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TORT REFORM—Page 22

# The Alaska BAR RAG

Volume 10, Number 3

*Dignitas, Semper Dignitas*

\$2.50

AUGUST, 1986

## Economy mixed for lawyers

### Alaska attorneys adjust to revenue

By Patrick Rumley and  
Mickale C. Carter

A lawyer can't help but wonder as he or she surveys the wreckage and ruin in today's economic environment: if or when the suffering will come to roost among those engaged in the private practice of law.

Most of us might suspect that with fewer dollars changing hands in the state these days, money spent on lawyers and their ilk will be one of the first cuts from business or family budgets. I should characterize this more a fear than a suspicion. After all, we all hear our family dentist lament that people are putting off that crown that should be installed or that regular check-up that can wait for next month. Since the trip to the lawyer's office can be placed roughly on a par with an afternoon spent in a dental chair with gadgets hanging out of your mouth, it is not unreasonable to believe that the regular resort to a lawyer's couch might be curtailed.

That's the fear. But after all, we are supposed to be rational dispassionate people who don't let our emotions get the best of us. What are the facts? This article provides a snapshot of how practitioners in various fields of law view the impact of present economic conditions on their practice and what they foresee such impact will be in the future.

As a barometer of this impact, we interviewed practitioners from the fields of natural resources, criminal, commercial and real estate, and tort law. Their response was willing, almost anxious and sometimes surprising. All the interviewees see some opportunities amid economic casualties.

#### Natural Resources

James Linxwiler, a partner at Guess & Rudd, specializing in natural resources law (among other things), and Jim Reeves of Bogle & Gates, a senior partner with that firm who



Cusumano Photographic, Tempe, Arizona

## We will miss Wendell Kay—See page 16

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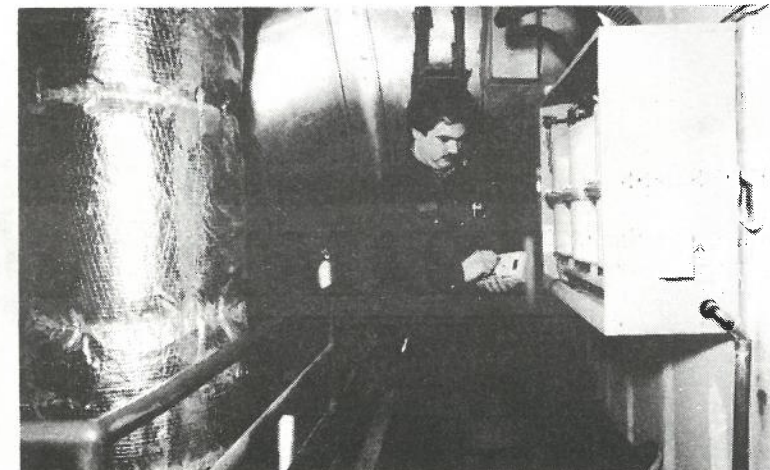
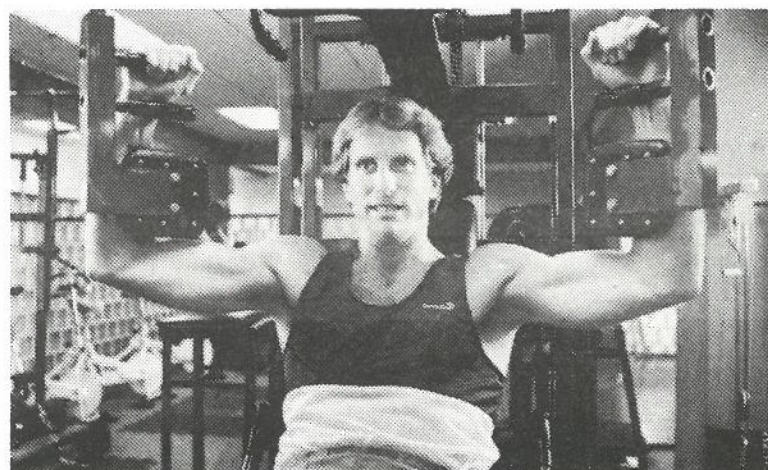
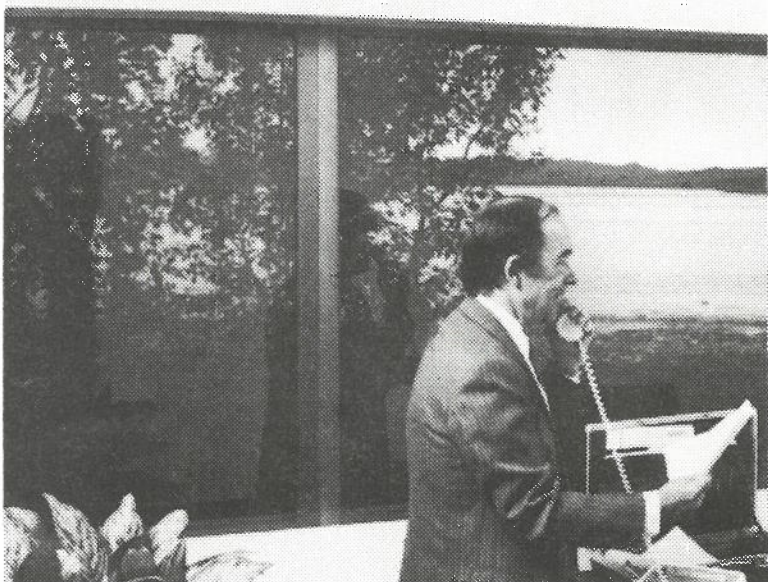
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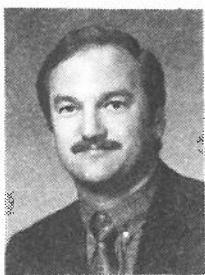
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## PRESIDENT'S COLUMN

Ralph Beistline

Flying back to Fairbanks from Anchorage last week, I found myself seated next to two doctors who were apparently returning from a medical convention. I had intended to use this time to put the finishing touches on this article about Professionalism and the Public Image of Lawyers in Alaska.

The doctors, however, were quite distracting and were discussing the insurance crisis and their belief that it was caused entirely by the "lawyers." They also seemed to perceive lawyers as the source of all evil. They laughed loudly to old jokes such as:

**Q: What is the difference between a dead lawyer and a dead skunk?**

**A: There are skid marks in front of the skunk.**

and,

**Q: What is the definition of a "real shame"?**

**A: A bus full of lawyers going over a cliff with three empty seats.**

This discussion seemed to have the attention of all the people in the surrounding rows. Even the stewardess was interested. I thought at first that, as president of this Association, I should introduce myself, refute their disparaging attacks, and then valiantly edify them as to the sanctity of the legal profession and legal practitioners. As I was about to do this though, I looked at the attentive passengers and noted that most of them seemed to be enjoying the doctors' conversation and, to my surprise, seem to share their spirit. I wondered if they could possibly be in agreement with the doctors' perception of the lawyers in Alaska. Or could it merely be that they were too polite to interfere?

As we passed over the mountain, the stewardess arrived with the cashews (the doctors each got two packages) and the doctors' conversation changed to other topics. Thereafter, I was left to my thoughts and the completion of this article.

As I glazed out the window at the Tanana Valley (known internationally as the home of the Tanana Valley Bar Association), I began to wonder if it was really possible, given the nature of our profession, to improve our public image.

By the time we had landed in Fairbanks, however, this brief attack of pessimism had passed and I returned to my office to complete this article.

I have concluded that we should not be discouraged by a poor public image, for our discouragement won't improve it. We should strive though to improve ourselves and our profession. As we do this we must believe that our public image will improve. Our goal, though, should not be a good public image as much as a high level of professionalism.

Webster's New World Dictionary defines a "professional" as one worthy of high standards. As lawyers, the concept of professionalism seems to involve three separate areas. First, there is the inter-lawyer relationship, second, there is the lawyer-client relationship and third, there is the lawyer-bar relationship. Each area

is important and reflects, to some extent, our status as professionals, and the image we portray to the public.

The thrust of this column centers on inter-lawyer relations, an area in which all of us have room to improve. In my practice, I have known lawyers who distrusted everyone else in the profession, and who virtually hated their adversaries. Given this attitude, it is not surprising that the public is suspicious of lawyers, when they note that we are suspicious of one another. This attitude not only creates a hostile and unpleasant environment for justice to work, it increases the cost of litigation, which further decreases the lawyer's public image.

On the other hand, I have known lawyers who blindly trusted everyone and who treated adversaries as their closest confidants. Justice cannot be gained in this environment, either, and the public perception that "we are all in cahoots" is encouraged.

We should strive for a happy medium, where we treat one another with respect, consideration and courtesy but do so without losing sight of the best interest of our clients. This is possible. It is in this environment that justice can be best obtained. One is not any less an adversary if one says "please" and "thank you"; or checks an opponent's schedule before setting a deposition; or shakes his or her hand after a closing argument. In fact, it would seem that one is unprofessional if one does not.

While it is relatively easy to treat a professional attorney professionally, it is more difficult when dealing with the obnoxious lawyer (of whom we all know several). They come in all genders, shapes, and sizes and generally perceive themselves as perfect. While dealing with such individuals is not easy, it is generally possible. The key in this regard is to be an actor as opposed to a reactor. To gauge one's conduct on what one knows to be right as opposed to lesser standards set by others. As in everything else, the standard of professionalism we adopt should not be set by those at the lowest level of our profession.

To emphasize the importance of professionalism in the practice of law, the Bar Association has instituted a Professionalism Award, consisting of an appropriate certificate and plaque which will be awarded to as many as three attorneys annually, chosen by a committee of the board, based on nominations from the bar. This is envisioned as a very prestigious award and is aimed at focusing on those individuals who are perceived by their peers as exemplifying the attributes of a true professional attorney.

This award will be presented for the first time at the 1987 Bar Convention in Fairbanks, Alaska. Hopefully, by placing renewed emphasis on this aspect of our practice, we can improve the overall quality of law in Alaska, and possibly even improve our public image.

I am now in the process of gathering some appropriate doctor jokes. The next time I fly, I want to be prepared.



## The editor's desk

James M. Bendell

### FROM THE EDITOR'S DESK

As the new editor of the Bar Rag, this is my inaugural issue. Readers will notice that a new format is being introduced. First, I have two associate editors to assist me, a news editor and a features editor. In addition to sharing the workload, this allows me to blame someone else if there is anything wrong with the paper. Also, several new features are starting with this issue. Each edition of the Bar Rag will now have a central focus issue—in this issue the impact of the slow economy on the legal profession. Our next issue will be devoted to the subject of legal ethics and we invite interested readers to send in articles or suggestions on that topic.

We will also have regular columns from established practitioners in various fields giving advice and suggestions to the general practitioner in areas that may be of relevance. In this issue, Jan Ostrosky, a practitioner of commercial law, advises on the law of foreclosure. Rodney Kladeen, who has a Master's of Law and Taxation degree, discusses the implications of the filing of tax returns by divorced persons. Mike Schneider, in the area of torts, deals with fact investigation in tort cases. Future issues will rotate features in such areas as divorce, criminal law, and real estate. We feel that these practical "how to" columns will be of service to the general bar.

We are also inaugurating a Persons column to report on the movements and changes of firms by attorneys in the state; we will also be reporting births and marriages and deaths. Please write in and tell us of any announcements that you have.

A great deal of this issue is devoted to Wendell Kay. The reason is quite simple. Those of us who knew Wendell can attest to the fact that he was one of the most extraordinary lawyers in this state. This was not simply because he was a great lawyer (he was)—but because he was a great human being. Wendell had a love of people and a genuine joy for life that was contagious. Despite his incredible talents, he was a humble man who never hesitated to help or socialize with new members of the bar. He was so full of life that it is still hard to believe that Wendell is gone.

Finally, I would like to take this opportunity to thank Harry Branson for all the years of thankless labor that he put into The Bar Rag. Those of us who have written for The Bar Rag in the past know that Harry made this paper a special object of his attention. He has worked without salary and often without a great deal of gratitude. Often in the past Harry was the subject of criticism on the ground that The Bar Rag occasionally printed matters that were too rowdy to be included in a "professional publication." Harry's basic premise was to have a publication that emphasized that lawyers are living and breathing persons, too and have lives beyond those of the courtroom. Pictures of lawyers playing softball in jeans were as much a subject of his paper as were coverage of Bar Convention highlights. If anyone thinks that Harry's coverage of the somewhat earthy sides of human



Past-president Harry Branson strikes a pose with daughter, Siri, in Prince William Sound.

conduct was at times too explicit, then perhaps this only proves that experimentation does not come without risk of offending someone.

For all your years of tireless efforts, thanks Harry!

We also say farewell to Gail Fraties who leaves the pages of this publication to assume his responsibilities as Superior Court Judge in Bethel. Gail also is to be thanked for being editor of the Bar Rag for one year. His column "All My Trials" will be missed by most, although not without a few dissenters. Let us hope that he finds time in the future to return to his column.

Thank you and good luck Gail!



## In the Mail

May 13, 1986

Deborah O'Regan  
Executive Director  
Alaska Bar Association  
Post Office Box 10029  
Anchorage, AK 99510

Dear Ms. O'Regan:

Edward B. Benjamin, Jr., of New Orleans, Louisiana, President of The American College of Probate Counsel, has announced that Robert L. Manley, of the law firm of Hughes, Thorsness, Gantz, Powell & Brundin, of Anchorage, has been elected a Fellow of the College.

His election took place during the recent meeting of the College in Lake Buena Vista, Florida.

The American College of Probate Counsel is an international association of lawyers. Its purposes include improvement of the standards of persons specializing in wills, trusts, estate planning, and probate and the modernization of the administration of our tax and judicial systems in these areas. Membership, which is a post of honor and recognition of outstanding qualification, is by invitation of the Board of Regents.

Sincerely yours,  
Vickie Hauge

### NOTICE

TO: ALL MEMBERS OF THE ALASKA BAR

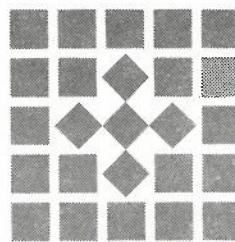
RE: DISPOSAL OF *DEPOSITIONS*  
AND *EXHIBITS* IN CASES FILED  
PRIOR TO 1980

Because of a shortage of storage space in most of our courts, we need to dispose of the depositions and exhibits from old closed cases which are still being held by many of the courts. Therefore, you have until September 30, 1986 to notify the court that you wish to pick up any depositions and exhibits currently stored by the Alaska Court System *in cases filed before 1980* which are no longer pending or on appeal. This includes both published and unpublished depositions as well as all exhibits.

After September 30, 1986, the trial courts will destroy the depositions and exhibits in all pre-1980 cases without giving individual notice to the parties.

Your request to pick up your depositions and exhibits in these cases must be made in writing and must be received by the court no later than September 30, 1986. Please do not call the courts to make these requests. Please include your phone number in your request so the court can notify you when your depositions and exhibits are ready to be picked up.

July 10, 1986  
Arthur H. Snowden, II  
Administrative Director  
Alaska Court System



## Solid Foundations

By Mary Hughes

The Alaska Bar Foundation is, thanks to the support given it by the Alaska Bar Association members, financially well. Approximately 50% of the membership responded positively to the dues check-off. The money received has been placed in an undesignated account and will probably be used to support the Zenith line—800-478-7878. The lawyer's help line is completing its first year of service and has been of assistance to many members of our Bar. A thank you to Lesley Sullivan is appropriate.

The Foundation is planning to celebrate the bicentennial of the Constitution in style and is presently working on program ideas. Naturally the support of individual bar members as well as local bar organizations will be necessary if the celebration is to be a success. The Foundation hopes to run public service announcements on radio and television relative to the Constitution. Additionally, a celebration of the Constitution is tentatively being planned for Law Day.

With the unfortunate passing of Justice John Dimond and Wendell Kay, the Foundation has formed endowments for both lawyers. The Juneau Bar, spearheading the Dimond Endowment, has resolved that the monies

donated be utilized to assist in promoting access to justice for all Alaskans. Since Wendell Kay spent a considerable amount of his time in later years developing a Bar history, the monies donated to the Kay Endowment will be utilized to fund an Alaska Bar history.

The Anchorage and Juneau Bars must be thanked for generous contributions. The Anchorage Bar was a major supporter of the Foundation's law school scholarship program.

An hour presentation on tort reform was broadcast via the Learn Alaska Network in May. The tape, ¾" or 1" width, is available from the Foundation and was shown at the Bar convention in June.

The IOLTA rule is still before the Alaska Supreme Court. The rule which would permit a voluntary IOLTA program has been the subject of two conference sessions and a year's worth of consideration. A decision is imminent!

The Trustees of the Foundation attempt to meet quarterly. Any questions or comments with respect to Foundation matters may be addressed to: Bart Rozell, Winston Burbank, John Conway, Sandra Saville or Mary Hughes.



## CONFERENCE UPCOMING

The Alaska Association of Legal Assistants is hosting the Region 1 Conference of the National Federation of Paralegal Associations next month in Anchorage.

The conference, to be held September 26 through September 28 in the Captain Cook Hotel is expected to draw more than 100 registrants from Alaska, the Pacific Northwest and Hawaii (Region 1) and other areas in the country for a full schedule of CLE programs. Further program and registration information can be obtained by calling Ann Hayman in Anchorage at (907) 276-3222.

The American Bar Association National Legal Resource Center for Child Welfare Programs will hold its third annual child advocacy conference November 13-15 at the Westin Hotel, Chicago. The seminar is sponsored by the Young Lawyer's Division. Additional information: Sally Small Inada, ABA, 1800 M St., N.W., Washington, D.C. 20036, (202) 331-2250.

Public Speaking for Professionals is a new one-day course sponsored by the American Law Institute-American Bar Association Committee on Continuing Professional Education. The course will be offered September 26 at the Drake Hotel in Chicago. Further information: ALI-ABA, 4025 Chestnut St., Philadelphia, PA 19104, (215) 243-1600.

The Practicing Law Institute has a series of seminars upcoming. A summary follows:

Managing Health Care: Legal and Operational Issues Facing Providers, Insurers and Employers. September 25-26, St. Moritz-on-the-Park, New York, NY.

Seventeenth Annual Estate Planning Institute, September 25-26, Hyatt on Union, San Francisco, CA; October 16-17, Doral Inn, New York, NY; November 13-14, Ashley Plaza, Tampa, FL.

Section 1983 Civil Rights Litigation and Attorneys' Fees: Developments and Problems, September 15-16, Roosevelt Hotel, New York, NY; October 27-28, Holiday Inn Golden Gateway, San Francisco, CA.

Securities Litigation: Prosecution and Defense Strategies, September 22-23, Hotel Parker Meridien, New York, NY; October 20-21, Four Seasons Hotel, San Francisco, CA.

Ninth Annual Institute for Corporate Council: Critical Issues for Corporate Counsel, September 23-24, Waldorf-Astoria, New York, NY.

Computer Law Institute, September 18-20, Waldorf-Astoria, New York, NY.

General Aviation Accident Litigation, September 25-26, Essex House, New York, NY.

Fifth Annual Institute on Municipal Finance Law, September 25-26, Sheraton Centre, New York, NY.

Further information on these meetings from the Practicing Law Institute, 810 Seventh Ave., New York, NY, (212) 785-5700. Fees for seminars in the \$400 range.

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# Lawyers say 'stay flexible' . . . from page 1

also specializes in that field, are cautious. Linxwiler immediately conceded that the downturn in exploration activity has substantially shut off the flow of work emanating from that area. While conceding this, he hastened to add that the overall amount of work has not decreased notably. He emphasized that the "big ticket" litigation issues are relatively unaffected by the sputters and spurts of the economic cycle. They continue on and clients continue to pay for qualified practitioners to push on with cases which may have important significance to the bottom line of the company in the future. Not to be forgotten is the day-to-day bread and butter practice which supports the huge operations at Prudhoe Bay, Kuparuk and Endicott on the North Slope. The oil companies aren't closing the door and turning out the lights on these projects. Neither do their lawyers.

What may be most surprising to those who do not directly practice in the area is that mining law practice is flourishing, despite the hard times (or perhaps, because of them) that have beset the mining industry in Alaska, Linxwiler said. He acknowledges that there may be some belt tightening, i.e., businesses relying more upon in-house counsel to carry more load, but does not see this trend cutting very deeply into his practice.

Reeves, of Bogle & Gates, shares this sentiment, observing that the volume of practice over the past five to six years has been uneven, with no relationship existing between any particular industry developments. He sees no real downturn inconsistent with this pattern, stating that he is "doing as much as (he has) ever done

before." His case load has not changed in volume, although it may in type because of the shutdown of exploratory work in the oil, gas or mining industries and an increased load for other type work related to production activities. He commented wryly that the legal profession is in a fortuitous position of being able to take on cases on both sides of the economic cycle.

Jeff Lowenfels, a partner at Birch, Horton, Bittner, Pestinger & Anderson, agrees in large part with his colleagues from other firms. He mentioned that although he has lost a few clients due to departure from the state or closing of business, he has not found his experience over the past several months to be all that bad. According to Lowenfels, many companies have remained here, such as mining companies, but have chosen not to operate this summer. Their choice not to operate does not necessarily mean a lack of mining legal business. Generally, he finds that his clients have become less willing to fight the good fight in litigation and more willing to forsake the costs and risks inherent in litigation for settlement. In his work related to federal and state agency permitting, he has found the agency representatives less obstreperous in their approach to review of projects. Agency personnel are reluctant to kill or place burdensome restrictions upon the few industry projects which are going forward this year. In short, he sees the economic impacts as being neither all good nor all bad, but a mixed bag of both.

## Commercial, Bankruptcy, and Real Estate

There are few surprises to report in these fields. Bankruptcies are up and real estate sales are down. Lawyers who have previously focused on real estate matters are shifting now toward bankruptcies to earn income from the increasing amount of this type of work.

Les Romo, a sole practitioner in Anchorage, has seen a definite decrease in commercial and real estate related matters. Both businesses and individuals are holding back from entering into new ventures or commercial transactions in anticipation of circumstances worsening, rather than improving, he says. He sees tax reform as an aggravating factor. People are reluctant to commit to obligations for which they cannot predict the tax implications. Collections and bankruptcies have also been more frequent. He noted especially an increasing need for flexibility of landlords in responding to business pressures upon tenants in these difficult times. When commercial tenants run into a sea of red ink, some landlords are responding by lowering rents in order to keep their space filled. In these times, there aren't many prospective tenants standing in line to fill the space in the event that an existing tenant capsizes. Romo does not expect a short-term turnaround of the recent economic trends. He concludes that those who have "lived and died" with an area of practice depended upon prosperous conditions have walked on treacherous ground and serve as an example to the rest of us that we should not "place all of our eggs in one basket."

## Tort Law

The economy, at present, is having little or no impact on the amount of work for those involved with personal injury litigation from either the plaintiff or the defense perspective. Although defense bar attorneys pride themselves in being readily distinguishable from plaintiffs' bar attorneys, and *vice versa*, it

became apparent during our interviews that the interviewees shared a common characteristic; when confronted with an adversary (in this case, the economy), both waxed eloquent. Perhaps, predictably, the plaintiffs' attorney interviewed was much more pessimistic about the future than was the defense attorney.

David Schmid of Kay, Saville, Coffey, Hopwood & Schmid, a plaintiffs' attorney, predicted that the present economy will likely have a great impact on the practice of tort law. He expects that the inevitable high rate of unemployment will influence how cases will be handled. For example, an unemployed plaintiff with no means of support will be more likely to settle for less than the perceived value of the case.

Schmid predicted that the high rate of unemployment will also impact recoveries, if the case does go to trial. If the plaintiff were unemployed, the wage loss will be significantly less. Also, with problems in the economy, a plaintiff cannot make demands for cost of living increases, and the projected lost wages will then necessarily be less than in a strong economy.

Schmid also predicted that there will be a larger number of defendants who will be judgment-proof. He foresees that the problem of judgment-proof defendants will be prevalent in auto accident cases and cases which involve some small businesses. He thinks that these defendants will be unable to afford liability insurance because of the poor economy, unemployment, and/or reduced wages. He believes that this will result in fewer defendants being pursued.

This predicted increase in the number of judgment-proof defendants will also likely decrease the actual number of cases that plaintiffs' attorneys will handle. The competition among plaintiffs' attorneys will also be intensified because of the likelihood that more potential plaintiffs will be leaving the state. Those plaintiffs will, undoubtedly, seek the assistance of out-of-state counsel.

Leroy Barker of Roberston, Monagle, Eastaugh & Bradley, a defense attorney, viewed the situation quite differently. He stated that to understand the present situation it must be placed in a historical perspective. In 1978-79, with the completion of the pipeline, the population in Anchorage dropped and there was a corresponding drop in work. It should be remembered that the economy came back. In 1973, with the oil crisis many predicted world calamity because of the commonly held belief that there was simply not enough oil in the world to meet the world's needs. However, history speaks for itself. There was not a world calamity, and the economy came back.

Barker said that if you look at history, you can see that things never turn out as good as one hopes or as bad as one fears. Alaska's economy has always had its ups and down. It is presently in a down. The economy will improve.

Barker took the opportunity during his interview to discuss a topic related to the oil crisis, tort reform. He stated that our American system is one of compensation of victims. That system, he believes, is here to stay. He predicted that the insurance crisis will also work itself out. As he sees it, the cause of the present crisis was the fact that the insurance companies did not steadily increase premium rates. If they had steadily increased their rates, people would have budgeted for the increase as they budgeted for other costs which have increased over the last decade. Now, insurance companies, all at once, want what looks like a giant increase. This

increase has caught some businesses off guard. Barker is confident that these businesses will adjust and will maintain their insurance and that our tort system will continue.

## Criminal Law

The present economy has not impacted the practice of criminal law along defense and prosecution lines, as one might expect. The most important factor is rather whether one's practice is in the private or public sector. Private sector criminal defense appears to be hardest hit by the present economic climate. The public sector (i.e., public defenders and the prosecutors), seems to be either unaffected or enjoying an increased workload.

The District Attorney's office remains active. Mary Jane Sutliff who handles misdemeanors, stated that in her section she saw no change brought about by the present economy.

Nancy Shaw, a public defender in the new federal defender program, predicted that with the present economy her department would be receiving more business. There will be fewer people able to pay for defense, and, possibly, there will be more crime because of people being unemployed. However, she does not foresee a rapid increase in the defender program because of Gramm-Rudman. She predicted that the great need for a public defender will, nonetheless, likely result in increased staff.

Representing the private sector, a local criminal defense attorney who wished to remain anonymous (no doubt, to protect the innocent), stated that criminal defense practice has already been affected by the present economy. He said that there are already no mid-level felony cases—those that carry a price tag of between \$15,000 and \$30,000. Additionally, the higher priced cases are not in the numbers that they used to be.

He sees the cause as what he calls a "self-fulfilling prophecy." The courts are allowing court-appointed counsel more often than the situation requires. Because of the present economic conditions, the courts do not make adequate inquiry when the defendant requests a public defender. The people are cash poor but many have other resources. For instance, they could take a second mortgage on a home. He acknowledged that the courts are in a bad situation because they have to make sure there is a trial within 120 days, and there is not much time to make a full economic disclosure analysis.

## Conclusion

For the attorneys interviewed by the Bar Rag, the most pervasive impact on the practice of the economic downturn in Alaska is more qualitative than quantitative. Flexibility is the watchword for the present and perhaps the future. The most optimistic in the profession see prospects for prosperity by responding to the needs of both economic upturns and downturns as they occur. In each field of practice, one must evaluate the kinds of legal services which will be in demand during good times and bad. In bad times, direct yourself to the needs of the creditor or debtor in settling accounts or negotiating payment arrangements. In good times, focus on the transactions which are the driving force of prosperity.

In simple terms—roll with the punches. And if all of your eggs are in one basket. . . don't drop it.

## The Alaska Bar Rag

Editor in Chief . . . . . James M. Bendell

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President Beistline has established the following schedule of Board meetings during his term as president. If you wish to include an item on the agenda of any Board meeting, you should contact the Bar office or your Board representative at least three weeks before the Board meeting.

September 4, 5 & 6, 1986

November 6, 7 & 8, 1986

January 8, 9 & 10, 1986

March 19, 20 & 21, 1987

June 1, 2 & 3, 1987—Fairbanks

## Thwaites elected fellow

The American College of Probate Counsel, has elected Richard S. Thwaites, Jr., of the law firm of Campbell, Ostrovsky & Thwaites, Jr., of Anchorage, as a Fellow of the College.

The American College of Probate Counsel is an international association of lawyers. Its purposes include improvement of the standards of persons specializing in wills, trusts, estate planning, and probate and the modernization of the administration of our tax and judicial systems in these areas. Membership, which is a post of honor and recognition of outstanding qualifications, is by invitation of the Board of Regents.

## Board supports CLE tuition credit plan

The Board of Governors at their June 2 meeting in Valdez passed the following resolution:

IT WAS RESOLVED, that persons who travel commercially to an Alaska Bar Association CLE seminar shall receive a credit for their transportation costs of up to 50% of the cost of the seminar; that this does not apply to the mid-winter CLE program in Hawaii or the CLE programs at the Bar Association Annual Convention.

To give you an example: two attorneys from Fairbanks attended the recent 1986 Tax Conference held in Anchorage. Since their airfare of \$222 more than exceeded 50% of the \$175.00 tuition fee, they were both eligible for a full 50% credit, or \$87.50 toward the tuition. The \$175.00 seminar cost each of them \$87.50. Proof of travel (ticket voucher) must be shown at the time of registration check-in to receive the credit.

Any questions about the tuition credit plan should be directed to Linda Nordstrand, CLE Director, at the bar office.



## THE LUNCH CIRCUIT

*Editor's Note: With this issue, attorney Philip Matricardi joins regular columnists in the Bar Rag, taking readers to restaurants near Alaska courthouses.*

By Philip Matricardi

Consider Kumagoro.

Kumagoro #2 occupies the northwest corner of the block all but filled with the Hotel Captain Cook directly south of the State Courts across 4th Avenue at K Street. Kumagoro serves Japanese food. The combination of airline crews and legal beagles crowd out tourists at lunchtime. Other restaurants at this location managed to fail despite the ideal location. A passable Greek restaurant (that actually served Greek food) was the immediate predecessor.

The original Kumagoro at D Street between Fourth and Fifth Avenues opened as a noodle house. Lately the Kumagoro at that location serves Occidental-style steak dinners and no noodles at all anymore. Noodles live on at both Kumagoro's K Street location and the newest Kumagoro on Fourth Avenue next to Stewart's Camera Shop across from the old City Hall.

Kumagoro #2 serves a couple versions of udon and ramen. For meatless marathoners they offer tanmen, ramen noodles in a fish broth with lots of veggies, priced at \$4.80. The other noodle bowls range from \$4.00 to \$6.50.

Kumagoro #2 serves sashimi but no sushi. A plate of raw fish can be costly; a small combo costs \$4.80; large combo (shrimp, tuna, and geoduck clam) runs \$12 as does an all-tuna order (maguro). More popular as an economical and satisfying lunch (especially for carnivorous types) are Gyoza and Yakitori. Gyoza (\$4) are stuffed dumplings that resemble potstickers, fried ravioli, or the Hawaiian version of dim sum called "half moon." Prepared in advance, Gyoza emerge hot from a reheat on the grill and come with three ingredients from which the savvy customer creates a dipping sauce—hot oil, vinegar, and shoyu (soy sauce).

Yakitori is chicken on a stick, a fast food teriyaki. Yakitori broiled chicken on a skewer costs \$3.80. Tempura (battered deep fried vegetables and seafood) can be ordered over rice or noodles or a la carte. Shrimp tempura is the priciest (\$7.50 a la carte), onion or zucchini tempura the cheapest (\$2.50).

For those with a hankering for the unusual (or sushi-heads going through withdrawal) Kumagoro offers Omusubi. These rice ball "sandwiches" are wrapped into a triangle with norimaki (pressed seaweed) and contain various goodies inside the warm rice—Ikura omusubi at \$1.50 each contain salmon eggs; sake omusubi at \$1.25 each contain smoked salmon; Ume omusubi at \$1.00 each contain pickled plum (definitely an *acquired* taste). Not listed on the menu but available for the asking is Katsuo omusubi which is stuffed with dried bonito.

People with large appetites at lunch might consider the "Complete Dinners" for around 10 bucks apiece, which include a choice of king salmon, cod fish, tempura, sashimi, or beef teriyaki accompanied by soup and rice. The most expensive item on the menu is tempura and sashimi complete dinner for \$12.80.

Kumagoro serves sake, beer, and wine.

Service can be fast and gracious, yet, at times, diners waste away from neglect for no apparent reason. Kumagoro serves lunch from 10 a.m. to 2 p.m. The place is busy from 11:45 a.m. until 1 p.m. It's usually easier to find a table after 12:30 p.m. than right at noon. Most folks manage to get in and out within half an hour. Quality of food is terrific. Preparation is simple, authentic, and flawless.

If you really want to stretch your legs from court and Kumagoro #2 seems too close (or too crowded), the newest Kumagoro is only four blocks east along Fourth Avenue on the same side of Fourth as the old traffic court building. The new Kumagoro provides nicer furniture, many more tables, and a much wider range of choices on the menu, all under a higher ceiling. It's the place with the pine front.

In addition to all the food available at the K Street location, the new Kumagoro offers chicken or pork curry, oden (a variety of fish cake in broth with a hard boiled egg), and a limited selection of sushi.

*Food critic Philip Matricardi can be heard on Saturday mornings on KSKA FM91, Listener Supported Radio for South Central Alaska.*

## Substance abuse committee formed

The Board of Governors has approved the establishment of a subcommittee on substance abuse, which it, optimistically enough, hopes will perform a useful service for lawyers whose lives or practices are compromised by the use of alcohol or drugs.

The Subcommittee will function in an official formal fashion when bar discipline counsel or the court system refers an individual for an evaluation and recommendation. The Subcommittee will not address the merits of client grievances or other complaints about the attorney. Subcommittee members will also be available to lawyers, their families, and their friends to simply talk about the difficulties that may have arisen related to alcohol or drug abuse. No records will be kept of the names of individuals making informal inquiries or the nature of their questions, and these conversations will be confidential.

Some of the 28 Subcommittee members are recovering alcoholics. Some are the spouses of attorneys. All have completed a one-day training session conducted by the Bar Association. In addition, some members have considerable experience because they have completed treatment programs or have professional training. All have access to descriptions of treatment programs and information about costs and admissions.

If you wish to talk with someone, you may call the Bar Association office at 272-7469 and they will refer you to a Subcommittee member. We are also printing here the names of the Subcommittee members so that anyone desiring information may directly call a member in whom he or she has confidence.

### Committee Members

D. Scott Dattan  
Stephen S. DeLisio  
Kelly Fisher  
Gregory J. Grebe  
William A. Greene  
Carmen L. Gutierrez  
Donna M. Habermann  
Trena L. Heikes  
Thom F. Janidlo  
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Sarah T. Kavasharov  
Elizabeth P. Kennedy  
Karen A. Kirby  
Terese Lapinski-Kashi  
Michael J. Lindeman  
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Edward R. Niewohner  
Debbie Ostrovsky  
Arden E. Page  
Stuart Cameron Rader  
J. Justin Ripley  
Rhonda Butterfield Roberson  
Joel A. Rothberg  
Mary Jane Sutliff  
Richard N. Sutliff  
Gail N. Thompson  
Susan L. Urig  
Diane F. Vallentine  
Herbert A. Viergutz

## Medical plan update

Initial response to the Association's new medical/benefit plan has been overwhelming. As of this writing, 33 firms representing 250 participants have enrolled. A number of firms are preparing to enroll shortly and we expect participation in excess of 400 by October 1. Firms have ranged in size from one to 50 employees.

Many firms are finding that, with the Bar's program, they are able to obtain similar or better coverage for a smaller premium. Most firms are realizing savings between 7% and 33%, depending on the carrier they transferred from. One larger law firm that enrolled in the plan will realize an annual premium savings of over \$45,000.

One rating "quirk" has appeared. A few groups presently enrolled with Blue Cross have been quoted premiums under the Bar plan which are the same or slightly higher than they are presently paying. This can happen if a firm's employee census is different now than when their Blue Cross plan last renewed. We are working on the problem with Blue Cross and hope to have an interim solution so that these firms need not wait until their annual renewal to switch to the Association's plan.

Medical expenses in Alaska are again increasing after 18 months near-stabilization. This translates into increasing premium upon renewal. The Association's group rates are "locked-in" until June 1st of 1987. A firm joining the Bar's plan now can thus enjoy several months of lower premiums until our group renewal. As a growing healthy self-rated group, we expect favorable rates.

We would like to thank all firms for their patience during the quoting process, especially in the three weeks following the start-up of the plan. By now, all of you who have enrolled prior

to August 1 should have received employee benefit booklets.

All reports on Blue Cross service to date have been positive. If you wish to inquire about a claim, call Blue Cross Customer Service toll-free at 800-426-6400. Customer Service reps now have available a sophisticated split-screen computer inquiry system and can answer 99% of all inquiries on first call. Blue Cross processes over 90% of claims within 10 days.

If, after calling Customer Service you still have a claim question or a problem, call our agent, Bayly, Martin & Fay (276-5454 or 276-5617, Bob Hagen or Denise Smith) for assistance.

Each firm's insurance administrator can also contact Libby Knecht, our plan's dedicated special accounts representative at Blue Cross in Seattle for assistance with any claims or billing problems that may occur. She can be reached at either the "800" number or called collect at 206-361-3969.

This is *your* group medical/benefit plan; we need to know how it's working for you. Please feel free to call either Bob Hagen or Denise Smith at Bayly, Martin & Fay or Gerry Downes at the Bar office, 272-7469, with your comments or suggestions.

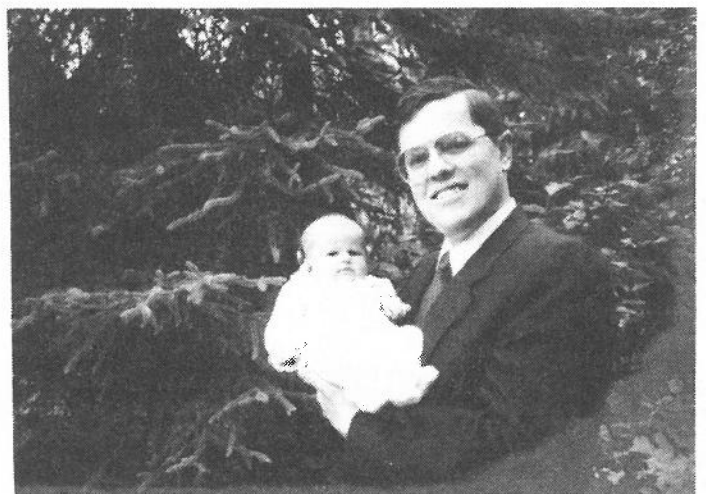
**Correction**—The article in the May "Rag" about the Bar's medical plan indicated that credit for coinsurance would be made at mid-year takeover for non-Blue Cross groups of four or more. This was incorrect. Deductibles are credited but coinsurance is not.

Coinsurance is that portion of a provider's bill that an employee is responsible for. On the Association's plan, this is 20% of major/medical expenses to a total of \$375 or \$600 per patient per calendar year, after the deductible.

### IN MEMORIAM

Wendell P. Kay, June 29, 1986  
Edward J. Fyfe, July 29, 1986

## Jacobus gets first distinguished service award



Ken Jacobus poses with his new daughter, Rachel Elizabeth Beth-el, born July 15, 1986.

Anchorage attorney Kenneth P. Jacobus was awarded the First Annual Board of Governors Distinguished Service Award at the 1986 Annual Convention in Valdez. The award was established by the Board of Governors to honor an attorney who has made significant contributions through volunteer service to the Bar Association.

Jacobus was born in Wisconsin and received both his B.S. and his J.D. degree from the University of Wisconsin and was admitted to the Alaska Bar in 1969. After clerking for Justice Jay Rabinowitz in Fairbanks, Jacobus joined the

firm of Hughes, Thorsness, Gantz, Powell & Brundin.

Jacobus is currently chair of the Ethics Committee. He and his wife Cheri run the Alaska Bar Review/B.A.R., Inc. bar review course. Ken is also treasurer of the Anchorage Bar Association. Ken has served on the Alaska Legal Services Board of Directors from 1971-1977 and is presently a captain in the JAGC, U.S. Army Reserve.

Ken and his wife Cheri have a 16-year-old daughter, Cheri-Catherine and a one-month-old daughter, Rachel Elizabeth.

## PRACTICAL POINTERS



By Rodney Kleedehn

Married couples generally file joint income tax returns. Couples do this because filing a joint return usually results in a lower tax than filing separate returns. However, filing a joint return causes the spouses to be jointly and severally liable for the tax although one spouse earns all of the income. The joint and several liability usually creates no problems if the couple stays married as they will consider themselves to be "in this matter together" when the Internal Revenue Service comes calling. However, togetherness usually ends at or prior to divorce. For that reason, divorce agreements commonly have provisions specifying who will be responsible for income tax liabilities. The IRS is not bound by such agreements and can collect the tax from either or both spouses so long as there is only one recovery.

If your divorce client is having second thoughts about whether or not he or she signed a joint return grossly understating the tax liability, the Internal Revenue Code (hereafter IRC) may provide relief. IRC § 6013(e) provides that a spouse shall be relieved from liability if three conditions are met:

- First, there must be a substantial understatement of tax as defined in IRC § 6013(e) attributable to grossly erroneous items of the other spouse.
- Second, the innocent spouse must establish that in signing the return he or she did not know and had no reason to know that there was a substantial understatement.
- Third, taking into consideration all the facts and circumstances, it must be inequitable to hold the innocent spouse liable for the deficiency attributable to the substantial understatement.

The relief from liability is available for the innocent spouse only and applies to a deficiency only to the extent that the deficiency is attributable to the substantial understatement. In

## TAX

addition, innocent spouse relief is available only if the understatement exceeds a percentage of the innocent spouse's income determined pursuant to IRC § 6013(e)(4).

Some divorces result at least in part from the filing of fraudulent returns or protest returns at the insistence of one spouse.

In other cases, the disintegration of the marriage may result in the failure to file returns. If no returns are filed, your client is safe if he or she had insufficient income to require that a return be filed (less than \$1,040 for 1985 returns). Otherwise, you and your client should be concerned about the statute of limitations for assessing income taxes.

Generally, the Internal Revenue Service must assess the tax within three years after the later of the due date of the return or the date the return actually was filed. If an amount includible in gross income which is greater than 25 percent of the amount stated on the return is omitted, the tax may be assessed at anytime within 6 years of the later of the due date of the return or the date the return actually is filed. There is no statute of limitations in the case of a willful attempt in any manner to evade or defeat the tax. In the case of a fraudulent return filed with intent to evade tax, there is no statute of limitations.

Furthermore, the Supreme Court ruled in *Badaracco v. Commissioner*, 464 U.S. 386 (1984), that in the case of a fraudulent return followed by an honest amended return, the filing of the honest amended return does not start the running of the statute of limitations. The case remains one of a fraudulent return regardless of the taxpayer's later repentant conduct, and the tax may be assessed at any time. The Service also may assess the tax at any time if no return is filed. A protest return is not considered a return so there is no statute of limitations.

As this discussion indicates, divorce is a proper occasion to discuss and evaluate potential problems your client has with the IRS. You should determine whether or not all returns

have been filed. If so, you should determine whether or not your client believes them to be legitimate returns. If a return was not filed, or a fraudulent return was filed, you must decide whether to take action or let sleeping dogs lie.

Even if you determine that there is no problem or your client decides to let sleeping dogs lie, the government should be advised of any change of your client's address. With few exceptions, the IRS cannot assess the tax until it mails a statutory notice of deficiency to the taxpayer. This notice advises the taxpayer that the Service has determined that a deficiency exists and that it will be assessed along with interest and, perhaps, penalties and other charges, unless the taxpayer files a petition in tax court within 90 days of the date of the notice. The beauty of filing a petition in tax court is that the taxpayer gets to litigate the issues on the merits prior to paying anything. If the taxpayer fails to file the petition within 90 days of the date of the notice of deficiency, the Service will assess the tax along with interest and any penalties and other additions. Once these items have been assessed, they must be paid in their entirety before the taxpayer may proceed with a refund claim and refund litigation. *Flora v. United States*, 362 U.S. 145 (1960). Although in limited situations, the IRS will allow an audit reconsideration without payment, you should never count on this as audit reconsiderations are totally within the discretion of the Service and rarely allowed.

The importance of receiving the statutory notice of deficiency cannot be overstated. The notice is deemed sufficient if mailed to the taxpayer's last known address, so the deficiency may be assessed although the taxpayer never knew of a problem. In the case of a joint income tax return filed by a husband and wife, the notice of deficiency may be a single joint notice unless the IRS has been notified by either spouse that separate residences have been established. If the Service has been given notice, a duplicate original of the joint notice must be sent by certified mail or registered mail to each spouse at his or her last known address.

Without the notice, the spouse keeping the family mailing address is more likely to receive the notice. If neither spouse keeps the family mailing address, it is possible that neither actually will receive the notice. If one spouse retains the mailing address, the question arises whether or not that spouse can be trusted to notify the other spouse of the problem. On more than one occasion, someone has negotiated unsuccessfully with the Service and ignored a statutory notice of deficiency without advising a former spouse. This results in assessment of the tax against the former spouse without him or her having the opportunity to be heard, and assessment forecloses the right to litigate in tax court prior to payment. To avoid this, notice of a new address should be given to the district director. For the District of Alaska, the district director's address is Internal Revenue Service, P.O. Box 101500, Anchorage, Alaska 99510.

If what I have said is already water under the bridge and the tax has been assessed against your client without his or her having received the statutory notice of deficiency, you still may have a chance to avoid paying the tax before having the issues considered on the merits. The IRS is entitled to treat the address appearing on the taxpayer's return as the last known address absent "clear and concise notification" of a new address. The Ninth Circuit Court of Appeals has held that a subsequently filed tax return with a new address gives the IRS notice. *United States v. Zolla*, 724 F.2d 808 (9th Cir 1984). The court noted in *Wallen v. Commissioner*, 774 F.2d 674 (9th Cir 1984), that the Service has the ability to perform a computer search of a taxpayer's social security number. The court held that the Service must perform such a search if it is aware of the fact that the taxpayer has moved.

Hopefully, these ramblings will be of help in advising your clients. Bear in mind that this article does not touch upon income tax liability arising from support payments and other exchanges of wealth resulting from divorce.

Anchorage Bar Association  
Annual Picnic and Train Ride

Plan to attend the Anchorage Bar Association's annual free picnic and train ride!

## Train Schedule

Leave Anchorage train depot at 9:30 a.m. August 23; stop at Birchwood Road at 10:15 a.m.; arrive Snyder Park at 11:00 a.m.

Leave Snyder Park at 4:30 p.m.; stop at Birchwood Road at 5:15 p.m.; arrive Anchorage depot at 6:00 p.m.

To make reservations call Pat or Mickey at 276-7377.

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## The movie mouthpiece

Edward Reasor

The proud judge who announces at a social gathering that he has not taken a vacation for five years, and the assistant public defender who brags at cocktail parties about how many manhours the state owes him in compensation are not to be envied. It is a simple fact of life that when one is in a stressful occupation (which the law apparently is), occasional absences from that stress enable one to have a keener outlook, a brighter spirit, and a more inventive attitude.

Since it's summer and the motion picture is the art mode of choice for the most represented generation of the Alaska Bar, what better way to spend time away from the office than taking a tour of Universal Studios in Los Angeles?

One does not have to be a movie expert to appreciate the magic of cinema, because the Universal Studio tour gives one a behind-the-scenes look at the biggest and busiest motion picture studio in the world.

The tour is a two-hour excursion through 420 acres of Universal's front and back lots, highlighted by the mechanical charge of the monster shark "Jaws" (the same one used in the movie), a visit to "The Parting of the Red Sea," a ride across a collapsing bridge, and a stop adjacent to a flash flood for real, live special effects. Tour passengers are locked into a comfortable tram, which is pulled by a motor bus while the tour director stands beside the driver to point out points of interest.

More good news: The studio tour now has available the new \$6.5 million attraction featuring King Kong. Kong, himself, is a computer-controlled, three-story-high mythical monster brought to life as passengers ride by.

The Universal Studio tour is the best tour that I have taken, although I have been in numerous movie studios throughout the world. It is, of course, big business and captures in part some of the features of Disney World (clean sidewalks, gift stands, etc.).

While passengers assemble and wait for the tour to begin, they're treated to a live, "The Adventures of Conan"—a sword and sorcery spectacular highlighted by special effects not seen in the "Conan" movie. Visitors may also test their dramatic skills at a "Screen Test Comedy Theater" or watch live-action Western stunt shows and animal stunts.

Universal Studio tours are open every day except Thanksgiving and Christmas and admission is only \$13.50 for adults and \$9.95 for children. It's one of America's best-kept secrets.

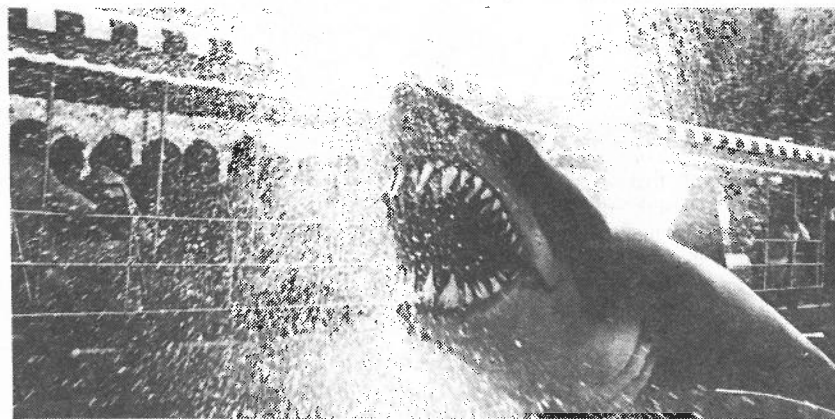
Traditionally, movie studios were closed to the general public, based in part upon potential damage claims and the egos of some movie executives and star prima donnas. Public tours were not allowed at Universal until 1964, but since then more than 45 million guests have toured the studios. I have talked to movie stars, directors, screen writers, and one producer, all of whom claim that they learned something new about movie-making from their own personal tram ride through the back lot. I certainly did.

Almost after the first turn, the tram passenger is intercepted by alien creatures who pilot a Cylon tank. The tram is blasted by a space cannon, detoured into a giant space ship and then all tourists are confronted by the Cyclons until rescued by a Colonial Warrior. Sound like "Battle Star Galactica?" It should, because this is the same equipment and extras

used in the television series. The exhibit is the world's largest permanent laser display.

As one exits the alien spacecraft, a burning house facade—set on fire electronically for each tram visitor—encourages one to ask: "How did they do that?" Almost every conceivable special effects question is then answered when all the passengers disembark to visit a special effects stage complex, presented in part by Kodak.

The special effects stage contains a three-



"Jaws," lunges at unsuspecting visitors to Universal Studios, California, recreating part of the drama in the fictional New England town of Amity a few summers ago. (Courtesy, Universal Studios)

part, multimedia documentation of motion picture special effects and post-production techniques, as explained by video cassette through the services of Actor Robert Wagner. Some visitors even volunteer to reenact certain scenes such as the popular "2001 Space Walk." The most interesting aspect of the special effects stage demonstration was the brief but illustrious demonstration of how Fred Astaire danced on the ceiling in his movie "Royal Wedding." Interestingly enough, some of the special effects we marvel at today were invented by Thomas Edison.



Passengers on the Universal Studios tour tram see the parting of the Red Sea through the magic of special effects and hydraulics. (Courtesy, Universal Studios)

Also in the special effects stage area is the model ferris wheel that was used in the movie "1941." It still works, even though it was "destroyed" by a Japanese submarine in the movie. Blue screens and the matte process are aptly demonstrated by use of movie sequences from "E.T." First-time movie students are introduced to the relatively new concept of computer motion control, where the model does not move but the camera does.

Not everyone, of course, is interested in special effects or the small details of moviemaking, so after a time everyone is reboarded on the

tram and shown approximately 500 outdoor sets and facades. Depicted are locations as diverse as the Old West, New York City, Chicago, and famous cities in Europe.

The actual, complete locations of W.C. Field's "My Little Chickadee," Paul Newman's "The Sting," and a good portion of the now-popular "Back to the Future" look and feel exactly as they do in the films we all saw. The San Francisco streets, the court houses, the

typical small American city squares, Main Street, U.S.A.—all are smaller than one imagines due to the magic of projection. (A good portion of what one sees in a film is a facade; that is, only the front of the building is shown and there may be nothing behind it except two-by-fours holding it up. Obviously a facade depends on one's point of view.)

Numerous movies were made at Universal Studios. Alfred Hitchcock's "Topaz," and "Torn Curtain" were filmed there and ample time is given tourists to take pictures of the sets and facades of those films before continuing on the

tour ride to an old bridge which Universal calls the "collapsing bridge." As each tram crosses this creaking antique, the bridge, thanks to the courtesy of well-engineered hydraulics, gives way. The driver then maneuvers the tram around the set, which allows viewers to see the bridge rebuilding itself for the next tram. All through this tour, a well-informed young man or woman speaks of Universal's support teams. Among other things, these teams raise and grow twenty five thousand plants on the premises for use in television and motion picture



productions.

One of the more dramatic special effects experienced during the guided portion of the studio tour is watching the tram as it appears to drive through the middle of a 600-foot lake. Actually, water is being parted electronically, allowing tram riders an eye-level view of the water. For onlookers, the tram appears to submerge. This occurs because the angle of the onlooker is different than that of the passenger, and the lake is 150 feet wide and 5 feet deep. Thus, the tram passes through the cascading water without getting any of its passengers wet.

Other passengers enjoyed the New England setting for Amity, which doubles as "Cabot Cove" for the television series "Murder, She Wrote." This set has a complete lake, the boat "Orca," and a weathered fisherman trying his luck, when suddenly his pole disappears beneath the water surface what appears to be a great white, man-eating shark. In a flash "Jaws," himself, lunges out of the water directly at the tram.

Still other visitors were genuinely frightened, through the courtesy of the late Alfred Hitchcock, who in addition to being a Master Director, was a Special Effects Expert. Hitchcock designed the "Doomed Glacier Expedition," a wintery outlook location that the tram pulls into. Through the courtesy of Sensurround, the sound effects of howling wind and crackling ice, the rider thinks that the tram is actually spinning through a long cavern. What is really happening is that a gigantic mirror is reflecting the revolving walls and the tram so successfully that, even if one closes his eyes, the feeling of being transported is so astounding that it is difficult to believe that the tram is simply moving straight forward. This is exactly the effect Alfred Hitchcock created in both of his films "Vertigo" and "Rear Window."

It was interesting to me as a movie buff to see the actual sets of well over 100 that I remember by heart.

Some guides spin additional tales beyond the regular highlights of the tour. The day I rode the tram, just last month, our guide was kind enough to inform us as we passed through the Appian Way, (from the movie "Spartacus" starring Kirk Douglas) that almost all of the Roman soldier extras in that film were college students from the nearby Los Angeles area. She claims that if you look carefully at the film, you will see that some of them are dressed in tennis shoes and wearing watches. The editor didn't think the reshooting of this small gaffe was worth the effort, so he toned it down as much as he could, but some footage of these college student actors stayed in the film. Our guide also informed us that the actual home called the Chicken Ranch, is one of the few completed houses on Universal's lot. It is used for both inside and outside filming. Everything is there and one could live in this house. You'll remember it as the "Best Little Whore House in Texas."

One of the most famous homes on the tour was the Bates home, prevalent in outside film shots in "Psycho," "Psycho II" and the just-released "Psycho III." Actually, the home is a facade and is not capable of handling inside shooting.

Our guide told us that when the original Psycho shower scene was filmed (many film historians claim the scene as one of the more exact and better anxiety-producing sequences in filming), Anthony Perkins was in New York and (therefore) the hand that stabbed the lovely victim was the hand of an extra! But then, Janet Leigh was on vacation at the time the shower knife scene was filmed and so for 45 seconds what we see is a double of Ms. Leigh in the shower room. In short, the two characters we most closely associate with the Bates house and the famous Psycho shower scene, Anthony Perkins and Janet Leigh, were not in fact the ones used in the movie.

Oh well, that's the magic of cinema.

## Failure Analysis and Failure Forensics

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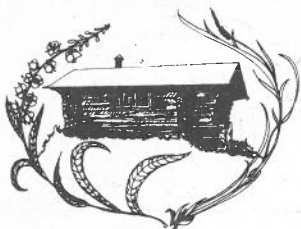
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## HISTORICAL BAR



*Editor's Note: The following vignette on the colorful legal history of Alaska is among the manuscripts received by the (special) Historians Committee of the Alaska Bar Association.*

*By way of an introduction far better than we could convey, we reprint here the letter of transmittal the late Wendell Kay sent on May 28 with the colorful manuscripts you'll be reading in future months.*

May 28, 1986

President Harry Branson  
Alaska Bar Association  
310 K Street, Suite 602  
Anchorage, AK 99501

Re: Historians Committee

Dear Mr. President:

I am glad to present a report of the Historians Committee to you on behalf of the members. I enjoyed compiling and editing this report, although most of my work consisted of hassling the contributors until they finally produced something.

Herald Stringer got to Anchorage a year before I did, so his recollections and mine would be somewhat parallel, although he knew a few fellows I never met, such as Karl Drager and Noel Wenbloom.

Norm Banfield brings memories of Bert Faulkner, with whom I once tried a great lawsuit in Ketchikan. Buell Nesbitt and I represented Governor Earnest Gruening, Attorney General Henry Roden and Road Commissioner Frank Metcalf, who had all been libeled by the "Juneau Empire." The jury gave the plaintiffs one dollar compensatory and five thousand dollars punitive damages each.

I only wish we could have had more contributions.

Very truly yours,

Wendell P. Kay  
Kay, Saville, Coffey, Hopwood & Schmid

## Discipline imposed

Francis Kernan was disbarred by Order of the Supreme Court dated June 2, 1986 but effective May 1, 1980 for a felony conviction. Mr. Kernan was convicted of a drug-related offense in Florida.

Attorney A received a private reprimand based on his neglect of legal matters entrusted to him. The attorney's neglect resulted in the dismissal of an appeal in one case. In another case the trial took place in the absence of Attorney A because he neglected to inform the court that he would be unavailable.

## Anchorage since Statehood

Robert Ely

### Bob Ely Arrives in 1959

When I first came to Anchorage in June of 1959 there were seventy lawyers listed in the yellow pages. All of the great names from Territorial day plus the first crop of law graduates from the class which graduated in the summer of 1958 who had been admitted the following winter. Among them were John Savage, Pete Walton, and George Boney.

I had written John Savage, a graduate of Harvard Law School where I attended, about job prospects in Anchorage. He encouraged me to come without writing in advance for a job. When I stepped off the plane he was there to meet me and told me that he was quitting as J. L. McCarrey's law clerk and that the judge wanted to see me in the morning. The following day, J. L. interviewed me and hired me as John's replacement. I served him as law clerk in his capacity as the last of the Territorial judges presiding in the new State of Alaska until the transition of the court system in February of 1960.

At that time I was hired by Judge Walter Hodge, the first United States District Judge for the State and worked for him until February of 1961 when Gene Guess, Joe Rudd, and I formed our law firm.

Also arriving that summer were Ev Harris, Jerry Wade, John Conway, Jerry Gucker, and Jerry Kurtz. Ted Pease, who had been working for a year in Boston, arrived in January of 1960. Jack Roderick, who had been in and out of the University of Washington law school also returned to Alaska that summer, I believe.

Sitting as the law clerk to the last presiding judge in the new State of Alaska I saw every matter being litigated in the State Court System. The system was so clogged that virtually no cases were tried. Judge McCarrey and I concentrated most of our energy on a weekly motion calendar of gigantic length, while fitting in a few pressing criminal trials which could not be further delayed.

With no possibility of getting to trial, the civil bar was left with motions for summary judgment and motions to dismiss as the only paths to achieve final adjudication. The motion cal-

endar was filled with these items, many of which were granted, a far cry from the cautious attitude taken by the subsequently appointed superior court judges when dealing with such motions.

Sitting in my position in the law library of the old Federal Court House I met every lawyer in Anchorage and most of the lawyers from elsewhere in the State. As a result of the intense courtroom activity and my familiarity with virtually every lawyer in the State, when I embarked upon private practice in 1961 I felt no inhibition at all in dealing with any lawyer or walking into any courtroom, a decided advantage for a lawyer newly embarked upon private practice.

A characteristic of the Bar Association at that time which will always be remembered by those of us who lived through those first years of the new State Bar with its annual influx of law graduates eager to participate in whatever future lay ahead for them in the new State of Alaska, was the paranoia and hostility of some of the older lawyers to new arrivals. Their reaction to the prospect of a dramatically expanding Bar filled with young, eager, and generally bright lawyers, as communicated to me and my contemporaries by the Admissions Secretary of the Bar Association, Peter J. Kalamarides, was to utilize every technical ground for discouraging, excluding or rejecting applicants.

All of us have stories from those days. They range from rejections of applications because an inapplicable question did not have "NA" typed in and letters from Pete Kalamarides to inquiring law students urging them to bypass Anchorage and go immediately to Unalaska and Unalakleet where "opportunities still exist in an otherwise crowded Bar" to the law clerk for Supreme Court Justice John Dimond whose young wife was suddenly stricken with cancer and had to be rushed to Seattle utilizing the last

funds available in their bank account a few days before the deadline for filing applications for the Bar. The clerk's reaction was to accompany his application without a check but with a letter setting out his special circumstances and asking for a reasonable period of time to gather together the necessary funds. Pete, true to form, rejected his application for "failure to comply with the clear and unambiguous provisions" of the Bar regulations.

Despite these efforts of Peter Kalamarides and his supporters among the older members of the Bar, young lawyers continued to migrate to Alaska, swelling the ranks of the Bar and enriching the environment in which we all practiced.

It was a great time to have come, that first year after Statehood when the Territorial court was in transition, when newspaper editorials and Chamber of Commerce meetings were full of hope for a future which there wasn't really much evidence of if one looked around and where Ely Guess and Rudd could start from scratch as large as any other law firm in the State.

*Robert C. Ely was educated at Yale and Harvard and founded the highly successful law firm of ELY, GUESS & RUDD, together with Gene Guess and Joe Rudd. While I am sure that Pete was super strict in his interpretations of the Rules on Admission, I do not know of any other member of the local bar who took the position of trying to keep people off. In fact, as Dave Talbot said, "Wendell, we've got to keep these young people coming. They file a lot of lawsuits and we can beat some of them."*

### Request for Proposal

The City of Kotzebue is inviting proposals from law firms for legal services related to general legal representation of the City of Kotzebue as set forth herein.

To receive consideration, sealed proposals must be received at the office of the City Manager, Box 46, Kotzebue, Alaska 99752 by 2:00 p.m. on August 31, 1986. No distribution of the proposals will be made to the respondents. The fully completed proposal shall be signed by a responsible official of your firm. All submittals shall be enclosed in a sealed envelope and plainly marked "Proposal for legal representation."

The proposals will be opened at 2:00 p.m. on August 31, 1986. Any proposal not received by this date and time shall be rejected.

Informal inquiries concerning this Request for Proposal, may not be made to the City. All inquiries, soliciting information regarding the proposal, must be made in writing and addressed to the City Clerk, Box 46, Kotzebue, Alaska 99752.

All questions seeking information regarding the proposal will be answered in writing. It is your duty to submit the appropriate written inquiries to allow a reasonable time for a written response to be made by the City of Kotzebue.

The City of Kotzebue reserves the right to:

1. Request clarification of a respondent's proposal or to supply any such material necessary to assist in the evaluation of respondents.
2. Modify or otherwise alter any of the terms of the Request for Proposal.
3. Reject any and all proposals received and to waive deviations from the terms of the Request for Proposal if the City determines that the deviations are not material.

### Terms and Conditions of Performance

Your proposal must be submitted with the understanding that it will form a material part of any subsequent contract. The proposal should be complete and any incomplete proposal may be rejected as non-responsive.

The contract will be for one year. It may be renewed on subsequent one-year terms following an annual evaluation of the City Council.

### Services to Be Provided

The firm selected as counsel will provide services principally related to the general representation of the City of Kotzebue which includes, but is not limited to, drafting and reviewing of contracts, drafting ordinances, representing the City Council and Administration at Council meetings, negotiating contracts for the City, conducting administrative hearings as well as representing the City in litigation.

### Background

Responses to this Request for Proposal will be considered on factors including:

1. A familiar understanding of Title 29 of the Alaska Statutes as well as a general understanding of municipal government organization, structure and operation.
2. Experience in the representation of rural municipal corporations in the State of Alaska.
3. Sufficient capability and support within the respondents office to represent the City of Kotzebue on a multitude of issues simultaneously with sufficient back-up support as needed.
4. Experience in litigation and administrative hearings in areas including construction, land issues and others.

### Evaluation

During the evaluation process, the City Council may request the presence of one or more respondents before the City Council for presentation of their proposal and for the answering of questions of the City Council. All costs and expenses incurred by each respondent in responding to this Request for Proposal will be at the respondent's responsibility.

### Award

Following the evaluation, the City Council may make an award to the firm that the Council feels will best represent the City of Kotzebue. The firm chosen, if any, may be required to enter into a written contract memorializing the terms and conditions as set forth in the Request for Proposal or as further negotiated by the City Council and the respondent.

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## PEOPLE

G. Nanette Thompson, formerly of the A.G.'s office, is now practicing with Bailey & Mason . . . Mark Woelber has joined the office of Russell Winner and Associates . . . Linda M. Wingenbach has moved from Bethel to work for the Public Defender in Ketchikan . . . Stephen M. White has relocated to Juneau from Cordova . . . James D. Babb is now working at the law office of William T. Ford . . . Nelson Traverso, formerly with the Public Defender in Fairbanks, is now with the office of Public Advocacy . . . Ronald H. Jarrell has formed his own firm of Ronald H. Jarrell & Associates . . . Kathryn M. Kolkhorst is a partner in the Juneau firm of Ruddy, Bradley & Kolkhorst . . . M. Richard Stevens has joined the law offices of Richard H. Erlich in Kotzebue . . . The firm of Smith, Robinson, Gruening & Brecht has changed its firm name to Smith, Gruening, Brecht, Evans & Spitzfader . . . Craig F. Stowers is now working for the U.S. Court of Appeals-9th Circuit, in Juneau . . . Bonnie Robson has opened her own office, the Law Offices of Bonnie Robson . . . Karen L. Loeffler, formerly of the A.G.'s office, is now with the District Attorney's office in Anchorage . . . Robert J. McLaughlin has joined the Anchorage office of Faulkner, Banfield, Doogan & Holmes . . . Robert D. Lewis has relocated his law office from Wrangell to Haines . . . Mary P. Treiber is the supervising attorney in the Public Defender Office in Barrow . . . Michael H. Rorick, formerly with the Attorney General's office in Anchorage, has relocated to Seattle . . . Jerald M. Reichlin is with the Law Offices of Mark Moderow . . . Karen L. Russell is now a partner in the firm of Russell & Wilcox . . . Richard J. Ray has

relocated from Kodiak to Fairbanks . . . William T. Cotton is the new Court Rules Attorney for the Alaska Court System . . . Roger Brunner has recently opened the Law Office of Roger Brunner . . . R.K. Reiman is now with the firm of Trefry & Kasmar . . . David D. Mallet has relocated from Petersburg to Juneau . . . Steven J. Carney, recently of Spokane, WA, is now in Wasilla . . . Patrick T. Brown has opened his own law office in Fairbanks . . . Lloyd I. Hoppner, Joseph L. Paskvan and Scott L. Taylor are now members of the firm Hoppner & Paskvan . . . Jeffrey K. Rubin has relocated from Sitka to Barrow . . . Paul W. Koval, Walter T. Featherly, III and Anthony S. Guerriero have opened the Law Offices of Koval, Featherly & Guerriero . . . Bruce E. Horton is now in Sitka . . . Kenneth P. Ringstad is a partner in the firm of Rice & Ringstad . . . Winfred E. (Gene) Burden has relocated to Kenai . . . Charles R. Pengilly is now practicing with the Public Defender Agency in Fairbanks . . . Patrick Anderson is with the University of Alaska at Juneau . . . Bernard J. Dougherty and Kenneth L. Wallack have formed the firm of Dougherty & Wallack . . . David M. Bendell is relocating to Seattle . . .

Ken and Cheri Jacobus had a 9 lb., 5 oz. baby girl on July 15. Rachel Elizabeth Bethel . . . Richard Garnett has left the firm of Erwin, Smith, and Garnett and has become "of counsel" in the firm of Wohlforth and Flint . . . Adrienne P. Fedor is now an Assistant District Attorney with the Anchorage office . . . Richard S. Thwaites, of the law firm of Campbell, Ostrovsky & Thwaites, has been elected a Fellow of The American College of Probate Counsel . . .



## IN PRINT

## In Print

A Washington state publisher has introduced a newsletter it says is the only reporting service nationally that covers legal malpractice issues exclusively on a monthly basis.

*Lawyer's Liability Review* reports on insurance trends, case brief summaries (Slip Opinions), newsworthy developments, practice management and other malpractice-related topics. Published the third week of each month by Timeline Publishing Co., Inc., P.O. Box 40062, Bellevue, WA 98004, (206) 828-5678. Annual subscription rate is \$195; six-month rate is \$105. Query for back issues.

*The Little Death* is a new murder mystery novel written by an attorney and former prosecutor in California. The novel follows Henry Rios, a gay public defender and self-styled investigator, in his search for the murderer of Hugh Paris—a member of one of California's influential dynastic families. *Publisher's Weekly* says the novel is "distinguished by good writing and skillful adaptation of the genre's traditions; particularly striking is author Michael Nava's vision of the legal system as a true instrument of justice." Published by Alyson Publications, Boston. ISBN 0-932870-96-1. \$6.95.

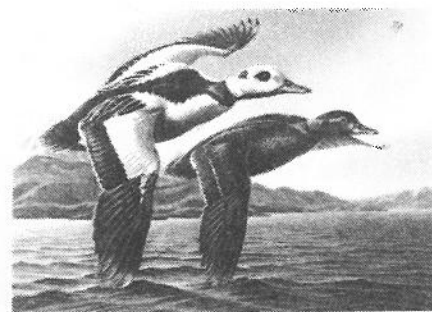
*Preparing for Trial* is a 45-minute video tape program with manuals developed with Loyola University School of Law. The package is geared toward preparing clients and witnesses for deposition or trial, covering such topics as improving testimonial confidence, importance of appearance, strategies of testimony, and relieving fear and intimidation.

The program is \$195 for the tape and 10 manuals. Add \$5.00 for shipping/handling. Publisher is CES Education Services, Inc., 1503 S.E. 47th Terrace, P.O. Box 1425, Cape Coral, FL 33904. (813) 549-4455.

The Alaska Waterfowl Conservation Stamp Print and Medallion Program doesn't have anything to do with attorneys specifically, but for collectors and sport hunters, we make note of the second edition due out this fall—a pair of Steller's eiders in flight.

The state's first duck print last year generated \$900,000 for habitat management by the Alaska Department of Fish & Game. Artist James A. Meger submitted the winning design for this year's stamp, print and medallion.

The "Alaska II" stamp will sell for \$5.00 (\$7.50 signed by the artist). A print (6½×9 image on paper size of 12×14 inches) signed and numbered will be \$135 and the print and a medallion made from Alaska gold will sell as a set for \$300. The edition will be limited to orders received by October 18. Another edition of 250 will be sold that consists of a matching print and medallion, plus a special color remarque hand-painted by the artist, for \$750. Orders can be placed at local galleries or directly through Voyageur Art, Publisher, 2828 Anthony Lane So., Minneapolis, MN 55418, (612) 788-2253.



The 1987 Alaska duck stamp

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## COMMERCIAL

By Jan Samuel Ostrovsky

Until very recently, judicial foreclosures in Alaska were a rarity. Rising real estate markets, combined with a one-year right of redemption, rendered nonjudicial foreclosure the remedy of choice. In the past, it has been difficult to find an attorney who had completed a judicial sale or a case with pleadings which could be used as guides.

Now, of course, the situation has changed. Judicial foreclosures are in vogue in this declining market. However, there is little precedent to rely upon and even worse, there is little collective experience upon which to draw when framing pleadings and determining procedures.

The procedures which follow have worked in the past and are currently being used; bear in mind, though, that they have not been well tempered through extensive litigation.

In this article, I presume a certain level of comfort in drafting and have not included forms. For those who find it convenient to refer to actual pleadings, two recent cases are *Alaska National Bank of the North v. Childs*, 4FA-85-1407, and *Alaska Teamsters-Employer's Pension Trust v. Charles W. Ellis, et al.*, 3AN-83-2548. The former case was prosecuted by the author. It is not offered as exemplary but as a place to start. The second case was handled by Mike Price. At the very least, those pleadings should result in an insurable title.

Foreclosure procedures differ from other litigation primarily at two stages: preparation of the complaint and preparation and enforcement of the judgment.

The complaint must, of course, identify the property and junior interest holders and must request foreclosure of any junior interest holders.

Since all subordinate interest holders must be made parties, a title report is always ordered before the complaint is drafted. As a practical matter, you will probably want to order a litigation

sale guarantee from your title company.

If the Internal Revenue Service has filed a tax lien, consult and comply with 28 U.S.C. §2410(b).

Similarly, if the State of Alaska claims a lien, the complaint must comply with A.S. 09.50.390.

A *lis pendens* should be recorded at the time suit is filed. You will want your title report updated as of the recording date so that the complaint can be amended to include any late filed interests.

The judgment should be more than a simple recitation of your right to foreclosure.

Careful drafting of the judgment form provides an opportunity to eliminate many of the open questions surrounding the foreclosure process.

Consider, for example, having the judgment entered for the full amount of the debt, specifying that the proceeds of the sale be applied against that amount, as opposed to simply specifying that judgment for a deficiency after sale be enforced. Compare 9.45.170 with 9.45.180. Arguably this allows pre-sale execution on other property. However, it should be noted that this may not work if your process server conducts the foreclosure sale by writ of execution, as is sometimes done in the Fourth Judicial District.

Other questions which can be resolved in the judgment include:

- The obligation of the debtor to vacate immediately upon sale (or confirmation of the sale) and provision for the issuance of a writ of assistance if necessary.
- The date of sale (consider leaving upon, i.e., not less than 30 days after the date of the judgment).

Judicial Foreclosures  
Returning

- Whether or not the plaintiff or other parties may purchase at the sale.
- Application of proceeds and surplus.
- The authority of the person conducting the sale to issue a deed or certificate of sale.
- An immediate order directing debtors not to commit waste (if not previously requested).
- Foreclosure of junior liens at sale.
- Establish lack of homestead exemption.
- Sale by parcels.
- Authority to make necessary repairs during the redemption period. See A.S. 09.35.300.

Sales are generally conducted by a process server. An experienced process server (and there are those, at least in Fairbanks and Anchorage) makes your job immeasurably easier. Confer with your process server prior to submitting a judgment form.

Process servers charge a percentage (Ad. R. 11). As a result, on an expensive parcel the (courageous) plaintiffs' counsel may ask the court for permission to conduct the sale him or herself. In the alternative, a reduced fee can sometimes be negotiated.

Notice and sale procedures are set out at A.S. 09.35 and should be familiar to your process server. You should double check the legal description in the published notice and make sure that the debtor and all junior creditors are notified.

At the sale, the process server provides a certificate of sale to the buyer. Its contents are

set out at A.S. 09.35.210. A return of sale (or service) is filed by the process server. After 10 days, plaintiff applies for an order confirming the sale. (Civ. R. 69(e) and A.S. 09.35.180).

Confirmation forgives a multitude of sins. (A.S. 09.35.180(d)).

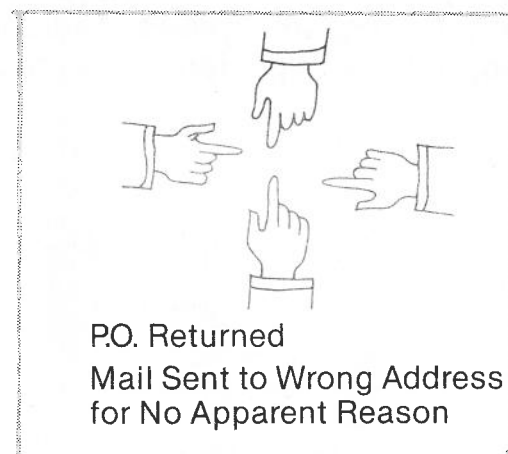
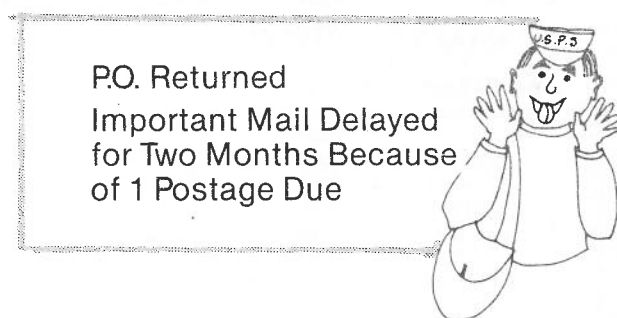
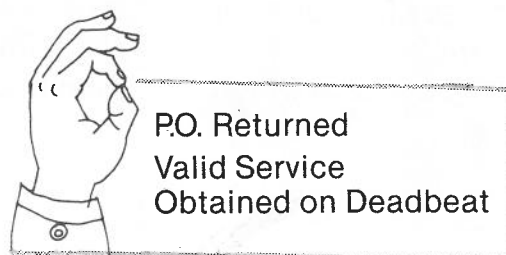
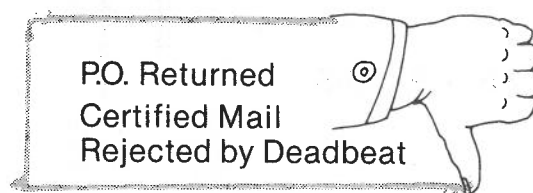
The statutes are not helpful from this point on. There are at least two workable procedures for obtaining a clean title at the end of the redemption period. Under one procedure, the certificate of sale provides that if the debtor has not redeemed within a year, the purchaser may apply to the court for release of the original certificate for recording which shall operate as a deed. Perhaps a simpler technique is to apply for a deed pursuant to Civ. R. 70 at the end of the year.

During the redemption period, post-judgment liens against the debtor will continue to show as exceptions to title policies. Presumably this is because such liens will be valid if the right of redemption is exercised. To prevent an undue effect on sale, Mike Price suggests requesting a provision clearing such exceptions upon the issuance of the final deed.

The procedures offered above should not be considered anything more than guidelines. They are designed to avoid major pitfalls. However, judicial foreclosure procedure is not yet well established either by precedent or general experience. Independent decisions must be made during the process, and it is therefore important that anyone conducting a judicial foreclosure attains a level of comfort with such guidelines as do exist.

First day of issue

## New postal rubber stamps



The Bar Rag's own J.B. Dell was recently commissioned to develop exclusive postal stamp designs, reflecting the unique conditions encountered by today's modern delivery system. Look for them soon on your parcels and dispatches.

CLE SURV

Members speak on mandatory CLE, attendance, future topics, locations

During the spring, the Alaska Bar Association conducted a survey of its 2,500 members to give us more information on what Alaska's attorneys want in continuing legal education (CLE) programs.

It is interesting to note that of the 315 responses received from members, a very slight majority (158) approve of mandatory CLE for Alaska attorneys. The

survey also indicated that the bar's membership is actively interested in improving programs that provide pertinent treatment of specific topics.

The following are the results of the survey. We invite further comments on the CLE program. These may be directed to Linda Nordstrand, CLE director, at the bar offices.

1. Should CLE be mandatory for attorneys in Alaska?

	Yes	No	No Response	Total Responses
	158 (50%)	146 (46%)	11 (4%)	315
Judicial District				
First	17	16	3	36
Second	1	3	1	5
Third	120	100	7	227
Fourth	14	20	0	34
Outside	2	7	0	9
No answer	4	0	0	4
Years Bar Member				
0-3	37	39	3	79
4-10	70	55	3	128
+ 10	48	51	5	104
No answer	3	1	0	4

Gender				
Male	107	111	9	227
Female	46	32	2	80
No answer	5	3	0	8
Age				
Under 30	6	11	1	18
30-39	102	84	5	191
40-49	34	37	4	75
50+	9	9	1	19
No answer	7	5	0	12

2. Did you attend a live Alaska Bar Association CLE program in 1985?

	Yes	No	No Response	Total Responses
	209 (66%)	103 (33%)	3 (1%)	315
Judicial District				
Third	168	57	2	227
First, Second and Fourth	37	37	1	75

3. During 1985, how many continuing legal education programs did you attend at each of the following levels?

Number of Responses	
337	Alaska Bar sponsored programs
80	programs sponsored by local law firms
60	programs sponsored by local organizations
61	programs sponsored by state organizations
182	programs sponsored by national organizations

4. If you are a member of an Outside state bar association, are you subject to mandatory CLE requirements?

Yes 71 No 150

5. How many Alaska Bar Association CLE programs do you plan to enroll in during the next 12 months?

Average per response was 2.

6. To what extent is each of the items below important in your decision whether or not to attend a live Alaska Bar Association CLE program with 5 being very great extent and 1 being very little extent (summary of ratings)?

- 5=Applicability of program topic(s)
- 4=Quality of program speakers
- 3=Cost of registration
- 3=Cost of travel and lodging
- 3=Time required away from office
- 3=Proximity to office
- 2=Approval or direction of employer
- 2=Ease and convenience of renting videotapes

7. Which CLE program lengths do you prefer?

191	Half day
200	Full day
39	Day and a half
58	Two day
79	2-hour session with lunch
100	2-hour session with breakfast

8. Which days of the week do you prefer for CLE programs?

63	Monday
50	Tuesday
49	Wednesday
61	Thursday
133	Friday
133	Saturday
92	No preference

9. Are you a member of one or more Alaska Bar Association substantive law sections?

Yes 219 No 93

10. If you answered yes to question 9, during 1984 or 1985 did you attend one or more CLE programs sponsored by a section of which you were a member?

Yes 65 No 129

11. With regard to video and audio replays of Alaska Bar Association programs, please indicate your first, second, and third preferences among the following:

First	Second	Third	
126	33	38	Attend a group video replay in your area if a resource attorney or other expert is available to answer questions.
25	93	47	Attend a group video replay in your area without a resource attorney or other expert available.
4	7	13	Purchase video tapes.
115	53	69	Rent videotapes on an individual basis.
9	11	14	Buy audio cassettes.
16	37	36	Rent audio cassettes.

12. If you attended an Alaska Bar group video replay in 1984 or 1985, please indicate the type of replay(s) you attended.

Number of Responses	
14	Group replay in Fairbanks
15	Group replay in Juneau
17	Group replay sponsored by local bar association
10	Group replay sponsored by employer/law firm
6	Other group replays

# KEY RESULTS

13. If you attended a group video replay or individually rented videotapes during 1984 or 1985, please indicate your assessment of the overall technical quality of the videotaping:

38 Good      37 Fair      10 Poor

14. If you answered “poor” to the above question, what do you feel can be done to improve technical quality? (Specific comments.)

- 1. Improve sound pickup; let speakers know they are on camera and must speak into mike.
- 2. Audio.
- 3. The presentation was good but it did not last long in my memory.
- 4. Very difficult to hear—you should staff with technical expertise in videotaping.
- 5. Better electronic equipment in preparation of and playback of tape.
- 6. Better sound recording—seeing the speaker is unnecessary.
- 7. Use Maxwell or TDK high end tape.
- 8. Better sound, better picture, better operator.
- 9. Improve sound; have 2 cameras (need more than 1 angle to keep viewer interest).
- 10. Stop charging rent.
- 11. All I could hear at the evidence mini-series was china coffee cups hitting the saucer. Camera too far away.
- 12. Sound.

15. FAIRBANKS AND JUNEAU AREA ATTORNEYS ONLY: Please indicate to what extent you feel each reason below impacts attendance on group video replays in Juneau and Fairbanks, with 5 being very great extent and 1 being very little extent (summary of ratings).

- 3 Seminar topics are not applicable
- 2 Poor quality videotape
- 1 Poor quality playback equipment
- 3 No opportunity to interact with speaker(s)
- 2 Easier and more convenient to individually rent videotapes
- 3 Seminars too long to view in one evening
- 3 Looking at “talking heads” is boring
- 1 Other

16. Please give us your suggestions for effective and economically feasible ways to deliver CLE to locations outside of Anchorage.

- 1. Any way to use Learn Alaska network? Also—publication of manuals or handbooks—as in Oregon, Washington.
- 2. Provide brochures/manuals.
- 3. Video rentals.
- 4. Resource attorney—Videotape—Full day.
- 5. Start ½ or 1 day sessions with live seminars. Have the local bar organize the session for the speaker commute. No more videos of Anchorage sessions!
- 6. Draw upon local talent to address same topic areas. Especially in Fairbanks, this is very possible.
- 7. Video tapes never leave Anchorage and arrive in Fairbanks. Why is that?
- 8. More individual rentals cheaper and permit individuals access to video equipment.
- 9. Rental videos—I rent 3-5 per year.
- 10. Video.
- 11. Keep bar outside of Anchorage updated list of available videotapes. Make tapes available sooner after live CLE.
- 12. Make, send more audio or videotapes.
- 13. Video replay with resource attorney or teleconference.
- 14. More use of 11(a).
- 15. Change locations sometimes—it wouldn't hurt to have outside of Anchorage—like in Kenai.
- 16. Have them in Hawaii.
- 17. Include paralegals. Offer college credit.
- 18. Pack tapes in sleds during Iditarod Sled Dog race.
- 19. Let's have mandatory CLE.
- 20. Use locations attractive to all Alaskans, like Hawaii, Whitehorse, Vancouver, British Columbia.
- 21. Could you include a video and audio tape library index with future Bar mailings?
- 22. Make videotapes more available; I've been on the list for over a year and still haven't seen one.
- 23. CLE is a waste of time—I am not interested.
- 24. Have some live presentations—Tapes (if you must) should be much cheaper and in the daytime.
- 25. Satellite/communication—live in Anchorage; viewed in Juneau and Fairbanks—provide linkage for communication, questions. We have the equipment—let's use it.
- 26. Why not rotate live CLE's between Anchorage, Fairbanks and Juneau? Then Anchorage would use videotapes sometimes and Juneau wouldn't always have to use videotapes.

- 27. Hold them during the day.
- 28. Advertise—pre-registration.
- 29. Rent videotapes to individuals.
- 30. The videotape is an inexpensive and excellent method; poor attendance is mainly due to lack of interest and topics not being immediately relevant to practice.
- 31. Videotape and the opportunity to submit written questions to resource attorney.
- 32. Buy more of the high quality teaching videos available nationwide. Less home-brew, please.
- 33. Videotape library in conjunction with local Bar—CLE materials, books, etc. purchase at discount through Bar.
- 34. Per capita CLE attendance in Juneau far exceeds that in Anchorage for live programs. If programs must be in Anchorage only, allow substantially reduced registration fee for Alaska attorneys who must incur significant travel expenses to attend (i.e., credit air fare or ½ airfare v. registration fee).
- 35. Cost of video rental is too high. I have been discouraged from renting videos based solely on price. If cost were less, you would end up with at least a little of my money instead of none of my money.
- 36. Keep videotaping and improve the ease of renting individually (maybe make more copies of same tape). Lots of us have VCR's now (VHS tape).
- 37. If CLE's mandatory, the requirement should not be fulfilled by just Alaska programs. Out of state specialty programs should satisfy requirement.
- 38. Shift the primary site to other cities on a rotating basis.
- 39. Simply set them up! Juneau would have excellent attendance at local live programs, if you would give it a chance.
- 40. Satellite.
- 41. Have statewide TV network do it in early morning hours.
- 42. Audio cassettes—High quality.
- 43. Video replay registration available at the door.
- 44. Videotapes are the best! Publish a list of available tapes and rental and purchase prices, e.g., your library of tapes.
- 45. We need cheaper video replays and need cassettes of programs. Convenience and cost are key factors in continuing education.
- 46. Nuke Anchorage.
- 47. Rotate outside semi-experts to Fairbanks/Anchorage/Juneau one or two times a year; Continue annual Hawaii CLE; Make convention a CLE event.
- 48. Videotape.
- 49. Why? Make 'em come here. It's not that expensive. Arrange group charters. We'll put up several attorneys at our home.
- 50. Tie programs in with vacation plans of speakers.

17. Indicate your preference for future CLE programs (of the following):

Continued on page 14

Basic Course

Number of Responses

- 44 Bankruptcy
- 31 Taxation
- 26 Business/Commercial Law
- 25 Evidence
- 24 Appellate Practice
- 24 Alternative Dispute Resolution
- 22 Administrative Law
- 22 Real Estate
- 21 Wills, Trusts & Estates
- 20 Trial Advocacy/Pretrial
- 20 Skills Training in Negotiation
- 19 Insurance
- 19 Skills Training in Witness Examination
- 18 Consumer Law
- 18 Debtor & Creditor
- 18 Law Office Management

Intermediate Course

Number of Responses

- 72 Business/Commercial Law
- 64 Debtor/Creditor
- 63 Evidence
- 62 Real Estate
- 57 Appellate Practice
- 56 Skills Training in Negotiation
- 55 Administrative Law
- 55 Corporate/Partnership Law
- 55 Skills Training in Witness Examination
- 55 Trial Advocacy/Pretrial
- 53 Bankruptcy
- 50 Law Office Management
- 47 Personal Injury & Property Damage
- 44 Insurance
- 44 Skills Training in Oral Argument
- 44 Wills, Trusts & Estates

Advanced Course

Number of Responses

- 77 Evidence
- 63 Trial Advocacy/Pretrial
- 57 Business/Commercial Law
- 56 Real Estate
- 54 Skills Training in Witness Examination
- 53 Contracts
- 51 Personal Injury & Property Damage
- 48 Skills Training in Oral Argument
- 45 Appellate Practice
- 41 Debtor & Creditor
- 41 Skills Training in Negotiation
- 40 Corporate/Partnership Law
- 40 Family Law
- 38 Criminal Law & Practice
- 37 Administrative Law
- 36 Product Liability

# More CLE survey . . . continued from page 13

18. The Alaska Bar Association uses a standard design format for its brochures. Do you readily recognize the brochures?

Yes 241 No 57

## DEMOGRAPHICS

19. Your gender:

Female 80 Male 227

20. Your current age:

Average age 36

21. Years a member of the Alaska Bar:

Years	Responses
0-3	79
4-10	128
+ 10	104

22. Type of employment:

Number of Responses	
229	Private law practice
8	In-house corporate counsel
12	Judicial
53	Government agency
7	Public or nonprofit practice
4	Other

23. Indicate your position:

Number of Responses	
80	Sole practitioner
77	Partner
17	Dept. manager/supervisor
114	Sal'ried associate/staff attorney
21	Other

24. The Alaska judicial district in which your office is located:

Number of Responses	
36	First
5	Second
227	Third
35	Fourth
9	Outside

25. Your current membership status:

Number of Responses	
5	Inactive
303	Active Alaska
32	Active Outside

26. Are you an active member of one or more Outside state bar associations?

Yes 112 No 194

27. Indicate the importance to you of each of the following categories by using the scale below:

3=very important 2=important 1=not important

Number of Responses	Average	
279	2	Annual convention programs
285	2	Substantive Law section membership and programs
299	3	Continuing legal education
270	2	Bar sponsored insurance programs
272	2	Legislation and lobbying
256	2	Bar committee functions

28. Additional survey comments included the following:

1. Mandatory CLE is absolutely essential to make a modest effort to improve our Bar. The public should demand it. Especially since we don't have a law school to provide a continuing nexus with the active Bar.
2. Publication of CLE handbooks on specific areas of the law would be helpful, e.g., administrative law, juvenile law, advising Alaska businesses, real estate law, etc. I am familiar with the Oregon CLE publications. Most of them are very helpful, high quality, practical handbooks. They are sold to members for prices typical of law treatises.
3. Please circulate manuals, handbooks, etc. in lieu of video/audio.
4. I hope we do not go into a mandatory CLE. It spawns many lecture groups at expensive price tags. Outsiders may think CLE is a valuable tool for lawyers and that mandatory CLE therefore must be good. I find I go to Washington for state bar mandatory CLE: not to learn anything, but to satisfy the requirement.
5. The CLE program seems to have become even more oriented to Anchorage in 5 years. I'm tired of receiving flyers to CLEs at the Captain Cook (where family law section meets too) with a video for Fairbanks and Juneau. The Bar Association has a surplus. Use it for CLE!!
6. Bar sponsored insurance program is very much needed re: malpractice.
7. The Alaska Bar Association is much more responsive to members' interest and inquiries than the Outside bar association I belong to. Keep up the good work.
8. The last CLE I went to in Juneau began with an hour long, unproductive lunch. The program was only 4 hours long, so we in effect wasted 1/4 of our time. I think the Bar on the whole does a very good job of coordinating CLE programs. I would encourage more efficiency in the programs themselves, so there is as little dead time as possible once the program begins. Thanks for your efforts.
9. Perhaps Bar could be more active in: (a) community outreach/legal education; (b) pro bono services for those not eligible for ALSC or PD/OPA representation (Pro bono or reduced cost services).
10. Should be mandatory for all new attorneys.
11. Make more tapes available. Not enough and cost of live CLE outside Fairbanks is prohibitive. CLE is good idea, but need more tapes. Audio tapes much cheaper than video. Cost of attending CLE outside Fairbanks is approximately the cost of a week in Europe at present.
12. A prerequisite to any CLE program should be good quality written materials, distributed on a timely basis. The Hawaii CLE in March of 1986 was an unforgivable lapse in this sense. I think that it was outrageous for the Bar to encourage all of those people to come to a seminar, and to charge a big registration fee, and then have no written materials. Availability of copying facilities in Kauai was an insulting excuse—for all of those people who paid all that money, someone should have hustled over to Honolulu to get them copied. It was also an insult that the speakers left early on the last day. These things suggested that the people running the program don't think that attorneys who register for these programs take them seriously. We do.
13. If you were prepared to work with the University of Alaska, Anchorage and allow non-lawyers to attend at reduced fees, we might be able to award college credit for some sessions and induce larger enrollment, thus saving the bar and its members money.
14. After attending numerous CLE programs in Alaska and Texas, I would travel to any location in Texas to attend a CLE course before I would walk across the street to attend a CLE course in Alaska. Reason: quality and professionalism. Also, Texas Bar publications are so good: The Texas Bar Journal, Texas Lawyers Weekly Civil Digest, Texas Lawyers Weekly Criminal Digest, Quarterly Business Law Report, Quarterly Real Estate Report, and all the other publications, books, tapes and cassettes. I get a lot for my Texas Bar dues of \$65.00.
15. I don't think the Bar is at all interested in CLE here in Fairbanks. Rejection of mandatory CLE is unanimous.

16. Most effective CLE presentations are refresher courses which re-cover basics of subject—too often. Lecturer plunges into most recent development in subject area and loses 1/2 of audience. This has discouraged me from much attendance, even in areas of interest.
17. How about paying return postage? You'd get more response. This applies to all correspondence.
18. I believe that the Bar Association could approve the legislature have a legal department whose function it is to approve legislation after it's proposed. Writing legislation is legal work often done by non-lawyers. Also, I believe a large number of people doing land work for Native corporations, the state, miners, banks and real estate firms are preparing legal documents with no license to do so. I believe they are practicing law without a license. I object to their practices and believe the bar should address the issue. Non-lawyers should not be allowed to attend CLE classes or seminars, and the bar should take a position against patriots in action. Practicing law without license AS.08.08.230.
19. I'm already subject to a mandatory CLE requirement in another state. That's fine. I would be concerned about satisfying both my current state and Alaska CLE requirements at the same time. If Alaska adopts mandatory CLE, I suggest that, for each year a member or inactive-Alaska member satisfies the mandatory requirements of another state, the Alaska requirement is waived or considered satisfied.
20. I am an American Bar Association member, and a member of ATLA. I am a member of several American Bar Association sections. I am a member of the local bar association. I purchase several books a year, and read the ABA, ATLA or ABH sections publication. I have found Alaska Bar CLE a waste of time. The course materials are always cursory. The lectures are always either too fragmented to follow or at a more advanced level than I can follow and impossible to review by my notes because of poor materials. I gave up on Alaska Bar CLE about 5 years ago.
22. Please get health insurance program. Look into satellite workshops.
23. I feel most uncomfortable taking a day off in the middle of a trial because of the costs and inconvenience of counsel, parties, witnesses and jurors. Therefore, I never attend seminars which impinge upon trial time. (8:30-1:30) I suspect this applies to many of the other judges as well as counsel who litigate regularly. The afternoon motion calendar is more easily adjusted. Have we considered using 1/2-day afternoon sessions for seminars? For example, were the Business Organization seminars to be conducted over two afternoons, I would be there.
24. I belong to two Outside bar associations which have mandatory CLE. Before it became mandatory I regularly attended CLE programs and always for more than the hours now required under the mandatory systems. Most of my colleagues did the same. As a professional, I resent mandatory CLE requirements as well as the bureaucracy which invariably accompanies them. Lawyers will voluntarily undertake continuing legal education and bar associations can assist in this process by making good programs available to them.
25. You folks do a great job! Thanks for this questionnaire and the opportunity to offer comments.
26. The more seminars, the better. I think the interest is there.
27. Quite frankly my state agency doesn't pay me enough to allow me to pay my own way to all these conventions. In other states, "new admittees" get price breaks until their lives and practices have stabilized. I still owe \$2000 just for moving expenses; the state will not reimburse me; I would prefer to acquire some furniture rather than pay all my money to go to Bar Association functions. There are no bargains in Fairbanks and I don't see how people can afford to live here.
28. Not a great survey.
29. Suggest we give video to a few video rental stores around town and allow us to rent them at our leisure. Briley's will handle them paying a royalty to the Bar. Let me know if I can help.

## PRACTICAL POINTERS



## TORTS

By Michael J. Schneider

It was my good fortune to have Vernon X. Miller (now deceased) as my torts professor. Dean Miller had been the dean of law at Catholic University, The University of San Francisco Law School, and Loyola Law School. Not a man given to making claims about himself, he did claim to have taught more people torts than Prosser. I have no doubt that he did. Dean Miller loved the law, and particularly the law of torts, more than anyone I have met. His slight stature was filled with a heart as big as all outdoors and a steel-trap mind of equal dimension.

Dean Miller, in his seventies, was able to remember all of the names of those in his class of over 100 students after the second week of school. Despite this man's obvious abilities and considerable credentials he, at first, left many of us unimpressed. He always wanted to focus on *the facts* of the *prima facie* case. We all knew that attorneys were those people who passed the bar exam. We were also aware that bar examination questions contained all the necessary facts. It was a mastery of the analysis and the relevant rules of law that we required to achieve our professional destiny and many of us were determined to focus on little else.

As I look back on a number of the earlier tort cases I have handled, I find that I was slow to shed this understandable, though obviously myopic perspective. As I now review files of otherwise capable practitioners in consultation or in anticipation of possible association, it becomes obvious that many of us have difficulty transcending our law school outlook on the law of torts and performing adequately for our clients in the real world. I have seen a number of well organized files with extensive legal memoranda reflecting considerable attorney time and effort at the law library but with such scant information regarding critical facts and important witnesses as to make effective prosecution of the case difficult or impossible.

In my view, facts come in two general categories: those facts that are not likely to change and can therefore be obtained at a later date (e.g., the client's date of birth, social security number, similar information for relevant relatives, etc.) and those facts that are clearly and obviously affected by the passage of time and changing conditions (e.g., the depth of the snow, the slipperiness of the roadway, the names, locations, and memories of important witnesses, etc.). Since many of us have a difficult time accurately separating one category of factual information from the other, it is wise to get *all the information possible* in the initial interview. Many good attorneys, like all good pilots, use checklists to make sure that they don't overlook any important aspect of the case in the initial interview. The library is full of these things. See for example Harry M. Philo, *LAWYER'S DESK REFERENCE* (6th Ed. 1979) in general and specifically at §6:3 and Appendix A. Specific

areas of inquiry can be enhanced by checklists from certain specialists. Your consulting economist, for instance, is likely to have a form eliciting questions required for his or her evaluation of lost wages, earning capacity, or losses to the estate. Your client can be questioned directly from this form in combination with your own checklist or that plagiarized from one of the publishers.

The client interview should be completed *as soon as possible* after initial contact with the client and should be *immediately* followed by an appropriate investigation of the case. The key word here is "appropriate" and a good deal of judgment must be used in figuring out how many resources to commit to a given case. Investigation by you, your staff, or your client may be adequate in a case of minor injuries. In a case involving major and permanent injuries or death it is almost always necessary and appropriate to retain a *qualified and experienced* investigator. Additionally, it is often required that competent expert assistance be retained at once to focus investigative efforts and to ensure that important facts are not missed by the attorney and by members of the investigative team. It is true that too much investigation of a small case can lead to a pyrrhic victory at best and an economic disaster at worst. Nevertheless, failure to immediately and thoroughly commit adequate investigative resources to major cases *at their onset* will deny your clients their right to obtain a fair recovery and will have the effect of raising E & O premiums for all of us in the long run. . . . When in doubt, err on the side of thoroughness. I have never seen a case lost or an attorney sued because of doing too much investigation. Get help if neither you nor your client can afford the investigation that a given case reasonably requires. Association on cases is a practice employed by the best lawyers in every state. The practice is avoided only by the greedy and the incompetent.

Your initial interview should always seek to elicit whether or not a given incident was investigated by some law enforcement or other investigative agency. A positive response should *never* lull you into believing that your responsibilities regarding the investigation of the case are in any way lessened. As criminal defense counsel and plaintiffs counsel in injury cases I have seen hundreds, if not thousands, of police and other investigative agency reports. The quality of those efforts has ranged from the most professional to the most incredibly inept. Furthermore, I've never seen an investigator or an investigative agency that, having generated an inept investigative effort or having reached a bizarre conclusion, would not defend it to the death. Problems like this simply cannot be overcome without thorough, competent and independent investigation conducted at the earliest possible stage of the case.

This article is intended to be general in

nature and the questions that follow are just a few of those that should be asked of your client at the initial interview and focused on in the investigation of the case. Ask yourself if these areas of inquiry are adequately addressed in the injury cases in your office.

With regard to the incident and the scene, what happened (obtain as detailed and concise a description of the mechanism by which the incident occurred and/or injuries were suffered as you possibly can from the client)? Where is the scene? Is there any *good* reason why you (no, not your associate, your secretary, your client, etc. . . ) cannot personally view the scene immediately?

When did the incident occur and does the time of occurrence bear significantly on the incident (such as with an intersection or roadway where traffic levels vary drastically during different times of the day)?

Was sight distance a factor in this incident? If so, were transitory phenomena or items (e.g. snow berms, leaves on bushes or trees, vehicles, temporary structures) playing any part whatsoever in limiting or enhancing the normal sight distance in this incident? If so, how can evidence of these transitory items best be preserved or reproduced for use at trial?

Were surface conditions a factor (it won't do your client any good to measure the coefficient of friction on a piece of roadway *after* the ice has melted or *after* the roadway has been resurfaced)?

What witnesses to this event and/or to the damages incurred by your client are there, what are their current names, addresses, and phone numbers and what *permanent contact address and phone number* can be obtained for them (if your key witness is John Smith from New York City who lists a room at the Captain Cook as his current address, this is a clue that you need more information in a big hurry. . . )?

Did lighting conditions, artificial or natural, play any conceivable role in the incident that your client complains of? If so, how can this evidence be preserved or duplicated for the purpose of trial?

If significant injury is involved, where are the items that were involved in the incident (airplanes, vehicles, etc.) and is it possible to preserve them for analysis? If these items cannot be secured or purchased, is it possible to detail the damage to them through expert observation, photography, measurement, or other means?

As to your client and his or her damages, what is your client's identity, date of birth, social security number, and marital status? Obtain similar information for their family members. Have they photographed or otherwise documented any of their physical injuries (the client in traction or black and blue from head to foot today may look better than you do two years later during trial)? If there is some delay between

initial contact with your client and your first meeting, can your client obtain adequate photographic evidence of the client's condition or can you secure a photographer or investigator to accomplish this before the initial interview?

A complete list of all health care providers should be obtained along with medical releases from your client. Appropriate correspondence should be directed to those providers requesting medical records *and* billings. A complete social, educational, employment, wage earning, and recreational history should be obtained from the client.

Why did the client come to see you? If it was primarily because medical bills were unpaid, will the client's own medical payments coverage (in the case of an auto accident) help keep the hounds at bay while the case is prosecuted? If not, will health care providers be willing to accept a lien on your client's recovery in lieu of unending collection letters or referral of the client's account to a collection agency?

If your client was a pedestrian and if there is a chance (and there always is) that the offending vehicle and driver were uninsured, does your client have uninsured motorist coverage? If so, what are the limits? It has been my observation that many practitioners do not appreciate that uninsured motorist coverage protects *people* not vehicles. If your client owned a vehicle with uninsured motorist coverage *or was a resident relative of someone who did*, this coverage will, in most cases, provide a source of recovery *whether or not your client was in the insured vehicle when hurt*. Under certain circumstances (particularly with regard to incidents occurring before January 1, 1985), uninsured motorist coverages may be "stacked" where multiple policies exist or multiple vehicles on a single policy are insured and where separate premiums are paid for each listed vehicle.

The list of areas of inquiry mentioned above is considerably less than exhaustive. Nevertheless, this sort of information is required to do an adequate job of preparing an injury case. The investigative effort should focus on information provided by the client as well as holes in that information. Remember that your client is cursed with the same frailty of memory as other human beings. The client was busy being seriously injured. His or her recollection of the incident may be inaccurate despite their best efforts to truthfully communicate with counsel.

## Summary and Conclusion

Most tort cases are won or lost on the facts. Much important evidence is certain to be lost if not immediately identified and preserved. In order to do the best job possible for your client it is critical to do a thorough and complete interview of the client *as soon as possible* after the incident and to *immediately* initiate an appropriate investigation of the case.

# 'The facts' of tort practice

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## MEMBERSHIP OPPORTUNITIES AVAILABLE

The Supreme Court Committee charged with the task of reviewing and revising the Alaska Civil Pattern Jury Instructions announced recently that it has positions available on the committee as it begins its second year of revision. The committee meets monthly in Anchorage. If interested, please call or write Judge Karen L. Hunt, Superior Court, Anchorage, 303 K Street, 99501, 907-264-0772.

## Tribute to Wendell Kay

# A fine barrister remembered

By Judge William Fuld

The Alaska Bar and the people of Alaska lost a great trial lawyer and teacher when Wendell Kay died. Instead of a funeral, his will provided that there be a party to celebrate his life. He did not want us to mourn or be sad. A week after his death, more than 1,000 friends, family, clients, politicians and fellow Alaskans who had the good fortune to know Wendell gathered at the Hilton Ballroom to pay tribute.

The members of the Bar know Wendell as a brilliant trial lawyer, probably the best criminal defense attorney who has ever practiced in the State of Alaska. The memorial service and talks that were given at the farewell party reminded us that he did a lot more than persuade judges and juries with his concise, witty, logical and moving arguments.

In the 1950s and 1960s Wendell served in the State Legislature and he was Speaker of the House in 1955-56. He enjoyed politics and was effective. Indeed, as Judge Buckalew (his former partner and colleague in the Alaska Legislature) told us at the memorial service, Wendell suggested tactics that led to Alaska gaining statehood.

### A Willing Public Servant

He was active in politics when Alaska had men like Bartlett, Gruening, and Egan working to make the transition from territorial days to Statehood. When Wendell spoke, they listened. It was the State and the nation's loss that Wendell was not elected governor or senator. He would have stood out in the United States Senate and, as Gruening did, would have been an articulate spokesman for rational government policy. However, Wendell was not one to



Portrait of dedication

regret what was not to be and until he died he was pursuing with zest his many interests.

I would also note that he agreed in 1969 to apply to the Supreme Court. His partner, Les Miller, was on the Judicial Council, Walter Hickel was governor, and although Wendell was a leading Democrat he had fought a primary fight against Bill Egan and there was every reason to believe that he would be appointed. However, the Judicial Council can be unpredictable and Chief Justice Nesbett convinced the three lay members to vote against Wendell. Whether Wendell would have been happy as a Justice unable to advise clients and young lawyers and speak out on issues and candidates is questionable, but I'm sure he would have written some memorable opinions.

### Writer and Teacher

Indeed what most lawyers don't appreciate about Wendell, except for those of us who have actually worked with him, was that his ability in the courtroom was matched by his ability to research and write briefs. He was a good writer and was extremely well read, reading at least a book a week. He read widely in history, poetry, biography and retained most of what he learned. He had a tremendous knowledge of American History.

What he liked to do most (besides play golf) was teach, and he was extremely happy teaching trial tactics to the students at Arizona State University Law School in Tempe. He enjoyed sharing his knowledge and was not reluctant to share trial tactics with any lawyer who asked questions. He would freely provide advice on how to handle cases and he did the same for candidates for political office, whether they were young or old.



House members from the 1955 Territorial Legislature take a few minutes to pose together outside their chamber. From left are: E.G. Bailey, Harry Palmer, Irene Ryan, Wendell Kay, Russ Young, Raymond Plummer, Ken C. Johnson and Stan McCutcheon. (Missing the roll call for the photo were Seymour Buckalew and Peter Kalamarides.)

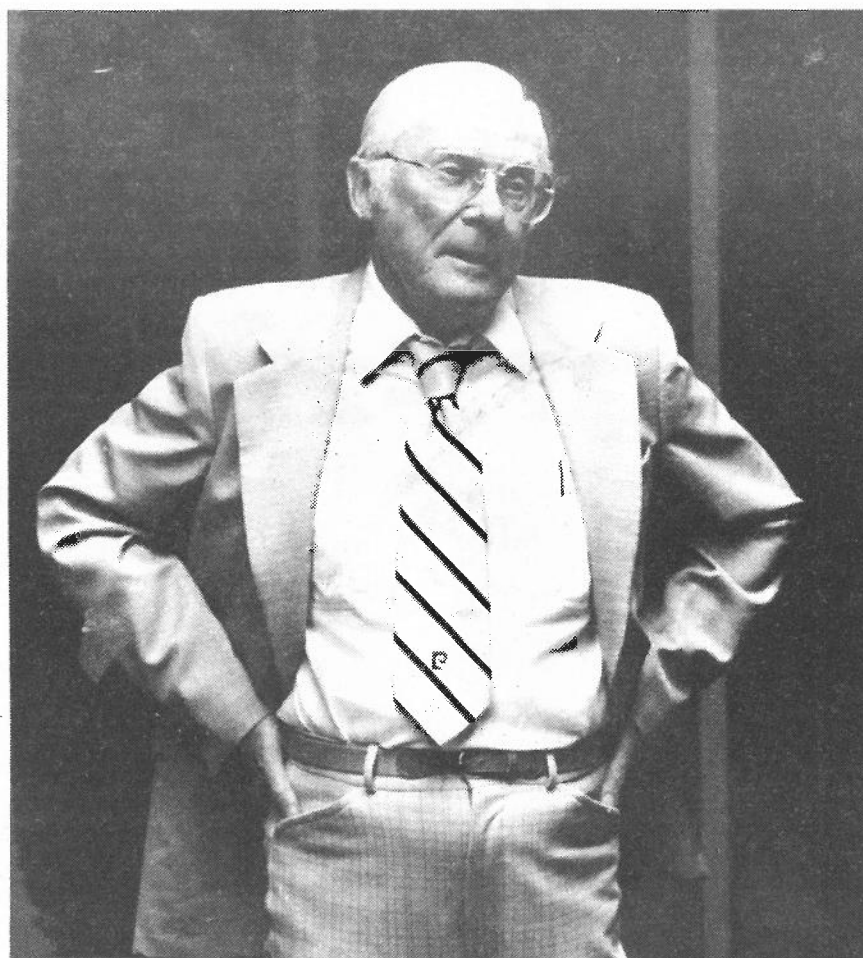
I think his interest in teaching and his ability as a teacher accounted for some of his great success as a leader in the legislature and as a successful trial lawyer. In the courtroom, he was the one who had command of the facts and the law and educated the jury. He was sincere and kind. He never berated a witness, unless and until he was convinced the witness was lying and then he showed his anger and displeasure and the jury understood the reason for such displeasure.

### Champion for the Defense

His success record in defending people accused of serious crimes is legend and I doubt if anyone practicing criminal defense has so consistently won felony cases as Wendell did.

It is not that he picked the easy cases or took a case because he was sure it was "winnable." He hated to say no, to turn a potential client down and indeed he took a number of hopeless cases which resulted in a plea. But even then he obtained good plea bargains for his clients in the days when plea bargaining was a reality and often achieved reduced charges in more recent years.

While Wendell, himself, did not brag and was a modest person, I recall Les Miller, a long time partner, telling me that in the early 1960s, there was a backlog of pending felony cases. Wendell defended approximately 10 felony cases in a 14- or 15-week period and won all 10 of them. (Today we have better police, career prosecutors and speedy trial rules, but, still, when



Counselor Wendell Kay rises for the defense.

you consider that there had been enough evidence to indict the accused, that feat alone is remarkable.)

In more recent years, Wendell liked to say that he specialized in self-defense for people accused of murder with small caliber hand guns. His favorite defense was self-defense and again his recent record of success (1970-1982) is outstanding.

People charged with murder often turned to Wendell. He enjoyed the challenge as well as the complete trust these clients put in him.

In the last years of his life, Wendell was writing a book recounting some of his memorable trials; he was also writing a book on cross-examination. Donations to support publication and editing may be made to the W. P. Kay Endowment (Alaska Bar Foundation), in care of Sandra Saville.

### A Memorable Case

A recent (1980) case Wendell liked to talk about was a murder which occurred in a trailer in Chugiak, on a road called Helluva Road. The case was a strong prosecution case. The victim was an alcoholic; but had maintained a responsible job for some years and was well insured. The victim and his wife were friends of our client, the accused murderer. The widow had



Grid star Wendell Kay in high school days.

testified before the Grand Jury that the men were both somewhat intoxicated and were arguing, when she got upset, fled the trailer barefoot and went to a friend's house. That night, the police received report of a car on fire and found an automobile, belonging to the victim, consumed in flames. Inside the automobile was the victim, who had died of strangulation. Our client was seen walking away from the burning car and was located in a nearby bar.

Because it appeared that the death probably resulted from fighting between two intoxicated people and because of Wendell's ability, the District Attorney during the first days of trial offered to reduce the charge to manslaughter, which seemed reasonable. The client told Wendell that there should be absolutely no deals, that he had done enough time in his younger days and if he had to go back to jail he would kill himself. Wendell was convinced that in fact a guilty verdict would result in the client killing himself. The client had done enough irrational things in his life to make us believe that he probably would. The stakes were high and Wendell went on to defend the case with his usual enthusiasm and ability. But perhaps with more than the usual anxiety since this was the first "death penalty" case since Statehood.

All Wendell generally needed was one flaw

in the prosecution case to convince a jury that there was reasonable doubt. In this case, the prosecutor had a reluctant witness, the widow, who was the last person to see the deceased and our client together. The widow had every reason not to want to come back to the State of Alaska (she was visiting in Las Vegas at trial time) because according to the defendant, she was an accomplice, if not the actual perpetrator, in the crime. However, the widow was a somewhat frail, elderly appearing lady who would have had difficulty strangling her husband, although there was evidence that a rope had been used.

The defendant took the stand and admitted most of the prosecution's case, namely that he and the deceased had been drinking and were highly intoxicated, that he passed out and when he woke up the widow was shaking him awake and saying, "You have to help me, my husband's been killed." The defendant, being an obliging fellow trying to protect someone from a charge of homicide, put the body in the family station-wagon and planned to drive to a lonely place and dispose of the body. However, he had trouble with the car and it finally stalled on an access road next to the Glenn Highway. He then decided that cremation was in order, so he set the car on fire. I'm sure that if the widow had appeared to testify, Wendell would have "convicted" her of perjury through cross-examination



U.S. Sen. E.L. "Bob" Bartlett (third from right) chats with Wendell Kay (left) and Alex Miller (second from left).

if not murder, but her absence did not hurt the defense. The District Attorney wanted a lesser included offense of tampering with evidence, which trial Judge Rowland rejected.

As the time for final argument drew near, Wendell thought about having his secretary Francis appear in the back of the courtroom. She was the same age, height and build as the missing widow. As he had done many years before in another "who done it" case, Wendell was going to point at the lady standing in the back, dressed in black and say, "Now folks, if I told you there was the real killer, who never showed up to testify, who fled barefoot in the snowy night, you would think about that, wouldn't you? It would make you hesitate to act." Thus Professor Kay, the Silver Fox, would demonstrate that the State had not proven its case. Francis didn't want to play the role and Wendell rarely used the same argument more than once.

Wendell's word was as good as gold and prosecutors and judges never doubted his promises. If he asked for a continuance, he would never refuse the same request. He also expected and demanded that clients stick to the truth. He insisted one client plead guilty who had forged false documents to support an alibi defense.

Getting back to the Helluva Road murder case, the jury acquitted. The next week the District Attorney got an indictment for tampering with evidence for burning the body but that charge was dismissed on grounds of double jeopardy and speedy trial and is reported in the Court of Appeals and Supreme Court as *State v. Williams*.

A year later, the widow who never appeared at trial came into the office and hired Wendell to defend her daughter. The charge, first degree murder; the victim, the widow's new boyfriend; the defense, self-defense. Wendell liked to say it just shows how one good defense leads to another good defense. That trial is another story.

Continued on page 18



Wendell Kay

#### WENDELL KAY

We are gathered here today to pay our respects to an extraordinary man. While he lived among us, he managed to squeeze several strenuous lifetimes into one. We remember him as an idealist, a humanitarian, a statesman in the early legislature, a magnificent trial lawyer, a teacher, a great storyteller, a leader of the bar, and a friend.

In one way or another, he touched all of our lives. Whenever his name comes up in a conversation between lawyers, there is usually a story to follow concerning a moment of high drama or hilarity from a trial; or an account of his pitching in to help a greenhorn attorney; or taking on another hopeless cause and somehow winning. It isn't just lawyers he mattered to, either. Wherever you go in this state, people remember him. They may not be able to give you the name of another lawyer, but they know Wendell Kay.

Wendell Kay was a many-gifted individual. He possessed wit, intellect, courage, compassion and kindness in extra measure. Perhaps the greatest gifts he had were those attributed to a kindred, although fictional spirit, Raphael Sabatini's Scaramouche who "was born with the gift of laughter and a sense that the world was mad." Wendell lavishly shared his laughter, along with all of his other gifts, with us.

Wendell was a great spirit. Like all others of his breed, he lived by his own code. His life was a marvelous adventure. He loved to do battle in court. He was, first and last, a fighter of great causes. When calamity entered his life, he met it like a champion—with equanimity and courage.

Wendell loved jazz. He was particularly fond of the New Orleans variety. I believe he secretly envied the lives of some of his favorite jazz musicians. Like one of them, Louis Armstrong, he managed to collect some of the best artists in his field around him. His various partners, associates and office-sharers over the years include some of the finest trial lawyers in Alaska.

To me, he was a hero. He was what I always believed a great American trial lawyer would be. He was the thirteenth juror. He was the Silver Fox. He was the best damned lawyer in the state.

He will be remembered. Not only by lawyers and judges, but by the people of Alaska that he served and periodically served up on the witness stand. We will all go on telling Wendell Kay stories for the rest of our lives.

—Remarks made by Harry Branson  
at Memorial Service for  
Wendell Kay, July 8, 1986

# Kay plays historic role. . . continued from page 17

## The Foremost Practitioner

The Helluva Road homicides demonstrate Wendell's genius as a defense attorney and hopefully, a number of his recollections of trying cases will soon be published in book form. Just as Judge Wickersham wrote a classic about trials and trails on the Yukon, Wendell had many good trial stories that he meant to set down in writing.

One of the outstanding attributes of Wendell as politician, teacher, friend, and trial attorney, was that he knew when to stop talking. He didn't talk just for the pleasure of hearing himself talk. Where other attorneys would take days to pick a jury in a murder case, Wendell rarely took more than several hours. Judges and jurors appreciated his ability to get to the point and sit down.

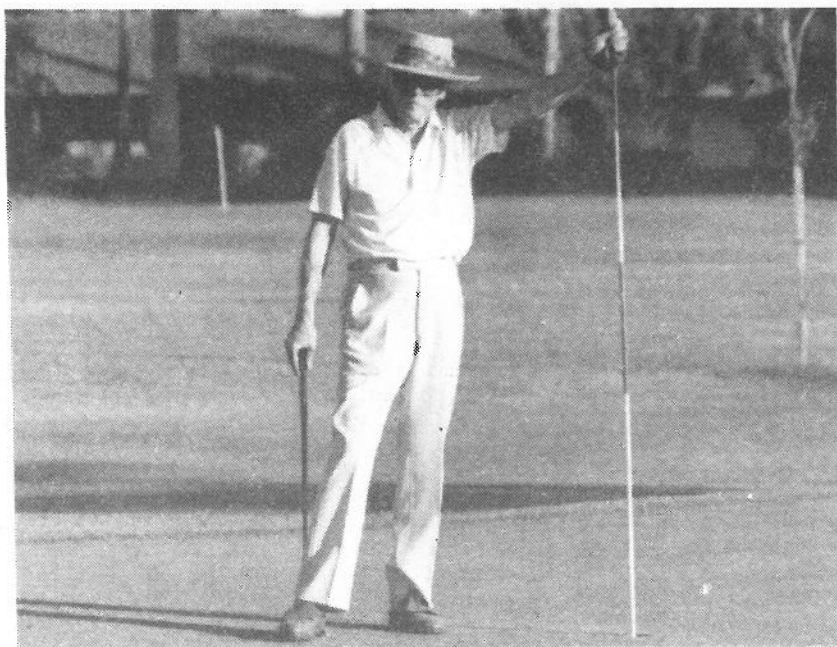
We have lost a friend, a teacher, and an outstanding advocate for justice. He was certainly the foremost practitioner of the art of advocacy that this State has seen or will see for a long time. As Ed Boyko liked to say, "Wendell is number 1, but I try harder." He understood that for the justice system to work, every person accused of a crime or involved in litigation should have a good attorney to insure a fair trial. Wendell made sure that many Alaskans obtained that fair trial.

Because there would be no need for courthouses if we didn't have advocates, because you wouldn't need a new courthouse if attorneys didn't get to try cases before a jury of 12 peers, the new Anchorage courthouse should be dedicated and named in the memory of a trial lawyer, legislator, teacher, sportsman, scholar, and gentleman—our friend and colleague, Wendell P. Kay.

*Judge Fuld joined Wendell Kay as an associate in 1968 and was his law partner from 1970 until his appointment to the Bench in 1983. He was asked to write this on short notice and promises that he and Wendell's former partners will contribute some additional stories about the Silver Fox in future editions.*



Wendell Kay takes the podium during a 1959 campaign trip for JFK. Flanking him on either side of the podium are Ernest Gruening, John F. Kennedy, Bob Bartlett and Ralph Rivers. Stan McCutcheon sits at the end of the table on the left.



An avid golfer, Mr. Kay always practiced his etiquette on the green.



Territorial Governor B. Frank Heintzleman signs a bill passed by the 1955 Territorial Legislature. Looking on are Rep. Thomas B. Stewart, Sen. John Butrovich, Sen. J. Earl Cooper, House Speaker Wendell Kay, Sen. Jim Nolan and Rep. Joe McLean.

## Simplification or Obfuscation

By Stephen E. Greer

I remember several years ago when the present Tax Reform Bill was first being considered in Congress. At the time it was known as "Treasury One." While I was in the process of attending an LL.M. tax program at great personal expense, a friend called to tell me that my pursuit of this degree was in vain. Congress was on the verge of passing landmark legislation which would so dramatically simplify our taxing scheme that it would put tax accountants and in particular, tax lawyers out of business. I was too heavily involved in learning about corporate liquidations at the time to be concerned with newspaper headlines, but was concerned and spoke with the Dean of the tax program who was fairly reputed within tax circles about the proposed changes. To my astonishment he seemed completely unconcerned about anxiety regarding a market for my services and his need to keep his program in demand. Later in the year and further along in the curriculum I discovered why.

Changes in the Tax Code are as certain as the existence of taxes. So long as politicians can make political headway with the tax issue, there will be change. Unfortunately change in itself prevents simplification. It is commonly said among accountants and tax lawyers that one way to simplify the tax code is to leave it alone. If this were done it would give us all time to finally understand its provisions. Perhaps this statement is a sad commentary on the present tax code; but, on the other hand, our economy and the manner in which private enterprise operates is so complex that the manner in which revenue is taxed will likely remain a complex process. None of us want the two line return, i.e., 1.) how much did you make and 2.) turn it over to the IRS.

Change unfortunately brings with it a feeling of uncertainty and havoc. Let's take one fairly simple and common deduction, the depreciation deduction. This topic is rather timely because, with the current shakeout in real estate values, now might be the time to start looking for that special deal. Let's assume you've

selected a parcel of commercial property and you must now select the method of depreciation which you will utilize. Previous to 1981 the taxpayer had the option of selecting either straight line depreciation or an accelerated method which would give the taxpayer the ability to take large deductions in the early years and smaller deductions in later years. This fit in nicely with the common tax planning tool of accelerating your deductions and deferring your income whenever possible. Unfortunately if you selected an accelerated method, part of the depreciation deduction taken in early years was recaptured as ordinary income.

With election of President Reagan and the expressed need to help business, came the Economic Recovery Tax Act (ERTA) of 1981. A new method of depreciation was instituted which allowed a faster recovery of capital assets than had previously been allowed. Real estate could be depreciated over 15 years. Later, Congress felt it was too generous and lengthened this recovery period from 15 years to 18 years and then to the present 19 years. Included with

these changes was an alternate provision which allowed a taxpayer to depreciate the property using a straight line method over the same period of time as expressed in the ACRS tables. In the rush to acquire the greater depreciation deductions allowed by ACRS, many taxpayers failed to realize the potential recapture problem. If the property was residential real estate, only the excess depreciation over straight line was recaptured as ordinary income, but if the property was commercial property, all the depreciation taken would be recaptured as ordinary income. Many a taxpayer found out to their chagrin that they would have been much better off had they opted out of ACRS and elected straight line where none of the depreciation is recaptured as ordinary income.

If this isn't enough, the tax proposal now before Congress changes several important aspects of owning real estate. The President's Proposal would stretch depreciation deductions over 28 years. The House Bill establishes a

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# Investiture of Andrew J. Kleinfeld

The courtroom of the Fairbank's Federal Building was the July 14th (Bastille Day) scene of the investiture of Fairbank's attorney, Andrew J. Kleinfeld as Alaska's newest U.S. District Court Judge. A crowd of jurists, political notables, fellow lawyers, family and friends watched on as the 41-year-old Fairbanks attorney was administered the oath of office by Chief Judge James M. Fitzgerald and thereby becoming the sixth District Court Judge to hold office in Alaska.

Judge Kleinfeld was born in New York City in 1945 and grew up in the Washington, D.C. suburb of Alexandria, Virginia where he graduated as valedictorian of Groverton High School in 1962. He attended Wesleyan University in Middletown, Connecticut and graduated magna cum laude in 1966. He received his Law Degree from Harvard Law School in 1969.

He and his wife Judith, a professor of psychology at the University of Alaska, Fairbanks, were married in 1967. They moved to Fairbanks in 1969, where Judge Kleinfeld served as Alaska Supreme Justice Jay Rabinowitz's law clerk for two years. He then went into private practice as a sole practitioner and continued in that capacity until his investiture. During his first three years of private practice he also held a part-time position as United States Magistrate in Fairbanks.

Judge Kleinfeld was President of the Tanana Valley Bar Association in 1976-77. He was a member of the Alaska Bar Association's Board of Governors from 1981 through 1984. He served as President of the State Bar Association in 1982-1983. He was nominated by the Alaska Judicial Council for appointment to the Alaska Supreme Court in 1980 and again in 1983.

In the Fall of 1985, Senator Frank Murkowski, a Fairbank's resident, submitted to President Reagan the names of Andrew Kleinfeld, Daniel Moore and James Singleton for appointment as the first judge to sit in the newly-created third seat on the Alaska District Bench. During the investiture, Senior Judge James A. von der Heydt, who led the move to get the new seat, noted that over the past few years the Alaska Federal case load had significantly increased in both number and complexity. He also noted that the decisions of the District Court had had an impact far beyond the reaches of the District.

Judge Kleinfeld compared the Federal Judge nomination procedure to the philosopher Zeno's Paradox, where a turtle must continue to move half way to his goal, then a quarter, then an eighth, and so on ad. infinitum, so that to reach the goal in a finite period of time is an impossibility. President Reagan nominated Judge Kleinfeld to the position on March 26, 1986. Yakima, Washington attorney, John Gavin, a member of the Standing Committee on Federal Judiciary of the American Bar Association, conducted the Bar Association's investigation of Judge Kleinfeld. This called for the interviewing of a great number of lawyers and judges with whom Mr. Kleinfeld had practiced and law enforcement officials with whom he had come in contact. He received uniformly high ratings from all of these groups. The investigation packet which Mr. Gavin prepares, is then sent to the other committee members in all thirteen districts for their review and investigation. Judge Kleinfeld received a unanimous endorsement of all the members of the Standing Committee.

Unlike some Reagan nominations to the Federal Bench, Mr. Kleinfeld was relatively uncontroversial. During his April 23, 1986 confirmation hearing before the United States



Judge Andrew J. Kleinfeld relaxes with friends.

Senate Committee on the Judiciary, Congressman Young and Senator Stevens both strongly supported Senator Murkowski's selection and urged the committee to approve Mr. Kleinfeld. During the hearing Mr. Kleinfeld was questioned by the Committee on a memorandum he had written for the Fairbanks North Star Borough Board. In 1984 a controversy had arisen concerning whether or not a book dealing with homosexuality, *A Way of Love, A Way of Life*, should be removed from the high school libraries. Working pro bono, Mr. Kleinfeld, after reviewing medical opinions obtained by the School Board, reviewing School Board regulations, and court decisions, concluded that it would be within the School Board's realm of discretion to either keep the book on the shelves or take it off. As he testified before the Senate Committee, "... I thought it was legitimate and appropriate for the parents to ask that the book be removed from the shelf. My personal feelings were out of respect for the parent's concern about their children that it was appropriate to remove the book from the shelves and perhaps send it over to the public library." He went on to say, "if this book had been for sale in a bookstore, I would have been on the other side of this case, if someone had tried to take it out of a bookstore. The First Amendment, I think, protects the right of bookstore to sell the book."

The other area of Senate inquiry was Mr. Kleinfeld's position on abortion. He stated he had been honored to be asked to offer his counsel to the Alaska "Right to Life" organization. The Committee ended with the Chairman correctly predicting that he did not anticipate any trouble getting the nomination confirmed. It was confirmed by the entire Senate on May 14, 1986.

In addition to Alaska's two senators, several of Judge Kleinfeld's fellow judges and friends were in attendance at the investiture. Both Anchorage attorney Ken Jacobus and Alaska Court of Appeals Judge Coats told the gathering that they had also been Judge Rabinowitz's law clerks when Judge Kleinfeld arrived in Alaska. Ken Jacobus noted that the Kleinfelds had little money and few possessions when they came to Alaska, but did have boxes and boxes of books.



Judge Coats stated that when he and Judge Kleinfeld would have discussions as law clerks it would always involve some weighty legal matter, while many of his discussions with Justice Rabinowitz were held on a tennis court. He said the same was true when he visited Fairbanks today.

A number of speakers, including Judge Kleinfeld himself, noted with bemusement the various definitions of the term "investiture." Ralph Beistline, the current President of the Alaska Bar Association said the first definition in its dictionary was a ceremony wherein an archbishop confers of bishopric on another. Judge Kleinfeld found a definition which noted the practice of a vassel presenting his lord with a clump of dirt; he felt, however, that the preferable definition was the donning of a robe of office. Judge Kleinfeld was robed by his father.

Irving Kleinfeld, a recently retired member of the Board of Veteran's Appeals of the Veteran's Administration. The senior Mr. Kleinfeld noted that he and his wife had the robes tailored for their son but they had been way-laid by the airline, and had arrived only just before the ceremony.

A theme repeated by a number of the investiture's speakers was the belief that Judge Kleinfeld was in fact a "Fairbanks Judge." Over the past few years, Fairbanks had not had a permanently sitting Federal Judge. As a result, the number of cases filed in Federal Court in Fairbanks has remained rather constant. It is Judge Kleinfeld's hope that this trend will change with his investiture. Although he is now required to maintain an apartment in Anchorage, his family will remain in Fairbanks, which he shall still consider as his home.

Judge A. Russell Holland said Judge Kleinfeld will have no time to sit back and enjoy his new job. His fellow judges have assigned between two and three hundred pending cases to him. These will include almost all of the Fairbanks cases so that Judge Kleinfeld will have ample opportunity to see his home over the years.

Judge Kleinfeld's legal skills and sense of humanity were praised by the current Tanana Valley Bar Association President, Dick Savell, Fairbanks attorney and friend Winston S. Burbank and former Fairbanks North Star Borough Mayor, Bill Allen. Judge Kleinfeld was well known as a courteous worker, as a highly capable advocate, as well as a courteous opponent. Earlier this year, he had given an impromptu seminar for a number of the newer members of the local Bar. He shared a number of his "secrets" in preparing and evaluating civil cases, both from a plaintiff's and a defendant's point of view. He stressed the necessity of extending courtesies to opposing counsel. A failure to agree to another attorney's request for an extension of time could result in difficulties for the rest of a legal career. Judge Kleinfeld believes his years as a civil litigator will stand him in good stead with members of the trial bar; whether they represent the plaintiff or the defendant. As he is well aware of the problems faced by trial attorneys, he hopes to work with and not against his former fellow practitioners.

Among the other speakers at the investiture were Michael Spaan, who is a U.S. Attorney for Alaska. Although he was not personally acquainted with Judge Kleinfeld, he looked forward to the challenges which the entire Federal Bench faces with newly enacted legislation, particularly in the area of the new Criminal Sentencing Code. Lawrence J. Nelson, Special Agent in Charge of the Federal Bureau of Investigation, noted that like Mr. Gavin, he too had to investigate Judge Kleinfeld. As a result of that investigation, he felt Judge Kleinfeld would do an excellent job. He also directed attention to Judge Kleinfeld's children: Daniel, age 11; Rachel, age 10; and Joshua, age 8. He explained that children of Federal Judges can have a tough time because they always have to be on their best behavior and be somewhat restrained. Federal Marshal William Opel thanked Judge Fitzgerald for blowing his cover, since he was providing security for this proceeding but went on to advise Judge Kleinfeld and his family that they were now under protection of his office.

After Judge Fitzgerald read congratulatory messages from Chief Justice Rabinowitz on behalf of the Alaska Supreme Court and Justice Boochever of the Ninth Circuit Court of Appeals, Judge Kleinfeld was given his first opportunity to address a body in his new capacity. Just prior to Judge Kleinfeld's remarks Judge Fitzgerald chided him that from this point his troubles were just beginning. Judge Kleinfeld stated that for the first time ever he felt almost too overwhelmed to speak in a courtroom. He thanked Senator Stevens and Senator Murkowski and Representative Don Young for their whole-hearted support of his nomination. He went on to remark upon the closeness he feels to the Bar Association and the need for the attorneys to promote justice. His theme was that our advisory system of justice was a three-legged stool which can stand only by relying equally upon capable and aggressive counsel for the plaintiff and defendant as well as a neutral trier of fact. He praised the independence, competence and integrity of the Alaskan Bar. Lastly, he took the opportunity to remind his friends that underneath the robes he is the same "Andy Kleinfeld" as before.

The ceremony then ended and a reception then followed, was hosted by the Alaska Bar Association, and attended by scores of congratulatory officials, friends, and relatives.

## Alaska Hosts Six States Judicial Conference

More than 110 judges, 60 from Outside, visited Anchorage as Alaska played host to the annual Six States Judicial Conference from June 30 through July 2. The conference brings together trial and appellate court judges from Alaska, Idaho, Montana, North Dakota, South Dakota and Wyoming to share information and participate in workshops concerning matters of general interest to the bench, as well as particular concerns of the judges from those states.

The six states that make up the conference all are sparsely populated, and share a common economic dependence on agriculture, logging, mining, and other basic industries. They also share common cultural backgrounds closely

tied to Native American history, as well as a dominant federal presence. It was those factors that gave rise to the idea for the Conference.

This year's theme was Native American Law, with Professor Charles Wilkinson delivering the keynote speech to the first plenary session of the conference the morning of June 30. Prof. Wilkinson is on leave from his professorship at the University of Oregon School of Law, and has been a visiting professor at the University of Colorado at Boulder. He was the managing editor for the recent revisions to Cohen's Handbook of Federal Indian Law (1982), the definitive treatise on the subject, as well as a co-author of West's 1979 Casebook on Federal Indian Law. Prof. Wilkinson presented an over-

view of Native American law, giving the conferees a framework within which to address specific topics during afternoon workshops on Indian rights.

Canadian Justice Thomas Berger followed with a stirring account of his recent travels in Alaska as head of the Alaska Native Review Commission. Justice Berger's work culminated in the 1985 publication of *Village Journey*, a controversial report strongly recommending greater independence of Alaska Native peoples through tribal sovereignty.

The afternoon workshop on Indian law was

Continued on page 23

# Bar members take in convention



Diane Vallentine and Ray Gardner share a bench aboard the *Glacier Spirit* during the bar's May cruise.



Ken Jensen, of Anchorage, and Judge James Blair, of Fairbanks, enjoy a bite aboard the *Glacier Spirit*, suspending poker play for a few quiet minutes on deck.



Bar conventions being rated only PG, Bill Bixby, President of the Valdez Bar Association, brings his daughter to the softball tournament to marvel at the top-flight play.



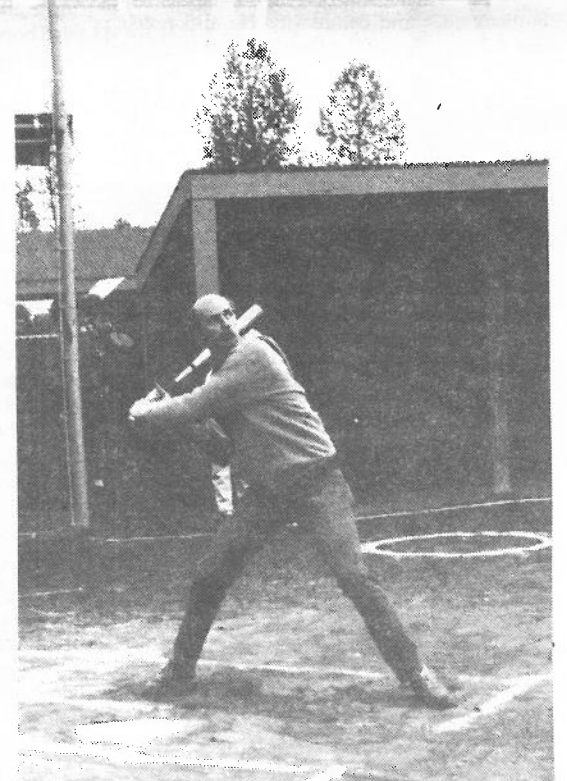
Ralph Beistline, of Fairbanks, and his wife, Peggy, relax aboard Stan Stephens Charters cruise to the glacier.



Executive Director Deborah O'Regan eyes an arriving softball; (no witnesses, first-hand or otherwise, could be found who remember whether she caught it).



Crowds during the Valdez softball tournament respond with mixed enthusiasm to the drama played on the field.



Anchorage Attorney John Reese prepares to blast one out of the park and onto Meals Drive in Valdez (no witnesses could be found who remember whether he hit the ball or not, either).

(Left to right) Board members Stan Ditus and Judith Bazeley, both of Anchorage, and Ralph Beistline, president-elect from Fairbanks, deliberate during the annual business meeting.

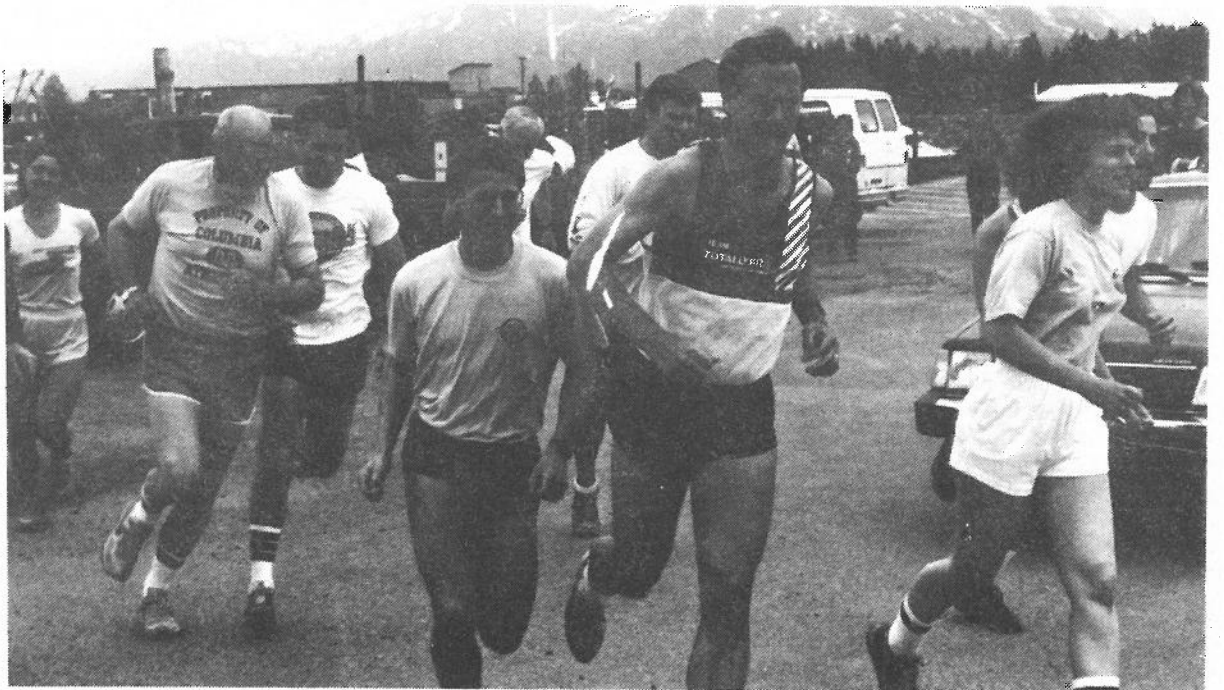


# in Valdez

Convention album photos by Steve Van Goor unless otherwise noted.



Niesje Steinkruger, of Fairbanks, bravely pokes fun at her fellow lawyers.



## The race is run

About 20 hardy souls took part in the convention fun run, racing from the Sheffield House to the Mineral Creek "Bridge to Nowhere" and back. A local ringer, 17-year-old Yuri Miller, won the race (and the men's division) in an official time of very, very fast. (The first attorney in the men's division to finish the race was Michael Sewright of Anchorage.)

Winner of the women's division was attorney Barbara Schuhmann of Fairbanks.

The two winners and the overall last place finisher, the Bar's own Deborah O'Regan, were treated to a helicopter tour of Valdez by Soloy Helicopters.

The race judge intended to disqualify a few of the last place finishers for "trying," but finally decided that anyone who could try to finish last as hard as Deborah did was deserving of the prize.

Winning the "Gubernatorial Race" division of the run was Ron Somerville. Ron clearly was the class of his division, and his show of force apparently caused his rivals to not show up for the event. If only the primary race was as easy, right Ron?

—submitted by Dan Winfree



Convention speaker Robert Kaufman (a Beverly Hills attorney) and Linda Nordstrand, assistant bar director, pose with the gun Kaufman once received as payment of fees.



Alaska Supreme Court Justice Daniel A. Moore, Jr. (who spoke at the bar's annual business meeting in Valdez) reviews Kaufman's unusual fee: It Evens the Odds.



Valdez Vanguard/Keith Searles



Passengers on the *Vince Peede* wave and shout greetings to convention-goers aboard the *Glacier Spirit*, one of two Stan Stephens Charters vessels that cruised to Columbia Glacier with the bar during the Valdez meeting.

# Tort Reform: The Legislative Landscape

By Daniel Patrick O'Tierney

The smoke has cleared but the horizon remains hazy in the aftermath of attempts to legislate a resolution to the so-called "liability insurance crisis." Amid the clamor for insurance and tort reform that arose over the past year, came the news that the Boy Scouts of America decided to impose a \$20 fee on every troop and pack in the country in anticipation of liability insurance increases. Meanwhile, nearly 40 states, including Alaska, passed legislation changing the way civil lawsuits are tried and damages awarded.

On the home front, the Alaska legislature addressed the issue with Senate Bill 377, which was passed during the 1986 session. In this compromise legislation, House and Senate negotiators responded to tort reform lobbyists with several important changes to the nature of civil liability and the recovery of damages for personal injury due to negligence.

The States haven't been alone in trying to legislate a solution to the nationwide spectacle of rising liability insurance rates. For the first time, Congress is also under pressure to impose federal regulations on the insurance industry. For decades, the states alone have regulated the industry, which has been exempt from federal anti-trust law. The Reagan administration has introduced a bill containing a host of limitations on jury awards, lawyer's contingency fees and the doctrine of joint and several liability. A measure limiting noneconomic damage awards in product liability cases to \$250,000 has passed the Senate Commerce Committee, although most analysts don't expect the House to act at all on the issue this session.

The insurance industry lobby has argued—rather successfully at this point—that the "crisis" is the product of a defective legal system. Whether or not one's practice encompass personal injury litigation, most members of the Bar are undoubtedly familiar (by now, *ad nauseum*) with horror stories about burglars falling through school roofs and laughing all the way to the bank, and the like. Advocates of tort reform have campaigned vigorously against the perceived lack of certainty involved in the tort system and the size of liability awards. In a nutshell, they argue that juries are allowed to give excessive awards on arguably frivolous claims advanced by avaricious lawyers against "deep pocket" defendants, regardless of their role in the injury. They reject the argument that the amounts of personal injury awards have increased at the same pace as inflation.

Few industry analysts disagree, however, that the present dilemma in part is the cumulative effect of savage price competition. Insurers discounted premiums over most of the past decade in a bidding war to attract more business and investment funds in order to take advantage of high interest rates. This aspect is cyclical. Now that rates have fallen, premiums appear to have risen commensurately to make up for the shortfall of investment profit. From that perspective, profit-oriented management within the industry itself has created a roller coaster ride of rising and falling prices.

Nevertheless, the majority of state legislatures appear to have focused upon tort reform, as opposed to insurance rate regulation, as the

short-term antidote. At least 13 states, including Alaska, imposed a ceiling on jury awards for "non-economic damages." The State of Washington passed an interesting measure which ties limits on non-economic damages to the State's average annual wage and the victim's life expectancy, among other things. Nearly a dozen states have altered or abolished the doctrine of joint and several liability.

In one of the most dramatic turn-arounds, the West Virginia legislature met in special session to modify insurance industry regulation that it had passed only a few months earlier. In the face of a threat of massive policy cancellations by the five major insurance companies in the state, the legislature repealed measures which required strict financial reporting by the insurance industry of profits and losses for individual cases, and also specified limits on the right to cancel insurance policies.

Advocates of tort reform have not completely carried the day in the legislative arena, however. There are exceptions, although Alaska is not one of them. In New York, for example, the Insurance Superintendent was empowered to restrict changes in commercial liability rates. Also, North Carolina legislation empowered government officials to order rate roll-backs, and Hawaii lawmakers approved a 37% rate roll back over three years as part of a package of measures limiting liability awards.

The most notable example of insurance reform occurred in Florida where the legislature enacted a *quid pro quo* for a \$450,000 ceiling on non-economic liability awards. Although insurers have since secured injunctive relief, the sunshine state passed legislation ordering a roll back for commercial liability insurance rates of

In Alaska, the passage of Senate Bill 377, although compromise legislation, clearly reflects an attempt to reform the tort system and not the insurance industry. On whole, the bill appears to be guided by two primary principals:

- Structured settlements should be encouraged;
- Compensatory and punitive damage awards should be limited.

The presumption is that lower damage awards will result in lower liability insurance premiums. The legislation does not exact limits on the insurance industry's rates of return.

Here are some of the most notable changes in SB 377:

- **Ceiling on Damage Awards.**

AS 09.17.010 mandates a \$500,000 ceiling on awards for non-economic damages (pain and suffering, physical impairment and others). The limit doesn't apply to damages for disfigurement or "severe physical impairment." The latter exception, which is similar to that enacted in Massachusetts, opens the door for what I expect to be considerable litigation over what types of impairment are "severe." It is also unclear who is to determine what constitutes severe physical impairment, although I suspect it will be determined a question for the trier of fact.

40% or more—to levels of January, 1984, before premiums began soaring. Further, the Florida Insurance Commissioner was empowered to decide whether a company's post-1984 losses warrant an increase from that base.

Notwithstanding the foregoing examples, most of the restrictions on liability awards have been narrow in scope or limited to sparsely populated states. The impact of those enactments on insurance rates and the availability of insurance remains to be seen. Further, the legislative battleground over liability awards and settlements will shift to several large states, including California, New Jersey and Pennsylvania, where the stakes will be high. Thus far in California, joint and several liability for non-economic damages has been abolished by referendum.

- **Punitive Damages.** The burden of proof that plaintiffs must satisfy in order to collect punitive damages has been escalated from the current standard of "a preponderance of the evidence" to "clear and convincing" proof. AS 09.17.020.

- **Discounting Future Damages.** The use of "special verdicts" in which specific monetary amounts of economic and non-economic losses are itemized is required by AS 09.17.040. This section of the bill requires that juries reduce the future economic damages to present value, unless both parties agree that the award of future damages will be computed under the *Beaulieu* Rule. This rule essentially allows for neither an increase in value for inflation nor a discount of future damages to present value because the two are considered to offset each other.

Moreover, if the injured party requests it, future damages may be paid, to the maximum extent feasible, through periodic payments rather than through a lump sum payment. The statute makes no specific mention of whether interest will accrue over the payment period. Economists hired by both parties as expert witnesses probably will be the big winners under this discounting amendment.

- **Non-Profit/Municipal Negligence.** AS 09.17.050 raises the degree of negligence ("gross" negligence) that must be proven in order to recover tort damages against someone acting in the "course and scope of official duties" as they pertain to nonprofit corporations or hospitals, school boards and municipalities.
- **Joint and Several Liability.** The so-called "deep pocket" rule in multi-defendant lawsuits has been amended by AS 09.17.080. This section requires that fault be allocated among defendants and specifies that a defendant allocated less than 50% of the total fault cannot be held jointly liable for more than twice the percentage of his allocated fault.

This provision arguably may persuade plaintiffs it is not in their best

interest to settle with any individual defendant prior to trial, given that the remaining defendants may succeed in attributing enough liability to the excused party to escape the 50% joint and several liability threshold themselves.

What impact these changes in Alaska law will have obviously remains to be seen. Even if they result in a marked reduction in damage awards, the question remains whether that reduction will translate into smaller insurance premiums. Perceptions alone often fashion reality. The trouble with a perceived "crisis" such as the insurance issue is that legislatures often are stampeded into attempting to resolve it with a few bold strokes. Tort reform, no less than insurance reform, deserves a careful and reasoned approach.

In the case of the liability insurance "issue," it may well be that statutory limits on damage awards—like price controls and wage freezes—will prove counter-productive. What is clearly needed is data to demonstrate whether or not there exists a logical nexus between the health of the insurance industry and the health of the tort system. The tort system has evolved over a period of many years, and reliance upon the good sense of a jury of our peers has long been considered the best way to achieve fair, just and complete compensation for injured parties.

Hopefully, the Alaska legislature will carefully monitor the effect of SB 377 on insurance rates and insurance availability, as well as its effect on the rights of injured parties to adequate compensation. Otherwise, the Legislature may find the Boy Scouts camped out on the steps of the Capitol building in Juneau next year.

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## Tax reform. . . continued from page 18

30-year recovery period. The Senate Amendment would depreciate residential rental property over 27.5 years and nonresidential rental property over 31.5 years. Under the President's proposal and the House Bill, the basis for depreciation would be increased to take into account inflation. In summary, the proposed changes will increase the recovery time for real estate, thus lessening the depreciation deduction.

What does all this mean to the investor in real estate? When one considers the change in the depreciation rates, the possible elimination of the favorable capital gains tax and a limitation on the amount of loss allowed with rental real estate, it might be wise for present owners with greatly appreciated real estate to sell the property before the end of the year. Buyers might consider buying before the beginning of the year to take advantage of a 19-year recovery period for depreciation under ACRS. This assumes an effective date of January 1, 1987, for enactment of these provisions.

The preceding example illustrates just one area where tax reform for the sake of simplification is in actuality a misnomer. What has, in fact, really occurred is increased possibilities for tax planning (as a caveat it should be noted that

the preceding example was meant for illustrative purposes only, as each taxpayer will have unique considerations which must be taken into account). Instead of simplifying the Code, some people feel the changes have only complicated it. Additionally with the growth of the federal deficit and the need for more revenue, we might see even more restrictive depreciation schedules in the future. On the other hand, the current emphasis to give individual taxpayers less while taxing business more, may very well place economic growth in a malaise. If this occurs, there may be a push to reinstitute the favorable tax benefits allowed by ERTA, to spur economic growth and investment.

The point is that only thing inevitable about the Code is change itself and it won't be far in the future when the Reform bill presently under consideration by Congress will itself be the subject of reform.

*Stephen E. Greer is a newly associated tax attorney with the firm of Smith, Gruening, Brecht, Evans and Spitzfaden. Readers are advised not to apply the advice set forth in this column to their own specific legal problems. Those with specific legal problems should consult further with an advisor.*

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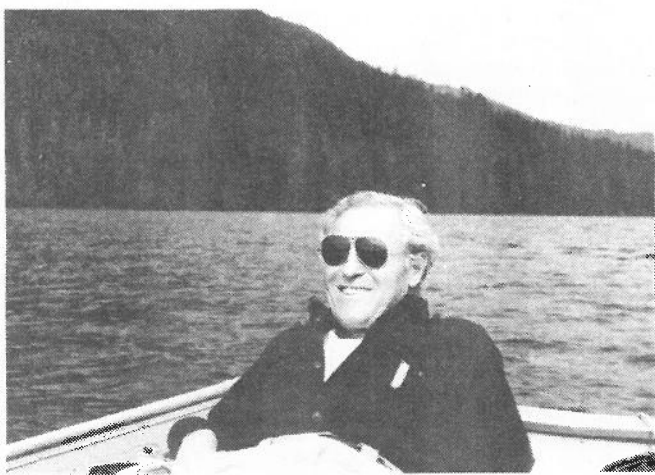
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# Judge Boocheever Goes to Senior Status



Judge Robert Boocheever takes in the outdoors.

Circuit Judge Robert Boocheever has elected to take senior status with the Ninth Circuit Court of Appeals, to which he was appointed in 1980 by President Jimmy Carter. The move will permit Judge Boocheever to reduce his case load by one-third to one-half, and allow him to live in Juneau for much of the summer. Not only do three of the four Boocheever children reside in Juneau, but the judge and his wife, Connie, are fishing enthusiasts who no doubt find the environs of their Pasadena, California, residence a restriction on that on avocation.

Judge Boocheever went to the Ninth Circuit after sitting on the Alaska Supreme Court from 1972 to 1980, serving as its Chief Justice from 1975 to 1978. He lists among his more significant Alaska opinions *State v. Glass*, 538 P.2d 879 (Alaska 1978) (surreptitious transmitting and recording of conversations violated right to privacy under Alaska Constitution) and *Aguchak v. Montgomery Ward*, 520 P.2d 1353 (Alaska 1974) (summons form that failed to advise rural, indigent debtor of option to file written pleadings violated due process).

Prior to his appointment to the Alaska

Supreme Court, Judge Boocheever was in private practice for 25 years in Juneau with the firm of Faulkner, Banfield, Boocheever & Doogan. Judge Boocheever began his legal career in Alaska in 1946 when he became an assistant United States attorney in Juneau after four years as a captain in the United States Army. Judge Boocheever obtained his undergraduate degree in 1939 and his law degree in 1941, both from Cornell University.

Judge Boocheever has a reputation as one of the more liberal judges on the 28-member Ninth Circuit Court of Appeals. He is a demanding judge, noted for his probing questions. His colleagues consider him one of the hardest working judges on the court who prepares very well not only for arguments of counsel, but for presentation of his views to panel members.

Judge Otto Skopil of Portland, Oregon has announced his own move to senior status. The decisions by Judges Boocheever and Skopil to take senior status will enable President Reagan to appoint two new members to the Ninth Circuit. The new appointments will leave the court evenly divided between Democratic and Republican presidential appointees.

...continued from page 19

## Six states meet

headed by a panel consisting of Prof. Wilkinson, Justice Berger, Roy Hundorf, President of Cook Inlet Region, Inc., Anchorage, lawyer Bob Wagstaff, Alaska Legal Services lawyer David Case, and U.S. District Court Judge Russell Holland. The divergent views held by the panelists, particularly with respect to the desirability of tribal sovereignty and Native independence, made for lively discussions.

Other afternoon workshops included a session on developments in tort reform, headed by Keith Brown, Jim Delaney, Sandra Saville, and Joe Young, and a discussion on appellate case delay led by Alaska Supreme Court Justices McCall and Burke, and Court of Appeals Judge Brynner. For the technologically oriented, there was a workshop on computer applications to courtroom and judicial administration led by Oakland, California, Court Administrator Stan Collins, and Dick Delaplain, Technical Operations Manager of the Alaska Court System.

The second day of the Conference again began with a plenary session open to the public at which constitutional scholar and author Ronald Collins spoke on "Significant Developments in State Law." Mr. Collins discussed the growing trend of state appellate courts to rely upon state constitutional provisions for their discussions in order to avoid the increasingly conservative views of the United States Supreme Court on federal constitutional issues.

The remainder of the morning was consumed by a variety of workshops. Chief Judge of the United States District Court for the District of Utah Bruce Jenkins led a workshop on management of complex litigation. As the author of the opinion in *Allen v. United States*, 588 F. Supp. 247 (D. Utah 1984), declining with the government's liability for damages allegedly arising from open-air nuclear tests, Chief Judge Allen was particularly well suited to lead a workshop on case management.

Alaska State District Court Judges Anderson, Andrews and Kauvar, and Alaska Judicial Council Executive Director Fran Bremson comprised the panel that led a workshop on video arraignments in misdemeanor cases. The technique currently is used in a Fairbanks pilot project, and is expected to reduce costs associated with criminal proceedings as it gains wider acceptance. The third workshop the morning of July 1 provided an update on developments in child custody law. Professor Andrew Walkover of the University of Puget Sound Law School moderated the workshop.

The final day of the Conference was kicked off by the University of Puget Sound Law School's Dean Townsend with a survey of recent developments in federal constitutional law. The conferees again attended workshops during the

late morning hours. Assistant Attorney General Bill Mellow and Frank Flavin, Executive Director of the Alaska Commission on Judicial Conduct, led a workshop on Judicial Immunity. State Court Judges Blair, Schulz and Rowland conducted a panel discussion on voir dire techniques in the other morning workshop.

Naturally, the conference was not all work. Anchorage lawyer Dave Walsh showed slides and spoke on his climb of Mt. McKinley during the June 30 lunch. Anchorage lawyer Robert Stoller received a standing ovation from conferees during the July 1 lunch for his reading of Robert Service poetry. During the concluding lunch on July 2, Judge Fitzgerald delivered a brief Alaska judicial history. The conferees then were treated to a brief talk by 1986 Iditarod winner Susan Butcher.

Many of the conferees from Outside brought their families and combined attendance at the Conference with vacations. A bus tour to Hope was arranged for family members of conferees during the Monday afternoon workshops. Following the Tuesday lunch, all conferees and their families were treated to a trip to Portage Glacier followed by cocktails and dinner at Alyeska. Many of the conferees from Outside drove or took ferries to or from Alaska, and the state's natural beauty drew raves from Outsiders.

Following the Wednesday conclusion of the Six State Judicial Conference, the business meeting for the Alaska Judges Conference was held. Due to Alaska's hosting of the Six State's Judicial Conference and budgetary constraints, it was not possible to hold the Judges Conference contemporaneously with the Alaska Bar Convention in Valdez this year.

As with other state employees, fiscal concerns were foremost on the agenda at the Judges' Conference. Chief Justice Rabinowitz advised the state judges that no salary merit increases to salaries would be given within the state court system, and that a 30-day freeze on hiring would be imposed.

One bright spot in the Judges Conference was the planned computerization of the Alaska court's case management. Approximately \$750,000 of previously appropriated funds still are available for the project that the judges hope will streamline the administrative functions of the court system. The National Center for State Courts, a San Francisco consulting firm, has conducted a needs assessment and is expected to submit a conceptual report to the Judicial Council in the near future. However, it is not anticipated that a computer system for management of the Alaska State Court system will be a reality for another one and one-half to two years.

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