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The Alaska BAR RAG

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Wendell Kay Headlines Convention

Awards Plentiful at Annual Gala Function

It was obviously awards night at the Alaska Bar Association's annual convention banquet held in the Anchorage Sheraton Hotel on June 14, 1980.

First the Alaska Bar Historians awarded the banquet audience an evening of reminiscenses with **Wendell Kay** who solemnly assured his delighted listeners that everything he remembered was true.

Then as reported elsewhere in this issue the coveted Stanley awards (inspired by the recent **Stanley Ditus**) were distributed to deserving journalists by the Editor-in-Chief of the *Bar Rag*.

Twenty-five Years

Twenty-five-year bar membership awards were presented by outgoing Bar President, **Donna Willard**, to the following members:

Kenneth R. Atkinson
Russell E. Arnett
Henry J. Camarot
Roger G. Conner
Dickerson Regan
Warren W. Taylor
James K. Tallman
David H. Thorsness
Robert M. Opland
David J. Pree
Neil S. McKay

Scholarships

These awards were followed by the first annual Alaska Bar Association Scholarship awards. The Chief Justice George Boney Memorial Scholarship, the Association's highest award was presented to **William Lee Estelle**, a lifetime Alaskan from Palmer. Estelle is a 1980 University of Alaska graduate. He will enter Duke Law school this fall. Other awards were presented to **Thomas Wagner**, a former school teacher in Nulato, Minto, Hughes and Aleknagik; **Lance Nelson**, a 12-year resident of Fairbanks; **Joel DeVore**, an 18-year resident of Alaska studying law at the University of Oregon and **Barbara Craver**, a Librarian at the University of Alaska.

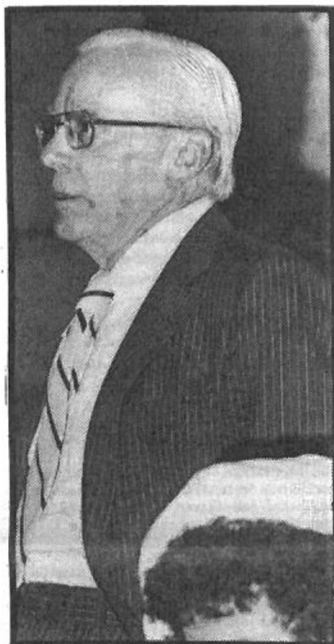
President Willard paid recognition to the law firm of **Hartig, Rhodes, Norman and Mahoney** for its continuing services to the Alaska Bar Association by presenting John Norman, who appeared on behalf of the firm with the first annual President's award.

Downhill Slide

The evening began to slide downhill with the annual awards of gifts to the outgoing and ingoing Presidents of a purse and a rubber mallet respectively.

Outgoing Board Members, **Donna Willard** and **Harry Branson** each received engraved pen sets for their services to the Board.

The last award of the evening was a stuffed cloth can-can dancer which was presented to **Donna Willard** by Board member **Jonathan Link** for something she did one night in Fairbanks.



Stanley Awards Highlight Banquet

The first ever and, who knows, possibly annual, Coveted Stanley Awards for Heroic Journalism were enthusiastically presented in no particular order at the Alaska Bar Association's convention banquet on Saturday evening, June 14.

Bar Rag Editor in Chief, **Harry Branson**, obviously unaccustomed to public speaking, stumbled through a confused preamble to the awards ceremony in which he attempted to explain the origins and dimensions of the awards and the arbitrary manner by which the recipients were selected. Sensing the restiveness of the glittering array of hopefuls in the audience, he at last began pronouncing the names of the deserving winners.

Crusty Curmudgeon

First, **Russ Arnett** bounded up to the podium to receive the Crusty Curmudgeon award for his historical, occasionally libelous columns, to the wildly enthusiastic cheering of the crowd. He was followed by retiring bar president and occasional copy reader **Donna Willard**, who received the only foreign language award: Prima Donna e Mobile ("First Donna is Fickle").

John Havelock received the Coveted Stanley Award for Improvement of the English Language. Unfortunately John was unable to be present at the ceremony so the interfacing had to be done by a surrogate, **Deirdre Ford**, new Associate Editor of the *Bar Rag*.

Ace Reporters **Judith Bazeley** and **Kathleen Harrington** each won an award for Investigative Journalism.

Bar Research

Bill Garrison was selected for the Bar Research award as a result of his untiring efforts in the vineyards, cabarets, grog shops and saloons of the Great Land.

Wayne Anthony Ross received the Best Sport Writing Award for his outstanding contributions to fin and feather writing. Wayne seized the opportunity to deliver an impassioned monologue on some subject or other.

Headline and Disclaimer

Perhaps the most exciting moment of the ceremony was Branson's announcement that **Karen Hunt** had won the Best Headline and Disclaimer Award for her front page headline expose of judicial candor, and her subsequent inspired denials.

Other awards included the Marine Mammal Poetry Award to **Robin Taylor** for "Seal Poker's Lament," the Fast Food Poetry Award to **Ralph Beistline** for "Ode to a Chenaburger," and Best Summer Vacation Theme Award to **James Blair** for his trip to China article.

Stanley Ditus, in absentia, received the Coveted Stanley Award for Inspired Non-Interference by a Director of the Board.

Bar Voluntarily Raises Dues!

Recognizing its responsibility to both the profession and the public which it serves, the members in attendance at the Alaska Bar's annual meeting, overwhelmingly adopted a bylaw change which increases annual dues by 72% effective January 1, 1981.

In 1980, active members of the Association paid $180.00. In 1981, they will be required to remit $310.00. Judicial dues were raised from $137.50 to $310.00 per year and inactive members will pay $75.00 as opposed to the $35.00 currently being assessed.

The resolutions were passed in response to the failure of the legislature to appropriate traditional funding in aid of the discipline function of the Alaska Bar and the explanation of the Board of Governors with respect to the adverse effects of inflation and expanded programs and services. It was the first time since 1974 that a dues increase had been proposed.

A separate resolution resulted in the levy of a special one-time $20.00 assessment for 1980-to partially solve this year's projected deficit. Once again, the failure of the Legislature to provide funding in aid of discipline was the major culprit necessitating this extraordinary measure.

During the discussion two points were emphasized continually: The Association's integral role in the legal profession in Alaska and the necessity for lawyers to accept total responsibility for self regulation, financial and otherwise. In this connection a resolution advocating the return of responsibility for discipline to the Supreme Court was tabled indefinitely.

Also reiterated numerous times was the disinclination of the membership to accept any further funding from either the Court or the Legislature and the strong sentiment that association programs should be continued at current levels.

For members so desiring, 1981 dues may be paid in two installments. However, exercise of that option will add a $10.00 service charge to cover lost interest income and the additional administrative costs.

In other action, the creation of a Citizen's Dispute Center was approved, future out of State Board meetings were precluded and the Convention went on record as favoring a Juneau Supreme Court seat.

A resolution providing for annual dues of $250.00 was defeated.

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President Willard Sums Up Board Efforts

Outgoing president **Donna Willard** gave a State of the Bar message to association members attending the Annual Business meeting on Saturday, June 14, 1980 at the Anchorage Sheraton Hotel.

The report summed up a series of new programs, systems and benefits established during her tenure as a member of the Board of Governors and as President of the Alaska Bar Association for the past year. In addition Ms. Willard spoke of some of the unresolved problems and obstacles facing the Board and membership arising out of a series of regulatory investigations during the past year by the Ombudsman, Legislative Affairs Committee and the House Judiciary Committee which culminated in House Bill 984, Senate Bill 588 and the Sunset of the Bar Association resulting from the failure of the Legislature to pass a bill extending its life.

President Willard outlined the efforts of the Board and Bar Office staff in each of the investigations enumerating various court appearances, conferences, appearances before legislative committees, accumulations and preparation of requested materials and discovery, as some of the activities which were to occupy most of the Board's time and attention during the last year.

Each one of these investigations involved demands for the release of confidential information pertaining to admissions, discipline or off record executive sessions involving litigation or bar administration and personnel problems. The Board of Governors refused to turn over any confidential materials. All other requested information of a public nature was turned over to the agency requesting it.

After giving a brief history of House Bill 984 Senate Bill 588, President Willard turned to the question of the Bar's present financial position in light of the legislature's refusal to appropriate money for the continuation of the discipline function.

Achievements Noted

President Willard summed up a number of innovations and improvements in the structure of the Bar Association during her tenure as a Board Member. She praised the reform of the committee structure of the Bar which has resulted in the elimination of several unnecessary or nonfunctioning committees. Participation in committee activities has increased dramatically during the past two years, partly because of more careful selection of persons willing to commit themselves to the work of various committees. She acknowledged the time and energy expended by committee members stating "without their individual efforts and cooperative spirit, the bar association could not function effectively."

Problems Encountered

Willard commented briefly on some of the problems the Board encountered during the past three years involving the hiring of various executive directors and support staff. She reported that the membership rolls are completely up to date and that bar offices now have a comprehensive, formalized set of financial records. In addition the files have all been systemized. She noted that the Board has adopted a written personnel manual by which the staff is guided and an employee evaluation system.

Finally, President Willard noted a number of special programs that have been instituted by the Board of Governors during her tenure, specifically: institutional television advertising, the law school scholarship program, the *Alaska Bar Rag*, the appointment of Bar Historians, the work of the Bar in criminal conflict cases and the special malpractice insurance study. In addition to these special programs President Willard called the membership's attention to the amount of work that has been put into admissions, discipline, membership, CLE, bylaws, rules, regulations and policy making by the Board of Governors.

When she finished her speech President Willard was given a standing ovation by the crowd.

Bryner, Singleton, Coats Tapped for New Court

On July 28, 1980 Governor Hammond's office announced the names of **Alex Bryner**, **Judge James Singleton** and **Robert Coats** as the Governor's choice to fill the three available seats on the newly formed intermediate appellate court.

Bryner, the overall top choice of the Alaska Bar in the recent Judicial Poll brings a background of criminal defense and prosecution experience, appellate experience as an advocate before the Alaska Supreme Court, the Ninth Circuit Court of Appeal and the U.S. Supreme Court. His previous judicial experience consists of two and one-half years as an Alaska District Court Judge in Anchorage.

Judge James Singleton has been an Alaska Superior Court Judge in Anchorage for the past 10 years. He was the second overall choice of the Alaska Bar for the new court in the Judicial Poll. He was rated first in the categories of legal reasoning, knowledge and willingness to work.

Robert Coats, a 37-year old native of Fairbanks, Alaska has spent seven years as a public defender and one and one-half years as an assistant attorney general. He served as a law clerk to Justice **Rabinowitz** for approximately one year.

ALASKA BAR ASSOCIATION

IN THE MATTER OF)
THE LAST ANNUAL MIXED)
MEDLEY ROAD RACE)

RACE RESULTS

COMES NOW the **ALASKA BAR ASSOCIATION** and states:

1. The above-captioned race occurred at or about 5:30 o'clock p.m., on Friday, June 13, 1980.
2. The race occurred at Anchorage stadium (a/k/a Mulcahy Park).
3. The moving parties consisted of 35 4-member teams, each consisting of 2 males and 2 females.
4. The course included a 4-mile trek to Goose Lake, two 2-mile Mulcahy Park track legs and a 3-mile jaunt to Westchester Lagoon.
5. The course was completed with the greatest dispatch by the team of **Greg Tibbetts, John Clark, Katie Stovern and Krisa Hathhorn**, finishing in 53 minutes, 55 seconds. The Tibbetts team also won the 80-139 combined age division.
6. The 80-and-under age division was won by the team of **Dede Hathhorn, Bob Eder, Theresa Stovern** and **Jesse Gore** with a total elapsed time of 56 minutes and 25 seconds.
7. The 140-and-over age division was completed in a winning 1 hour, 4 minutes and 48 seconds by **Pat Baird, Cindy Besh, Dan Ellsworth and Gary Sanger.**
8. The winning Bar Association team consisted of **Bob Eastaugh, Patti Eastaugh, Alex Young and Mary Hughes.**
9. Official results were as follows:

Last Annual Mixed Medley Road Race

80-and-under division—1) Dede Hathhorn, Bob Eder, Theresa Stovern, Jesse Gore 56:25; 2) John McCracken, Clint Winey, Robin Wright, Lisa Hodson 56:26; 3) Craig Walker, Karen Jeske, Joe Alward, Julie Slevert 56:42; 4) Peter Lekisch, Betsy Haines, Jennifer Lekisch, Andrew Lekisch 1:04.40; 5) Chris DeLaRonde, Mark Carmen, Lucy Stockman, Steve Summers 1:04.48; 6) Gary Spidahl, Judi Spurr, George Gates, Cheryl Jones 1:08.16; 7) Danny Sindorf, Amy Sindorf, Michelle Jones, Hellen Jones 1:08.44; 8) Katie Reeves, Val Johnson, Jim Weble, Tim Stevens 1:12.02; 9) Kristin Hellen, John Hellen, Molly James, Ronald Randall 1:17.22.

80-139 division—1) John Clark, Katie Stovern, Krisa Hathhorn, Greg Tibbetts 53:55; 2) Michelle Cutsforth, Dick Miller, Jerry Ulmer, Ann Rutherford 59:32; 3) Suzanne Ray, George Faust, Jill Follett, John Burte 1:00.55; 4) George Walker, Dick Mize, Leslie Walker, Katie Lovern 1:01.29; 5) Mary Cashen, Mark Quackenbush, Chris Fall, Jody Clark 1:01.37; 6) Bob Eastaugh, Patti Eastaugh, Alex Young, Mary Hughes 1:02.02; 7) Tom Meacham, Lisa Fussner, Stephanie Cole, Gayle Savage 1:04.37; 8) Zeke Gardner, Tim Olivera, Larry Smith, Lanie Fleischer 1:04.55; 9) Robert Updegrave, Lynda Delaney, Alex Monterrosa, Kathy Monterrosa 1:05.17; 10) Lucie Woofler, Bob Woofler, Krista Serfling, Doug Marx 1:05.37; 11) Mimi Hogan, Mike Hogan, Martha Hogan, Bill Hogan 1:05.47; 12) Rigler family 1:10.09; 13) Sedwick family 1:12.51; 14) Jeff Badger, Judith Imlach, Fave Hashek, Darrel Hebert 1:13.54; 15) Paul Proue, Amy Proue, Theresa Proue, Ray Brooks, no time; 16) Jay Caldwell, Twila Caldwell, Jim Case, Erica Case 1:20.51; 17) David Jones, Connie Jones, Michael Jones, Maile Caldwell 1:23.54.

Custody Investigator Gets Help

Francis Stevens, Custody Investigator with the Alaska Court System has recently introduced a new addition to his staff. On June 2nd, **Ardis Cry** was hired to fill the newly created Assistant Custody Investigator position.

Ardis has lived in Alaska since 1978, when her husband, **Randy**, was hired in Bethel as Chief of Police. The Crys lived in Bethel for nearly a year. During that time, she was in private practice as a Marriage and Family Counselor and counseling consultant to the Family Violence Program. From Bethel, the Crys moved to Kodiak where she served as Staff Psychologist for the U.S. Coast Guard Support Center.

Ardis was born in Northern California but says that she considers Alaska home. She has a degree in Social Work, completed her graduate studies in Marriage and Family Counseling at the University of San Francisco in 1978 and is currently enrolled in a Doctoral Program in Psychology.

Carefully Chosen

Selected from a slate of 75 applicants for the position, Ardis brings to the Program a divergence of professionalism and expertise in working with children and families. Prior to her work in Alaska, she spent six years in Law Enforcement working as a counselor, investigator and Director of Youth Services Programs for Municipal Police Departments in California. She has taught domestic dispute intervention and has held an Alaska Police Standards Instructor's certification in child abuse and sexual assault investigation. Earlier in her career, she worked as a Social Worker, primarily in children's services providing planning, placement and supervision of dependent Court wards.

RACE RESULTS [continued]

140-and-over division—1) Pat Baird, Cindy Besh, Dan Ellsworth, Gary Sanger 1:04.48; 2) John Gissberg, Barbara Fleek, Barbara Newell 1:06.25; 3) Carol Larson, Hugh Fleischer, Alice Tower, Peter Gruenstein 1:09.28; 4) Gordie Edberg, John Nyboer, Sharon Edberg, Gale Stover 1:11.17; 5) Tim Middleton, Joyce Middleton, James Reeves, Cathy Reeves 1:12.03; 6) Larry Kulik, Sue Ellen Tatter, Sandy Saville, Bob Libby 1:17.3.

10. The race director, **Peter Partnow**, and race official, **Olof Hellen**, conducted an outstanding race and one that was fun for participants and audience alike.

WHEREFORE, it is prayed that the above-captioned race become an annual event.

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Observations of a 'New Boy'

by Randall P. Burns

The headline for this story could have been: "Bar Bites Dust." Or: "See-sawing Board Totters." It certainly was my expectation. I could have handled a convention with those results: my bags were packed. But, how do you explain what happened? Heads reeling instead of rolling. Goodwill—not get well—cards became the only appropriate post-convention greeting.

The Board certainly girded itself well for what it perceived was going to be a floor fight that would require, in addition to their combined mortal expertise, a summoning of the lesser legal gods and the Fantastic Four. (I've discovered attorneys are very superstitious; the pre-trial mumbo jumbo of some is worthy of the descendants of Odin.) Feeling like Damocles with the Sword of Financial Ruin hanging over its head, the Board of Governors began attempting to clearly define the problems: the No-Dues-Increase-Since-'74 and the Increased-BOG-and-Discipline-Expense forces had combined with those nefarious enemies Double-Digit-Inflation and Legislative-Whim to unbalance the Association's budget. Doom was proclaimed *and* imminent. To explain, articles were published by that sibyl from the Public Bar, **Pat Kennedy**, detailing the history of our budgetary rise and fall. Resolutions were published mapping out alternative routes to financial Nirvana. The Association had a request before it. Its leaders, united, were not asking members to raise an army, just dues. And all was to be made ready for the Gathering in June. The annual pow *had* to be a wow.

New Kid on the Block

Of course, as the new kid on the chopping block, I'm more than a little anxious that the Convention run smoothly. A perfectionist by fear, not design, plans for the Professional Update Conference and Annual Business Meeting were confirmed, reaffirmed, altered, discarded, and finally, ALL IS IN READINESS.

Under the graceful trees, on the jade staircases, within the handsome meeting rooms, during the luncheons, and through the rather sedate evenings in the hospitality suites of the Sheraton Anchorage Hotel, Association conventioneers met, talked, politicked, got some education and, apparently, enjoyed themselves.

Fans and Teddy Bears

I was expecting a brown-bladed fan. Instead, everywhere, teddy bears. For sure, I thought, the Bar Marathon that **Peter Partnow** had planned would be taking a walk: not a whole lot of people had expressed an interest. Wrong again. Over a hundred people ran the course that fine Friday afternoon and Peter already has plans for a Second "Last Annual Mixed Medley Bar Association Fun Run."

I was depressed because the luncheon and banquet numbers were so low. Then, on the day of each meal function, we sold out. [At one luncheon I was collecting tickets at the door and this well-dressed, distinguished looking gentleman comes in. I asked for his ticket. He said he hasn't checked in at the registration desk yet, so he didn't have it. I sent him back for the ticket. **Karen Hunt** came bounding over. "Anything wrong?" she asked. "No," I said, "he didn't have a ticket so I sent him back to get it. Why?" "THAT," she says, "was **Justice Conner!**" (Where is that hole in the floor when you want *and* need it?) Score: New Kid—0; Chopping Block—1.]

I decided, since Thursday and Friday was the Professional Update Conference and most people were engrossed in the various reports being given by their colleagues, that this was the eye of the storm. I knew all hell would break loose on Saturday and went to bed Friday night sick to my stomach.

Fortunately, the 14th started off poorly. Of all the reporters who wished to be invited to the 8:30 a.m. press conference with ABA President-Elect **Wm. Reece Smith**, only P.J. Gentry of KENI Radio showed. This was a good sign: things *were* going to go wrong today! And, sure enough, Hotel maintenance was having trouble setting up the meeting room; mikes weren't working; the overhead projector and screen for the financial report had been forgotten, even the coffee was late. But, Panicked Participation! Where were the throngs? The angry masses?

At 9:30 a.m. President Willard decided to start and by 10:00 a.m. there must have been 150 people in the room. I had expected a horde of attorneys out for bear. Maybe, in fact, that's where they were, because the crowd—while impressive—was not large; edgy, but not ugly.

Good News

Then the meeting started off when Mr. **Craford** from Great West Life Assurance Company announced that *despite* the Association's failure to enroll the requisite number of attorneys (200), the company had decided to go ahead and institute the program. This is *good* news! To add insult to injury, Great West also decided to open up the program to employees as well. What a beginning!

The next item on the agenda was the reading of the minutes of last year's business meeting. The minutes usually bore just about everyone, and only inflame a few (the Board can't accomplish everything it's asked to in one year), and should set a promising tone. Vice President **Jon Link** then moved to postpone reading of the minutes. There was a second. There are no objections so, like sheep, we moved on. Next we discussed the location of the 1981 Bar Convention. Ah, here was a chance for a little Southeast vs. Southcentral rivalry. Shades of Capital Move-itus! The choice: Kenai or Juneau. No one was here to speak for Kenai (good, an underdog); **Mike Thomas** spoke on behalf of the Juneau Bar Association.

Wendall Kay stood up and moved to hold the meeting in Kenai. [Apparently he has fond memories of the place. The last time he was in Kenai he was interrupted during a speech he was giving by a former client of his (rumored to be the owner of a few Spenard -uh- "spas") who, in her happy, inebriated state, flung herself at him, knocking both Mr. Kay and his neighbor off the back of the stage.] Jon Link suggested that there might be some logistical problems in Kenai. Beore the debate could heat up, and with Mr. Thomas' subtle suggestion that the meeting might possibly be held at Glacier Bay Lodge and in our thoughts, votes were taken and the 1981 Convention glided into Juneau for the 4th, 5th and 6th of June.

The Year in Review

The President asked and received permission to change the orders of the day, and a few special committee reports were given. **Mike Thomas** gave a report on the work and recommendations of the Examinations Review Committee; **Henry Camarot** distilled the essence of the specialization Committee's findings to date; and **Connie Sipe** discussed the proposed nonprofit Citizens Dispute Center suggested by the Alternative Disputes Resolution Committee.

Donna then gave the President's Report. The report was both a very fine capsulation of the past year's traumatic events (the Ombudsman's suit, the Legislative Budget and Audit Committee's suit, sunset, finances) and a good description of the Association's accomplishments (e.g., revitalized committee system, Board standing procedures and policies enumerated, scholarship program revitalized, Bar risk management and mandatory criminal contracts committees successful, etc.). It was objective and informative, dammit, and she deserved the standing ovation she received. A break was called; good vibrations permeate the room. I ran out.

As I ran out I saw **John Lohff** and **Larri Spengler** carrying trays of goodies in. Their timing was all wrong. It was just what the doctor ordered. This was the food set out for the 25 people expected at the press conference. Since basically no one showed, John and Larri whipped the fruit, rolls, juices and other goodies over to the meeting room and people descended upon the food in a bacchanalian display of good cheer and bad manners. Tensions eased. Grapes were passed around. Soft drinks were brought in.

Angst is Mine

After the break, Angst is mine. The financial report was on. Board member **Pat Kennedy** and myself were going to try to provide, utilizing overhead transparencies, a presentation of the facts regarding the Bar's current bleak financial picture. I figured no matter what we said, regardless of the validity of our figures, this was our Waterloo. First Ms. Kennedy discussed the areas of increased expenditures and reasons for those increases in the last three years; I then ran through the 1979 audit; Pat then discussed our situation this calendar year; I then showed the revised 1980 budget and the projected shortfall of some $37,000. President Willard stated that after lunch we would then detail the impact of the various resolutions upon this year's current budget, as well as next year's finances.

She called a halt to the proceedings, and lunch was announced. There had been a few questions, perhaps some dismay, but—dismally—no fusilades. The message was apparently getting across: numerous factors contributed to the Bar's sorry financial future, but terrible mismanagement was not among them. **Wm. Reece Smith, Jr.** was the luncheon speaker. Adding to the feelings of unity beginning to erode the temper of the day, Mr. Smith rallied that Saturday lunch-bunch by stating that he knew **Charlie Parr** was "FLAT WRONG" if Parr believed deintegration of the Bar was the solution to perceived problems with the legal profession. Who invited him anyway?

Consideration of the resolutions was my last hope for an outbreak of ill feeling, uncooperative spirits, and general mayhem. As reported elsewhere, it didn't happen.

The banquet was a success—no one could see straight. Bar Counsel came dressed as the White Knight.

Holy Convened Convention!

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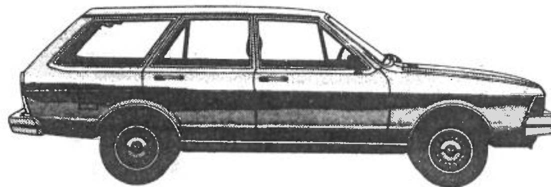

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'Random Potshots'

by John E. Havelock

Tax Law Debacle

The legislature and the public suffered from a policy overload earlier this year. OPEC pricing policies have posed for Alaska the toughest policy questions since the Native Claims were settled. (1) How are the long term fiscal needs of state and local government to be met? (2) Should any taxes at all be levied and if so on who? (3) What role should the state play in the private economy of the state? Who gets the loan subsidies and why? (4) Which among the backlog of unmet public needs should be met and how identified?

Each of these major wealth management issues deserved extended public debate and would be more than enough to occupy a full session. The 1980 legislature tried to do it all and the results are less than satisfactory in each case.

Puritanical Impulse

In debating the tax question the legislature evolved during its term from tax "relief" towards sentiment favoring a complete suspension or repeal of the personal income tax. Unfortunately, before the evolution was complete, the legislation reached the voting stage. The puritan impulse was expressed via transference. Yes, taxes must be paid, no, not by us and our friends but by new people.

Likewise, in response to the question of the state's role in the private economy, the legislature moved to avoid the issue by "privatization." Give the money away. Capital preservation distribution models following the pattern of the Native Claims Settlement Act (which has neither age nor durational residency requirements) were discarded as "to complex" in favor of cash dividends per year of residency, a supposedly "simple" formula.

Opinions of the Attorney General

Both of these legislative schemes have now surfaced as constitutional issues in *Zobel v. Williams 3 AN 80-2856 Civil.*

In addition, the state is faced with a state constitutional challenge from Representative **Randolph** if, as it proposes, it removes his tax relief initiative from the ballot on the grounds the tax relief enacted is "substantially the same." The Attorney General's call on this one is necessarily a close question.

The Attorney General's reported advice against veto to the Governor on the constitutionality of the tax and distribution legislation also involves close questions, looking at the issues in a light most favorable to that advice. One assumes that the Department tended to premise the question as "do we have a reasonable chance of defending it in court?" rather than "what is the most likely judicial ruling?" The Department of Law is now in an advocacy, rather than an advisory role so its current say-so needs to be taken with salt.

But before permanently turning them over the the lawyers and judges, these issues should be reviewed from the perspective of public policy and political practicality.

Precommitted Refunds

There is one new fact of great importance. A great many Alaskans have already made financial commitments based on the tax refund though the dividend scheme, as "funny money," is unlikely to have produced such a result. Though Judge Moody's determination that the tax repeal and the tax on new residents are not severable is legally above reproach, given the public's assumptions on expenditure of the refund, there is not a chance in the

[continued on page 5]

Guest Editorial

by John R. Strachan

The 1980 Bar Convention, instead of being the last, as announced by the T-shirt contingency, may have been the most important since its inception. Certainly a spark was ignited there. Now it's up to the Board of Governors and the membership to fan it.

Two important resolutions prove the spark; one, increasing dues to $310 so the Bar functions are fully funded by the membership, and the second, a $20 amount to pay our bills and face the future. A cynic might think that we are merely following the legislative guidelines and solving problems by throwing money at them with no thought to the underlying causes. It's true that little discussion was evident regarding litigiousness on the part of our leadership, undertaking causes for short term gains and long term disasters. Little criticism was leveled at the failure of the leadership to provide leadership or a recommended solution in the form of a recommended resolution presented to the convention. Nor was there much discussion on the wisdom of underwriting board travel when the association can't pay its legitimate bills.

Look for Solutions

That is as it should have been. The crisis is too deep to castigate for past errors and the fault legitimately rests with all of the membership. It's time to look for solutions. To do so one must first identify the problem, and take action lest the spark be lost.

Two areas ought to be analyzed—the **public image** and the **internal organization** of the Bar.

Internally the Bar has been far too stratified—too wedded to the concept of going through the chairs, and inflexible. In an old state with aged members who retire to work with the Bar Association the going through the chairs concept makes more sense. With a young Bar such as ours, any interest is quickly suffocated when one must plan 5 years in advance for a position of authority. One can spend their energies elsewhere for quicker rewards. A return to a true convention system with nominations for all positions open to the floor and election at the convention will inspire campaigns for the offices and in turn interest in the association and attendance at the conventions.

More Committees

Many more and active committees ought to be established and members appointed to serve and report. The committees should reflect the interest of the Bar Association, not just self interest. We are an ancient and honorable profession with a long history of political involvement in popular and unpopular causes. No other profession is as intrinsically involved with the political process, it touches us daily. We are lawyers. We must be actively involved in the selecting process of our legislators. A **political action committee** needs to be formed; its members appointed.

Recommend Legislators

We have some formidable members in our organization. No one is better equipped to screen and make recommendations on legislators. The newspapers do it, the Hod Carriers do it, the Teachers Association does it. We are in a position to make greater contributions as our concern, by the nature of our profession, must be to encourage quality legislators and obtain quality, thoughtful legislation. We have the people who can ask the weighty questions. Imagine a candidate for the House interviewed by **Ralph Moody, Ed Merdes, Paul Robison** or **Dave Thorsness** to name a few. An endorsement from such a group can have an impact. Its comments on Legislative schemes would be analytic and valuable.

The objection will be that a recommendation of a candidate by the Bar will carry the kiss of death to a candidate, citing a Bar position on the retention of a judge. If our approach is to endorse only candidates who will commit themselves to continuing and funding the association that fear is warranted. If the interview and endorsement is primed on the greater commitment to the profession and our public responsibilities, the endorsement will earn respect.

Public Relations

My perceptions may be wrong but I did think we accomplished more at the convention than listen to Ms. Smith's luncheon speech. That, however, was all that was reported in our local papers. A Bar Association graced with such luminaries as **Ed Boyko** ought not to be unsophisticated in obtaining favorable publicity. A public relations arm ought to be established and tell the public we are here, active, and determined to fulfill our commitment as an ancient and honorable profession. That determination expressed at the convention, ought to be made public.

Public Image

Which leads to the public image of the Bar. We do not fully deserve the reputation as a lightweight organization dedicated to its own self-interest. Contrary to Mr. Merdes' comments, the Bar has encouraged establishing means to provide low cost services to the public through the Public Defender Agency, Legal Services, small claims procedures, and, of course, through its most recent resolution for an alternative fee dispute center. We know this, the public does not. It's time it did. If the steps outlined are taken, together with those that others will suggest, our public image will improve. Our emphasis however should not be on improving our image, it must be on improving our association, the rest will follow.

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All My Trials

by Gail Roy Fraties

The Editor has asked me to write something for the *Bar Rag*, on the logical assumption that he has already captured the intellectual crowd with **John Havelock**'s columns. So, fine, I don't have anything to do—and if you're one of those lawyers who has never been able to read all the way to the end of the *Ravin* decision, spends at least part of every day wondering what the hell you're going to do next, and likes to get drunk and listen to **Bill Garrison** imitate **Judge Sanders**, then this column is for you. At least, it's written by someone just like you.

A lot of people have suggested that I do a seminar on law office management. These are lawyers who are overworked, plagued with referrals from satisfied clients, and have tax problems because of their high income. Out of my own vast experience and brilliant career, I certainly feel qualified to offer solutions for these and other problems of the successful practitioner—and of my many insights, those that are not predicated on personal experimentation, I have learned from watching the rest of you. The following principles, if carefully followed, should free you from the burdens of a successful practice.

Selection of Cases

Take everything that comes in the door, preferably on a contingent fee. Some excellent examples of non-producers are product liability cases on leaking trailers, contested divorces where the husband (an indigent) wants the six infant children on the grounds that his wife is an "unfit mother" (be particularly alert for the catch phrases "money is no object," and "it's the principle of the thing"), and libel and slander actions by school teachers. In accepting personal injury cases, one must be guided by Gucker's maxim, "Time expended on the case varies in inverse ratio to the certainty of liability, severity of injury and depth of pocket." See, also, Gregg's Commentary on Gucker's Maxim, "The dogs live forever."

Fee Arrangements

Don't put anything in writing. Contingent fee agreements, in particular, should be explained to the client after the case has been won or settled, preferably after your office has advanced several thousand dollars in costs. Criminal cases, especially those requiring lengthy trials, should be billed when the work has been done and (as often happens) your client is a guest of the State. Nothing contributes to the rehabilitation of the individual like receiving a bill for $30,000 or $40,000 immediately after having been sentenced to life without the option of parole.

Work Organization

There is an insidious tendency among legal practitioners these days to be businesslike. This only increases their productivity, and leads to unfortunate problems with tax shelters and the IRS. My recommendations on internal law office management are as follows:

(1) Eliminate your filing system—or if you must have one, keep it in alphabetical order and don't ever close anything. Several decades of files, maintained in this way, can provide a lot of excitement for your staff when someone named Smith is calling from Ethiopia to ask about the status of his case. I mean, we liked Easter egg hunts as kids, didn't we? Why should we take all of the fun out of our lives just because our clients are efficiency freaks?

(2) If you must keep files, don't fill them up with memos concerning interviews with your client, telephone conversations and so forth. Most of that information is best committed to memory, as you lose the freshness of

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POTSHOTS

[continued from page 4]

world that the legislature is going to re-impose that tax. The special non-severability clause was just an attempt to coerce the judiciary into buying into the tougher issue.

Why Tax New Residents?

Furthermore, there is not a constituency supporting the tax levy on new residents (the practical impact of a tax on persons filing for the first time). All Alaskans asked for was tax relief for themselves. The average Alaskan is not so ungenerous as to demand that the immigrants pay. The rudeness of various Alaskans to the Zobels arises primarily from concern that the vacation planned, the outboard motor committed to or the debts paid may now have to be borne out of pocket.

Legislative imposition of this tax really reflects an unrelated, structural, concern of some members of the recent legislature, to wit, that relief from major public burdens or the grant of significant public benefits might unduly encourage immigration. Apart from the constitutional problems with this motive, it is of dubious economic validity. Maybe business will settle in New Hampshire rather than across the border in Massachusetts to avoid state income taxes, but no individual is going to move to Alaska from some southern clime for that reason.

Accordingly, the new resident tax is bad policy, should not have been enacted in that form and would not have been enacted if there had been more time to think about it.

Socking it to Alaska

Even if the state Supreme Court reverses Judge Moody, the issues posed are ripe for certiorari. I can see the U.S. Supreme Court clerks rubbing their hands over the application. Socking it to Alaska is a well-established national mode of establishing high moral principle. Local doubt over the validity of the tax will continue well into 1981. Citizens who have assumed commitment of their refund are not interested in waiting to test the legislature's power to impose a tax on new residents.

Solution of this public dilemma required the Governor or the legislature to call itself into special session to consider the personal income tax. The Governor is the preferred caller since he may limit the topic by his proclamation.

There are several additional policy benefits from this course. First, it will give the Alaska Supreme Court and the legislature more time for the deliberations essential to the processes of each. The legislative process was too hasty. The new legislature should think the bigger issues through again.

An election is a time of stimulated public debate. For Alaskans, whether Mr. Carter or Mr. Reagan is elected President is probably less important than the questions stated respecting how the state will manage its wealth. Every candidate should be asked for his position. Candidates expecting to take leadership positions should be asked to produce thought-through proposals for wealth management.

The Next Case

Neither do we want to press the Alaska Supreme Court into an abbreviated consideration of constitutional issues of such sweeping import. The dividend act can wait until next session in any case. At such time, if ever, as an Alaskan residency case does go to the U.S. Supreme Court, we had better be sure we have the best foot forward. A Supreme Court alarmed by excesses of regional hubris is more likely to make sweeping proclamations reaching every nook and cranny of regional preference such as the state's longevity bonus which would stand its best chance outside the context of a pattern of regional, durational residential preferences.

Lastly, it is not to the benefit of Alaskans that issues which will be identified by the national press as symptoms of our parochial greed be aired in the national press, a result which will ensue from extended litigation and particularly if the case goes on appeal to the U.S. Supreme Court.

A Special Session Now

So, please let us have a special session now. Do not wait for the relief which the state Supreme Court cannot give us. The making of public policy should be a legislative function, the court a forum of last resort. The questions of equity in the design of the law which the court is being asked to consider as a legal matter are also questions of sound public policy which the legislature should reconsider—now.

TRIALS

[continued from page 4]

your approach to a case if you slavishly keep a history of it. Further, presupposing that you are charging an hourly rate, you cut down on your billing time by being efficient. The optimum is to have your client tell you his story over again every time he comes to the office.

(3) Eliminate calendaring systems, bring-ups, office computers, intelligent secretaries or anything else that can help you keep track of your work. Filing, if it is done at all, should be on an annual basis—and then only by those on your staff who are barely able to keep track of what planet they're on, much less the English alphabet.

In the selection of legal secretaries, emphasize beauty over ability. Why should your office be cluttered up by something that looks like it needs a stake through its heart, when you have to work around the lady all day? In this regard, an excellent rule has been enunciated by **Bob Downes** in his famous statement of Downes' Law, "The smaller the brain, the bigger the gazumbahs."

Client Relations

It's important for attorneys to maintain the dignity of our profession, and we can only do so by putting our clients, and others, in their place. One way of doing this is by judicious use of the telephone—which, if effectively used, can screen the attorney from many annoying interruptions—like new clients. Old clients, as well, should be treated by the staff as though they are a troublesome nuisance. Make them go through at least six secretaries before they get to speak to an attorney. If they state, "This is John Jones calling for Attorney Branson on the matter of my execution at the stake tomorrow morning," they should immediately be challenged, "JOHN WHO?" in a loud and belligerent voice. If it is after 11:00 in the morning, they may then be told, "Mr. Branson isn't in yet."

If the client ever does get in to your office, make sure that you've either forgotten the appointment, or that he has to wait two or three hours to see you. It's helpful, as well, to greet him from behind a mountain of files on the desk—while fumbling through them for several minutes trying to find his. A nice touch is to ask him for a hint about the nature of his case (particularly if it has been in the office for several years). "Let's see, are you the Plaintiff or the Defendant?" is a popular ice-breaker.

While you are discussing your client's case with him, accept as many telephone calls as you can—especially if he's on an hourly rate. Then, if he ever gets a billing (which, of course, I don't advocate on a regular basis—or with any detail) he will be interested to discover that he has been charged an hour and a half for his interview, most of which time you spent on the telephone talking to other people. Finally, entirely too much emphasis has been put on the use of trust accounts in handling clients' funds. It takes away from the personal touch, as the average client feels much more like family if he gets his share of a $2 million judgment written in your own hand on a personal check.

Bar Poll

These few pearls will get most of you off to a good start on the leisurely life, unhampered by personal possessions or the burden of wealth. On another subject, many of my readers will probably be interested to learn that in the latest Bar poll one of the candidates was a fictitious name, entered as a control by the Judicial Council. This was done as the result of a complaint by a disappointed subject of a former poll, a Trappist monk who had never been in Alaska, but was nonetheless characterized as "unqualified," "diseased," "depraved," and "unfit to practice law" by 179 Alaska lawyers who claimed personal knowledge of and acquaintanceship with him. Information is unavailable concerning the fictitious individual mentioned above, other than the fact that his is one of the nine names that went up to the Governor.

Spenard Divorce Ethics

As a sop to those of you who insist that anything you read have some redeeming social value, this is to report the findings of the Ethics Committee on the matter of **Max Gruenberg** of Anchorage. Mr. Gruenberg, on having accepted the 75th call of the week from one of his divorce clients on the subject of her husband's latest transgressions, heatedly advised her to "kill the son of a bitch, lady, I can win a murder case." She took his advice, and the question before the Committee was whether it fell below the standards of the Anchorage professional community. The decision, which will be published next week, is that it did not—on the grounds that contested divorce cases are not governed by the law of the State of Alaska, but rather by that of the jungle, or fang and claw. That being so, the popular local attorney's comment fell well within the parameters of appropriate counsel, and was neither improper nor questionable.

All inquiries may be directed to the writer at the offices of the *Bar Rag*, and will be answered promptly—either by personal letter, or through this column. Death threats and heavy breathing by anonymous phone callers will be studiously ignored—I get enough of that from my own clientele.

Letters

From: **T.S. Moninski II**
Asst. Area Court Administrator/
Clerk of Court

Subject: **Announcement**

I am very pleased to announce that I have been offered and have accepted, the position of Area Court Administrator for the First Judicial District, Alaska Court System. As might be expected, the judges of Southeastern have asked that I assume my new responsibilities at the earliest possible time. While I will attempt to accommodate their request, the needs of the Third District must also be considered and in any event, I will be on duty in Anchorage for at least another thirty days.

I would like to take this opportunity to thank each and every one of you for your past support and cooperation. The people of Alaska are fortunate to be served by the judges and staff of the Third Judicial District. While I may be a few hundred miles away, you can count on my continued assistance in any way possible. I'll only be as far away as the telephone.

Again, thank you for helping me to prepare for the new assignment which I will soon undertake.

Editorial "Aftermath"

Dear Editor:

As a nonresident regular member, I am astonished by the legislative action against the Alaska Bar as you report it in the May issue.

A number of years ago, Chief Justice **Buell Nesbett** led the then three-man Supreme Court into abolishing the statutory state bar and integrating the Alaska Bar by court rule, a well established judicial power, wholly independent of the legislature.

I was the intermediary appointed by the American Bar Association to resolve the dispute which ultimately terminated in a decision of a three-judge federal court in Anchorage. Peace was restored.

Now the war has centered in the legislature. Actually, the legislative power as to members of the bar is limited to establishing minimum standards. It cannot constitutionally interfere with the Supreme Court's power completely to integrate the bar and to set higher than the legislative standards.

I feel confident that the Alaska Bar situation will be restored to proper balance, if not by the legislature, then by the Supreme Court. The Court's control over the bar is necessary and inalienable, regardless of what the legislature says.

Sincerely,
Alfred J. Schweppe

Law Firm Cooperative

Dear Editor:

The purpose of this letter is to determine if there is any interest in the formation of a cooperative of law firms organized for the purpose of facilitating the practice of law by solo practitioners and small firms.

I believe that the small firm will become more economically viable and deliver better legal services if it sets up legal systems for routine matters which require forms. For example: bankruptcy, collections, contracts, corporations, estate planning, partnership, probate, real estate and wills. The large firm already has established these systems but few small firms are tied in to those systems. Very often, each small firm must reinvent the wheel for a routine matter. The cooperative would either appoint a committee to prepare a certain system or contract out the preparation of the system to an expert in that field of specialization. The systems would then be copyrighted and sold to cooperative members.

The cooperative could investigate other ways to increase economic performance by cooperative members. For example, it should be able to negotiate discounts on purchases for office supplies and so forth by cooperative members.

In fact, the cooperative will do many of the things that are done in other states by state bar associations. However, I do not believe that the activities which I propose to be handled by the cooperative should be handled by the Alaska Bar Association. It may be that there could be some sort of coordination of effort with local bar associations and the Alaska Bar Association.

If there is anyone interested in this proposal, please write me. If there is sufficient interest, an organizational meeting could be held in the near future.

Robert E. Price

Private Adoptions

Ladies and Gentlemen:

The Alaska Hospital would like to remind attorneys who are handling private adoptions to contact the hospital as far in advance as possible. Financial arrangements can then be made, and the Social Services Department can be alerted so that the actual birth and relinquishment will be completed with the most speed, confidentiality, and support for the relinquishing parents.

Please contact the hospital's Patient Financial Adviser, as well as a counselor in the Social Services Department.

Sincerely,
Patt Sandberg
Social Services Department

Garrison Out of Bondage, Frankel Into Discipline

Bill Garrison Interview

by Judith Bazeley
Ace Reporter

After spending three years disciplining attorneys and sorting out attorney-client misunderstandings, outgoing Bar Counsel, **Bill Garrison**, plans to spend several months vacationing in Thailand and the Philippines. Given "the miserable summer" he feels in no hurry to get back for "a miserable winter," but he is sure that he will eventually return to lawyering in Alaska, possibly to private practice. However, he does not totally discount the possibility of "getting into some type of business in Southeast Asia."

The Bar Association did not have full-time Bar Counsel before Garrison took the job in 1977. Discipline had been contracted out to five or six attorneys and one of Garrison's initial tasks was to gather in and sort out all pending matters. "Very frankly this place was a mess. You couldn't figure out what was going on."

Revised Rules

In the three years since Garrison took the job the disciplinary rules have been "for all practical purposes revised," and it is his opinion that while they are not perfect they work much more efficiently. In addition, increased staff has made the discipline section of the Bar Association operate more effectively. Besides full-time Bar Counsel there is now a full-time secretary and a full-time investigator. "But, we need more staff," adds Garrison. Increased consumer awareness and involvement over the past several years has bred an increase in complaints to the Bar Association. At the same time one of the time consuming aspects of Bar Counsel's job is handling of admissions appeals and Garrison feels it would be beneficial to have an additional attorney, full or part time, to handle these matters. Another factor Garrison cites as contributing to overall improvement in the discipline section over the past three years has been the cooperation of a very receptive and hardworking Board of Governors.

Garrison says that most of the attorneys he has dealt with since becoming Bar Counsel are both consciencious and competent. "A lot of the problems don't involve violations of the Code of Professional Conduct and Responsibility, but are really breakdowns in communication between lawyers and their clients." According to Garrison this is particularly true in the field of domestic relations where clients are often unhappy with their spouses, the judge, the law, the spouse's attorney and ultimately their own attorney.

Interference with Justice

In the first quarter of 1980 Garrison says that 45% of the files closed fell in the category known as interference with justice. This is a broad and inclusive grouping including but not limited to overzealous representation, misconduct by government lawyers, failing to represent clients within the bounds of the law, communicating with a party of adverse interest, threatening criminal prosecution to obtain an advantage in a civil matter, contact with officials, restrictive employment agreement and aiding the unauthorized practice of law.

Garrison says that the office of Bar Counsel is in good shape now with the exception of problems created by Sunset legislation and recent legislative inaction of which he says "nobody can really know what is going to happen. It is a bridge we will have to cross when we come to it."

The Man for Nome

Garrison came to Alaska from Minnesota where he had been in private practice for five years doing largely personal injury work. He was lured here by the offer of the Nome District Attorney position of which he says "they had not had a District Attorney up there for some time and couldn't find anybody stupid enough to go there." Nonetheless, he enjoyed Nome and the fact that he was the prime law enforcement officer for 145,000 square miles of Native Alaska. "Juneau just sort of forgot I was there...I would get a call and a memo every once in a while from somebody asking me what was going on, and then they let me run my own program which I enjoyed very much." Garrison mutes his self-deprecation by pointing out that he survived at least a couple of administrative changes.

When asked if he isn't a logical applicant for the Nome Superior Court Judgeship, Garrison replied that he gave the position a considerable amount of thought, but ultimately and for a variety of reasons, decided not to submit an application. Of the Nome position he said, "I think that the Court should consider some type of circuit court or traveling judgeship," adding that he feels that the court administration may not be adequately sensitized to the problems of rural judgeships.

Garrison doesn't think that his successor, **Marv Frankel**, who he describes as intelligent, common sensical, well-known and possessed of the necessary integrity required of Bar Counsel, will experience any problems with the position.

Interview with Marv Frankel

by Judith Bazeley
Ace Reporter

Marv Frankel returned from an eight-month sabbatical in Nevada and California with the intention of resuming private practice. At the recent Alaska Bar Convention he learned that the Bar Association was seeking a replacement for Bar Counsel, **Bill Garrison.** He decided to apply because "it... sounded very challenging, particularly at this rather crucial time in the relationship of the bar, the public and the legislature." He is not deterred by the uncertain future of the Bar Association and its disciplining section—"hopefully, sooner or later, it will be resolved satisfactorily to the Bar, the public and the legislature." "My general philosophy is that nothing in life is permanent."

In his life so far Frankel has had three careers, as an engineer, a business man and a lawyer. Originally from Cleveland, Ohio, he came to Alaska in 1966 to work in the United States Attorney's Office. After three years in that position he went into private practice with the firm of Robison, McCaskey and Frankel. For 10 years he was engaged in general practice emphasizing business law, taxation, bankruptcy, estate planning and domestic relations. Most recently, after leaving Alaska nine months ago, he worked with the Gaming Control Board in Nevada.

Frankel has always been active in Bar Association activities serving on various substantive committees as well as on grievance and fee arbitration committees. In addition he has been Director of the Boys Club of Alaska, a program director for the Beth Shalom Synagogue, a director of the Anchorage Chapter of the NAACP and, despite his active membership in the Jewish congregation, president of Catholic Charities of Alaska. He still retains his membership in a number of civic organizations.

Frankel says that while in private practice he was always a strong exponent of preventive law, attempting to advise and guide clients prior to, and if appropriate, in avoidance of, the event of major litigation. He feels that these skills will be of assistance to him as Bar Counsel in helping to defuse complaints individuals may have against one another.

Along these lines he sees the possibility of a stronger program of informing the bar membership of the nature of the complaints received by Bar Counsel. Frankel agrees with outgoing Bar Counsel Bill Garrison that a lot of the complaints are non-meritorious and result from attorney-client misunderstandings. Advising the bar members of these complaints might encourage them to try harder to prevent complaints arising in the first instance. Frankel agrees with comments by his predecessor that increased staff for the Bar Association's discipline section is probably necessary.

Frankel states that he has always believed in good self-disciplinary procedures and adds that another possibility he is considering suggesting to the Board of Governors is a stronger public relations program geared to informing the public and the legislature that the Bar does have an efficiently run, impartial, progressive disciplinary procedures with the hopeful end result of establishing stronger public confidence in the areas of discipline and fee arbitration.

Frankel would also like to see a program designed to encourage members of the Bar to call the Bar Association's discipline section with questions they may have with regard to their professional obligation, prior to making decisions. "I would suspect that most of the members of the Bar realize, at a given time, that certain things may be questionable or subject to client misunderstanding, and they make an educated professional decision, but they might be assisted in that decision through this office if there were such a program in effect."

On a personal note, Frankel believes that Anchorage will be home for him and his "beautiful and illustrious wife" for the rest of his life. He also says "over the years I have had tremendous respect for the caliber of the members of the Bar and the legal profession, and, of course, all of the good things and ethical things never made the newspapers and the occasional problem that arise, I think, erroneously give members of the press and members of the general public the wrong impression. There is no profession that is perfect, whether in law or medicine or anything else, but I think, by and large, in my experience, we have an excellent Bar here and the general membership has a high degree of responsibility in its conduct and ethical behavior."

He also added that he plans to stay in law for the rest of his life and hopes that his health will always permit him to avoid the necessity of retirement.

ALASKA COMPUTER EMPORIUM
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Judge Mary Alice Miller

Mary Alice Miller, Fairbanks district court judge, retired on June 20, 1980 after almost 13 years on the bench. She and her husband, Orlando, will continue residing in Fairbanks. Mr. Miller retired as history professor at the University of Alaska at Fairbanks in June 1978. Their plans for the future include extensive travel in Alaska, Japan, Mexico, Guatemala, Europe and Asia.

Judge Miller was appointed to the district court by Governor **William Egan** effective December 1, 1967. Her appointment brought the total number of district judges in Fairbanks to three. **Hugh Connelly** and **Benjamin Delahay, Jr.** were the other two Fairbanks district judges. The superior court judges serving when she was appointed were **Everett Hepp** and **William Taylor.**

Judge Miller was born in Chicago, Illinois and moved to Washington, Missouri in 1930 where she graduated from high school in 1938. After attending Central College at Fayette, Missouri for two years she enrolled in the University of Missouri where she received her law degree in 1944. Following World War II, she began private practice of law in 1947 in Steamboat Springs, Colorado. She married her husband Orlando in Houston in 1952. They came to Alaska in August 1955 when he was transferred by the Air Force to Eielson Air Force Base near Fairbanks.

Judge Miller worked as a secretary for the law firm of Collins and Clasby until she passed the Alaska bar examination in October 1956. She remained with the firm as an associate attorney until December 1967 when she was appointed to the Fairbanks district court.

Court employees gave Judge Miller a surprise potluck luncheon on June 19. The gathering was in the Fairbanks grand jury room where employees, state troopers and others presented her with gifts and congratulations. Area Court Administrator **Pat Aloia**, District Court Judge **Monroe Clayton** and Superior Court Judge **Warren Taylor** joined Judge Miller at the head table. Judge Taylor presented her with an Eskimo figurine by artist **C. Alan Johnson.** On her last day, June 20, the clerks decorated her parking space with crepe paper streamers and a specially decorated file folder with many court seals upon it. Completing the decorations was a sign, "Happy Retirement."

On Friday, July 11, the Tanana Valley Bar Association will honor Judge Miller at their "Annual Christmas Party in July" to be held at the Alaskaland Wilderness Park in Fairbanks. Friends of the Tanana Valley Bar Association, bar members and ocurt system employees are invited.

(Stolen from the Court System Newsletter.)

ODE

Mary Alice Miller (may I call you "MAM"?),
Why did you retire and leave us in this jam?

Do you know who might replace you,
Are you aware
Your robes might soon encircle
The frame of **Jane Koovare?**

Had you thought when you retired
That **Robert Downes** and crew
Would want to fill your place so fast,
Would you thus have bid adieu?

Had you known that **Hershel Crutchfield**
—Whose friends both call him "Ed"—
Wanted to wear your clothes so bad,
Would you have said:

I leave you now.
Do not stand up.
Unjudged I be.
Lift up your cup.

What would you have done, my friend,
If I had said to you,
The judge who follows may well be
A Cheyenne or a Sioux?

They may select a red man
With a name like "Lonesome Pine"
Who will think that jurisprudence
Was invented by Judge **Cline.**

There may be several ladies
Vying for your post,
Eager to sit upon the bench
(Immediately following their eggs and toast).

Your seat, after all, is a woman's seat,
A woman's behind should fill it.
Christopher, Robert, Hershel, hear,
None of you has an appropriate rear.

Downsey, I can't understand it,
Why do you want this job?
Look what it did to your partner Jay.
Sob!

Chris, you're really too short to be a judge.
Judges should be tall, at least five-ten
(Unless we're talking about a woman judge,
In which case, being a shorty is OK,
Which brings me to **Dick Savell,**
The shortest person at this picnic.)
...

MAM, do you want Natalie
To be apprentice judge,
Before she's even changed her name
Or learned the art of making fudge?

Do you really have to leave us?
Do you really want to go?
Won't you miss us terribly?
Won't you change your yes to no?

You leave us now.
We will stand up.
Unjudged you be.
Lift the cup.

—On the occasion of the annual Christmas party of the Tanana Valley Bar Association, July 11, 1980, honoring **Mary Alice Miller.**

Alaska Bar Association Board Meetings 1980-1981

September 7, 8, 9	Fairbanks
October 23, 24, 25	Anchorage
December 11, 12, 13	Anchorage
January 29, 30, 31	Anchorage
April 2, 3, 4	Anchorage
June 1, 2, 3	Juneau

UA-Anchorage Offers Pre-Law School Program

An opportunity for people interested in pursuing a law school education will be offered this summer at UAA in the form of a four-week Pre-Law School Introductory Program (JUST 250 and JUST 256) from August 4-29, 1980. The major focus of the program is aimed at Alaska Native college graduates and students, however, other interested applicants will be considered as well.

The purpose of the program will be to introduce participants to all aspects of law school requirements. The intensive, four-week course will be offered for six optional academic credits. Regular classes will be held Monday through Friday from 8:30 a.m. to 4:30 p.m. The classes are designed to develop basic analytical, discussion, reading, and writing skills, all of which are extremely valuable in preparing for the Law School Admission Test (LSAT) and law school. Students will also be familiarized with LSAT and law school application procedures with follow-up assistance being given during the next year.

The course will be taught by **Dr. Edward J. Bronson** assisted by members of the Anchorage bar. Dr. Bronson is a professor of Political Science at California State University, Chico. He has extensive experience in teaching this type of program to minority groups and in placement of minority students in many law schools.

Costs to students should be minimal, except for those who wish to attend the program for academic credit. Course materials will be provided and housing will be available.

Those interested in attending this Pre-Law School Introductory Program, which is supported by the Alaska Bar Association's Committee on Legal Educational Opportunities, or would like more information should contact **Lois Sanborn** or **John Havelock** at the Justice Center, University of Alaska, Anchorage, 3211 Providence Avenue, Anchorage, Alaska 99504 or call 263-1810.

Vacancy on Supreme Court

A vacancy on the Supreme Court of Alaska will be created effective August 15, 1980 by the appointment of Justice Robert Boochever to the United States Court of Appeals for the Ninth Circuit. Applications are now being accepted for the office of Associate Justice of the Supreme Court of Alaska.

A Supreme Court Justice must be a citizen of the United States and of the state; a resident of the state for five years immediately preceding appointment; have been engaged for not less than eight years immediately preceding appointment in the active practice of law; and at the time of appointment be licensed to practice law in Alaska. For these purposes, the active practice of law is defined in AS 22.05.070.

The annual salary of an Associate Justice is $70,068. A Justice is entitled to personal leave as established by the Administrative Rules of Court, state paid health and dental benefits, and retirement benefits under the judicial retirement system.

Interested persons should write or call the Alaska Judicial Council and request an application form. Such forms may also be obtained in person at the above address. All applications should include a statement from a physician assessing the physical capability of the applicant to perform the duties of a Supreme Court Justice.

Completed applications must be received by the Alaska Judicial Council no later than 4:30 p.m. on August 11, 1980.

Notice to Washington Bar Members

Peter A. Galbraith, Esquire, of Anchorage, has informed this office that the Washington State Board of Continuing Legal Education has approved the Alaska Bar Association's Professional Update Conference for credit under the Washington Mandatory Continuing Legal Education Rule. Credit for the program was awarded in the amount of ten (10) credit hours. Please note that receipt of full credit is based upon attendance at the entire Conference.

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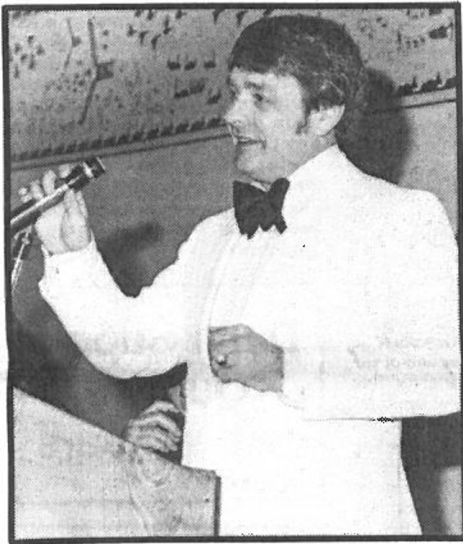

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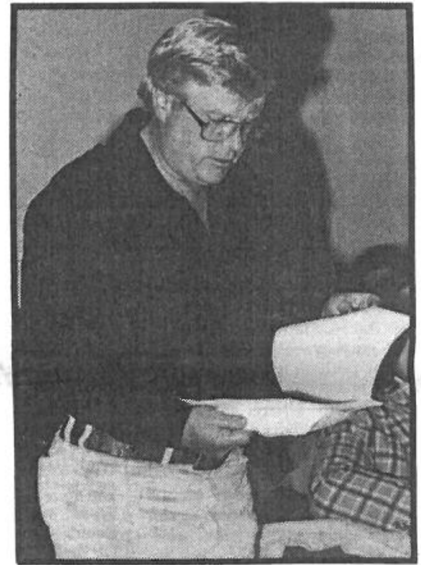

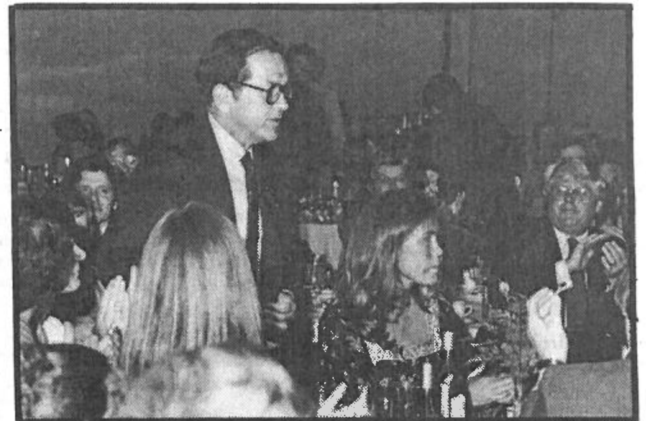

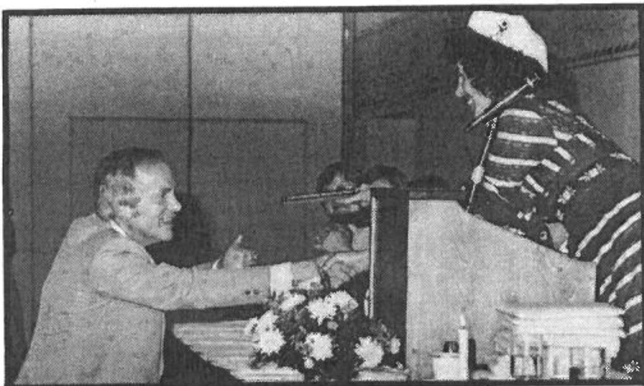

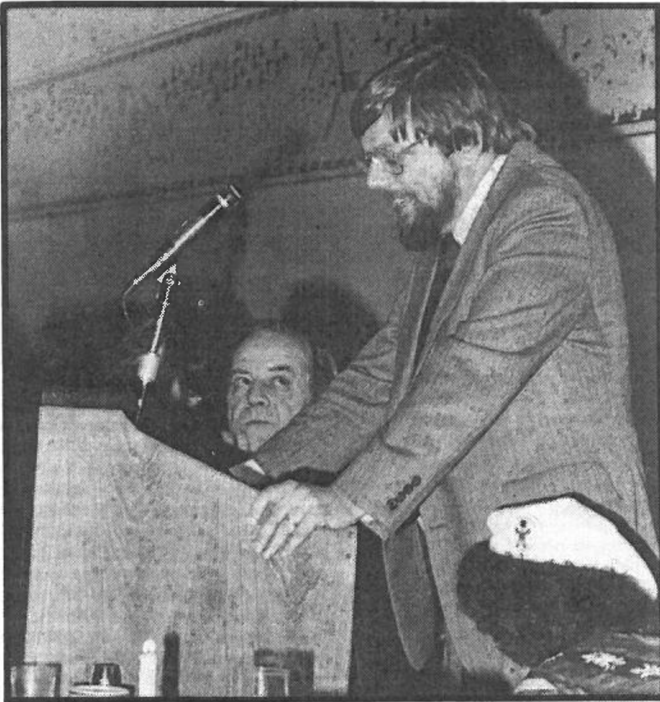

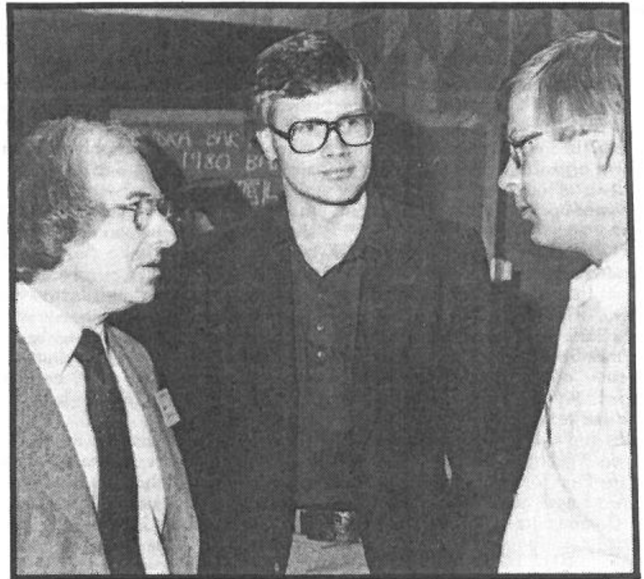

BOG Requests Input

As you are all aware, the Alaska Bar Association has been undergoing Sunset review by the Legislature. At the same time we have been reviewing our own organization and listening to the views of our members. We now solicit your opinion on some important issues.

The House Judiciary Committee has issued a report calling for continuation of the Alaska Bar with some changes. It passed a bill making the Alaska Bar a State agency with mandatory membership and providing for numerous other changes previously reported to you. On the floor of the House the requirement of mandatory membership was deleted and a section was added requiring Board of Governors members to file conflict of interest statements with the Alaska Public Offices Commission. No funding was provided for this new form of State agency.

The Senate passed a bill extending the Alaska Bar in its present form for four years.

The Alaska Supreme Court advised the Legislature that it favored a continued integrated bar association.

The legislative session ended with no bill passing both houses. The Alaska Bar is thus subject to Sunset as a statutory body on June 30, 1981, unless further action is taken. The Legislature also failed to appropriate any funds to the Alaska Supreme Court to support disciplinary action by the Bar.

At the June 14 annual meeting of the Alaska Bar Association in Anchorage, the members endorsed the continued self-regulation of the Alaska Bar. The membership rejected a proposal to turn discipline over to the Supreme Court and voted for a special assessment and dues increase for 1981 to make up for the loss of State funds and to pay for continuation of bar association activities.

The Alaska Bar Association now faces several alternatives for action. One is integration by court rule in conjunction with, or as an alternative to, legislative action. The Board of Governors has therefore published the following rules for consideration and comment.

Regardless of what the Court does, it can be expected that legislation affecting the Alaska Bar will also be considered next year. Accordingly, comment on legislative alternatives is also appropriate.

Proposed Bar Rules

Re: Integration Under Court Rule

Rule 65: *Name and Preamble.*

The name of the body governed by these Rules shall be the Alaska Bar. The Alaska Bar is an independent professional body created by and existing under the authority of the Constitution and laws of the State of Alaska. The Supreme Court of the State of Alaska is the highest judicial tribunal of the State and has common law supervisory powers over all officers of the judicial system, including lawyers.

Rule 66: *Membership.*

Section 1. All persons licensed to practice law in this state shall become members of the Alaska Bar immediately upon the issuance of a license to practice by this court.

Section 2. All members in good standing as of the effective date of this rule shall be considered to be members.

Section 3. A person licensed to practice law in this state who, on the effective date of this rule, is not enrolled on the membership rolls, shall be reinstated as a member only in accordance with the Alaska Bar Rules.

Section 4. No person shall engage in any way in the practice of law in this state unless the person is an active member of the Alaska Bar in good standing, except that a member in good standing in another jurisdiction may appear in the courts of this state under the rules this court may prescribe.

Section 5. The status and categories of membership shall be determined and governed by the bylaws of the Alaska Bar.

Section 6. It shall be the duty of each member of the Alaska Bar to immediately advise the Executive Director of any change of mailing address.

Rule 67: *Board of Governors.*

Section 1. The Board of Governors shall be the governing body of the Alaska Bar. Members of the Board shall receive no salary.

Section 2. The Board of Governors shall consist of nine active members elected by the active members of the Alaska Bar under bylaws and regulations promulgated by either the Board of Governors or members of the Alaska Bar.

Section 3. The Board of Governors may adopt bylaws and regulations:

(a) concerning membership and the classification of membership in the Alaska Bar;

(b) providing for employees of the Alaska Bar; the time, place and method of their selection; and their respective powers, duties, terms of office and compensation;

(c) concerning annual and special meetings;

(d) providing for publication of an official publication of the Alaska Bar;

(e) concerning the collection, deposit and disbursement of membership fees, penalties and all other funds;

(f) providing for the organization and government of local subdivisions of the Alaska Bar;

(g) providing for all other matters affecting in any way the organization and functioning of the Alaska Bar.

Section 4. The Board of Governors may

(a) approve and recommend to this court additional rules for promulgation by the court, including rules concerning admission and discipline and defining the practice of law;

(b) sue and be sued in the name of the Alaska Bar in a court of competent jurisdiction;

(c) fix the annual membership fee for all categories of members.

Rule 68: *Committees and Sections.*

The Board of Governors may create such standing committees and sections as it may deem desirable. The powers and duties of the committees and sections shall be prescribed by the bylaws.

Rule 68: *Unauthorized Practice of Law.*

The Supreme Court of the State of Alaska has inherent jurisdiction to prohibit the unauthorized practice of law. The practice of law by any person except as provided for in these Rules shall constitute a contempt of the Court.

Justice Boochever to Join the Ninth Circuit Court of Appeals

In late May the White House announced that President Carter would nominate Alaska Supreme Court Justice Robert Boochever to replace Judge Shirley M. Hufstedler on the Ninth U.S. Circuit Court of Appeals. Judge Hufstedler left the Ninth Circuit Court earlier this year to join President Carter's cabinet as Secretary of the newly created Department of Education.

The President's nominations for federal judgeships must be confirmed by the United States Senate; and before the Senate can confirm them, the Senate Judiciary Committee must approve all nominees. The Senate Judiciary Committee hearing on Justice Boochever's nomination was held on June 9, and Justice Boochever passed this stage of the appointment process without difficulty.

Prior to the hearing, the committee reviewed an FBI report on Justice Boochever and a questionnaire completed by him on his background, financial holdings and judicial philosophy. The chairman at the hearing, Senator Howell Heflin (D-Alabama) was a former chief justice of the Alabama Supreme Court who knew Justice Boochever from his term as chief justice of the Alaska Supreme Court. Senator Heflin stated that Justice Boochever was well qualified for the position on the Ninth Circuit and noted that he had been endorsed by the American Bar Association. The Senator then asked Justice Boochever to make a statement on his behalf.

In his statement Justice Boochever noted that the Ninth Circuit receives 13 percent of its cases from Alaska, the fourth largest caseload from any of the nine Western states within the jurisdiction of the court. He said it would be an advantage to have an Alaskan on the court who understands the unusual aspects of the state.

Senator Ted Stevens (R-Alaska) introduced Justice Boochever at the hearing and urged his early confirmation, stating that if confirmed by the Senate, Justice Boochever would be the only Alaskan on the Ninth Circuit Court and that his appointment would "correct a long standing inequity in that no Alaskan has served on that court or any other federal appellate court for as long as I can remember."

The committee asked no questions of Justice Boochever and no objections were raised to his nomination. However, committee member Senator Robert Dole (R-Kansas) read a lengthy statement from Senator Strom Thurmond (R-South Carolina) who objected that the minority had not been given enough time to go over the investigative reports on several recent judicial nominees and that the minority would exercise its prerogative to call witnesses back before the committee if it decided this was necessary. This objection apparently concerned the recent rash of U.S. District Court judicial appointments and was not directed at Justice Boochever, because there was no delay in the committee's approval of his appointment. Justice Boochever was notified on June 17 that the committee had voted 9-0 to approve his nomination, and the next day the Senate unanimously confirmed it.

Justice Boochever plans to resign from the Alaska Supreme Court effective August 16, although his last official day at work will probably be about July 15. He will begin work with the Ninth Circuit on September 2.

The Ninth Circuit Court is headquartered in San Francisco, and most of its hearings are held in that city and in Los Angeles. Hearings are, however, also held in other major cities within its jurisdiction, including Seattle, Portland, Phoenix, Boise and Anchorage. There are 23 authorized judgeships on the court, 19 of which are currently filled. The court sits in three-judge panels to hear cases.

Justice Boochever's work on the court will be very similar to his work on the Alaska Supreme Court, hearing appeals from lower courts rather than presiding at trials. One of the main differences will be that in interpreting the U.S. Constitution, the Ninth Circuit Court is subordinate to the U.S. Supreme Court, while the Alaska Supreme Court has the final word in interpreting the Alaska Constitution.

Justice Boochever plans to continue living in Juneau and to open an office in the federal building there. He will commute to the hearings in the various cities in which the court sits. He does not expect that he will have to travel any more than he has in the past

[continued on page 11]

IMMIGRATION

Keith W. Bell of the Alaska and Washington State bars, announces his availability to lawyers for consultations and referrals in US Immigration and Nationality Matters re: applications for non-immigrant and immigrant visas, admissions to United States, adjustment of status to permanent residents, deportation hearings, and other proceedings before the US Immigration Service.

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IN THE SUPREME COURT OF THE STATE OF ALASKA ORDER NO.

Amending Subparagraph (2) of Paragraph (e), Rule 5, Alaska Rules of Criminal Procedure, Relating to Preliminary Hearings in Felony Cases.

IT IS ORDERED:

Subparagraph (2) of paragraph (e), Rule 5, Alaska Rules of Criminal Procedure, is amended to read:

(2) Right to Preliminary Hearing.

(i) The judge or magistrate shall inform the defendant of his right to a preliminary hearing. A defendant charged with a felony is entitled to a preliminary hearing if he waives his right to grand jury, unless:

(aa) he waives the preliminary hearing; or

(bb) an information has been filed against him, with his consent, in the superior court; or

(cc) a judge or magistrate determines ex parte that the prosecuting attorney has shown by a preponderance of the evidence from affidavits or otherwise that one or more of the following circumstances establish that a preliminary hearing would not be in the best interests of justice:

[i] a witness shall be subjected to the likelihood of substantial danger;

[ii] an informant's identity should not be revealed because of the likelihood of impairment of an investigation or substantial danger to the informant;

[iii] the statute of limintations may run;

[iv] the defendant is not available to process;

[v] testimony in open court would result in unnecessary emotional trauma or embarrassment to a complaining witness in a case involving sexual assault;

[vi] testimony of a child witness is essential in a case involving child abuse or sexual assault;

[viii] a complex case involves multiple counts, multiple defendants, or voluminous evidence so that a preliminary hearing would result in undue delays and expense;

[ix] when all multiple defendants do not waive grand jury;

[x] there are substantial security problems; or

[xi] secrecy is essential to the apprehension of other suspects.

(ii) Unless a judicial determination as provided in (i)(cc) above has been made that a preliminary hearing would not be in the best interests of justice, no grand jury indictment shall be sought without first providing a reasonable opportunity to proceed by preliminary hearing as provided by these rules.

(iii) At his first appearance on a felony charge, the defendant shall be informed by the court of his right to have the case against him heard by a grand jury and his right to waive the grand jury and receive a preliminary hearing. If the defendant does not waive his right to a grand jury within 7 days after consultation with defense counsel or, in any event, within 15 days of the initial appearance, then unless the court allows an extension of time, further proceedings shall be by grand jury.

(iv) If after having had the opportunity to consult with defense counsel the defendant waives both grand jury and preliminary hearing, the judge or magistrate shall forthwith hold him to answer in the superior court and further proceedings shall be by information.

(v) Waiver of grand jury and preliminary hearing shall be made in open court on the record. The judge or magistrate shall not accept the waiver without first determining, by addressing the defendant personally, that the waiver is made knowingly, voluntarily and after opportunity to consult with defense counsel.

(vi) In all cases in which a defendant is entitled to a preliminary hearing, the judge or magistrate shall schedule the preliminary hearing to be held within a reasonable time, but in no event later than

(aa) 10 days following the defendant's waiver of grand jury, if the defendant is in custody, or

(bb) 30 days following the defendant's waiver of grand jury, if the defendant is not in custody.

With the consent of the defendant and upon a showing of good cause, taking into account the public interest in prompt disposition of criminal cases, the judge or magistrate may extend the time limits specified in this subsection one or more times. In the absence of consent by the defendant, the judge or magistrate may extend these time limits only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

DATED:__________

EFFECTIVE DATE:__________

Bar members wishing to offer written comments or suggestions on the proposed rule should submit their responses on or before August 15, 1980 to:

Hon. Jay A. Rabinowitz
303 K Street
Anchorage, Alaska 99501
(ATTN: Preliminary hearing rule)

IN THE SUPREME COURT OF THE STATE OF ALASKA ORDER NO.

Amending Subsection (11) of Paragraph (c), Rule 24, Alaska Rules of Criminal Procedure, Relating to Challenges of Jurors for Cause.

IT IS ORDERED:

Subsection (11) of paragraph (c) of Rule 24, Alaska Rules of Criminal Procedure, is amended to read:

(11) That the person within the previous two years:

(i) has been a party adverse to the challenging party or attorney in a civil action; or

(ii) has complained against or been accused by the challenging party or attorney in a criminal prosecution.

DATED: July 23, 1980

EFFECTIVE DATE: September 1, 1980

(Matthews, J., dissents from part (i) of subsection (11) which imposes a limitation of two years pertaining to challenges in civil actions.

IN THE SUPREME COURT OF THE STATE OF ALASKA ORDER NO.

Amending Rule 35, Alaska Rules of Criminal Procedure Relating to the Modification and Reduction of Sentences.

IT IS ORDERED:

1. Paragraphs (b), (c), (d), (e), (f), (g), (h), (i), (j) and (k) of Rule 35, Alaska Rules of Criminal Procedure, are redesignated as paragraphs (c), (d), (e), (f), (g), (h), (i), (j), (k) and (l), respectively.

2. New paragraph (b) is added to Rule 35, Alaska Rules of Criminal Procedure, to read:

(b) **Modification or Reduction of Sentence—Changed Conditions or Circumstances.** The court may modify or reduce a sentence at any time during a term of imprisonment if it finds that conditions or circumstances have changed since the original sentencing hearing such that the purposes of the original sentence are not being fulfilled.

(1) The sentencing court is not required to entertain a second or successive motion for similar relief brought under this paragraph on behalf of the same petitioner.

(2) No sentence may be reduced or modified so as to result in a term of imprisonment which is less than the minimum required by law.

3. Paragraph (1) of Rule 35, Alaska Rules of Criminal Procedure, as redesignated under Part 1 of this order, above, is amended to read:

(1) **Suspension of Sentence and Probation After Judgment.** Within 120 days after judgment of conviction of any offense, the court may entertain an application for suspension of sentence or probation in the cases prescribed by law.

DATED: July 23, 1980

EFFECTIVE DATE: August 1, 1980

IN THE SUPREME COURT OF THE STATE OF ALASKA ORDER NO.

Nine Part Order Amending Rules 1, 3, 5, 11, 31, 45 and 56 of the Alaska Rules of Criminal Procedure

IT IS ORDERED:

1. Rule 1, Alaska Rules of Criminal Procedure, is amended to read:

Rule 1. Scope

These rules govern the practice and procedure in the superior court in all criminal proceedings and, insofar as they are applicable, the practice and procedure in all other courts in criminal proceedings.

2. Paragraph (a) of Rule 3, Alaska Rules of Criminal Procedure, is amended to read:

(a) The complaint is a written statement of the essential facts constituting the offense charged. A citation issued for the commission of a misdemeanor or a violation shall have the same force and effect as a complaint and shall be filed as a complaint; provided, that the citation satisfies the requirements of a valid complaint as provided by these rules. A complaint or citation shall be made upon oath or af-

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BOOCHEVER

[continued from page 10]

as a justice on the Alaska Supreme Court.

Justice Boochever has had a very distinguished legal career. Originally from New York, he came to Alaska in 1946 after graduating from Cornell University Law School (class of 1941) and serving four years in the U.S. Army during World War II. He was an assistant U.S. Attorney for a year and then joined the Juneau law firm of Faulkner and Banfield. After 25 years in private practice, he was named to the Supreme Court of Alaska in 1972.

We asked Justice Boochever what his thoughts are on leaving the position he has held for eight years as a justice (three of those years as chief justice) of the Alaska Supreme Court. His answer was:

"Although I'm obviously pleased with the new appointment, it is with great regret that I'll be leaving the Alaska Court System. I've considered it a great privilege to serve on the Supreme Court and particularly enjoyed the association with the other justices, each of whom I admire and respect.

"I appreciate the cooperation I've received over the years both from my own staff and from the administrative staff. I've never had any situation in which any reasonable request wasn't promptly handled.

"I'm pleased that I shall be able to maintain a home in Alaska and hope not to lose contact with the people with whom I've been associated on the Alaska Supreme Court."

(Stolen from the Court System Newsletter.)

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Bar Officers Picked

Hunt, Fisher, Kennedy, Wade Serve as New Officers

The annual bar convention unanimously endorsed the Board's selection of **Karen Hunt** as President-Elect, **Stanley Fisher** as Vice President, **Pat Kennedy** as Treasurer and **Jerry Wade** as Secretary of the Alaska Bar Association.

Karen Hunt was recently reelected to her second term on the Board of Governors. Her tenure as President of the Bar Association will begin in June of 1981 assuming that there is a Bar Association to be President of at that time. Fisher, Kennedy and Wade will serve in their new offices for the 1980-1981 term.

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RULES 1, 3, 5, 11, 31, 45, & 56

[continued from page 11]

firmation before any judge or magistrate, except that the following complaints and citations may be signed before any persons authorized by law to administer oaths or affirmations:

1. A complaint or citation for a traffic infraction as defined in Title 28 of the Alaska Statutes.

2. A complaint or citation for a misdemeanor where arrest has been made without a warrant.

3. A citation which the defendant has signed thereby promising to appear.

3. Subparagraph (1) of the paragraph (a) of Rule 5, Alaska Rules of Criminal Procedure, is amended to read:

(1) Except when the person arrested is issued a citation for a misdemeanor or a violation and immediately thereafter released, the arrested person shall be taken before the nearest available judge or magistrate without unnecessary delay. Unnecessary delay within the meaning of this paragraph (a) is defined as a period not to exceed 24 hours after arrest, including Sundays and holidays.

4. Paragraph (d) of Rule 5, Alaska Rules of Criminal Procedure, is amended to read:

(d) Misdemeanors and Violations. If the charge against the defendant is a misdemeanor or a violation the judge or magistrate shall proceed in accordance with Rule 1 of the Alaska District Court Rules of Criminal Procedure.

5. Paragraph (g) of Rule 11, Alaska Rules of Criminal Procedure, is amended to read:

(g) Record. An electronic recording shall be made of the entire proceedings except that no recording need be made of pleas to offenses for which the maximum possible penalty is a fine.

6. Paragraph (h) is added to Rule 11, Alaska Rules of Criminal Procedure, to read:

(h) Plea Withdrawal.

(1) The court shall allow the defendant to withdraw his plea of guilty or nolo contendere whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct manifest injustice.

(i) A motion for withdrawal is timely and is not barred because made subsequent to judgment or sentence if it is made with due diligence.

(ii) Withdrawal is necessary to correct a manifest injustice whenever it is demonstrated that:

(aa) The defendant was denied the effective assistance of counsel guaranteed by constitution, statute or rule, or

(bb) The plea was not entered or ratified by the defendant or a person authorized to act in the defendant's behalf, or

(cc) The plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed, or

(dd) The defendant did not receive the charge or sentence concessions contemplated by the plea agreement, and

(A) the proscuting attorney failed to seek or opposed the concessions promised in the plea agreement, or

(B) after being advised that the court no longer concurred and after being called upon to affirm or withdraw the plea, the defendant did not affirm the plea.

(iii) The defendant may move for withdrawal of the plea without alleging innocence of the charge to which the plea has been entered.

(2) Once the plea has been accepted by the court and absent a showing that withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw a plea of guilty or nolo contendere as a matter of right. Before sentence, the court in its discretion may allow the defendant to withdraw a plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea.

(3) A plea of guilty or nolo contendere which is not accepted or has been withdrawn shall not be received against the defendant in any criminal proceeding.

(7) Subparagraph (1) of paragraph (e) of Rule 31, Alaska Rules of Criminal Procedure, is amended to read:

(1) Offenses Against Property. When an indictment charges a theft or theft-related offense against property, on conviction of the defendant the jury shall ascertain and declare in the verdict the value of the property that was the subject of the crime.

8. Paragraph (b) of Rule 45, Alaska Rules of Criminal Procedure, is amended to read:

(b) Speedy Trial Time Limits. A defendant charged with a felony, a misdemeanor, or a violation shall be tried within 120 days from the time set forth in paragraph (c) of this rule.

9. Rule 56, Alaska Rules of Criminal Procedure, is amended to read:

Rule 56. Definitions.

As used in these rules, unless the content otherwise requires:

(a) "Prosecuting Attorney" includes the attorney general, assistant attorneys general, deputy attorneys general and any other attorneys, legal officers and assistants charged by law with the duty of prosecuting the violation of any law, statute or ordinance.

(b) "Magistrate" includes magistrates, district judges, superior court judges and any other judicial officer authorized by law to conduct a preliminary examination of a person accused of a crime.

(c) "Presiding Judge" includes the duly-designated presiding judge of the superior court in each judicial district or, in his absence, the person designated presiding judge pro tem.

(d) "Offense" means conduct for which a sentence of imprisonment or payment of a fine is authorized by law.

(e) "Misdemeanor" means an offense for which a sentence of imprisonment for not more than one year may be imposed.

(f) "Violation" means:

1) an offense as defined in AS 11.81.900(b)(55);

2) a traffic infraction as defined in Title 28 of the Alaska Statutes; or

3) any other offense under state or local law which is punishable only by a fine.

DATED: July 23, 1980
EFFECTIVE DATE: August 1, 1980

IN THE SUPREME COURT OF THE STATE OF ALASKA ORDER NO.

Amending Paragraph (j) of Rule 1, Alaska District Court Rules of Criminal Procedure.

IT IS ORDERED:

Paragraph (j) of Rule 1, Alaska District Court Rules of Criminal Procedure, is amended to read:

(j) **Rules Inapplicable in Misdemeanor Cases.** In the case of a misdemeanor or violation the provisions of the following Rules of Criminal Procedure shall not apply:

(1) Rule 5, relating to preliminary hearings; and

(2) Rule 32(c), relating to presentence investigation.

DATED: July 25, 1980
EFFECTIVE DATE: August 1, 1980

Extradition Procedures Cumbersome

CHICAGO—Fifty-year old extradition procedures are "too cumbersome" to meet the needs of a society that travels on interstate highways and is guided by computer technology, according to a committee of the National Conference of Commissioners on Uniform State Laws.

[continued on page 16]

To All Counsel and Parties to Completed Criminal Actions

Re: Attached Order from Honorable Ralph E. Moody, Presiding Judge, Third Judicial District

Please be advised that the Clerk's Office will immediately commence exhibit management and control procedures consistent with the attached Order from Judge Moody dated June 20, 1980. In that regard, all attorneys and parties to criminal actions which have achieved final judgment and for which the time for taking an appeal or filing a petition for review has expired are hereby notified of their obligation to withdraw any models, diagrams, exhibits and depositions which continue to remain in the custody of the Clerk of Court. Attorneys and parties will have thirty (30) days from the date of receipt of this notice to claim their exhibits and depositions and to arrange for their return. Those items not claimed within this 30-day period will be processed as outlined in Judge Moody's Order.

In the future, any models, diagrams, exhibits or depositions which remain in the custody of the Clerk of Court following completion of the action with the appeal time or the filing a petition for review time having expired will be immediately returned to the party or person who submitted these items or processed pursuant to the attached order.

Your cooperation in claiming these models, diagrams, exhibits and depositions as well as advising the Court, on a timely basis, of your intention to abandon these items will allow for their expedited processing and will be sincerely appreciated.

Dated at Anchorage, Alaska this 23rd day of June, 1980.

T. S. Moninski, II
Assistant Area Court Administrator/
Clerk of Court

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Closely Held Corporations Shareholder Compensation

by Thomas J. Yerbich

A persistent problem which plagues the owners of the closely held corporation is how to get the money out of the corporation while at the same time minimizing tax consequences. This post-incorporation problem occurs whenever the venture is profitable (unfortunately, not infrequently the reverse being true). There are basically four means by which the shareholder(s) of a closely held corporation may withdraw cash in excess of the corporation's operating requirements.

First, compensation for services rendered to the corporation, assuming the shareholder is employed by the corporation in some capacity; second, by payment to the shareholder of rental for real or personal property leased by the shareholder to the corporation for its use in its operations; third, by the payment of dividends; and fourth, by loans to the shareholders. This article will only address the first two alternatives, primarily because dividends are taxed at both the corporate and shareholder levels, and A.S.§10.05.213 prohibits loans by a corporation to its officers or directors. In addition, this article, because of constraints on its length, will not address compensation for services other than salary and bonuses. So-called "fringe" benefits, pension and profit-sharing plans, and deferred compensation are, in and of themselves, sufficiently complex as to require separate treatment.

The author acknowledges that this article is neither all-inclusive nor exhaustive on the subject. It is designed simply to acquaint the general practioner with the problem generally, and provide sufficient guidance to cope with or handle the usual situation.

Compensation

The basic rule with respect to compensation, as set forth in IRC §162(a)(1), is that deductible business expenses extend only to a "reasonable allowance for salaries or other compensation for personnel services actually rendered." Treas. Reg. §1.162-7(b) acknowledges that the reasonableness of compensation depends on the facts of each case, and in general indicates that "reasonable and true compensation is only such amount as would ordinarily be paid for like services by like enterprises under like circumstances." IRS most frequently questions the reasonableness of compensation where the parties are related taxpayers, such as closely held or controlled corporations, and such returns are more closely scrutinized by the tax court.[1]

In determining the reasonableness of salaries, there are certain fundamental rules which apply. The threshold or touchstone question which must always be answered is whether or not the compensation is for services actually rendered. Payment which is otherwise reasonable under the guidelines will be disallowed to the extent that it is in reality a distribution of corporate earnings, and not compensation for services actually rendered.[2] In addition, the test of reasonableness of the salary is applied to the individual salary being reviewed, not the collective salary paid all employees or even those employees similarly circumstanced or situated.[3] Also, as a result of the general presumption that the deficiency determination by IRS is correct, where the IRS challenges the reasonableness of the compensation paid, the taxpayer must be prepared to justify that the deduction claimed is reasonable.[4]

Major factors which may enter into a determination of reasonableness include nature, extent and scope of the employee's work; qualifications; duties performed; character and degree of responsibilities; amount of time required; ability and achievements; volume of business handled by the employee; size and complexity of the business; relationship of compensation to gross and net income; prevailing general economic conditions; cost of living in the locality; comparison of salaries with distributions to shareholders; prevailing rates of compensation for comparable positions in comparable businesses; salary policy as to all employees; and, in closely held corporations with a limited number of officers, the amount of compensation paid to the particular employees in previous years.[5] Where the Board of Directors sets shareholder-employee compensation prior to or at the beginning of the year, the action of the Board is entitled to great weight, but is not necessarily controlling.[6] If the affected officer controls the Board, the Board action is not given much weight.[7] Also, it is the total compensation package which is being scrutinized, including fringe benefits, pension and profit-sharing plans, stock options, etc.; accordingly, when fringe benefits are available to executives of comparable size firms, their absence may be an important factor in determining reasonableness.[8]

One ploy, not infrequently attempted, is to tie the compensation of the shareholder-employee to some form of contingent agreement (i.e., percentage of profits earned, or sales made). Although contingent salary agreements are normally considered reasonable[9] the view of the courts, including the tax court, is that contingent salary arrangements are not necessary as an incentive for shareholders since stock ownership provides the incentive normally sought to be obtained by contingent compensation agreements.[10] This same view extends to incentive bonuses; and a bonus which might be considered reasonable for a non-shareholder may nonetheless be unreasonable with respect to a shareholder.[11] As a consequence, year-end bonuses to shareholders are often considered a distribution of profits; however, they may be allowed if the services rendered are substantial, measured either qualitatively or quantitatively.[12]

Another device commonly utilized to both withdraw corporate funds other than by dividends, and to shift income from a higher bracket taxpayer to a lower bracket taxpayer, is the "employment" of relatives, particularly children. Payments made to relatives of the con-

[continued on page 15]

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

In the Matter of:)

THE DISPOSITION OF CRIMINAL EXHIBITS IN THE CUSTODY OF THE CLERK OF THE COURT RELATING TO DISPOSED CRIMINAL ACTIONS)

ORDER

In order to establish an ongoing system to manage and control exhibits and depositions in criminal action,

IT IS HEREBY ORDERED that, effective immediately, after final judgment has been entered in any criminal action and after the time has passed for taking of an appeal or filing a petition for review, all models, diagrams, exhibits and depositions filed in such actions shall be returned to the party or person who submitted these items at hearing or trial, without necessity of filing copies thereof.

If such models, diagrams, exhibits and depositions cannot be returned as above indicated, the Clerk shall have the authority to dispose of such items as follows:

For items of value, to arrange for the sale of such items at public auction, the date, time and general description to be published prior to the sale in a newspaper of general circulation. The proceeds, less cost of sale, will be deposited into the General Fund Revenue Account for the State of Alaska;

For items of value that cannot be sold, to attempt to locate charitable institutions or other public service organizations to which such items can be donated;

For all other items, to make any other appropriate disposition which is consistent with the rules of court, this order and sound exhibit management principles.

DATED at Anchorage, Alaska this 20th day of June, 1980.

Ralph E. Moody

Presiding Judge

Recommend for approval:
Larry Weeks, District Attorney

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Judicial Selection Reform

by Henry J. Camarot

The purpose of this article is to suggest that the Bar Association give serious consideration to endorsing an amendment to the Constitution of the State of Alaska that will establish a new procedure for the selection of judges.

Although I was a strong supporter of the Missouri Plan when it was first written into the State Constitution, I am very disappointed with the results I have seen, particularly in the last few years. I am convinced that the appointive processes for the judiciary needs overhauling so as to get it out of "politics," which was the prime objective when the Missouri Plan was first adopted. By "politics" I mean leaving the determination of who shall be a judge or justice to too limited a group of individuals who may be interested in personal or partisan gain. This can generally be more apparent in the governor's office, then with the judicial council members. Over the years, "politics", as I describe it, has been blatantly present in more instances than it should have been from both sources; in my opinion, some decisions and opinions reflected political influences. Anybody who does not think the selection of judges and justices is too deeply enmeshed in politics must be turning his blind side to the realism of what has been and is occurring.

In fairness, there are many judges and justices who have been selected who have proven themselves worthy of the office; but, unfortunately, there are also many who leave much to be desired. Indeed, many trial lawyers today will not try a case without a jury, manifesting a refusal to leave their client's fate solely in the judiciary. There are also Judicial Council members who are undoubtedly very consciencious in trying to fulfill the grave responsibility entrusted to them.

I think at the outset it's well that we take a brief examination of the appointive and the elective systems, and their pros and cons. I believe this is important because I'd like to believe after refreshing their memory this letter might stimulate others to get involved and spearhead a reappraisal to see if they agree to the necessity of a change in the State Constitution if we are to have judges out of politics.

Elective System

With the advent of "Jacksonian Democracy" during the 1830's citizens began to feel sentiments like those that the citizens of Alaska are beginning to express that the people should elect almost all public officials, including judges. (See *Anchorage Times* Editorial, Monday, June 16, 1980.) In 1846, the New York Constitutional Convention substituted popular election for appointment by the Governor or the Legislature. Interestingly enough, it was not until the admission of Alaska in 1958 that a new state adopted anything other than the elective concept. But by the end of the 19th Century dissatisfaction with the elective method had set in. In 1906 **Rosco Pound** argued:

"Putting courts into politics, and compelling judges to become politicians, in most jurisdictions has almost destroyed the traditional respect for the bench." In 1913, President **William Howard Taft** severely criticized partisan and non-partisan elections, and the basis of his criticism was that unqualified persons could run entirely on their own and get elected through aggressive campaigning. (See 1976 Spring Issue, *North Dakota Law Review* p. 327.)

Apppointive System

The Appointive Plan (sometimes called the appointive/elective plan) was first formulated by Professor **Albert M. Kales** of Northwestern University, given official endorsement by the American Bar Association in 1937. It was adopted by Missouri in 1940. Because that was the first state to so adopt it, it became known as the Missouri Plan.

The essentials of the merit of the Missouri Plan as set forth in the Alaska Constitution are as follows:

SECTION 5. Nomination and Appointment: The governor shall fill any vacancy in an office of supreme court justice or superior court judge by appointing one of two or more persons nominated by the judicial council.

SECTION 6. Approval or Rejection. Each supreme court justice and superior court judge shall, in the manner provided by law, be subject to approval or rejection on a nonpartisan ballot at the first general election held more than three years after his appointment. Thereafter, each supreme court justice shall be subject to approval or rejection in a like manner every tenth year, and each superior court judge, every sixth year.

SECTION 8. Judicial Council. The judicial council shall consist of seven members. Three attorney members shall be appointed for six-year terms by the governing body of the organized state bar. Three non-attorney members shall be appointed for six-year terms by the governor subject to confirmation by the majority of the members of the legislature in joint session. Vacancies shall be filled for the unexpired term in like manner. Appointments shall be made with due consideration to area representation and without regard to political affiliation. The chief justice of the supreme court shall be ex officio the seventh member and chairman of the judicial council. No member of the judicial council, except the chief justice, may hold any other office or position of profit under the United States or the State. The judicial council shall act by concurrence of four or more members and according to rules which it adopts." adopts."

Election v. Appointment (General Comparison)

The primary purpose of the Missouri Plan is that the Judicial Council is presumed to be able to give extensive consideration to a judicial candidate's ability and character in order to give the governor or the elected official making the appointment a list of the best qualified candidates available. But this allows the Governor to frequently choose the least qualified judicial candidate from a list of nominees submitted by the Council if motivated by political concerns.

Proponents of the elective system contend that the Judicial Council deprives the people of the right to choose the judiciary—that by substituting an appointive for an elective method, an erosion of the processes of a democracy occur. (See address by the Chief Justice of the North Dakota Supreme Court, **Alvin Strutz** at the North Dakota Constitutional Convention Committee on judicial functions and political subdivisions, August 30, 1971.) Chief Justice Strutz argues:

"If the people are not competent to elect a man as judge under our present 'elective' system, how in the name of common sense will they be any more competent to pass on a judge's right to be retained after he has served for three years in office? Remember: when a judge's name appears on the ballot and the people are asked to retain or reject him, they have no idea who is going to take his place if he is rejected. The tendency would be for the electorate to feel that they might get an even worse judge than the one whose name appears on the ballot, and therefore they would be inclined to vote for his retention."

What Chief Justice Strutz is stating is that under the Missouri Plan, judges get life tenor, causing an over-complacent judiciary.

The criticism has also been made that what happens is Bar politics is substituted for the politics of a campaign. Already, the contention has been made that the Bar has too great an influence on the selection of judges, and that they are not exercising it with professionalism. (See *Anchorage Times* quoted above.)

It has also been effectively argued that when a judge runs for office, he is involved in a campaign that costs money and requires management and assistance from members of the Bar or friends. The view is expressed that the impartial attitude needed by a judge in the administration of justice becomes suspect when contributors of money or work appear before this judge in court as either attorneys or litigants. However, it would appear that Judicial Canon Number 32 if adhered to, should meet this argument. That Canon reads:

"A judge should not accept any presents or favors from litigants or from lawyers practicing before him or from others whose interests are likely to be submitted to him for judgment."

And Judicial Canon 30 reads:

"If a Judge becomes a candidate for any judicial office he should refrain from all conduct which might tend to arouse reasonable suspicion that he is using the power or prestige of his judicial position to promote his candidacy or the success of his party.

"He should not permit others to do anything in behalf of his candidacy which would reasonably lead to such suspicion."

Interestingly enough, a recent study indicates that there is very little statistically meaningful difference between elected and appointed judges concerning performance on the bench, and that a judicial selection system is really only a policy choice between majoritaianism with more direct public participation in government and nonpartisan selection based on technical competence. (See **S. Nagel**, *Comparing Elected and Appointed Judicial Systems*, 36-38, 1973.)

In my view, the Elective System in Alaska does have the drawbacks complained of, although I would have to concede that in our state, which has a relatively limited population, oft times the voter is better acquainted with the candidate than he might otherwise be in larger jurisdictions. However, with the large turnover of population in this state, this assumption may not be totally valid.

I don't foreclose the elective process as being a valid means of choosing judges, and it should be reexplored against both the experience elsewhere and the unique Alaska backdrop. But there is merit in the argument that elective judges could be incompetents yet get elected because of the availability of money, (whether their own or from special interests), professional campaign managers, paid for media exposure, etc. in contrast to the more competent candidate who might not be able to afford or commit himself to an election campaign and shuns contributions because of the connotations that might attach.

The major problems that I see with the Missouri System in Alaska are primarily two-fold:

(1) I believe the Judicial Council is far too small in number, there have been times in the past when I was disappointed with the selection because it hardly appeared to me that the names of the most qualified candidate or candidates were transmitted to the Governor. Furthermore, it is the Governor who appoints the lay persons to the Committee and even though they are subject to Legislative approval, they are rarely if ever denied confirmation. Therefore, it can reasonably be argued that they are politically obligated to him if he chooses to indicate his preferences as to who should be the nominees.

(2) I believe much too much power is vested in the Governor. It is a single person who ultimately makes the judicial selections. He may have the assistance of a number of advisors, the Attorney General most logically being the main spokesman, but this does not alleviate the shortcoming. Indeed, it may accentuate it if an Assistant Attorney General's name is transmitted as a nominee.

The Judicial Council's poll among the lawyers also concerns me. Its value is questionable. It may have some benefit, although it has been the subject of serious challenges. Indeed, if the public knows of the recommendations of a bar poll, particularly as to the recommendation of whether a judge should continue in office more often than not it will do the very opposite. Another criticism is that I believe there are too many attorneys under the Attorney General's jurisdiction who can band together and support or oppose a particular candidate.

For these reasons, and although I would not be totally wedded to the proposal, I would like to suggest a Constitutional Amendment which would have the following effect:

(1) Cause the Judicial Council to be expanded to approximately 30 persons, 10 of which are attorneys chosen by the Bar Association, and 10 who are lay persons who are elected for revolving terms of four years. It might be appropriate to consider allowing different segments of the Bar to vote on Judicial Council candidates, giving weight to both geographical concerns and philosophical views, as an illustration, plaintiff's bar and defendant's bar voting separately on candidates proposed. I would not be opposed to a lesser number if 20 members were determined to be too unwieldy; but I believe they still should continue at one-half attorneys, and one-half lay persons.

(2) Have the Judicial Council screen the nominees and select not less than two and not more than four, and that these names be placed on the ballots in the particular district where they will serve, or in the case of a Justice, statewide, to be voted on by the public (and not selected by the Governor).

(3) If they seek to secure a further term or terms in office, they should be allowed to automatically do so, but the Judicial Council should also select an additional one to three nominees if they deem it appropriate, to run against an incumbent.

Getting the judiciary out of politics is commendable but I don't know that it's worked in Alaska under the Missouri Plan, or that it's really necessary to exclude the public from being at least more involved than they are presently.

I would hope that the Bar Association would appoint a special committee to look into this matter, and perhaps even invite lay persons to serve on that committee.

The Alaska Bar has always been an independent group, and, notwithstanding public criticism, much of which I think is unfair, has maintained an independence and a vital interest in the administration of justice. I do not believe it will flinch from calling a spade a spade or acknowledging some of the things said here—indeed some have already done so in informal sessions, and in some instances, in far more vociferous terms.

It is time that a review, and hopefully changes were made. I, for one, believe the public and the Bar need to become far more involved than they are presently in the selection of our judges and justices.

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COMPENSATION

[continued from page 13]

trolling shareholder are scrutinized carefully by both the IRS and the court; however, the ordinary tests of reasonableness apply.[13] As a general rule, payments to children, even minor children, are allowed; provided, however, compensation is paid for personal services *actually* rendered by the child as a bona fide employee.[14]

One frequently overlooked factor in justifying the reasonableness of compensation is the failure to consider prior inadequate compensation. Compensation for services performed in earlier years is deductible for the current year even if unreasonable for the current year; provided, however, that the total compensation paid for prior years, when added to that already paid, is not unreasonable.[15] This is of particular import where the affected shareholder-employee has entered into an agreement with the corporation to take lower pay in earlier years to allow capital buildup.[16] Whenever compensation is being paid for prior services which were inadequately compensated at the time they were rendered, it is generally recommended that the corporate resolutions specifically spell out that portion of the compensation allocated for the prior services.

Two other important conditions which may exist and could affect the question of reasonableness are: (1) compensation that might otherwise be deemed unreasonable may nonetheless be reasonable when the percentage of the compensation, as measured against profits, actually decreases;[17] and (2) where the shareholder-employee has personally guaranteed corporate obligations (a common occurrence in Alaska), this added risk to the shareholder-employee may justify otherwise unreasonable compensation.[18]

As noted earlier, a major factor in determining the reasonableness of compensation paid to a shareholder-employee is the "comparability" test. To check comparable salaries paid in the industry, one source is the compilation of court cases decided since 1954 contained in Table I, the Appendix to Chapter H, RIA, *Federal Tax Coordinator 2d*. In addition, comparable salary information in some instances may be obtained from industry or trade associations, U.S. Department of Labor, Bureau of Labor Statistics, Fortune 500, and other private sources. In Alaska, when utilizing the comparable salary approach, bear in mind both the cost of living differential between Alaska and the Lower 48, and the effects of inflation where the "comparable" salary is a year or more old.

An extremely important factor considered by both the IRS and the courts when addressing the question of reasonable compensation is the presence or absence of dividend payments. This is particularly true in cases involving substantial year-end bonuses which indicate that cash is available to make dividend distributions.[19] However, the absence of dividend payments, even where substantial cash is retained, may not detrimentally affect the determination of the reasonableness of the compensation, provided that the cash is retained for purposes of business necessity.[20]

What protective devices, if any, may be provided to prevent the disallowance as a deduction of a portion of the compensation which is deemed to be unreasonable? The most commonly employed device, and that almost universally recommended by the commentators, is the utilization of the so-called "hedge agreement." Under a hedge agreement, the employee agrees, prior to the time that the compensation is paid, to repay to the corporation any part of the compensation which may be disallowed as being unreasonable. *CAVEAT:* although hedge agreements are recognized and generally given effect by the IRS,[21] the existence of a hedge agreement may be treated by the court as indicating an awareness on the part of the parties that the compensation is unreasonable.[22]

Rental Payments

When incorporating a closely held already established business, the question of what assets are to be transferred to the corporation almost always arises. The transfer of assets decision becomes particularly acute where the owner(s) of the business to be incorporated also owns real property or operating equipment (e.g., vehicles) utilized in business operations. Whether these assets are to be transferred to the corporation, or retained by the incorporator-owner(s) embraces both business and tax considerations. No discussion of business reasons will be attempted in this article.

One basic tax reason for not transferring operating assets transfer to the corporation is to preserve the possibility, by the use of lease payments, of permitting the shareholders to withdraw corporate profits in a form deductible to the corporation,[23] thus avoiding the double taxation problem.

Unlike compensation, neither the Code, nor the Treasury regulations promulgated thereunder, limit rent to that which is "reasonable." However, rental may be disallowed if unreasonably high;[24] as between related taxpayers, the amount of the rental payment is limited to that which is fair and reasonable.[25] Where rental payments are really disguised distributions of profits to the shareholder, rental payments may be disallowed as a rental deduction, and treated as a nondeductible dividend distribution.[26]

Where the rental agreement is negotiated at arms-length,[27] or where the rental rate is set at the same rate as would either be charged by or paid to a "stranger," it is reasonable.[28] Also, the reasonableness of the rental may be established by application of the "comparability" test and expert testimony is admissible to establish the fair rental value, whether utilizing the "comparability" of "rate of return" tests.[29] Where there is no comparable rental property the reasonable rental may be based upon the value of the property, providing for a fair rate of return to the owner.[30] In addition, equipment rentals based on a "usage" factor or basis, appear to be justifiable, even if the aggregate rental might otherwise be unreasonable, provided the degree of usage greatly exceeds the expectation of the parties at the time the rental agreement was entered into.[31] *CAVEAT:* the *Post* decision indicated, however, that in some cases, the aggregate of the rental paid may become so great as to become unreasonable.

In the event that it is determined the rental rate is unreasonable, is there any protection for the taxpayers involved? At this time, the IRS has clearly indicated that hedge agreements authorized by Rev. Rul. 69-115 apply only to salary. At present, the tax court and/or district courts may or may not honor a hedge agreement directed towards or encompassing rental payments entered into by the taxpayers, although at least one district has indicated that it would not honor a hedge agreement. Nevertheless, a carefully drafted hedge agreement may, in the opinion of this author, be the best potential protective device available. Where rental deduction is disallowed as unreasonable, the "excess" amount may still be deducted as reasonable compensation if, when added to other compensation paid to the same shareholder-employee, the total compensation paid that shareholder-employee is not unreasonable.[32]

Recommendations

The author recommends certain basic procedures be followed for all closely held corporations. While these recommendations are not all inclusive nor exhaustive, adherence to them should preclude most of the problems which generally arise with respect to the issue of reasonableness of compensation.

1. Use written employment agreements, and have the Board of Directors set the salaries of all officers in December of each year for the following calendar year.

2. Determine and document what a reasonable salary should be for each officer; however, as is often the case, particularly in newly started businesses, the ability of the corporation to pay that salary simply does not exist. Therefore, the actual salary to be paid should be set at a figure which the corporation reasonably expects to be able to pay from its cash receipts.

3. Whenever leasing operating assets to the corporation occurs, prepare a written lease agreement, embodying the same terms as would exist as between unrelated parties dealing at arms length.

4. Where cash availability permits, establish *early* some dividend distribution history, preferably on a regular basis. Perhaps the best "plan" is one in which the Board establishes (and follows on a year-to-year basis) an objective dividend-paying criterion to be applied. There are an infinite number of potential variations.

5. At its regular annual meeting, the Board should specifically address the overall compensation policy, paying particular attention to bonuses and/or dividends. Not only should decisions to pay bonuses and/or dividends be reflected in the minutes (including the underlying rationale) but also decisions *not* to pay bonuses and/or dividends. Remember, the *why* in corporate actions may be as important, if not more so, than the *what*, particularly when dealing with tax laws.

6. Avoid the following "red flags" which are indicators to the reviewing IRS agent that compensation may be "disguised dividends":

(a) Total compensation paid in the same ratio as stock holdings;

(b) Retroactive salary setting;

(c) Year end bonuses, after profits are determined, constituting a substantial portion (more than one-third) of the total compensation paid the shareholder-employee; and

(d) Paying year-end bonuses to shareholder-employees in the same ratio as stockholdings.

7. DOCUMENT - DOCUMENT - DOCUMENT! Memories of corporate action do fade, and formalized documentation is less suspect than a shareholder's "after-the-fact" recollection.

Remember, setting a fixed salary or rental payment does not necessarily bind the corporation to making those stipulated payments at the time required. When cash flow does not permit, payments to shareholder-employees may be deferred to such time when there are sufficient cash proceeds on hand to make the payment without jeopardizing the financial viability of the corporation. There is, however, a caveat which must be observed whenever payments to shareholder-employees are accrued rather than paid. In the event that the corporation is an accrual basis taxpayer, actual or constructive payment of monies must be made to any related person (shareholder holding more than 50% of ownership within the corporation, applying the rules of attribution) within 2½ months after fiscal (tax) year end, or the deduction is lost *forever*.[33] Accordingly, provision must be made in the case of an accrual basis corporation, for payment (actual or constructive) within that 2½ month period.

Conclusion

In conclusion, always bear in mind that reasonable compensation is not subject to precise computation. All of the circumstances must, by necessity, be considered. A large majority of the reasonable compensation issues would never arise if taxpayers would exercise good judgment and a little common sense, and document the reason(s) for taking the action. Also, do not routinely acquiesce to the IRS position. The Tax Court frequently sides with the taxpayer or arrives at some middle ground in its decisions.

(Footnotes available upon request.)

Attorney Needed

The Alaska Court System is seeking an attorney to serve as a Traffic Magistrate in Fairbanks. Starting salary is $2845./mo. The person selected will preside in Traffic Court and hear misdemeanors and other traffic infractions. This includes such duties as arraigning defendants, taking pleas, fixing bail, setting cases for trial and making recommendations to the Calendar Control Judge in regards to continuances. A non-standard work week may be required.

Minimum qualifications are: Graduation from an accredited college with a LLB or JD degree. Trial experience is preferred.

Applicants should submit an Alaska Court System application to the Personnel Office at 1007 W. 3rd St., 2nd floor, Anchorage or applications may be mailed to the Alaska Court System, 303 "K" St., Anchorage, AK 99501. Applications are also available at the Court Building, 604 Barnette St., Fairbanks, AK 99701. Applications will be accepted through Thursday, July 25, 1980.

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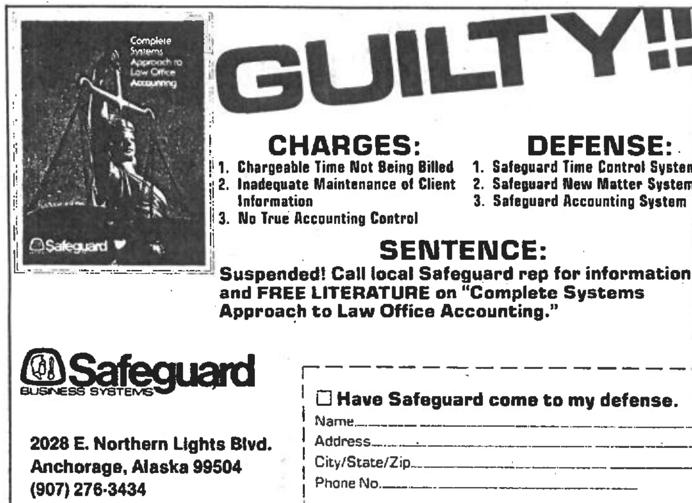

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Recent Ruling Declares AS 44.62.320(a) Unconstitutional

by Arthur H. Peterson

The hottest recent item in Alaska's world of administrative regulations is the Alaska Supreme Court's ruling in *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (1980). The court held AS 44.62.320(a) unconstitutional. That is the statute that purports to grant the legislature authority to annul an administrative regulation by means of a concurrent resolution.

In a 3 to 2 decision, the court said, essentially, that the constitution specifies the procedure for "law-making," that legislative action to annul an administrative regulation has the effect of law-making, and that, therefore, the legislature could not use a resolution to annul a regulation. The court pointed out that the constitution's requirements for law-making include limitation of a bill on three separate days, the recorded ayes and nays on final passage, and the opportunity for the governor's veto. Resolutions are not governed by these provisions.

Legislature Not Amused

Needless to say, the legislature was not pleased with this result. It passed CSHJR 82 am (1980 Legislative Resolve No. 5), proposing a constitutional amendment to allow the legislature to annual a regulation by use of a concurrent resolution approved by a majority vote of the membership of each house. That will be on the ballot this fall.

Another thing that the legislature did in response to the *A.L.I.V.E. Voluntary case was pass HB 949. That bill sought to annul the same Department of Revenue regulation (a limitation on lottery prizes) that was dealt with in the A.L.I.V.E.* case. Because he favored the policy expressed by the department, and because of two related constitutional issues which the court did not resolve in the *A.L.I.V.E.* case (separation of powers, and special legislation), the governor vetoed the bill.

A Look at History

The legislature's interest in the subject of administrative regulations may have been recently rekindled, but it is not new. In 1959, the Alaska Administrative Procedure Act was enacted, based on California law with a look at other states and the Model State Administrative Procedure Act. The house and senate judiciary committees prepared a joint report, part of which appears at 1959 House Journal pages 394-397 and part of which exists only in file drawers in various offices. The latter part is fairly detailed and could be of assistance to someone researching the area. The Alska Code Revision Commission has copies, and copies should be available from the Legislative Affairs Agency.

By the mid-60s, the legislature found that not everything was running smoothly. The Administrative Code was being published in little ACCO binders and the material was often hard to read. Moreover, several different numbering systems were in use at the same time, and at least one agency itself was using more than one different numbering system for the regulations in its title.

The legislature directed the Legislative Affairs Agency to revise the Alaska Administrative Code (that was back in the state's more innocent days of giving little thought to the separation-of-powers doctrine as it applied to this subject). The Legislative Affairs Agency produced several reports, a few revised AAC titles, and several suggestions for legislation. Over the next several years, legislation was enacted untying various little knots in the APA, establishing the position of regulations attorney in the Department of Law, and requiring the publication of a drafting manual for administrative regulations. In addition, the current form of the Alaska Administrative Code was published.

Plain English

One of the major thrusts of the drafting manual is to emphasize making regulations readable by the public—the now more-or-less popular "plain English" movement. It also attempt to standardize and simplify regulations processing for the administrators. That, in turn, should make things easier for the public. The seventh edition of the manual should be published sometime this summer.

Among the other proposals enacted during that period, was the provision in 44.62.260 limiting emergency regulations to a life of a single 120-day period. The catalyst for that enactment was the activity of a particular agency which suddenly discovered that it did not have regulations, found an emergency, adopted emergency regulations, let them lapse, and repeated that process three or four times for the same batch of regulations!

Over the years, some legislators, frustrated with some of the problems related to administrative regulations, have proposed repealing the entire APA. That would simplify life for a lot of the administrators (not quite what the legislators might have intended), but it would leave the public unprotected.

Legislative Oversight

In the mid-70s, the legislature became more concerned with the policy expressed in some of the administrative regulations. Seeking to systematize the "legislative oversight'" function, it established the Administrative Regulations Review Committee as an interim committee of the legislature. When the committee was created in 1976, it was assigned the duty of reviewing administrative regulations and making recommendations concerning them to the legislature.

Nationwide, there is a revived legislative interest in dealing with administrative regulations. Various states have come up with proposals covering perhaps every possible permutation of the concept of "legislative veto." Some courts have held that invalid. Other, less drastic measures, such as Alaska's ch. 16 SLA 1980 which requires fiscal notes for regulations which would necessitate "increased appropriations," are more likely to be upheld.

The National Conference of Commissioners on Uniform State Laws is currently revising the 1961 revision of the Model State Administrative Procedure Act. The new version will go into considerably more detail and will emphasize public participation in and access to various functions, including rule-making.

Extradition

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The drafting committee found the old act was encrusted with too many layers of officialdom. For example, the 1926 version requires at least nine state agencies in the asylum and demanding states to act before the process of trying the alleged crime can begin. Some of these officials, such as the Secretary of State, would have no interest in the prosecution of the crime.

The committee draft also would grant suspected fugitives a right to a judicial hearing to contest arrest orders on their merits. The hearing could be waived by accused fugitives, but it would be available during both extradition and rendition procedures to prevent injustices such as mixups in identification.

The committee also believes its draft might decrease dependency on professional bail bondsmen who it found have "more legal power to retrieve fugitives than either federal or state police."

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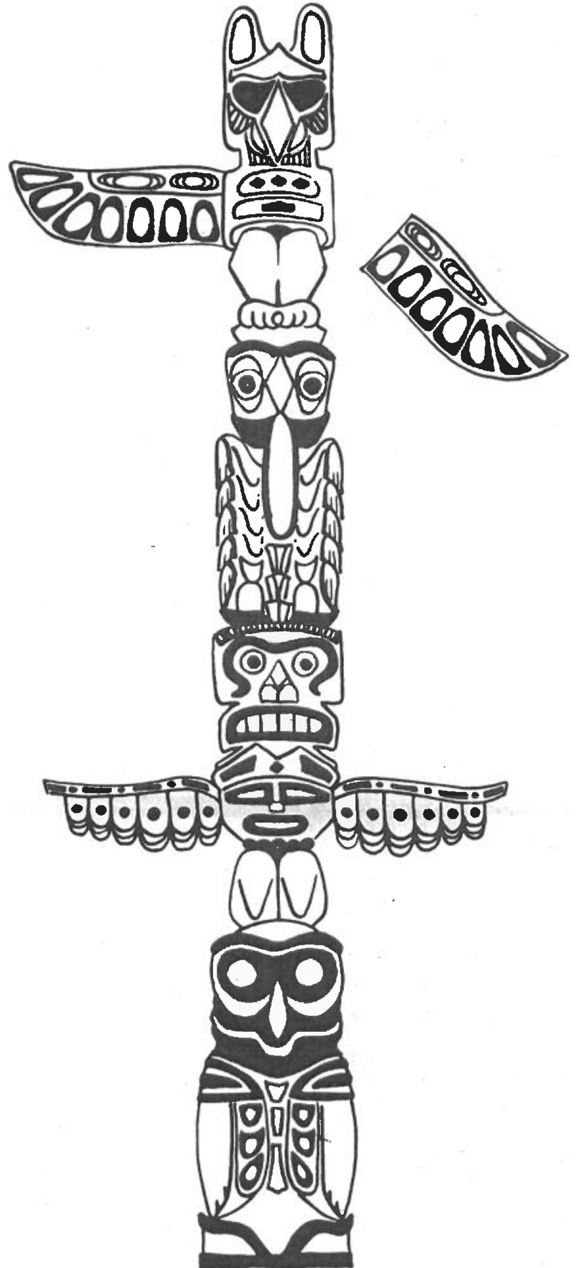

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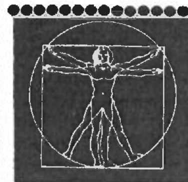

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