorney of Anchorage.

A typical offering from the pseudo General Mancado was his terse reply to T.C. Greene of Abbyville, Alabama. Mr. Green had written a letter to the parish tax assessor, as follows (copy to every Attorney General in the United States, the U.S. Attorney General, and half the western world):

"Dear Sir:

I refuse to pay my tax assessment on the grounds that you have addressed your billings to 'T.C. Green.' I have not given you permission to use my initials, and I refuse to respond with rudeness. My name is Terrence Cantrell Green – and you will address me as such, or suffer the consequences."

The letter, which was written on stationery bearing the title, "T.C. Green & Associates," was signed "T.C. Green." Perfectly normal for the genre.

"General Mancado's" reply was as follows:

"Dear T.C."

The tax assessor of your parish has brought to my attention the fact that you have not referred to me as 'Equi Frilli Brium.' I have not given you leave to do so, and if you do it again – I won't let you ride in my ark. I'm watching you, boy."

Signed "Equi Frilli Brium," by General Mancado, copy to Tom Wardell.

## SCARING SIANGKO

All of this was preamble to an unnerving incident in the life of Richard N. Siangko, then as now coroner/public administrator for the First Judicial District at Juneau. I was in the next room when Rick, whose family in the Hawaiian Islands had apparently been bothered in some way by the aforementioned religious group, entered Joe Balfe's office and asked, "Joe, have you ever heard of a guy by the name of General Mancado?"

Mr. Balfe instantly assumed a strange posture, standing on one leg with the other extended behind him while making "V for Victory" signs with both hands, and stated in a loud and threatening voice, "Equi Frilli Brium!" Judy, who was seated nearby, assisted with a quote from one of the General's more lucid free verse offerings, "My iron string vibrates to the deeds of your iron string." It was a shaken Rick Siangko who appealed to me for some explanation of this bizarre conduct, and I'm not sure that he accepts to this day that we are not charter members of the cult.

## THE KUM YESS MOBERLE AFFAIR

While on the subject of the Juneau bar, several of its members have requested me to reveal my insight into the "Kum Yee Moberle" affair, of which I had the honor to play a leading role. "Kum Yee" as we called her in the trade, had come to Juneau from Tacoma, Washington, for the avowed purpose of setting up our first massage parlor. In furtherance of that objective, she spent many thousands of dollars redecorating a suite of rooms at the Hilton. Her piece de resistance (if that is the expression that I want) was a "full body massage" for \$75, which culminated with the massage of the male patron's sexual organs, and a relaxing ejaculation.

She had been foresighted enough to have her Tacoma lawyer phone ahead to Juneau city attorney, Lee Sharp, to inquire whether local statutes forbade such activity. Lee, a thoroughly moral, not to say sheltered, individual, didn't have the slightest idea what the euphemism meant, and responded that as far as he knew, massages in Juneau were perfectly welcome and legal.

Ms. Moberle's first customer for a full body massage was a handsome policeman from the Juneau Police Department, coincidentally the son-in-law of Chief Jim Barkley. Not satisfied with the evidence gathered at his first treatment, in which – as he faithfully recorded in this police report – he was masturbated for \$75, the young man returned for another engagement (this time with a tape recorder). It was this devotion to duty that inspired popular Juneau attorney and former Alaska Bar president, "Jungle Jim" Bradley, to publicly nominate Chief Barkley as "father-in-law of the year." He can do that sort of thing, being not only a mordant wit but a powerful physical specimen, as well. Jim once told me an anecdote from his childhood, in which his father defeated a traveling circus strong man in a wrestling match – and I absolutely believe him.

Anyway, the young officer's second experience – which he dutifully taped – impelled me to pay a visit to the Chief of Detectives at the Juneau Police Department. I was accompanied by Juneau investigator, Stan Edwards. Stan, a former Salinas police department night detective, and later a lieutenant of the Juneau police department, is a formidable type himself. We were invited to the inner sanctum, and the tape was put on for our edification.

#### A MEDLEY FOR THE ORGAN

It quickly became apparent that the small commercial tape recorder, concealed in the officer's pocket, had picked up enough surface noise to obliterate most of the conversation. Those familiar with the vagaries of tape recording are aware that the cheaper instruments record just about anything that tends to obliterate conversation – tapping pencils, shuffling feet, and so forth. In this instance, a small dog had been barking outside the window, a typewriter could be heard in a nearby room, and somebody had left a television turned on to a crime drama, replete with gunshots and sirens. A fair rendition of the quality of the tape is as follows:

Kum Yee: "Would you like me to –"

Dog            "Yap, yap, yap."

Typewriter:   "Tap, tap, tap, tap, tap."

TV:            "Bang, bang."

Officer:       "Do it slowly when you –"

Dog:           "Yap, yap."

Typewriter and TV:   "Clackety, clack (sirens, gunshots)"

Kum Yee:       "You like that don't you? Now I'm going to (bark, bark, clackety, clack, gunshots, screams, sirens)."

*This went on for several minutes, until it became obvious that there was no evidentiary value in the tape at all, one way or another. Stan Edwards listened patiently to the end, and then remarked in his cool and professional style (for the benefit of the fascinated detectives), "It's worse than we thought, Gail. It sounds like an orgy of some sort – she's got a dog making it with a typewriter."*

## Chapter Ten

I want to thank my readers for the overwhelming response to my last column, concerning the drunks in Monterey County. So far as the families of Messrs. Fijikowski and Rojas are concerned, I invoke the *New York Times v. Sullivan* rule. I suppose people watching is a family trait, however, and my father, Roy Chris Fraties – formerly chief of police of Carmel, California, and later an FBI agent, told me his own “drunk in public” story many years ago.

### MOVING BACK

Dad had gone over to Monterey to call on Municipal Court Judge Eugene Harrah, now retired, a popular and long suffering judge along the general lines of Judges Machado and Stewart, described in my last column. He waited patiently while Judge Harrah sentenced his own large quota of 347-F’s (drunk in public), this particular group being denizens of Lower Alvarado Street in Monterey, rather than the equally productive Soledad Street Salinas. After it was over, he called on the Judge in chambers.

They discussed whatever business had brought my father to Monterey, and then Judge Harrah, obviously still under the influence of the morning’s rigors – looked pensively out the window at the blue outlines of the hills surrounding the Carmel Valley.

“You know, Roy,” he said quietly, “someday I’m going to move back into those hills.” He was silent for a moment, and then repeated, “Way back.”

My father left the old gentleman, still staring out the window.

“Good-bye Judge Harrah,” he remarked as he closed the door.

“Way back,” said Judge Harrah, “way, way back.”

The criminal bar has been apprised of the proposed legislation which will soon be offered by the executive department, under the guidance of that brooding genius of law and order, Chief Prosecutor Daniel W. Hickey (“Dan” to his several friends). Mr. Hickey believes in uniformity and simplification, and there is a persistent, although apocryphal, rumor that his original proposed sentencing statues (AS 12.55.125) was as follows:

Section 12.55.125. Sentences for felonies.

*(a) A defendant convicted of any felony shall be sequenced to the following presumptive disposition:*

*If the offense is a first felony conviction, death.*

*If the offense is a second felony conviction, death. Reincarnation. More death.*

*As the legend goes, that version wouldn't fly with certain ultra-Left Wing liberals in the House and Senate – which resulted in the cumbersome and complicated language with which the Courts are burdened today.*

#### *THE PETUMENOS PLAN*

*A total breakthrough in the administration of justice is no mean accomplishment, and to achieve it Mr. Hickey turned to one of his most able colleagues, Timothy J. Petumenos of the Department of Special Prosecutions. The result is a plan which should brilliantly balance the understandable desire of the various police agencies to put everybody in jail with the insistence of Constitutionlists that the accused should be accorded at least a modicum of procedural protection.*

*Mr. Petumenos proposes a sliding scale of entitlement to constitutional rights which would make accommodation to the sensibilities of that portion of our population which believes that bad guys ought to be treated summarily. The proposed wording is as follows, and – as its proponent freely admits, “still has some bugs in it.” Suggestions from the Bar are solicited.*

#### *PROPOSED AS 12.100.100. SLIDING SCALE ENTITLEMENT TO CONSTITUTIONAL RIGHTS.*

*(a) If the defendant has not previously been charged with an offense, other than minor traffic, municipal, or sport fishing and hunting violations (see .125 of this chapter), he shall be entitled to the full range of constitutional prosecution afforded by the United States and Alaska Constitutions.*

*(b) If the accused has a prior conviction, the arresting agency need not give the Miranda warning, and search and seizure protection will be deemed suspended.*

*(c) If the accused has two prior convictions, a confession may be beaten out of him, so long as a doctor and priest (either of his own choice, or appointed by the State) are in attendance.*

*(d) If the accused has three prior convictions, bail, trial, and right to counsel will be forfeit.*

#### *AS 12.100.110. FACTORS IN AGGRAVATION.*

*If a defendant is tried under sections 12.100.100 (b) or (c), the court may alter normal trial procedures for factors in aggravation.*

*(a) The following factors shall be considered by the trial court for this purpose:*

*The defendant, regardless of prior convictions, is certified, under oath, as a “slime ball,” “asshole,” or “scum bag” by the arresting officer (two demerits).*

*The defendant, regardless of previous criminal history, has talked back, demanded his rights, or otherwise impeded an orderly investigation (one demerit).*

*The defendant has previously been suspected of having committed a crime, smoked dope, or otherwise offended public decency (one demerit).*

*The defendant’s conduct created a risk of offending the sensibilities of law abiding citizens (one demerit).*

*The defendant’s conduct during the commission of the offense indicated that he is a smartass (one demerit).*

*The defendant, at the time of committing the offense, was under suspicion for having possibly committed other offenses or indiscretions (one demerit).*

*The defendant’s attitude has generally pissed off the prosecutors, the police agencies, or the court system (three demerits).*

*(b) Upon a showing that any of the above factors are present, the court may, as its discretion, apply the following modifications of procedure:*

*One demerit. The prosecutor is entitled to unlimited peremptory challenges, as opposed to one for the defense. Conviction may be achieved by a simple majority of the jurors. Hearsay objections by the defense, but not by the prosecution, will be overruled.*

*Two or three demerits. All of the penalties under (1), with the addition that the defense with opening statement and final argument.*

*Four to five demerits. All of the penalties under subsections (1) and (2), with the further proviso that the defendant must dispense with cross-examination, and may be called as an unfriendly witness in the prosecution’s case in chief.*

*More than five demerits. All of the penalties under subsections (1) through (4), and in addition the Judge may – at his discretion – sit at prosecution table, while the prosecutor is entitled to join the jurors in their deliberations.*

#### **DANKWORTH DISSENTS**

*It is hoped that the above procedural changes will insure the protection of the law abiding public, and the meeting of the justice to the lawless, with maximum efficiency. However, civil libertarian Senator Ed Dankworth, when asked whether he felt that these changes were in the*

interests of justice, replied, "I don't think they go far enough. After all," he continued with a twinkle, "these people wouldn't be arrested if they hadn't done something."

### BOYKO'S THEORY

Edgar Paul Boyko, whose exploits in the trial courts of Alaska and California need no embellishment here, once remarked that attorneys who specialize in a particular field of law eventually begin to resemble their clients, undergoing in that regard the same mysterious alchemy that affects husbands and wives, and pets and their owners. That is, insurance defense litigators start to resemble insurance executives or adjusters – depending on their place in the hierarchy – and tax attorneys assimilate the whimsical and fey characteristics of IRS agents. Other examples abound – aviation attorneys tend to be able to fly airplanes, medical malpractice specialists act like, and often are, doctors, and divorce lawyers have hideous home lives, terminating in protracted and agonizing litigation.

### SUSPICIONS CONFIRMED

Criminal lawyers, of course, are aware of this phenomenon – and are naturally sensitive to its far-reaching implications. Personally, I've always comforted myself with the thought that it simply makes us more broad-minded about the frailties of our fellow human beings ("So he dusted a dude who burned him with some bad shit. So what?") I suppose that the continued exposure to our clients does have a pervasive effect on our thinking, and I was never more aware of it than during a confrontation which took place five years ago when I was defending one of the more engaging rogues in the Fairbanks area.

This was one of the first criminal cases to be tried before the then newly appointed Superior Court Judge Frank Jay Hodges, Jr. – himself a formidable trial attorney before he ascended to the bench – and I was on my best behavior. My relationship with my client was kept on a highly professional level until the moment arrived when we were deeply involved in jury selection. I felt extremely fortunate in the general makeup of the jury, particularly one black lady of great intelligence and dignity who I perceived to be not only motherly, but compassionate and understanding as well – qualities the defendant sorely needed if his transgressions were to be forgiven. However, my client's sensibilities on the subject had been affected by the many years that he spent in tough prison populations, during which time he had become a militant racist.

### POWER JURY SELECTION

When both sides had used up most of their preemptories, Judge Hodges graciously permitted me a few minutes with my client in the privacy of a small office immediately adjacent to his. The walls were thin, so we kept our voices down as much as possible. My client lost no time in giving me his opinion of my key juror. "The (racial slur)," he stated, with chilling finality, "goes."

Thereupon, I reasoned with him for the better part of ten minutes, while he sat quietly – apparently listening attentively. I pointed out that black people, as a result of a long history of

oppression, tend to identify with the underdog, a description that certainly fits the defendant in most criminal cases. Further, since their color sets them apart, they are often unfairly selected as logical suspects if a crime has taken place in their proximity, and many of them – although in every respect totally law-abiding – have no great love for the police. If anyone is willing to give some poor fool the benefit of the doubt, a black person will – at least that’s my opinion. I finished this summation, and asked my client whether anything I had said affected his thinking. “The (racial slur) goes,” he repeated.

I was in despair, but my investigator took up the cudgel. He spoke to our client in a friendly, man-to-man fashion, employing the street argot that we all seem to learn in the criminal subspecialty, but to no avail. Quoth my client, “The (racial slur) goes.”

“GOD DAMN YOU, JEFF,” I shouted, suddenly stung beyond endurance, “WHAT THE HELL DO YOU KNOW ABOUT JURY SELECTION? THE (RACIAL SLUR) STAYS!”

The defendant, who – despite his sinister reputation – does not lack for a sense of humor, grinned and relented. I am informed by reliable sources, although I’ve never dared to discuss it with him, that Judge Hodges leaped like a gazelle when this proclamation roared through the thin walls of his chambers, as it apparently did throughout the entire floor. I don’t think my favorite juror heard me, though. At least, I hope not.

## Chapter Eleven

*“You’re kidding!” (laughter) “How did he get it in his mouth?”*

*My running mate, Deputy District Attorney Sam Lavorato, was on the phone in the next room, talking to Detective Sergeant Les Rodman of the Salinas Police Department. Sam, our intake officer, usually spent an hour in the morning answering inquiries from various police agencies concerning problem cases, and I thought no more of the matter. Later I found him in our law library, in earnest conversation with one of the D.A. investigators, Bob Taylor.*

*“Sam, it’s just got to be against some regulation. Nobody should be able to get away with anything like that.” Bob sounded concerned.*

*“I don’t know, pal – we’ve looked everywhere. I guess the legislature never passed a law against it, because nobody ever thought of it before.”*

*“How about cruelty to animals?” Bob persisted.*

*Both of them started laughing. I sat down and was handed a cup of coffee, whereupon Sam explained that Salinas’ finest had responded, red lights and sirens, the night before to the home of one of the more prominent citizens, on a complaint from his wife that she had just found him in their stable, performing oral copulation on one of the race horses. The suspect, having been conducted immediately to jail by horrified officers, was due for arraignment – but nobody could determine what, if any, law he had violated. I volunteered to help, and we thoroughly research the matter – everything from the Penal Code through Fish & Game to Pure Foods and Drugs, without success. We then advised the police to let the gentleman in question off with a stern warning, and he was released without further incident.*

*As legal advisers and confidantes of the police in the area, we had a lot of strange problems presented to us for our opinion. Earlier that year, the warden of Soledad State Prison (a penal institution located in the county) had called on us in an emergency situation. In those days, California law provided that narcotic addicts could turn themselves in to any local prison, whereupon they were provided with free transportation to a narcotic rehabilitation center in the state. One of them had dutifully done so at Soledad, but had inadvertently been put in with the main prison population – where upon he was captured by a gang of Black Muslims and gang raped for several nights before he was detected and rescued.*

*The warden naturally expected a civil suit, but on finding out that the addict was heavily strung out on heroin, we advised that he simply be shipped off without comment. He never complained to anybody, as it transpired, and all ended happily. “He probably thought it was part of the treatment,” was Lavorato’s comment.*

The Salinas Valley is an agricultural community, and the general population runs to cattle ranchers, farmers, stockmen, and other Western prototypes. Presumably, their thinking influenced the judiciary – the law at the grassroots level was often applied rather severely by magistrates in justice courts. These individuals, although many of them were wise and good, were citizens with no legal background, often with little formal education at all. We were not surprised, therefore, when Judge Bloom in Castroville sentenced a particularly irritating recidivist to five years' penal servitude for a violation of California Vehicle Code 14601, driving without a license, a misdemeanor. On frantic inquiry from District Attorney Bert Young, Judge Bloom replied candidly, "I just got tired of looking at him." We got him out of state prison on a writ of habeas corpus, had his sentence reduced to thirty days, and installed him in county jail where he belonged. He didn't complain, either.

Some years before, the Magistrate at Soledad – in keeping with local sentiment – had condemned a horse thief to death, and sent him to the sheriff for execution. The sheriff, unprepared for this eventuality, came to the District Attorney – who reduced the charge to petty theft, whereupon the more conservative court in Salinas sentenced the miscreant to ten days. The presiding judge also phoned the Magistrate, in his supervisory capacity, to inform him that his sentencing practices were a touch out of line with misdemeanor laws ordinarily practiced in the justice courts of California.

I use the word "ordinarily" advisedly, of course, in light of Judge Bloom's own sentencing procedures – and the fact that all of the magistrates generally adopted a law and order approach to trial practices. Usually, as Sam observed, they took their view of the law from the CHP officers who frequented their courts. He told me one instance where he was trying a proper case against a citizen who had been arrested by the CHP within Magistrate James Young's jurisdiction. The defendant had asked for a jury trial, and twelve citizens were duly empaneled. At the point where the CHP officer stated that he had clocked the defendant at 70 m.p.h., Judge Young intervened to inquire of the accused, "Are you listening to this?"

He repeated the same question various times at key points in the officer's testimony, and appeared shocked when the defendant took the stand to refute the accusations.

"I know I was only doing 55," said the accused, "because I looked at my speedometer when..."

"Are you saying the officer lied?" interrupted the Judge angrily. From there on, according to Sam, the trial degenerated.

"Christ, Gail, I thought he was going to hold the dude in contempt," Sam told me later. "I can't seem to convince the old bastard that these people have a right to disagree with the cops."

Although everyone in Monterey County seemed to have strong ideas on law enforcement, not all of them necessarily believed in police intervention in their personal affairs. In the summer of 1968, several members of the Maggio family, owners of a large and prosperous fruit and

vegetable factoring operation in King City, California, arrived in the office accompanied by their attorney, Mike Panelli, and requested an audience with the District Attorney. Mike, a capable and talented trial lawyer of long experience, was trying to calm them down – and spoke to them in fluent Italian, which they seemed to prefer. Theirs was a multimillion dollar enterprise, and it appeared that their accountant –whom they had taken into their trust and confidence, although he was not Italian – had embezzled just short of \$1 million in the space of seven years. They wanted him arrested, and dealt with summarily.

“How much time is he going to get?” inquired the eldest brother and leader of the group.

“For a first offense, five years,” was Mr. Young’s reply. “He’ll be eligible for parole in about two.”

There followed a heated and rapid exchange of Italian between Mike and the various brothers whereupon the senior Maggio again addressed himself to the District Attorney. “For stealing a million dollars from us, he does two years?”

The answer was in the affirmative.

“Never mind,” was the ominous reply. “We’ll take care of it.”

The import of all of this was not lost on the District Attorney, who immediately got in touch with the sheriff’s department and had the offending accountant picked up for his own protection. I had his case for a while before I left for Alaska, and he subsequently pled out and was sent to the state prison, where he would be relatively safe. I wasn’t there, and can’t vouch for it, but I understand it was the only plea bargain in the history of Monterey County where the defendant held out for the longer term.

I start this column with a salute to the animal kingdom, and it seems fitting to end it that way with the story of “Lavorato’s Foundation.” We had a lot of trouble with motorcycle gangs in Monterey County in the late ‘60s, and Sam was trying a sodomy case against Corky Boozinger, the leader of “The Losers.” They were a scruffy lot, as their name implies, and I recall asking a gang member on one occasion what they did for amusement besides beating up cops.

“Oh, I don’t know, Mr. Fraties,” he said, “we just drink a lot of beer and tell lies.” He paused. “We don’t even have a motorcycle yet. That’s how bad it is,” he continually sadly.

Anyway, we had heard from the detective division that one of the inmates of the county jail was in possession of pictures of Boozinger perpetrating the same act on a large German shepherd that had brought the midnight rider, described above, to our attention. Sam felt that if he could get those photos into evidence, it would enflame the jury against the defendant, and assure an easy conviction. He proposed to offer the inmate in question a remission of his sentence in exchange for these exhibits, and told me that he was going to have them blown up to four foot poster size, for better display to the jury.

*“How the hell are you going to get that shit into evidence, Sam?” I was intrigued with his plan, of course, and hoped that he could do it.*

*“Gail, it’s easy. When I cross-examine Boozinger I’m going to ask him if it isn’t true that he performed oral copulation with the victim. [Sam used a different expression, but his meaning was clear.] He’s going to deny it. Then I ask him, ‘Well, you’ve done it with a lot of other girls, haven’t you.’ He’ll deny that. Then I say, ‘What about men?’ – and he’ll be shocked, and deny that. Then I say, ‘Well, what about animals?’ and he’s going to be even more pissed off and deny hell out of it. Then I say, ‘What about this one?’ and whip out the poster in front of the jury. It’s proper impeachment.”*

*Sam never got to use his foundational techniques, because – much to our disappointment – Boozinger thought better of it and came to the office with his attorney to discuss a plea bargain. While they were talking, Sam politely offered coffee all around, and the negotiations were concluded peacefully. Afterwards, I was present when Investigator Taylor spoke accusingly to his close friend.*

*“I suppose you gave that dog-molesting son-of-a-bitch coffee, right?”*

*“It’s O.K., Bob,” Sam replied calmly. “I let him use your cup.”*

*A strangled cry, accompanied by a spray of coffee, was the anticipated response, and another uneventful day in the Monterey County District Attorney’s office drew quietly to a close.*

*Our annual bar convention has come and gone – and, as usual, hardly anyone attended. This is, of course, traditional with the Anchorage Bar, particularly when the convention is held in this city. I can’t imagine how anybody with a moment to spare could pass up a hot item like “Off The Record” (videotape, 9:00 a.m. to 12:00 noon on Thursday, May 20), but there it is.*

## Chapter Twelve

### **STUFF** TO GIVE TO THE TROOPS

Some of my readers have suggested an agenda more closely attuned to the needs of the Alaska practitioner, and fortunately we have no lack of qualified instructors in a number of vital areas of interest at all. Consider the mass appeal of the following:

#### *Proposed CLE Session*

*101 Unanswerable Arguments for a Continuance – Edward J. Reasor and Edgar Paul Boyko. 9:00 a.m. to 12:00 noon.*

*Intimidation through Motion Practice – Phillip P. Weidner, Walter Share, David Manheimer (a panel). 9:00 a.m. to 12:00 noon.*

*Early Retirement Made Easy – Joseph D. Balfe. 2:00 p.m. to 2:15 p.m.*

*Controlling Trial Counsel Through Body Language – Judges Victor Carlson and J. Justin Ripley (who will expand upon his recent article, “The Lifted Eyebrow as a Lethal Weapon”). 2:00 p.m. to 5:00 p.m.*

Similarly, our awards banquets fail completely to recognize those achievements which are truly meaningful to the trial bar. The present unfortunate propensity of the Department of Law to inhibit perjured testimony in the courts is going to have a dampening effect on criminal defense, to be sure, but the following categories deserve recognition, perhaps by a silk purse in the shape of a sow's ear:

1. *Most imaginative alibi.*
2. *Most effective trial of investigating officer.*
3. *Most subtle cheap shot at prosecutor.*
4. *Most little old ladies with hearing problems seated on an individual jury.*

The prosecutors, of course, would have their own categories:

1. *Most rednecks and orangutans on a single jury.*
2. *Most outrageous appeal to jury prejudice.*

3. *Most incredible eyewitness identification.*
4. *Most imaginative argument for introduction of prior bad acts.*

*Of course, there are categories in which all trial lawyers may wish to compete, such as “most consecutive leading questions successfully asked,” and the civil bar would naturally favor such areas as “most outrageous recovery,” “most penurious settlement,” and “most vexatious discovery technique.”*

#### *LAW AND ORDER REVISITED*

*I don't know whether you watch television as much as I do, but you may have noticed that the politicians have discovered that law and order is a popular issue. My favorite ad is the housewife seated behind a Gatling gun with a broadsword in her teeth, who wishes the voting public to know that if she is elected to the municipal assembly, things are going to get a lot tougher for the Cosa Nostra. We are informed that the criminal population of the state is burgeoning, and it would be interesting to see what would happen if the crooks really got out and voted. Personally, I think it would be a refreshing change to see a gubernatorial candidate on television with a black mask, talking out of the corner of his mouth, and assuring the Underworld vote that if elected, he will eliminate the Department of Public Safety, hire less prosecutors, and see to it that criminals are returned to the streets as fast as possible. Don't think they're not capable of it – but not to worry, they wouldn't keep those promises any more than they do the ones about law enforcement.*

#### *THE ELECTRONIC AGE*

*My readers among the police agencies have requested another story about former Public Safety Commissioner James P. “Pat” Wellington – and I am happy to oblige with his infamous exploit at Juneau's B.M. Behrends Bank, which occurred when Pat was a lieutenant in the Juneau Police Department.*

*Chief of Police T.L. “Swede” Seiverson (March, April, 1982/Alaska Bar Rag/Page 5) left the police station payday with the announced intention of cashing his salary check, and Pat decided to accompany him. It was a rare sunny day in spring, and both officers – clad in their full uniforms – made a brave and imposing sight as they strode through the city streets. The citizenry wasn't exactly stepping off the sidewalk, but you could tell that these men had the respect of the townspeople.*

*It was really too nice to go inside, and there being no one at the drive-up window, the two officers walked up to it and were served immediately by an imposing young lady of statuesque proportions. She took their checks into the interior of the bank for verification, and Pat swooned weakly against the chief.*

*“Chiefie,” he croaked in a strangled voice, “Chiefie.”*

Chief Seiverson, as ever, was impatient with any lapse from dignity. "What the hell is wrong with you anyway, Pat?" he wanted to know.

The reply came immediately. "Chiefie, DID YOU SEE THE TITS ON THAT BROAD?"

Having completed the conversation, and oblivious to the fact that it had been transmitted all over the bank by the hidden microphone at the teller's window, Pat and Chief Seiverson waited patiently for the teller to return. She refused to do so, however, and her replacement was an outraged vice president who summarily ordered the policemen from the bank premises. Pat did try to go back to apologize, but they wouldn't let him in.

#### ZEN IN THE ART OF DEFENDING DWI's

Anchorage attorney Roger H. Beaty recently confirmed a private theory of mine that success in defending criminal cases varies in inverse ratio to the amount of effort expended. We were waiting for a calendar call, and he told me about a client whose drunk driving case he had recently handled, with complete success.

"This dude calls me in the middle of the night," said Roger, "the cops have him, he's drunk on his ass, and wants me to come down before he takes the breathalyzer. I agreed, but unfortunately fell back to sleep. An hour later, the cops called back, and I apologized all over the place – telling them that I'd be right down, but I fell asleep again."

Apparently, having waited several hours for the somnolent attorney, the police – after a heated argument with an Assistant District Attorney who didn't want to come down either – released the prisoner on a small bail. The next morning, he informed Roger that his arraignment had been set for 1:30 that afternoon.

"Was he upset?" I wanted to know.

"No," Roger replied, "he thought it was part of my defense strategy, particularly when I forgot to show up at arraignment. It was put over till the next day, and by that time, the case had been dismissed by the DA's office because the officer at the scene hadn't made very good observations, and somebody forgot to turn on the videotape in the station."

There was a pause. "I really hated to charge him," he added.

In response to those kind readers and friends who have inquired concerning my health, I am happy to attribute my recent dramatic weight loss to the efforts of the Nutri-System organization of this city. How I came to apply to that group for assistance is another story, however – and, as with many traumas in my life, the story begins in Courtroom F, care of Superior Court Judge Ralph E. Moody. In my years of practice before him, I've given the old darling [to use Rumpole of the Bailey's expression] a good many hours of innocent amusement – and this occasion was no exception.

#### HIGH COCKALORUM

*It was during a preliminary hearing last fall in which the central issue seemed to be the identification of the assailant. The problem, from the prosecution point of view, was that the victim had identified her attacker as having a "high pot belly," whereas my defendant was, and is, an athletic looking man with no trace of such an appendage, high or otherwise. The chief investigator, APD Officer William E. Gallop, is a competent and professional policeman who candidly admitted to this discrepancy, and a few others as well. An hour's searching cross examination left him unbowed, but somewhat bloodied nonetheless.*

*Judge Moody, who had been listening to all of this with uncharacteristic restraint, intervened with a question. "What," he asked Officer Gallop in his soft drawl, "is a high pot belly?" The harried policeman glanced about the courtroom, nodding slightly as his eye fell upon defense counsel. "It's like the one on Mr. Fraties," he replied calmly.*

*Judge Moody was delighted. "Show me a profile on that, would you, counsel?" he requested, playing up to his mixed audience of attorneys, police and other courtroom personages. I complied, and signed up for an intensive diet and appetite control course immediately upon leaving the courtroom. Today, forty pounds lighter, all I have to do is think about Courtroom F and its genial proprietor and whatever appetite I have left disappears completely.*

## Chapter Thirteen

### **STREET** SMARTS

*My faithful readers are familiar with the training methods employed by Anchorage investigator Gary Veres when he was on duty with the Los Angeles sheriff's office in the Watts district, some years ago [See Bar Rag, November-December, 1982]. We were trying a homicide together in Juneau last Christmas, and Gary – during one of our numerous drinks together – recalled more incidents in his life as a training instructor in Watts. Many of you will recall that he spent six years there in that capacity, mostly on the night shift. Gary honestly liked a lot of the local denizens and got on well with them. However, his various trainees were a constant source of frustration.*

*“The dumbest son of a bitch I ever trained,” said Gary, “had to be a redneck by the name of Eddie Joe Hunt.” He shuddered at the memory and added, “he damn near got us both killed one night.”*

*“We responded to a fight call at about 2:00 a.m.,” Gary recalled, “and here was this black dude lying on the ground surrounded by two or three hundred of his brothers. He had been stabbed several times in the abdomen, and I was afraid that we might lose him. Eddie Joe was with me that night and as I interviewed various people in the crowd to attempt to identify the victim's assailant, I instructed Officer Hunt to take a statement from the injured man. It looked like it might turn out to be a dying declaration.”*

*Eddie Joe knelt beside the victim and attempted to communicate with him, without much success. Severe injuries had rendered him nearly unconscious, and the young trainee was having difficulty getting his attention.*

*“This was a tough crowd,” Gary continued, “and I wasn't getting much help from them. I could hear Eddie Joe shouting at the victim, trying to get his attention. He wasn't getting anywhere, though, and the mob was getting ugly.”*

*This went on for some time with the victim becoming increasingly weak and unresponsive. He didn't seem to be able to recall anything about his attacker's size, age, weight, clothing or other identifying characteristics. “You better get some kind of description,” shouted Gary to the frantic trainee, who was obviously anxious to make a breakthrough on his first major felony case. Gary and the angry crowd became aware of a new line of questioning at the same electrifying instant. “WAS IT A (six letter word meaning 'Black')?” Eddie Joe wanted to know. Gary sighed heavily at the memory. “I still don't know how I got us out of that one alive,” he stated ruefully.*

## THE NIGHT OF THE JACKAL

Not all the trainees were as dangerous as Eddie Joe, but almost all of them suffered from cultural shock to one degree or another. Mike Miltmore was one such – being a young white gentleman, of liberal persuasion, from a rich family. Apparently, having taken a degree in sociology, he had joined the cops as a logical vehicle for his training in dealing with diverse cultures. He was not, however, very well equipped by his university education to deal with some of the basic facts of life in this notorious ghetto area.

“I had told Mike a dozen times never to sit down in Watts,” Gary reminisced, “and to keep his feet shuffling even while standing up in someone’s habitation.”

I was mystified, and wanted to know why.

“The cockroaches, man,” was Gary’s rejoinder and, of course, a story went with it. “We were in this little old lady’s apartment one night,” said Gary. Apparently, someone had burglarized the place and taken all her shoes – and she wished to take a report. Trainee Miltmore, ignoring all of Gary’s advice, sat down at the kitchen table and prepared to make an entry in his notebook.

“I wasn’t going to warn him again,” Gary recalled, “so I just stood there shuffling my feet, knowing what was going to happen.” Mike soon faltered and gazed in horrified fascination as a four inch cockroach began to emerge from under the lazy susan. It looked, according to Gary, like the warhorse mentioned in the Old Testament that says to itself “Ha, Ha!” among the trumpets, and it appeared to have designs on Officer Miltmore’s notebook.

The complaining witness continued with her description in a quiet and long suffering monotone, “They took my green shoes, my red shoes, my yellow shoes, my black shoes” here, without breaking her recitation, she reached for a frying pan which was lying on the counter – “my purple shoes, my white shoes” –

Without so much as interrupting her description, the little old lady – obviously an experienced Watts homemaker – swung the frying pan with terrific force, severely injuring the offending insect, and nearly frightening trainee Miltmore to death in the process.

“I can’t believe she did that,” he complained weakly on the way to the station. “I thought I had been shot.”

## IN SEARCH OF PEN PALS

On the subject of the police, most of you are aware that Juneau District Court Judge Gerald O. Williams used to be a member of that fraternity before he went to law school. He was contemporary of Pat Wellington, Bill Houston and Chief “Swede” Seiverson, all known to readers of my former columns. While still a member of the State Troopers, Judge Williams sent a request, in the Chief’s name, to the personal column of the National Enquirer [which, in its former incarnation, was somewhat of a scandal sheet] with a request that the writer be sent

a picture of a “virile male,” and for the next three years Chief Seiverson arrived at the office early to intercept the mail before it was opened by his secretary.

#### CIRAULO'S SUCCESS STORY

As readers of the Bar Rag who have enjoyed his articles are aware, Judge Williams is an historian of no mean ability. In that role, he told me recently how the present Chief of Police in Juneau, Joseph Ciraulo, first went on the force. “Swede Seiverson had been using a prisoner by the name of Virgil Cox for his executive assistant,” said the judge. “About the time Mr. Cox was to be released, Joe Ciraulo’s father-in-law approached the Chief and asked whether or not a position would be opening up in the near future. Somehow, Swede had managed to keep his useful inmate in custody in the local jail for about three years, although he normally would have been sent out to spend his time in the federal system.”

An agreement was reached that Joe could have the clerk’s job if his father-in-law would locate Mr. Cox a job on the outside with the municipal government. “And that is how,” the judge reminisced, “the City of Juneau got a new policeman, and the airport got a burglar.” It wasn’t very long, either, before Mr. Cox was back at his old duties and Joe – having been released from clerical assignment – went out on the streets to lay the foundation for an eminently successful career in police work.

## Chapter Fourteen

### **FEE** ARBITRATION MADE EASY

Attorney A. Lee Peterson, an old friend and confidant, attended a small birthday party given in my honor recently and, as a mark of his esteem, brought me a nice bottle of wine, Saint Emilion, a 1978 Bordeaux. I thanked him for it and remarked that it must be expensive, being an import, and all. He surprised me.

"You have no idea, Gail," he replied. "This stuff is worth almost eight hundred dollars a bottle. I got it from [Anchorage and Honolulu trial attorney] Ed Reasor." I knew that a story had to go with that one, and Lee complied.

"I tried Ed's case involving a fee dispute against a couple of former partners, and it took about ninety-five hours of my time. We won and at the cost hearing, Ed told Judge Souter my fees are a hundred dollars an hour. I was really looking forward to that \$9,500.00, but instead of paying me in cash, he went out and got me a case of twelve bottles of this excellent wine."

Lee permitted himself a gentle smile. "I guess he didn't want to offend me by just giving me the money."

It seems to me that our court rules should provide for judge shopping. We proceed upon the theory that the client can challenge only one judge who is wrong for his case – taking a chance (as in jury selection) on getting still another orangutan out of the box. In Monterey County, everything was simpler. Of course, we practiced plea bargaining there, too. Sometimes it took everyone in the courthouse to get some poor soul out of the machinery.

### BEATING THE SYSTEM

I first was introduced to the system early in my legal career. Before I joined the District Attorney's office, I was with the law firm of Pioda, Leach, Stave, Bryan & Ames (known to my readers from past columns, as are several excellent trial lawyers who were in it, including Bill Bryan, Bob Ames, and George McInnes). My first assignment from the court system (we had no public defender's office) was a complex little item, and took most of the District Attorney's office to resolve.

Superior Court Judge Stanley Lawson was known to be death on sex cases. "He just goes crazy," was McInnes' observation. He was a fine man, but had little patience with the vagaries of human nature that result in sexual misconduct of some sort or another. Judge Anthony

Brazil, on the other hand, who presided at the other end of the hall, didn't share Judge Lawson's prejudices, and didn't think much of him personally, either. It was a long-standing animosity, between two otherwise outstanding jurists. The cause of it is lost in the mists of antiquity, but it was a very real phenomenon – and we made use of it on this occasion.

#### A FINE ROMANCE

The fact situation, as I came to understand it, was as follows: Joe Bloom, a local lawyer with a small and otherwise innocuous practice, had been asked to resolve a serious emotional problem for a couple of his young clients. These two individuals had fallen in love while the lady of the combination was still married to another gentleman. Wishing to do the right thing, she had consulted Attorney William Stewart (later Municipal Court Judge Stewart – see “All My Trials,” Bar Rag, “Midsummer Night's Dream” edition, Vol. 4, No. 6, 7 and 8). He had a flourishing practice in the Alisal District (Salinas' equivalent to Anchorage's Spenard) and apparently had briefly advised the young lady just before he went on the bench. Whatever he told her, she misunderstood – and took it upon herself to marry her new friend while still officially married to the original husband. Students of California legal history will be aware that at that time divorce was not granted immediately in California, rather a one-year interlocutory period had to be endured – during which the parties were still married, although they wanted to be divorced. I don't know what redeeming social value this was supposed to have, but it certainly led to some interesting problems, as in this case.

#### A FINE MESS YOU'VE GOT US INTO

Anyway, the interlocutory period finally passed, and although the lady was sort of married to her new husband, they both became conscience-stricken by what they had done – and sought the advice of Attorney Bloom. None of us could figure out why he hadn't simply ignored the premature marriage and told them to get married again – inasmuch as their first one was void. His decision was to take his clients before Judge Lawson (a dangerous one in the circumstances) and move for an annulment. The good judge, visibly shaken, was about to sign the papers when he took it upon himself to ask the couple why they couldn't have waited. Attorney Stewart having just taken the bench in the interim, the young lady replied, “Judge Stewart said it would be all right.”

This explanation so outraged the court that it not only required a transcript of the hearing, but sent it to District Attorney Bert Young with the message (handwritten on the cover), “I want these people prosecuted to the full extent of the law.” At this point, I was appointed to the case – and introduced to two thoroughly frightened and bewildered miscreants.

#### A SUSPENDED FINE

The District Attorney's department just wanted the problem to go away, but they couldn't very well ignore the Judge's mandate. Thereupon I became a student of finesse in maneuvering the Court System by two masters of their craft, Assistant District Attorney Ed Barnes and defense counsel Bill Bryan. For some reason (probably sexist), bigamy in California at that time was a

*felony for a man, and a felony/misdemeanor (providing greater latitude for leniency in sentencing) for a woman. Mr. Barnes suggested changing the attempted husband's charge from bigamy to accomplice to the pseudo wife's transgression. That having been accomplished, Bryan called the Jury Commissioner, Ernie Maggini, a co-conspirator in many such plots, who readily agreed to put the matter on Judge Brazil's docket for change of plea, and sentencing.*

*Judge Brazil had heard the whole story by this time, and was delighted with an opportunity to upstage his antagonist under these circumstances. I conducted the sentencing hearing, replete with many admonitions to my clients to reform their ways, and their tearful assurances to the Judge that they would. He then sentenced both of them, under the misdemeanor aspect of the statute, to a small fine, suspended on condition of good behavior for a period of probation of thirty days. Everyone was delighted with the result – except Judge Lawson, of course, and the clients, who didn't have any more idea what had happened than cows in a forest. I still remember the little wife asking me in a quavering voice, "Does this mean we don't have to go to jail?"*

#### THE RHYTHM METHOD

*I was fond of all the judges, but Judge Brazil was one of my favorites. He was a handsome, intelligent man of rather diminutive stature, and fine Patrician features. These qualities he shared with my cousin, Judge Machado, probably as a result of their mutual Portuguese heritage. He also had a beautiful shock of silver hair – which gave him a commanding and imposing presence on the bench.*

*Judge Brazil had been around a long time (he was a former District Attorney) and was thoroughly comfortable in the environment of his courtroom. I used to like to watch him conducting an uncontested divorce, which he orchestrated with the skill of a Toscanini. He liked to close his eyes and put both hands on top of his head while letting his robes drape gracefully on either side of the chair – his "drowsing eagle" posture. When testimony started, his right hand would gently wave toward the witness, where it would pause for several beats until he had heard enough. At that point, another languid sweep to counsel would indicate that the Judge was ready for summation and prayer for relief. This would proceed for a few moments at which time another rhythmic movement from the bench signified that he had heard enough of that, as well. It saved time, and was as satisfying as watching a ballet.*

#### ABOVE AND BEYOND

*He had a restless and incisive intellect, however, and managed to keep about six months ahead of Mr. Justice Traynor of the California Supreme Court (who himself was usually the bellwether of changes in the United States Supreme Court policy by a similar period). This made him distinctly short of patience with transgressions against the rules of evidence, as he demonstrated on one occasion where I had been appointed to defend a man accused of rape. Both the defendant and the victim were Spanish-speaking, so I enjoyed a distinct advantage over Deputy District Attorney Lee Pittman, who was assigned to prosecute the case, in that I*

understood that language, and he did not. At one point in the trial, my opponent asked the vital question as to whether or not my defendant had achieved penetration. The reply (through the interpreter) was clearly in the negative. Sensing the vital element of his rape case in jeopardy, he sought to repeat the question – and was stopped by an “asked and answered” objection. There was a pause, as he regrouped for a new attempt.

“I don’t want you to try that again, Mr. Pittman,” said Judge Brazil.

“I won’t, your Honor.”

“Then ask your next question.”

“I’m thinking, your Honor,” he replied cautiously.

The jury was fascinated, particularly when the Court told Mr. Pittman that if he had no further questions of his witness, he could terminate his direct examination. The poor man made one more valiant attempt. Fixing the witness with a kind and compassionate gaze he asked in his most seductive and friendly voice, “Did he go up and down?”

I didn’t even have a chance to object to that one, as Judge Brazil beat me to it. Despite his scathing criticism, I still regard it as an outstanding example of virtuosity and courage under fire.

#### OUT OF SIGHT

Many of our own judges, being Alaskan, fellow attorneys, and frontier people, have their own engaging ways of displaying humor and compassion. On an admittedly fast track, it would be hard to beat District Court Judge Joseph Brewer in both of these departments. On one occasion I recall, he had the distasteful duty of presiding over a case against a rather irate, and definitely old and crotchety, Catholic priest. This elderly gentleman, not overly impressed by the quality of legal ability shown either by his, or the opposing, counsel, insisted in intervening at every point in the trial. He liked to spell things out for people, and frequently interrupted with, “That’s a lie, L-I-E,” or “that is totally false, F-A-L-S-E.” At the end of the trial, Judge Brewer had to rule against him – and was told, “My son, you’re obviously a good judge and a nice man, but you are wrong. W-R-O-N-G.” The Judge, as ever, was equal to the occasion.

“I’m sorry, Father,” he replied, “I guess you’re going to have to appeal. A-double-P-E-A-L.”

On another occasion, I observed a case in his court by trial attorney Mary Anne Henry, presently the District Attorney in Ketchikan. Opposing counsel Mike Schneider was having fun with the case, particularly in his excellent cross-examination of a young officer who insisted that he had put the half-dead defendant on the breathalyzer after the accident, rather than taking him to the hospital, because he refused medical attention. He stated that it was the policy of his department.

*Mike asked him (slightly exaggerating to make the point) whether if a troop of Brownie Scouts had been run over by a flaming gasoline truck, and were lying in the street bellowing in a chorus that they didn't want to go to the hospital, would that alter the application of the rule?*

*His reply, which is etched in my memory, was, "Mr. Schneider, if we see a man walking down the street with his arm cut off and he doesn't want to go to the hospital, we are not allowed – by departmental policy – to take him there."*

*Judge Brewer, who had been listening to all of this calmly enough, stood straight up and made a public service announcement. "Oh, Jesus Christ," he stated fervently, as he strode from the bench. He went in his chambers, and wouldn't come out for some time, after which the trial was successfully concluded, at least from a defense point of view. Every time I hear someone is having trouble getting the support of the Bar in a retention vote, I wonder whether the world is comprised of people who want to try cases in front of judges that aren't any fun. If that's their objective, they're going to have a hell of a time replacing all the characters on our bench.*

## Chapter Fifteen

### **MONTEZUMA'S** REVENGE

The Ketchikan Bar has recently awarded one of its members, the legendary A. Fred Miller, the “J. Paul Getty of the North” award for his stunning financial coup in the Mexican peso market. Investor Miller, attracted by the interest rates of 35% offered by a Mexican brokerage house, plunged heavily in the peso – whereupon the Mexican government promptly devalued it by 41%. Offended by this lapse of good faith, he has filed suit in the Ketchikan Superior Court, where the defendants are represented by trial attorney Cliff (“Cisco”) Smith of that city. Conflict of laws questions are the subject of a continuing debate at the traditional morning coffee sessions of the Ketchikan lawyers and – since venue appears to be in Guadalajara – a collection has been taken up to provide the plaintiff with a guitar and sombrero. Attempts have been made to get him to practice sleeping under a cactus, as well, but so far as he has sternly resisted this suggestion, as well as advice to invest in Southern Civil War bonds, Japanese World War II occupation money and post-Hindenburg German marks.

Students of the Alaska judicial system, of whom I count myself one, have noted that the immense pressure of the Anchorage case load has had a startling and pervasive impact on motion practice in this city. The ever-present pessimists are fond of pointing to those sociological experiments which indicate that rats, trapped and overcrowded in a maze, tend to attack one another. As observed by Court Administrator Arthur H. Snowden, “Those that the Court System would destroy, it first makes mad.”

#### FILL IT TO THE RIM

For example, I can never watch Anchorage Superior Court Judge Ralph E. Moody at arraignments without thinking what a marvelous decaffeinated coffee ad the world is missing. The scene opens with Judge Moody, attended by his staff, fidgeting in his chambers after an unusually heavy session. Actor Robert Young enters and speaks.

Robert Young: “Wow, Ralph, you were a bit tough on old Gail today, weren't you –?”

In-Court Deputy Leila Breaux: “It's his coffee, he just loves it – but it's the caffeine he can't stand.”

Robert Young: “Doesn't he know about Decaf?”

However, more enlightened observers have noted that the Judge's seemingly testy approach toward his duties is really a highly sophisticated form of communication, developed through necessity by the volume of motions submitted by the Public Defender's Office, the

prosecutors, and private bar. The spiel of the tobacco auctioneer, and the subtle signals of an art auction are also unintelligible – they too having evolved because of the necessity of the participants to communicate in a highly charged, noisy and disorderly atmosphere.

#### POWER MOTION PRACTICE

To watch Judge Moody in concert with former Public Defender John M. Murtagh is a study in speedy and effective resolution of complex legal issues. It only requires interpretation to become understandable.

Attorney Murtagh (having briefly stated his legal position): “– Therefore, your Honor, it is our belief that the defendant, although an indigent, an itinerant, and a recidivist escapee, should be granted release on his own recognizance.”

Judge Moody: “—Nighed.” (Sometimes pronounced “denied.”)

Translation: “Counsel, your motion has been carefully considered, and although you present your position cogently and I am impressed by the authorities you have cited, I must accede to the position of the District Attorney’s office that – barring an opportunity to put our client to death painlessly as soon as possible – the protection of the public would seem to indicate that a high bail is necessary.”

Attorney Murtagh: “But, your Honor—”

Translation: “I wonder if the Court has had the opportunity to consider the subtler implications of the most recent Supreme Court cases cited in our brief? If so, and upon mature reflection, is it not possible that the Court may reconsider?”

Judge Moody (raises right hand, and jabs index finger toward ceiling).

Translation: “Counsel, your position is thoughtfully expressed, but this forum declines to reassess the matter. The Supreme Court of the State of Alaska, however, which sits on the fifth floor of this building, may embrace your legal reasoning. I urge you to present the problem there without delay.”

Attorney Murtagh: “Your Honor, may I—”

Translation: “I deeply appreciate this Court’s patience, but would urge your Honor to grant my client immediate relief. An appeal to a higher tribunal, at this juncture, would sadly inconvenience him – since their own crowded calendar precludes speedy resolution of this vexing problem.”

Judge Moody: “Push five when you get on the elevator.”

Translation: “I thank counsel for his observations, but must reiterate my original position – and urge response to the Appellate Courts as viable alternative to further debate.”

The difference, of course, is in judicial economy. What would ordinarily require fifteen to twenty minutes of colloquy is reduced to a matter of seconds, due to the technical mastery of the individuals involved.

#### YIN AND YANG

Some of my readers are in prison – I'm sorry to say (sorry for them, that is – I sure as hell tried to avoid it) and others are in police circles. Since I have friends in both camps, I sometimes have difficulty in explaining their divergent views to each other. You know how it is when you give a dinner party and invite a mixed bag of your favorite people – hoping that the chemistry will be right. Since these two groups spend most of their professional lives raising hell with each other, it's somehow difficult to achieve a meld.

Any high ranking policeman can tell you that the lines of demarcation between the two factions is a thin one, particularly when dealing with members of the Detective Division. In the jungle habitat where investigators and the criminal element alike ply their trade, the essential differences between the hunter and the hunted are not all apparent – and the general craziness that pervades the streets seems to affect everyone equally.

#### AN IRRESISTIBLE IMPULSE

Former Public Safety Commissioner James P. "Pat" Wellington needs no introduction to the criminal bar, or to anybody else in the criminal justice system for that matter. The cognizetti, however, are aware that Pat's close personal friend Captain William Houston – former Director of the Division of Adult Corrections and presently the Superintendent of the Lemon Creek Correctional Facility at Juneau – is easily as twisted as Pat is, and probably worse. A war story from their past will illustrate my point.

Twenty years ago, both of them were serving on the Juneau Police Department – Pat as a lieutenant, and Captain Houston as a detective sergeant. In those days, the police department was located on the top floor of the old court building – high on a hill in Juneau. It has since been replaced by a modern State office building.

Anyway, the bathroom which had been provided for the officers in the station was a small and narrow cell-like affair at the top of the stairs. It had a toilet, and a wash basin – otherwise, there was barely room to turn around. The building was old and shabby, and the door to the john – being ill-fitted and badly hung – had at least an inch of space under it.

#### APOCALYPSE NOW

Chief of Police T.L. "Swede" Severson – a large and dignified individual with little patience for frivolity – outfitted himself one winter morning in his full regalia, preparatory to attending a city council meeting. He put on his dress uniform, replete with stars on the shoulder, and was altogether an imposing presence. As he prepared to leave the building, however, he answered a call of nature in the small cubicle I have described, and was apparently seated there when

Detective Sergeant Houston returned from a burglary investigation. At the top of the stairs, next to the bathroom, his superior officer – Lt. Wellington – was waiting. For some reason, he had a fifteen-pound CO2 fire extinguisher in his hands.

“Bill,” said the Lieutenant in a quiet but commanding voice, “the Chief’s in the biffy. Give him a little shot,” he continued, handing over the fire extinguisher. Sgt. Houston, the product of many years of disciplinary drill in the Marine Corps, complied instantly – inserting the nozzle of the extinguisher under the door, and pulling the lever. Startled by the Chief’s bellow of rage, he dropped the heavy equipment – which jammed under the door, and couldn’t be shutoff.

By this time, Chief Severson was making sounds like a water buffalo trapped in a broom closet, and the terrified officers – afraid to face his wrath – did the only sensible thing and ran away. Eyewitnesses have described his appearance, when he finally emerged, as looking like Frosty the Snowman dressed up for part in the “Pirates of Penzance.” A few tracks, and a small half-moon on the toilet seat were the only areas of the bathroom not thickly coated with foam. His uniform was in sad disarray, he was late for his meeting with the Council, his dignity was compromised, his day had been ruined, and he was looking for raw meat.

#### GUILTY, WITH MITIGATING CIRCUMSTANCES

Pat Wellington, whom nobody has ever accused of being nonpolitical, managed to stay out of sight for two hours before the Chief caught up with him. Sgt. Houston had driven to the Airport, and was contemplating taking a flight for Seattle, when cooler heads reached him on the radio and urged him to turn himself in, which he eventually did.

If I remember correctly, Pat pleaded temporary insanity and Sgt. Houston took the position that he was only following the direct order of a superior officer. Chief Severson didn’t think any more of that excuse than the Nuremberg Court did, but finally relented – accepting a sacrifice of two days’ annual leave from each individual in atonement. Both, from the vantage point of the many years that have passed since that electrifying moment, agree today that it was worth it.

## Chapter Sixteen

### **SUSPICIONS** CONFIRMED DEPARTMENT

*My stringers around the state have supplied me with this week's quotable quotes from the judiciary, as follows:*

*Anchorage Superior Court Judge Ralph E. Moody to District Attorney Larry R. Weeks after defense attorney Michael J. Keenan cited the latest Alaska Supreme Court case, supporting his position on all fours: "I think we're in trouble."*

*Ketchikan Superior Court Judge Thomas E. Schulz, upon being alerted by his clerk that it was time for a ruling, after having "rested his eyes" during a late Friday afternoon adoption hearing: "I find sufficient basis to establish incompatibility of temperament, the property settlement is reasonable and..."*

*I'm sure there is general agreement between the prosecutors and the defense bar that crime is a growth industry, but I didn't realize how rapidly things had escalated until I returned to State employment recently. My first prosecution case was an armed robbery, and in preparation for the presentation of evidence I phoned one of the investigating officers, APD Patrolman Thomas W. Hume, at his home just before he went on the midnight shift.*

YOU SEE ONE —

*"Tom, we're going to trial next week on those armed robbers you apprehended last March," I said, naming the defendants, "and I'd like to get together with you to prepare you for your testimony."*

*Hume sounded cautious. "Can you refresh my memory a little bit?" he wanted to know.*

*"Sure, that's the one where the three perps dragged some dude out of the Monkey Wharf, held him up with an Uzi assault rifle, and then beat hell out of him. One of the three robbers used a sword cane, the gunman had a banana clip in the Uzi with 25 slugs in it, and the other idiot was wearing a gorilla mask."*

*There was a brief silence from the officer's end as he digested this information. "I'm not sure, Mr. Fraties," he replied, "I'd have to look at my report. Can you give me a few more details?"*

We finally got it all straightened out, and I hasten to add that Officer Hume is a good investigator and deservedly respected officer. It's obvious, however, that he has a lot on his mind.

#### WATTS DEFENSIVE DRIVING

To those of us who get most of our violence, much less sex, on late-night Visions, it might seem difficult to forget such a bizarre facts situation in a short period of time, but street cops are accustomed to casual violence in one form or another. Anchorage private investigator Gary Veres, known to my readers as a former training officer in the notorious Watts district of Los Angeles, told me a story just the other night that is illustrative of this phenomenon.

"I was riding with a veteran for a change," said Gary (whose heart-rendering problems with his trainees have been described in other columns), "we were going along an alley and I saw this wino laying among some trash barrels with his poor little thin legs sticking out in the road. John was driving, and I told him to watch out for this individual." (Gary used a more descriptive street term, but his heart was obviously in the right place.)

He continued. "I knew John wasn't listening to me, so I warned him again. He didn't slow down then either, and I was getting desperate. I ended up shouting right in his ear, but somehow he didn't understand me."

Gary's powers of vivid description, as ever, were equal to his story, which quickly reached a shattering climax.

GARY: "JESUS, CHRIST, JOHN, SLOW DOWN, YOU'RE GOING TO HIT..."

SQUAD CAR TIRES (front and rear): "KA-BUMP, KA-BUMP."

OFFICER ROGERS: "Say what?"

"God help us, Gary, did the poor man get badly hurt?" I wanted to know.

"Just broken legs," he replied calmly. "We reported it as a hit-run."

I remarked that it all sounded somewhat like justice west of the Pecos, and Gary agreed. However, the night shift in Watts was hectic enough to make such incidents seem routine. "It was like fishing in a hatchery," he recalls, "all you had to do for some excitement was hit the red lights."

#### SEVEN AT A BLOW

The responsible citizens were equally violent – I suppose in self-defense. Gary expounded on this phenomenon with his recollection of a Watts liquor store owner who got tired of being robbed by the local denizens, thirsty and otherwise. One night a robber caught him in a bad

mood and got blown away with a .357 magnum, which had been concealed under the counter for that very purpose.

The police were quick to seize upon this opportunity to encourage citizen participation in law enforcement, and praised the doughty proprietor to the skies, awarding him a police commendation medal for his valor. Greatly encouraged, he apparently killed five more attempted perpetrators in the space of four short years, each time receiving favorable and complimentary attention from the authorities, as well as the heady privilege of seeing his name and picture in the public press. However, the Watts armed robbers – a hardy breed – were undaunted.

Once summer evening the proprietor received a threatening phone call, obviously from someone who was unaware of his impressive kill ratio. “Listen carefully, man,” said a menacing ghetto voice, “you’re being watched – and in ten minutes, I ma coming to your store. I’m going to order a bottle of Chivas, and if you don’t put all your money in the sack with it, I’ll blow your sorry ass away. If I don’t get you, my partner will – he’s got you in his sights right now.”

This information affected the combative store owner like a relaxing week in the country, and he whistled to himself as he checked the loads in his pistol and prepared to greet his visitor. Soon, a dignified gentleman in a three-piece suit entered the store and popped the fatal question.

“May I have a bottle of Chivas Regal, please?” he asked, in a soft and cultivated voice.

“Those were his last words,” said Gary. “The owner shot him right between the eyes, and called us – just like the other six shootings. It was his M.O.”

I was horrified. “Did he get the right man?” I wanted to know.

“I don’t really know,” Gary replied. “We searched the body and he didn’t have any weapons him. He didn’t have a criminal record either – I think he was a CPA with Price Waterhouse.”

“What happened to the store owner,” I inquired – knowing from experience that an O. Henry twist of some sort was in the offing.

“We just gave him another commendation,” Gary replied, with a faint smile. “It was like that Ring Lardner story – no one wanted to knock him, he was the champion.”

## Chapter Seventeen

### **BEYOND** PLEA BARGAINING

*The defense bar will be pleased to know that the ban on plea bargaining imposed by former Attorney General Avrum M. Gross has not prevented the prosecutors from giving embattled defense counsel a break on a case-by-case basis. A situation that springs to mind was my encounter with the small but powerful Pat Doogan, a felony prosecutor in the Fairbanks office. Pat, as ever, was the soul of courtesy as I unburdened my heart to him in an impassioned plea for clemency.*

*My client was a recidivist child pornographer, and needed all the help he could get, as Pat agreed. The most damaging thing in the Government's case was the collection of some two to three hundred pictures of what seemed to be roughly half the juvenile population of greater Fairbanks, all of whom managed to be seated on or around my client's face in various stages of disarray, and a variety of compromising postures. Pat, although he would not plea or change bargain, was magnanimous. "I'll tell you what I can do, Gail," he stated. "Let's circulate the pictures among the jurors during voir dire, and I'll give you a free challenge to anyone who faints or throws up."*

#### WHAT PRICE GLORY?

*Many of my readers have asked for news of Joseph D. Balfe, former District Attorney of Anchorage, presently the Department of Law's representative to the Department of Public Safety. As some of you know, Joe used to be a highway patrolman in Oregon – where he once received the Governor's medal of commendation for valor. The true story of that award, however, was never revealed before I got a few drinks into him on a recent hunting trip and asked him about it.*

*"There was really nothing to it," he replied. "I was about four hours into the day shift outside Portland, Oregon, and I had parked my unit by the side of the highway to watch the traffic. It seemed like a long shift, and I was bored. While checking the license plates of the passing cars against a hot sheet of stolen vehicles which had just been distributed, I spotted this late-model Cadillac with a 19-year-old kid driving it – and sure enough, there was the license number on my list."*

*Joe accepted another drink and continued. "I knew that if I just drove up alongside him and waved him over, he'd stop the vehicle and surrender peacefully."*

*"So that's what you did, I suppose," asked our former mutual friend and hunting companion, former Chief Investigator for the Department of Law, Dale W. Cheek.*

*"No," Joe replied reflectively. "I sneaked right up behind him and hit him with the red lights and siren. He took off like a jackrabbit, just as I knew he would."*

*"How far did he get?" Dale wanted to know.*

*"He made it all the way to downtown Portland," said Joe. "We had a high-speed chase in excess of a hundred miles an hour until we reached the downtown area. Both of us were weaving in and out of dense traffic, dodging pedestrians and running stoplights. He finally lost it, and went through the front window of a three-star restaurant. I still had to chase him two blocks before I could get the cuffs on him."*

*Twenty-five thousand dollars in damage and several TV appearances later, Officer Balfe accepted his medal from a grateful government and – greatly encouraged by his meteoric rise in law enforcement – applied to Willamette University Law School (night division), the start of a distinguished career in prosecution.*

*"That was kind of hard on the kid, wasn't it?" (Dale is a Libra.)*

*Joe considered the question. "DE MINIMUS NON CURAT LEX," he said.*

*In this age of computers, communication is the watch word – and state government is definitely uptown in this department. The District Attorney's offices alone have AJIS to track the citizenry, PROMIS to organize the caseload, and just about every sort of space-age typewriter, telephone system, and dictating equipment known to western man. Former prosecutor William W. "Bangkok Billy" Garrison was in Anchorage the other day on one of his infrequent visits from the Far East, and I took him on a tour of the Anchorage District Attorney's office. Of course, I boasted about our progress, and Bill responded with a reference to the halcyon days when (for an unforgettable five years) he was the District Attorney in Nome.*

*"I don't know where all you guys had gone (he was referring to the general exodus of Republican attorneys when Governor Bill Egan regained the throne in 1971), but I did know that John Havelock was the new Attorney General. Nome was pretty far north in those days, and I found out about the change when a memo arrived, advising all District Attorneys that John wanted a monthly report of the activities of our respective offices."*

*SEND US MORE*

*Mr. Havelock had apparently hit upon the novel idea of having each District Attorney write a monthly letter, addressed directly to Governor Egan. This letter was to contain not only a statistical summary of prosecution activities, but also general information concerning law enforcement, community attitudes, and problems – in any – that were being encountered in the complex endeavor of protecting the public. District Attorney Garrison, no great lover of paperwork, complied with as much grace as his anarchistic nature would allow.*

*"It was in the dead of winter," he recalled, "and everybody was too cold to be committing crimes – at least, the police weren't finding out about them. The first month, I wrote Governor Bill a long letter, complete with the number of cases tried, convictions, acquittals, office and community problems, police data, and just about everything I thought might interest the old boy. He didn't reply, and – as I recall – I sent a report faithfully every month until spring."*

*As the time wore on, without a reply either from the Governor or the Attorney General (through whose offices the communications were directed), Attorney Garrison began to feel neglected. Never one to maintain a low profile, he decided that his detailed reports were dull reading, and needed something more calculated to provoke interest. The first paragraph of his next report was a grabber. "LAST WEEK," it announced tersely, "IN A JOINT EFFORT WITH THE FEDERAL GOVERNMENT (UNITED STATES COAST GUARD) THE ALASKA DISTRICT ATTORNEY'S OFFICE FOR THE SECOND JUDICIAL DISTRICT COOPERATED IN THE SINKING OF THIRTY-FIVE THOUSAND TONS OF JAPANESE SHIPPING. NO PRISONERS WERE TAKEN."*

*There was no response. Piqued at this rebuff, the offended prosecutor allowed his monthly newsletters to degenerate into a creative writing exercise. Successive reports detailed a counter attack by the Japanese empire, a visit by emissaries from the lost city of Atlantis, and a pitched battle between the Nome police force and invaders from outer space who had landed on the outskirts of the city in a long, cigar-shaped, flying object. According to Bill, it was the governor's failure to respond to a request for instructions concerning an exchange of prisoners between the Nome residents and the flying saucer people that caused him to give up writing his reports altogether.*

*"Did you ever get any reaction?" I wanted to know.*

*"As a matter of fact, I did," he replied with a smile "The very first time I failed to send in a report, I got back a form letter inquiring what had happened to it. I didn't resume writing, and every month I got the form letter – and we were all happy. I really don't think either John or the governor were reading them," he concluded pensively.*

### *THE CHILDREN'S HOUR*

*I wasn't through showing him the wonders of our new offices, however, and took him to see the special facility used by our Sensitive Crimes Unit for the interrogation of juvenile victims of various sorts of sexual crimes. It consists of a comfortable room, complete with tiny furniture, dolls, children's picture books, and just about everything that is necessary to make the toddler/victim comfortable and at home. The idea is that the prosecutor and defense attorney can sit with them among their toys and discuss the variety of bizarre acts that have been perpetrated on them by their mothers, fathers, teachers, counselors, neighbors, ministers, or friends. All of this can be observed through a one-way mirror, and in the adjoining room a video camera stands ready to tape the testimony – often precluding the necessity of exposing victims of tender years to the ravages of cross-examination in open court. It's all very sensible, human, and effective.*

Garrison digested all of this silently, and seemed to be attracted to the pictures on the walls – depicting, as they do, a variety of fictional characters beloved by all children, including most of the principals of the Walt Disney animated cartoons. Bill was apparently formulating some sort of direct examination as he studied the pictures of Donald Duck, Pluto, Porky Pig, Mickey Mouse, and other members of the Disney high command – and the direction his thoughts had taken quickly became apparent.

“Was it white, like Uncle Donald’s,” he cooed in dulcet tones, “or black, like Uncle Mickey’s?”

#### WITH JUSTICE FOR ALL

Most members of the large public law firms in Anchorage, particularly the District Attorney and Public Defender offices, have had the dubious distinction of appearing on a complex motion, without warning and without preparation, before a frustrated and generally growly Superior Court judge – who is not inclined to listen to any excuses, simply because the responsible attorney is otherwise occupied. I was having coffee in our lunchroom the other day when Renee Erb, an effective and dedicated prosecutor, returned from such a harrowing experience.

“I’m getting tired of this,” she stated emphatically. “Every god damned time somebody around here screws up motion practice, I’m the one that gets to run over to court and try to explain to the judge.”

I was aware that she had been having a rough week, and asked who she was talking about.

“White Fang” (Honorable [name withheld by request]), she replied. “He’s got me three times running. He doesn’t even ask my opinion any more because he knows damn well I won’t know what I’m talking about. Why do I always have to be the whipping boy,...girl,...person?” (Renee is a dedicated, although nonmilitant, feminist.)

Out of her agony, after due deliberation, members of the District Attorney’s staff have devised a new rule which is hereby presented to the Bar, in the hopes that it will eventually receive some consideration by the Supreme Court:

*Criminal Rule 60. Designated whipping person.*

(a) These rules take specific notice of the fact that attorneys are required, on occasion, to appear in court concerning motions of which they are not the author, and have little knowledge. Such individuals will hereinafter be recognized as having a protected status, with rights and responsibilities commensurate with their position before the court. The degree of protection enjoyed by such attorneys will vary in inverse ratio to the amount of time they have had to prepare for their appearance.

Three to five minutes: The court, despite the degree of provocation by the concerned office, will treat the designated whipping person with courtesy. No sanctions may be invoked, nor may the court’s voice be raised.

*In excess of five, but not more than ten minutes: The court may raise its voice, and may – in extreme cases – inquire as to what the hell is going on.*

*Ten to twenty minutes: The court may raise its voice, engage in veiled threats, inquire what the hell is going on, and ask the courtroom generally if anybody knows what the hell is going on.*

*In excess of twenty minutes: The sky's the limit.*

*(b) Inasmuch as judges grow understandably weary of dealing with the same whipping persons (frequently those at the lower end of the hierarchy), every court is entitled to one challenge per motion to a designated whipping person. It must, however, accept the substituted whipping person, unless a challenge can be predicated for cause.*

*(c) Where a court has been required to deal with a whipping person from any given firm more than three times in one week, it will be entitled to nominate its own choice of whipping person from said firm to make appearances for the remainder of the week in question.*

*(d) Fines, penalties, and other manifestations of the court's displeasure will be shared between the designated whipping person, as defined in this section, and the responsible attorney, without regard to contribution.*

*Comments on this suggested rule from interested members of the bench and Bar are invited.*

## Chapter Eighteen

### **INSTANT** REPLAY

*I like to watch movies on Home Box Office, at least I did until I saw “The Trial” (Paul Newman and Charlotte Rampling, 1982). I like Mr. Newman, and the picture was highly recommended by some of my friends, none of whom happened to be trial lawyers.*

*I don’t know about you, but when something about a movie that I’m watching on television makes me uncomfortable, I either switch around to another channel until the offending scene is over, or go out to the kitchen to fix myself something to eat. This frequently happens in horror movies, where the slime monster is about to bite somebody’s throat out, or worse. After I had switched to “Knight Rider,” “The Jeffersons,” and “Women of San Quentin” a number of times, I began to realize that “The Trial” was bothering me – and it didn’t take long to divine the reason.*

*Here’s a man who’s getting old, has no money, and drinks too much. His wife has divorced him, and the girlfriend is working against his interests. His star witness splits, and is not under subpoena. The insurance company is spending a fortune to defeat him, and the other lawyer knows more evidence than he does. Finally, both the judge and his clients hate him, and are giving him a bad time.*

*I don’t care if he is good looking, that’s normal for trial lawyers. For this other shit, I have to watch television? If I want to play “This Is Your Life,” I’ll sign up for a game show.*

*A startling development affecting trial practitioners everywhere occurred recently in the Supreme court opinion dealing with a controversial case involving State Senator George Hohman. Usually, the Supremes have the last word – but they’re dealing with press lords now.*

### THE COURT OF LAST RESORT

*In that case, a defense attorney (who prefers to remain nameless) was acting as co-counsel to the distinguished Anchorage trial attorney Wendell P. Kay. After a protracted argument on the point of evidence with the astute and determined prosecutor Timothy J. Petumenos, said individual – in a mistaken attempt at courtesy – stated “I don’t agree [but] I’ll accept the ruling of the court (Hohman v. State, 669 P.2d 1316, 1325). In the recently rendered opinion, this unfortunate remark indicated to the justices either that he didn’t give a damn what the court did, or that he had resigned himself to his fate. Therefore, it was deemed not preserved for appeal.*

*Trial counsel, hereinafter, will be well advised to make a more spirited defense of their position – rather than suffer the embarrassment of a waiver. The following scenario may serve as a suggested format.*

*Trial Court: (After listening to extensive debate on an evidentiary point.) Does either counsel have further argument?*

*Both Counsel: No, your Honor.*

*The Court: Very well, I'll sustain the objection.*

*Proponent of Objection: Thank you, Your Honor.*

*Opposing Counsel: Your Honor, I would like to make a record, if it please the court.*

*The Court: You may.*

*Opposing Counsel: May the record reflect that I have broken my pencil and thrown it across the room (the Schulz syndrome<sup>1</sup>)?*

*The Court: It may.*

*Opposing Counsel: Further, that I have offered to punch Your Honor's lights out, flipped the bird, and threatened the life of an opposing counsel?*

*The Court: Certainly.*

*Opposing Counsel: Finally, that I've torn my clothing, smeared my face with ashes, and put on a black arm band. Does Your Honor think that will be sufficient?*

*The Court: Perhaps it would help if you were to kick opposing counsel in the nuts.*

*Interested members of the judiciary and trial bar may seek further guidance in the seminal article "Power Objections – or How I Learned to Stop Worrying, and Love the Bomb," Weidner, UCLA Alaska Law Review, Vol. 25.*

#### *THINGS THAT GO BUMP IN THE NIGHT*

*My apologies to whoever it was I frightened half out of his wits the other day, and I hope you read this column. My explanation is as follows:*

*In an abortive attempt to bring a little class to an otherwise sordid profession, I recently wore my full length, scarlet lined, midnight blue cape to work. As many of you know, there are no more straight men – everybody is a comedian. My beautiful garment did not have the intended effect, but rather elicited such sympathetic comments as, "Can we help you, Count?," and "I'm*

<sup>1</sup> My old friend and former partner, Ketchikan Superior Court Judge Thomas E. Schulz, still holds the Southeast Alaska record in this event – a recorded throw of 35 feet, 7 inches.

sorry, the blood bank is down the street.” I spent the entire morning being offered directions to Transylvania, and responding to inquiries concerning garlic, the full moon, and other arcane subjects. Assistant District Attorney Gene Murphy, the author of some of the above observations, actually shrank from me and held up a crude cross he fashioned out of a yardstick.

By noon, I was pretty well sensitized on the subject of my odd attire, and as I strode through the Anchorage Superior Courthouse I thought I saw an old friend, Municipal Prosecutor Allen Bailey, smiling at my appearance. He was some distance away, but as I approached him I felt it best to do a little dance, twirl my cane (another affectation), and swirl my cape as I knelt gracefully at his feet. Thereupon, I looked up into the horrified face of a total stranger, who only vaguely resembles Allen.

### THE TWILIGHT ZONE

Now knowing what else to do, I ran away – but, whoever you are, I’m really not crazy. Not yet, anyway, although my grasp of reality is tenuous at best. I think a few more cross-examinations of psychiatric expert witnesses ought to just about do it.

One of them was actually on the jury panel the other day, and, having answered all of the standard questions posited by the large poster in Courtroom E (Honorable Seaborn J. Buckalew presiding), he volunteered with a disconcerting grin, “I think I would make an excellent juror.” Assistant Public Defender Venable Vermont and I glanced each other.

“I wonder who’s running the asylum in his absence,” he whispered. “Are you going to challenge this nut roll, or shall I?” We stipulated, and he was dismissed with the contempt he deserved.

### THE GENTLEMAN BANK ROBBER

We all have our disappointments, and when I was in California recently, San Francisco defense attorney James Brosnahan described one of his own. It concerned an entrepreneur entitled the “Gentleman Bank Robber” by the press. When finally captured, he turned out to be a nattily dressed black gentleman with a small mustache, a three-piece suit, and a charming manner. His M.O. was to engage a bank teller in pleasant conversation, and after a moment or so, open his coat displaying to her eyes only a gun and a note which stated succinctly, “Wrap up the money, don’t make a false move, and no one will be hurt.” On receiving his package, he would invariably give his charming smile which – if anything – was enhanced by a gold studded incisor, and state, “Have a nice day.” Thus, the sobriquet, so suave was this individual that one picture, taken by a concealed camera, showed the bemused teller actually smiling after him as he walked off.

“I went to interview this jive-turkey at the jail,” said Jim, “and he certainly lived up to his billing. Furthermore, he apparently had an excellent alibi. He completely took me in, and I was sure that he was telling the truth. No one that nice could be a criminal.”

*The defense attorney had finished his visit, and was about to leave in high spirits when his client spoke words that shattered his hopes, and clutched his heart with icy fear.*

*“Have a nice day,” quoth the defendant, his gold tooth flashing. “Nevermore,” was the faltering reply, and a change of plea followed routinely.*

## Chapter Nineteen

### THE BABCOCK WARNING

*The Ethics Committee is to be commended for their comprehensive reply to a question recently posed by Assistant District Attorney Russell S. Babcock, who – on behalf of the prosecution and defense bar alike – posed a question concerning the ethical propriety of a defense attorney advising his client not to submit to a breathalyzer test (a class A misdemeanor) when under arrest for driving while intoxicated.*

*The committee concluded that, “Such a recommendation by an attorney is improper without the addition of further advice and discussion as outlined below. An attorney, however, should present legal theories which the attorney in good faith believes might challenge the validity of the statute; advise the defendant concerning the legality of prospective conduct; explain the legal consequences and judicial response to any refusal to take a breathalyzer in light of recent court decisions; and submit his professional opinion of the scope, meaning and validity of the involved laws.”*

*Having been one of that embattled breed myself, I now invite the Ethics Committee to make further recommendations as to how a defense attorney is to accomplish this high purpose when, as usually happens: 1) It’s 3:00 a.m. in the bleak morning, following a hard night; 2) Counsel is semi-comatose; 3) The client is drunk on his ass; 4) He is using his one phone call, with an 8 ft. cop standing by.*

*Perhaps it would be best to have something printed up, so it can be read to the client under these conditions, like the Miranda warning.*

### VIGNETTES

*Anonymous Attorney: “I can’t find a building to jump off of, why don’t we go over to Charlie Court and make some noise while Judge Ripley is conducting a jury trial?”*

*Federal prisoner Tom Williams<sup>2</sup>, in his letter of March 21, 1983, to Seward Magistrate George Peck: “Let me tell you about this lovely place the government has sent me to. It straddles the border of New Mexico and Texas. It is built like a Spanish mission. The “Alamo”*

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<sup>2</sup> Mr. Williams, who is serving five years for a federal law violation, unsuccessfully attempted to resist the determined effort of Kenai Assistant District Attorney James L. Hanley to have judge Peck run his fifteen days on the lengthy federal sentence. When asked by Bar Rag reporters why he was being so insanely chicken shit, Attorney Hanley would only smile modestly and state, “Just doing my job.”

would be a more fitting description than anything else. The only difference is that the Mexicans aren't fighting to get in, they're already in here."

Honorable Ralph E. Moody, to the routine assertion by the defendant in a revocation proceeding that he had found God at the Sixth Avenue Jail: "Well, I've been sitting on this bench a good many years – and a lot of you fellows find God there. However, he never seems to accompany you when you leave. I've concluded that he lives there. Therefore, I'm sending you back where he can keep an eye on you."

Honorable Victor D. Carlson, responding to an inquiry at an omnibus hearing by Anchorage defense attorney Roy W. Matthews, III, as to whether his Honor had read the ten voluminous motions filed on behalf of the defendant in a drug case: "Yes (pausing thoughtfully, and then continuing in measured tones), "a national forest has been sadly depleted."

#### A BAD APPLE

"Our client was so bad," reminisced Anchorage domestic attorney Edward J. "Jack" Fyfe, "that when Judge Singleton gave him visitation rights with his seven year old daughter, it was on the condition that the visits take place only in the presence of an armed policeman."

He was discussing a custody case which he had handled with the able assistance of his former partner, Anchorage trial attorney Gary R. Eschbacher.

#### POWER ACCOUNTS RECEIVABLE

"Right in the middle of the case," said Jack, "we find out that this space cadet is about to spend a ten thousand dollar check that he had promised to endorse over to us for our fees. Naturally, Gary and I drafted up a TRO and rushed over to the courthouse to prevent this outrage. We arrived there at 4:30, but for some reason couldn't find a judge anywhere, and Gary had a few words to say about it."

"I can imagine," I replied – encouraging him to tell the rest of the story.

"We were coming down on the elevator," Jack continued, "and Gary was holding forth about civil servant bastards, 9 to 5 drones that complain about too much work, but are never around the courthouse when an honest lawyer needs something – you know, the usual thing."

At this point, apparently, Mr. Eschbacher's soliloquy was interrupted by a deep voice from the back of the elevator.

"I'll sign your TRO, Counsel," said Mr. Chief Justice Edmond Burke, stepping forward to do so.

"We never did get our money," Gary said sadly. "All we ever got out of the (Oedipal relationship) was a grievance. This happened eight years ago, and I haven't heard anything further about it. You're not going to put this shit in the Bar Rag, are you, Gail?"

## YOUR MONEY OR YOUR LIFE

*Of course Messrs. Fyfe and Eschbacher are not the only lawyers in Alaska that are careful about money. Anchorage attorney and business entrepreneur Brian R. Shute recently did a star turn in an armed robbery, during which he personally disarmed his assailant and turned her over to the airport police.*

*Brian came to see me immediately after it had happened, and told me that a young woman at the airport had stuck a .22 Derringer in his face, demanding his money. He thereupon grabbed the gun out of her hand, smashed her to the ground, and dragged her feebly twitching body to the nearest policeman – where he supervised the taking of a confession, complete with Miranda warning. It appeared that the defendant had been suffering from hallucinations, and Brian was worried that she might interpose an insanity defense.*

*“You’re the one that ought to be seeing a shrink, Brian,” I exclaimed. “What the hell do you mean risking your life instead of giving this turkey your money? Don’t you know that a .22 bullet at close range can kill you as easily as a hand grenade?”*

*Brian was offended. I’m not saying Brian’s wallet is an erogenous zone. Personally, he’s a very affable and generous man. However, he does tend to get a bit protective when people try to take money away from him.*

*“Listen, Gail,” he replied heatedly, “I had a fifty dollar bill in my wallet. I figured she was going to kill me anyway, and it would just be worse if I died knowing she had my money as well.”*

## Chapter Twenty

### **FIELD** AND STREAM

Spring is definitely in the air, even in Anchorage, and I was in an expansive mood the other day as I passed Superior Court Judge J. Justin Ripley on the way to the courthouse. We exchanged greetings and comments about the nice weather, and I told him that I thought I saw some bait fish working near the dock. The seagulls were diving on them, and I had watched the whole thing from my office through field glasses.

*“(Chief Assistant District Attorney Robert) Bundy has no class,” I continued, “he told me it was just garbage.”*

*“Maybe it’s a body,” said Judge Ripley with a smile. “Think positively, Gail. Crime feeds your family.”*

### A PLEA IN MITIGATION

*After protracted debate, the District Attorney’s Office has awarded to Anchorage assistant public defender John Salemi the coveted Chutzpah award for his successful argument to Superior Court Seaborn J. Buckalew in a recent sentencing hearing. Mr. Salemi was representing a defendant with a long criminal record, and therefore in a mandatory sentencing posture. His client had just been convicted again for committing five forgeries in the amount of several thousand dollars.*

*As the criminal bar is well aware, AS 12.55.155(d)(3) provides for mitigation of the mandatory sentence if “the defendant committed the offense under some degree of duress, coercion, threat, or compulsion insufficient to constitute a complete defense, but would significantly affect his conduct.” The intrepid defense attorney urged that his defendant needed the money badly to pay his pusher, who was getting ugly about nonpayment.*

*The prosecutor on the case was so awestruck by Mr. Salemi’s bold move that he was unable to frame a proper objection, and the sentence was duly mitigated. Judge Buckalew, however, sternly resisted suggestions that he should further mitigate under (d)(12), “the defendant assisted authorities to detect or apprehend other persons who committed the offense with him,” (translation – rolled over on as many of his friends as he could think of in order to get better treatment for himself) and (d)(9), “the conduct constituting the offense was among the least serious conduct included in the definition of the offense” (translation – he needed the money for a good cause).*

### PROSECUTION DECLINED

The Iditarod race has concluded for another year, but dog lovers among my readers should be interested in a further adventure of Nome's former district attorney, William "Bangkok Billy" Garrison. An outraged musher had come to Bill with a complaint that he had caught his neighbor in sexual congress with the complainant's lead dog. She had been howling pitifully, according to her owner, and all his other dogs were in an uproar, tangled up in their traces and generally in sad disarray. Bill, who didn't really want to get involved, continued his questioning as follows:

Mr. Garrison: "Where is she now?"

Owner: "Hell, man, - I shot her. She couldn't even walk properly after that bastard was finished with her."

Mr. Garrison: "Well, there you are then. We can't prosecute without a victim."

#### BODY LANGUAGE

Law in the bush does seem to have a "West of the Pecos" quality that is rarely encountered in the big cities. Anchorage District Attorney Victor C. Krumm told me the other day about a rape case he prosecuted while he was the District Attorney in Bethel. The victim, who spoke only Yupik, needed an interpreter to convey her testimony to the jury.

"She really got into it," said Vic, "and although I couldn't understand a word she said, I could see by all of her body movements that she was describing choking, kicking and gouging. Hell, I was watching a forcible rape going down right in the courtroom.

The victim continued for several moments, after which the interpreter spoke: "She says the gentleman persuaded her to love him."

"I knew that couldn't be right," the District Attorney continued, "and I suspected that the interpreter (a member of a rather austere Christian sect) was using considerable poetic license. However, this lady was so straight that I couldn't get her to use the actual expression that the victim was obviously trying to convey to the jury. The best I could get was an amplified version."

Interpreter: "The gentleman was holding a knife at my throat while he twisted my arm. He asked me to LOVE him and said if I do not LOVE him he would kill me, shoot my son, and burn the house down. So I LOVED him."

#### QUOTABLE QUOTES

Fairbanks District Attorney Harry Davis: "It's better to win and get reversed than never to have won at all."

Chief Justice Edmond W. Burke: "I can't define the practice of law, but I know it when I see it."

Anchorage defense attorney Eric Hanson's client, on being told that she was released OR, on condition that she obey all laws: "How can I do that? I'm a prostitute."

Distraught mother to Superior Court Judge Ralph E. Moody, on being asked why she no longer wished to be her son's third party custodian: "He just butchered the family dog in the bathtub."

Judge Moody: "Yes, but did he violate any of his conditions?"

Trooper and free-lance exorcist James A. Stogsdale, discussing the implications of the Miranda warning with murder suspect John Noah: "Get it off your chest and get it out of your system, because tonight you're going to go back home and you're going to wake up in the middle of the night and there is going to be some visions. David's soul is still in your cabin looking for a place to go, because he doesn't know what happened to him. And David's soul is going to wander around that cabin until somebody knows what happened. I just want to help you, John, and I can do it."

"My client is a family man. You people ought to take another look at him before you prosecute for assault in the first degree. That charge is going to destroy him."

The speaker was popular defense attorney James D. "Jim" Gilmore, who maintains a practice with his erudite partner, Jeffrey M. Feldman, only two floors from the District Attorney's Office. I had dropped in for a visit, and was – by mutual agreement – being softened up for the kill. The mandatory sentence of five years for the charge in question was naturally of real concern to the client, and his attorney as well.

PUT YOUR HAND IN THE HAND...

"You know, this guy has two little kids and has never been in trouble before in his life," Jim said. "Who's going to take care of them if you send him away?" I reminded him that his client had been somewhat less than gentle with the victim, but he continued.

"Let me tell you something – when this man called me up on the telephone he was so shaken that his six year old daughter noticed, and asked him if he was upset. He replied that he was, and she crawled into his lap, putting her trusting little hand in his (Jim's actual words), and said: 'Daddy, if you're afraid, I'll go with you.'"

"Jesus Christ, Jim," I replied weakly, "it's a little early in the morning for this sort of thing, isn't it?" and of course I couldn't wait to get back upstairs to repeat his startling and effective ploy. District Attorney Victor Krumm was unimpressed. "Tell Jim," he said with a smile, "that trusting little hand better stay where it belongs, or his client will be in real trouble."

THE SPERM CARRIER BANK

His comment was symptomatic of the concern that the prosecution and defense bar alike, to say nothing of the police agencies and the public, have felt with the rising flood of child molest

cases with which the judicial system is expected to deal. Since victims and defendants are often in the same family, additional confusion arises, prompting Anchorage prosecutor Betsy H. Sheley to remark on one occasion that she would like to start a defendant bank.

*“Half these women want their husband killed when they find out that he’s molested the kids and raise hell if we don’t have enough evidence, and the other half don’t want him prosecuted no matter how strong the case is. I can’t please anybody,” she stated with some asperity. “I think if I were to start some sort of pool, I might be able to keep a few of these idiots in storage until their wives want to trade.”*

*In case either of my esteemed colleagues were, by these remarks, to be subjected to the charge of having a sardonic sense of humor – I would have to reply that as all the people who deal with them are well aware, the choice is whether to laugh or cry at the horrifying human problems which comprise our daily fare.*

#### THE MOODY CRITERIA

*Of course, a lifetime of experience helps, as evidenced by a sentencing hearing conducted not too many years ago by Anchorage Superior Court Judge Ralph E. Moody. The defendant, although he hadn’t actually injured anybody, had been exposing himself to high school girls in the Fourth Avenue Theatre – and when he wasn’t doing that, sneaking into produce warehouses and mis-conducting himself among the vegetables. His defense counsel stated that his client wasn’t a bad man, he just had a severe sex problem.*

*“We all have severe sex problems, counsel,” replied Judge Moody in his soft Alabama drawl. “Did it ever occur to you that there is a difference between the way normal people and criminals deal with them?”*

## Chapter Twenty-One

### A CHRISTMAS WISH

The snow is already falling, and Christmas will be with us soon. Personally, I like to spend mine with my close friend and former partner, Juneau trial attorney Peter M. Page, a tidewater Virginian of the highest caliber. His household, at least when I am not there, is conducted with the decorum and good taste characteristic of Peter's entire family.

On December 25, 1982, I had finished a trial in Juneau and was rewarded not only with a stay at the Page residence, but a Christmas dinner as well. I've heard the fine old Anglican prayer Peter always says as grace many times, and can recite it from memory: "May the Lord bless us and make us thankful for these and all his mercies, and supply the wants of others, for Christ's sake, Amen."

I was definitely alone in those days, and it had been decided during my visit that perhaps Melinda (Peter's sister), a talented actress who lives in New York with her husband, actor Frank Hamilton, could be prevailed upon to introduce me to one or more of her alluring show biz friends on my forthcoming visit to New York. Peter got on the long distance telephone to discuss this project, and was so carried away with Christmas greetings that he quite forgot the original purpose of the conversation.

I was lurking in the bedroom, eavesdropping as best I could, and noticed that he was about to finish a call without asking the vital question.

"PETER, WILL YOU FOR GOD'S SAKE GET TO THE PART ABOUT ME GETTING LAID?" I bellowed in my agony and frustration. There was a deathly silence, followed by Peter's footsteps advancing toward the bedroom door. We're brothers and everything, but I make it a point not to cross Peter. Like most ex-fighter pilots, he has a quick and dangerous temper. The door swung open, and he stood for a moment gazing at me contemplatively.

"I'm really very sorry, man – I forgot myself," I began. He softened slightly, and I continued, "Look, I lost my head – but what (returning to topic A) did Melinda say?"

"She said," he replied calmly, with an oblique reference to the prayer that had begun the day's festivities, "that she will have your want in mind."

The words "for Christ's sake, Amen" drifted into my own mind, but I prudently kept them to myself.

### QUOTABLE QUOTES

Investigator Larry Robinette of the Anchorage Police Department, on firepower (discussing the recent case of a lady who killed her boyfriend with a small caliber pistol): "It's funny, Gail, these God damned perpetrators shoot somebody with a .22 and kill them instantly. We shoot them with a .357 mag, and they live forever."

Resolution passed last year by the Anchorage Bar Association, unanimously: "Resolved, that when the Supremes travel, they all have to use the same airplane."

Former Alaska Bar president, Fairbanks trial attorney Andrew J. Kleinfeld, on being chided for absorbing several Danish pastries at an early morning board meeting: "Gail, I never deprive myself of a sensual pleasure."

Anchorage trial attorney Murphy L. Clark's client, on being informed of the 3.7 million dollar verdict returned for her husband's wrongful death in a recent Ketchikan trial: "Is that good?"

Sign on the desk of appellate attorney John A. Scukanec, laboring in the Office of Special Prosecutions and Appeals under the benevolent tyranny of popular Anchorage attorney and judicial candidate Peter A. Michalski: "WHERE'S THE BREEF?"

Anchorage prosecutor and judicial candidate, Eugene P. Murphy (with reference to the unstinting legal advice given the more flamboyant trial attorneys in the District Attorney's Office by patient William H. "Mick" Hawley and his intellectual associates in O.S.P.A.): "They're the only people in the whole operation who know that a reporter is not necessarily someone who works for a newspaper."

Jim Gilmore (op. cit.), referring to defense counsel's notorious remark after the successful insanity defense of President Reagan's assailant, John W. Hinkley: "I've always wanted to win a big case and tell the press 'Another day, another accounts receivable.'"

Everybody has some outlandish theory of jury selection, and I make it a practice – among other eccentricities – to make a mental note of the juror's sun sign. This is easily done, because their date of birth is part of the data placed on the juror questionnaire. It's not carved in granite, of course, but I like to think that Capricorns, for example, are more apt to convict than, say a sympathetic Pisces. It's fun, and it sometimes amuses the jurors – at least it keeps them awake.

#### WHAT'S MY SIGN?

Anchorage Chief Assistant District Attorney Leonard M. "Bob" Linton (an uncompromising Virgo) challenged me on this notion. "I'll bet you can't tell me a thing about Patty (Mrs. Linton)," he said, "and she's a Capricorn."

"Well," I ventured, "then I'd have to guess that she's pretty tough minded."

*"Bullshit!" replied Bob, "she's the only person I know that believes that Charles Manson and Sirhan Sirhan were railroaded."*

*I tried again. "I'm sure she's practical."*

*"Are you serious?" he responded. "I have to watch her like a hawk. It's a good day when she can get the car started."*

*One more attempt seemed indicated. "Capricorns are usually fairly intelligent about money," I offered.*

*"We're lucky we're not in the poorhouse," he responded.*

*Personally I've always like Patty – and I know that Bob does. I think he was just trying to win the argument. Or perhaps her moon is rising in Jupiter. What do I know?*

#### *CONTINUING EDUCATION OF THE BAR*

*Anchorage Superior Court Judge Victor D. Carlson has remarked on occasion that some defendants would be better off if they said nothing in their own behalf. He's right, of course, particularly when they blame their problems on the victim – as one of them did in the presence of Superior Court Judge Seaborn J. Buckalew the other day.*

*As a former District Attorney in Anchorage, and judge in the same city for many years, he's used to human tragedy – but he's also a kindly man, and offenses against children bother him. The defendant's remarks in allocution concerning his romance with a nine year old child had gone on for some time when the judge intervened in his soft Texas drawl:*

*"Do you know how shocking it is for me to hear this sort of excuse? Why, if I didn't know the age of the victim, I'd have thought you were describing Cleopatra."*

*This literary allusion went straight over the head of the defendant at a considerable altitude, and his counsel seemed equally nonplussed.*

*"She's the one who seduced Mark Anthony," continued the judge helpfully.*

*A confused silence greeted this observation, and the court directed its further remarks to Assistant District Attorney Alexander "Alex" Bortnick, who was handling the sentencing for the prosecution.*

*"They called her the serpent of the Nile," he said reminiscently, "but (with a look at the defendant) let it pass. Eight years."*

#### *CHALLENGE FOR CAUSE*

*I don't know whether you've ever tried to ask a juror the old reliable voir dire question which requires them to put themselves in the defendant's shoes. Something to the effect that if they*

were on trial, would they feel comfortable with a juror in their present state of mind. I always screw it up, and can't even write it properly.

That being so, I was comforted by a story Fairbanks trial attorney and former territorial governor Mike Stepovich told some of us one afternoon concerning his first jury trial. He was very young in those days, and had associated himself with a prominent local trial attorney who was to do the majority of the trial work while Mike, hopefully, had a learning experience.

Things had gone smoothly on the first day with the gracious and courtly elder attorney charming one and all with his courtroom demeanor. However, at lunch time he went out and got drunk – a condition that the judge noticed immediately on commencing the afternoon session. The offending attorney was ordered to leave the courtroom, and Mike – like the proverbial understudy getting his first big break when the leading lady can't make the bell – rose grandly to examine the next venireman.

"Mr. Jones, if you were in the defendant's place, and he were in your place, would you want a man in your state of mind sitting in judgment on you?"

The juror gazed at him apprehensively. "I'm not sure what you mean," he said.

"I mean," said Mike, "if you were over there and he was in your spot and you were accused of crime and he was the juror, would he be safe having someone who thinks like you do – or wouldn't you want someone in your frame of mind sitting in judgment of you if you were him?"

The juror looked at the judge nervously.

"May I ask you a question?"

"Certainly."

"Is he drunk too?"

## Chapter Twenty-Two

### **SOMEPLACE** IN TIME

*Julie Werner-Simon, the engaging and diminutive young Francophile in the Anchorage District Attorney's Office, gives no quarter in the courtroom. She's also living proof that being a tough trial lawyer doesn't have to detract from a lady's femininity, as she demonstrated conclusively one afternoon when I went over to Simon & Seaforts to tell her that her jury had just sent out a question. She had been in trial for a number of days, and was having her first beer after work.*

*"I'm so tired," she remarked, "that even half a beer has got me lightheaded. I'll go over there, but I hope they haven't asked anything complex."*

*"I guess this is my big opportunity to make a move on you, Julie," I said, with creaking gallantry. She glanced at me demurely with her incredible basilisk eyes. "Gail," she said kindly, "why don't we wait until I'm old enough to appreciate it?"*

### FAMOUS LAST WORDS

*Strange things, the poet Robert Service tells us, are done in the midnight sun – and if he wasn't thinking specifically of former Nome District Attorney William "Bangkok Billy" Garrison, he must have known somebody a good deal like him. We got together recently when Bill was here on one of his infrequent visits, and he reminisced about an investigation he and Alaska State Trooper homicide investigator Charles "Chuck" Miller had conducted into the fatal shooting of an Eskimo fisherman's wife.*

*The young couple had been out in their boat, and the shotgun they carried for seal went off – purportedly by accident – fatally wounding the lady with a load of buckshot under her arm. It seemed obvious to both men that a terrible accident had occurred, and there was no indication of crime, or even negligence. Nevertheless, propriety required that they take a statement of the only witness, the victim's husband.*

*Investigator Miller, hoping for some sort of a dying declaration, asked the widower if his spouse has said anything before she died. The reply was in the affirmative.*

*Trooper: "Well, what did she say?"*

*Husband: "She said 'UU'GAH!'"*

*Trooper (with growing suspicion): "Come, Mr. Wassillie, you know very well we don't speak Upik. What does it mean?"*

Husband (stolidly): "It's Eskimo for 'ouch!'"

## WHAT'S MY SIGN II

We were trying a felony case in Courtroom J the other day (Honorable Rene Gonzalez presiding) and Greg wearied of the gambit I described in my last column. As my readers will remember, I occasionally like to throw in a comment on *voir dire* indicating that I have noticed the jurors' birthdates, and know their sun sign. A very nice lady had responded amiably enough to my questions and had stated – among other things – that she enjoyed music, reading, and the arts, to which I replied with what I hoped was a winning smile, "A typical Pisces."

Greg had heard enough. Marching resolutely to the jury rail, he transfixed the offending juror with his piercing gaze.

"Mrs. Wilson," he stated, "I am a double Leo with a Scorpio moon. Does that tell you anything about what the hell I think, or whether I should be involved in this case?"

On receiving the juror's emphatically negative reply, Greg proceeded with some satisfaction to another line of questioning – and I desisted, at least for the purposes of that particular trial, from further metaphysical inquiries.

## QUOTABLE QUOTES

Legal Assistant Pamela Barkhoefer, on studying a chart outlining a smorgasbord of twenty-one counts graphically depicting a defendant's sexual misconduct with his victims (anal intercourse, oral copulation, vaginal penetration, fondling, and so forth): "I'll take two of these (pointing), one of these, and four of those."

Trial lawyer and critic Peter Gruenstein, on being asked why the lettering of the Superior Courts in Anchorage follows no pattern perceptible to human intelligence (R and J are on the second floor, B, E, C, D, and A on the third, H and K on the fourth – and nothing is in any known sequence): "They probably let the same guy that designed the courthouse pick out the letters."

Kenai Assistant District Attorney James L. Hanley, on being informed that Chief Justice Jay A. Rabinowitz disapproves of my column: "I think he has a point. His stuff is usually pretty funny, without being vulgar. You're going to have to try harder."

I knew that I inviting problems by giving away one of my trade secrets ("What's My Sign," subsection of *All My Trials*, the Alaska Bar Rag, April 1985). Anyway, Anchorage trial attorney Greg Oczkus is not only a friend and a reader, but a resourceful practitioner as well.

## Chapter Twenty-Three

### **LAW** SOUTH OF THE YUKON

*I tried a murder case in Bethel recently, and jury selection there has nuances all its own, as opposing counsel Anchorage trial lawyer James D. “Jim” Gilmore (who won, incidentally) can attest. We were dealing with what was apparently an all Eskimo panel, drawn exclusively from some of the 56 villages scattered along the banks of the Yukon and Kushokwim Rivers. Jim had a sophisticated defense predicated on the purported menacing behavior of the victim, which eventually compelled Jim’s client to shoot him (as I understood the argument) in anticipatory self defense.*

*Neither of us could get anything out of the prospective jurors, who – as is the custom of Yupik people – skillfully avoided sharing any of their thoughts on voir dire by retreating behind the Yupik language barrier. They appeared to be completely nonplused by our questions involving fair trial, the right of self defense and other legal niceties, but trial judge James Blair refused defense motions for a change of venue or a new panel. “These people are Alaskans, highly intelligent, serious minded, and better qualified for jury duty than most,” he stated pragmatically. “Further, we have been using Yupik juries on felony cases for years, with eminently sensible results. Motion denied.”*

*Attorney Gilmore, who could not anticipate his success at that point, was distressed for his client – and I tried to cheer him up.*

*“Don’t worry, Jim,” I said brightly. “They’re not going to understand our testimony either. How do you think they’re going to handle scientific evidence from (Anchorage forensic pathologist) Dr. Rogers?”*

*Jim refused to be comforted. “White God comes in iron bird,” he muttered.*

### THE POWER OF NEGATIVE CONDITIONING

*There are some places in Anchorage which are inadvisable to visit after sundown, unless one is accompanied by the 82nd Airborne Division. That is true of Chilkoot Charlie’s, for most people, and applies also to the Jade Room – at least for Marvin (surname withheld by request), an amiable gentleman who has figured, as a witness, in three of our recent felony trials.*

*I first met him when Robert C. “Bob” Bundy, former Chief Assistant District Attorney and presently Anchorage litigator for Bogel and Gates, was interviewing witnesses for an assault which (with deference to the Jade Room’s function as a meeting place for Anchorage’s homosexual community) he referred to as “the shootout at the Oh-Gay Corral.” In that*

particular incident, poor Marvin got in the way of a bullet that was intended for someone else. It struck him in a fleshy and non-vital portion of his anatomy, and he bore the ignominy and pain of his wound with stoic good nature. We all liked him.

He didn't stop meeting his friends at the Jade Room, either, and soon was back as the victim of a terrible beating which had been inflicted by a local denizen who not only took Marvin's money, but savaged him with sadistic pleasure. I conducted that trial, and in the course of it got to know him well enough to be worried about his safety if he kept on hanging around the fringes of Anchorage night life. By this time, all the prosecutors were aware that he was having a run of bad luck, and it wasn't long before he surfaced again – once more a victim of the dynamic environment of his favorite bar.

On this occasion, a stranger had appeared – offering to show the regulars how to get out of bonds, presupposing that they wished to do so. The idea was that he would tie up their hands, and show them a simple way to undo the rope and mystify their friends. It being a quiet evening, everyone – including Marvin – volunteered, and soon half a dozen patrons were securely tied up – whereupon the mystery guest proceeded to rob them. Outraged, they fell upon and managed to immobilize him, the police intervened and the case routinely arrived at the District Attorney's Office.

Stephen E. "Steve" Branchflower, the head of the felony intake section, was concerned. "Marvin's been shot, beaten and robbed, all in the space of about six months," he said. "He's gonna have to give that shit up, if he wants to stay alive."

Chief Assistant District Attorney Leonard M. "Bob" Linton agreed. "It's called 'scared straight,'" he remarked.

#### THE FINAL SOLUTION

I was trying a case with Anchorage Assistant Public Defender Craig S. Howard the other day, and during one of the breaks we discussed a topic of mutual interest, the practices and tribal lore of the District Attorney's Office. Craig agrees with me that a motivated individual on the prosecutor's staff can do more to get people out of undeserved trouble than anywhere else in the judicial system. His only codicil, I suppose, is that we don't do it often enough.

Anyway, it was in the course of this discussion that I suddenly realized that we could improve the entire system immensely, and satisfy practically everyone involved, by the simple device of switching the personnel of our two offices.

By doing so, we would have the compassionate and humanitarian people who now comprise the Public Defender's personnel making charging decisions, and all of the tough bastards in the DA's Office who don't care about anything except winning trials would be fighting for the defendants' rights. I'm not entirely sure that anyone would ever be charged, much less convicted, but it would certainly serve to relieve the present pressure on the court system.

## QUOTABLE QUOTES

Superior Court Judge Warren W. Taylor, commenting with mild exasperation on the court system in general: "It reminds me of what judge (Everett W.) Hepp used to say. 'It's like owning a sick goldfish – you know something is wrong, but you don't know what to do about it.'"

Anchorage District Attorney and aquarist Victor C. Krumm's corollary to Judge Hepp's maxim: "I just flush the little bastards."

Anchorage Police Officer Gereth D. Stillman (armed robbery at Quik Stop, APD report 86-42650): "I advised the suspect of his Miranda rights, told him I wished to ask him some questions concerning the armed robbery, and he stated he would rather have an attorney present before he incriminated himself."

Alcoholic defendant (remarks in allocution before Superior Court Judge Rene Gonzalez, after spirited argument by his attorney, Public Defender Beth Kertulla): "Hey, your Honor – like, this program I'm going through and stuff—"

Probation Officer Debbie Gevfert, re above (sotto voce to prosecutor): "Why don't we just revoke him now? We're all here and everything..."

Anchorage Superior Court Judge Seaborn J. Buckalew, responding in his usual patient fashion to defense counsel's angry argument that the prosecutor was attempting to make her client sound like one of Genghis Khan's Mongol horde: "Now, counsel – I know that your client didn't ride with Genghis Khan's horde. Mind you (with a gentle smile), if he had I don't think he would have stood out, particularly."

J. Gerald Williams may no longer be a household word, at least among the younger attorneys, but in his prime – roughly between the years of 1962 and 1973, when he was the presiding judge of the local bankruptcy court (a function now fulfilled by his son, J. Douglas Williams II), he could be counted on for a significant donation to the speech-making at any bar function. It was the unique ability currently demonstrated by popular Anchorage attorney and raconteur Stan Didus, whose recent contribution to the retirement roast of Superior Judge Ralph E. Moody is only now gradually fading from the Bar's collective memory.

## Chapter Twenty-Four

### **INSIDE** DARKEST ALASKA

Judge Williams was no great respecter of persons either, and he rose to one of his frequent high points at the investiture ceremony of Justice James M. Fitzgerald, when he left Alaska Supreme Court to become the newly appointed Federal District Court Judge in Anchorage.

Dignitaries abounded from all over Alaska and outlying areas, including the presiding judge of the Ninth Circuit Court, who attended with his family and retinue. These august personages were in a state of cultural shock on being introduced to Alaska. Moreover, none of them were prepared for J. Gerald Williams. His normal speaking voice, at that time, was several decibels higher than pain level and – as an old fashioned type orator – he raised it considerably above that when making a public address, which he did on this occasion.

Everyone had told affectionate little stories about Justice Fitzgerald, most of them emphasized his scholarship and integrity, and Judge Williams decided to throw some light on the real character of the nominee.

*“WE WERE ON A DUCK HUNTING TRIP,”* he began on a gradually ascending pitch, *“AND OF COURSE OLD FITZ HAD HAD QUITE A FEW DRINKS – IT WAS ALMOST 9:00 A.M. BY THAT TIME. WE WERE ALL STANDING IN THE CAMP, AND JIM WAS HAVING SOME TROUBLE MAKING IT FROM THE DUCK BLIND. HE KEPT FALLING DOWN AND CRAWLING.”*

*“Here it goes,”* said former Attorney General G. Kent Edwards, who was standing beside me. I glanced toward our visitor from the Ninth Circuit, and although his eyes glittered slightly, he maintained his composure and continued to listen, with a fixed smile on his lips.

According to Judge Williams, one lone duck appeared on the horizon, flying at a very high altitude. It was alone in the October sky, and in the early morning light was all but invisible against the overcast. The hunting party watched with concern as their friend staggered to his feet once more, and, focusing his bleary eyes on the target as well as he could, lifted his shotgun in one hand and fired. To their delight and amazement, the duck was stopped in mid-flight, and fell out of the air – seeming to take many minutes of tumbling end over end before it landed at their feet, dead as Christian charity.

They were all enthusiastic, of course, and congratulated him roundly. *“I’ve never seen a shot like that in my life,”* said one of their number. *“How did you ever do it?”*

The narrator paused in his story to make sure that he had the undivided attention of his audience, particularly the dignitaries from Seattle, which indeed he had.

*“JIM FITZGERALD HAS ALWAYS BEEN A MODEST MAN,” roared Judge Williams, “AND THIS WAS NO EXCEPTION. ‘HELL,’ HE SAID, ‘THAT WAS NOTHING. WHEN A FLOCK LIKE THAT GOES OVER YOU’RE BOUND TO HIT AT LEAST ONE OF THEM.”*

### *THE SHOW MUST GO ON*

*Superior Court Judge Karl S. Johnstone of Anchorage is another interesting study in judicial restraint. A complex man, he was a quick wit and an equally quick temper. If he isn’t Irish, he ought to be – inasmuch as he shares with that beguiling race the combination of charm and temperament that have made them a leaven to the world’s population. He doesn’t abide fools gladly, either, and is easily irritated if the courtroom performance of the lawyers who appear before him drops below his high professional standards.*

*As I’ve ever had occasion to mention before in this column, the courtrooms in Anchorage leave a great deal to be desired – and that of Judge Johnstone is no exception. It’s not as bad as Courtroom H (AKA “The Guppy Tank,” Superior Court Judge Victor D. Carlson presiding), but as a disaster it’s in world class. To paraphrase Walk Whitman’s heartfelt comment about lawyers and hearses-horses, something about designing a courthouse makes an architect snicker.*

*Anyway, we were trying a murder trial in Judge Johnstone’s court last week, and anything that could go wrong, did – in spades, doubled. The judge had put up with a series of delays occasioned by malfunctioning equipment, and his already volatile temper was in an unstable and explosive state. The videotape of the crime scene had been consumed by the VCR, a cassette was partially released by one of the officers pushing the wrong button, and the use of a slide projector by the prosecution had required the entire courtroom to be plunged into stygian darkness. It gradually emerged over a period of approximately half an hour, the power-saving sodium lights flickering on one by one, giving a surreal and disturbing mood to the whole sorry proceeding. As a final jarring note, one of the witnesses was late.*

*We were very near the end of presentation of evidence, and Judge Johnstone manfully restrained himself from a natural urge to tear both attorneys to quivering bits and dance on their remains. When the last defense witness finally arrived, however, he was a very old gentleman who had the traditional problem of affixing the microphone to his shirt. In Alaska, as some of my stateside readers might not know, we record everything rather than using a court reporter – which requires the tiny microphone used by the witness to be affixed to a collar or some other article of clothing. When these little numbers drop off, as this one did several times, the amplifying system makes it sound like a stegosaur’s death rattle.*

*“As you ladies and gentlemen will notice,” said Judge Johnstone to the jury with a grim smile, “we have a \$50,000 piece of sound equipment here, which is entirely dependent upon its being connected to the witness by a fifty cent tie clip.”*

*The jurors giggled nervously, and listened carefully to the witness’s brief contribution. There was no cross-examination, and on being dismissed, the elderly witness stood up and started to*

walk away from the stand without detaching the equipment. The clip remained in place, but the microphone fell to the podium once more with a resounding crash.

There was a deathly silence in the courtroom, and everyone looked toward the embattled judge for some comment. "Take the clip," he said with deep feeling. "Leave the microphone."

#### THE SAGA CONTINUES

In response to reader inquiries concerning the well-being of Marvin, whose contribution to law enforcement as a perennial victim was reported in the August Bar Rag ("All My Trials," subsection 'Power Negative Conditioning'), I am happy to report that his madcap social life at the Jade Room continues unabated. I dropped in there to report to the owners the conviction of Marvin's latest assailant (they had also appeared in the trial as witnesses), and he and his friends kindly bought me a drink. One thing led to another, and by the time I left the party was well underway.

The next morning, I repeated all of this to paralegal assistant Pamela Barkhoefer, who had also become friends with all of the witnesses in the trial, particularly Marvin, due to his long association with this office. She was mystified, therefore, when she received a call from him later in the day inquiring in a subdued voice as to whether the verdict had come in. He sounded a bit off his feed.

"Why, Marvin," she said, "didn't Gail go by the Jade Room last night to tell you that the jury had come back with a conviction of first degree robbery? They believed you people, and we won the trial."

Marvin was delighted with the news. "I guess that's why we were celebrating," he said.

### Chapter Twenty-Five

#### **CHALLENGE** FOR PROBABLE CAUSE

Some people just don't want to be jurors. We had one of them in Courtroom D the other day (the turf of Superior Court Judge Mark C. Rowland), where I was attempting – with indifferent success – to prosecute a pathetic looking, tiny Vietnamese gentleman over the determined opposition of Public Defender Venable Vermont. The charges were burglary, as well as assaults purportedly committed on an investigating policeman and his dog by the knife-wielding little oriental.

Before beginning the voir dire of the individual jury members, Judge Rowland permitted me to direct a number of general questions to the panel as a whole, in order that the attorneys might make notes for further questioning. One of the prospective jurors, a cross looking gentleman seated in the first row, answered all of them in the affirmative. I asked if anybody on the panel had ever been the victim of a violent crime, and he (among others) raised his hand. In

response to the inquiry as to whether or not anyone would have problems judging police testimony by the same standards applied to other witnesses, his hand went up again. He responded positively, as well, to questions designed to find out whether prospective jurors had philosophical personal reasons whether the circumstance that the defendant was an oriental would prejudice anyone, and whether the fact that a canine had been injured would elicit undue sympathy.

After the second or third affirmative response I caught Venable's eye, and he smiled slightly. We knew what was going on. So did Judge Rowland who, having been approached by the reluctant juror during the break, spoke to counsel briefly off the record before the jury was reconvened.

"That guy in the front row came up to see me at half time," said the judge, "and told me that he was once attacked by a gang of Orientals with knives whom he had surprised in the act of burglary. He thinks that it would affect his judgment on the case."

"I'll bet it would," said Venable. "He didn't happen to identify my client as one of them, did he?"

#### QUOTABLE QUOTES

Anchorage Public Defender Cynthia "Cindy" Strout, on hearing that Eagle River house candidate Sam Cotton was calling for an even tougher insanity defense standard than the stringent legislation presently in effect: "I don't think the higher primates will make the cut."

Anchorage Police Officer Greg Baker, revealing that he drinks a full pot of fresh ground strong Colombian coffee every morning before he goes on beat: "It gets me so wired up that I'm ready to arrest anybody – I don't give a shit whether they've done anything or not."

Recidivist Willie Roundtree to Anchorage Superior Court Judge Rene Gonzalez, during his remarks in allocution: "Your Honor, I'm real good at being rehabilitated."

Head of the Office of Public Advocacy, defense attorney Brant McGee, recalling some of the typically charming classic bad actors he has represented in his career: "I never met a psychopath I didn't like."

Anchorage Police Officer Mark T. Mew, dutifully filling out form ST-10 (APD Property & Evidence Report) on an item seized among the purported loot of a burglary suspect:

Type of Article: Masturbation Device

Size, Caliber, etc.: "Fits all."

Timid looking gentleman from the audience, having heard Anchorage attorney and State House Representative Don Clockson (a strong proponent of protection of women from

domestic violence) remark that we can't have women being beaten, there's just no excuse for it: "Well (hesitantly), what about if she just goes on...and on...and on -?"

I've had the occasion to remark in this column before that the mores and language of the street eventually affect everyone involved in the administration of justice. The other morning I had just finished using an electrifying (to civilians) expletive in a telephone conversation with a colleague in the Public Defender's office, and suddenly realized that a very proper witness (actually the victim) in the case I was preparing was still seated in the office. She was your standard little old lady, with blue hair and about two million dollars worth of jewelry discreetly displayed. I apologized, and she forgave me with a gentle smile.

"It's all right," she stated mildly. "I've been listening to your secretaries in the outer office most of the morning."

## Chapter Twenty-Six

### **A** REASONABLE ALTERNATIVE

Anyway, I attended a sentencing last year (Courtroom C, a/k/a “Charlie Court” Honorable J. Justin Ripley presiding) with opposing counsel, popular Public Defender Dan Hensley (now stationed in Juneau). It involved a woman who was charged with a couple of low range felonies for aiding and abetting her husband, who molested the children.

There were many mitigating factors, including the fact that she was a passive and somewhat unwilling participant, had been isolated from her friends and family in a remote area by the real bad actor in the family, and although she had cooperated in some of the acts, had tried to protect the children as best she could and reported her husband at the first opportunity.

The degree of her involvement required that she be charged, but our department was sympathetic toward her, and I concurred with Dan’s eloquent plea for an SIS, which Judge Ripley, a compassionate man, imposed with his usual stern and impressive warning. The Defendant, as was the general plan, was suitably chastened – but not unduly ground up by the system, and all was well. Afterwards, Mr. Hensley and I discussed the matter, and I expressed a concern.

“There’s only one thing that bothers me about this case, Dan,” I said. “She said that she had to go along with the program because they were so far from town, and everything – but I think she had another option.”

“What was that?” Dan wanted to know.

“Well, she knew that he kept a loaded pistol by the bedside. I think she should have shot him.”

My friend studied me quietly for a moment.

“You know, Gail,” he said, “sometimes I think you’ve been in this business too long.”

### AN UNSUSPECIFIED MITIGATOR

Jerry Lewis Jordan hasn’t been sentenced as yet, but I’m coming right up front with a mitigator. He’s already been scared half out of his wits.

Mr. Jordan, a law-abiding citizen so far as I can tell (other than his one brush with the authorities) started having problems with the system on the 22nd day of November, 1985, at

or near Anchorage, in the Third Judicial District, State of Alaska. He was seated in his vehicle on Barrow Street, near Fourth Avenue, and Officer Kitchen of the Anchorage Police Department observed him to be holding a piece of paper in his right hand, at which he was poking with a straw. Upon closer observation, APD Investigator Coles saw some white powder on the paper – and responding to a friendly inquiry from the police, poor Mr. Jordan threw the material all over the car.

He had apparently been attempting to snort up about a tenth of a gram of cocaine – and the officers scraped up enough from the seat cushions to get a positive ID by field test. The suspect admitted everything, and appeared in Courtroom B (Honorable Karl S. Johnstone presiding) the other afternoon for a change of plea. He is a diminutive but dignified black gentleman with a touch of gray in his hair, and had entered the court quietly with a friend some ten minutes before his hearing was scheduled to begin.

I wasn't aware of his presence, having just taken the verdict on a rather sordid and violent rape case. The in-court deputy, obviously relieved, congratulated me on the result – and I was in the midst of a law-and-order tirade.

*"I'M GOING TO PUT THIS GUY AWAY WHERE THEY'LL HAVE TO FEED HIM VITAMIN D THROUGH THE PIPES,"* I said enthusiastically. *"THIS IS THE KIND OF MAN WHO HAS TO BE ISOLATED FROM SOCIETY FOR A LONG PERIOD OF TIME SO THAT DECENT FOLKS CAN GET ON WITH THEIR LIVES WITHOUT BEING KILLED IN THEIR BEDS."*

There was a furtive movement behind me, and I turned to see Mr. Jordan for the first time. Everything about him was pathetically small, except his eyes. He was staring at me fixedly, and looked a good deal like one of those tiny nocturnal animals that are too frightened to come out in the daylight. It took me a moment to realize what was the matter with him.

*"Are you Mr. Jordan?"* I wanted to know.

He was able to nod, after glancing at his friend for moral support.

*"Well, I'm not talking about you,"* I continued in what I hoped was a reassuring tone. *"That was the trial we just finished."*

He recovered his composure somewhat, and was able to go through his change of plea with the assistance of his able and persuasive counsel, Public Defender John Salemi. I can't speak for the Court, of course, but I know Judge Johnston to be a very fair man – and as far as the District Attorney's Office is concerned, Mr. Jordan, relax – it's got to get better.

*JUST KIDDING, MRS. JOHNSON...MRS. JOHNSON?*

It's bad enough, of course, when the prosecution does something like this unwittingly. The business makes you crazy enough, I regret to say, that an otherwise rational and responsible individual has been known to pull a stunt like that for the fun of it. My old friend, Sam Lavorato

– with whom I prosecuted cases in Salinas, California, in the bad old days before the invention of fire – is a case in point. I remember it as if it were yesterday.

Sam had spent several days trying a strong-arm robbery involving a vicious assault by two young street hoodlums on an elderly husband-and-wife team. The defendants had separate trials, but the one that Sam tried had given the husband a severe beating while encouraging his partner (who complied as well as he could) to administer a similar one to the old lady. “Kill the bitch,” was one of his milder instructions.

The Salinas Police Department, happily, intervened – and Sam achieved a conviction on his defendant for strong-arm, as well as for aiding and abetting an assault on Mrs. Victim. As is usual in these cases, both individuals were terrified of the defendant - and had made many inquiries before and during the trial concerning their safety if they testified against him. Sam was out of the office, for some reason, when the verdict came in, and the defendant was remanded to custody under heavy bail. I reported his success to him, however, and soon afterwards heard him on the phone in conversation with the old victims.

“Would you believe, Mrs. Johnson,” he said, with a grin at me, “that the jury acquitted him on both counts?” He fell silent for a moment, and I could hear excited utterances over the phone. “Well, they did,” continued Sam, calmly. “Furthermore, Judge Brazil ordered him to get in touch with you and your husband to see whether you can’t straighten things out.” He then burst into a carefree laugh, and told her the truth.

“I really had her hyperventilating there for a moment,” he said to District Attorney Bert Young later over coffee.

Mr. Young was understandably not amused.

“What in hell did you propose to do if she had a fatal heart attack?” he asked heatedly.

Sam was unconcerned. “I would have lied,” he said.

## ELECTRIC DREAMS

“I had a dream about you the other night, Gail.”

The speaker was adroit Anchorage defense counsel Mitch Schapira, a formidable opponent and amusing friend. “You were wearing that damned cape, and carrying your cane as well,” he continued, “and I dreamed I made a motion to Judge Ripley, who was presiding over our case.

‘If Mr. Fraties is going to dress like a clown,’ I said, ‘he should be required to go all the way and wear a beanie with a propeller on it.’

“It was so vivid,” continued Mitch, “that it really had me going for a while. Then Judge Ripley granted my motion.”

*"I suppose the fact that he granted such a silly motion is what tipped you off?" I offered.*

*"No," Mitch replied, "the fact that he granted one of my motions at all." (They've had their moments.) "That startled me so much that I woke up."*

#### *TWO STARS FROM THE D.A.'S OFFICE*

*Anchorage trial lawyers are familiar with the Japanese restaurant across the street from the Courthouse, adjacent to the Keyboard. You are all well advised not to eat there if the management has any reason to suspect that you are connected in some way with the Anchorage District Attorney's Office. A story, of course, goes with it.*

*Anchorage District Attorney Victor Krumm used to like to eat there, and he recently invited several of us to accompany him. As he was paying the bill on the way out, he noticed a small sign – apparently written in Japanese (probably for the edification of the JAL crews who often stop at the Captain Cook).*

*"I wonder what that means," he wanted to know.*

*Assistant District Attorney Renee Erb offered a translation. "I think it says 'If you bring your dog in here, don't expect to get it out alive,'" she stated.*

*There was a strangled sound from one of the proprietors, who was checking us out.*

*Somehow Vic convinced the outraged lady that the remark she overheard concerned another, far-removed and esoteric legal subject. When we were back on the sidewalk, Chief Assistant District Attorney Bon Linton comforted him.*

*"Never mind, Vic," he said soothingly. "There are plenty of other restaurants in town."*

*Vic refused consolation. "You forget I've been in most of them with these idiots before," he replied.*

#### *QUOTABLE QUOTES*

*Anonymous defense attorney on the recent blessed event in the family of feisty and effective prosecutor Betsy Sheley, the head of the sexual assault unit in the Anchorage District Attorney's Office: "Thank God she had a boy."*

*Anchorage prosecutor, former Israeli soldier and scholar, Alex Bortnick – in a memo to Intake Officer George Schaefer: "George – do you realize that every time you get a cantankerous case at grand jury you send me one of these carve-him-into-a-eunuch-and-feed-it-to-the-camels memos...as Mohammed once said: 'B'illallum al-kahlam al-fahthi who-ah awal el awaleen...'"*

Anchorage Superior Court Judge Seaborn J. Buckalew, with typical friendly interest, to juror who answered standard voir dire question number 8 in the negative: "You know, Mr. Bradison, you're the first contractor we've ever had here that hasn't been involved in litigation."

Anchorage Superior Court Judge Peter A. Michalski, with a suspicious glance at TASC representative Marian Kowacki: "How did you say you pronounce that name?"

High school business law student, John Murk, in a paper written about his impressions of several local trial lawyers, to Anchorage attorney and teacher Dierdre D. Ford: "What is a nice woman like you doing a Bar like this?"

"You'll never guess what my client did to me the other day."

The speaker was Anchorage trial attorney Harry Branson, and he knows – as do all of my faithful readers – that I am incurably addicted to war stories. We were having lunch at the Tokyo Gardens, which is behind the Flash Cube Building (where the Public Defender's offices are located). Harry likes their sushi, and I use this enticement to troll him away from his frantic domestic lay practice on occasion. As is true of many lawyers, he is wonderful raconteur, and I urged him to continue.

According to Harry, he and his client were appearing before Judge (Name Withheld by Command) on a very serious issue, involving presentation of legal authorities and argument of the existing facts. Given the nature of Harry's practice, it concerned matters of child custody, property settlement, and other parental and post-marital rights and privileges.

"At the door of the courtroom," said Harry, "this turkey tells me 'Mr. Branson, I've been keeping something from you.' I told him for God's sake to let me in on it, and I didn't realize when I used that expression how apropos it was."

He had been looking for the waitress while we talked, but he paused for a moment to make sure he had my full attention. He needn't have worried.

"He told me," he continued with a grim expression, "Well, Mr. Branson, I had a vision the other night, in which my true identity was revealed to me. I am Jesus Christ, formerly of Bethlehem and Nazareth, the Risen Lord – Savior of Mankind."

Harry leaned across the narrow table, and fixed me with his intense gaze.

"And I told him," he said with deadly emphasis, "let me do the talking."

## Chapter Twenty-Seven

### **WHAT** THE LORD HAS JOINED TOGETHER

The Lord seems to visit our courtrooms frequently, perhaps to check us all out. Anyway, He appeared before Judge Ralph Stemp in District Court not long ago, with exciting consequences. The Judge and I have been friends for many years, and when I saw him on one of my rare visits to the State law library the other day, he brought me up to date on the latest news of courtroom.

"I came in this morning for arraignments," he related, "and the bailiffs were all smiling. It was some sort of an in-group joke, and they wouldn't tell it to me, so I just got on with it."

Things proceeded uneventfully, as most of the prisoners were being arraigned and/or sentenced on minor charges. However, misdemeanants in Alaska – as is probably true in most states – more than compensate for the petty nature of their offenses by their flair, originality, and enthusiasm.

The Judge noticed that two of them, who were sitting together, were exchanging angry looks – and it wasn't long before a brief but spirited fight broke out between them.

"One of these dudes," he explained, "was under the impression that he was the Devil, and the other thought he was Jesus. Naturally, the bailiffs handcuffed them together."

He smiled reminiscently.

"It wasn't working," he said.

### WHAT'S IN A WORD

Anchorage attorney Max Gruenberg is presently representing his district in the second session of the Fourteenth Alaska State Legislature, but when they aren't in session, he has the same sort of practice that Harry does. I asked him one time how he could stand doing divorce work all the time, and he responded that he couldn't see how I did criminal. He has a point, of course. If anything, the criminals are much more tolerant of the police and prosecution than divorce litigants are of each other.

Some years ago I had the honor of being a partner in a firm in Juneau headed by the venerable Doug Gregg of that city. I say "venerable," because he now bills himself as the "oldest living member of the Juneau bar," whatever that means. I recently asked him not to use that expression around me, since we're about the same age.

One morning, an attractive woman in her middle years came into the office. She was exquisitely groomed, well-spoken, and emphatic in her request for our representation in a divorce action against her husband. He was a local doctor (they left Alaska fifteen years ago), and, as sometimes happens, had become enamored of his nurse. As I remember, this rather mysterious creature had convinced him that he was a former prince of the Kingdom of Atlantis, where she claimed to have known him. Whatever she told him had obviously been strong medicine, if that is the expression I'm looking for, and he had fallen desperately in love with her – a phenomenon that appeared to occur periodically in this particular marriage.

These were people who obviously were very attached to one another, but about every three or four years the marriage went on the rocks – and since there was plenty of money in the family, everybody chose up sides and hired lawyers. We didn't know this at the time we took the case, but the doctor (after the reconciliation that routinely followed our action) once told me that he had paid for three divorces and never got any of them. He didn't get this one either, but it was exciting while it lasted.

According to our client, she had become suspicious of his latest romantic escapade when she called by his office during business hours and found the doors locked. His excuse to her was that he was “giving direction” to the party of the third part, and when his wife found out what he was really giving said nurse, that particular word became her euphemism for the activity she was sure was actually taking place.

“Alan really looks tired recently,” she said on one occasion. “He’s probably been giving that little bitch too much ‘direction.’”

We had a hearing on an interim support order and, due to Mr. Gregg’s excellent legal briefing on the subject, secured for our client the highest weekly interim support known to the Juneau bar up to that time. The parties, however, remained on speaking terms.

“Those lawyers of yours are really sharks,” he complained to her on the telephone one night. “Why, do you realize that you’re making more than my secretary does?”

“Of course I do,” she responded with saccharine venom, “and I don’t have to take all that ‘dictation’ either.”

## THE VANISHING WILDERNESS

Misdemeanants are interesting, at least to me, because although felony cases are usually sad affairs, your average misdemeanor is a nice person who has gotten crosswise with the law and is often completely torqued about the whole affair. This is particularly true of Fish & Game cases, as every sports-minded Alaskan knows. Fish & Game regulations are sometimes hard to understand, anyway, and the zeal with which they are enforced seems to vary in inverse ratio to their intelligibility.

*We all respect the Wildlife Protection agents, and there's no question that they have a tough job. However, it is also clear that many Alaskans, particularly those who like to be let alone (a high percentage), view their activities with deep misgivings, and don't like to be questioned by them. This probably hurts their feelings, as illustrated by a story of my old friend, Ed Whiteman (presently in Seattle, but formerly a Protection Officer) told me some years ago. Ed likes to fly, and carried out his duties airborne as often as possible.*

*One autumn afternoon in the Interior, Ed obtained the use of an airplane for the ostensible purpose of counting predators on the ground. A caribou herd was expected through the area within a month, and it was of some passing interest to Fish & Game to anticipate how many bear and wolves might be present to celebrate its arrival. However, as Ed told the story, he was primarily flying for the fun of it.*

*"I went way up a river system, into country you couldn't possibly reach except by an extended canoe trip," he recalled. "There were very few places for planes to set down, and no evidence that any ever had. As I was about to turn back, I noticed that there was – in fact – a canoe pulled up on the bank of one of the tributaries, with a fisherman standing beside it casting into the water. I had been on outpost duty for weeks, and hadn't talked to anybody except by radio – so I thought I'd drop in and see him. There was a sand bar about half a mile away perfectly suitable for landing."*

*Ed landed the plane, and patiently trudged through willow underbrush for about three-quarters of an hour before reaching the bank. The fisherman was oblivious to his presence, and lost in the pleasure of fly casting in this beautiful, unspoiled, and hitherto lonely environment.*

*"He was startled to see me," Ed remembered, "and I didn't want to tell him that I was lonesome to talk to somebody – so by way of making conversation I asked him if I could see his license."*

*The lone fisherman's reaction was completely dramatic and unexpected. With an oath, he broke his beautiful flyrod over his knee and cast it into the middle of the stream. Then he reached down and threw in after it two large Arctic char that he had landed. Finally, he tore off his fishing hat, complete with an assortment of flies, and after stamping on it, threw it in the water as well.*

*"I was never so embarrassed in my life," Ed continued. "After I got him calmed down, it turned out that he had been hassled by one of us some years before and had taken to fishing remote areas to get away from it all. I guess he thought I had flown all that way just to make sure he was legal."*

*For a moment, we were both lost in thought – I with a vision of the remote system, and Ed with his memories.*

*"He had a license, too," he concluded.*

## QUOTABLE QUOTES

*Juneau Alaskan District Attorney James L. Hanley on the subject of defense counsel winning a criminal case: "It only encourages them."*

*Anchorage District Attorney Judge Michael N. White, arguing a criminal case to the jury in his former incarnation as District Attorney in Palmer: "As the Court advised you, this man deserved a fair trial. He's had one – now go in there and convict him."*

*Anchorage trial attorney Greg Oczkus, on being asked whether his mother (the source of his knowledge on the subject) still shares my interest in astrology: "No, thank you, Gail, she's better now."*

*Public Defender Venable Vermont, on leaving an urgent phone message for his equally busy opposite number in the District Attorney's office misrepresenting that he wanted to plead out the defendant as charged in a particularly difficult murder case: "I lied. I just wanted to make sure you'd return the call."*

*Bethel Police Captain Peter LaMere, on arriving at the scene of a purported crime where two over-enthusiastic recruits had conducted a warrantless search: "Gentleman – I think we have just committed a burglary. We'd better get the hell out of here before the police arrive."*

*Anchorage District Attorney Victor Krumm, on being asked whether he knew anything about motions to satisfy: "I'm not sure, I just do the best I can."*

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