U.S. Postage Paid
Bulk Mail
Permit
No. 401
Anchorage, Alaska

The Alaska BAR RAG

Volume 2, Number 10 | Dignitas, Semper Dignitas | October 1979 | $1.00

Chief Admits Failure

By Karen Hunt

Chief Justice Jay Rabinowitz told the Anchorage Bar Association at its noon luncheon on October 15, that the present calendaring situation in Anchorage is a mess. Using such words as "Dismal" and "inefficient" Rabinowitz described the Status Quo as unacceptable and stated "I'm convinced early assignment is a must." Rabinowitz stated that the evidence before the Court calendaring Committee is inescapable that some type of individual calendaring is more efficient than the present master calendaring system utilized in Anchorage. He further commented that a motion practice that results in motions being noticed and scheduled for argument every day is "intolerable" for the Judges. Thus, a motion day is one of the suggestions being considered by the Committee which is comprised of **Art Snowden**, Chairman, Chief Justice **Rabinowitz, Justice Matthews, Presiding Judge Ralph Moody, Judge Victor Carlson, Judge Mark Rowland** and Court administrative personnel.

While the Committee is not unanimous in its recommendation, attention will be given to developing an individual calendaring system with central staff handling the calendars under the direction of the presiding Judge. While not going into detail, Rabinowitz referred frequently to the Fairbanks model as a vast improvement over that District's prior handling of calendaring. Commenting that the Fairbanks model was a possible guide, he indicated that a "cook book" should be developed on calendaring procedures for the entire State Judicial System. The Committee proposals are currently being circulated among the Anchorage Judges for comment.

Backlog Breakthrough

Rabinowitz announced that an intensive effort was under way for the month of January through April, 1980 which would utilize Judge time from all over the State to alleviate the present backlog of cases pending in Anchorage. Conversations are being held between the State Court System and the Federal Governmnet for possible use of the old Federal Courthouse court rooms to accommodate the additional Judge time which is being made available. Southeastern has indicated it will contribute two months of Judge time to Anchorage as will Fairbanks. Judge Cook is expected to be in Anchorage for one month also. Rabinowitz further announced that Senior Judges from Anchorage would be used and that **Judge Hepp** would be brough into Anchorage to hear criminal cases for one month.

In making his announcement, Rabinowitz stated that the past pro-

[continued on page 12]

Johnstone, Avery Tapped for Bench

Karl Johnstone

Charles R. Avery

Karl Johnstone and **Charles R. Avery** were selected to fill vacant Third Judicial District Superior and District Court seats respectively by **Governor Hammond** who announced his choices publicly on Tuesday, October 9, 1979.

Sourdough

Johnstone, a 38 year old Anchorage attorney in solo practice, first came to Alaska in 1967 after graduating from the University of Arizona Law School in Tuscon.

He began practice in Alaska with the law firm of Delaney, Moore, Wiles & Hayes with whom he spent a year before opening his own office in Anchorage in March of 1968. He has been engaged in the private practice of law throughout his professional career.

Johnstone is a divorced father of four daughters aged 2 to 8. Aside from his family, he is a dedicated fisherman, enthusiastic amateur pilot, and member in good standing of the Anchorage chapter of the Benevolent and Protective Order of Elks.

Johnstone expressed delight at the news of his appointment and told the *Bar Rag*, "I hope I can do a good job and justify all those kindly remarks made in my support."

Cheechako

Avery is a 38 year old former Native Claims Appeals Board attorney with the U.S. Department of the Interior. He first came to Alaska in June of 1977. He was admitted to practice in this State in November of 1978. Previously a graduate of the Emory University School of Law, he was admitted to the Georgia Bar in 1965. He practiced law as a partner in the firm of DuBerry and Avery in Decatur, Georgia from 1972 to 1977.

Avery has been married 15 years and is the father of a 12 year old boy and a 9 year old girl. He is a fishing enthusiast who spends as much free time as possible with his family on his boat in Prince William Sound.

When asked for an expression of his thoughts on his new position, Avery told the *Bar Rag*, "Having actively practiced trial law for 11 years, I hope to offer the Bar what I looked for and liked in a judge which basically is a judge who knows the law and applies it along with common sense. I enjoyed working in front of a judge who rules quickly and fairly when the need arises but who otherwise allows attorneys working in front of him the freedom to try their own case."

New Bar Exec Announced

The Board of Governors selected **Randall P. Burns**, Presently Executive Director of the Alaska Public Offices Commission, to fill the position of Executive Director of the Alaska Bar Association, at its meeting on Friday October 27, 1979. Burns was chosen after a search lasting several months and a series of interviews held in both the September and October meetings of the Board of Governors.

The Alaska Public Offices Commission which Burns heads is an agency of the Office of the Governor which administers Alaska's campaign disclosure, regulation of lobbying, and conflict of interest laws. The five member commission employs seven support staff and contracts with nine municipalities as regional offices. Burns, as Executive Director, has been responsible for developing proposed amendments to Alaska's three disclosure statutes and regulations implementing those laws. He has conducted investigations of alleged violations of the disclosure laws, including the subpoening of records and witnesses and the submission of case analyses to the Commission. In addition, Burns has worked with the Attorney General's office in preparation of case files and in the referral of cases for prosecution.

As part of his duties in connection with overseeing compliance with and enforcement of the reporting requirements of the disclosure laws, Burns has been responsible for the preparation of instruction manuals for candidates, political groups, lobbyists and employers of lobbyists. In addition, he has designed reporting forms, supervised staff in processing and auditing reports, assessed civil penalties for incomplete or late reports, presented workships throughout the state for those subject to disclosure laws, and assisted municipalities with disclosure law requirements.

Burns has also been responsible for directing the Commission's public information programs, involving the planning and execution of hearings, media projects, and presentations to organizations. His duties have included the preparation of annual budget requests and their presentation for executive and legislative branch review. In connection with this function, Burns has testified before the State Legislature on proposed changes in disclosure laws, as well as budget requests.

In his interview before the Board, Burns noted a number of similarities between the Association's Directorship and that of the Public Offices Commission. He stated his interest in the new position because it offers him the opportunity to focus his energies in a new field while allowing him the pleasure of utilizing his current skills and abilities.

The Alaska Bar Association has a new logo ready for use on stationary and in the electronic media. **Grant Pankhurst** from Nome, sent in the desing that won the Bar logo contest. **Carla Wilkins**, the Bar office receptionist prepared a design ready for the printer. The logo from grant Pankhurst came with an explanation of the design. His words were, "Justice - what everyone expects from the legal profession, Integrity and Competency - the major proceeds of the Alaska Bar Association, Advocacy - the basis of the legal system. The Scale is the symbol of Justice - the most recognized symbol of the legal profession; and the stars are from the flag of Alaska."

INSIDE

Garbage..... 2,4
Exam..... 3
Halfcocked..... 4
Invasion..... 5
Nowhere..... 11

Ethics Committee Opinion No. 79-2

The question posed to the Committee is:

Is is proper for an attorney or an attorney's agent to go to the trash receptacle used by opposing counsel and remove bags of trash containing, among other things, copies of pleadings, correspondence, etc., that were discarded in the normal course of opposing counsel's operations?

The basic facts appear to be that as a hotly-contested case, involving substantial amounts of money, neared trial and while settlement negotiations were in progress, one attorney dispatched an investigator or someone else on the attorney's behalf to go to the trash receptacle used by his opposing counsel and remove bags of trash that had been disposed there in the normal operation of the opposing counsel's office.

Since a lawyer who removes or causes removal of trash containing documents from opposing counsel's office violates, if not the express letter of the Code of Professional Responsibility, then at least the spirit of it, this Committee finds such actions to be improper. Such conduct violates EC1-5 inasmuch as it is not in keeping with "high standards of professional conduct" and is not "temperate and dignified." While it is not such a clear violation, in this Committee's opinion, digging through and removing opposing counsel's trash is "prejudicial to the administration of justice" and "adversely reflects on his fitness to practice law" in contravention of DR1-102(B)(5) and (6). A violation of DR7-106(C)(6) also exists inasmuch as counsel has engaged "in undignified or discourteous conduct which is degrading," in the Committee's opinion, "to the tribunal." Finally, such acts clearly contravene Canon 9's mandate that a lawyer should avoid even the appearance of professional impropriety. EC9-2 and 9-6. While the conduct does not appear to be illegal, it nevertheless "diminishes public confidence in the legal system or in the legal profession." EC9-2. Clearly, a lawyer engaging in such activities has failed to:

> conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety. EC9-6.

Such an attorney might be ethically required to withdraw from the case if she or he came across any confidential information. As said by Henry Drinker:

> "A lawyer must also observe the customs of the Bar as well as the confidences of another lawyer, although indiscreetly given and improperly received, and although this may entail his withdrawal from the case."
> Drinker, **Legal Ethics**, 195 (1958)
> *See, also*, Op. No. 107, *Opinions of the Committees on Professional Ethics of the Association of the Bar of the City of New York and the New York County Lawyer's Association* (1958 ed.). Formal Opinion No. 47 of the American Bar Association requires withdrawal by an attorney who, even inadvertently, receives an improper disclosure of the opposing party's confidences.

In conclusion, while this Committee takes no position on whether an attorney engaging in the actions considered herein should be subject to discipline, it does find the conduct to be improper.

Adopted by the Board of Governors September, 1979.

U.S. District Court Fee Schedule

SCHEDULE OF FEES TO BECOME EFFECTIVE OCTOBER 1, 1979

Filing Fees:	
Civil Action -	$60.00
Habeas Corpus 28 USC 2254 -	5.00
Notice of Appeal (Civil & Criminal) -	5.00
For filing or indexing any paper not in a case or proceeding for which a case filing fee has been paid -	3.00
For registering a judgment from another district -	10.00
For filing a requisition for and certifying the results of a search of the records of the court for judgments, decrees, other instruments, suits pending, and bankruptcy proceedings, for each name searched -	2.00
For certifying any document or paper, whether the certification is made directly on the document or by separate instrument -	2.00
For reproducing any record or paper, per page (this fee does not include certification) -	.50
For comparing with the original thereof any copy of such transcript or record, entry record of paper, when such copy is furnished by any person requesting certification, per page (in addition to fee for certification) -	2.00
For reproduction of magnetic tape audio recordings, either cassette or reel-to-reel ($2.00 plus cost of materials) -	5.00 minimum
For admission of attorneys to practice -	15.00
For duplicate certificate of admission or certificate of good standing -	3.00

Pilot Programs Underway

Under the premise that each appeal is not entitled to nor should each receive the same treatment, oral argument without briefing has been initiated as a pilot program in two districts of the ninth circuit.

The program has thus far been limited to criminal cases which take three days or less to try, involving no factual or legal complexities and with no precedential value. Moreover, participation has been voluntary.

The Committee evaluating the program has thus far concluded that the procedure will not adversely affect appellate review, will provide more judge time for complex cases and time from filing to decision will be substantially shorter.

It is therefore being recommended that the voluntary nature be eliminated and that the program be expanded to included civil cases.

The challenge still to be resolved is the selection and classification of appropriate cases. Under consideration are various alternatives including designation of certain types, case by case review, option by the attorneys and by stipulation.

Also being implemented in three districts on an experimental basis is trial by arbitration. Civil cases, not in excess of $100,000.00 are referred, mandatorily, upon filing, to arbitration. There are a few exceptions, one of them being matters involving constitutional questions.

The principal feature of the program is hearing within 150 days of answer or 50 days after a dispositive motion such as one for summary judgment.

Trial de novo, as of right is available in District Court. The only penalty is possible award of costs for the arbitration if the losing party does not prevail at the District Court level.

United States Court of Appeals Panels to be Announced

The United States Court of Appeals for the Ninth Circuit has revised its practice with respect to advanced announcement of the identity of the judges selected to hear oral argument in particular cases. In the past, the identity of the three-judge panel hearing a case was not disclosed until the day of oral argument. Under the new procedures, the composition of the panel will be announced about one week prior to oral argument. In implementing a policy of announcing panel members in advance, the court has acted in response to a resolution introduced by the Lawyers Representatives to the Ninth Circuit Judicial Conference and passed by the Conference at its annual meeting in July.

The three-judge panel selected to hear particular cases will be identified by official announcements published by the court. These calendar announcements will be filed in each of the U.S. district courts in the circuit about one week prior to the scheduled oral argument. Attorneys may determine the identity of U.S. Court of Appeals judges who will be hearing their case by checking the bulletin boards of local U.S. district courts one week prior to argument or by checking with the Clerk's Office of the U.S. Court of Appeals during the week prior to oral argument. In adopting this policy, the court announced that motions for continuance will not be granted after the announcement of panel members has been made.

Letters to the Editor

Lost in the Shuffle

Dear Editor:

In the August issue of the *Alaska Bar Rag*, page 11 carried an article on the 9th Circuit Judicial Conference. In listing Alaska's current delegation, I note that the United States Magistrate was not named. Please be advised that the undersigned is presently serving a three year appointment as a Magistrate Delegate to the Judicial Conference, having been invited by Chief Judge Browning. I did attend the 1979 Judicial Conference at Sun Valley, Idaho, July 22 through July 25, 1979. Let's keep the record straight!

Very truly yours,
John D. Roberts
United States Magistrate

Editors Reply:

Done!

Bar Exam Results

70 Pass July Bar

Of 101 applicants who took the July Bar Exam, 70 passed for a pass rate of 70.2 percent. This includes 4 attorney applicants, of whom two were successful.

The number of applicants taking the exam this year is down from the two previous years: 125 took the exam in July, 1978; and 122 in July, 1977.

Swearing in will be November 9 in the Supreme Court at Anchorage.

Names of the successful applicants are:

Accinelli, Theodora C. 735 K Street, #M, Anchorage, 99501
Anderson, Arthur S. 2601 W. 32nd Ave., Anchorage, 99501
Antel, Helene M. SRA Box 378, Anchorage, 99507
Bandy, Denise, 5331 E. 26th #5, Anchorage, 99504
Bendell, David M.. 630 W. 8th Ave., Anchorage, 99501
Brandt, Tamara D., Box 618, Douglas, 99824
Brink, Robert C., PO Box 91, Anchorage, 99501
Casperson, John E., 1109 Medfra Ave. #1, Anchorage, 99501
Davis, Laura L., 1902 Alder St., Anchorage, 99504
Donley, David, 1303 Southampton, Anchorage, 99503
Edwards, Donald W., 2811 Klamuth Ave., Anchorage, 99501
Evans, Robert A., P.O. Box 2871, Anchorage, 99501
Figura, Mark L., 810 N Street, Anchorage, 99501
Finley, Scott, 3016 E. 20th, Anchorage, 99504
Ford, Michael F., 352 Distin, Juneau, 99801
Friedman, Richard H., General Delivery, Sitka 99835
Gruenstein, Peter E. 717 O Street, Anchorage, 99501
Harvard, Andrew, 1327 G St., Anchorage, 99501
Heen, Mary L., 1624 W. 14th Ave., Anchorage, 99501
Herman, Barbara, PO Box 1728, Juneau, 99802
Hogan, Teresa Ann, Box 4-326, Anchorage, 99509
Howard, Craig, c/o Stanley Fischer, PO Box 2398, Kodiak, 99615
Johnson, Phyllis C., 156 8th Ave., Fairbanks, 99701
Jungreis, Michael, 3350 W. 69th Ave. #A, Anchorage, 99502
Kamm, Marilyn, 520 Halvorson Rd., Fairbanks, 99701
Kavasharov, Sarah T., c/o Spengler, 811 Basin Rd., Juneau, 99801
Lessmeier, Michael, 4921 Dartmouth Rd. #4, Fairbanks, 99701
Loescher, Joseph R., 5142 E. Northern Lights,Anchorage, 99504
Levy, Madeleine, 1010 W. 10th Ave., Anchorage, Ak 99501
Logan, Donald, Gen. Del., Anchorage, 99502
Luecker, Barry, SRA Box 42-S, Anchorage, 99507
Macy, Jennifer, PO Box 248, Bethel, 99559
Mason, Robert B., 510 L St. #405, Anchorage, 99501
McConnell, Annalee G., 804 W. 14th Ave., Anchorage, 99501
McKinstry, Larry, Rt. 5 Box 5271, Juneau, 99803
McNeil, Chris, 421 W. 10th St., Juneau, 99801
Moran, Joseph, 2631 Lorn Baranof Dr., Anchorage, Ak 99503
Murphy, Laurel, 5800 Glenn Highway, Anchorage, 99504
Nichols, Clark, 420 L Street #301, Anchorage, 99501
Orbeck, Dale, P.O. Box 2546, Juneau, 99801
Owers, James, c/o Ms. J. Clarke Supreme Ct., Juneau 99801
Owers, Leslie L., General Delivery, Juneau, 99801
Page, Nelson G. 1129 G Street, Anchorage, 99501
Parke, John H., PO Box 248, Bethel, 99559
Parke, Marilyn D., PO Box 248, Bethel, 99559
Patterson, Albert D., 7718 Old Harbor Rd., Anchorage, 99501
Perkins, Joseph J., 510 L St., Anchorage, 99501
Perkerson, Barbara J., SRA 78A (Foster Dr.), Anchorage, 99504
Roberts, Thomas C., 410L Wedwood Dr. #1, Fairbanks, 99701
Rose, Elise, SRA Box 1550N, Anchorage, 99501
Szudlo, Walter J., 1505 Crosson Ave., Fairbanks, 99701
Simmons, Douglas R., 6101 chevigny #B, Anchorage, 99502
Smith, Peter M., Box 6283 Airport Annex, Anchorage, 99502
Sorsby, William J., 9161 Claridge Pl., Anchorage, 99507
Stephens, Melvin M., II, Box 503, Kodiak, 99615
Steward, William, 5307 Dorbrandt, Anchorage, 99502
Stoetzer, James, 8411 Miles Ct., Anchorage, 99504
Swanson, Michael Alfred, 412 Gastineau #57, Juneau, 99801
Tervooren, Steven S., 1109 Medfra Ave. #6, Anchorage, 99501
Terwelp, Jeffery A., 110 E. 11th Ave. #11, Anchorage, 99501
Triem, Frederick W., Box 1270, Box 55, Sitka, 99835
Troll, Timothy E., PO Box 248, Bethel, 99559
Urig, Susan L., 734 W. 8th Ave., Anchorage, 99501
Vogt, Deborah, c/o Dept. of Law Pouch K, Juneau, 99811
Voigtlander, Gail T. 1837 Thunderbird Pl., Anchorage 99504
Walker, Russell W., 678 Grant Middle Ave., Ketchikan, 99901
White, Michael N., c/o District Attorney, 941 W. 4th, Anchorage, 99501
Williams, Stephen, PO Box 850, Fairbanks, 99707
Williams, Teresa, 204 E. 5th #213, Anchorage, 99501
Woodell, Michael, c/o Bradbury & Bliss, 430 C Street #301, Anchorage 99501

CLE News

Tax Conference

A tax conference sponsored by the Alaska Society of CPA's is set for November 29 in Anchorage at the Captain Cook and for November 30 in Fairbanks at the Travelers Inn. The subjects and speakers for the conference include the following:

Morning

New Appeals Procedure
Hank Biciedo
Appeals office, IRS
Seattle, Wash.

Tax Planning for Divorce
Gary C. Randall, Esq.
Gonzaga Univ. of Law
Spokane, Wash.

Tax and Accounting Aspects of Buying a Business
David Winder, CPA

David Winder, CPA
Peat, Marwick, MITCHEL & Co.
Seattle, Wash.

Afternoon

Pension and Profit Sharing Plans New Wrinkles on Some Old Ideas
Bob Doss, CPA

Current Income Tax Developments
Chuck Obendorf, CPA

Estate Planning
Theodore Sherwin, CPA

Current Tax Shelters
Ralph Papetti
Foster & Marshall, Inc.

An advanced afternoon session in Anchorage only will include the following:

Estate Planning Problems
Cheryl Baumbach, CPA
George Georig, Esq.
William Lawrence, Esq.

Real Estate Tax Shelters
Gary Postlethwait, CPA
William Bankston, Esq.
John Nabors
The Parkwood Co.

The fee will be $60.00 per person in advance and $70.00 at the door. Reservations should be sent to the Alaska Society of CPA's, P.O. Box 675, Anchorage, Ak. 99510 with indications of location and sessions selected.

Criminal Law Seminar

On January 1, 1980, the revised Alaska Criminal Code becomes effective. The new code dramatically and comprehensively alters the substantive aspects of Title 11 and adds a new sentencing scheme adopted in Title 12. Among other important features of the revised code, all crimes with the exception of murder and kidnapping are classified based on their seriousness as Class "A," "B," or "C" felonies, or Class "A," or "B" misdemeanors. The defendant has the burden of establishing an affirmative defense by a preponderance of the evidence. Additionally, the revised code provides for uniform penalty provisions.

The Continuing Legal Education Committee of the Alaska Bar Association is sponsoring a program for all attorneys on the revised criminal code. The program is to be held on November 16th and 17th in Fairbanks at the Traveler's Inn; on November 29th and 30th in Anchorage at the Anchorage Westward Hilton; and on December 7th and 8th in Juneau at the Juneau Hilton. This one and a half day seminar will present an overview of the revised criminal code, including comparisons with the present code, approximately one month before the new criminal code provisions take effect. The program schedule is to include an overview of the criminal code, including general principles of liability and culpability, sentencing, justification, offenses against persons, offenses against property, offenses against public administration, prostitution and gambling, weapons and offenses, offenses against public order and offenses against family, as well as several question and answer sessions and panel discussions.

In addition to a manual on the revised criminal code, each participant will be given comprehensive outlines of the presentations. The manual and outline will be made available to interested members of the Alaska Bar who are not able to attend the CLE for a nominal fee.

Due to the substantially increased enrollments in all CLE couses, advance registration is strongly recommended. All members of the state bar and judiciary will be receiving a registration form in the mail in the near future.

Anchorage Bar News

On October 22, 1979, the elections for Officers and directors of the Anchorage Bar Association was held. The new officers for the upcoming year are:

Tom Boedeker	**President**
Stan Howitt	**Vice President**
Ken Jacobus	**Treasurer**
Larri Spangler	**2nd Vice President**

The Board members are: **Bruce Bookman, Vince Vitale, John Havelock, Ken Jensen.**

During the past month, a number of excellent programs have been presented. The most notable among these were the programs by Chief Justice Rabinowitz and the Attorney General, Avrum Gross.

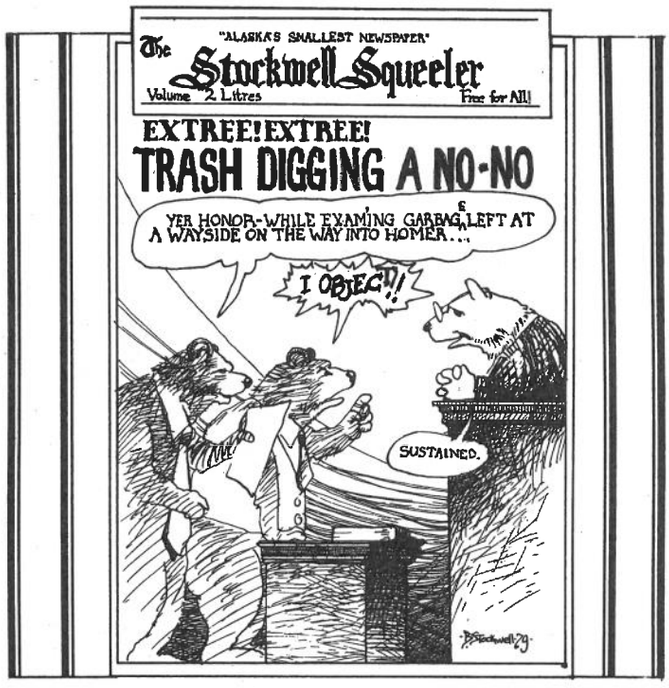
Chief Justice Rabinowitz addressed the association regarding calendaring problems and other court system problems occurring in Anchorage. The Chief Justice made specific reference to the calendaring committee composed of court system personnel. His special thanks were extended to the private members of the Bar who were active in making suggestions to the committee.

Although at the time of his address to the Bar Association the committee had not issued its formal report and recommendations, the Chief Justice did tell us what recommendations would be made. The principal features dealing with the court problems in Anchorage will be to abolish central calendaring and to return individual calendaring. Also, beginning in January and continuing through April, judges from other judicial districts will sit in Anchorage to attempt to work off the backload of cases. The Chief Justice indicated there was a possibility that some of the files handled by these other judges may have to be in other court facilities outside of the State courthouse. Another possible result of the committee study could be the changing of the motions calendar so that a judge only hears motions on one particular day of the week. This proposal would allow greater time on the other days for handling trials.

Since Chief Justice Rabinowitz's talk, the committee has issued its report. Hopefully, resulting changes will alleviate some of the problems. However, it does appear obvious that cooperation between the Bar and the court system will be necessary to alleviate the problems. A special thanks should go to those members of the private Bar who freely gave of their time to make the suggestions and meet with the committees. This kind of cooperation can go a long way towards solving problems.

Rebate to Taxpayers

Avrum Gross addressed the association with regard to disposition or use of the expected oil revenues. In brief, he discussed possible repeal of income tax, the use of a rebate to the taxpayers, or use of the revenue to create permanent funds. Mr. Gross indicated that the Governor's favored position would be use of the revenues for permanent fund purposes. The pointed out flaws in the income tax and direct rebate methods as benefit from the revenues could be obtained through long-term use of the money from a permanent fund in which the income only would be expended. The comments by Mr. Gross were of great interest to the Bar as the disposition of the funds will affect the continued economic vitality of the State. It is an area in which all members of the Bar as citizens should express their views.



Letters to the Editor

Ombudsman's Subpoenas

Dear Editor:

I find it very difficult to comprehend the position adopted by the Alaska Bar Association respecting its obligation as a public agency to respond to subpoenas initiated by the ombudsman under specific statutory authority.

It may be for lack of imagination that I cannot perceive a legal theory upon which the Alaska Bar Association could claim that it is not a regulatory agency of the State of Alaska. Of course, I, like other lawyers who have been around a long time, are aware of the recurrent battles which have been fought to prove or disprove that the Association fits at one or another place on the State organizational chart. But all that notwithstanding, the nature of the Association as a public agency must be tested in context with the governmental function it serves within the State of Alaska.

The Alaska Bar Association collects a franchise tax from all persons practicing law within the State of Alaska. There can be no serious question but what the Alaska Bar dues constitute a business or occupational license fee and, hence, the proceeds of that tax constitute public funds. While we may, for historical reasons and by virtue of our charter avoid the general prohibition against dedicated funds, that unquestionable benefit cannot be stretched to cloak us with immunity from all laws and regulations governing the expenditure of public funds.

In addition to the tax money generated by Bar dues, the Alaska Bar Association received reimbursement of its costs in performing some of the governmental functions delegated to it by the Supreme Court of Alaska. Here too our organization is involved in the administration of public funds for a governmental purpose and we have no right to set ourselves above the law in respect to an accounting of our activities in the interest of the general public.

While the games being played with the ombudsman may be the heady stuff of which headlines are made within our house organ, *The Bar Rag*, the policy adopted by the Board exposes our association to an unnecessary and immediate risk of destruction. The legislature of the State of Alaska—and properly so in my opinion—might well view our claim to immunity from law as a convincing reason to legislate us out of existence. And should such a result be the fruit of our arrogance, the very valuable functions of an independent Bar Association would be sacrificed. I would urge all members

[continued on page 5]

STAFF

Harry Branson..... Editor in Chief
William T. Ford..... Managing Editor
Rand Dawson..... Advertising Director
Wm. W. Garrison..... Bar Editor
Donna C. Willard..... Copy Editor

Contributing Editors

John Havelock — **Wayne Anthony Ross**
Deirdre Ford — **Russ Arnett**
Barbara Schuhmann — **Joe Kalamarides**
Richard Whittaker — **Andy Kleinfeld**

Ace Reporters

Kathleen Harrington — **Judith Bazeley**

The Bar Rag is published monthly. Mail received at Box 3576, Anchorage, AK 99510.

The Bar Rag is available to non-lawyers by subscription for $10 a year, or may be purchased from the Alaska Bar Association office, 360 "K" Street, Anchorage, AK 99501 for $1.00 a copy. Display and classified advertising rates are available.

"Random Potshots"

(Editor's Note: **John Havelock** *was unable to make the deadline this week so otherwise rejectable copy contributed anonymously has been used as filler. We apologize to our readers.)*

Dean **Vernal Hafcocked** retired the other day from the University (some say forced out for dithering, excessive muttering and simian similitude. Vernal, late in the evening, fended off the charge with half-hearted vehemence.) Six of us older chaps who have known if not liked Vernal for some time cajoled each other into taking him to dinner, if not from love or respect, we nodded, at least pro forma.

We came by at half past six. Obviously not early enough. Old Vernal already had an Everclear gleam in his eye of legal pad yellow purity. Though cleanliness was not among his virtues, for the occasion he had evidently tried to clean that bilious Rumanian suit of his, the one with all the vents, patches and pleats, that gave the garment the shape of an amoeba with a bad case of indigestion. You could see the dry soap remains of several efforts with the end of a dabbing cloth, one on the lapel next to his left vest pocket evoked Argentina. A Roschach figure adorned his right side pocket in which was stuffed an unread advance sheet, still affecting the legal scholar even after school hours.

At the Ribhause, we danced in feigned graciousness to avoid sitting next to him but one task was mine by lot. The Provost had sent another memo around in January ordering the *establishment of a tradition. Each* retiring prof would be interviewed appropriately by a colleague in the fall for the yearbook, hopefully generating a couple of extra strands of instant ivy to wrap around the commons building, disguising its economic origins, architectural plans borrowed from the mess hall of the nearby Air Force base.

Old Vern was predictably oblivious to my purpose. His secretary says he stuffed official memoranda in one of those logs-from-newspaper machines, kept in the corner of his room, and took a briefcase full home Thursday afternoon to stoke a weekend fire. Otherwise he had no use for them. Maybe those burnt memos were avenged in the end.

Hafcocked brightened to the first question, thinking I cared. "Future of the University? Listen, when the State didn't have any money, the politicians stuffed it down this rat hole. Now for Chissake, they got money coming out of their ears and no one gives a shit about the place."

I shifted slightly, thinking an appeal to vanity might give me something more printable if less colorful. "Vern, you came here with the birth of legal education. What do you consider your major accomplishment?"

He turned slowly, then directing a fat finger at my chest, "Abortion" he accused; then reflecting, "Well, it sure as hell ain't got much to do with legal education. Christ, you know its not just lawyers that the public hates, it's the law, too. No surprise. We have never taught the public law. Why should they see good in an instrument of frustration? Who said the University would be an exception? Rules and regulations are a tangled briar, a veil to bureaucratic intrigue and selfish purpose. Right?" he leared at me, making heavy fun of my duties as assistant to the Deputy Dean of the College of Arts and Letters.

[continued on page 5]

The Chinese Are Coming! The Chinese Are Coming!

By Russ Arnett

Chinese students coming to the U.S. soon will be stopping at Alaska Pacific University to polish their English and, by living in Anchorage, examine the U.S. in microcosm. The "Five Modernizations" China is pursuing include modernization of China's legal system. Civil and criminal codes enacted by the Chinese Parliament take effect in January 1980. The Gang of Four will be tried and Chinese and foreign reaction to the trial concerns China's leadership. Alaska lawyers will be asked to explain to the Chinese students our court procedures and the legal protections which we cherish.

Perhaps we should explain to them that during a trial actually two trials may be in progress. Just as a college test may itself be tested to determine whether it has accomplished its purposes, so also a trial may be tried to see what it accomplished, or did not accomplish. Were the Supreme Court itself present *en banc* during a trial, and the justices even kibitzing with the trial judge, and were the Supreme Court to certify the trial was conducted in conformity with all rules of substance and procedure, the trial still might be a failure.

What are the effects of the trial upon those whom it touches? This is how the trial must ultimately be judged. Its effects ripple through society and may have a half-life longer than strontium 90. The monetary costs to the litigants may exceed the amont in dispute without considering the cost to the State. Some trials cause social wounds to fester. Courts are used by social and economic activists more to pursue their grand designs than as forums for settling particular disputes.

I was asked to explain our judicial system to one of the Chinese students, a Mr. Chang.

"Our system of justice," I told him, "like that of all civilized systems, is basically a search for truth."

"But you say that lawyers make arguments even though they personally do not believe they are sound."

"A lawyer is hired to win and if he does not exercise every effort in behalf of his client short of deliberately presenting false evidence he is betraying his duty to his client," I explained.

"Why not forbid lawyers from making arguments they not believe?" he inquired.

"False logic or faulty arguments are perfectly permissible," I argued. "Whether the lawyer believes them is irrelevant. American judges and jurors know this."

"But how," asked Chang, "can you claim this is seeking truth?"

"I know you orientals have your ancient and inscrutable traditions and all that, but you must realize too, the common law has evolved over centuries. Millions of cases have been decided with the guilty punished and the innocent set free."

"You mean all guilty are punished and all innocent set free?" he smiled.

"Of course not. We don't claim perfection. If a man commits a crime our goal in Alaska is to rehabilitate him as well as protect the public."

"Then if defense attorney knows his client committed crime," said Chang, "why not have client plead guilty? You seem more anxious to get him off than to reform him."

"But, you see, the State must be able to prove him guilty. He may in fact commit a crime but still be innocent in the eyes of the Law."

"Well, wouldn't more guilty be punished and innocent freed if both lawyers told the Court all they know and say only what they believe, as though they were officers of the court."

"The most important consideration," I cautioned him, "is not to punish guilty. It is far better for a thousand guilty to go free than for one innocent man to be convicted."

"Have observed in your courts that wealthy who can afford high priced lawyer more likely to go free. Is what we are told in China."

(Showing irritation). "Look, Chang. China doesn't have a modern legal system so you have difficulty understanding ours. Or do you think you do?"

"Is rather like (suppressing a giggle) Chinese fire drill."

"I never could stand a smart-ass."

Potshots

[continued from page 4]

"Yeah, I've been one helluva success. Lawyers didn't want to see anything happen; cops didn't want anything to happen; the University didn't want anything to happen, a triumph of ignorance and institutional inertia."

We needed an uplifting thought. "Vern, think of the justice system, haven't we made great strides in Alaska?"

Vern sneared: "Don't be tacky, man. We started using tape recorders in the courthouse in 1960. So that's progress? We have a new criminal sentencing code that will make our jails Newgates. The best answer we can find for court congestion is more courts to congest. The judges humor the 'culture of lawyers' while the culture kills justice. We are as progressive as a digestive tract."

Mine was rebelling, possibly the old coot, but more likely the Ribhause garlic salt that was supposed to make Kenai beef as tasty as it was chewy. It would have been the decent thing to take him home but no one wanted to make the effort to wedge him out of there in his present mood.

"You know, you bastards, you are all lying to the public. TV makes up stories about cops, judges, lawyers and parole officers and you say, 'Yeah man, that's us.' Bullshit! Like Sir Walter Scott described the age of chivalry. You wish. You're all just bums, believing lies, lying to yourselves, protecting your ass and trying to make a buck."

He was becoming incoherent. I could pick out some sentiments from an old alumni magazine from my own school for the interview and no one would notice the difference, including Vern. He'd probably think he actually said it. Traditions are still made that way. We eased out into the parking lot. It was still raining. Would summer never end?

Letters

[continued from page 4]

of the Alaska Bar Association to review very carefully the wisdom of the present policy of the Board of Governors and provide the Board with an expression of opinion concerning the time, effort and energy now being devoted to the Board's claim that we are above the law.

Sincerely yours,
JENSEN, HARRIS & ROTH
Kenneth D. Jensen

Bar Rag Interview

Wendell Kay

Part II

By Kathleen Harrington

KH: How long did your partnership with Judge Buckalew last?

WK: Buck and I stayed in partnership or associated until about 1960. At about that time, it became necessary to sell that building and move to another place. I bought a building at that time and we decided to dissolve and separate, by that time **Les Miller** was working for me. So we decided to separate and Les and I bought a building which is now where the Captain Cook parking garage is. By that time they had built a new state court building, we are talking about a period 1959-60, so we bought that building, a nice house, it was a nice house, we remodeled it. **Bob Libbey** came to join us and then **Bill Jacobs** so the firm was Kay, Miller, Libbey & Jacobs. And we had a very busy, busy practice. And the little building was very handy to the court. We just slipped out the front door and ran over to the court. The earthquake in 1964 however substantially demolished a considerable portion of the building. And for about six months we practiced out of two trailers located across the street in front of where the Captain Cook is now.

KH: Where were you when the earthquake hit?

WK: I was in Haines, Alaska conducting a meeting of the local boundary commission of which I was then the chairman. And there wasn't much earthquake there in Haines. It just shook the building a little and I remember some gentlemen was just finishing speaking and the light fixtures shook quite a bit and the building rattled a little and I said "We want to thank you for those earth shaking remarks." And everybody laughed and then about five minutes later a State Troooper came running in and announced there had been a terrible earthquake in south-central Alaska and that Anchorage was in flames and Seward was in flames and the meeting quickly adjourned and we all ran to the telephones. I got back to Anchorage the next day to find that my house was uninjured except part of the chimney fell off. And the family was all fine. The office was substantially damaged. So, as I said, we practiced out of trailers for awhile and then we were going to rebuild the office into a nice building. In fact we started on it when the city condemned the whole property for parking purposes. And so we then moved into the 8th Avenue Building which is the building that was occupied by Burr, Pease & Kurtz.

KH: Have you ever had any desire to become a judge?

WK: No, I really never did. I enjoy practicing law too much. I don't say that with any sense of disrespect or anything like that because I certainly respect people who do like to be judges who are willing to become judges. I think it's a sacrifice in a way to become a judge. It hurts your social life; your comradship with other lawyers is impaired, I'm sure. I don't think I would have made a judge anyway because I don't have a judicial temperament. I'm very partisan, I'm very much an advocate and I think it would have been very difficult for me to be a judge.

KH: What about on the Supreme Court?

WK: Well, I was once drafted. The lawyers of Anchorage circulated a petition on my behalf and asked

Wendell Kay

that I be appointed to the Supreme Court in about 1966 at a time when there were two vacancies. And I was very gratified. I ranked very high on the bar poll. But I had some enemies on the judicial council and my name never got to the Governor. One of my partners, Les Miller, was on the judicial council at the time but there were two or three guys on the council that I had had trouble with, Jack Warner down in Seward for one. I threatened to throw him out of a window down in Juneau one time at the legislature.

KH: Why was that?

WK: Because he was a reactionary no good rascal. I should have thrown him out of the window but I didn't do it. Anyway, he was on the judicial council so naturally he voted against me. But that's okay, I really am happy, very happy I didn't get the job because it would have been an altogether different lifestyle than I've been used to. I've enjoyed my freedom in a way and I probably never would have started going to Arizona and never started teaching down there. I would have missed a great experience if I had not.

KH: When did you start teaching in Arizona?

WK: The founding dean at Arizona State Law School was a fellow by the name of **Willard Pedrick** and Pedrick had been a year behind me at law school and he had worked on the law review under my supervision. He thought I was really a great legal scholar and one thing or another and so we continued our friendship through the years. In fact, his son came up here in high school and worked his way through college working various jobs that I helped him get. Anyway, he asked me down to give some lectures and I gave a series of four lectures at Arizona State and at the University of Arizona on roughly the subject of trying a criminal case. The jury selection, final argument and so on and so forth. And they were well received. I remember **Pat Rodey** was I think president of the Bar Association of Arizona when I gave those lectures and they were very well received by the student body of both schools. That was in 1974 and that summer Dean Pedrick's teacher of trial practice was killed in an automobile accident and so he picked up the phone and called and asked if I would come down and teach a course in trial practice that winter and the wife and I had enjoyed Arizona very much when we were down there for the month or so at the time we gave the lectures

[continued on page 6]

Wendell Kay

[continued from page 5]

the previous year so we decided yes, there was not much of a choice, I said yes I would be glad to teach. That was in 1975 when I went down and taught for eight weeks as a visiting professor and I've been very fortunate. There have been two deans since then and both of them have continued to invite me so I never know from year to year whether I will be invited or not but so far I've been fortunate, I've been invited every year.

KH: When you teach the course of trial strategy and trial practice do you do it in an anticdotal way?

WK: No. I don't think kids really, war stories about law practice are very entertaining but I don't think you learn very much by merely telling a class a bunch of war stories. In fact the dean warned me not to do it. So I don't. You may tell a story once in a while if it illustrates a point very well. I think it's good to hammer a point home by telling a story that illustrates what can happen to you if you don't do it. But, no, I teach by its a common method of teaching trial technique now days. The student does the work and the professor plays judge and critiques my kids. My kids start off by arguing motions which is fairly easy. You want to break them in easy. Any law school senior ought to be able to get up and make an argument. Then we go into jury selection. And we bring actual people. Everybody brings somebody and we select jurors in cases. I use a bunch of materials that I've accumulated and put togehter eight or nine different cases and so they pick juries, they pick a juror in a criminal and a juror in a civil case. Then we make opening statements. Everybody makes an opening statement. Everybody is critiqued by me and the rest of the class. Sometimes I use a video tape if we have time to video tape a few of them and let them see what they look like when they make an opening statement. Then we go to direct examination of witnesses and cross-examination at the same time. Direct examination is immediately followed by cross-examination of the same witness. And that takes quite a period of time for everybody to do a direct and cross-examination. By that time it's getting down to final argument time. And we do final arguments and everybody has a final argument and then we spend about one session picking up incidental things like motions after trial and so on and so forth.

KH: Is the setting in a criminal context or a civil context?

WK: Both. Half the cases are civil and half are criminal and if I think a kid is inclined to want to do criminal work I give him a lot of civil cases and if a kid is inclined to do civil work I give him a lot of criminal cases.

KH: Have you had any especially embarrassing moments in court?

WK: Well, you try not to think about your most embarrassing moments in court.

KH: But they are hard to forget, aren't they?

WK: Believe me they do occur. There is not much you can do about it sometimes. Recovering from embarrassing moments and not showing embarrassment is the hardest thing to do I think. I recall trying a case with George Grigsby, a civil case over the rental of a tractor in which my client had assured me that he was telling the truth about certain circumstances on the rental. He ran a little construction company here in town at the time and George completely demolished him. Finally he admitted that he had lied and of course I felt like getting down and crawling out of the courtroom on my hands and knees.

KH: What did you do?

WK: Asked the judge to dismiss the case. Took the guy back over to the office, castigated him, ran him out and told him never to come back. That was about all you could do. I'm sure there have been some more embarrassing moments but I can't remember any right now. Probably blanked them out of my mind. I can remember one, no, go ahead.

KH: You don't want to do that?

WK: No, it wasn't mine. It was another lawyers.

KH: Was it a good story?

WK: Not a bad story. It's about George Grigsby. A woman by the name of Marie Cox had an establishment over on Fifth Avenue. This was probably the early 50's. Called Marie's Chili Parlor. Actually it was a front. She had a pot of chili in the front room and girls in the back. And an assault with the dangerous weapon happened in there one night inthe back. One guy stabbed another and then ran out the back door, jumped over a fence. George is defending him. And Marie is on the witness stand and George is cross-examining her about the events and he got for some reason stuck on the location of the door and he kept asking her, "Now, did the door open from the left or from the right? Is the handle on the left or the right? Does the door open in or does it open out?"

And Marie looked at him with considerable puzzlement for a while and finally she lost her temper. She said, "Mr. Grigsby, why are you asking me all these questions about that door? You know that door. You are in and out of there every night."

Now the ordinary lawyer, that would have destroyed him. Grigsby never batted an eye. There was a big roar of laughter from the courtroom. George never batted an eye. He merely held up his hand and when the laughter subsided he said, "Ah, yes Mrs. Cox, of course I know about the back door but I'm sure that none of these fine gentlemen on the jury know about the back door." Whereupon half of the jury proceeded to blush, duck and there was another roar of laughter from the courtroom. Now I don't know whether you could do that or I could do that but it happened and George got away with it.

Talking about embarrassing moments. I was down at seminar this last weekend, last Friday at the Kenai Bar Association and the head man from Texas, a very fine gentleman by the name of Broadus Spivey had just arisen to tell us all about opening statements and final arguments and one thing or another when the side door of this room occupied by 35 eager students of the laws opens and in staggers a very drunk female client of mine, who operates a fine establishment here in town known as Char's Escort and Dating Service. And she proceeds to lurch through the chairs and sit down about ten feet away from Mr. Spivey and fixed him with a beady glare. And Spivey didn't know quite what to do but he continued talking whereupon every three sentences she would exclaim, "That's right. You're right there."

So I suggested to one of the gentlemen that it seemed to me that they better get the woman out of there, that she was a trouble maker and no telling what she was going to do when she was drunk. So he and another young man went up and got her by the arm and they were leading her out and I'm hoping to God she doesn't see me when all of a sudden she spots me and lets out a wild shreak, "Oh, Wendell," and tries to tackle me around the neck. Now that was an embarrassing moment but I proceeded, I was last on the program fortunately. So I succeeded in telling them about George Grigsby and Marie and said I wished I had George's ability to turn an event.

KH: Do you remember the case you've most enjoyed trying?

WK: Gosh, I enjoy trying almost all cases. Some you don't enjoy. Sometimes you may have disagreeable clients, an unpleasant set of facts. I recall just a few years ago defending a young man accused of murder. The evidence indicated that he had possibly stabbed the victim, a young housewife 37 times. Rather gruesome pictures. Really a very difficult, unfortunate sad case. As far as a really exciting case a recent one was the trial of *State vs. Duncan Webb*. This was an unusual case where you get a young lawyer accused of in effect of being an accessory to murder. And it was a very, very touchy case resulting in a hung jury. Seven for acquital on the main count. They acquited him on one count. On the chief court it was seven to five for acquital. But it was a very, very difficult case. I was not able to try, to handle the case on the retrial. He was defended by a fine lawyer from San Francisco.

KH: Are there any cases in your memory that gave you a great deal of satisfaction in terms of either the people you were representing or the result of a combination of the two?

WK: Are there any cases in your memory that gave you a great deal of satisfaction in terms of either the people you were representing or the result of a combination of the two?

WK: Oh yes. I've tried a great many cases and I think everytime you get a successful result your heart swells with job and you tend to feel that you are indeed the greatest trial lawyer in the world and then of course the next time out you get bear and a dark cloud of gloom descends over the world and you're convinced that you are a stumblebum but it all evens out and while you tell yourself during a particularly agonizing trial that this is an awful way to make a living, that you will never do it again, that you don't know why you let yourself in for it, that you should have been an undertaker; when it's all over a few weeks later you forget all that and you look back on the case and your career with a lot of satisfaction. You remember the good parts and the happy times and the great victories and then you tend to somewhat pass over the more dismal aspects of practicing law of which there are many. I recall for some reason I wanted to determine whether I had talked to a certain person in the late winter of 1963. And I keep minute books daily, calendar books for a long ways back. The ones before 1964 were destroyed in the earthquake unfortunately along with a lot of interesting files and briefs. But anyway, I went back in 1963 and checked through January and February and in a period of six weeks I tried nine cases. These were Superior Court cases. One after the other. Some criminal, some civil. Twice the jury in the preceding case was still out while we were picking the jury for the next case. That is a lot of strain if you can imagine trying nine major cases in six weeks. One after the other without any rest. The only days between cases were weekends.

And of course you worked on the weekends to get ready for Monday. I'm sure I couldn't do it now but in those days I thought that was fun. How exciting it was to have something to do instead of just sitting around the office twiddling your thumbs or writing papers. You had to rush into court and start picking another jury. That was great. That's the way it ought to be. I would shudder to try that now.

Information to Bar Rag

Meetings have recently been held between court representatives, members of the Anchorage Bar Association and Alaska State Medical Association to discuss procedures regarding the appointment of Medical Malpractice Advisory panels as provided for by A.S. 09. 55.536.

To insure timely appointments of the panel, the court is requesting counsel to designate all medical malpractice complaints filed as COMPLAINT FOR MEDICAL MALPRACTICE.

Definite procedures have been forumulated and are in the process of being implemented. Interested counsel are invited to contact the Legal Technician at the Clerk's office for more specific information, 264-0441.

LeEllen Baker
Chief Deputy Clerk
Office of the Clerk
303 K St.
Anchorage, Alaska
Ph. 264-0442.

Coming Events

1979

November 16, 17	
Criminal Code Seminar	Fairbanks
November 29, 30	
Criminal Code Seminar	Anchorage
December 7, 8	
Criminal Code Seminar	Juneau
December 6, 7, 8	
Board meeting	Anchorage

Proposed Amendments

Proposed Amendment to Section 1 of Rule I-1, Alaska Bar Rules

The introductory phrase of Section 1 of Rule I-1 of the Alaska Bar Rules is amended to read: "As used in Rules I-1 through I-8:

Section 1 of Rule I-1 of the Alaska Bar Rules is amended by adding at the end of said section a new subsection (h) as follows:

(h) "Receipt of Written Notice" means actual receipt of a written notice, personally or by mail, by the addressee of such writing except notices sent by the Alaska Bar Association which are considered received by the addresses three days after the postmark date of the Certified or Registered Mail to the latest address of the addressee on file with the Alaska Bar Association."

Proposed Amendment to Alaska Bar Rule I-2

Section 1(b) of Alaska Bar Rule I-2 is amended to read as follows:

(b) Be a graduate of a law school which was accredited or approved by the Council of Legal Education of the American Bar Association or the Association of American Law Schools when the applicant entered or graduated or submit proof that the law course required for graduation from such a law school will be completed and that a degree will be received as a matter of course before the date of examination. Certified proof of graduation, together with a certified copy of the applicant's law school transcript, shall be sent directly from the school to the Alaska Bar Association and received prior to the date of the examination. Graduates of law schools in which the principles of English common law are taught but which are located outside the United States and beyond the jurisdiction of the American Bar Association and the Association of American Law Schools may qualify for examination upon proof that the foreign law school from which they graduated meets the American Bar Association Council of Legal Education standards for approval, and provided further that an applicant who has graduated from a foreign law school shall submit certified proof of successful completion of not less than one academic year of education at a law school accredited or approved by the Council of Legal Education of the American Bar Association or the Association of American Law Schools, which certified proof shall include evidence satisfactory to the Board that the graduate of a foreign law school has successfully completed not less than one course in United States constitutional law and civil procedure in the United States.

Proposed Amendments to Alaska Bar Rules 5, 6, 7, 7.1 & 8

1. Rule 5, Alaska bar Rules, is repealed. Rule 6 is redesignated as Rule 5. Rule 7 is redesignated as Rule 6. Rule 7.1 is redesignated as Rule 7.

2. Rule 7, Alaska Bar Rules (now Rule 6) is amended to read as follows:

Section 1. Notice and representation by counsel.

(a) Notice of any final adverse determination by the Board, a master or committee appointed by the Board, shall be given to an applicant. Such notice shall be sufficiently specific to allow the applicant to be able to prepare a response, petition for review, or request for hearing as may be permitted under these rules.

(b) The Board shall send written notice by certified mail to the applicant's latest address on file with the Executive Director.

(c) An applicant may be represented by counsel in all proceedings for admission to the practice of law. Such counsel shall be admitted to practice in the State of Alaska, and shall file a written appearance with the Board. Thereafter, notices required or permitted to be served upon the applicant shall be served upon his counsel.

Section 2. An applicant who has been denied an examination permit or has been denied certification to the Supreme Court for admission to practice shall have the right, within thirty days after receipt of written notice of such denial, to file with the Board a written statement of appeal. Such statement of appeal shall be verified by the oath of the applicant that all statements contained therein are true, on the applicant's own knowledge, or on the basis of information furnished to him. Failure to file a timely appeal statement shall constitute a waiver of any right to appeal. In his statement of appeal, an applicant shall state all grounds upon which he intends to rely and may:

(a) Object to the form of notice from which such appeal is taken on the ground that it is so indefinite or uncertain that he cannot reasonable prepare his statement;

(b) Present new matter on which he relies to establish his eligibility to take the examination or for admission to practice, whichever is applicable.

An applicant who is denied an examination permit or who is denied certification shall allege facts which, if true, would establish an abuse of discretion or improper conduct on the part of the Board, the Executive Director, the committee or a master. If the allegations in the verified statement are found to be sufficient by the Board, a hearing shall be granted. No hearing shall be granted on the sole allegation that the examination, in whole or in part, was assigned an improper grade by the committee of law examiners. If a hearing is denied, the applicant may appeal from the denial of the hearing under the procedures of Rule 8.

Section 3 [Section 2 of present Rule 7].

Section 4 [Section 3 of present Rule 7].

Section 5 [Section 4 of present Rule 7].

Section 7 [Section 6 of present Rule 7].

Rule 7, Alaska Bar Rules (renumbered as Rule 6) is further amended by adding at the end thereof a new Section 7, as follows:

Section 7. When the Board denies an examination permit on the basis of character, the Board shall give the applicant not less than ten (10) days written notice of its action, and a statement of the specific grounds on which the denial of the examination permit is based. Within ten (10) days of receipt of such written notice, the applicant may submit to the Board such written argument, documentation, or other material as the applicant deems relevant to the denial of the examination permit. Upon receipt of any such material, the Board shall reconsider the denial in a timely fashion and give written notice of its decision.

Proposed Amendments to Article VI of the Alaska Bar Association By-Laws

Section 1 of Article VI is amended as follows:

SECTION 1. Officers. A president-elect, vice-president, secretary, and treasurer shall be elected by a majority vote of the active members of the Alaska Bar in attendance at the annual meeting.

There is added to Article VI a new Section 6 to read as follows:

SECTION 6. Treasurer. The treasurer shall be responsible for the financial accounting of the association, and shall render a report of the status of the financial affairs of the association at each meeting of the Board of Governors and shall give an oral report to the membership at the annual meeting. The treasurer shall have such further duties as the Board of Governors shall direct.

DISCIPLINE REPORT

Advertising- Use of Trade Names

Apparently some confusion exists regarding the method and means by which an attorney may advertise his/her services to the public. It is strongly suggested that any attorney wishing to advertise, consult and review beforehand Alaska Code of Professional Responsibility, Canon 2, as amended by Supreme Court Orders 356 and 357 effective April 1, 1979 and July 1, 1979 respectively.

Specifically, regardng the use of trade names, prohibitions against their use were contained in DR 2-102(B) and such prohibitions have been carried over into the DR as amended. Consequently, Alaska Bar Ethics Opinion 76-2 is still controlling.

Regarding the constitutionality of such restrictions, the attention of those interested is directed to two recent decisions in this area; **Friedman v. Rogers**, 99 S. Ct. 887 (1979) and **In re Oldtowne Legal Clinic**, P.A., 400 A.2d 1111 (md. 1979).

Attorney Violates Code

Recently the Alaska Supreme Court issued an opinion wherein it determined that an attorney had violated the Code of Professional Responsibility in three separate instances. **In the Matter of Craddick**, #1877, July 13, 1979. The Bar office has received numerous requests for supplemental information on the nature of the violations. In an effort to provide ethical guidelines for attorneys practicing in Alaska, the following has been taken from the findings made by the Area Hearing Committee. These findings were

[continued on page 8]

Advertising

[continued from page 7]

adopted unanimously by the Disciplinary Board.

COUNT I

The petition for formal hearing initially alleged four separate violations of the Code of Professional Responsibility. Count I of the petition alleged unauthorized advertising, a violation of DR 2-102(a). This count was dismissed by the Area Hearing Committee on the basis of the U.S. Supreme Court decision issued in *Bates v. State Bar of Arizona*, 43 US 350 (1977).

COUNT II

Count II of the petition alleged a violation of DR 7-105, which pro hibits an attorney from presenting, participating in presenting, or threatening to present criminal charges solely to obtain an advantage in a civil action.

The charge arose out of a meeting in the office of the respondent. Present at the meeting were the respondent, respondent's client, an employee of the client, the employee's husband, and the employee's attorney.

Prior to the meeting respondent's client had advised the respondent that the employee had stolen money from the client and that the client wanted the money returned. Respondent's client supplied respondent with evidence tending to prove a taking of funds amounting to $7.28 and had told respondent that he was certain the employee had stolen much larger and substantial funds.

Respondent contacted the employee and instructed her to appear in his office. Prior to their appearance, respondent had no knowledge or expectation that the employee's husband, an attorney, would accompany her.

The sole purpose of the meeting was to cause the employee to admit the taking of the sum of money from her employer, respondent's client, and to arrange for a method of repayment.

Respondent was of the expressed opinion that his client lacked any proof of a taking in excess of $7.28.

At the meeting, respondent was asked by the employee's attorney as to which capacity respondent was acting, viz, as city attorney or as a private attorney to the employer.

Respondent stated that he was acting as a private attorney and could not, in any event, be involved in his capacity as City Attorney because the subject of discussion involved either a felony or embezzlement, and a City Attorney's jurisdiction did not include either felonies or embezzlements. It is not clear which position was stated by respondent, or which position respondent admits to have taken. It is clear that he stated one or the other.

During the course of the meeting, respondent stated that he had proof of the employee taking as much as $750.00 but respondent refused to disclose that proof to either her or her attorney.

Respondent, on one or more occasions, stated that if the employee would admit to the taking and arrange for repayment, "nothing further would happen," or "it won't go any further."

When the employee denied the charges made by respondent, the meeting ended with the respondent advising all concerned that the matter was going to be given to the District Attorney, and the employee's attorney came away with the distinct impression that criminal charges involving as much as $1,000.00 would be filed against his client.

After the departure of the employee, her husband, and her attorney, respondent asked his client what client wished to do; the client directed respondent to see, that criminal charges were filed.

Subsequently, a misdemeanor charge was laid against the employee charging her with taking $7.28. This charge was later dismissed.

The Area Hearing Committee concluded that respondent had arranged a confrontation with his client's employee for the sole purpose of gaining an admission from her that she had taken as much as $750.00 from her employer and exacting from her a promise to repay, knowing full well that respondent did not have a shred of proof to support that claim.

At the meeting, respondent first declared that the subject matter involved a felony, later lied to the employee and her attorney by stating that he had proof of a taking of at least $750.00 and finally making it clearly understood by all of those in attendance that if the employee admitted the obligation and made arrangements to be paid same the matter would go no further.

Respondent's expressed belief was that his conduct, as above described, did not violate the Code of Professional Respondibility, DR 7-105, because he did not make a direct threat of criminal prosecution.

Respondent is apparently of the mistaken belief that it is perfectly proper to resort to the use of innuendo in evading the prohibition of DR 7-105.

COUNT III

Count III of the Petition alleged a violation of DR 5-105 of the Code of Professional Responsibility which obligates the lawyer to decline or cease employment if the interest of another client may impair or compromise the lawyer's independent professional judgment.

The Area Hearing Committee found that during the period wherein the complaint arose, respondent was employed as attorney for the City and Borough. The employment contract allowed respondent to engage in the private practice of law if such practice was not in conflict with the City's interest.

Respondent was hired and paid a legal fee by private clients to appear before the Sitka Planning and Zoning Commission to present to the Commission the historical background of the legal title and certain real property which his clients were seeking to either subdivide or obtain a variance for an order to sell the property as two lots. This appearance and presentation was in fact made by respondent.

Approximately three weeks after the initial presentation respondent again appeared before the Planning and Zoning Commission, at the request of the Commission in his capacity as City and Borough Attorney. At the request of the Commission, at said meeting, respondent outlined for the Commission various legal theories under which the Commission might properly deny the application of respondent's private clients.

The Planning and Zoning Commission denied the petition of respondent's private clients based upon the grounds suggested by respondent.

At a subsequent meeting of the assembly of the City and Borough at which the Client's appeal of the Commissions' denial was considered, respondent, in his role as City and Borough attorney advised the assembly that it could legally subdivide the property in question if it saw fit.

The Assembly ultimately approved the petition of respondent's private client.

The Area Hearing Committee found that although respondent was a contractual part-time City and Borough attorney, he was in fact under obligation to the City and Borough at all times and as to the ongoing activities of the City and Borough.

A part-time City and Borough attorney cannot represent a private client before any deliberative body of the city and borough because his obligation is to the City and Borough whether or not called upon by the body in question. His independent judgment must necessarily be impaired or compromised when he undertakes representation of a private client before any such body. Thus, respondent should have rejected representation of these private clients before the Planning and Zoning Commission in the first instance.

After having accepted and gone forward with the representation of the private client, respondent then should have not rendered legal advice to the Planning and Zoning Commission and Assembly as their attorney, on the Petition of the respondent's private client.

Respondent maintains a view that his conduct as above described did not violate the proscriptions of DR 5-105 because his representation was not as an advocate, in that he never specifically recommended denial or approval of the private client's petition.

COUNT IV

Count IV involved violations of DR 4-101(b), which proscribes an attorney from revealing a confidence or secret of a client; DR 5-105(a) which requires that an attorney decline preferred employment if the exercise of his profesional judgment on behalf of a client will be or is likely to be adversely affected by the acceptance of the proferred employment; and DR 5-105(b) which requires an attorney to discontinue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client.

At all pertinent times respondent acted as the City Attorney. According to his understanding with his primary employer, the City, respondent was permitted to carry on a private practice so long as it was not in conflict with the interest of the City.

Respondent was placed on retainer as attorney for a family corporation. The corporation held, as its principle asset an apartment building.

After respondent was placed on retainer the Corporation was notified by the State Fire Marshall that certain improvements had to be made if the apartment building were to remain occupied by its tenants.

From time to time respondent acted on behalf of his private client to prevent the closure of the principal asset, the apartment building.

Several months after respondent was retained by the Corporation respondent discovered that his principal client, the City, had instigated the Fire Marshall's demand for improvements to the apartment building.

Respondent then informed the corporation of the conflict of interest and withdrew his representation.

Respondent continued to represent the city on the same matter.

During the course of respondent's private employment, as counsel for the corporation, respondent learned that there might be adequate reserves available for financing the required improvements.

To the respondent's direct knowledge, his client did not want to use any reserve funds to make the required improvements.

Respondent, acting as City attorney, telephoned the mortgagee of the apartment building to deterine whether such funds were available.

The area hearing committee concluded that respondent through his representation of the corporation, gained confidential knowledge of the corporate finances. Subsequently, respondent attempted to use this knowledge contrary to the wishes of the corporation to further the interest of the city. Undoubtedly, respondent also believed that his actions were taken in the best interest of his former client and it would seem that his former client did in fact have more to lose if the apartment building were shut down than he would by having any reserve accounts made available for the improvements.

By substituting his judgment for that of his former client, respondent quite likely could have saved the day for both the city and his former client. That however was not in accord with the wishes of his former client.

In using the information respondent gained from his representation of his former client, respondent clearly breached DR 4-101(b).

In continuing with his representation of the City, with regard to the corporation, respondent breached DR 5-105 (a) and (b). Upon learning of the conflict above, respondent should have terminated his employment, not only with his private client, but with the city, insofar as such representation related to the corporation.

Boedecker Elected President

Thomas R. Boedecker was elected President of the Anchorage Bar Association on October 22, 1979. During the noon meeting at the Westward Hilton, a complete slate of officers and board members were elected to serve with him. The new officers are **Stanley Howitt**, Vice-President, **Larri Spengler**, Second Vice-President, **Douglas Williams**, Secretary, and **Kenneth Jacobus**, Treasurer. The new board members are **Bruce Bookman, Vincent Vitale, John Havelock** and **Kenneth D. Jensen.**

IN THE TRIAL COURTS FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS
604 Barnette Street, Rm. 342
Fairbanks, Alaska 99701

Notice to Claim Exhibits, Depositions and Transcripts

If you were involved in any Civil or Misdemeanor court case filed in the Fourth Judicial District before January 1, 1978, which is now closed and not on appeal, you should make arrangements to immediately remove from our file any exhibits, depositions and transcripts you wish to keep.

If these exhibits, depositions and transcripts are not claimed and removed from the court system on or before January 1, 1980, they will be destroyed.

You may call 452-1551 or write to the above address for further information.

DATED at Fairbanks, Alaska this 21st day of August, 1979.

JAMES R. BLAIR
Presiding Superior Court Judge

Taxation Committee Reports

Should You Incorporate Your Law Practice?

By Robert L. Doss, Jr.

Corporations, and professional corporations in particular, have been called everything from the ultimate tax shelter to a pain in the neck (and perhaps a few other things which do not suit the tenor of this publication to repeat). The objective of this set of articles will be to examine the incorporation of a law practice, in the process hopefully explaining why some of the more positive statements made about professional corporations are true; when the time may be right, if ever, for you to incorporate your practice; to point out some of the costs and traps involved in forming, operating and dissolving a professional corporation so that you do not come away from the experience with a professional corporation with some of the more negative feelings mentioned. Hopefully these articles may be of some use both to those of you who know little or nothing about professional corporations and may be considering at some time the incorporation of your practice; as well as those of you who have a greater degree of familiarity with corporations, who may already be practicing as a professional corporation, for your own needs and perhaps those of your clients in other fields.

Why Incorporate?

There are both tax and non-tax reasons for incorporating. Some of the tax as well as the non-tax aspects of incorporating will be explored in our next article. The material that follows will be a consideration of the employee benefit tax advantages of incorporating.

The major tax advantage to be obtained in incorporating a professional group is in the retirement plan area. The general tax characteristics of retirement plans, whether corporate plans or plans maintained by a proprietorship or partnership, known as Keogh or HR-10 plans, are probably familiar: employer contributions to the plan are tax deductible by the employer within certain limits; the participants in the plan are not currently taxed on the contributions made on their behalf; the income earned on the funds held in the plan, whether in the form of a trust or some other arrangement, is generally not subject to income tax as it is earned by the plan; lump-sum distributions to a participant or his beneficiary may quality for very favorable income taxation rates; and a distribution upon death to the beneficiary of a participant in a plan may be exempt from estate tax.

★ ★ ★

There are certain distinguishing characteristics that should be considered, however, between corporate qualified plans and Keogh plans. The major distinguishing characteristic is the limitations on the deductible contribution which may be made by the employer. The maximum deductible contribution to a Keogh plan for each individual in the plan is the lesser of $7,500.00 or 15% of compensation. If a corporation adopts a pension plan or a profit sharing plan (or both), it may be able to deduct contributions of up to the lesser of 25% of an employee's compensation, or $32,700.00, the latter amount being subject to periodic cost-of-living adjustments. A corporation may also adopt another type of pension plan, known as a defined benefit plan, which, depending on the age of the key participant, may provide for substantially larger deductible contribution levels, in some cases in excess of 100% of current compensation.

With respect to the employees that would be eligible to participate in a qualified plan, with a Keogh plan the employer may impose a waiting period of up to three years of employment before an employee may be eligible to participate in the plan. If an employee does satisfy this eligibility period, and becomes a participant in the plan, all contributions made to the plan on his behalf would become immediately vested; that is, if the employee were to leave at any time subsequent to his entry into the plan, he would have a nonforfeitable right to all contributions made to the plan on his behalf and earnings thereon. A corporate plan may have a similar rule to the one just stated with respect to a Keogh plan. A corporate plan, however, may have a shorter eligibility period, not to exceed one year, and at the same time adopt a vesting schedule which could reduce or eliminate a departing employee's nonforfeitable right to his interest in the plan for a number of years. Thus, the plan may provide that an employee terminating service prior to four years of service with the employer would not be entitled to any portion of the contributions made by the employer on his behalf. If the employee had worked for four years, his percentage of the contributions made on his behalf would be limited to 40%, and that percentage would increase gradually with each subsequent year that the employee had worked so that he would not earn a nonforfeitable right to 100% of those contributions until he had been employed for as much as eleven years. The amounts forfeited by terminating employees, in profit sharing plans, may be allocated among the remaining participants in the plan in a similar fashion to the allocation of the employer contribution. In pension plans, the amounts forfeited reduce required employer contributions to the plan.

In a corporate plan, loans may be made by the participants from the plan to the extent of their vested interest, and perhaps in greater amounts with adequate security. Under certain circumstances, and in certain corporate plans, participants may make withdrawals from the plan, subject to current taxation, prior to termination of employment and at any age. No loans may be made from a Keogh plan to a partner or proprietor, nor may withdrawals be made by these individuals prior to the attainment of 59½ without being subject to a penalty of 10% of the amount of the withdrawal or loan.

Finally, corporate plans have the capability of having a great deal of portability between plans; that is, if a participant leaves the employment of a corporation, and as a result receives a distribution from the qualified plan of that corporation, he may avoid taxation on the distribution if it is transferred to an individual retirement account, or to another qualified corporate plan or a Keogh plan. The self-employed participant in a Keogh plan can only make a tax free rollover to an individual retirement account, and then only provided that the individual is either disabled or has attained age 59½.

The other major tax advantages available to a corporation that are not available to partnerships and sole practitioners are the availability of group term life insurance and the use of a medical expense reimbursement plan. Group term life insurance may be taken out (if there are enough employees to qualify for group insurance), which may cover the stockholders who are employees as well as the other employees, and the premiums will be deductible by the corporation. If the coverage per employee does not exceed $50,000.00, the premium paid by the corporation is not treated as additional compensation to the employee.

Under a medical reimbursement plan, the payments that the corporation makes for the medical expenses of its employees are deductible to the corporation but not taxable to the employees. It should be noted, however, that the Revenue Act of

[continued on page 10]

Taxation

[continued from page 9]

1978 provides that, beginning in 1980, if the medical reimbursement plan does not meet certain non-discrimination standards, the medical expenses or reimbursements paid to or for the highly compensated employees will be subject to taxation to those employees. Thus this particular corporate planning tool has been severely curtailed and potentially eliminated by those provisions.

When to Incorporate?

Taking into account the various tax advantages to be achieved by incorporating a professional group, the question is often raised as to when is the proper time to incorporate. Though other factors are involved, as numerical analysis is certainly a relevant factor in this timing decision. Ignoring for the moment the various costs associated with incorporating, the analysis should initially focus on the relative amount of deductible contributions which may be made to qualified plans, either in an unincorporated form, to a Keogh plan, or to a corporate plan. For example, assume we have a proprietorship, with a net income of $45,000.00, the proprietor would be able to make a deductible contribution to a Keogh plan for his account of $6,750.00 or 15% of the earned income. In a corporate plan (or plans), assuming a salary of $45,000.00, as an employee he would be entitled to contribute and deduct as much as $11,250.00 for his account (and as noted above, perhaps more through use of a defined benefit plan). The difference in deductible amounts between a Keogh plan and a corporate plan is even greater at larger amounts of earned income or salary. For instance at a comparative level of $75,000.00 the maximum contribution to the Keogh plan would be $7,500.00, while the maximum contribution and deduction for the corporate plan would be $18,750.00. At a comparative level of $125,000.00, the relative deductible amounts would be $7,500.00 versus $31,250.00. Even if we were to assume that the only plan to be maintained by a corporation was a profit sharing plan, in order to retain the maximum degree of flexibility each year since it requires to fixed contribution, once the comparative level of salary and earned income exceeded $50,000.00, the comparative amount deductible in the corporate plan would be increasingly greater than the amount deductible for the Keogh plan.

★ ★ ★

Obviously part of the consideration in determining whether or not to incorporate a practice is what the costs of incorporating would be. Each of you is familiar with your own charges, of course, for the various steps involved in the actual incorporation. Since there would be a new entity, there may be additional annual accounting expenses. If you are involved in installing retirement plans, you are also familiar with what your fees might be for those services. Initial costs for retirement plans, if you or your client are advised to go to outside services, may range anywhere from no fee at all for adopting certain prototype plans or as much as $2,000.00-$3,000.00 for a combination of individually designed plans. The annual administrative cost of maintaining a plan maybe in the range of $500.00 $1,500.00, depending upon the number of employees covered by the plan, and to what degree you choose to control the investment of the plan.

A frequent objection to maintaining a qualified plan is the cost of covering employees of the professional group other than the professional employees. As I will illustrate, this "cost" may not exist, and by means of various design techniques, you may actually get the government to pay all the "cost" of covering employees, as well as some of your own investment, by means of reduced corporate taxes.

A common design technique is to require a waiting period for participation in a plan tied with a deferred vesting concept. As noted above in comparing a Keogh plan to a corporate plan, a corporate plan may include an eligibility waiting period for participation in the plan of up to one year, and the attainment of age 25. The corporate plan which includes an eligibility period of one year or less may adopt a deferred vesting period which will have the effect as turnover occurs, depending on the type of plan, of either increasing the account of the remaining participants or decreasing the required cost to the employer for contributions to the plan.

Another technique employed to minimize the cost of covering non-professional employees is to integrate a plan with Social Security. Without going into a detailed explanation, the general result of this integration is to allocate a portion of a contribution to the higher paid employees only, with the balance being allocated among all participants. Of course this has the effect of allocating a greater amount, as a percentage of compensation, to the higher paid employees than to other employees. For example, where the contribution for each shareholder-employee may amount to 25% of his compensation, the total contribution for the other employees may be considerably lower, perhaps as low as 5-10% in some plans.

★ ★ ★

A final design technique of rather recent interest involves the concept of operating a professional practice as a partnership, with the partners being separate one-person professional corporations and/or individuals. The purported advantage of this sort of arrangement is that each partner is able to adopt a qualified plan tailored to his needs, without the necessity of covering any other employees, since there are none. That is all non-partner employees are employees of the partnership, not of any of the partners. This concept, though not a new one, was given a considerable boost by the result in the case of **Thomas Kidde**, 69 T.C. 1055 (1978). That case was appealed by the government to the Ninth Circuit on October 6, 1978. In the case, a corporation, Thomas Kidde, M.D., Inc. was a one-man professional corporation that formed a partnership with another one-man professional corporation in which each professional corporation owned a 50% interest. Several professionals who were formerly employed by Kidde, Inc. became employees of the partnership (the Tax Court held that they were employees despite the taxpayer's contention that they were independent contractors). The Court held that the partnership's employees were not to be attributed to Kidde, Inc. because it did not control the partnership and that, since control of a partnership is defined in the Code as being more than 50% ownership for other purposes, it should also be defined by that criterion for purposes of Section 401(a)(3), thus the corporate plan would not need to cover the employees of the partnership as eligible participants. This holding was contrary to a long-held IRS position, set forth in Rev. Rul. 68-370 (1968-2 CB 174), and reconfirmed in several recent Private Letter Rulings. Basically the position of the IRS is that, unless the employee group is clearly an independent contractor with respect to its services to the professional corporation(s), each partner would be required to in some fashion cover a portion of the salaries of the partnership employees in his qualified plan.

Illustration

To tie together the foregoing discussion of cost and design techniques, let us consider a practical example.

The firm of Suem and Savem, A Professional Corporation, has recently incorporated. They are considering adopting retirement plans. Suem and Savem are each 40 years old. They have set their salaries at $80,000 per year each. They have one associate, age 27, whose salary is $25,000; a secretary/bookkeeper, age 35, whose salary is $18,000 and a secretary/receptionist, age 25, whose salary is $15,000. Savem is inclined to favor deferring as much income through retirement plans as he can, up to 25% of his compensation. He is not sure they can afford all that, but feels they can certainly contribute an amount equal to 10% of compensation annually. Suem thinks it will be too expensive to cover the other employees, and would rather invest the money on his own. Alternatively, he would like to know what would be available to him if they did adopt plans, and he decided to quit five or 15 years from now, or retire at age 65.

The following table was prepared to illustrate what net amount of cash would be available to Suem based on an annual investment of $20,000 (25% of his $80,000 salary):

After-tax cash available to Suem after a period of years.

Year 5	
Alternative A	$58,326
Alternative B	$110,466
Alternative C	$116,296
Alternative D	$127,692
Year 15	
Alternative A	$250,472
Alternative B	$372,016
Alternative C	$392,506
Alternative D	$418,719
Year 25	
Alternative A	$582,918
Alternative B	$809,409
Alternative C	$843,559
Alternative D	$946,668

Alternatives

A: No plan is adopted. Suem invests $20,000 of after-tax earnings.

B: The corporation adopts a profit sharing plan and a money purchase pension plan which requires a contribution of 10% of compensation. The total annual contribution to the accounts of each shareholder is $20,000.

C: Suem and Savem, A Professional Corporation is split up into a **Kidde** arrangement. Neither shareholder covers any of the other employees in his plan. Suem cntributes $20,000 per year to his plan.

D: The corporation adopts a profit sharing plan and a defined benefit pension plan which calls for an annual cost for each shareholder of $8,000, or 10% of their compensation. The total amount put into both plans each year for each shareholder is $20,000.

Assumptions

1) All employees are eligible participants.

2) The associate and the secretary/receptionist turn over every two years.

3) The secretary/bookkeeper is permanent.

4) The following vesting schedule is adopted: 0-3 years = 0%, 4 years = 50%, 5 years = 100%.

5) The corporate tax rate is 25%.

6) Suem's individual incremental tax rate is 50%.

7) Suem removes all his funds from the plan(s) at the end of the period indicated, and the lump-sum distribution would qualify for ten-year forward averaging.

8) The funds invested earn 8% before taxes.

9) The plans are integrated with Social Security to the maximum extent possible.

10) the annual administrative costs for the plans are $1,000.

11) The calculations include Suem's portion of the "cost" of including employees in the plan where appropriate.

Addendum

The Ninth Circuit dismissed an appeal from the Tax Court case of **Thomas Kiddie, M.D., Inc.** in October, 1979. More importantly, on October 4, 1979, the Tax Court, in a declaratory judgment action, **Lloyd M. Garland, M.D., F.A.C.S., P.A. v. Commissioner of Internal Revenue**, Dkt. No. 9956-78R, held that the pension plan of a professional medical association which was a 50% partner with an individual doctor in a medical practice was a qualified plan where the only employer of the professional association was a physician, and the employees of the partnership were not covered by the association's plan. The significant aspect of this decision was that the Tax Court relied upon IRC Code Sections 414(b) and (c) in reaching its decision. The **Kiddie** case had been decided based on rules in effect prior to the adoption of the above code sections in 1974. The court stated that, in a situation to which Section 414 applies, it would be the exclusive test for determining whether common control exists in coverage questions. It remains to be seen whether the Internal Revenue Service will follow this decision or will continue to litigate the issue.

One Giant Step Nowhere and Other Ramblings

By Marc Grober

To those members of the bar who have practiced in the field of Indian Law, there is no finer example of giving with one hand and taking with the other than the manner in which the Federal government redresses native grievances.

One artiface employed by the Feds has been the tautology—keep 'em running in circles. One of the oldest symbols known to man and popularized in *Worm Ouraborous*, the serpent swallowing itself is perhaps the thematic forerunner of such works as *Catch-22*; you just can't get there from here.

★ ★ ★ ★

In the past this treatment of American aboriginals has been in large part limited to the federal administration (with their bureaucratic variation on the theme: "blessed are those who move in little circles for they are destined to become big wheels"). Even the BIA, though still apparently dissatisfied with their own performance, has failed to measurably improve that performance over the last century.

★ ★ ★ ★

Though the bar has been witness to the occasional decision ignoring the general rule that statutes passed for the benefit of Native Americans be construed liberally in their favor, the Federal Courts have usually been the fountainhead of Indian Rights as they have consistently reprimanded the Department of the Interior and local government for taking advantage of these people during the cultural transition from enlightened communal regines to capitalism.

★ ★ ★ ★

I was somewhat dismayed however that while reading the Alaska Federal District Court's opinion in *People of South Naknek v. Bristol Bay Borough* (A76-211-memorandum and order, March 6, 1979) the specter of the avaricious worm haunted my perusal.

The Court at page 6 of that opinion states:

> While State law concerning fixtures may be helpful as a guide in determining what is a "permanent improvement," the tax immunity question is a matter of federal law. No state, of course, could remove the tax immunity by applying a narrow definition of fixtures or reclassifying the improvements as personal property. (citations omitted).

The Court concludes that though the land homes or other permanent improvements on restricted land are exempt from local taxation, there is no such prohibition with respect to "personal" property.

Not Exactly Ruled From The Grave, But...

The Court grounds its opinion in large part on two Supreme Court decisions; *U.S. v. Rickert*, 18 U.S. 432 (1903) and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) While *Rickert* contains language which apparently the Court paraphrased prohibiting state courts from attempting to tax improvements by expanding "personalty" and limiting "realty," (aren't Federal Courts required to *apply* state substantive law), *Rickert* is over 75 years old. *Mescalero* on the other hand, states that whether an improvement is realty or personalty for the purpose of local taxation is to be determined on the basis of the "intimacy" between improvement and land. Though *Rickert* contains the prohibition, it lacks a test, which Supreme Court provides in *Mescalero*. In other words, some finder of fact must determine whether an improvement has been "permanently" affixed to the land.

Must the home owner provide a foundation for his improvements? How is the home to be affixed so that it meets the *Mescalero* test? Hasn't that decision been left to the Borough?

These are all questions that came to a head in the Bristol Bay area as Bristol Bay Borough and the City of Dillingham attempted to tax the property of natives in the region. In a series of skirmishes between local government and restricted title holders, local government attempted to levy taxes on all realty and personalty located in the area (yes folks, even the fishing boats that were owned outside of the municipality but which exchanged cargo in the municipal docks felt the glinting stare of local revenooers).

In Alaska, however, the law of personalty and realty is much the same as in the states involved in *Rickert* and *Mescalero*. Mobile homes are personalty, at least most of the time. In fact (though such matters are just now coming into the current legal arena with the banks climbing over consumers as the bottom slowly sinks out of our "outside" based economy) the question of the priority of a security agreement on a mobile home as against the mortgage or deed of trust on the real property to which it has been affixed is truly a classical property issue.

Skeletons in the Cellar

A legal approach to this problem is handicapped by the fact that in many bush communities real foundations are engineering nightmares and many people live in cabanas or wannigans—non-affixed improvements. Further complications are raised by a native cultural tradition that though there is no private ownership of land there can be private ownership of one's cabins, shacks, homes. While in the bush it is far from unusual to be told that one person owns a cabin that sits on anothers property, it is just as common to see a will that leaves the house to the testator's daughter and the land it sits on to his son. Such a will can and has tied up estates for months.

There could be little doubt in anyone's mind that restricted land is not taxable but personal property is. The question of importance for the Court to decide was where the line between the two could be drawn. In citing *Mescalero* it is apparent that the Court left the real issue rattling "understairs," allowing local authorities to determine whether or not a certain improvement is taxable, the Court guarantee to the contrary notwithstanding.

Bringing it Home

These problems are not limited solely to natives or to the bush (there is substantial acreage in restricted title in urban and suburban Alaska). Let's look at an example.

Jack and Jill purchase some property on Hillside in Anchorage on a wrap around escrow (now de rigeur in the Anchorage area). At the same time they purchase a mobile home and sign a security agreement thereon which is promptly filed with the Department of Motor Vehicles. Now, Jack gets a contractor friend to put in a foundation and a first floor and they jack the mobile home (now freed of its mobilizing structure) on top (yes, people have done this).

Jack and Jill then sell the "home" to a bfp without telling him of the security agreement on the second floor and proceed to get themselves killed trying to visit our state capital by plane. In one hour or less tell me who gets what for which reasons (such sweet remembrances of law school). All of which is a bit far afield from King Salmon (no doubt where Jack and Jill would have landed if they had gone to visit South Naknek instead of the site of the state's new capital reconstruction).

In *South Naknek* plaintiff's motion for summary judgment was granted in part and denied in part, but did plaintiffs really get any relief at all? The case of *Johnson v. Dillingham* (case Number 76-16207 Third Judicial District at Kodiak) graphically illustrates where the matter was prior to *South Naknek* and where it is now.

Now You See It, Now You Don't

In *Johnson* a native holder of a restricted title "gave" a cabin located on his land to his daughter who claimed the cabin. However, in briefing the matter before Judge Madsen plaintiff's attorney, Alaska Legal Services Corporation, stated that their client did not have a possessory or any other interest in the house (although the stipulated facts were expressly to the contrary).

Both parties briefed the issues of affixing chattels to realty extensively. The Court settled the matter by finding that:

> Delores Johnson is not the owner nor does she have any possessory interest in the house.
>
> Memorandum decision and opinion, January 8, 1979

Basically the Court found that the house was permanently *affixed* to the land and was therefore realty which issue, however, was mooted out by the Court's finding (directly contradicted by the record), that Delores Johnson had no interest in the house (the city was only attempting to tax Ms. Johnson's possessory interest). The Court did not address defendant's claim that Ms. Johnson's possession of the home constituted some interest that was taxable.

California, on the other hand, allows taxation of tenancies, even where those tenancies are provided to federal employees by federal agencies to keep personnel on site. One would have thought that, barring Judge Madsen's opinion, the same would be true in Alaska.

George W. Thompson in his *Commentaries on the Modern Law of Real Property* (see §18 et seq for example) points out that the distinction between personalty and realty has always been a function of societal needs, a determination akin to "highest and best use".

The Alaska District Court was in essence requested to weigh the financial needs of local government against federal pre-emption due to prior commitments to the subject aboriginals on a balance beam bounded in a historical milieu having a tradition of conservative acculturation. Reducing the Aforesaid to English: "Where to now"?

The Court's response (perhaps based on the only prior Alaska State case on point, *Johnson*) was a paper shrug.

Devitt Committee Final Report Out

Statement of Leonard S. Janofsky

Last week the Judicial Conference of the United States adopted the final report of its committee, known as the **Devitt Committee**, which was created to consider Standards for Admission to Practice in the Federal Courts. The conference approved creation of a special committee to oversee and monitor, on a pilot basis, (A) an examination in federal practice subjects, (B) a trial experience requirement and (C) a peer review procedure. The experimentation would be conducted in a selected number of district courts which would volunteer their cooperation.

The Judicial Conference also recommended by the Devitt Committee is highly desirable. In fact we urged such pilot testing when the ABA testified before the Devitt Committee last April. The ABA will cooperate with the Judicial Conference as these experiments go forward.

These experiments will provide the opportunity to determine whether the concerns relating to an examination in federal practice subjects and trial experience requirements expressed by the young lawyers, minorities and state and local bar associations have validity and, if so, whether appropriate changes can or should be made to accommodate such concerns.

As regards the recommendation of the Judicial Conference that the ABA consider amending its law school accreditation standards to make courses in trial advocacy mandatory in all law schools, it should be noted that at the same time that the Devitt Committee was developing its recommendation, a task force of the ABA Section of Legal Education, known as the "Task Force on Lawyer Competency: The Role of the Law Schools," was also studying the law school curriculum. It has recently submitted a series of 28 recommendations for the improvement of law school education.

The ABA Board of Governors has authorized the distribution of the task force report to educators and to state and local bar associations for study and comment. The task force has recommended that law schools "offer instruction in litigation skills to all students desiring it." Whether it will be feasible or desirable to make such courses mandatory is not yet clear. The effective teaching of trial skills requires a small teacher-to-student ratio and is, therefore, very expensive. Thus the funding of such a curriculum is likely to be far more difficult than the development of the curriculum and faculty. The law schools have also raised the concern of academic freedom. The proposal of the Judicial Conference will be referred to the ABA Section of Legal Education for study and recommendation.

The ABA currently is involved in a program to which I intend to give high priority during my presidency, whereby we are developing mass production techniques for the teaching of trial skills to lawyers already admitted to practice. The highly popular and successful programs of the National Institute for Trial Advocacy have already been capsulized by the ABA into a nine-day course. This year we are conducting a pilot program in two states to develop techniques that will further intensify the program and lower its cost so as to bring it within the time and financial means of young lawyers and those engaged in solo or small office practice. That program should be available early next year to all bar associations and continuing legal education administrators throughout the country.

Rabinowitz

[continued from page 1]

posals by the Anchorage Academy of Trial Lawyers and an ad hoc committee of trial attorneys in anchorage recommending appointment of experienced trial lawyers to act as pro temp Judges in order to alleviate the backlog will not be used.

Additionally, Rabinowitz announced that the evidence was sufficient to enable the Court System to ask the legislature for two additional Superior Court Judges for Anchorage. In response to listeners questions, Rabinowitz urged the Anchorage Bar Association and the Alaska Bar Association to support the Court's request in Juneau through lobbying efforts.

In closing, Rabinowitz observed that the proposals submitted to the Court by the ad hoc committee of trial attorneys in Anchorage wherein that group recommended specific time periods for moving litigation through the Court are compatible with the proposals presently being considered by the Calendaring Committee.

Reforms Require Cooperation

Rabinowitz recognized the tension existing between the Supreme Court and the Superior Court on the issues of past Court System freedom given to each District to develop on its calendaring systems and concern on the part of the trial bench that the Supreme Court is not supporting the trial bench in affirming sanctions imposed by the Trial Court upon attorneys who fail to follow the rules of civil procedure. Citing the Constitution, Rabinowitz was firm in his statement that the Constitution gives the Supreme Court exclusive domain for Court administration. However, he observed that any reforms from any source are going to require trial Judge and lawyer cooperation to effectively administer any calendaring system which attempts to move litigation through the Court efficiently with justice for all.

In closing, Rabinowitz indicated that the calendaring Committee is not unanimous in the decision, but it is likely to continue to review present discovery practice and procedures. Rabinowitz hinted that reform may be necessary in that area in order to make any calendaring system effective.

Rabinowitz also indicated in response to questioning there must be a difference in treatment between the simpler cases and the more complex cases if either are going to be given trial dates certain in order to move them expediently and efficiently through the Courts.

When asked for comment, Judge Carlson stated that the ad hoc lawyers committee suggestion to have self-imposed time limits on cases in order to move them through the Courts was needed because there is not enough Judge time available to actively involve the Judge in all phases of the litigation and to "do it all."

You Are Cordially Intived by the Trial Courts of the State of Alaska To the Installation of
C. Richard Avery
As Judge of the District Court of Alaska
On the Sixteenth Day of November Nineteen Hundred and Seventy-Nine
At Four O'Clock P.M.
In Courtroom C, Third Floor
Boney Memorial Court Building
Anchorage, Alaska